Batson Ethics for Prosecutors and Trial Court Judges

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It was easy for everyone—or almost everyone—to act appalled when a videotape of a jury selection training session for Philadelphia prosecutors was released to the public. That videotape showed Jack McMahon, erstwhile rival of Lynne Abraham, the incumbent District Attorney for the city of Philadelphia, urging fledgling prosecutors to avoid seating poor African Americans as jurors. Not only was the action he advocated clearly unconstitutional under Batson v. Kentucky, as any minimally informed prosecutor would have known, but its purported rational was also phrased offensively, making ample use of stereotypes about uneducated African Americans, African Americans from the South, and young African-American women.

Far be it from me to defend Mr. McMahon. He certainly deserves censure for openly flouting the Supreme Court's command and for his obvious disrespect for citizens whose interests he is sworn to protect. Still, I think the story as it played out in the newspapers missed the larger truth: While the incident was certainly outrageous, it was not unusual. The participation of African Americans and other racial minorities in criminal cases is frequently eliminated or minimized for reasons that have more to do with the prospective jurors' color than their qualifications.

The responsibility for this state of affairs is diffuse. One aspect of the videotape debacle that received little attention is the apparent passivity of the audience. Why would all of those attorneys sit and listen without objection to patently unconstitutional marching orders?

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I use "Black" and "African American" interchangeably throughout this article in deference to the nomenclature used by Americans of African descent to refer to themselves. I capitalize "Black" because it denotes racial and cultural identity. I do not capitalize "white" because it is ordinarily used to encompass a variety of separate ethnic and cultural groups—and because I do not wish to lend the term any additional emphasis. See Kenneth B. Nunn, Rights Held Hostage: Race, Ideology and the Peremptory Challenge, 28 Harv. Civ. Rights Civ. Lib. L. Rev. 63, 64 n.7, for a similar practice and rationale.

Observers trained in social psychology might see the behavior of these junior attorneys as further replication of the results of the Milgram experiments, while law-and-economics scholars might find this yet another unremarkable instance of individual profit maximization. To my mind, such explanations are too generic to be accurate and, perhaps not coincidentally, exonerate the other parties who have responsibility for this and other instances of racially motivated exercise of the peremptory challenge.

Perhaps I am naive, but I do not believe that a large group of young prosecutors would quietly absorb a lesson from a superior on the necessity of any other Constitutional violation, such as withholding favorable evidence from the defendant. Although some prosecutors in practice violate *Brady v. Maryland*, which requires such disclosure, most at least understand the rule imposed by *Brady* and acknowledge their obligation to follow it. With respect to *Batson*, both the specifics of the obligation and its normative underpinnings are more ambiguous.

This uncertainty exists not only because *Batson* is a relatively new rule, though that is part of the problem. *Batson* reversed an old rule, buttressed by a century of lore, intuition, and practice. Consider the Supreme Court's approach in *Miranda v. Arizona*, which reversed another old rule. The opinion is so detailed in its description of proper conduct, so explicit regarding the dangers it was redressing, and so forthrightly prophylactic that it has been criticized as reading more like a statute than a constitutional ruling. As Part I will describe, the Supreme Court's treatment of the obligation to abstain from racially discriminatory use of the peremptory challenge has been a far cry from the *Miranda* model. From the beginning, *Batson* was short on the details of proper behavior and ambiguous with respect to the nature of the wrong it was redressing. Subsequent cases have failed to illuminate the specifics of correct behavior, further obscured the reasons to refrain from the prohibited behavior, and resolutely refused to find sufficient proof of racially discriminatory intent in the egregious cases.

A large measure of the blame for the persistence and prevalence of racially motivated peremptory challenges must therefore fall upon the Supreme Court. Part II will address the dilemmas that the

Supreme Court’s failures have caused for lower appellate courts, both federal and state, and survey some of the responses that those courts have crafted to those dilemmas. Although there are some valiant efforts here—some from unexpected locales—many appellate judges bear substantial responsibility for the wrongful striking of minority-race jurors in their jurisdictions, for they have acquiesced to it.

Finally, academics such as myself must accept some responsibility for focusing all of their attention on the rules that appellate courts should be crafting for the review of Batson cases. As has been observed many times, academics tend to focus on appellate courts and cases, perhaps because appellate opinions are so much more accessible than the doings of trial courts, and perhaps because, increasingly, tenure-track academics have little or no personal experience in the trial courts. This tendency has been exaggerated in the peremptory challenge literature, of which there is now an enormous quantity, most of which lauds Batson’s spirit while urging more vigorous enforcement through a variety of stricter reversal rules. Part III attempts to begin a different dialogue, one focused on what prosecutors should ask themselves before exercising a peremptory challenge against a member of a minority racial group, and, concomitantly, what trial judges should ask of prosecutors before upholding such a strike or series of strikes.\(^6\) I propose three questions that I think all ethical prosecutors and trial judges must address to remain true to their oaths to uphold the Constitution, and examine the effect of asking those questions in the troublesome cases posed in Part II.\(^7\)

I. **Limited Guidance from the Supreme Court**

The history of peremptory challenge law has been reviewed in detail in many places. I do not attempt a complete recapitulation here, but only wish to establish four aspects of that history that presently undermine understanding and enforcement of the prohibition against racially motivated peremptory challenges: First, the legally

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6. I do not mean to suggest that a violation of these proposed rules should subject one to sanctions; nor do I here address which Batson violations may currently be the subject of discipline. On discipline for Batson violations, see Robin Charlow, Tolerating Deception and Decision After Batson, 50 STAN. L. REV. (forthcoming 1998).

7. Although the Supreme Court has held that Batson does apply to defense strikes, see, e.g., Georgia v. McCollum, 505 U.S. 42, 59 (1992), I do not here address what defense attorneys should consider before exercising a peremptory challenge. I postpone that question, largely because the defense attorney’s competing Sixth Amendment obligation makes the issue more complicated; I would not, for that reason, apply any of my proposals to them. Moreover, racially motivated exercises of the peremptory challenge by the defense are a smaller problem, because demographics more often preclude defense attorneys from racially stacking the jury.
and institutionally entrenched position of the opposite older rule of Swain v. Alabama;\(^8\) second, the lack of specificity in Batson v. Kentucky\(^9\) concerning the proper conduct of prosecutors and trial courts; third, the Court’s blurring and undermining of the rationale that supports the Batson rule in subsequent cases such as Powers v. Ohio\(^10\) and Georgia v. McCollum,\(^11\) which transform the Batson right into one belonging to the struck juror; and finally, the Court’s adamant refusal in Hernandez v. New York\(^12\) and Purkett v. Elem\(^13\) to create any enforceable reversal rules. For the reader that is intimately familiar with peremptory challenge law history and law, such as the prosecutors and trial judges at with whom this article hopes to start a dialogue, this section can be skimmed.

A. Permissive Law and Practice Prior to Batson

The United States Congress prohibited the race-based exclusion of any qualified citizen from jury service in 1875,\(^14\) and in 1880 the Supreme Court held that a West Virginia statute excluding Black people from jury service violated the Black defendant’s right to equal protection. That decision, Strauder v. West Virginia,\(^15\) concluded that the law does not protect equally if “every white man is entitled to a trial by a jury selected from persons of his own race or color, . . . and a negro is not . . . .”\(^16\) Although the Court soon extended Strauder to the exclusion of grand jurors on the basis of race\(^17\) and the racially discriminatory administration of facially neutral petit jury discrimination laws,\(^18\) the concerns underlying Strauder were not applied to peremptory challenges for another one hundred years. Indeed, even while the Supreme Court became increasingly solicitous of discriminatory selection of the venire, eventually permitting an inference of racial discrimination to arise upon a simple showing of statistically significant disparity between venire composition and population pro-

\(^12\) 500 U.S. 352 (1991).
\(^15\) 100 U.S. 303 (1880).
\(^16\) Id. at 309.
\(^17\) See Ex parte Virginia, 100 U.S. 339 (1880).
portions coupled with an opportunity to discriminate, it remained silent concerning the possibility that peremptory challenges could vaporize gains created for African-American defendants by favorable venire selection law.

This silence was broken by the Court's decision in Swain v. Alabama, which only made matters worse. The Court was unanimous that no equal protection violation arose from the deliberate peremptory striking of all six Black jurors from Swain's jury. The Court endorsed racial stereotyping in the exercise of the peremptory challenge by reasoning that although race is normally irrelevant to legal decisionmaking, in the peremptory challenge context, "the question a prosecutor . . . must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be." The Court never discussed Strauder's underlying assumption that striking African-American jurors in cases with African-American defendants might lead to more unfairness rather than less. In hindsight, the Swain opinions are remarkable in their unanimity on the permissibility of striking Black jurors in Black-defendant cases, particularly because Justice Brennan was already on the Court when Swain was decided. The unrecognized conflict with Strauder's rationale and the Court's unanimity on this issue both suggest that the racially discriminatory use of peremptory challenges was extraordinarily well entrenched, at least in 1965 when Swain was decided.

Swain further reinforced the practice of depriving minority-race defendants of same-race jurors by its only caveat: An equal protection claim would lie only if the defendant could prove that the prosecutor struck Black jurors in every case, regardless of the crime, the race of the defendant, or the race of the victim. Over the next twenty years, defendants proved unable to meet this burden, probably because most prosecutors who were striking Black jurors on the basis of their race did so "selectively"—that is, only in Black-defendant cases. Certainly it was not because prosecutors were not engaging in racially motivated strikes, for they were doing so with great frequency in Black-defendant cases.

21. See id. at 222.
22. Id. at 220-21.
23. See id. at 224.
Student commentators harshly criticized *Swain* and a number of state court judges dissented in cases that applied it, but only two state courts repudiated *Swain*'s holding by relying on their state constitutions. Despite numerous certiorari petitions, some in death penalty cases, the Supreme Court refused to revisit *Swain* until the Second Circuit Court of Appeals held that the Sixth Amendment impartial jury requirement was violated by racially motivated peremptory challenges.

**B. The Batson Opinion: An About-Face With No Marching Orders**

Despite the Second Circuit's opinion, the Supreme Court did not decide the Sixth Amendment question in *Batson*, but reversed its opinion in *Swain* and held that a prosecutor's racially motivated exercise of his peremptory challenges violates the Equal Protection Clause of the Fourteenth Amendment. *Batson* rejects both of *Swain*'s central premises, concluding that a prima facie case may be established without reference to actions taken in other cases, and deeming unconstitutional action taken based upon the presumption that Black jurors will be partial towards Black defendants.

Unlike *Miranda*, which gave detailed instructions to the police officer asked to follow a new and counterintuitive policy, *Batson* countermands its prior endorsement of prosecutors' instincts with nothing more specific than "Don't!" A prosecutor should not strike jurors based upon their race—but how should she determine whether a planned strike of a minority-race juror is in fact based upon the juror's race? Given the high correlation of race with economic and cultural differences, when is a strike arguably based upon a characteristic other than race that a prosecutor acting in good faith should avoid? Silence.

27. See People v. Wheeler, 583 P.2d 748 (Cal. 1978); Commonwealth v. Soares, 387 N.E.2d 499 (Mass. 1979). For the effect of these decisions on other state courts, see Johnson, supra note 25, at 1659-63.
31. See id. at 95.
32. See id. at 97.
The opinion offers no more substantive instruction for trial court judges. With respect to procedure, the Court instructs trial judges that the defendant must be offered the opportunity to establish a prima facie case and that the prosecutor must be given the chance to rebut it.\textsuperscript{33} With respect to substance, however, the Court tells trial judges only that they should consider all circumstances relevant to the establishment of a prima facie case,\textsuperscript{34} and that more than assertions of good faith are needed to rebut an established prima facie case.\textsuperscript{35} In contrast, the \textit{Miranda} opinion provided not only a detailed description of what the state actor was supposed to do, but also an admonition to the suppression court judge that the burden of showing waiver is "heavy," a characterization clearly calculated to offset old habits.\textsuperscript{36}

One might excuse these omissions as flowing from an unexamined assumption that racial motive would be easy to discern, both for the prosecutor and the trial court, but for the fact that Justice Marshall's concurrence directly challenges such an assumption. Citing state court examples involving proffered motives of speculations about family relationships and assertions about demeanor, Marshall noted that specious facially neutral reasons for striking jurors are easy to invent and difficult to probe.\textsuperscript{37} He also pointed out that the wilfully recalcitrant prosecutor or the indifferent trial judge was less of an obstacle to \textit{Batson}'s enforcement than the unconsciously racist assumptions and rationalizations that influence even parties with "the best of conscious intentions."\textsuperscript{38} The majority offered no guidance that might ameliorate these concerns, though it did explicitly reject Marshall's conclusion that only the abolition of the peremptory challenge would resolve these problems.\textsuperscript{39}

Another problematic aspect of the majority opinion lies in its blurred rationale. Although \textit{Batson} formally brought peremptory challenge law in line with venire selection law, it lacked the venire selection cases' emphasis on the harm that would accrue to Black defendants from the racial cleansing of the jury pool.\textsuperscript{40} \textit{Batson} does state that discriminatory jury selection violates the defendant's right to equal protection because it denies him "the protection that a trial by

\begin{itemize}
\item \textsuperscript{33} See id. at 96-98.
\item \textsuperscript{34} See id. at 96-97.
\item \textsuperscript{35} See id. at 97.
\item \textsuperscript{36} See \textit{Miranda v. Arizona}, 384 U.S. 436, 475 (1966).
\item \textsuperscript{37} See \textit{Batson}, 476 U.S. at 106 (Marshall, J., concurring).
\item \textsuperscript{38} Id.
\item \textsuperscript{39} See id. at 99 n.22.
\item \textsuperscript{40} See, e.g., \textit{Strauder v. West Virginia}, 100 U.S. 303 (1880).
\end{itemize}
jury is intended to secure,” but it does not specifically include in this right the protection against racist decisionmaking by all-white juries as the Strauder opinion did. Moreover, the Batson opinion appears to give more independent weight to the harms to the excluded juror and the community. This diffuse rationale further complicates the tasks of diligent prosecutors and trial court judges; they cannot resolve murky application questions by deferring to the interest of the protected party because Batson leaves unclear which party they are obligated to protect.

C. The Batson Progeny: After One Step Forward, Two Steps Back

If Batson itself was a good decision that left many questions unanswered, subsequent Supreme Court cases have all abjured answers, cabined appellate court reversals, and discouraged further reflection by ethical prosecutors and trial court judges. 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. Moreover, the two cases that directly address inferences to be drawn from dubious alternative explanations of racially exclusionary strikes both disapprove of appellate court reversals of egregious trial court determinations, and therefore are likely to create inferences that Batson imposes new procedures, but not new obligations.

1. Broader applications with murkier rationales

Reasoning that only one of Batson’s ends was “to protect individual defendants from discrimination in the selection of jurors,” the majority in Powers v. Ohio concluded that a white criminal defendant has third-party standing to object to the violation of the Black

41. Batson, 476 U.S. at 86.
42. For a more complete discussion of the differences between Strauder’s focus on the defendant and Batson’s three-pronged approach, see Sheri Lynn Johnson, The Language and Culture (Not to Say Race) of Peremptory Challenges, 35 WM. & MARY L. REV. 21, 24-25, 31-33 (1993).
47. Powers, 499 U.S. at 406.
venireperson's equal protection right not to be excluded from jury service on the basis of race. The injury-in-fact requirement for third-party standing was deemed satisfied because "[t]he overt wrong . . . casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause." Justice Scalia's dissent hotly contested this "aggressive resort to third party standing," characterizing this as "[i]njury in perception [that] would seem to be the very antithesis of 'injury in fact.'"

From the perspective of the prosecutor or trial judge trying to determine what she should do, this case may be merely odd, rather than an additional obstacle to understanding her constitutional duty. Powers may be read to leave unchanged the obligation to the minority-race defendant created in Batson, simply creating an additional obligation to the minority-race venireperson in cases with majority-race defendants. Georgia v. McCollum, however, goes one step further, and in the course of extending the rationale of Powers to defense exercises of the peremptory challenge, impairs the persuasiveness of Batson and diminishes motivation to probe facially neutral reasons for strikes that have racially exclusionary effects.

In McCollum, the Supreme Court held that white defendants could not exercise their peremptory challenges in a race-conscious manner to eliminate Black jurors. First the opinion addresses whether a criminal defendant's racially discriminatory strike "inflicts the harms addressed by Batson." Relying on Powers, the Court reasoned that although the defendant suffered no harm from racially motivated defense strikes, Batson was violated because such strikes caused harm to the juror and the community.

48. See id.
49. Id. at 412.
51. Powers, 499 U.S. at 427 (Scalia, J., dissenting).
52. This itself has some marginal cost in clarity: In a Black-defendant case, should the prosecutor examine his actions with respect to the rights of the Black defendant, the Black juror or both?
54. See id. at 68.
55. Id. at 48.
56. The Court then determined that the defendant, despite his adversarial relationship with the government, is nevertheless a state actor when he exercises the peremptory challenge, due to his reliance on governmental benefits, his performance of a traditional governmental function, and the exacerbation of the injury by the incidents of governmental authority. See id. at 51 (quoting Edmonson v. Leesville Concrete Co., 500 U.S. 614, 621-22 (1991)). The Court also concluded that the state incurred harm when doubt was cast upon the fairness of its judicial
Thus far, like Powers, McCollum neither furthers nor hinders a prosecutor's or trial judge's understanding of his constitutional duty under Batson. It is in answering the last question however, that the Court's opinion must baffle the diligent and ethical prosecutor or trial judge. Must "the interests served by Batson . . . give way to the rights of the criminal defendant"? The Court declared that extending Batson to defendant challenges will not undermine the peremptory challenge's role in promoting justice, for "[i]t is an affront to justice to argue that a fair trial includes the right to discriminate against a group of citizens based upon their race." Here the Court does not distinguish between the defendants in McCollum, white men who were trying to eliminate all Black jurors, and minority-race defendants, who might use the challenge to increase the likelihood that a single minority-race jury would serve. Although the defendant has "the right to an impartial jury that can view him without racial animus," he cannot use his peremptory challenges to help insure such a jury, for his (only?) protection against racial animus lies in voir dire.

This is a mystifying pronouncement, given that voir dire law does not even assure a single question concerning racial bias in cases where the defendant is accused of committing a violent interracial crime. Justice O'Connor objected to this sanguine view of the adequacy of other measures for eliminating racist white jurors, noting that conscious or unconscious racism can affect the way in which white jurors adjudicate cases involving minority-race defendants. She reasoned that the use of peremptory challenges to secure some minority representation "may help to overcome such racial bias, for there is substantial reason to believe that the distorting influence of race is minimized on a racially mixed jury." Justice Thomas, who concurred in the judgment, argued that the Court's path departed from the wisdom of Strauder by rejecting the premise that the racial composition of juries

process, and such a public perception constitutes the injury necessary for third-party standing. See id. at 55-56.
57. Id. at 57.
58. Id.
59. Id. at 58.
60. See Ristaino v. Ross, 424 U.S. 589 (1976); see also Turner v. Murray, 476 U.S. 28, 37-38 (1986) (finding that a constitutional right to voir dire concerning racial bias only extends to penalty phase of a capital trial involving interracial crime, and is not required to assure fairness of the guilt phase).
61. McCollum, 505 U.S. at 68 (O'Connor, J., dissenting).
62. Id.
may affect outcomes, and erred in putting the rights of the jurors above the rights of the defendants.63

Should the diligent prosecutor conclude that in honoring Batson, he need only respect the juror’s interest in his right to serve? But what if, in the prosecutor’s experience, the typical juror does not wish to serve? Should the trial judge conclude that the appearance of race neutrality—to the juror and to the community—is the only thing she need insure? When O’Connor and Thomas protest that these rulings will harm minority-race defendants, and the Court does not even specifically address this risk, should prosecutors and trial judges assume that the majority deems the risk of white racism so negligible that they need not be considered in the Batson calculus? Or should the majority’s silence be seen as conservative decisionmaking limited to the facts of the case: These white defendants, given the racial composition of the venire, were adequately protected from racially biased adjudications of guilt, so no calculations regarding the effect of strikes on racially fair outcomes were necessary. If the latter, why did the Court not indicate the limits of it holding?

At a minimum, Powers and McCollum, by their silence regarding defense use of racially inclusive peremptory challenges, cavalierly risk the interpretation that defendants do not matter as much as jurors and that the appearance of racial neutrality matters more than racially fair outcomes. I think it intuitively obvious that in the context of a criminal trial, fairness to the defendant is more morally compelling than is creating an appearance of neutrality among jurors. Thus, the rationales of cases that expand Batson’s scope diminish the apparent moral weight of the obligation created by Batson. The Supreme Court is clearly responsible for that diminution and any resulting laxness in the trial courts.64

2. Stingy appellate review and starvation ration advice to trial court actors

Unfortunately, the two Supreme Court cases that determine the scope of appellate review of Batson decisions create further disincentives for serious Batson inquiries. In Hernandez v. New York,65 the Supreme Court held that, at least in a case with Spanish-speaking witnesses, striking Latino jurors on the basis of their proficiency in Span-
ish does not constitute per se racial discrimination. The prosecutor had struck all four Latino jurors from the defendant’s venire—two, he said, because he was uncertain that they would listen to and follow the interpreter, given their hesitancy and lack of eye contact when they said they would listen only to the interpreter. The Supreme Court described these two challenged exclusions as based on a “subjective criterion having a disproportionate impact on Latinos,” but deemed the reason race-neutral because it did not rest “on the intention to exclude Latino or bilingual jurors, nor on stereotypical assumptions about [a suspect class].” The trial judge’s decision to believe this facially neutral reason, the Court said, depended largely on an evaluation of credibility, and must therefore be reviewed under the most deferential “clearly erroneous” standard. Under this standard, all but three Justices found no error.

I have criticized Hernandez at length elsewhere. At least on the facts of Hernandez, where there is no indication that members of the panel without Spanish surnames were even asked about their fluency in Spanish, I think denominating fluency in Spanish as a race-neutral characteristic is absurd. I also think the extraordinary deference standard is inappropriate, given Justice Marshall’s acute observations concerning the ease of dissemblance and the likelihood of self-deception regarding racial stereotyping. But my purpose here is not to rehash the correctness of the appellate standard; rather, I want to note how the manner of that standard’s articulation affects trial court personnel charged with the initial decisionmaking.

In assessing whether the trial court’s determination was clearly erroneous, the Supreme Court cited six facts that would have supported the trial court’s determination that the prosecutor was credible. All of these are extraordinarily flimsy, and only one was even mentioned by the trial judge as supporting his decision. The first is demeanor, notoriously unreviewable, and certainly unreliable if the prosecutor is unaware of his own motives. The second, the prosecutor’s unsolicited defense of his challenge, might indicate either good

66. See id. at 356-57.
67. Id. at 370.
68. Id. at 361.
69. See id. at 365-69.
70. See Johnson, supra note 42.
71. See People v. Hernandez, 552 N.E.2d 621, 628 (N.Y. 1990) (Kaye, J., dissenting) (“[T]here is no indication that any other members of the panel were also asked if they spoke Spanish.”), aff’d, 500 U.S. 352 (1991).
72. See supra note 37 and accompanying text.
faith or a guilty conscience. The third, the “fact” that the prosecutor “did not know which jurors were Latino,” was hardly evidence of the prosecutor’s sincerity because the only source for this “fact” was the prosecutor’s own assertion. The fourth, the only one actually cited cited by the trial judge, was the Hispanic ethnicity of the victims. This, however, does not weigh against a race-based strike; the most pernicious form of white racism, a propensity to convict minority defendants based on lesser evidence, provides a motive to strike regardless of the race of the victim. The fifth and sixth reasons, that only three of the struck jurors could “with confidence be identified” as Latino and that two were struck for legitimate reasons, proves nothing given that the prosecutor struck all even arguably Latino jurors.

What can a trial judge or prosecutor make of this ridiculous list of “support” for the trial judge’s determination that the strikes were not racially motivated? For the prosecutor who acts in bad faith, the message is clear: Say something, but don’t say race. For the indifferent or racist trial court judge, the message is also clear: Say it wasn’t race. Perhaps the Court assumes there are very few such prosecutors and trial judges. Perhaps a rigorous appellate review is unnecessary because most prosecutors and trial judges are not trying to evade the Supreme Court’s commands. What then does the Court offer to guide the ethical prosecutor and trial judge? Silence.

Should the good prosecutor ask more of himself than a plausible nonracial excuse? Does the excuse even have to be plausible? Should an ethical trial judge demand a plausible excuse? Should she ask for evidence that what is plausible is also true? The Supreme Court’s next foray into that area does not answer either of these questions, but is similarly conducive to an inference that only formal compliance with a “Don’t say race/Say it wasn’t race” rule is required.

The Eighth Circuit had held in *Elem v. Purkett* that when a prosecutor has cited a facially irrelevant characteristic as the sole basis for a challenged strike, he is obligated to “articulate some plausible race-neutral reason for believing [that characteristic] will somehow affect the person’s ability to perform his or her duties as a juror.” It then determined that the prosecutor’s justification that two prospective jurors’ mustaches and beards looked suspicious did not constitute a plausible reason. The Supreme Court reversed in a per curiam

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74. See Johnson, supra note 25, at 1616-51 (reviewing the literature).
75. 25 F.3d 679 (8th Cir.), rev’d per curiam, 514 U.S. 765 (1995).
76. Id. at 683.
77. See id.
opinion that chastised the circuit court for collapsing the second and third steps of a Batson hearing and for "seizing upon" the Supreme Court's admonition in Batson that the prosecutor's stated reason must be "related to the particular case to be tried."\textsuperscript{78}

Proper Batson procedure, according to the Court in Purkett, consists of a first-step determination concerning the establishment of a prima facie case, followed by a second step that ascertains only whether the prosecutor has supplied a race-neutral explanation; this justification need not, however, be even "minimally persuasive."\textsuperscript{79} Only in the third step is the persuasiveness of the justification even relevant, and then it is simply part of the determination of "whether the opponent of the strike has carried his burden of proving purposeful discrimination."\textsuperscript{80} Moreover, the Court explained, Batson's reference to the "legitimate" reason that "must be related to the particular case to be tried" is not necessarily "a reason that makes sense," but merely a reason "that does not deny equal protection."\textsuperscript{81} "Silly or superstitious" race-neutral reasons need not result in findings of racial motivation.\textsuperscript{82}

The opinion does note that in the third step "implausible or fantastical justifications may (and probably will) be found to be pretexts for purposeful discrimination."\textsuperscript{83} With respect to what counts as an "implausible" justification or when an implausible justification should give rise to an inference of racial discrimination, however, the Court is silent. Again, there is plenty of comfort for the bad and the lazy, and still no guidance for the good. Such guidance is especially crucial when, as here, the prohibited practice is long entrenched and the psychological underpinnings of such race-based generalizations are prevalent, complex, and taboo.

II. DILEMMAS REFLECTED IN CIRCUIT AND STATE APPELLATE COURT OPINIONS

Under Batson's third prong, "the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed."\textsuperscript{84} With precious little guidance from the

\textsuperscript{79} Id. at 768.
\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{82} See id.
\textsuperscript{83} Id.
Supreme Court on the question of what enhances or detracts from credibility, the lower appellate courts have both tried to develop some general principals that apply to the assessment of any purported explanation, and struggled with specific reasons that seem especially susceptible to abuse. As we shall see, the diligence invested in this effort has varied widely.

A. Detecting the Dissembler (or the Deluded)

Are there signals or circumstances that suggest the inaccuracy of an explanation apart from its "fantastical" nature? Prior to Purkett, appellate courts had found four likely candidates, though none command unanimous support.

1. Failure to strike white jurors with the cited characteristic

Whether an explanation could possibly be neutral often "is a question of comparability."85 Most courts agree that if a prosecutor cites a single characteristic as the reason for striking a Black juror, and a white juror accepted by that prosecutor also possesses that characteristic, an inference of pretext arises.86 Even on this simple proposition, however, there is not clear unanimity. The Fourth Circuit has explicitly stated that it has not yet adopted such a rule.87 Moreover, some of the decisions by courts purporting to apply this rule draw remarkable distinctions. In one South Carolina case, for example, the court upheld the strike of an African-American juror for involvement short of conviction in a DUI case despite the seating of a white juror with a DUI conviction!88 Or, as a dissenting Virginia judge pointed out, the difference between the struck Black nursing assistant's job and the seated white occupational therapist's aide job was a slim basis

85. Devose v. Norris, 53 F.3d 201, 204 (8th Cir. 1995).
87. See United States v. McMillon, 14 F.3d 948, 953 n.5 (4th Cir. 1994); see also Spencer v. Murray, 5 F.3d 758, 764 (4th Cir. 1996) (finding ignorance of Southside Strangler reports sufficient support for strike based upon Black juror's supposed literacy and educational level when "virtually all of the other members of the jury panel had at least heard something about the Southside Strangler") (emphasis added).
for finding good faith.\textsuperscript{89} How many such cases there are is difficult to discern, for often the opinion simply states in conclusory terms that no white juror possessed the same characteristic.\textsuperscript{90}

Although there are many such single-characteristic cases, particularly in Texas and Alabama, the usefulness of this comparability rule has diminished over time. Newer cases show that prosecutors now tend to cite a combination of reasons for each challenged strike. Even if all of the cited characteristics are possessed by at least one seated white juror, courts often find insufficient proof of discriminatory intent because no single white juror possesses all of the cited traits.\textsuperscript{91} 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.\textsuperscript{92} None, however, have invoked a per se rule against such lists, regardless of their length.

2. Assertions that lack support in the record

Many courts have concluded that purported explanations that lack support in the record require an inference of pretext.\textsuperscript{93} The Fourth Circuit, however, again remains skeptical, and maintains that a good faith error may have caused a wrong assertion and therefore need not give rise to an inference of racial motive.\textsuperscript{94}

An additional complication arises when one of a series of reasons is invalid, either because it was unsupported by the record or because it was not racially neutral. At least one court has held that giving one


\textsuperscript{90} For example, the court's opinion in Howard v. Moore, 131 F.3d 399 (4th Cir. 1997), does not describe how the death penalty views of seated white jurors differed from those of struck Black jurors. In fact, they were virtually indistinguishable. For more detail, see Sheri Lynn Johnson, \textit{Race, Respectability, and Truth} (forthcoming Yale Law Journal 1998).

\textsuperscript{91} See, e.g., United States v. Jimenez, 77 F.3d 95, 100 (5th Cir. 1996); Hollingsworth v. Burton, 30 F.3d 109, 113 (11th Cir. 1994); United States v. Hughes, 970 F.2d 227, 231-32 (7th Cir. 1992); United States v. Lewis, 837 F.2d 415, 417 n.5 (9th Cir. 1988); Davis v. State, 596 So. 2d 626, 628-29 (Ala. 1992); Lingo v. State, 437 S.E.2d 463, 467-68 (Ga. 1993).

\textsuperscript{92} See, e.g., United States v. Stewart, 65 F.3d 918, 926 (11th Cir. 1995); United States v. Alvarado, 951 F.2d 22, 25 (2d Cir. 1991); United States v. Chinchilla, 874 F.2d 695, 698-99 (9th Cir. 1989).


\textsuperscript{94} See United States v. Chandler, 36 F.3d 358, 367 (4th Cir. 1994).
false reason makes all other reasons irrelevant, and another has held that the persuasiveness of one proffered explanation magnifies or diminishes the persuasiveness of companion explanations. On the other hand, the transcript in a case affirmed on appeal reflects that when the prosecutor gave a reason unsupported by the record, the trial judge pointed out his error and asked him if he had further reasons.

3. Inadequate or discriminatory voir dire

Because Batson itself states that a prosecutor's statements and questions during voir dire are relevant evidence, no lower courts can disagree; but holdings vary widely on how egregious voir dire conduct must become before it demonstrates racial motivation. A refusal to voir dire or a lack of meaningful questioning may give rise to an inference of discriminatory intent. Other differences in the examination of white and African-American jurors are also probative. A prosecutor may not rely upon a response to a question to distinguish a struck African-American juror from a seated white juror if the prosecutor has not asked the white juror the precipitating question.

Three state courts—Alabama, Florida, and Texas—have fre-
quently held that the failure to voir dire on a characteristic or association from which the prosecutor claims to infer an unfavorable attitude warrants discrediting the reasoning as pretextual.

4. Lack of a case-specific reason

In *Purkett v. Elem*, the Supreme Court criticized the Eighth Circuit for "seizing upon" *Batson's* statement that the prosecutor's stated reason must be "related to the particular case to be tried."\(^{104}\) Prior to *Purkett*, such "seizures" were common in a number of courts; at least ten states had so held.\(^{105}\) Since *Purkette*, a Florida intermediate appellate court has held that Florida's constitution is more demanding than the federal Constitution, at least with respect to silly or superstitious reasons,\(^{106}\) and a South Carolina intermediate appellate court has questioned whether the earlier case-specific standard will be adopted as a matter of state constitutional law.\(^{107}\)

B. Identifying Surrogates and Pretexts

It should be clear by now that relatively few cases will be reversed on appeal because of the foregoing generic rules for discerning dissembling and self-delusion. Once a prosecutor has read a few of the comparability cases, she can easily avoid reversal based on a similarly situated white juror simply by adding more reasons—either because a complex of reasons truly explains her choice or because she


knows how to get away with discrimination. She will be careful to elicit enough information about each juror to provide a basis in the record for citing enough characteristics to explain her choices and thereby also avoid being accused of desultory voir dire. If she need not provide a case-specific reason, she should have an easy time justifying both legitimate and illegitimate strikes, whichever she is inclined to make.

It will not be so easy if the characteristics that most often distinguish Black jurors are deemed surrogates for race. Nor will it be so easy if many common characteristics are deemed so inconsequential as to be pretexts. After Hernandez and Purkette, appellate findings of race surrogates and pretexts are likely to be rarer. Here, however, I survey past appellate treatment of some of the most troubling explanations not to predict or advocate future reversals, but to indicate the array of difficult determinations that face prosecutors and trial judges who are trying to do the right thing despite the lack of appellate guidance.

Any selection or organization of troubling traits is arbitrary, but I shall address four general categories: personal characteristics, such as age, appearance, and demeanor; education and employment; associations, such as family, friends, organizations, and neighborhood; and asserted beliefs and prior behavior. Within each category, there are both easy and hard cases, but I postpone for Part III a scheme for sorting them.

1. Personal characteristics

Age and gender are probably the easiest characteristics to cite because of their salience and ubiquity. Citing gender is now precluded because of the Supreme Court's ruling in J.E.B. v. Alabama ex rel. T.B., but courts often uphold age—young, old, or similar to the defendant's—as a race-neutral and sufficient reason, unless it runs afoul of the comparability rule. There are exceptions: Alabama courts repeatedly refuse to accept age without a showing of age-re-

lated bias, and other isolated decisions reject it as a sufficient explanation.

Prosecutors frequently cite personal appearance as the reason for a strike, and courts have upheld many seemingly irrelevant physical traits with little scrutiny. For example, a "pretty girl" was struck because of a supposition that she might be attracted to the defendant or his attorney. A "muscular build" was the basis of another strike deemed permissible because, as the prosecutor explained, a muscular build may reflect feelings of inferiority. Wearing a crucifix also provided a reason to strike, as did wearing a Malcolm X cap or simply "look[ing] familiar" to a detective. Appellate courts have upheld as race-neutral and nonpretextual bases for strikes: having lost teeth (because the defendant had also lost teeth and this might provide a basis for sympathy), wearing "flashy" clothing, resembling the defendant, or his mother, chewing gum, being overweight, wearing a large gold watch, or having a "bad appearance."

On the other hand, a few courts have scrutinized justifications involving physical characteristics with more suspicion. A Georgia court determined that striking an African-American woman because she had a gold tooth was based upon impermissible racial stereotyping, and Massachusetts has held that strikes based upon supposed

115. See United States v. Hinton, 94 F.3d 396, 396-98 (7th Cir. 1996).
119. See United States v. Tindle, 860 F.2d 125, 129 (4th Cir. 1988).
resemblance to the defendant's mother are not race-neutral.\textsuperscript{126} A Texas court used a broad definition of comparable white jurors in determining that striking an African-American defendant for an ostensibly "strange" haircut was impermissible when a white juror with a different, but also unusual haircut was allowed to serve.\textsuperscript{127} Initially, an intermediate Virginia appellate court reasoned that striking a juror for wearing a jacket with the logo of Virginia State University (a predominantly African-American institution), with no explanation as to why it was objectionable, was impermissible.\textsuperscript{128} On rehearing, however, the court was more gullible, and upheld the strike.\textsuperscript{129}

Although careful scrutiny of physical characteristic justifications is unusual, the response to strikes based on a juror's purported demeanor has been more varied. Numerous cases uphold a variety of justifications for a strike: inattentiveness (in this case \textit{three} Black jurors were claimed to exhibit the problematic demeanor),\textsuperscript{130} looking tired,\textsuperscript{131} appearing to doze,\textsuperscript{132} staring at the prosecutor,\textsuperscript{133} appearing too independent (as evidenced by a rigid carriage and obstinate manner of answering questions),\textsuperscript{134} acting hostile to the prosecutor,\textsuperscript{135} giggling,\textsuperscript{136} appearing to be untruthful,\textsuperscript{137} having a weak\textsuperscript{138} or strong\textsuperscript{139} personality, or immaturity.\textsuperscript{140} On the other hand, Florida\textsuperscript{141} and Texas\textsuperscript{142} have reversed reliance on demeanor reasons absent \textit{specific} record support for them, and Alabama has frequently found such de-

\begin{itemize}
\item \textsuperscript{126} See Commonwealth v. Harris, 567 N.E.2d 899, 904-05 (Mass. 1991).
\item \textsuperscript{127} See Woods v. State, 801 S.W.2d 932 , 936-37 (Tex. App. 1990, no pet.).
\item \textsuperscript{129} See id.
\item \textsuperscript{130} See United States v. Sherrills, 929 F.2d 393, 395 (8th Cir. 1991).
\item \textsuperscript{134} See Washington v. Johnson, 90 F.3d 945, 954 (5th Cir. 1996).
\item \textsuperscript{135} See Maxey, 1992 Tex. App. LEXIS 765, at *4-5.
\item \textsuperscript{139} See Green v. State, 839 S.W.2d 935, 939 (Tex. App. 1992, pet. ref'd).
\item \textsuperscript{140} See Tharpe v. State, 416 S.E.2d 78, 81 (Ga. 1992).
\item \textsuperscript{142} See, e.g., Davis v. State, 796 S.W.2d 813, 819 (Tex. App. 1990, pet. ref'd); Smith v. State, 790 S.W.2d 701, 796 ( Tex. App. 1990, no pet.); C.E.J. v. State, 788 S.W.2d 849, 858 (Tex. App. 1990, pet. ref'd).
meanor reasons insufficient to support a strike.\textsuperscript{143} A few other courts have urged trial courts to make specific findings concerning demeanor allegations.\textsuperscript{144} One final personal characteristic bears special notice: ascriptions of low intelligence—despite the ease with which they may be made and the conformity with degrading stereotypes—usually are upheld.\textsuperscript{145}

2. Employment and education

Unemployment, when supported by the record\textsuperscript{146} and applied evenhandedly, is frequently cited and universally upheld as a legitimate, race-neutral basis for a strike.\textsuperscript{147} Courts often also uphold strikes based on unstable employment.\textsuperscript{148} Appellate response has been mixed with respect to whether one may assume a negative attitude toward the prosecution from a particular job or occupation. “Sympathetic” occupations have been held to justify a strike,\textsuperscript{149} and being a student has been held reason enough to assume tolerance of drugs, and thereby justification for a strike.\textsuperscript{150} In contrast, Alabama


\textsuperscript{144} See United States v. Diaz, 26 F.3d 1533, 1543 (11th Cir. 1994); Chew v. State, 562 A.2d 1270, 1277 (Md. 1989); Hatten v. State, 628 So. 2d 294, 298 (Miss. 1993).


\textsuperscript{146} Cf. People v. Thronton, 628 N.E.2d 1063, 1069 (Ill. App. Ct. 1993) (holding record evidence of unemployment for only two months insufficient to support a strike).


\textsuperscript{149} See James v. Commonwealth, 442 S.E.2d 396, 398 (Va. 1994).

refuses to permit any generalizations based upon occupation. and Florida and Texas insist that any presumed occupational predisposition must be explored on voir dire or else deemed pretextual. Other courts, while espousing no general rules, have found particular examples pretextual, such as presumed anti-prosecution bias from hospital administrators, strikes based on federal employment, strikes of postal workers, strikes based on prior military experience (allegedly likely to cause nervousness) and, thank goodness, strikes based on employment in an occupation beginning with the letter “P”!

When a limited education is asserted to explain a strike, many courts are satisfied. The Fifth Circuit, however, has acknowledged that lack of education, because of its racist roots, might in some cases be impermissible grounds to strike, but found it race-neutral in a case where a complex conspiracy was involved. Two courts have found that particular forms of education—martial arts training and pre-law courses—may justify strikes.

3. Associations

Family associations often pose no issues at all, and may even rise to the level of a for-cause challenge. Relation to the defendant is the strongest example. Some family associations, however, are problematic either because of their attenuated nature, their extraordinarily strong disparate impact, or both. With respect to family associations,

159. See United States v. Moeller, 80 F.3d 1053, 1060 (5th Cir. 1996).
courts have upheld strikes based upon the juror having the same last name as a defendant the prosecutor had previously tried, a similar last name to a defendant in an unrelated trial, the same last name as a witness in the case, having no children, being a single mother, coming from a large family, being married to an unemployed person, or even just being a single woman. Several courts, however, have viewed strikes based on single status alone as highly suspect or impermissible, and one has reversed where the prosecutor relied upon the juror’s unwed motherhood.

With respect to less intimate associations, explanations relating to church affiliation appear to be the most common. Courts uphold strikes based on membership in Apostolic, Greater New God, “fringe,” or other affiliations, as well as for having strong religious convictions or “extensive” religious activities, although one court has drawn the line at Bible reading. Strikes related to membership in African-American organizations, on the other hand, have usually been deemed surrogates for race.

Assertions that the juror lives in a bad or crime-ridden neighborhood are also problematic. Courts have upheld the race-neutrality and relevance of neighborhood on several theories: residents are inured to violence or drugs, residents are more likely to mistrust the police or to have acquaintances that are involved in illegal activities, or most specifically, that the juror lives in the area in which the crime was committed. The Alabama courts, however, have rejected all variations of neighborhood arguments. More modestly, Massachusetts has found pretextual arguments that juror residence in the town of the offense or the same town as the defendant. The Ninth Circuit has rejected the explanation that a juror from a violent, poverty-stricken community is more likely to be inured to violence, reasoning that residence was being used as "a surrogate for racial stereotypes."

Even broader, but less common than neighborhood claims, are socioeconomic explanations for strikes. At least one court has approved the explanation that the juror was of the same socioeconomic class as the defendant.

4. Specific attitudes and prior behavior of the juror

Most expressed attitudes and acknowledged prior conduct are unimpeachable explanations for strikes; it is clearly race neutral to strike a juror who disagrees with the law or has been violating it herself. Some purported explanations that have been upheld reek (at least to this reader) of pretext: Not owning a firearm, a twenty-

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seven-year-old traffic conviction,\textsuperscript{189} and being concerned about racism in the system.\textsuperscript{190}

III. Ethical Solutions at the Trial Court Level

I will abjure the usual laments about inadequate policing by the appellate courts. By now it is clear that policing will neither curb the defiant prosecutor nor spur the inert trial judge.\textsuperscript{191} The Supreme Court's extreme deference to trial court determinations of racial motivation compels a focus on ethical trial court actors; perhaps this is the tack that should have been taken first. 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.

The trick is, of course, to convince prosecutors and trial court judges that they should be vigilant—and then to be specific about their obligations. As delineated above, the Supreme Court has failed miserably here, as have most state courts and commentators. Their (and our) failures and dilemmas can, however, illuminate the question of the normative obligations of prosecutors and trial judges. What should the training course for young district attorneys say about race and jury selection? What should task forces for racial fairness say to trial judges about their \textit{Batson} determinations?\textsuperscript{192} Ethical prosecutors and trial judges are obliged to both uphold the Constitution and seek justice. In the context of striking racial minorities from the jury venire, I think this has three implications. I hope there might be general agreement upon the three standards I propose, though I am sure there will be disagreement about some applications. Even if there is disagreement, however, I think we take a step forward by talking about what we \textit{aspire} to at the trial court level, rather than focusing exclusively on how bad trial court behavior must be to be reversed.

\begin{itemize}
\item \textsuperscript{191} Except for possibly those few vigilant state courts.
\item \textsuperscript{192} The National Judicial College trains new judges and has ongoing CLE programs, which might be an appropriate place to raise these issues.
\end{itemize}
A. What's Sauce for the Goose . . .

For the prosecutor considering whether he is justified in striking a racial minority from the venire, the question should be: Would I allow this person to sit as a juror if she were white? This question cannot be answered solely with reference to whether he has, in this case, actually accepted a white juror with the characteristic he is about to cite as the reason for the strike. Quite often there are no white jurors with the same characteristic. In answering the question, the honest prosecutor should consider whether he has in the past struck white jurors because they possess this characteristic, and with no greater evidentiary support for the conclusion that the juror indeed possesses this characteristic. If he has encountered this characteristic in white jurors before and not struck them, or cannot recall whether he did, he should abstain from striking the juror; if he has never encountered this characteristic (or a closely analogous trait) in a white juror before, he should ask himself if he is sure he will strike the next white juror with that characteristic (and make a note to do so if he concludes he will!).

What if the prosecutor thinks that a combination of unrelated reasons prompt his impulse to strike? Unless he can think of a closely analogous combination of reasons that led him to strike a white juror in the past, he should not strike the minority juror. Combined reasons are both more likely to be pretexts and less likely to be compelling, so avoiding a strike should rarely be very costly—unless of course, it is the kind of combination that experience has shown to be particularly damaging to the prosecution, in which case it can be justified with reference to a prior white juror strike.

The trial judge version of the “Sauce for the Goose” standard is almost identical: Would the prosecutor strike the juror if she were white? Often a trial judge will know the answer to that question without further inquiry, based on prior cases tried with this attorney. But if prior experience does not answer the question, the trial judge should ask the attorney not whether he has struck a white juror for the same reason or combination of reasons, but when. With an inexperienced attorney, there may be no bank account to draw upon, but common practice of other senior attorneys in the office (or a training manual advising such strikes) may provide a kind of credit. When

193. Where several reasons are related—for example, several different replies that each indicate hesitation about drug laws—they may be treated like a single characteristic, prompting the question: Have I struck a white juror with a similar level of ambivalence about drug laws?

194. Of course, if the training manual listed too many apparently innocuous bases for strikes, it would not be persuasive.
an inexperienced attorney is asserting a reason not generally deemed important by the office, however, the chances that he is either dishonest or self-deluded are relatively high, and the likelihood that this reason is significant to a fair trial for the state is quite small.

The "Sauce for the Goose" rule is the easiest of the three proposals to defend. It is the trial court analogue of the comparability rule, but it can be much more demanding because both the prosecutor and the trial judge have access to information on past practices of the prosecutor. That the defendant may not be able to prove on appeal that a prosecutor does not strike white jurors for the stated reason does not mean that the ethical prosecutor is free to strike for that reason; constitutional law is enforced through burdens of proof, but constitutional obligations are not defined by them. The standard matches the constitutional obligation, and the enforcing questions are the best approximation of rules I can devise to operationalize that standard. It is true that those rules may occasionally sweep in an innocent strike, but the good prosecutor has an obligation to keep himself informed, and even the most cursory awareness of stereotyping and unconscious racism suggest that the potential for inadvertent resort to racial considerations is far larger than the overlap in these rules.

Applying this standard will, I think, preclude most of the strikes that affront the casual reader. For example, age, marital status, occupation, same or similar names as defendant or other criminals, most physical appearance characteristics, and most religious affiliations would not withstand this test, nor would a decades-old traffic offense conviction or the mere failure to own a weapon.

What should happen if a prosecutor asserts an explanation for a strike that does not meet this test, but offers other explanations as well? To take an egregious example, consider the prosecutor who first stated that he struck a juror because she sat on a civil jury that rendered a verdict for the plaintiff, then added that she had trouble with circumstantial evidence, then retracted that reason, acknowledging that other jurors had had the same qualms, and finally said:

[T]he fact that she's got blonde hair. . . . It's been my personal experience that if somebody is not cognizant of their own reality and existence and want blonde hair, and they are a black woman, I don't want them on my jury. . . .

. . . .
... I mean, there's nothing in the black heritage, unless they may be some mulatto, or freak of nature, something like that—would extend to the personality of that person with the blonde hair.195

This hair explanation does not require further inquiry; by his own admission, the prosecutor would not have struck a white woman because she had dyed her hair blonde. At this point, the trial court should disallow the strike. The fact that another possibly neutral explanation has been proffered (service on a civil jury that returned a verdict for the plaintiff) is irrelevant because the prosecutor has clearly been influenced by race in his decision to strike.

B. If It Walks Like a Duck and Talks Like a Duck...

Assuming the prosecutor can satisfy herself that she would have struck a white juror with the same characteristic, she should next ask herself, “Is this explanation inextricably linked with race or racial stereotypes?” Obviously, prohibiting racial discrimination while permitting skin color discrimination would thwart the purpose of the Equal Protection Clause; using a surrogate for race is no more permissible than citing race itself. Even appellate courts have agreed that this principal requires deeming strikes based upon membership in African-American groups impermissible, but what is the broader principal for identifying surrogates for race? The only place I know to start is by scrutinizing characteristics that are closely linked to race through both disparate impact and stereotypes.

I do not propose that the prosecutor abstain from considering every characteristic that has strong racial connotations. For example, criminal convictions for violent crime have both psychological and statistical correlations to race, yet it would be absurd to forbid their use. What the good prosecutor should ask herself after identifying a trait closely linked to race is: Does this characteristic track my underlying concern significantly better than any other accessible trait that has less of a linkage with race? If the answer to that question is no, then the characteristic fails the “If It Walks Like a Duck” standard. Notice that the second question focuses upon other “accessible” traits. It recognizes that there may be better predictors that a prosecutor cannot discern; for example, actual criminal involvement is probably a better predictor of anti-prosecution attitudes than is a criminal conviction, but it is not accessible to the prosecutor. On the other hand, “accessible” also recognizes that prosecutors often could easily acquire infor-

mation that they do not; rather than presuming racial solidarity with defendants from attendance at a traditionally Black college or university, a prosecutor could inquire about it.

A trial judge should ask herself these same two questions. Sometimes, before she can resolve the question of accessible alternatives, she will need to ask the prosecutor what the trait selected is supposed to probe.

How do these two questions operationalize the race surrogate prohibition? General equal protection principals certainly commend them even if they don’t precisely command them. Village of Arlington Heights v. Metropolitan Housing Development Corp. describes the factors probative of racial motive, and among those are disparate impact, which is enough standing alone if it is strong enough to constitute a “stark pattern, unexplainable on any basis other than race.” (Some characteristics, such as “high crime neighborhood” approach this standard.) For characteristics with strong but less than “stark” disparate impact, Arlington Heights provides a nonexhaustive list of other indicators of racial motivation: procedural departures, substantive departures, contemporary statements, the exact sequence of events, and prior history of discrimination. The first question I pose (Is this characteristic inextricably linked with race or racial stereotypes?) should encompass disparate impact evidence, prior history of discrimination, and an additional indicator of discriminatory intent, the cultural meaning of an action. The second question (Does this characteristic track my underlying concern significantly better than any other accessible trait that has less of a linkage with race?) sweeps in substantive and procedural departures: Ordinarily a prosecutor solicits and relies upon the best predictor of an undesirable trait she can acquire. As with the first standard, the two operationalizing rules for the second standard are slightly broader than constitutionally commanded, but not in ways that cause any harm to the state. Again, if we give any weight to the likelihood of either unconscious or covert racial reasoning, this small prophylactic overreach is too small rather than too large.

In my view, application of the “Walks Like a Duck” standard would eliminate reliance on another large subset of the troublesome

197. Id. at 266.
198. See id. at 267-68.
explanations: at least in most cases, the contributions made by neighborhood, education, unwed motherhood, "unstable" employment, and social class can be probed by less racially charged considerations. Unemployment, at least for a substantial period of time, is more likely to pass the test despite its disparate impact and association with racial stereotypes.

Some physical appearance characteristics, such as gold watches and teeth, braids, muscularity, and probably obesity, would also fail this standard, though for a different reason: it is difficult to think of any relevant concern about which they are significantly probative. Association with Black organizations should likewise fail; I myself am convinced that wearing a Malcolm X cap falls into this category, for, at least in the 1990s, I do not think it significantly probative of racial militancy, and in any event, a prosecutor with such a concern should inquire about it, at least when the judge will permit such inquiry. Demeanor reasons relating to either hostility or inattentiveness, along with purported lack of intelligence, should also fail this test in the absence specific indicators of those traits.

Should the citation of one "Walks Like a Duck" reason doom a strike if other legitimate reasons are cited? Here the question is closer, and may depend upon the combination. If a prosecutor cites unstable employment and criminal convictions, I am inclined to think the strike should be allowed, for the first reason is a close call and the second is clearly persuasive. On the other hand, if the prosecutor starts with NAACP membership and adds an unemployed spouse, the first is clearly a surrogate for race and the second is dubious on both surrogacy and probativeness grounds.

C. Justice Is More than Foul Rules (and It's Not for Chickens Either)

The first two standards come from the Equal Protection Clause and the overriding duty to uphold the Constitution. The last one comes from the ethical obligation to do justice, for prosecutors, unlike private litigants, do not have the primary goal of winning. Doing justice requires more than just avoiding breaking rules set out by appellate courts or law professors or a supervising attorney. For the

200. Of course, not all NAACP members are Black, but because NAACP membership is overwhelmingly Black, because the NAACP is associated with African Americans in most people's minds, and because I cannot imagine what legitimate trait it predicts better than some racially associated characteristic, it "Walks Like a Duck."
prosecutor, doing justice when poised to strike a minority-race juror means, "When in doubt, don't!"

The long history of racial exclusion from jury service, along with the concomitant history of racially biased and often wrongful convictions, means that the moral prosecutor, after asking whether his planned strike satisfies the "Sauce for the Goose" and "Walks Like a Duck" standards, will pause. If he doubts that he would strike the same juror were she white, doubts that reliance on this racially charged criterion is necessary, doubts that he has voir dired in a race-neutral manner, or doubts that he has been completely honest with himself, he should err on the side of justice. This is particularly true in jurisdictions where the demographics of the venire mean that the questionable strike will result in an all-white or virtually all-white jury for a minority-race defendant. Indeed, some attorneys might decide that the racially exclusionary consequence of a strike by itself creates the quantum of doubt necessary to preclude going forward.

And the reason "Justice Is Not for Chickens" is that it does require taking some chances. Honest inquiry into racial issues is never easy. Foregoing the strike diminishes the likelihood that racial prejudice will aid in winning your case; sometimes it may even increase the likelihood that bias, racial or otherwise, will obstruct the fair evaluation of your case. It seems to me, however, that if a case is so marginal that the effect of one doubtful juror is likely to be dispositive, the case should not have been prosecuted at all, at least not without further investigation. If a case cannot stand examination by twelve jurors who fairly represent the community, it should fail. Even if adherence to the "Justice is More than Foul Rules" standard leads to a few hung juries, or even a few more acquittals in marginal cases, this is as it should be. (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.)

As for judges, after compliance with constitutional rights and legal rules, justice is supposed to be the only thing. For a trial judge, adherence to the "Justice is More than Foul Rules" means "When in doubt, ask more questions." If uncertain that a prosecutor has told the truth about a prior strike of a white juror, a trial judge can ask for the voir dire notes from that case. If dubious that use of a racially charged trait is necessary, she can ask the prosecutor to explain the infirmities of a substitute. If she has not herself seen evidence of a hostile attitude, she can ask the prosecutor for supporting details and then ask court personnel if they observed them.
These actions are not likely to make a judge popular with prosecutors, at least not in the beginning. It takes courage to take racial issues seriously, and more courage to do so openly. But asking 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. It will get easier as lawyers come to know what to expect; it may be helpful to tell new lawyers what the expectations are.

An ethical judge need not condemn racism every time he disallows a strike, nor should he allow his actions to be characterized as calling the prosecutor a racist. Discussions of good faith and an attorney's character will rarely be useful, for it is quite possible that a good prosecutor will make a bad challenge. Bad challenges may flow from overzealousness, mistake, or unconscious stereotyping, as well as from consciously hostile attitudes. Even believing that the prosecutor has done the best she can, the ethical trial judge should independently assess and pursue justice.

Legislators could make the task of the good prosecutor and trial judge easier by commanding these rules. They should do so, but that is another article, and hardly a reason for either prosecutors or trial judges to postpone consideration of their own ethical obligations.

IV. Conclusion

Some day, the enormous body of Batson case law and the reams of commentary may look bizarre. Why did anyone think that the race of the jurors was so important? I hope my children live to see the day, not because I expect them to be tried for criminal offenses, but because the world would be a very different place if race really did not matter in a criminal trial. Until that day, good prosecutors and trial judges have the power and the obligation to minimize racial discrimination in jury selection and jury deliberations: the power to "Do the right thing." Unless they exercise that power, they further delay the day when, blissfully, none of this will matter.