

January 2012

Batson Revisited (symposium)

Nancy S. Marder

IIT Chicago-Kent College of Law, nmarder@kentlaw.iit.edu

Follow this and additional works at: http://scholarship.kentlaw.iit.edu/fac_schol



Part of the [Civil Rights and Discrimination Commons](#), and the [Courts Commons](#)

Recommended Citation

Nancy S. Marder, *Batson Revisited (symposium)*, 97 Iowa L. Rev. 1585 (2012).

Available at: http://scholarship.kentlaw.iit.edu/fac_schol/389

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in All Faculty Scholarship by an authorized administrator of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact dginsberg@kentlaw.iit.edu.

Batson Revisited

Nancy S. Marder*

INTRODUCTION.....	1586
I. EXAMINING <i>BATSON</i> 'S INEFFECTIVENESS	1588
A. <i>GIVING REASONS</i>	1589
B. <i>BEING DEFERENTIAL</i>	1592
C. <i>EVISцерATING BATSON</i>	1593
II. REASSESSING THE AMERICAN THEORY OF JUROR BIAS	1595
III. EXPLORING ALTERNATIVE THEORIES OF JUROR BIAS	1600
A. <i>THE ENGLISH THEORY</i>	1600
B. <i>THE PROCESS THEORY</i>	1601
IV. DESIGNING JURY SELECTION ACCORDING TO THE PROCESS THEORY OF JUROR BIAS.....	1606
A. <i>ELIMINATING PEREMPTORY CHALLENGES</i>	1607
B. <i>PRESERVING FOR-CAUSE CHALLENGES</i>	1610
C. <i>MAINTAINING VOIR DIRE</i>	1610
CONCLUSION	1611

* Professor of Law & Director of the Jury Center, Chicago-Kent College of Law. I thank James Tomkovicz for organizing this conference and the *Iowa Law Review* for publishing the papers from this conference. My thanks, as always, to Jeremy Eden for reading early drafts and giving me helpful suggestions.

INTRODUCTION

The twenty-fifth anniversary of *Batson v. Kentucky*¹ provides an important moment to reflect on *Batson* and to consider how this seminal case and its progeny² have affected the use and abuse of peremptory challenges. I had initially welcomed the U.S. Supreme Court's approach to peremptory challenges in *Batson* back in 1986. Although *Batson* was a compromise³—preserving peremptories while seeking to address discriminatory peremptories—it had the noble goal of trying to eliminate discrimination during jury selection. I also embraced its expansion over the years. The logic of *Batson* was inexorable: just as prosecutors should not be permitted to use peremptories to eliminate African Americans as jurors, so too, defense attorneys⁴ and civil parties⁵ should be similarly constrained. Just as African Americans should not be subjected to discriminatory peremptories, so too, members of any race,⁶ ethnicity,⁷ or gender⁸ should not be subjected to discriminatory peremptories. However, over time I developed serious doubts that *Batson* and its progeny could achieve their central goal of eliminating discrimination during jury selection.⁹ Now, with twenty-five years of experience, we can look back and see just how ineffective *Batson* has been. This anniversary is an appropriate juncture to renew the call for the elimination of the peremptory challenge, echoing Justice Thurgood Marshall's recommendation in his *Batson* concurrence twenty-five years ago.¹⁰

1. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (holding that a prosecutor's use of a peremptory challenge based on race violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution).

2. See *infra* notes 4–6, 8, 16 (describing the cases that expanded the reach of *Batson*).

3. *Batson*, 476 U.S. at 126–27 (Burger, C.J., dissenting) (describing *Batson* as a “curious hybrid”).

4. See *Georgia v. McCollum*, 505 U.S. 42, 59 (1992) (extending *Batson* to defense attorneys).

5. See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616 (1991) (extending *Batson* to civil parties).

6. See *Powers v. Ohio*, 499 U.S. 400, 402 (1991) (holding that a *Batson* challenge can be made by a defendant of any race whenever the prosecutor exercises a peremptory based on race).

7. See *Hernandez v. New York*, 500 U.S. 352, 355 (1991) (noting that a *Batson* challenge can be made on the basis of ethnicity, but finding that in this case the prosecutor's reasons for exercising peremptories against two Latino prospective jurors were race neutral).

8. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994) (holding that gender-based peremptory challenges violate the Equal Protection Clause of the Fourteenth Amendment).

9. See Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041 (1995) [hereinafter Marder, *Beyond Gender*]; Nancy S. Marder, *Justice Stevens, the Peremptory Challenge, and the Jury*, 74 FORDHAM L. REV. 1683 (2006) [hereinafter Marder, *The Peremptory Challenge*].

10. *Batson v. Kentucky*, 476 U.S. 79, 102–03 (Marshall, J., concurring).

This anniversary prompts not only a reassessment of why *Batson* has been so ineffective over the course of twenty-five years, but also a reexamination of what any of us—lawyers, judges, and prospective jurors—can determine about individual juror bias before the start of the trial (other than the most clear-cut cases for which a for-cause challenge is appropriate). At some point during voir dire, judges typically ask prospective jurors whether they can be impartial.¹¹ If they say that they can be, then they are free to serve. The only barrier to their service is the lawyer who distrusts their response and removes them through the exercise of a peremptory challenge. But this assumes that a lawyer can recognize individual juror bias, and this assumption is based on anecdotal evidence, which is undermined by empirical studies.

England, which has eliminated the peremptory challenge,¹² offers another theory of juror bias. English barristers and judges explain that jurors will rise to the occasion and put aside their biases and perform their role as impartial jurors. When questioned about this, they suggest that most jurors can serve because they take their responsibilities seriously and will step into their role as “impartial jurors.”¹³

An alternative theory of juror bias, which I call the “process theory,” is that various stages of the jury process will help jurors to perform their role impartially even if they began the trial with biases that the juror, judge, or lawyers failed to identify. For example, the voir dire, oath, instructions, and deliberations (particularly with a diverse jury) help jurors to put aside their biases and to perform their role as impartial jurors. According to this theory, peremptories, which limit the diversity of the jury, make it more difficult for jurors to challenge each other during deliberations, and therefore, make deliberations less of an institutional constraint on juror bias.

Under both the English and the process theories, peremptories do not play a constructive role and should be eliminated. The elimination of peremptories in England also suggests that peremptories are not inevitable, even in a jury system that has had a tradition of peremptories, as England has had and the United States still has. Moreover, peremptories are harmful

11. See, e.g., *United States v. Torres*, No. 77 Cr. 680 (S.D.N.Y. May 19, 1980) [hereinafter *Trial Transcript*] (including a transcript of the jury selection); *id.* at 70–71, 74, 77, 79, 83, 89, 91, 96, 98 (providing instances when Federal District Court Judge Knapp asked prospective jurors if they could be impartial, and when they said they could be, they were not removed for cause).

12. As a result of the Criminal Justice Act of 1988, which took effect on January 5, 1989, criminal defendants in England no longer exercise peremptory challenges, see Criminal Justice Act, 1988, c. 33, § 118(1) (Eng. & Wales), and the Crown does not generally exercise stand-bys (in which the Crown can reserve judgment on a prospective juror until all other prospective jurors are considered), except in “a small number of cases.” John F. McEldowney, “*Stand By for the Crown*”: *An Historical Analysis*, 1979 CRIM. L. REV. 272, 281 (quoting the Attorney-General).

13. See Nancy S. Marder, *Two Weeks at the Old Bailey: Jury Lessons from England*, 86 CHI.-KENT L. REV. 537, 553 (2011).

to the jury system. As twenty-five years of *Batson* have shown, peremptories can limit African Americans' opportunities to serve as jurors and skew the composition of the jury, particularly in capital cases.¹⁴ Peremptories make it more difficult to achieve juries that reflect a fair cross section of the community.

This twenty-fifth anniversary gives us an opportunity to rethink the theory and practice of peremptory challenges under *Batson*. Toward this end, Part I will offer three explanations as to why *Batson* has been so ineffective in practice. Part II will critique the American theory of juror bias, which assumes that lawyers can discern juror bias and that lawyers will exercise peremptories to eliminate so-called biased jurors. Part III will look at the English theory of juror bias, which assumes that jurors will rise to the demands of their role and be impartial. Under this theory, peremptories are no longer needed. It will also look at the process theory and consider how peremptories undermine the effectiveness of jury deliberations. Finally, Part IV will examine the ways in which we should revise our own jury-trial practice by eliminating peremptory challenges to reflect the difficulty of identifying individual juror bias and militate against the harms that peremptories cause. Even if peremptories are eliminated, for-cause challenges and voir dire should remain. For-cause challenges exclude jurors who say they cannot be impartial, and voir dire serves other, albeit unacknowledged, functions, such as transforming summoned citizens into responsible jurors and providing the first step, according to the process theory, of educating jurors about the need to be impartial.

I. EXAMINING *BATSON*'S INEFFECTIVENESS

There are at least three reasons why *Batson* has been so ineffective over the past twenty-five years. First, lawyers quickly learned which reasons to give and which ones to eschew when they were challenged on the exercise of a peremptory challenge. Second, trial judges are reluctant to find *Batson* violations, and appellate courts are extremely deferential to trial courts when reviewing *Batson* challenges. Third, whatever force *Batson* might have had was undermined by *Purkett v. Elem*, a per curiam opinion by the Supreme Court.¹⁵

14. See EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 5 (2010), <http://s3.amazonaws.com/nytdocs/docs/368/368.pdf> [hereinafter EJI REPORT] ("Racially biased use of peremptory strikes and illegal racial discrimination in jury selection remains widespread, particularly in serious criminal cases and capital cases."); Henry R. Chalmers, *A Long Way to Go: Report Finds Lingering, Hard-to-Eradicate Discrimination in Jury Selection*, LITIG. NEWS, Fall 2010, at 6, 7 ("In death penalty cases from 2005 to 2009 in one Alabama county, prosecutors used peremptory strikes to remove 80 percent of the qualified African Americans in the jury venires, according to the [EJI] report.").

15. *Purkett v. Elem*, 514 U.S. 765 (1995) (per curiam) (holding that it is not until the third step of the three-step test that a trial court determines whether the opponent of a

A. GIVING REASONS

As part of the *Batson* compromise, the Supreme Court established a three-step test for a defense attorney who sought to challenge a prosecutor's exercise of a peremptory against an African American prospective juror.¹⁶ Even after *Batson*, prosecutors and defense attorneys typically exercised their peremptory challenges without having to give a reason. However, if the defendant was African American and the defense attorney suspected that the prosecutor had exercised a peremptory to exclude an African American from the jury, the defense attorney could object and raise a *Batson* challenge.¹⁷ Then, outside of the presence of the jury, either at a sidebar or in a separate hearing, the defense attorney could try to establish a prima facie case that the prosecutor had exercised a peremptory against a prospective juror because that person was African American, that peremptories permit discrimination by those "who are of a mind to discriminate," and that these and other facts raise an inference of purposeful discrimination.¹⁸ If the defense attorney succeeded in establishing a "prima facie case of purposeful discrimination" (step one),¹⁹ then the prosecutor had to give a reason for the peremptory (step two) that was related to the case at hand.²⁰ Finally, the judge then had to decide whether the reason was pretextual (step three).²¹ If it was pretextual, then the court would not permit the peremptory; if it was race-neutral, then the court would permit it.

One reason *Batson* was so ineffectual was that lawyers quickly learned which reasons to give and which ones to avoid. The only guidance the Supreme Court provided in *Batson* was that any reason should be "related to

peremptory strike has met his burden of proving purposeful discrimination, and that the reason given by the proponent of the strike at step two can be silly as long as it is race neutral).

16. The *Batson* test initially applied just to the defense's challenge of the prosecutor's peremptories in instances where the defendant was African American and the prosecutor sought to exclude African American prospective jurors from the petit jury. However, after subsequent cases, including *Powers v. Ohio*, 499 U.S. 400 (1991), *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), *Georgia v. McCollum*, 505 U.S. 42 (1992), and *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (all of which I refer to as "the *Batson* progeny"), the test became applicable to defense attorneys and civil parties and prohibited all parties of any race, gender, or ethnicity from using peremptories to exclude jurors based on these characteristics.

17. However, in some states in the South, defense attorneys are unlikely to make a *Batson* challenge because they know that the judge is unlikely to grant it. See, e.g., Chalmers, *supra* note 14, at 8 ("For example, the [EJI] report highlights the fact that no criminal defendant has successfully raised a *Batson* challenge in Tennessee and that no successful *Batson* challenge has occurred in South Carolina since 1992.").

18. *Batson v. Kentucky*, 476 U.S. 79, 96 (1986) (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)) (internal quotation marks omitted).

19. *Id.*

20. *Id.* at 98.

21. *Id.*

the particular case to be tried”²² and not so vague as to constitute a “hunch.”²³ Otherwise, it was up to trial judges to decide which reasons were acceptable. Prosecutors quickly learned not to say that they had exercised a peremptory based on the race of the prospective juror. Rather, they could give fact-specific reasons, such as the prospective juror stared,²⁴ hesitated before responding,²⁵ or failed to make eye contact.²⁶ In some courtrooms, they could say that the prospective juror lived in a neighborhood where there was a lot of drug activity and the case involved drugs.²⁷ They could also exclude prospective jurors because of their professions,²⁸ clothing,²⁹ or the way they wore their hair.³⁰ As these reasons suggest, almost any reason that is

22. *Id.*

23. *Id.* (“Nor may the prosecutor rebut the defendant’s case merely by denying that he had a discriminatory motive or ‘affirm[ing] [his] good faith in making individual selections.’” (quoting *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972)) (alterations in original)).

24. *See* *United States v. Ferguson*, No. 92-5571, No. 92-5587, 1993 U.S. App. LEXIS 22373, at *9-10 (4th Cir. Sept. 1, 1993) (holding that the prosecutor’s reasons for exercising a peremptory against an African American juror who “stared” at the prosecutor and might have difficulty with the complexities of the case were acceptable reasons).

25. *See* *Hernandez v. New York*, 500 U.S. 352, 356 (1991) (“I didn’t feel, when I asked [these two jurors] whether or not they could accept the interpreter’s translation of it, I didn’t feel that they could. They each looked away from me and said with some hesitancy that they would try, not that they could” (quoting the prosecutor) (internal quotation marks omitted)).

26. *Id.* at 357 n.1 (“I just felt from the hesitancy in [the jurors’] answers and their lack of eye contact that they would not be able to do it.” (quoting the prosecutor) (internal quotation marks omitted)).

27. *See, e.g.,* *United States v. Johnson*, No. 96-4002, 1997 U.S. App. LEXIS 16315, at *4-5 (4th Cir. July 3, 1997) (holding that the prosecutor’s peremptory challenge against an African American female juror in a drug case “because she lived in a neighborhood known for drug trafficking activities and that during questioning she stared coldly at the prosecutor” constituted “an adequate, race-neutral reason for striking the juror”); *United States v. Uwaezhoke*, 995 F.2d 388, 393 (3d Cir. 1993) (accepting as “race-neutral on its face” the government’s explanation that it exercised a peremptory challenge against an African American female juror “because of [her] likely place of residence, she was more likely to have had direct exposure to a drug trafficking situation than other potential jurors as a class”). *But see* *United States v. Bishop*, 959 F.2d 820, 827 (9th Cir. 1992) (“While residence may sometimes be a valid reason for a challenge, in this case the prosecutor’s invocation of residence rested on a stereotypical racial reason. As a result, we cannot find that race was not a factor in his decision.”).

28. *See, e.g.,* *United States v. McMillon*, 14 F.3d 948, 951, 953 (4th Cir. 1994) (holding that a prosecutor’s reasons for exercising a peremptory challenge against the only African American woman on the jury because of her age, number of children, and profession (computer analyst) were race neutral and not a pretext for racial bias).

29. *See, e.g.,* *United States v. Clemons*, 941 F.2d 321, 322-23, 325 (5th Cir. 1991) (holding that a prosecutor’s reason for exercising a peremptory challenge against an African American man because he dressed “like a rock star” was race neutral (internal quotation marks omitted)).

30. *See, e.g.,* *Purkett v. Elem*, 514 U.S. 765, 766 (1995) (“I struck [juror] number twenty-two because of his long hair. He had long curly hair. . . . And juror number twenty-four also has a mustache and goatee type beard. . . . And I don’t like the way they looked, with the way the

not explicitly about race will suffice. One judge made this point clear by compiling a list, supported by Illinois case law, that he thought prosecutors could distribute under the title “‘Handy Race-Neutral Explanations’ or ‘20 Time-Tested Race-Neutral Explanations,’” which included such offerings as “too old, too young, divorced, ‘long, unkempt hair,’ free-lance writer, religion, social worker, renter, lack of family contact, attempting to make eye-contact with defendant, ‘lived in an area consisting predominantly of apartment complexes,’ single, [and] over-educated.”³¹ The EJI report is replete with examples of reasons that trial judges in the South have found to be race neutral, including the “low intelligence” of African American prospective jurors.³²

Prosecutors just had to be careful not to give a reason that also applied to a white juror against whom they did not exercise a peremptory. For example, if they exercised a peremptory against a Latino prospective juror because he was from a certain city, then they had to be careful that they did not accept a white juror from that same city.³³ Otherwise, as long as they gave a reason that did not explicitly involve race, the judge usually found it to be race neutral.

As an indication that lawyers learned quickly which reasons to give and which ones to avoid, consider *United States v. Omoruyi*,³⁴ which was decided in 1993, seven years after *Batson*, but one year before *J.E.B. v. Alabama ex rel. T.B.*³⁵ At that point, the juror’s race was an impermissible reason for exercising a peremptory and excluding that juror, but the juror’s gender was still a permissible reason.³⁶ When the prosecutor exercised a peremptory against an African American female juror, he explained that he did so not because she was African American, but because she was female.³⁷ He said that he excluded her “[b]ecause she was a single female and my concern, frankly, is that she, like the other juror I struck, is single and given defendant’s good looks would be attracted to the defendant.”³⁸ After *J.E.B.*, lawyers would no longer *say* that they had exercised a peremptory because of a juror’s gender; rather, they would give some other reason. Again, the more fact-specific the reason, the more difficult it would be to challenge.

hair is cut, both of them.” (alteration in original) (quoting the prosecutor) (internal quotation marks omitted)).

31. *People v. Randall*, 671 N.E.2d 60, 65–66 (Ill. App. Ct. 1996) (footnotes omitted).

32. EJI REPORT, *supra* note 14, at 17–18, 24–27, 34 (internal quotation marks omitted).

33. *See, e.g., United States v. Chinchilla*, 874 F.2d 695, 698 (9th Cir. 1989) (“The government stated that it rejected juror Osuna due to his residence (La Mesa) However, another unchallenged juror lived in La Mesa.”).

34. *United States v. Omoruyi*, 7 F.3d 880 (9th Cir. 1993).

35. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).

36. *See id.* at 129.

37. *Omoruyi*, 7 F.3d at 881.

38. *Id.* (internal quotation marks and bold typeface omitted).

B. BEING DEFERENTIAL

Another reason that *Batson* and its progeny have been so ineffective is that trial judges are reluctant to find *Batson* violations, and appellate judges are deferential to trial judges' determinations.

Trial judges could undertake a more searching inquiry of the reasons a party gives to justify a challenged peremptory, and some do.³⁹ But since the reason only has to be race neutral, and since a more searching inquiry entails questioning the credibility of a prosecutor (or the party explaining the exercise of the peremptory), many trial judges accept the reason as permissible. One writer explained that trial judges are reluctant to undertake too searching an inquiry because they do not want to impugn the integrity of the prosecutor, an officer of the court.⁴⁰ Once the prosecutor has given a reason that is acceptable on its face, the trial judge is inclined to accept it. If the trial judge scrutinizes the reason further, it would be as if the trial judge did not believe the prosecutor and were essentially calling the prosecutor a liar.

Appellate courts also have reason to be deferential to the trial judge's finding in a *Batson* challenge because the trial judge sees the lawyers and jurors in the courtroom, whereas the appellate court has only the cold, hard transcript before it. The appellate courts' deference makes sense particularly when so many of the reasons are fact-specific and often depend on the body language of the participants. It is difficult for an appellate court to gauge whether a prospective juror made eye contact or failed to make eye contact. As one appellate court explained: "Since the district court's determination of whether a peremptory challenge constituted purposeful discrimination turns on an evaluation of credibility of the prosecutor's explanation, we should give those findings great deference."⁴¹ Although one academic suggested that *Batson* hearings could be filmed so that the appellate court would be able to watch the jury selection and see what the trial judge saw, this procedure has not yet been tried.⁴² In fact, in one pilot program in which appellate judges were able to watch a video of trial court proceedings

39. See *supra* note 27 (citing two cases that found place of residence to be race neutral and another case that found place of residence to rely on race-based stereotypes).

40. See, e.g., Chalmers, *supra* note 14, at 7 (identifying "judges' hesitancy to call prosecutors liars" as one reason discriminatory peremptories continue unabated).

41. United States v. Chinchilla, 874 F.2d 695, 697-98 (9th Cir. 1989). Interestingly, in *Chinchilla*, the appellate court, while acknowledging the need to treat the trial judge's findings with deference, did undertake a more searching inquiry of the prosecutor's reasons and did find that two peremptories—one exercised against a Latino prospective juror and one against a Latino alternate juror—were prohibited because they were based on race. *Id.* at 697-99.

42. See Mimi Samuel, *Focus on Batson: Let the Cameras Roll*, 74 BROOK. L. REV. 95 (2008).

(though not a *Batson* hearing) as the basis for their review, they preferred the transcript to the video because the video took more time to view.⁴³

The appellate courts recognize that they are called upon to review determinations that the trial judge is in a better position to make and so they proceed with deference. The Seventh Circuit provides an example of this tendency. Between 1986 and 2005, the Seventh Circuit reviewed forty-two *Batson* challenges in which they published opinions that appeared in a LEXIS database.⁴⁴ In an earlier article, I reported that in thirty-four of these cases (eighty-one percent), the Seventh Circuit affirmed the ruling of the district-court judge on the *Batson* challenge.⁴⁵ Of the eight cases that were not affirmed, five cases involved unusual procedures by the trial judge, one case was remanded for the prosecutor to give reasons, and two cases were before the Seventh Circuit on collateral review and the law had changed since the earlier rulings.⁴⁶ The Seventh Circuit explained that deference was appropriate because the trial judge is in the best position to make factual findings.⁴⁷ The Seventh Circuit admitted that it would accept a trial judge's rulings in *Batson* challenges unless they were "completely outlandish" or their "falsity" was readily apparent.⁴⁸ Thus, trial judges have little to worry about when it comes to appellate review of *Batson* challenges.

C. EVISCERATING BATSON

Given lawyers' awareness of which reasons to avoid and trial and appellate courts' deference, *Batson* was hardly a barrier to discriminatory peremptories, and *Elem* weakened *Batson* even further.⁴⁹ In this per curiam opinion, decided without the benefit of full briefing and oral argument,⁵⁰ the Supreme Court concluded that at step two of the three-step test, a party can offer any reason at all—no matter how "silly or superstitious"—as long as it is race neutral.⁵¹

The reason does not even have to be related to the case, as *Batson* had required.⁵² At step three, the judge must decide whether the "silly or

43. Memorandum from John Shapard on the Evaluation of Experimental Videotaping of Court Proceedings to the Judicial Conference Comm. on Court Admin. & Case Mgmt. (May 25, 1993), available at <http://www.scribd.com/doc/8763522/Evaluation-of-Videotape-Experiment> ("By far the most common objection to videotape [by federal appellate judges] was that it is much more time consuming to review a videotape than a transcript.").

44. Marder, *The Peremptory Challenge*, *supra* note 9, at 1708.

45. *Id.*

46. *Id.* at 1708–09.

47. *Tinner v. United Ins. Co. of Am.*, 308 F.3d 697, 703 (7th Cir. 2002).

48. *Id.* (quoting *United States v. Stafford*, 136 F.3d 1109, 1114 (7th Cir.), *modified*, 136 F.3d 1115 (7th Cir. 1998)).

49. *Purkett v. Elem*, 514 U.S. 765 (1995) (per curiam).

50. *Id.* at 770 (Stevens, J., dissenting).

51. *Id.* at 768 (per curiam).

52. *Batson v. Kentucky*, 476 U.S. 79, 98 (1986).

superstitious reason” is pretextual.⁵³ As long as the reason is race neutral, even if it is downright silly, it has now met the requirement of *Batson*.

The reasons the prosecutor gave in *Elem* to explain his peremptories were unrelated to the case at hand. The case involved a robbery. Elem objected to the prosecutor’s use of peremptories to exclude two African American men from the jury. As soon as Elem made his objections, the prosecutor simply gave his reasons without waiting for Elem to establish a prima facie case. The prosecutor explained that he struck both jurors because of their hair. One had “long hair” and the other had a “mustache and a goatee type beard.”⁵⁴ He added that he did not “like the way they looked” and that their hair “look[ed] suspicious” to him.⁵⁵ The trial judge overruled Elem’s objections and empaneled the jury, and the jury convicted. On appeal, the Missouri Court of Appeals affirmed the trial judge’s ruling on the *Batson* challenge, but the Eighth Circuit reversed as to the first juror, explaining that *Batson* required “some plausible race-neutral reason for believing those factors will somehow affect the person’s ability to perform his or her duties as a juror.”⁵⁶

In *Elem*, the Supreme Court reversed the Eighth Circuit and undermined *Batson* in at least two ways. First, it established that the reason a party gives for exercising a peremptory does not have to be related to the case.⁵⁷ This was a departure from *Batson*, as Justice Stevens noted in his dissent.⁵⁸ This departure means that the reasons can be fanciful or silly, as long as they are race neutral. If the prosecutor said that he excluded a juror because he was wearing a green shirt, it would not matter that green shirts have no bearing on the case.

Second, the Supreme Court tried to distinguish between fanciful or silly reasons and how judges should assess them at step two and step three of the test.⁵⁹ Such reasons can now be given at step two, but then at step three the judge must decide whether they are pretextual or not. For example, at step three, the judge must decide whether green shirts are pretextual, but unless all of the African American jurors are wearing green shirts, the judge would find that this reason, though silly, is race neutral, and therefore, not prohibited by the Equal Protection Clause. Before *Elem*, the Supreme Court

53. *Elem*, 514 U.S. at 768.

54. *Id.* at 766 (quoting Appendix to Petition for Writ of Certiorari).

55. *Id.* (quoting Appendix to Petition for Writ of Certiorari).

56. *Id.* at 767 (quoting *Elem v. Purkett*, 25 F.3d 679, 683 (1994)). The Eighth Circuit agreed with the State that excluding the second juror was not an error because “that juror’s status as a former victim of a robbery was related to the case at hand.” *Id.* at 773. At trial, the prosecutor had explained that the second juror had been the victim of a robbery with a shotgun and might assume that guns were necessary to robberies. *Id.* at 766.

57. *See id.* at 768–69.

58. *Id.* at 777–78 (Stevens, J., dissenting).

59. *Id.* at 768 (per curiam).

would have rejected the reason because it was unrelated to the case and would have prohibited the peremptory. As Justice Stevens explained: “[P]reoccupation with the niceties of a three-step analysis should not foreclose meaningful judicial review of prosecutorial explanations that are entirely unrelated to the case to be tried.”⁶⁰ Indeed, having long hair or facial hair, just like wearing a green shirt, had nothing to do with the case; yet, this irrelevant reason can now be the basis for a juror’s exclusion from the jury. *Batson* had said that a prosecutor could not exclude a juror based on a “hunch,” but this is exactly what the Supreme Court now permits under *Elem*. If *Batson* encouraged a charade, *Elem* created a farce.

II. REASSESSING THE AMERICAN THEORY OF JUROR BIAS

The main justification for the peremptory challenge is that it allows a lawyer to remove a prospective juror who the lawyer thinks will not be impartial, even though the judge did not remove the juror for cause.⁶¹ There are other justifications for peremptory challenges, some of which are legitimate, such as they allow the defendant to feel comfortable with his jury, and some of which are illegitimate, such as they allow lawyers to make examples of certain jurors during voir dire and then remove them with their peremptories.⁶² Lawyers also claim that peremptories give them some control over the selection of the jury, without requiring them to depend wholly upon the judge.⁶³ Many lawyers also believe that peremptories allow them to remove the one crazy juror whom the judge will not remove for cause. But the main justification for the peremptory, which is to remove jurors who cannot be impartial, depends upon lawyers’ ability to identify such jurors. Can lawyers do this? They say that they can, and the American theory of juror bias assumes that they can, but the evidence is anecdotal, and empirical studies suggest otherwise.

The voir dire, or questioning of jurors, is designed to provide the judge and lawyers with the information they need to remove jurors (whether with a for-cause challenge or a peremptory challenge) who cannot be impartial. One difficulty is that the questions, at least in federal court, tend to be quite cursory and to produce limited information.⁶⁴ Jurors are typically asked where they reside, the nature of their work, their marital status, what their

60. *Id.* at 777 (Stevens, J., dissenting).

61. *See, e.g.*, SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* 50–52 (1988).

62. *See id.* at 50.

63. *See, e.g.*, Marder, *Beyond Gender*, *supra* note 9, at 1086–88 (identifying several benefits of peremptory challenges, including that they allow parties to feel that they have exercised some control over jury selection and that they believe the jury will be fair).

64. *See, e.g.*, Barbara Allen Babcock, *Voir Dire: Preserving “Its Wonderful Power,”* 27 *STAN. L. REV.* 545, 549 (1975) (“[T]he limited questions put by the judge to the panel as a group greatly reduce the information produced by the voir dire.”).

spouse does, whether they have any children, what their children do, and whether they can be impartial.⁶⁵ As long as jurors say that they can be impartial, the judge will not remove them for cause. In the first instance, the judge and lawyers depend on the jurors' self-assessment to decide whether they can be impartial. Yet, it is difficult for jurors to recognize bias in themselves,⁶⁶ and even if they do, it is difficult for them to bring it to the attention of the judge, an authority figure whom they want to please.⁶⁷

The voir dire is conducted in the public setting of the courtroom and jurors are usually questioned as a group. It is undoubtedly difficult to be reflective in such a setting and to ask oneself if one can truly be impartial. It is also exceedingly difficult for a juror to admit in that public setting that he or she cannot be impartial. The socially acceptable, or what psychologists describe as "socially desirable," answer is that one can be impartial.⁶⁸ It is far easier to remain silent⁶⁹ and to blend in with the group⁷⁰ than to respond in a manner that is contrary to social expectations.

Lawyers believe that they can detect bias even when jurors are not able to admit it to themselves or others. However, there is no evidence that lawyers can do this. Alan Dershowitz, a law professor and trial lawyer, has acknowledged the difficulty of this task: "Lawyers' instincts are often the *least* trustworthy basis on which to pick jurors. All those neat rules of thumb, but no feedback. Ten years of accumulated experiences may be 10 years of

65. See, e.g., Trial Transcript, *supra* note 11, at 69–101.

66. See, e.g., Neil Vidmar, *When All of Us Are Victims: Juror Prejudice and "Terrorist" Trials*, 78 CHI.-KENT L. REV. 1143, 1149 (2003) (noting that psychological research on jurors suggests that jurors may not recognize their own prejudices).

67. See, e.g., Valerie P. Hans & Alayna Jehle, *Avoid Bald Men and People with Green Socks? Other Ways To Improve the Voir Dire Process in Jury Selection*, 78 CHI.-KENT L. REV. 1179, 1194 (2003) ("The judge's approval is important to a lot of prospective jurors and many will alter their responses or hide certain attitudes in order to be perceived favorably."); Vidmar, *supra* note 66, at 1150 ("The tendency to provide such ['socially desirable'] answers can be enhanced by the authoritative presence of the judge.").

68. Vidmar, *supra* note 66, at 1150.

69. See, e.g., Richard Seltzer et al., *Juror Honesty During the Voir Dire*, 19 J. CRIM. JUST. 451, 455 (1991) (describing a study of thirty-one criminal trials in D.C. in which researchers observed voir dire, conducted follow-up interviews, and analyzed data). The study found that about half the prospective jurors who had been victims of crime did not come forward during voir dire when they should have. *Id.* at 456 (finding under-reporting by about thirty percent of prospective jurors who had a connection with law enforcement and did not reveal it when questioned about it during voir dire).

70. Judge Mize, who added an individual voir dire to the group voir dire when he was a judge, found that the main advantage of an individual voir dire was that jurors could no longer remain silent as they had during the group voir dire. See Gregory E. Mize, *On Better Jury Selection: Spotting UFO Jurors Before They Enter the Jury Room*, CT. REV., Spring 1999, at 10. Once jurors had to respond to questions, they were forthcoming with information, and oftentimes this information led to for-cause dismissal. *Id.* at 12. Judge Kimba Wood also found that jurors were likely to be more forthcoming in the privacy of the judge's robing room than in the public setting of the courtroom. See Kimba M. Wood, *The 1995 Justice Lester W. Roth Lecture: Reexamining the Access Doctrine*, 69 S. CAL. L. REV. 1105, 1118–20 (1996).

being wrong.”⁷¹ A team of researchers who conducted an empirical study of attorneys’ and judges’ exercise of challenges described the problem as follows:

Those charged with making juror selection decisions receive little formal training for the task. What little training is provided is largely anecdotal or based on folklore or stereotypes. Further, even if there were reliable clues to juror bias, one cannot very effectively ‘learn on the job,’ largely because there is no effective feedback of how good one’s decisions have been. Judges and attorneys never know how those they have challenged would have decided the case had they been seated as jurors.⁷²

Empirical studies do not support lawyers’ contention that they can detect bias or discern which jurors are sympathetic to their case, which is what they really want to do,⁷³ even though they claim to want an impartial jury. In one of the few studies to examine the effectiveness of peremptory challenges, Hans Zeisel and Shari Diamond made use of two “shadow juries,” one consisting of those who had been dismissed through peremptory challenges and one consisting of randomly selected members of the venire.⁷⁴ They attempted to reconstruct the juries as they would have existed if peremptories had not been used. They found that seven of the twelve juries were only minimally affected by the use of peremptory challenges.⁷⁵ They concluded that prosecutors, and to a lesser extent defense attorneys, were unable to use their peremptories to any advantage and that the “collective performance of the attorneys [was] not impressive.”⁷⁶

In a study using mock jurors, researchers showed prosecutors, defense attorneys, and judges a taped voir dire and asked them which jurors they would have excused.⁷⁷ The researchers found that those who were excused “were no more or no less likely to convict than those who were acceptable to

71. Morton Hunt, *Putting Juries on the Couch*, N.Y. TIMES, Nov. 28, 1982, § 6 (Magazine), at 70, 82.

72. Norbert L. Kerr et al., *On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity: An Empirical Study*, 40 AM. U. L. REV. 665, 699 (1991) (footnote omitted).

73. See, e.g., KASSIN & WRIGHTSMAN, *supra* note 61, at 50 (“[I]t is no secret that [trial lawyers] strive to obtain not an impartial panel, but a sympathetic one.”); JAMES P. LEVINE, JURIES AND POLITICS 51 (1992) (“The use of peremptory challenges is supposed to eliminate people who are biased and leave a batch of open-minded jurors. But lawyers use their prerogatives to try to accomplish just the opposite—a jury packed with sympathizers or at least devoid of antagonists.”).

74. Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491, 498–99 (1978).

75. *Id.* at 507.

76. *Id.* at 517.

77. See Norbert L. Kerr, *The Effects of Pretrial Publicity on Jurors*, 78 JUDICATURE 120, 126 (1994). See generally Kerr et al., *supra* note 72.

judges and defense attorneys.”⁷⁸ Although attorneys thought that they would be correct in their predictions 71.9% of the time as to how prospective jurors would vote, in fact they were correct only 45.4% of the time.⁷⁹ They did “about as well as one might do by flipping a coin.”⁸⁰

In three other experiments, another group of researchers learned that trial lawyers tended to rely on two or three characteristics in deciding whether a juror would be biased.⁸¹ In the first experiment, the researchers looked at the type of juror characteristics that lawyers said they sought and found some agreement among lawyers about which ones indicated bias.⁸² In the second experiment, the researchers found that the lawyers’ use of these characteristics was no more sophisticated than the reasoning used by college sophomores when asked to select jurors.⁸³ Finally, in the third experiment, trial lawyers and law students, when asked which jurors to accept or reject, showed the same pattern of error: “Both attorneys and students made more incorrect acceptance and rejection choices than corresponding correct choices”⁸⁴

Although there are a few tools that could aid lawyers in detecting juror bias, they are not used as a matter of course during voir dire, at least not yet. For example, in a few courtrooms, the judge conducts an individual voir dire in addition to a group voir dire.⁸⁵ In the more intimate setting of the judge’s robing-room, when the juror meets face-to-face with the lawyers and judge and when the juror must, in fact, respond to questions and not hide in silence, there might be a greater chance that the juror will acknowledge his or her own bias in a particular case.⁸⁶ However, most judges are unwilling to add individual voir dire because they are concerned about making jury selection more time-consuming than it already is.

Another potential tool is having jurors respond to questions both orally and in writing. Judges sometimes agree to allow jurors to complete a written

78. Kerr, *supra* note 77, at 126.

79. *Id.*; Kerr et al., *supra* note 72, at 689.

80. Kerr, *supra* note 77, at 126; *see* Kerr et al., *supra* note 72, at 685 (“Thus, in identifying jurors hostile to their cases, defense attorneys would have done no worse in exercising their peremptory challenges had they simply flipped coins rather than analyzing the responses jurors made to questions about their exposure to pretrial publicity.”).

81. Paul V. Olczak et al., *Attorneys’ Lay Psychology and its Effectiveness in Selecting Jurors: Three Empirical Studies*, 6 J. SOC. BEHAV. & PERSONALITY 431, 438 (1991) (indicating that lawyers have “a tendency to emphasize only a few characteristics when forming judgments of bias”).

82. *Id.* at 435, 440.

83. *Id.* at 442. The authors concluded that “not only is jury selection by attorneys an art, but it is a lay art.” *Id.* at 443.

84. *Id.* at 446.

85. *See* Mize, *supra* note 70, at 10.

86. *See id.* at 15 (“I am convinced that even if individual questioning took up significant amounts of time (which it has not for me), it would be well worth expending the effort in order to avoid juror UFO’s and the consequent danger of mistrials caused by impaneling biased or disabled citizens.”).

questionnaire prior to oral questioning. If the questionnaire is well designed, it will ask the same question in more than one way.⁸⁷ Inconsistent responses may reveal a bias that the juror was unaware of or unable to admit to during the in-court voir dire. However, the written questionnaire is usually reserved for high-profile cases where there has been extensive pretrial publicity. In such cases, the lawyers and judge need to gauge how much jurors have heard about the case beforehand and whether they can judge the case based only on the evidence presented in the courtroom. Finally, the Internet presents a potential tool for lawyers seeking to uncover juror bias. With the Internet, lawyers have access to new sources of information about jurors so that even if jurors do not respond fully during voir dire, a more complete and candid picture of them can emerge from their Internet activity.⁸⁸ But this is still uncharted territory for most lawyers, and many jurors still remain “off the grid.”

Even though voir dire is supposed to help judges and lawyers exclude jurors who cannot be impartial, it is conducted in ways that make it exceedingly difficult for them to detect bias.⁸⁹ Judges are usually satisfied once jurors have said in open court that they can be impartial. Lawyers are usually satisfied once they have exercised their peremptories. However, these steps, though they might reassure judges, lawyers, and parties that biased jurors have been removed, have not proven to be effective. Self-assessment is difficult for jurors, yet judges rely on it.⁹⁰ Peremptories are difficult to exercise meaningfully, yet lawyers rely on them. The empirical studies suggest that we adhere to traditions such as peremptories based on the belief that lawyers can recognize individual jurors who are biased and remove them from the jury, even though this is not so. One response to this dilemma is to try to improve the voir dire process so that it is more likely to

87. See, e.g., Vidmar, *supra* note 66, at 1168–69 (describing survey data that were collected by questionnaire and interviews to explore the effects of pretrial publicity in a then-upcoming terrorist trial, and finding that respondents who said they could be impartial in response to some questions answered other questions in a way that indicated bias).

88. See, e.g., Thaddeus Hoffmeister, *Jurors in the Digital Age*, 83 U. COLO. L. REV. (forthcoming 2012) (manuscript at 33) (“The major concern surrounding juror privacy is the enhanced ability to learn information about jurors on the Internet. While some see this as an intrusion into the personal life of jurors, others believe that attorneys, like everyone else, should be able to obtain information about jurors, especially when such information is in the public domain.” (footnote omitted)).

89. See, e.g., Hans & Jehle, *supra* note 67, at 1201 (“In summary, the typical voir dire as it is currently conducted is often inadequate for detecting the biases of prospective jurors in criminal and civil trials.”).

90. See, e.g., Kerr et al., *supra* note 72, at 690 (finding in one empirical study that “the self-reports [of juror bias] were unrelated to the jurors’ later verdicts. . . [and] those who admitted having formed an opinion from pretrial publicity that they could not set aside were no more or less likely to convict the defendant than those who reported no such fixed bias”).

reveal juror bias.⁹¹ Another response is to realize that we cannot detect juror bias given the current process and so we need to reexamine our views on juror bias.

III. EXPLORING ALTERNATIVE THEORIES OF JUROR BIAS

A. *THE ENGLISH THEORY*

A number of English judges and barristers have espoused a theory of juror bias that differs from the American theory. According to the English theory, citizens are summoned to serve as jurors and when they assume the role, they will put aside their individual biases and serve as impartial jurors.⁹² If one takes this view, then all citizens, except those with a for-cause reason, can serve on the jury. Peremptories become unnecessary, and indeed, the English have eliminated them.⁹³

In the two weeks that I observed jury trials at the Old Bailey in London,⁹⁴ it became clear to me that the English theory of juror bias leads to a very different process of jury selection than the one found in American courtrooms. To begin with, jury selection proceeds very quickly. In one case of fraud, for example, the clerk randomly selected twelve names, and as each name was called the person answered “yes” and took his or her place in the jury box.⁹⁵ The judge asked the jurors if any of them worked for Customs and Revenue because the case involved that agency.⁹⁶ No juror did.⁹⁷ The judge then asked the jurors if any of them knew the barristers.⁹⁸ Again, no juror did. Each juror then read an oath or affirmation (after having selected the relevant holy book). When one juror had difficulty reading the oath, that juror was dismissed because the case involved many documents that the jurors would need to read. Another juror was seated and sworn in, and the trial was ready to proceed.

The entire jury selection was completed in a matter of minutes. The jury that was seated was diverse. The jury consisted of five men and seven women.⁹⁹ Of the twelve jurors, seven were white, four were black, and one

91. See, e.g., Hans & Jehle, *supra* note 67, at 1201 (“By expanding the use of questionnaires, modifying the questioning method and content, and allowing direct attorney participation, the courts could create a more effective voir dire.”).

92. My observations and interviews were the result of two weeks (Dec. 7–22, 2010) that I spent observing jury trials at the Old Bailey in London. I have recounted my findings more fully in an earlier article. See Marder, *supra* note 13, at 554 *passim*.

93. See Criminal Justice Act, 1988, c. 33, § 118(1) (Eng. & Wales).

94. See Marder, *supra* note 13, at 537 n.1.

95. See *id.* at 552 (describing jury selection in *R v. Ilene* (Old Bailey, London, Dec. 2010)).

96. *Id.* If the case had involved police witnesses, then the jurors would have been asked if any of them worked in law enforcement. *Id.* at 552 n.45.

97. *Id.* at 552.

98. *Id.*

99. *Id.*

was of South Asian ancestry.¹⁰⁰ Although not every jury will necessarily be diverse, English juries are more likely than American juries to be diverse because there is random selection without the skewing produced by peremptories. Indeed, one of the reasons the English eliminated peremptories and limited stand-bys¹⁰¹ was so that the jury would reflect more closely the heterogeneity of English society.¹⁰² As one report in the United Kingdom explained: “A jury should represent a cross-section drawn at random from the community, and should be the means of bringing to bear on the issues the corporate good sense of that community.”¹⁰³

What was interesting in this case was how little the barristers knew about the jurors. The only information they had was what they could gather from the jurors’ appearance (gender, race, and possibly age) and what they could glean from their choice of holy book or affirmation (Christian, Muslim, and non-observant) for their oath. Yet, the absence of background information did not leave them doubting the impartiality of the jurors. Instead, they assumed that all the jurors would play their proper role and put aside any individual prejudices they might hold. This was their role, and they were expected to perform it. The defendant was entitled to twelve impartial jurors and the expectation was that these twelve individuals, once they were sworn in as jurors, would assume their proper role. As one barrister had explained to another researcher: “I happen to take the view that whatever one’s personal prejudices, the chances are that a juror called to jury service and knowing the weight of responsibility upon him will do his utmost to discard prejudice.”¹⁰⁴ This view was echoed by barristers and judges I spoke with during my two weeks at the Old Bailey.¹⁰⁵

B. THE PROCESS THEORY

Another theory of juror bias is one that recognizes that it is difficult, if not impossible, to detect individual juror bias (except in extreme cases) during voir dire, and that rather than trying to do so, we should recognize that the jury system includes institutional features that will ultimately

100. *Id.*

101. Stand-bys allowed the Crown to reserve judgment on a prospective juror until all other prospective jurors were considered. *See supra* note 12.

102. *See* McEldowney, *supra* note 12, at 280–83.

103. Laura K. Donohue, *Terrorism and Trial by Jury: The Vices and Virtues of British and American Criminal Law*, 59 STAN. L. REV. 1321, 1345 (2007) (quoting DEPARTMENTAL COMM. ON JURY SERV., REPORT, 1965, Cmnd. 2627, ¶ 53).

104. VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 49 (1986) (quoting Hans, V.P. (1983), unpublished data).

105. *See* Notes from the Old Bailey (Dec. 7–22, 2010) [hereinafter Notes from the Old Bailey] (unpublished notes) (on file with the author). A subsequent conversation with Judge Brian Barker confirmed this view. Interview with Judge Brian Barker, The Common Serjeant of London and Deputy Senior Judge at the Cent. Criminal Court, Old Bailey, London, in Chi., Ill. (Sept. 7, 2011).

produce an impartial jury. According to this theory, the voir dire, oath, instructions, diversity of the jury, and deliberations will ensure that an impartial jury decides the case. I have labeled this the “process theory” because it focuses on the process that jurors go through as they perform their role as jurors. Each of these institutional features imposes a constraint on jurors and helps to ensure that they will not follow their personal whims and biases and that they will ultimately serve as impartial jurors. The jury process is what leads them to behave as impartial jurors.

According to the process theory, voir dire is important because it helps to transform a summoned citizen into a responsible juror. Even if the perfunctory questioning that takes place during voir dire does not enable lawyers to detect individual juror bias, it does help jurors to learn about their proper role.¹⁰⁶ When potential jurors enter the courtroom, they often think about what they can say that will enable them to be excused from jury duty. However, once they sit in the jury box, respond to the judge’s questions, and learn about their fellow jurors, a transformation begins to take place. They are transformed from citizens who want to be excused into jurors who want to perform their role ably.¹⁰⁷ Voir dire, then, is really the first of several steps where jurors begin to put aside their everyday concerns to assume the role of juror. For example, during voir dire and throughout the trial, jurors learn from the judge that they need to keep an open mind and to be impartial.¹⁰⁸ They also need to refrain from discussing the case, even with fellow jurors,¹⁰⁹

106. On the weaknesses of a limited voir dire, see Babcock, *supra* note 64, at 549; Hans & Jehle, *supra* note 67, at 1201; Zeisel & Diamond, *supra* note 74, at 529.

107. For an individual account of this transformation, see Dan Hatfield, *Jury Service an Engaging Adventure*, JUDGES’ J., Fall 2004, at 34, 36 (“Surprisingly, that [excusal] was a bittersweet moment for me. I had gone from wanting to get out of this [jury service], to a heartfelt obligation to serve.”).

108. See, e.g., Trial Transcript, *supra* note 11, at 37–38.

109. Some state courts, such as those in Arizona, have experimented with allowing jurors to discuss the case preliminarily before deliberations in civil jury trials as long as all of the jurors are present. See, e.g., B. Michael Dann & George Logan III, *Jury Reform: The Arizona Experience*, 79 JUDICATURE 280, 281, 283 (1996). The idea behind this experiment is that it will help jurors to absorb what they have seen and heard in the courtroom. One difficulty is that jurors sometimes discuss the case even when all of the jurors are not present. See Paula L. Hannaford, Valerie P. Hans & G. Thomas Munsterman, *Permitting Jury Discussions During Trial: Impact of the Arizona Reform*, 24 LAW & HUM. BEHAV. 359, 376 (2000) (finding that juries permitted to engage in preverdict deliberations did so without always waiting for all jurors to be present). One reason that other states have not followed suit is that they do not want jurors to form a fixed view of the case early in the trial, particularly before both sides have presented their evidence. *But see* ABA, PRINCIPLES FOR JURIES & JURY TRIALS princ. 13.F cmt. Subdivision F., at 103 (2005), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/ABA,%20Principles%20for%20Juries%20and%20Jury%20Trials,%20Comments%20to%20Principles,%202005.pdf> (“Recent empirical studies of structured juror discussions of the evidence during actual trials of civil cases found that allowing discussions did not lead to premature judgments in cases by jurors . . .”).

until they begin their deliberations.¹¹⁰ Voir dire is the starting point in the education of jurors as to their proper role as impartial jurors.¹¹¹

The oath that citizens take before they officially become jurors is another institutional constraint on jurors that helps them to assume their role as impartial jurors. It signals to jurors that they are about to perform a duty that is out of the ordinary. They have to stand up in court, in the presence of the public, the parties, and the judge, and swear or affirm that they will perform their responsibilities as jurors to the best of their ability and that they will decide the case based only on the evidence presented in the courtroom.¹¹² By taking an oath, they acknowledge before everyone in the courtroom and before whichever higher authority they believe in (if they believe in any) that they will do their utmost to abide by their oath.

The judge's instructions are another constraint on jurors that help them to keep an open mind and to be impartial.¹¹³ Typically, the judge reminds the jurors of this obligation throughout the trial. The judge will also remind the jurors that they can consider only the evidence presented in the courtroom.¹¹⁴ They are to decide the case based only on the facts as they find them and to apply the law as the judge instructs them on it.¹¹⁵ In addition, the judge will tell jurors not to discuss the case with anyone, and will repeat this admonition prior to any recess.¹¹⁶ Jurors try to follow the

110. For a preliminary instruction given by the judge during voir dire and throughout the trial, see ILL. SUPREME COURT COMM. ON PATTERN JURY INSTRUCTIONS IN CIVIL CASES, ILLINOIS PATTERN JURY INSTRUCTIONS—CIVIL § 1.01 (2011 ed.) [hereinafter IPI].

111. Some preliminary education could take place when summoned citizens consult state court websites for jury information or watch the juror orientation video that some courthouses offer, but at that early stage, citizens might not pay close attention because they still hope to be excused from jury duty.

112. For example, the following oath is used in criminal trials in California: "You and each of you, do solemnly swear that you will well and truly try the cause now pending before this Court, and a true verdict render therein, according to the evidence and the instructions of the Court, so help you God?" CALIFORNIA SUPERIOR COURT CRIMINAL TRIAL JUDGES' DESKBOOK 356 (Ronald M. George ed., 1988 ed.).

113. Trial judges typically instruct jurors to keep an open mind until they have heard their fellow jurors' views during the deliberations. For example, a trial judge in New York instructs jurors as follows: "Each of you must decide the case for yourself, but only after a fair and impartial consideration of the evidence with the other jurors." N.Y. STATE UNIFIED COURT SYS., CRIMINAL JURY INSTRUCTIONS 2D, Deliberations, available at <http://www.courts.state.ny.us/cji/1-General/cjigc.html> (select "Deliberation Procedures").

114. See *supra* note 110 (citing IPI § 1.01).

115. A typical instruction is: "I instruct you that the law as given by the Court in these and other instructions constitute the only law for your guidance. It is your duty to accept and to follow the law as I give it to you even though you may disagree with the law." 1A KEVIN F. O'MALLEY ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 10.01, at 5 (5th ed. 2000).

116. For example, Judge Lance Ito admonished jurors throughout the state criminal trial of O.J. Simpson as follows: "Please remember all my admonitions to you; do not discuss the case amongst yourselves, form any opinions about the case . . ." Transcript of Proceedings at 47,792, *People v. Simpson*, No. BA097211, 1995 WL 686429 (Cal. Super. Ct. Sept. 27, 1995).

judge's instructions even if they are difficult to understand¹¹⁷ because jurors are laypeople and look up to the judge, who is an authority figure in the courtroom.¹¹⁸

The deliberations also operate as a constraint on jurors and are a key element in ensuring that jurors maintain their impartiality. The deliberations are more likely to serve this function when the jury is diverse. When jurors come from different backgrounds, perspectives, and life experiences, they are likely to bring different ways of viewing the case into the deliberation room.¹¹⁹ During the deliberations, they engage in group discussion and try to reach a common understanding. Through this process, they can correct each other's mistaken notions, broaden each other's perspectives, and suggest different ways of looking at the evidence. A racially diverse jury allows jurors to challenge each other's biases¹²⁰ and can even lead white jurors to engage in a more thorough and careful deliberation than they would on a homogeneous jury by becoming more willing to discuss race-related issues.¹²¹ For a diverse jury to agree on a verdict means that the evidence was strong enough that jurors came to view the case in the same way even though they may have started out at very different points.

One example, albeit fictional, of how jurors during jury deliberations can expose and challenge each other's biases can be seen in the movie *12 Angry Men*.¹²² The defendant, a young man, was charged with the murder of his father; if found guilty, he would receive a mandatory death sentence.

117. See, e.g., Nancy S. Marder, *Bringing Jury Instructions into the Twenty-First Century*, 81 NOTRE DAME L. REV. 449, 454–58 (2006) (describing the findings of empirical studies showing that jurors have difficulty understanding jury instructions).

118. See, e.g., Note, *Judges' Nonverbal Behavior in Jury Trials: A Threat to Judicial Impartiality*, 61 VA. L. REV. 1266, 1278 (1975) (noting jurors' tendency to look to the judge for guidance because they are uncertain how to perform their new role).

119. See *Peters v. Kiff*, 407 U.S. 493, 503–04 (1972); HANS & VIDMAR, *supra* note 104, at 50 (“[A] jury composed of individuals with a wide range of experiences, backgrounds, and knowledge is more likely to perceive the facts from different perspectives and thus engage in a vigorous and thorough debate.”).

120. HANS & VIDMAR, *supra* note 104, at 50 (“The jury's heterogeneous makeup may also lessen the power of prejudice.”).

121. Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597, 605–06 (2006) (describing the findings of an empirical study using mock jurors in which white jurors on racially diverse juries discussed more facts, made fewer inaccurate statements, and considered more race-related topics than white jurors on homogeneous juries); see also 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, 1025 (2003) (“[M]embership on a racially heterogeneous jury might also influence White jurors' behavior during deliberations.”); *id.* at 1028–29.

122. 12 ANGRY MEN (Orion-Nova Productions 1957).

During the deliberations, two jurors reveal their biases.¹²³ Juror #3 (Lee J. Cobb) is prejudiced against the defendant because he has an estranged son who is the same age as the defendant. Juror #10 (Ed Begley) is prejudiced against the defendant because he is Puerto Rican, and Juror #10 believes that all Puerto Ricans are liars who fight amongst themselves and who do not think twice about killing each other.¹²⁴ One of the most dramatic moments in the movie occurs when Juror #10 begins another tirade against Puerto Ricans, and one by one his fellow jurors stand up and turn away from him.¹²⁵ Finally, he is left with just one juror, who tells him not to say another word. Juror #8 (Henry Fonda) lectures him (and the viewers) on the ways in which prejudice can impair judgment: “And no matter where you run into it, prejudice obscures the truth.”¹²⁶ Juror #10 sits apart from the other jurors but now joins them in voting not guilty.

After Juror #10’s ostracism and not-guilty vote, Juror #3 is the only juror still voting guilty. He attempts to remain a holdout, but soon succumbs to group pressure and to the realization that he voted guilty because of his feelings toward his son. He wants to punish his son by punishing the defendant. As Juror #8 observes in a rare display of anger: “Ever since we walked into this room you’ve been behaving like a self-appointed avenger. . . . You want to see this boy die because you personally want it, not because of the facts.”¹²⁷ In a moment of recognition, Juror #3 tears a wallet-size photo of himself and his son in half and changes his vote to not-guilty, thus, joining the other eleven jurors in rendering a unanimous verdict of not-guilty.

Each of these features of the jury process—the voir dire, oath, instructions, and deliberations—helps to ensure that jurors will be impartial throughout the trial and will render a verdict that is fair and impartial. Even when individual jurors deviate from this norm, as two jurors did in *12 Angry Men*, other jurors may challenge them during deliberations and expose their biases. Although jury deliberations are conducted in secret so that it is difficult to know whether this actually occurs, post-verdict interviews by jurors suggest that it does. Even when jurors disagree with each other, they usually describe their fellow jurors as having acted fairly, properly, and impartially.¹²⁸ According to the process theory, the various features of the

123. *Id.* How these two jurors made it through voir dire without being removed for cause is never explained. However, voir dire, which was not shown in the film, would not have been in-depth given the judge’s boredom with the case and the defense attorney’s indifference.

124. See REGINALD ROSE, *TWELVE ANGRY MEN* 180 (screenplay version of the film *12 ANGRY MEN*, *supra* note 122) (“Now you’re not going to tell us that we’re supposed to believe that kid, knowing what he is. . . . I mean they’re born liars.” (quoting Juror #10)).

125. See *id.* at 312–16 (depicting Juror #10’s tirade and ostracism).

126. *Id.* at 316 (quoting Juror #8).

127. *Id.* at 273.

128. For example, the holdout juror in the first criminal trial of former Illinois Governor Rod Blagojevich was described by fellow jurors as having acted consistent with her sense of what

jury system help to ensure that jurors will be impartial throughout the trial and during the deliberations. Thus, even if lawyers and judges cannot easily detect juror bias during voir dire, several institutional features of the jury system can contain it.

In my view, we should design jury selection based on the process theory of juror bias, though either the process theory or the English theory is preferable to the American theory. The American theory of juror bias assumes that lawyers and judges can detect individual bias during voir dire, even though empirical studies do not support this claim. This theory of bias excludes jurors from serving because lawyers have misgivings about them even though there is no reliable evidence that these jurors are biased. According to the English theory, it is assumed that all jurors can serve because they will rise to the occasion and perform their duties impartially. Although I share this assumption, I think the theory is incomplete. The process theory builds upon the English theory and recognizes that jurors will be constrained by various institutional features of the jury, such as the voir dire, oath, instructions, and deliberations, so that they will ultimately perform their role as impartial jurors. The jury process, with its various institutional constraints, will assist jurors to become impartial, even if they did not start out that way. Although the process theory and the English theory can overlap, the former recognizes the importance of several of the jury features and seeks to preserve them because of the vital role they play in transforming summoned citizens into impartial jurors.

IV. DESIGNING JURY SELECTION ACCORDING TO THE PROCESS THEORY OF JUROR BIAS

According to the process theory and the English theory of juror bias, there is no role for peremptory challenges. According to both theories, lawyers should not try to uncover subtle juror bias during voir dire as they do under the current American theory of juror bias. Not only are lawyers ill-equipped to do so, as empirical studies suggest, but also impartial jurors can be obtained through other means. The English theory recognizes that peremptories are not necessary because jurors, for the most part, will rise to

the evidence showed and what the prosecution had failed to establish beyond a reasonable doubt. Even though the other jurors were frustrated that the jury was a hung jury on all counts but one, they believed that the holdout juror had acted properly throughout the deliberations. See, e.g., Annie Sweeney et al., *Many Blagojevich Jurors Disappointed, Foreman Cites 'Lack of a Smoking Gun'*, CHI. TRIB. (Aug. 18, 2010), http://articles.chicagotribune.com/2010-08-18/news/ct-met-bлагоjevich-verdict-jury-20100818_1_female-juror-deliberation-senate-seat (“‘We deliberated logically and with respect for each other’s opinions,’ [jury foreperson James] Matsumoto said. Still, he added, ‘it was very frustrating.’”). Of course, there are exceptions, such as the holdout juror in *United States v. Thomas*, whose behavior raised questions among several jurors. *United States v. Thomas*, 116 F.3d 606, 609–11 (2d Cir. 1997).

the occasion and perform their role impartially.¹²⁹ The process theory recognizes that even if jurors do not begin as impartial jurors, they will be taught along the way by the jury process, and by the time they deliberate, they will deliberate impartially.

Under either of these theories, the peremptory plays no role, and therefore, should be eliminated. Its elimination would improve the jury process in several significant ways. No longer would there be the charade of disingenuous reasons to explain peremptories whenever they are challenged under *Batson*. Nor would there be the skewing of otherwise diverse juries through the exercise of discriminatory peremptories, particularly in capital cases, where this pattern is pronounced.¹³⁰ Moreover, the skewing of otherwise diverse juries interferes with the role that deliberations play in enabling jurors to challenge each other's views in order to arrive at a verdict that has been tested rather than blithely accepted.

The elimination of peremptory challenges does not necessarily mean the elimination of for-cause challenges or voir dire.¹³¹ In my view, voir dire should remain because it serves other useful, though rarely acknowledged, purposes, such as helping jurors learn about the role of the juror and the need for juror impartiality. For-cause challenges should also remain because they address the clear-cut cases in which everyone acknowledges a biased juror, oftentimes including the biased juror.

A. ELIMINATING PEREMPTORY CHALLENGES

If lawyers and judges cannot detect subtle juror bias during voir dire, then peremptory challenges cease to fulfill their purpose. The main function of the peremptory is to allow lawyers to remove those jurors whom they think will not be impartial, even though these jurors have not been eliminated for cause.¹³²

The elimination of the peremptory would improve the jury process in several significant ways. First, the *Batson* framework, which allows peremptories, but not if they are based on race, gender, or ethnicity, leads to a charade in which lawyers give all kinds of "silly" or fanciful reasons,¹³³ and judges tend to accept them as long as they are not the forbidden

129. This theory finds support in the work of Kadish and Kadish, who focused on the importance of roles and how they are exercised. MORTIMER R. KADISH & SANFORD H. KADISH, *DISCRETION TO DISOBEY* (1973). They looked at prosecutors, police officers, judges, and jurors, *id.* at 45–91, who exercise "recourse roles." *Id.* at 35. These roles are clearly defined, but also entail the exercise of some discretion. *Id.* at 34–36. For example, jurors for the most part follow the judge's instructions, "[b]ut the obligation is not absolute." *Id.* at 66. Occasionally, when the situation demands, "the jury may justifiably depart from the rule requiring it to defer to the judge's instructions." *Id.*

130. See EJI REPORT, *supra* note 14, at 5, 14.

131. See Marder, *supra* note 13, at 555–56.

132. See, e.g., KASSIN & WRIGHTSMAN, *supra* note 61, at 50.

133. Purkett v. Elem, 514 U.S. 765, 768 (1995) (per curiam).

reasons. This allows us to pay lip service to nondiscrimination during jury selection even though lawyers might well be exercising discriminatory peremptories. They might be unaware of their own prejudices, or they might be aware of them and simply offer disingenuous reasons in order to mask them.¹³⁴ In either case, the effect is deleterious to the jury. Superficial or disingenuous reasons undermine the integrity of jury selection and can lead to cynicism about the entire trial.¹³⁵ When a defendant hears that a juror has been excluded because the juror is wearing a green shirt, and the judge permits the peremptory because the reason is race neutral and the appellate court subsequently affirms, the defendant might lose faith in the jury system.

Second, the elimination of the peremptory would lead to more diverse juries. Lawyers exercise their peremptories to remove jurors based on race, gender, and ethnicity, even if they do not acknowledge this when required to give reasons. Even though the venire might have been drawn from a fair cross section of the community, and the first twelve names for the petit jury randomly drawn, lawyers can still use peremptories to undermine the diversity of the jury. The effect becomes particularly pronounced in capital cases.¹³⁶ “Death qualification”¹³⁷ can have a disproportionate effect on African Americans,¹³⁸ and prosecutors can use their generous allotment of peremptories to remove the few remaining African Americans left on a capital jury. As a result, African American defendants in capital cases can end up being tried by juries from which all remaining African Americans have been excluded.¹³⁹

When peremptories are exercised on the basis of race, gender, and ethnicity, the parties lose out on the benefits of a diverse jury. When jurors are drawn from different walks of life, they are likely to bring different perspectives and life experiences to their decision-making. When these jurors are removed through peremptories, their perspectives are lost to the

134. See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 106 (1986) (Marshall, J., concurring) (“A prosecutor’s own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is ‘sullen,’ or ‘distant,’ a characterization that would not have come to his mind if a white juror had acted identically.”).

135. *Powers v. Ohio*, 499 U.S. 400, 412 (1991) (observing that discriminatory peremptories “invite[] cynicism respecting the jury’s neutrality and its obligation to adhere to the law”).

136. See EJI REPORT, *supra* note 14, at 5, 14.

137. A “death-qualified” jury is one in which those potential jurors who say they could not vote for the death penalty are excluded from the jury. The Supreme Court has held that death qualification does not violate the fair cross-section requirement of the Sixth Amendment. *Lockhart v. McCree*, 476 U.S. 162, 167–68, 174–76 (1986).

138. See, e.g., Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 LAW & HUM. BEHAV. 31, 46 (1984) (finding that death-qualified juries are more likely to exclude women and African Americans).

139. See, e.g., *Miller-El v. Dretke*, 545 U.S. 231, 235–45 (2005).

group.¹⁴⁰ As the jury becomes more homogeneous, it loses jurors who might have remembered different pieces of evidence, corrected mistaken recollections, or simply viewed the evidence in a different light so that the jury can reach an accurate verdict.¹⁴¹ In other words, the exclusion of these jurors means that neither the parties nor the jury derives the full benefits of group decision-making,¹⁴² and the deliberations do not include jurors who can challenge each other's biases and insist upon an impartial deliberation.

Finally, the elimination of the peremptory would also benefit the excluded juror. Although jurors are told that lawyers can exercise peremptories, and that they should not take it personally,¹⁴³ it can still be demoralizing for jurors when they are excluded. They might well conclude that they were excluded for an impermissible reason.¹⁴⁴ If the few remaining African American jurors are excluded through peremptory challenges, it is clear to everyone in the courtroom that they were removed because of their race, even if that reason is never stated in open court. In addition, the excluded jurors miss the opportunity to be seen as full citizens. Jury duty and voting are the two badges of citizenship. When jurors are excluded from the jury, they feel like second-class citizens.¹⁴⁵ There is also the lost educational opportunity. As Alexis de Tocqueville noted, the jury serves as a "free school," educating citizens not just on the law but also on the responsibilities of self-governance in a democracy.¹⁴⁶

Thus, peremptories, even as modified under *Batson*, produce a number of harms that can be eliminated only if peremptories are eliminated. If

140. See, e.g., *Peters v. Kiff*, 407 U.S. 493, 503–04 (1972) (Marshall, J., plurality opinion) ("When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.").

141. See, e.g., *Ballew v. Georgia*, 435 U.S. 223, 232–44 (1978).

142. A more homogeneous jury is likely to lead to "group-think," in which jurors are unwilling to question and challenge each other; instead, they simply conform to the prevalent view. See IRVING L. JANIS, *GROUPTHINK* 7, 270–71 (2d ed. 1983).

143. See Mary R. Rose, *A Voir Dire of Voir Dire: Listening to Jurors' Views Regarding the Peremptory Challenge*, 78 CHI-KENT L. REV. 1061, 1097 (2003) ("Jurors seemed to realize that jury selection is only partly about them.").

144. According to Mr. Cox, an African American prospective juror who was challenged by defense counsel in a civil case that later settled: "I was excused seemingly just because my skin was black. There was no other reason why I should have been challenged. I was very irritated and extremely disappointed that such a practice should be allowed." Dale W. Broeder, *The Negro in Court*, 1965 DUKE L.J. 19, 28 (internal quotation marks omitted). The EJI Report documented more recent examples of citizens who were "excluded from participation in civic life on account of their race," and who suffered "humiliation and denigration." EJI REPORT, *supra* note 14, at 47. One excluded juror "grew emotional as he recalled how the prosecutor's racist actions made him feel unworthy" nearly twenty years after the experience. *Id.* at 30.

145. See *supra* note 144 and accompanying text.

146. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 252 (J. P. Mayer & Max Lerner eds., Harper & Row 1966) (1835).

peremptories are eliminated, that does not mean that voir dire and for-cause challenges must be eliminated too; they still have key roles to play.

B. PRESERVING FOR-CAUSE CHALLENGES

Although the process view of juror bias would lead to the elimination of the peremptory challenge, it would not lead to the elimination of the for-cause challenge. One difference between the for-cause challenge and the peremptory is that the for-cause challenge requires a reason in every instance, and the judge must agree to the reason. Another difference is that the for-cause challenge, though left to the judge's discretion, is appropriate only in a limited number of circumstances. It is typically exercised when the prospective juror has a familial relationship to one of the participants in the trial, when the prospective juror has a financial stake in the outcome of the case, or when the prospective juror says that he or she cannot be impartial.¹⁴⁷ Each of these instances presents a fairly clear-cut case when the juror cannot be impartial or satisfy the appearance of impartiality. Even the English theory of juror bias recognizes these instances; moreover, these instances do not require a searching inquiry to reveal.

In these few instances, it is important to have a mechanism to remove the prospective juror; otherwise, the parties will have doubts from the outset as to whether the jury can be impartial. The for-cause challenge provides such a mechanism, and it is flexible enough to encompass additional categories should they become necessary when the peremptory is eliminated.¹⁴⁸ The for-cause challenge, however, will not morph into the peremptory challenge as long as it is limited to a few agreed-upon categories, requires reasons that are given in open court, and remains a decision that the judge makes on the record.

C. MAINTAINING VOIR DIRE

Even if peremptories are eliminated, voir dire should be preserved because it serves other purposes that are important to the process theory of juror bias. Ostensibly, voir dire provides lawyers with information about jurors so that they can exercise their peremptories wisely rather than based on stereotype or hunch. However, as voir dire has become more perfunctory, the limited information gleaned from the process has become less useful. Lawyers are left to their own devices and resort to stereotypes and hunches in the exercise of their peremptories.¹⁴⁹ If that were the only purpose of voir dire—to provide information for the exercise of

147. See *Hopt v. Utah*, 120 U.S. 430, 433 (1887).

148. See Marder, *Beyond Gender*, *supra* note 9, at 1107.

149. See Kerr et al., *supra* note 72, at 699 (“Those charged with making juror selection decisions receive little formal training for the task. What little training is provided is largely anecdotal or based on folklore or stereotypes.”).

peremptories—then the elimination of peremptories would lead to the elimination of voir dire. However, voir dire serves other purposes and should be maintained, albeit in a more focused and abbreviated form.

Voir dire begins the process of teaching jurors about their proper role and helping them to make the transition from citizens to jurors. The elimination of peremptories would not alter this critical, though seldom recognized, purpose of voir dire. Without peremptories, though, voir dire could be shortened. It could begin with jurors taking their seat in the jury box and the judge introducing them to the case. The judge would still need to ask some basic questions, but these would mainly help the jurors, judge, and lawyers figure out if any jurors needed to be removed for cause. These questions could include: “Do any of you know the parties?” and “Do any of you have any connection to this case?” Though basic, they would be sufficient to reveal whether any of the jurors needed to be removed for cause. Without peremptories, there will be no need for the silly or intrusive questions that lawyers sometimes ask, such as: “What baseball team do you root for?”¹⁵⁰ Instead, the judge will be able to spend time explaining to the jurors how the trial will proceed, the role they will play, how their role differs from that of the judge, and why their role is so important to the judicial system.

By using voir dire to teach jurors about their role and to impress upon them the importance of juror impartiality, jurors will begin the trial with much better preparation than they now have so that they understand what is about to take place in the courtroom and what they will be asked to do later in the jury room. Such an approach to voir dire will allow it to fulfill its function according to the process theory of juror bias, which is to help jurors understand the need to keep an open mind throughout the trial and until they reach a verdict.

CONCLUSION

On the twenty-fifth anniversary of *Batson*, it is a fitting moment to look back and see how *Batson* has fared. In my view, it has not fared well. It is time to recognize that the *Batson* experiment has failed. It has led to a charade in which lawyers give reasons to explain their peremptories but the reasons are not real, and the subterfuge undermines the integrity of the jury system. It is time to stop the charade.

The root of the problem is not *Batson*, but our theory of juror bias. According to the American theory, we assume that lawyers and judges can discern which jurors are biased, even though empirical studies find no support for this claim. Because we assume lawyers can detect bias, we assume that they can use peremptories to remove biased jurors, but they cannot. We need to replace this theory with one that is more realistic, especially because

150. KASSIN & WRIGHTSMAN, *supra* note 61, at 53.

peremptories cause a number of harms. For example, they allow lawyers to skew the composition of the jury so that juries are less diverse than they would otherwise be. Venires are drawn from a fair cross section of the community, and individual jurors are randomly selected for the petit jury, but then lawyers' peremptories, exercised on the basis of race, gender, or ethnicity, undermine the diversity of the jury. These abuses reach their zenith in capital cases, in which the number of peremptories is high and the stakes are huge.

There are alternative theories of juror bias; the American theory is not the only one. The English theory suggests that jurors can rise to the occasion, put aside personal prejudices, and be impartial so there is no need for peremptories or an extensive voir dire. The process theory suggests that jurors will be constrained by institutional features of the jury so that they will learn to be impartial jurors and this lesson will be reinforced at various junctures throughout the trial, including the voir dire, oath, instructions, and deliberations. Thus, there is no need for peremptories because the jury process will ensure impartial jurors. Either of these theories leads to the elimination of the peremptory, though I think the process theory is more complete. According to either theory, there remains a role for the for-cause challenge and an abbreviated voir dire. With a new theory of juror bias, it becomes clear that our practices, including peremptory challenges, need to change. Justice Marshall foresaw this change twenty-five years ago. He proposed the elimination of the peremptory, and he was right. We have now had twenty-five years of experience with *Batson* and it is time to heed Justice Marshall's advice.