

# ASYMMETRY AS FAIRNESS: REVERSING A PEREMPTORY TREND

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## ABSTRACT

*A recent Ninth Circuit decision, prohibiting peremptory challenges on the basis of sexual orientation, reveals the continuing evolution of the Batson doctrine. Meanwhile, contrary judicial voices demand the abolition of the peremptory challenge. This Article uncovers two phenomena that militate against abolition of the peremptory challenge, and in favor of allowing Batson's evolution. First, the justifications for abolition apply asymmetrically to prosecution and defense, suggesting that an asymmetrical approach is more apt. Second, the states historically adopted an asymmetrical approach—unequal allocation of peremptory challenges to prosecution and defense—and yet many state legislatures have recently abandoned asymmetry, with some legislators declaring that there are no reasons not to. This Article supplies those reasons, demonstrating that asymmetrical allocation of peremptory challenges not only brings benefits in the context of jury selection but also may help resist tendencies elsewhere in the criminal justice system to equate asymmetry with unfairness, and thus to erode foundational protections.*

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## INTRODUCTION

The doctrine of *Batson v. Kentucky*,<sup>1</sup> created in 1986 and developed in numerous subsequent Supreme Court decisions,<sup>2</sup> continues to evolve. In

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

2. *See, e.g.*, *Snyder v. Louisiana*, 552 U.S. 472 (2008); *Miller-El v. Dretke*, 545 U.S. 231 (2005); *Johnson v. California*, 545 U.S. 162 (2005); *Purkett v. Elem*, 514 U.S. 765 (1995); *J.E.B. v. Alabama*, 511 U.S. 127 (1994); *Georgia v. McCollum*, 505 U.S. 42 (1992); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991); *Hernandez v. New York*, 500 U.S. 352 (1991); *Powers v. Ohio*, 499 U.S. 400 (1991).

January 2014, the Ninth Circuit Court of Appeals became the first circuit court to hold that the peremptory challenge, a trial tool with deep historical roots,<sup>3</sup> cannot be exercised on the basis of sexual orientation,<sup>4</sup> any more than it can on the basis of race,<sup>5</sup> ethnicity,<sup>6</sup> or gender.<sup>7</sup> Yet running alongside this doctrinal development is a current of despair: a growing body of judges,<sup>8</sup> as well as other commentators,<sup>9</sup> who declare that the doctrine has proved a miserable failure, and that, despite its deep historical roots, the peremptory challenge must be abolished.

Four rationales appear repeatedly in support of calls for abolition. First, that the peremptory challenge, which allows litigants to remove qualified potential jurors simply because they want them gone, is anti-democratic.<sup>10</sup> Second, that the *Batson* doctrine is difficult to police.<sup>11</sup> Third, that the

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3. See *Edmonson*, 500 U.S. at 639 (O'Connor, J., dissenting) ("The peremptory challenge is a practice of ancient origin, part of our common law heritage in criminal trials.").

4. *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 484 (9th Cir. 2014).

5. See *Batson*, 476 U.S. at 89.

6. See *Hernandez*, 500 U.S. at 352 (using the words "race" and "ethnicity" interchangeably).

7. See *J.E.B.*, 511 U.S. at 129 (extending prohibition on purposeful discrimination in peremptory challenges to challenges on the basis of gender).

8. For recent judicial recommendations of abolition, see, for example, *Miller-El v. Dretke*, 545 U.S. 231, 267 (2005) (Breyer, J., concurring); *Rice v. Collins*, 546 U.S. 333, 344 (2006) (Breyer & Souter, JJ., concurring); *Williams v. Norris*, No. 5:02 CV00450, 2007 WL 1100417, at \*6–7 (E.D. Ark. Apr. 11, 2007) (quoting state trial judge) ("I think *Batson* is the most ridiculous concept that a Judge has ever had to work with. . . . The United States Supreme Court made a terrible mistake. They should have outlawed peremptory challenges, because this puts a burden on the judiciary that is untenable. . . . I think that we'd all be better off if we excused for cause and put twelve in the box."); *State v. Saintcalle*, 309 P.3d 326, 348 (Wash. 2013) (González, J., concurring); *Morgan v. Commonwealth*, 189 S.W.3d 99, 116 (Ky. 2006) (Graves, J., concurring) (expressing the wish that the state would move one step closer to "the inevitable implosion of the current peremptory challenge system"), *overruled by* *Shane v. Commonwealth*, 243 S.W.3d 336 (Ky. 2007); Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 150 (2010) (describing the *Batson* process as "thoroughly inadequate"); John Paul Stevens, *Foreword, Symposium: The Jury at a Crossroad: The American Experience*, 78 CHI.-KENT L. REV. 907, 907–08 (2003) ("A citizen should not be denied the opportunity to serve as a juror unless an impartial judge can state an acceptable reason for the denial. A challenge for cause provides such a reason; a peremptory challenge does not.").

9. See, e.g., Joshua C. Polster, *From Proving Pretext to Proving Discrimination: The Real Lesson of Miller-El and Snyder*, 81 MISS. L.J. 491, 528–29 (2012) ("Ruling on *Batson* challenges . . . courts have accepted that prospective jurors were struck for being too old or too young; too vocal or too passive; too educated or too uneducated; for being single or because of a marital relationship; and for being accused of a crime or having been a victim of a crime."); Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1182 (1995); Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 199–211 (1989).

10. See *infra* Part I.C; see also Alschuler, *supra* note 9, at 156 (describing the peremptory challenge as "the most undemocratic feature of our democratic trial system").

11. See *infra* Part I.C.

harms caused by peremptory challenges are severe.<sup>12</sup> And fourth, that peremptory challenges serve few or no countervailing needs.<sup>13</sup> The best that can be done in light of these concerns, the critics say, is to retire *Batson*, abolish the peremptory challenge, and perhaps focus instead on methods of finding and removing potential jurors who have some *demonstrable* bias.<sup>14</sup>

This Article uncovers two phenomena that are critical to the discussion of the peremptory challenge in the criminal trial.<sup>15</sup> Each of them militates against across-the-board abolition of the peremptory challenge and in favor of allowing and encouraging the further evolution of the *Batson* doctrine.

First, the critiques used to justify the peremptory challenge's abolition do not apply symmetrically to the prosecution and the defense. Threats to democracy and other harms are qualitatively different when caused by prosecutorial peremptory challenges than when caused by defense peremptory challenges;<sup>16</sup> the need for the peremptory challenge is stronger on the part of the defense than on the part of the prosecution;<sup>17</sup> and there is at least some indication of differential policing of the peremptory challenge that imposes a more effective restraint on the defense's use of the peremptory challenge than on the prosecution's.<sup>18</sup> The relevant distinctions are downplayed or omitted by those judges who call for abolition—perhaps unsurprisingly, since some of these distinctions implicate troubling disparities in the criminal justice system over which they preside<sup>19</sup>—and an examination of them suggests that asymmetrical approaches are more appropriate than across-the-board abolition.

Second, many jurisdictions have already attempted an asymmetrical approach to the peremptory challenge, but this approach is steadily being eroded in a quiet march toward symmetry. In the decade prior to *Batson*, twenty states had in place a structure that corresponded to the asymmetrical harms and benefits of peremptory challenges: they allocated fewer to the prosecution than to the defense.<sup>20</sup> Since then, the quiet but

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12. *See infra* Part I.C.

13. *See infra* Part I.C.

14. *See infra* note 67.

15. This Article leaves to one side the allocation of peremptory challenges to the parties in civil trials.

16. *See infra* Parts II.A, II.C.

17. *See infra* Part II.D.

18. *See infra* Part II.B.

19. *See infra* Part II.D.

20. *See infra* Part III.A.3.

steady trend has been toward symmetry: only nine states currently preserve asymmetry,<sup>21</sup> and two of those regimes have been under recent legislative attack.<sup>22</sup> Lying behind these developments, as with other developments in criminal procedure, seems to be the notion that with two evenly matched adversaries duking it out, fairness dictates equal tools on both sides.<sup>23</sup> According to legislators and rules drafters considering this issue, there was no apparent reason why the two sides should not receive equal numbers of peremptory challenges.<sup>24</sup> This Article provides those reasons, and recommends that asymmetry in the allocation of peremptory challenges—greater allocation of peremptory challenges to the defense than to the prosecution—be restored in those jurisdictions where it has been abandoned.

Part I introduces the peremptory challenge, the *Batson* doctrine, and four of the most prominent justifications for doing away with them. Part II demonstrates that each of these justifications applies asymmetrically to prosecution and defense, thus militating in favor of asymmetrical approaches rather than across-the-board abolition. Part III uncovers one such asymmetrical approach, the asymmetrical allocation of peremptory challenges, and tracks its steady erosion. It proposes that this trend toward symmetry be acknowledged and reversed. Despite the surface appeal of equating symmetry with fairness, asymmetry is at the root of various structures in our criminal justice system designed to protect fairness.<sup>25</sup> Preserving asymmetry in the peremptory challenge context has promise,

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21. See *infra* Part III.A.3.

22. See *infra* Part III.A.3.

23. See *Morgan v. Commonwealth*, 189 S.W.3d 99, 138 (Ky. 2006) (Cooper, J., dissenting) (describing the motivation for abandoning asymmetry in that state as a “gradual[] recogni[tion] that in criminal cases, as has always been true in civil cases, there should be a level playing field between prosecution and defense”), *overruled by* *Shane v. Commonwealth*, 243 S.W.3d 336 (Ky. 2007).

24. See *Peremptory Challenges of Jurors: Hearing on S.B. 353 Before the H. Comm. on State Affairs*, 1993–94 Leg., 18th Sess. (Alaska 1994) (committee minutes) (“Representative Ulmer inquired whether or not [a proposed bill designed to bring about symmetry] was similar to how the law was previously in the state of Alaska. She assumed at one point there had been an equal number and it was changed. If so, why was it changed and why is it being changed back. Chairman Vezey answered . . . [that] [t]he legal history of the change . . . went too far back for him to have knowledge of. . . . Margot Knuth, Assistant Attorney General, Department of Law, answered Representative Ulmer’s question. . . . [She] did not know why the discrepancy had existed for so many years.”); 1 DAVID P. CLUCHEY & MICHAEL D. SEITZINGER, *MAINE CRIMINAL PRACTICE* 24-6.1 (1995) (quoting Advisory Committee Note relating to 1991 Amendment to the Rules of Criminal Procedure, which stated that “[t]he Advisory Committee sees no reason to continue the practice of giving to a defendant in a murder case twice as many peremptory challenges as are given to the state”).

25. See *People v. Hayes*, 301 N.W.2d 828, 830 (Mich. 1981) (“[W]e disapprove the notion reflected in the ruling we now reverse that identical treatment of opposing parties in a criminal prosecution necessarily achieves a fair result. Symmetry is neither an object of criminal procedure nor a proper criterion of fairness.”).

not only as an approach to some of the problems with *Batson*, but also as a concrete form of resistance to quiet and troubling trends toward symmetry occurring elsewhere in the criminal justice system.

## I. PEREMPTORY CHALLENGES, *BATSON*, AND THE CRITIQUES THAT THEY INSPIRE

### A. *Peremptory Challenges*

Peremptory challenges constitute the final stage of jury selection.<sup>26</sup> Of the potential pool of citizens who might serve as jurors, some never receive summonses.<sup>27</sup> Of those who present themselves at the courthouse, some are never called into a courtroom.<sup>28</sup> Of those who reach a courtroom, some are found to lack the relevant statutory qualifications,<sup>29</sup> some are excused because of the hardships that jury service would involve,<sup>30</sup> and some are removed through the attorneys' challenges "for cause," which allow the removal of those jurors that the court deems unable to be fair.<sup>31</sup> Those who remain are subject to peremptory challenges, allocated to each side in a limited number.<sup>32</sup> To exercise a peremptory challenge is merely to say "I do not want this person on the jury."<sup>33</sup> No further reason need be given, unless one's adversary makes a *Batson* challenge,<sup>34</sup> as described in the next subpart.

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26. See Sandra Guerra Thompson, *The Non-Discrimination Ideal of Hernandez v. Texas Confronts a "Culture" of Discrimination: The Amazing Story of Miller-El v. Texas*, 25 CHICANO-LATINO L. REV. 97, 104 (2005).

27. See Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 880-81 (2012).

28. See *id.* at 867.

29. See Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 MINN. L. REV. 592, 596 (2013).

30. See Roberts, *supra* note 27, at 880.

31. See Eva Paterson et al., *The Id, the Ego, and Equal Protection in the 21st Century: Building upon Charles Lawrence's Vision to Mount a Contemporary Challenge to the Intent Doctrine*, 40 CONN. L. REV. 1175, 1191 n.84 (2008) (citing *Darbin v. Nourse*, 664 F.2d 1109, 1113 (9th Cir. 1981)) ("The challenge for cause is narrowly confined to instances in which threats to impartiality are admitted or presumed from the relationships, pecuniary interests, or clear biases of a prospective juror.").

32. See Roberts, *supra* note 29, at 601.

33. See *Nieto v. State*, 365 S.W.3d 673, 675 (Tex. Crim. App. 2012) ("The party exercising a peremptory strike typically does not have to explain its rationale for the strike, unless the strike is challenged under *Batson*.").

34. See *id.*; *Batson v. Kentucky*, 476 U.S. 79 (1986).

## B. *Batson v. Kentucky*

The Supreme Court has set constitutional limits on the use of peremptory challenges. *Batson v. Kentucky* relied on the Equal Protection Clause to prohibit the use of peremptory challenges by the prosecution to effectuate purposeful discrimination against African-American jurors in criminal cases with African-American defendants.<sup>35</sup> Subsequent Supreme Court case law has expanded the reach of the *Batson* doctrine, so that purposeful discrimination on the basis of race, ethnicity,<sup>36</sup> or gender is prohibited,<sup>37</sup> in both civil and criminal cases,<sup>38</sup> regardless of which party is alleged to have engaged in it,<sup>39</sup> regardless of the race of the juror,<sup>40</sup> and regardless of the race of the parties.<sup>41</sup> The Supreme Court may soon decide whether the Ninth Circuit Court of Appeals was correct in finding that the doctrine should expand further, to include sexual orientation as a prohibited ground for exercising a peremptory challenge.<sup>42</sup>

*Batson* laid out a three-step process for assessing a claim of purposeful discrimination, the basic structure of which is still in place.<sup>43</sup> In *Batson*'s current form, the first step for an attorney who objects to a peremptory challenge is to establish a prima facie case of purposeful discrimination.<sup>44</sup> If the trial court finds that this step has been satisfied, the party who

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35. *Batson*, 476 U.S. 79.

36. *Hernandez v. New York*, 500 U.S. 352, 355 (1991).

37. *J.E.B. v. Alabama*, 511 U.S. 127, 129 (1994).

38. See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616 (1991) (private litigants in a civil case prohibited from basing peremptory challenges on race).

39. See *Georgia v. McCollum*, 505 U.S. 42, 59 (1992) (prohibiting purposeful discrimination in peremptory challenges exercised by defense counsel).

40. The Supreme Court has never held that purposeful discrimination against white jurors violates the Equal Protection Clause, but courts have assumed this to be a necessary implication of the decisions that the Court has reached. See Maisa Jean Frank, *Challenging Peremptories: Suggested Reforms to the Jury Selection Process Using Minnesota as a Case Study*, 94 MINN. L. REV. 2075, 2092 n.126 (2010) ("Although no U.S. Supreme Court precedent addresses this issue, some lower courts have extended *Batson* to the exclusion of white jurors."); see also *Powers v. Ohio*, 499 U.S. 400, 409 (1991) ("We hold that the Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race . . .").

41. See *Powers*, 499 U.S. at 402.

42. See *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 484 (9th Cir. 2014). On June 24, 2014, a *sua sponte* call for en banc review was rejected, with three judges dissenting. *SmithKline Beecham Corp. v. Abbott Labs.*, 759 F.3d 999 (9th Cir. 2014). Prospects for further review remain uncertain. *Id.* at 994–95 (O'Scannlain, J., dissenting) ("While this case may end here—neither party is likely to seek certiorari given that neither party urged en banc reconsideration of the applicable standard of review—reliance on the panel's analysis as an example of anything more than an exercise of raw judicial will would be most unwise.").

43. See *Batson v. Kentucky*, 476 U.S. 79, 96–98 (1986).

44. *Id.* at 96.

exercised the peremptory challenge must then give a reason that is neutral as to the alleged basis for the peremptory challenge.<sup>45</sup> Neutrality means little more than omitting mention of the prohibited basis.<sup>46</sup> The court's task at the third step is to assess whether the party objecting to the peremptory challenge has carried its burden of proving purposeful discrimination.<sup>47</sup> *Batson* declined to mandate "particular procedures" for courts to follow in their implementation of this three-step analysis.<sup>48</sup>

### C. Critiques of Peremptory Challenges and Batson

A wide variety of judges,<sup>49</sup> scholars,<sup>50</sup> and other commentators have called for the abolition of the peremptory challenge.<sup>51</sup> This subpart introduces four of their most prominent critiques.

The first critique is that to remove citizens from the jury in the absence of the kind of demonstrated bias that would justify a challenge "for cause" is anti-democratic.<sup>52</sup> The jury is idealized as a cross-section of the community,<sup>53</sup> and the peremptory challenge permits a type of cherry picking (or at least cherry rejection) that seems in tension with that ideal.<sup>54</sup>

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45. *Id.* at 97–98.

46. *Hernandez v. New York*, 500 U.S. 352, 360 (1991) ("A neutral explanation in the context of our analysis here means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed racial neutral."). For a recent attempt to assert higher standards at *Batson*'s second step, see *State v. Giles*, 754 S.E.2d 261, 262 (S.C. 2014) (holding that defendant's assertion that stricken Caucasian jurors were "not right for the jury" did not satisfy Step 2, even though it was "technically, semantically and intellectually race neutral").

47. *Batson*, 476 U.S. at 98.

48. *See id.* at 99 n.24 ("In light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how best to implement our holding today.").

49. *See supra* notes 10–14 and accompanying text.

50. *See supra* note 19 and accompanying text.

51. For a recent newspaper editorial calling for the abolition of the peremptory challenge, see Editorial, *The Problem with Peremptory Challenges*, L.A. TIMES (Sept. 20, 2013), <http://articles.latimes.com/2013/sep/20/opinion/la-ed-peremptory-challenges-sexual-orientation-20130920>, archived at <http://perma.cc/2DQQ-5H3K>.

52. *See Amar, supra* note 9, at 1182; *see also Alschuler, supra* note 9, at 156.

53. *See Amar, supra* note 9, at 1182 ("Democracy is well served if juries force together into common dialogue a fair cross section of citizens who might never deliberate together anywhere else.").

54. *See id.* ("By and large, the first twelve persons picked by lottery should form the jury. The jury—and not just the venire—should be as cross-sectional of the entire community of the whole people as possible. Peremptory challenges should be eliminated: they allow repeat-player regulars—prosecutors and defense attorneys—to manipulate demographics and chisel an unrepresentative panel out of a cross-sectional venire."); Alschuler, *supra* note 9, at 232 (abandoning peremptory challenges would mean juries could be selected in a way that reflects "the breadth of our communities rather than the group left over when lawyers had expended their peremptory challenges on pet hates"); Albert W.



The second critique is that the *Batson* doctrine has proven inadequate to the task of policing purposeful discrimination in peremptory challenges.<sup>55</sup> This critique takes numerous forms. The *Batson* test requires acts that its critics identify as very difficult: for the lawyer, asserting that a colleague at the bar has engaged in purposeful discrimination;<sup>56</sup> for the judge, detecting and declaring purposeful discrimination.<sup>57</sup> Despite the existence of *Batson*, statistical data indicate stark racial disparities in the use of peremptory challenges in numerous jurisdictions.<sup>58</sup> Anecdotal data

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Alschuler, *Implementing the Criminal Defendant's Right to Trial, Alternatives to the Pleas Bargaining System*, 50 U. CHI. L. REV. 931, 1018–19 (1983) (asserting that the tendency in a system of peremptory challenges, where “opposing advocates attack the panel of prospective jurors from both ends,” is “to provide juries of clerks and to diminish our vision of the jury as a cross section of the community”); Kathryn M. Young, *Outing Batson: How the Case of Gay Jurors Reveals the Shortcomings of Modern Voir Dire*, 48 WILLAMETTE L. REV. 243, 265 (2011) (exclusion of unpopular groups “means that the jury will not accurately reflect the values of the people who comprise the jurisdiction”).

55. See, e.g., William T. Pizzi, *Batson v. Kentucky: Curing the Disease but Killing the Patient*, 1987 SUP. CT. REV. 97, 134 (describing *Batson* as an “enforcement nightmare”); Brian J. Serr & Mark Maney, *Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 J. CRIM. L. & CRIMINOLOGY 1, 59 (1988) (arguing that the *Batson* procedural hurdles have become “less obstacles to racial discrimination than they are road maps” to disguised discrimination); Jeffrey S. Brand, *The Supreme Court, Equal Protection and Jury Selection: Denying that Race Still Matters*, 1994 WIS. L. REV. 511, 583–96 (claiming that *Batson* fails to permit the identification or elimination of challenges based on race).

56. See EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 6 (2010), available at <http://www.eji.org/files/EJI%20Race%20and%20Jury%20Report.pdf>, archived at <http://perma-cc/RU5G-KWC6> (“Many defense lawyers fail to adequately challenge racially discriminatory jury selection because they are uncomfortable, unwilling, unprepared, or not trained to assert claims of racial bias.”).

57. See *United States v. Clemmons*, 892 F.2d 1153, 1162 & n.10 (3d Cir. 1989) (“So long as peremptory challenges are permitted, trial and appellate judges will continue to have difficulty in ascertaining whether the prosecutor’s motives in exercising peremptory challenges are good or bad.”); *United States v. Thomas*, 943 F. Supp. 693, 698 (E.D. Tex. 1996) (“The Constitution provides the defendant with a right to have a jury selected free from discriminatory selection procedures. Nevertheless, a violation of this right is extremely difficult to determine.”); *People v. Bolling*, 591 N.E.2d 1136, 1142 (N.Y. 1992) (Bellacosa, J., concurring) (“The process that requires courts to sift through counsel’s words for patterns or pretexts of discrimination has not served the goal of cutting the discriminatory weeds out of the jury selection process.”); Sheri Lynn Johnson, *Respectability, Race Neutrality, and Truth*, 107 YALE L.J. 2619, 2657 (1998) (reviewing RANDALL KENNEDY, RACE, CRIME, AND THE LAW (1997) (“[T]he purposeful discrimination standard forces a judge to choose between ignoring specious justifications . . . or calling a fellow member of the bar a liar and a racist.”)); Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the Batson Challenge Procedure*, 31 LAW & HUM. BEHAV. 261, 263 (2007) (“[E]ven if attorneys consciously and strategically consider race during jury selection, they would be unlikely to admit it. Such an admission would have immediate consequences, as it would comprise a *Batson* violation. More generally, psychologists have noted that behavior is often influenced by the desire to appear nonprejudiced and to avoid the social sanctions that can follow from the appearance of racial bias.”).

58. See, e.g., *State v. Saintcalle*, 309 P.3d 326, 357 (Wa. 2013) (González, J., concurring) (“Racial disparities in peremptory usage have been documented in the courts of Alabama, Georgia, Illinois, Louisiana, North Carolina, Pennsylvania, and Texas.”); Robert P. Mosteller, *Responding to*

suggest that not just race but also ethnicity and gender frequently influence the use of peremptory challenges.<sup>59</sup> Scrutiny of *Batson* decisions suggests that lawyers offer absurd pretexts for their discriminatory use of peremptory challenges and, in doing so, evade *Batson*'s protections.<sup>60</sup> As one recent article summarized the situation,

[r]uling on *Batson* challenges . . . courts have accepted that prospective jurors were struck for being too old or too young; too vocal or too passive; too educated or too uneducated; for being single or because of a marital relationship; and for having been accused of a crime or having been a victim of a crime.<sup>61</sup>

Failures of trial courts adequately to police peremptory challenges are left undisturbed, thanks to the extreme deference shown to trial court *Batson* findings on appeal.<sup>62</sup>

The third critique develops from the perceived failures of the *Batson* doctrine, and identifies as severe the harms brought about by the peremptory challenge, particularly where it is driven by purposeful discrimination.<sup>63</sup>

The final critique alleges that there is no countervailing benefit to, or need for, the peremptory challenge.<sup>64</sup> Those mounting this critique assert that the results of studies investigating the effectiveness of the peremptory challenge are unimpressive.<sup>65</sup> They argue that challenges "for cause"

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McCleskey and *Batson*: *The North Carolina Racial Justice Act Confronts Racial Peremptory Challenges in Death Cases*, 10 OHIO ST. J. CRIM. L. 103, 104 (2012) ("North Carolina data . . . shows that, within geographically defined prosecutorial units as well as at the state level, peremptory strikes have been made at a far higher rate against racial minorities than whites. The effects of race persist even after the study controls for a broad range of neutral justifications for those strikes.").

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

60. See, e.g., *State v. McFadden*, 191 S.W.3d 648, 653 (Mo. 2006) (trial judge accepted prosecutor's explanation that he struck a juror because "she lived in a high crime area and had never heard gunshots"); Jean Montoya, *The Future of the Post-Batson Peremptory Challenge: Voir Dire by Questionnaire and the "Blind" Peremptory*, 29 U. MICH. J.L. REFORM 981, 1009 (1996) ("*Batson*'s requirement of articulating a neutral explanation for suspect peremptory challenges creates no substantial hurdle for 'those . . . who are of a mind to discriminate' . . .").

61. Polster, *supra* note 9, at 528–29 (footnotes omitted).

62. See *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008) ("[W]e have stated that 'in the absence of exceptional circumstances, we would defer to [the trial court].'" (second alteration in original) (quoting *Hernandez v. New York*, 500 U.S. 352, 366 (1991))).

63. See *infra* Part II.C.

64. See *infra* Part II.D.

65. See *infra* Part II.D.

suffice for weeding out jurors who are actually unfair<sup>66</sup>—or could suffice, with some tweaking<sup>67</sup>—and that all that is left for the peremptory challenge to achieve is the fulfillment of whims and stereotypes.<sup>68</sup>

## II. ASYMMETRICAL APPLICATIONS OF PEREMPTORY CRITIQUES

With Part I having laid out some of the leading critiques used in support of demands to abolish the peremptory challenge, Part II uncovers the fact that each critique applies asymmetrically to the prosecution and defense. This militates in favor of consideration of an asymmetrical solution, rather than across-the-board abolition. As regards each of the four critiques, the distinct roles, resources, and responsibilities of the prosecution suggest that the arguments for reduction or removal of peremptory challenges are stronger with respect to the prosecution than the defense.

### A. *Threat to Democracy*

It is of course true that every time a potential juror is removed by a peremptory challenge—whether exercised by the prosecution or the defense—that juror loses the opportunity to perform, at least in that trial, a key civic function.<sup>69</sup> Yet, because of the roles of jury and prosecution, and the current lack of prosecutorial accountability,<sup>70</sup> the prosecution is jeopardizing a broader range of democratic principles than the defense when it relies on peremptory challenges in order to shape its jury.

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66. See *Williams v. Norris*, No. 5:02 CV00450, 2007 WL 1100417, at \*6–7 (E.D. Ark. Apr. 11, 2007) (quoting state trial judge) (“I think *Batson* is the most ridiculous concept that a Judge has ever had to work with. . . . The United States Supreme Court made a terrible mistake. They should have outlawed peremptory challenges, because this puts a burden on the judiciary that is untenable. . . . I think that we’d all be better off if we excused for cause and put twelve in the box.”).

67. See, e.g., Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 500 (1996) (“If a system allowing challenges for cause is administered sensibly and without the carelessness engendered by the peremptory challenge safety net, *unfair* biases should be eliminated to the extent possible without resort to peremptory challenges.”).

68. See Alschuler, *supra* note 54, at 1018 (“In exercising a peremptory challenge, a lawyer is invited to give rein to his whim or hunch—usually not a whim or hunch that a prospective juror is partisan or incompetent but merely that he is likely to prove less favorable to the lawyer’s position than his replacement.”).

69. See *Powers v. Ohio*, 499 U.S. 400, 407 (1991) (“[W]ith the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.”).

70. See *infra* notes 77–80 and accompanying text.

The jury has historically been viewed as a buffer between the government and the defendant,<sup>71</sup> and a bulwark against oppressive governmental action.<sup>72</sup> Having the prosecution tailor its own bulwark jeopardizes this function in a way that defense peremptory challenges do not.<sup>73</sup>

The prosecution is envisaged as representing the People,<sup>74</sup> whereas the defense attorney's primary duty is to an individual client.<sup>75</sup> Having the prosecution pick and choose among the people in selecting its jury therefore threatens this representative function in a way that defense peremptory challenges do not.<sup>76</sup>

Effective representation of the people requires accountability to them,<sup>77</sup> and a prosecution that whittles juries down to a selected subgroup of the community avoids accountability to a cross-section of the people.<sup>78</sup> This avoidance of accountability compounds a lack of accountability that exists

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71. See Nancy S. Marder, *Justice Stevens, the Peremptory Challenge, and the Jury*, 74 *FORDHAM L. REV.* 1683, 1724 (2006) (citing *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968), for the proposition that the jury's role is to provide "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge").

72. See *id.* (describing the Supreme Court's view of the jury "as a bulwark against governmental oppression"); Katherine Goldwasser, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 *HARV. L. REV.* 808, 826 (1989) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968)) ("[T]he Framers of our federal and state constitutions granted criminal defendants the right to trial by jury 'in order to prevent oppression by the Government.' . . . They were therefore particularly concerned about unchecked prosecutorial power.").

73. See JON M. VAN DYKE, *JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS* 167 (1977) ("If the jury is to represent the conscience of the community in all its diversity, then no shade of opinion should be excluded. Otherwise, the defendant is not being judged simply by his community but rather by those members of his community who are approved—to the extent possible depending upon the number and method of peremptory strikes—by the government's representative in court.").

74. See Alafair S. Burke, *Prosecutors and Peremptories*, 97 *IOWA L. REV.* 1467, 1475 (2012) ("Prosecutors . . . represent a diversely constituted public. As such, they are in essence lawyers for the very communities disenfranchised by race-based peremptory challenges.").

75. See H. Richard Uviller, *The Advocate, The Truth, and Judicial Hackles: A Reaction to Judge Frankel's Idea*, 123 *U. PA. L. REV.* 1067, 1070 (1975) ("The Code of Professional Responsibility enjoins defense counsel to be faithful, resourceful and relentless in the service of his client's interest. No such injunction directs the prosecutor; he has no client, no interest save the interest of justice.").

76. Sheri Lynn Johnson, *Batson Ethics for Prosecutors and Trial Court Judges*, 73 *CHI.-KENT L. REV.* 475, 475 (1998) (describing jurors as citizens whose interests the prosecutor "is sworn to protect").

77. See Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13, 57 (1998) ("[T]he current system of choosing state and local prosecutors through the electoral process was established for the purpose of holding prosecutors accountable to the people they serve.").

78. See VAN DYKE, *supra* note 73, at 139 ("[I]f the jury panel sent into the courtroom is representative and thus fairly reflects the community's biases, challenging certain jurors because of their prejudices may alter the cross-section of views represented.").

throughout the prosecution's work.<sup>79</sup> Even though prosecutorial elections offer the promise of accountability, Ronald Wright has argued that they "do a poor job" in this regard.<sup>80</sup>

The ability to hone the jury pool down to a selected group spares the prosecution from the operation of incentives that may benefit the public. In other areas of the prosecutor's work, scholars have asserted that prosecutorial incentives currently point too strongly toward maximizing conviction rates<sup>81</sup> and often maximizing prison time.<sup>82</sup> Scholars have proposed ways in which incentives might be adjusted in order to help bring about prosecutorial accountability.<sup>83</sup> In the jury context, too, reducing the prosecution's access to the peremptory challenge might increase the incentives on the prosecution to address the community's concerns,<sup>84</sup> and thus help ensure that the prosecution is being held accountable to the broader community.

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79. See, e.g., Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365, 1365 (1987) ("[F]ew operate in a vacuum so devoid of externally enforceable constraints."). This lack of accountability has been loudly and increasingly bemoaned, especially as the prosecution's power and influence continue to surge. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506 (2001) (concluding that prosecutors are "the criminal justice system's real lawmakers"); Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 273–74 (2013) ("[W]e are living in a time of 'prosecutorial administration,' with prosecutors at the helm of every major federal criminal justice matter.").

80. Ronald F. Wright, *Beyond Prosecutor Elections*, 67 SMU L. REV. 593, 593, 608 (2014) (adding that "elections do not give chief prosecutors enough guidance about the priorities and policies they should pursue to achieve public safety at an appropriate fiscal and human cost," and that prosecutors' choices are "unresponsive to changes in public priorities and blind to the cost side of criminal justice").

81. See, e.g., Roberts, *supra* note 29, at 637.

82. See Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 GEO. L.J. 1509, 1513 (2009) ("Although their motivations vary, prosecutors have many reasons to prefer longer sentences: political pressures, ideology, office policy and culture, and career interests.").

83. See, e.g., Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 826 (2012) (proposing that prosecutors could be incentivized "to live in neighborhoods disproportionately impacted by the charging decisions made by the district attorney's office"); Adam M. Gershowitz, *An Informational Approach to the Mass Imprisonment Problem*, 40 ARIZ. ST. L.J. 47, 65–66 (2008) (urging that state officials send monthly bulletins to prosecutors, detailing state incarceration rates and prison overcrowding, in the hope that they bear this information in mind when they choose plea offers); Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 720–21 (1996) (suggesting that county prosecutors, who drive incarceration in state prisons, and yet do not have to pay for it, should be allocated an imprisonment budget and should be billed if they splurge beyond it); Russell M. Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69, 72–74 (2011) (outlining a proposal to ensure that prosecutors consider "previously overlooked costs" created by prosecutorial decisions).

84. See Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 952 (1997) (finding in the Supreme Court's *Old Chief* decision "a determination that prosecutors must accept the consequences of a statute that reaches far too many

There are a wide variety of community concerns that the prosecution might be incentivized to address, were it less able to remove from the jury those assumed to have such concerns. The prosecution not only has control over the way in which a prosecution proceeds, but also has influence over many of the other activities that might provoke community concern: police policies and practices,<sup>85</sup> legislative decision making,<sup>86</sup> prison growth,<sup>87</sup> and sentencing.<sup>88</sup> As an arm of the government, it also has the potential to influence social policies and practices.<sup>89</sup> When a potential juror voices concern about some of these phenomena, the prosecution is currently able to exercise a peremptory challenge to make sure that person's concern does not inform the jury's deliberations. If the number of prosecutorial peremptory challenges was reduced, it is possible that addressing those kinds of concerns would become more important to the prosecution.<sup>90</sup>

It is commonly assumed, for example, that the prosecution directs its peremptory challenges disproportionately against people of color in part because of an (accurate) assumption that their view of law enforcement is relatively likely to be negative.<sup>91</sup> Lessening the prosecution's access to

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cases that do not comport with popular notions of criminality"); Note, *Judging the Prosecution: Why Abolishing Peremptory Challenges Limits the Dangers of Prosecutorial Discretion*, 119 HARV. L. REV. 2121, 2137 (2006) ("[T]he real power of the cross-representative petit jury is its potential to constrain the exercise of prosecutorial discretion in a way that courts and others cannot.").

85. See Ben David, *Community-Based Prosecution in North Carolina: An Inside-out Approach to Public Service at the Courthouse, on the Street, and in the Classroom*, 47 WAKE FOREST L. REV. 373, 385 (2012) (discussing district attorney participation in law enforcement training in the Fifth District of North Carolina); Marc L. Miller & Samantha Caplinger, *Prosecution in Arizona: Practical Problems, Prosecutorial Accountability, and Local Solutions*, 41 CRIME & JUST. 265, 297 (2012) (discussing training provided by the Pinal County Attorney's Office to all local police officers).

86. See Stuntz, *supra* note 79, at 534 ("[L]egislators have good reason to listen when prosecutors urge some statutory change."); Barkow, *supra* note 79, at 314–15 ("Politicians want to keep the powerful interests and the public happy, and that means giving the Department [of Justice] what it wants.").

87. See John F. Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 GA. ST. U. L. REV. 1237, 1239 (2012) ("[A]t least since 1994, prison growth has been driven primarily by prosecutors increasing the rate at which they file charges against arrestees.").

88. See Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010, 1011–12 (2005).

89. See Bruce A. Green & Alafair S. Burke, *The Community Prosecutor: Questions of Professional Discretion*, 47 WAKE FOREST L. REV. 285, 294 (2012) (pointing out that part of the paradigm shift involved in the turn to community prosecution involves a reduction in prosecutorial autonomy and "more interaction with other officials and public representatives in order to deal with criminal and social problems in a more comprehensive manner").

90. For an exploration of the influence of litigation costs on prosecutorial behavior, see Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 652 (1972).

91. See *State v. Buggs*, 581 N.W.2d 329, 346 (Minn. 1998) (Page, J., dissenting) (citing a Minnesota Supreme Court's Task Force Report for the notion that "[p]eople of color have a general

peremptory challenges would increase the incentives for the government to address the causes of that negative view. It is commonly the case that prosecutors justify their use of peremptory challenges on the basis that a juror lives in a “bad or crime-ridden neighborhood,”<sup>92</sup> is “inured to violence or drugs,”<sup>93</sup> or “mistrust[s] the police.”<sup>94</sup> Lessening the prosecution’s access to peremptory challenges would mean that the prosecutor, as a governmental actor whose work is connected with these phenomena, bears some of the burden of these social ills.<sup>95</sup> As for racial disparity, one of the most striking facets of our criminal justice system,<sup>96</sup> it currently acts not as a cost that must be borne by the most powerful player in the criminal justice system, the prosecutor,<sup>97</sup> but as a justification for

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distrust of the criminal justice system”); MINN. SUPREME COURT TASK FORCE ON RACIAL BIAS IN THE JUDICIAL SYS., FINAL REPORT 36 (1993); Burke, *supra* note 74, at 1473 (“Empirical evidence demonstrates that people of color are more likely to be skeptical of law enforcement than white jurors.”); Marder, *supra* note 71, at 1725 (noting that prosecutors have used peremptory challenges “to remove African-Americans and members of other minority groups,” assuming “that these citizens would be more critical of the government and its case because they have been treated less well by police and other governmental actors than those in the majority”).

92. Johnson, *supra* note 76, at 499 (“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.”).

93. *Id.*

94. *Id.*

95. See Goldwasser, *supra* note 72, at 836 (“If the disparity between our aspirations and our reality leads to fewer convictions, that cost (if it is a cost) can rightly be imposed on society as a whole.”); Green & Burke, *supra* note 89, at 294 (pointing out that part of the paradigm shift involved in the turn to community prosecution involves a reduction in prosecutorial autonomy and “more interaction with other officials and public representatives in order to deal with criminal and social problems in a more comprehensive manner”).

96. See Justin D. Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 201 (2010) (mentioning “massive racial disparities” within the criminal justice system).

97. See Stuntz, *supra* note 79, at 506 (2001) (concluding that prosecutors are “the criminal justice system’s real lawmakers”); Barkow, *supra* note 79, at 273–74 (“[W]e are living in a time of ‘prosecutorial administration,’ with prosecutors at the helm of every major federal criminal justice matter.”); Alexandra Natapoff, Gideon *Skepticism*, 70 WASH. & LEE L. REV. 1049, 1078–79 (2013) (shaping her reform proposal in light of the fact that the prosecutor “holds many if not most of the cards, and that therefore it makes sense to impose on those powerful players greater responsibilities for the overall integrity of the system”). Many of the costs of prosecution are currently externalized and, therefore, provide no incentive to cabin those costs. See Gold, *supra* note 83, at 105 (pointing out that prosecutors externalize, and thus fail to take into account, the costs of incarceration and public defense, and proposing that prosecutors be required to reveal to voters the costs that they are incurring or anticipate incurring so that the costs can be internalized and can shape decisions about whether to charge, what to charge, and what sentences to recommend); Misner, *supra* note 83, at 719 (“The current flaw in the evolving power of the prosecutor is the failure to force her to face the full cost of prosecutorial decisions.”); *id.* at 720 (explaining that because incarceration driven by local prosecutors

prosecutorial peremptory challenges.<sup>98</sup> In the Minnesota case of *State v. McRae*, for example, an African-American juror shared her concerns about racial disparity and the slim chance that the African-American defendant would receive a jury of his peers.<sup>99</sup> Far from her voice creating any incentive for change, her voice helped incentivize what she feared, because her concerns were used and accepted as a reason to remove her from the jury.<sup>100</sup>

A reduction in prosecutorial peremptory challenges would place the burden for some of these social ills on a government actor whose work has some connection with these phenomena, rather than allowing the easy removal of unsatisfied customers.<sup>101</sup> In this way, one can see that the argument that peremptory challenges are damaging to democracy in part

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is paid for by the state, “the prosecutor has little incentive to create prosecutorial guidelines, to become an active participant in crime prevention programs, or to find less costly means of punishment”).

98. *See State v. Buggs*, 581 N.W.2d 329, 345 (Minn. 1998) (Page, J., dissenting) (declaring the importance of “being able to see and understand the racial impact of permitting prosecutors to exclude from service prospective jurors who do nothing more than express concerns about the racial makeup of the jury panel and our justice system’s treatment of people of color”).

99. *State v. McRae*, No. CI-91-1461, 1992 Minn. App. LEXIS 554, at \*3-4 (Minn. Ct. App. June 10, 1992), *rev’d*, 494 N.W.2d 252 (Minn. 1992).

100. *See id.* (endorsing prosecutorial justification for a peremptory strike). The trial court’s acceptance of these prosecutorial justifications was overturned on appeal, with the Minnesota Supreme Court declaring that “[t]o allow the striking of this juror on the basis of those answers in effect would allow a prosecutor to strike any fair-minded, reasonable black person from the jury panel who expressed any doubt the [sic] ‘the system’ is perfect.” *State v. McRae*, 494 N.W.2d 252, 257 (Minn. 1992); *see also Buggs*, 581 N.W.2d at 347 (Page, J., dissenting) (“Permitting prospective jurors to be excluded from service because their personal experience bears out what we said in our Task Force Report, makes no sense, but does make a mockery of our efforts to bring about racial fairness. In saying this, I do not mean to call into question this court’s commitment to eradicate racial bias from Minnesota’s judicial system. We must, however, move beyond rhetoric.”); MINN. SUPREME COURT TASK FORCE ON RACIAL BIAS IN THE JUDICIAL SYS., *supra* note 91, at 36 (1993) (finding that “[j]ury pools rarely are representative of the racial composition of a community” and that “[p]eople of color have a general distrust of the criminal justice system and exclusion from jury service fosters that distrust.”).

101. *See Goldwasser*, *supra* note 72, at 836 (“If the disparity between our aspirations and our reality leads to fewer convictions, that cost (if it is a cost) can rightly be imposed on society as a whole.”); *Green & Burke*, *supra* note 89, at 294 (pointing out that part of the paradigm shift involved in the turn to community prosecution involves a reduction in prosecutorial autonomy and “more interaction with other officials and public representatives in order to deal with criminal and social problems in a more comprehensive manner”).



because they threaten the opportunity for jurors to learn is a limited one;<sup>102</sup> they also threaten the ability of jurors to *teach*.<sup>103</sup>

Some prosecutors' offices have indicated an interest in greater responsiveness and accountability to the community through a variety of "community prosecution" initiatives.<sup>104</sup> These initiatives are said to aim at increasing the extent to which the prosecution learns about, responds to, and is accountable to the community's needs,<sup>105</sup> but they have been criticized as containing little substance.<sup>106</sup> Requiring that prosecutors hear more of the voice of the community in the jury trial, and that they be responsive to that community voice, would help provide some of that substance.<sup>107</sup>

In these ways, threats to democracy created by the prosecution peremptory challenge are greater than those created by the defense peremptory challenge. Reduction of the number of peremptory challenges allocated to the prosecution may provide some of the accountability that is currently lacking in the incentive system, and electoral system, within

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102. See Marder, *supra* note 71, at 1717 (quoting ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 275 (J.P. Mayer ed., George Lawrence trans., Anchor Press 1969) (1840)) ("Without peremptories, these jurors who would have been excluded will now benefit from the jury's educational function, in which the jury serves as a 'free school,' teaching citizens about the responsibilities of self-governance in a democracy.").

103. John F. Stinneford has explored a related problem with the federal prosecution of "street crime." The ability of law enforcement to escape unfavorable local juries by bringing cases into federal court allows law enforcement to "avoid confronting problems in its relationship to the community immediately below it (the people it protects)." John F. Stinneford, *Subsidiarity, Federalism and Federal Prosecution of Street Crime* 23 (Univ. of St. Thomas Sch. of Law Legal Studies Research Paper Series, Paper No. 05-19), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=847968](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=847968). "If local law enforcement can avoid the public manifestation of [local distrust of the police] by bringing risky cases into federal court, it will have less incentive to confront the much more difficult (and important) problem of its relationship to the community it serves." *Id.*

104. See, e.g., Kelley Bowden Gray, Comment, *Community Prosecution: After Two Decades, Still New Frontiers*, 32 J. LEGAL PROF. 199 (2008).

105. See Reenah L. Kim, Note, *Legitimizing Community Consent to Local Policing: The Need for Democratically Negotiated Community Representation on Civilian Advisory Councils*, 36 HARV. C.R.-C.L. L. REV. 461, 481 (2001).

106. See Alafair S. Burke, *Unpacking New Policing: Confessions of a Former Neighborhood District Attorney*, 78 WASH. L. REV. 985, 1010 (2003) (pointing out gap between the community's preferences and the proposals put forth by community police and prosecutors).

107. See *Witherspoon v. Illinois*, 391 U.S. 510, 519-20 & n.15 (1968) (juries "maintain a link between contemporary community values and the penal system," and "speak for" the community); Paul H. Robinson, *The Ongoing Revolution in Punishment Theory: Doing Justice as Controlling Crime*, 42 ARIZ. ST. L.J. 1089, 1107 (2010) ("One may well ask how well current American criminal law matches the community's intuitions of justice. The short answer is: not well. Modern crime-control programs, such as three strikes, high drug-offense penalties, adult prosecution of juveniles, narrowing the insanity defense, strict liability offenses, and the felony-murder rule, all distribute criminal liability and punishment in ways that seriously conflict with lay persons' intuitions of justice.").

which prosecutors operate, and that community prosecution purports to strive toward.

### B. Policing Problems

The *Batson* doctrine certainly presents formidable challenges to both trial judges and appellate judges, whether the prosecution or the defense exercised the contested peremptory challenges: one commentator has referred to *Batson* as an “enforcement nightmare.”<sup>108</sup> Yet there is some indication that the failures to police purposeful discrimination successfully have been more glaring in the case of prosecutorial peremptory challenges, and that when scrutinizing defense peremptory challenges, judges have been able to find rigor and depth in the doctrine.

In one of the largest empirical investigations of *Batson*’s application, Kenneth Melilli reviewed virtually all of the federal and state *Batson* decisions published in the seven years after the Supreme Court’s decision.<sup>109</sup> His research uncovered a higher probability of success for *Batson* claims made by the prosecution than by the defense.<sup>110</sup> A more recent analysis of a subset of *Batson* claims demonstrated ways in which federal courts found greater depth and rigor in the *Batson* doctrine when evaluating *Batson* claims made by the prosecution (each of which was ultimately upheld) than when evaluating *Batson* claims by the defense (each of which was ultimately rejected).<sup>111</sup>

Several commentators echo these findings in their assertions that the most glaring policing failures have occurred in response to prosecutorial peremptory strikes. Abbe Smith has noted that “[t]he problem with *Batson* is that it is so easily overcome by prosecutors.”<sup>112</sup> Charles Ogletree has attributed the policing problem to the same players.<sup>113</sup>

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108. Pizzi, *supra* note 55, at 134.

109. See Melilli, *supra* note 67.

110. See *id.* at 459 (success rate of 84.62% for prosecutors, as opposed to 15.87% for criminal defendants). Naturally, this does not establish that the defense challenges were more carefully screened. See *id.* (pointing out that it may be that prosecutors are “institutionally more selective about making the type of allegations inherent in a *Batson* challenge”).

111. See Anna Roberts, *Disparately Seeking Jurors: Disparate Impact and the (Mis)use of Batson*, 45 U.C. DAVIS L. REV. 1359 (2012) (analyzing twenty-nine decisions resolving *Batson* claims made by the defense and three decisions resolving *Batson* claims made by the prosecution).

112. Abbe Smith, “Nice Work if You Can Get It”: “Ethical” Jury Selection in Criminal Defense, 67 FORDHAM L. REV. 523, 543 (1998).

113. See Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099, 1107 (1994) (“[I]n many jurisdictions . . . *Batson* has been more or less undermined by prosecutors who fabricate facially neutral reasons for striking minority jurors, and trial courts that have difficulty evaluating such reasons.”); *id.* at 1110

Increased attention needs to be given to the possibility that the policing difficulties of *Batson* are greater with respect to prosecutorial peremptory challenges than with respect to those exercised by the defense. It is worth reexamining, for example, the implied critique contained in the assertion that

[r]uling on *Batson* challenges . . . courts have accepted that prospective jurors were struck for being too old or too young; too vocal or too passive; too educated or too uneducated; for being single or because of a marital relationship; and for being accused of a crime or having been a victim of a crime.<sup>114</sup>

Upon doing so, one finds an additional fact omitted from this description: each of these peremptory challenges was made by the prosecution.<sup>115</sup>

In light of the possibility of unequal policing, additional empirical research should be conducted on the question of whether the policing, and policing problems, are uniform. It might not be surprising were the research to suggest an asymmetry. It remains the case that prosecutors are particularly drawn to peremptory challenges targeted at African Americans,<sup>116</sup> the constituency that the *Batson* doctrine was set up to protect.<sup>117</sup> Defense challenges, by contrast, are often more likely to focus

(“Ineffective scrutiny of prosecution explanations is the single greatest problem hindering the effective implementation of *Batson*.”).

114. Polster, *supra* note 9, at 528–29 (footnotes omitted).

115. See *United States v. Jynes*, 197 Fed. Appx. 351, 353 (5th Cir. 2006); *Stokes v. State*, 194 S.W.3d 762, 764 (Ark. 2004); *People v. Cowan*, 236 P.3d 1074, 1114 (Cal. 2010); *People v. Lomax*, 234 P.3d 377, 413 (Cal. 2010); *People v. Hamilton*, 200 P.3d 898, 933 (Cal. 2009); *People v. Ledesma*, 140 P.3d 657, 687 (Cal. 2006); *People v. Jurado*, 131 P.3d 400, 423 (Cal. 2006); *People v. Reynoso*, 74 P.3d 852, 865–66 (Cal. 2003); *People v. Allen*, No. A118253, 2008 WL 2673363, at \*6 (Cal. Ct. App. July 9, 2008); *State v. Holloway*, 977 A.2d 750, 758 (Conn. App. Ct. 2009); *Sykes v. State*, 953 A.2d 261, 270 (Del. 2008); *Roberts v. State*, 651 S.E.2d 689, 693–94 (Ga. 2007); *Walker v. State*, 640 S.E.2d 274, 277 (Ga. 2007); *Taylor v. State*, 620 S.E.2d 363, 366 (Ga. 2005); *People v. Davis*, 677 N.E.2d 1340, 1345 (Ill. App. Ct. 1997); *People v. Gaston*, 628 N.E.2d 699, 701 (Ill. App. Ct. 1993); *State v. Jacobs*, 32 So. 3d 227, 231 (La. 2010); *State v. Givens*, 888 So. 2d 329, 340 (La. Ct. App. 2004); *Pitchford v. State*, 45 So.3d 216, 226 (Miss. 2010); *Horne v. State*, 825 So. 2d 627, 636 (Miss. 2002); *State v. Terry*, 928 S.W.2d 879, 884 (Mo. Ct. App. 1996); *State v. Williams*, 922 S.W.2d 845, 859 (Mo. Ct. App. 1996); *State v. Myers*, 603 N.W.2d 378, 386 (Neb. 1999); *Morales v. State*, No. 54180, 2010 WL 3503519, at \*1 (Nev. July 15, 2010); *Munoz v. State*, 238 P.3d 840 (Nev. 2008); *People v. Hecker*, 942 N.E.2d 248 (N.Y. 2010); *State v. Mulligan*, 736 N.W.2d 808, 820–21 (S.D. 2007); *State v. Martin*, 683 N.W.2d 399, 403 (S.D. 2004); *Carroll v. State*, No. 10-08-00413-CR, 2010 WL 5142386, at \*7 (Tex. Ct. App. Dec. 15, 2010).

116. See, e.g., David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 48 (2001).

117. See *Roberts*, *supra* note 111, at 1416 (describing the Supreme Court doctrine as “rooted in the need to protect African Americans”).

on white jurors.<sup>118</sup> It would not be unprecedented for a legal structure set up to protect a minority group to evolve so that it offers equal or greater benefit to the majority.<sup>119</sup>

### C. Harmfulness

Drawing in part on the sense that *Batson* is an inadequate policing device, commentators have decried the harms that peremptory challenges—and particularly discriminatory peremptory challenges—are said to cause. Here, again, the critique has asymmetrical application, given differences between prosecution and defense peremptory challenges that relate to documented harm, impact on racial diversity, and damage to ethical precepts.

Discriminatory use of prosecutorial peremptory challenges has a long history, preceding and following *Batson*. Prosecutorial abuse of the peremptory challenge was the basis for the claim in *Batson*.<sup>120</sup> Before *Batson*, the Supreme Court had already catalogued a history of discriminatory prosecutorial challenges in the 1965 case of *Swain v. Alabama*.<sup>121</sup> It did the same in *Batson*,<sup>122</sup> and again in *Miller-El v. Cockrell*.<sup>123</sup> A smoking gun emerged in 1997, when a prosecutorial

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118. See Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 LAW & HUM. BEHAV. 695, 698–99 (1999).

119. See Melilli, *supra* note 67, at 463 (examining all published cases from April 30, 1986, the date of the *Batson* decision, through December 31, 1993, and finding that *Batson* challenges made on behalf of white jurors had a 53.33% success rate, while those made on behalf of African-American jurors had a success rate of 16.95%); *J.E.B. v. Alabama*, 511 U.S. 127 (1994) (upholding *Batson* gender discrimination claim brought on behalf of male jurors); *Powers v. Ohio*, 499 U.S. 400 (1991) (upholding *Batson* racial discrimination claim brought by white defendant); Lisa A. Crooms, “*Everywhere There’s War*”: A Racial Realist’s Reconsideration of Hate Crimes Statutes, 1999 GEO. J. GENDER & L. 41, 57 (noting that “hate crime ordinances fail to provide adequate protection to African-Americans, while race-based penalty enhancement mechanisms afford whites more protection from racially-motivated violence”); Ann Scales, *Feminist Legal Method: Not So Scary*, 2 UCLA WOMEN’S L.J. 1, 8 (1992) (“It is no accident that a majority of equal protection sex discrimination cases decided by the Supreme Court have been brought by men. It is no accident that the hot racial issue in equal protection doctrine is ‘reverse discrimination’ challenges to affirmative action plans, that is, claims by white people that they are victims of racism.”).

120. See Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1032 & n.104 (1988) (citing Justice Marshall’s *Batson* concurrence and its review of data from four jurisdictions to illustrate “the overwhelming propensity of prosecutors to strike black jurors from cases with black defendants”).

121. *Swain v. Alabama*, 380 U.S. 202, 234–35 (1965) (Goldberg J., dissenting) (“[T]he State . . . participates, in Talladega County, in employing the striking or peremptory challenge system to exclude Negroes from jury services in cases where white men are involved.”).

122. *Batson v. Kentucky*, 476 U.S. 79, 103–04 (1986) (Marshall, J., concurring).

123. *Miller-El v. Cockrell*, 537 U.S. 322, 334–35, 347 (2003) (“[T]he culture of the District Attorney’s office in the past was suffused with bias against African-Americans in jury selection.”).

training video revealed explicit advice by a then-assistant district attorney in Philadelphia to rely on prohibited group-based assumptions.<sup>124</sup> If one adopts the common imagery of the peremptory challenge as a weapon<sup>125</sup>—and in the case of capital trials,<sup>126</sup> a potentially deadly weapon<sup>127</sup>—the grounds for restricting the use of this weapon based on past conduct seem clearer for the prosecution than for the defense.<sup>128</sup>

Both historically and in recent trials, the statistical tendency of prosecutors to exercise their peremptory challenges against people of color has meant that prosecutorial challenges are more likely than defense challenges to reduce racial diversity on the jury.<sup>129</sup> Indeed, because the group targeted by the prosecution for removal is frequently smaller than that targeted by the defense,<sup>130</sup> the prosecutor is more easily able to remove that group from the jury box entirely. A reduction in jury diversity is a significant loss, not least because diversity appears to enhance a jury's effectiveness in many ways,<sup>131</sup> including imposing some sort of limitation on the operation of bias.<sup>132</sup>

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124. See Edward S. Adams & Christian J. Lane, *Constructing a Jury That Is Both Impartial and Representative: Utilizing Cumulative Voting in Jury Selection*, 73 N.Y.U. L. REV. 703, 708 (1998); *Lark v. Beard*, 495 F. Supp. 2d 488, 493–94 (E.D. Pa. 2007).

125. See, e.g., *United States v. Yepiz*, 685 F.3d 840, 841 (9th Cir. 2012) (“One of the most valuable weapons in the arsenal of the trial attorney is the peremptory challenge.”); *Betts v. United States*, 132 F. 228, 235 (1st Cir. 1904) (“[T]he right to challenge peremptorily . . . is among the most useful weapons of defense put in the hands of an accused person. It is the only method of cutting off underground, malevolent currents, visible at some times to no one except the accused and his counsel, and sometimes not even to both of them.”).

126. See Marder, *supra* note 71, at 1729 (noting that this is the setting where “the consequences are most severe”).

127. See Baldus et al., *supra* note 116, at 10 (“[Pennsylvania’s] comparative advantage in the use of peremptory challenges has several consequences for capital defendants; it enhances the probability of death for all defendants; it raises the level of racial discrimination in the application of the death penalty; and it denies defendants a trial by a jury that includes at least one of their ‘peers.’”).

128. See VAN DYKE, *supra* note 73, at 166–67 (discussing a precursor to the peremptory challenge—the government’s ability to ask a potential juror to “stand aside”—and noting that “[e]ven those early courts that were least critical of the practice of allowing the prosecution to stand jurors aside felt that the practice should end if the prosecutor abused it); *id.* (“The practice [of exercising prosecutorial peremptory challenges] is being abused—the prosecutor frequently uses its peremptories to eliminate entire ethnic groups—and it is time to consider some remedial measures,” including “tak[ing] away all peremptory challenges from the prosecution.”).

129. See Tanya E. Coke, Note, *Lady Justice May Be Blind, but Is She a Soul Sister? Race-Neutrality and the Ideal of Representative Juries*, 69 N.Y.U. L. REV. 327, 332 (1994).

130. See Baldus et al., *supra* note 116, at 128 (finding, based on Philadelphia research, that “the prime target groups of the prosecution are smaller in number than those of defense counsel”).

131. See Marder, *supra* note 71, at 1725 (“[A] diverse jury affords the best protection to a defendant that the government’s case will be carefully and critically examined.”).

132. See Samuel R. Sommers, *Race and the Decision Making of Juries*, 12 LEGAL & CRIMINOLOGICAL PSYCHOL. 171, 181 (2007) (“[R]acially diverse juries deliberated longer, discussed more trial evidence, and made fewer factually inaccurate statements in discussing the evidence than

It is certainly the case that defense attorneys are prohibited from purposeful discrimination in their peremptory strikes, just as prosecutors are.<sup>133</sup> Pointing out asymmetries in the harmfulness of peremptory strikes is not intended as an endorsement of purposeful discrimination by the defense. However, a reframing may help distinguish the situation of the parties. Sheri Johnson raises the question of whether all defense peremptory challenges that take account of race should be termed discriminatory.<sup>134</sup> In a context such as the contemporary criminal justice system, where a disproportionate number of defendants are people of color,<sup>135</sup> and where lack of diversity on the jury—especially an all-white jury<sup>136</sup>—has a tendency to increase bias,<sup>137</sup> a defense peremptory challenge exercised against a white juror might not count as racial discrimination under a “rough definition” of the term that Johnson lays out<sup>138</sup>: “racial discrimination in jury selection is any jury selection practice that is

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did all-White juries. Interestingly, these effects, too, cannot be explained solely in terms of the performance of Black jurors, as White jurors were more thorough and accurate during deliberations on diverse vs. all-White juries. A potential implication of these findings is that one process through which a diverse jury composition exerts its effects is by leading White jurors to process evidence more thoroughly.”); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 414 (2007) (“Studies have linked culture and diversity to the reduction of implicit biases. These studies indicate that racially diverse juries, for example, may make fewer cognitive errors than homogenous jurors, and that learning about or experiencing diversity and multicultural ideologies in general can reduce implicit bias.”); Deborah Ramirez, *Affirmative Jury Selection: A Proposal to Advance both the Deliberative Ideal and Jury Diversity*, 1998 U. CHI. LEGAL FORUM 161, 162 (“[A] racially diverse jury is more likely to render a race-neutral verdict, because it is more likely to suppress racial bias in deliberations and to challenge inferences based on thoughtless racial stereotypes.”); VAN DYKE, *supra* note 73, at 152 (arguing that the narrowing down of the jury pool caused by challenges “for cause” and peremptory challenges, “although aimed at eliminating bias and impaneling an impartial jury, may in fact—by excluding certain types of people from the jury panel—increase the jury’s bias”); *see also* Skilling v. United States, 561 U.S. 358, 388 n.21 (2010) (“Peremptory challenges, too, ‘provid[e] protection against [prejudice].’” (quoting *Darcy v. Handy*, 351 U.S. 454, 462 (1956))).

133. *See* Andrew E. Taslitz & Sharon Styles-Anderson, *Still Officers of the Court: Why the First Amendment Is No Bar to Challenging Racism, Sexism and Ethnic Bias in the Legal Profession*, 9 GEO. J. LEGAL ETHICS 781, 781 n.4 (1996).

134. *See* Sheri Lynn Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21, 83–84 (1993).

135. *See* Abbe Smith, *Defending Those People*, 10 OHIO ST. J. CRIM. L. 277, 287 (2012) (“Most of those accused and convicted of crime are poor. Disproportionate numbers are nonwhite.”).

136. *See* 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, 1029 (2003); *see also* *Georgia v. McCollum*, 505 U.S. 42, 61 (1992) (Thomas, J., concurring in judgment) (“Simply stated, securing representation of the defendant’s race on the jury may help to overcome racial bias and provide the defendant with a better chance of having a fair trial.”).

137. *See* Johnson, *supra* note 134, at 83–84 (“The specific assumption . . . that the total exclusion of black jurors from black defendant cases is likely to increase the risk of racially biased adjudications . . . is still valid today.”).

138. *Id.* at 85.

intended to increase the likelihood that racial bias will influence the outcome of a particular criminal trial.”<sup>139</sup>

Finally, through its use of peremptory challenges, the prosecution may be straying from the precepts of prosecutorial ethics. With respect to defense ethics, Abbe Smith has argued that the ethical duty of zealous representation requires the defense to do whatever needs to be done with peremptory challenges,<sup>140</sup> since a client’s fair trial, and possibly life, is at stake.<sup>141</sup> For the prosecution, however, the relevant ethical (and constitutional) duties include a duty to “seek justice,” rather than merely convictions.<sup>142</sup> The prosecutor is a “minister of justice”<sup>143</sup> and required to strive for procedural justice for every defendant.<sup>144</sup> Commentators often appear to lose sight of this distinction in the peremptory context, accepting without qualm that while the defense will seek to remove all potential jurors that it might suspect would favor the prosecution, and seek to keep all those that it might suspect would favor the defense, the prosecution will simply do the reverse.<sup>145</sup> As Barbara Babcock puts it, for example, “[o]f

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139. *Id.*; see also *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 644 (1991) (Scalia, J., dissenting) (“Both sides have peremptory challenges, and they are sometimes used to *assure* rather than to *prevent* a racially diverse jury.”).

140. See Smith, *supra* note 112, at 565 (“No matter how personally distasteful or morally unsettling, zealous advocacy demands that criminal defense lawyers use whatever they can, including stereotypes, to defend their clients.”).

141. See *id.* at 530–31 (“It is not that I believe that racial or demographic stereotypes are an accurate proxy for the attitudes and life experience of all prospective jurors. I do not. It is that, absent a meaningful exploration of the latter, I am stuck with the former, and it would be foolhardy or worse not to at least consider the generalizations on which the stereotypes are based.”).

142. See *Donnelly v. DeChristoforo*, 416 U.S. 637, 648–49 (1974) (Douglas, J., dissenting) (“The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial.”); AM. BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-1.2 (3d ed. 1993), available at [http://www.americanbar.org/publications/criminal\\_justice\\_section\\_archive/crimjust\\_standards\\_pfunc\\_blk.html](http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pfunc_blk.html) (“The duty of the prosecutor is to seek justice, not merely to convict.”); L. Song Richardson, *Due Process for the Global Crime Age: A Proposal*, 41 CORNELL INT’L L.J. 347, 357–58 (2008) (“The U.S. Constitution and the ethical rules only obligate defense attorneys to vigorously advocate their client’s cause. In contrast, prosecutors are duty-bound to refrain from allowing their role as advocates to eclipse their obligation to ensure fair proceedings. They are quasi-judicial officers who must ensure that trials lead to reliable outcomes that are worthy of public confidence. Hence, they are often referred to as ‘ministers of justice,’ reflecting their special role seeking truth and justice in adversarial criminal trials.” (citing MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. [1] (2014) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”))).

143. See Richardson, *supra* note 142, at 357.

144. See MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. [1] (mentioning obligation “to see that the defendant is accorded procedural justice”).

145. See *State v. Saintcalle*, 309 P.3d 326, 363 (Wash. 2013) (González, J., concurring) (“[A]ttorneys use peremptory challenges to exclude unfavorable jurors, not to obtain an impartial jury.”); 2 ANN FAGAN GINGER, JURY SELECTION IN CIVIL AND CRIMINAL TRIALS § 18.2, at 1022 (2d

course, neither litigant is trying to choose ‘impartial’ jurors, but rather to eliminate those who are sympathetic to the other side, hopefully leaving only those biased *for* him.”<sup>146</sup> But surely the picture is more complicated.<sup>147</sup> What if the prosecution did indeed suspect that a potential juror was biased in favor of the prosecution? Is there an argument that the prosecutor should exercise a peremptory challenge against that juror, if the defense does not?<sup>148</sup> Through a single-minded engagement in partisanship, the prosecution may be treading on foundational ethical and constitutional precepts.<sup>149</sup> as Richard Uviller puts it, “the interest of justice is not a partisan cause.”<sup>150</sup>

#### D. Lack of Need

Arguments that peremptory challenges fail to serve any need that might counteract the harms documented in Subpart C also apply with more force

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ed. 1985) (“Despite its theoretical function, the voir dire is in reality a contest between the two adversaries toward the goal of selecting the jury that is most favorable to [either] side.”); Eric D. Katz, Comment, *Striking the Peremptory Challenge from Civil Litigation: “Hey Batson, Stay Where You Belong!”*, 11 PACE L. REV. 357, 361 n.19 (1991) (describing this as the “dog-eat-dog” approach to the peremptory challenge).

146. Barbara Allen Babcock, *Voir Dire: Preserving “Its Wonderful Power”*, 27 STAN. L. REV. 545, 551 (1975); see also J. Christopher Peters, Note, *Georgia v. McCollum: It’s Strike Three for Peremptory Challenges, but Is It the Bottom of the Ninth?*, 53 LA. L. REV. 1723, 1741 (1993) (“Realistically, each side in a criminal proceeding is after the same distinct result: a jury which favors its respective side.”).

147. See Melilli, *supra* note 67, at 499 (“Because the state’s only legitimate interests are to provide the litigants with fair and impartial juries and to provide potential jurors with selection procedures that are not unfairly discriminatory, the interest of litigants in securing the most favorable jurors should be an irrelevant consideration.”).

148. See VAN DYKE, *supra* note 73, at 167 (“It is the duty of the prosecutor, as an officer of the state, to see that the accused is tried by a fair, impartial, and representative jury; it is not the role of the prosecutor to attempt to impanel a jury composed of those most likely to convict.”); George C. Harris, *The Communitarian Function of the Criminal Jury Trial and the Rights of the Accused*, 74 NEB. L. REV. 804, 816 n.49 (1995). For a suggestion of a way in which the prosecutor’s ethical duty might trump certain litigation efforts, see Michael C. Wallace, Sr., *Make the Hand Fit the Glove: OPR Finds Professional Misconduct*, 57 WAYNE L. REV. 497, 518 (2011) (mentioning that the prosecutor’s duty to represent the interests of the people includes “represent[ing] the interest of the defendant”); Richardson, *supra* note 142, at 356 (“[T]he U.S. Constitution requires prosecutors to temper their adversarial zeal and protect the fairness and reliability of the criminal process.”); David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 MD. L. REV. 1502, 1585 n.345 (1998) (suggesting that Christopher Darden, in prosecuting O.J. Simpson, arguably had discretion, thanks to his ethical obligation to “seek justice,” to “refuse to oppose the introduction of evidence impeaching the credibility of [Mark Fuhrman],” once he had been presented with “conclusive evidence that Fuhrman lied under oath about using racial epithets”).

149. See Catherine Ferguson-Gilbert, *It Is Not Whether You Win or Lose, It Is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?*, 38 CAL. W. L. REV. 283, 289 (2001).

150. Uviller, *supra* note 75, at 1070.



to the prosecution than the defense. Both in advance of trial and at trial, a variety of phenomena combine to offer the prosecution certain advantages that the defense peremptory challenge has a chance to try to offset.

Before a criminal defendant reaches the moment of being able to exercise peremptory challenges against potential jurors, he or she will already have been subject to decision making by a host of criminal justice players: legislators,<sup>151</sup> police officers,<sup>152</sup> prosecutors,<sup>153</sup> defense attorneys,<sup>154</sup> and judges.<sup>155</sup> Others, such as probation officers<sup>156</sup> and parole boards,<sup>157</sup> may lie ahead. Each of these has been shown to be vulnerable to implicit bias,<sup>158</sup> a phenomenon that is a particular threat to the criminal defendant population, given the disproportionate representation of people of color therein.<sup>159</sup> Despite the implicit bias affecting these groups of decision makers, the criminal defendant is—with rare exceptions—stuck with them: no matter how extreme their bias may be, nothing like a peremptory challenge is permitted.<sup>160</sup> The peremptory challenge process

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151. See Robert J. Smith et al., *Implicit White Favoritism in the Criminal Justice System*, 66 ALA. L. REV. 871 (2015).

152. See E. Ashby Plant & B. Michelle Peruche, *The Consequences of Race for Police Officers' Responses to Criminal Suspects*, 16 PSYCHOL. SCI. 180 (2005) (finding that, in simulations, police officers are more likely to shoot unarmed black suspects than unarmed white suspects).

153. See Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC'Y REV. 587, 615–19 (1985) (finding charging disparities in prosecutors' decisions whether to press charges against black and white potential defendants).

154. See Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1545–56 (2004) (presenting evidence that death penalty defense attorneys display implicit racial biases comparable to the rest of the population).

155. See Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1197 (2009) (it does).

156. See Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 LAW & HUM. BEHAV. 483, 500 (2004) (identifying implicit bias directed against black youth in probation and police officers).

157. See Leo Carroll & Margaret E. Mondrick, *Racial Bias in the Decision to Grant Parole*, 11 LAW & SOC'Y REV. 93 (1976).

158. See Roberts, *supra* note 27, at 833 (“Implicit biases’ are discriminatory biases based on either implicit *attitudes*—feelings that one has about a particular group—or implicit *stereotypes*—traits that one associates with a particular group. They are so subtle that those who hold them may not realize that they do.”); *id.* at 877; Roberts, *supra* note 29, at 621. The phenomenon is of course widespread outside the criminal justice arena as well. See John T. Jost et al., *The Existence of Implicit Bias Is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies that No Manager Should Ignore*, 29 RES. ORGANIZATIONAL BEHAV. 39 (2009) (discussing implicit bias in areas such as medicine and employment).

159. See Smith, *supra* note 135, at 287 (“Most of those accused and convicted of crime are poor. Disproportionate numbers are nonwhite.”).

160. There are a few counter-examples. Some jurisdictions allow judges to be challenged peremptorily. See Gabriel D. Serbulea, *Due Process and Judicial Disqualification: The Need for Reform*, 38 PEPP. L. REV. 1109, 1123 n.105 (2011) (“Seventeen states allow for peremptory disqualification [of judges] (without cause); three states have quasi-peremptory rules (the judge must recuse or transfer the recusal motion to another judge); thirty-one states do not allow peremptory

represents one small area in which an effort to right the balance can be made.

The stages of jury selection that precede the exercising of peremptory challenges also contain numerous elements that favor the prosecution. First, though the criminal defendant is entitled to a jury pool that represents a cross-section of the community,<sup>161</sup> the doctrine by which that right is enforced is widely viewed as anemic.<sup>162</sup> A successful cross-section challenge has not been heard in federal court since 1995.<sup>163</sup> Second, the stage at which the trial judge adjudicates challenges for cause also has the potential to favor the prosecution, given the racial disparity between the jurors targeted for removal by prosecution and defense and the vulnerability of judges to the same kinds of implicit racial bias that affect the rest of the population.<sup>164</sup> Finally, the “target group” that the prosecution most frequently selects for peremptory challenges tends to be made up of people of color.<sup>165</sup> People of color are not only often in the minority to begin with,<sup>166</sup> but they are also disproportionately excluded from jury service through the various stages of jury selection that precede the peremptory challenge, including the response to summonses,<sup>167</sup> statutory disqualifications,<sup>168</sup> and the granting of hardship exemptions.<sup>169</sup> This leaves less work for the prosecution to do at the peremptory challenge stage. The explanation from one judge, therefore, for why his state needed to move to symmetrical peremptory challenge allocation—that “[t]he purpose of specifically limiting and allocating peremptory

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disqualification.”). Some public defense offices permit client choice; a proposal for more widespread choice in this area has recently gained traction. See Adam Liptak, *Need-Blind Justice*, N.Y. TIMES (Jan. 4, 2014), <http://www.nytimes.com/2014/01/05/sunday-review/need-blind-justice.html>.

161. See *Duren v. Missouri*, 439 U.S. 357 (1979).

162. See *State v. Buggs*, 581 N.W.2d 329, 346 (Minn. 1998) (Page, J., dissenting) (citing Minnesota Supreme Court’s Task Force Report for notion that “jury pools rarely are representative of the racial composition of a community”); MINN. SUPREME COURT TASK FORCE ON RACIAL BIAS IN THE JUDICIAL SYS., *supra* note 91, at 36 (1993).

163. See *United States v. Jackman*, 46 F.3d 1240 (2d Cir. 1995); see also Ogletree, *supra* note 113, at 1150 (“The correct response to [the problem of apparent unfairness in an all-white jury acquitting a white defendant of a crime against a black victim] is to assure that the jury pool does not exclude minorities.”).

164. See Rachlinski et al., *supra* note 155, at 1196–97.

165. See Baldus et al., *supra* note 116, at 48.

166. See *id.* at 128.

167. See Nina W. Chernoff, *Wrong About the Right: How Courts Undermine the Fair Cross-Section Guarantee by Confusing It with Equal Protection*, 64 HASTINGS L.J. 141, 176–78 (2013).

168. See Roberts, *supra* note 29, at 602 (“Because rates of criminalization vary according to race, jury exclusions relying on criminal records have a disparate impact . . .”).

169. See Natalie A. Pifer, Berghuis v. Smith: *Continuing Ambiguity in Fair-Cross-Section Claims*, 44 LOY. L.A. L. REV. 1035, 1038 (2011).

strikes by statute or rule is so one side cannot unfairly ‘stack the deck’ against the other<sup>170</sup>—overlooks the extent to which the deck may already have been stacked by the time peremptory challenges become available.<sup>171</sup> Another claim, by Akhil Reed Amar, that choosing the first twelve jurors will keep the jury as close as possible to a cross-section of the community, overlooks the extent to which racially disparate filtering has already occurred by the time that peremptory challenges begin.<sup>172</sup>

The biases harbored by jurors—both explicit and implicit—also tend to favor the prosecution.<sup>173</sup> The explicit biases include widespread assumptions that police and prosecutors are unimpeachable,<sup>174</sup> that the guilt of the accused is likely,<sup>175</sup> and that the presumption of innocence is a fiction.<sup>176</sup> The implicit biases of jurors, like those of the majority of the population,<sup>177</sup> tend to disfavor people of color, and thus a disproportionate number of criminal defendants.<sup>178</sup> These implicit biases can affect all of the main tasks that jurors are called upon to perform: evaluation of evidence,<sup>179</sup> evaluation of behavior,<sup>180</sup> recall of facts,<sup>181</sup> and judgment of

170. *Morgan v. Commonwealth*, 189 S.W.3d 99, 138 (Ky. 2006) (Cooper, J., dissenting) (“[T]he General Assembly and, subsequently, this Court have gradually recognized that in criminal cases, as has always been true in civil cases, there should be a level playing field between prosecution and defense.”), *overruled by* *Shane v. Commonwealth*, 243 S.W.3d 336 (Ky. 2007).

171. *See* Ogletree, *supra* note 113, at 1143 (“The defendant’s peremptory challenge has sometimes been called a historic protection against governmentally ‘stacked decks.’”).

172. *See* Amar, *supra* note 9, at 1182 (“By and large, the first twelve persons picked by lottery should form the jury. The jury—and not just the venire—should be as cross-sectional of the entire community of the whole people as possible. Peremptory challenges should be eliminated: they allow repeat-player regulars—prosecutors and defense attorneys—to manipulate demographics and chisel an unrepresentative panel out of a cross-sectional venire.”).

173. *See* Ogletree, *supra* note 113, at 1147–48 (“Inasmuch as statistics show that more venirepersons in most criminal trials are likely to be biased against the defendant than for him or her, the defense peremptory serves as a necessary corrective in a way that the state’s challenge simply does not. The additional control over jury composition which peremptory challenges give to defendants is arguably necessary in order to counteract the proprosecution bias which would be found in a random population sample.”).

174. *See* Nancy Gertner, *Is the Jury Worth Saving?*, 75 B.U. L. REV. 923, 931 (1995) (reviewing STEPHEN J. ADLER, *THE JURY: TRIAL AND ERROR IN THE AMERICAN COURTROOM* (1994)) (“The public, with few exceptions, has enormous faith in the skill and integrity of police and prosecutors.”).

175. *See id.* (“Studies regularly suggest that juries believe that because someone is accused, they are likely to be guilty.”); Ogletree, *supra* note 113, at 1143 (“Most prospective jurors enter the courtroom prepared to convict an accused . . .”).

176. *See* Toni M. Massaro, *Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C. L. REV. 501, 518 n.102 (1986) (noting studies that suggest that sixty percent of Americans reject the presumption of innocence).

177. *See* Roberts, *supra* note 27, at 849–50.

178. *See* Levinson et al., *supra* note 96, at 189–90.

179. *See* Roberts, *supra* note 27, at 830.

180. *See id.*

181. *See id.*

guilt.<sup>182</sup> While of course the prosecution may rely on witnesses who are people of color and therefore vulnerable to the jurors' implicit bias,<sup>183</sup> the findings of implicit bias research are particularly alarming in the case of African-American defendants. Jurors' implicit biases not only involve negative attitudes and stereotypes regarding African Americans,<sup>184</sup> but specifically involve an association of African Americans with violence,<sup>185</sup> weaponry,<sup>186</sup> and guilt.<sup>187</sup> The assumptions of guilt are not harmless mental quirks: they predict the ways in which jurors evaluate ambiguous evidence.<sup>188</sup>

These implicit biases, statistically most likely to favor the prosecution's efforts, go unmentioned and unaddressed in the majority of courthouses in this nation.<sup>189</sup> Only a few judges have introduced innovations that aim to guard against this risk.<sup>190</sup> Moreover, the realities of trial can in fact serve to *reinforce* potential jurors' pro-governmental biases, first because of a process of acculturation to governmental norms,<sup>191</sup> and second because of jurors' ruminations on the potentially disturbing implications of a not guilty verdict.<sup>192</sup>

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182. *See id.*

183. *See id.*

184. *See id.* at 833 (“Implicit biases’ are discriminatory biases based on either implicit *attitudes*—feelings that one has about a particular group—or implicit *stereotypes*—traits that one associates with a particular group. They are so subtle that those who hold them may not realize that they do.”).

185. *See id.*

186. *See id.*

187. *See* Levinson et al., *supra* note 96, at 190 (demonstrating that mock jurors “held strong associations between Black and Guilty, relative to White and Guilty, and [that] implicit associations predicted the way mock jurors evaluated ambiguous evidence”).

188. *See id.*

189. *See* Roberts, *supra* note 27, at 830 (explaining that “[j]uries are generally told nothing about implicit bias,” whether in juror orientation or in individual courtrooms).

190. *See id.* at 859 (describing efforts of District Court Judge Mark Bennett to counteract implicit juror bias); Janet Bond Arterton, *Unconscious Bias and the Impartial Jury*, 40 CONN. L. REV. 1023, 1029–30 (2008) (outlining attempts during voir dire to guard against the effects of implicit racial bias). The work of North Carolina District Court Judge Louis Trosch to develop a “bench card” for judges in juvenile court, to ensure that they ask a uniform set of questions in making an initial determination about whether to order detention, provides a good example of state judicial efforts. *See Right from the Start: The Courts Catalyzing Change Preliminary Protective Hearing Benchcard*, NAT’L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES (Mar. 1, 2010), <http://www.ncjfcj.org/resource-library/publications/right-start-courts-catalyzing-change-preliminary-protective-hearing-0> (judicial materials); Wash. & Lee Univ. Sch. of Law, *Implicit Bias: MLK Day Speaker Judge Louis A. Trosch ’88*, YOUTUBE (Jan. 22, 2013), <http://www.youtube.com/watch?v=8xTXnkqQ-OQ> (Judge Trosch discussing these initiatives).

191. *See* Justin D. Levinson, *Suppressing the Expression of Community Values in Juries: How “Legal Priming” Systematically Alters the Way People Think*, 73 U. CIN. L. REV. 1059 (2005).

192. *See* Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 GEO. L.J. 945, 1007 n.300 (1998) (“[B]y the time the trial occurs, most jurors have

Finally, the resources of the prosecution tend to be greater than those of the defense.<sup>193</sup> The vast majority of criminal defendants rely on government-provided attorneys,<sup>194</sup> many of whom carry extraordinarily high caseloads.<sup>195</sup> The resource advantage affects the entire course of the trial, including jury selection, in which the prosecution has greater access to the type of investigation that helps bring to light valid grounds to remove potential jurors “for cause.”<sup>196</sup>

Given these various advantages possessed by the government, the need for the peremptory challenge seems stronger in the case of the defense. Two additional factors support this notion. First, empirical data provide some support for the idea that the defense is better able to make effective use of the peremptory challenge.<sup>197</sup> Recent research suggests that since the criminal defendant is statistically more likely than the prosecutor to be a

every reason *ex ante* to want a conviction and little reason to desire an acquittal. If the jury convicts, (1) it confirms that the police and prosecutor brought the right person to trial, (2) it removes a dangerous person from society, and (3) it gives some comfort to the victim that justice has been done. But if a jury acquits, it almost always means that (1) the wrong person was arrested, and the real guilty person is still at large, or (2) the right person was arrested, but the prosecution failed to put on a convincing case, or the trial process was otherwise mishandled.”)

193. See Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y. L. SCH. L. REV. 911, 912 (2011) (“The current American system is marked by an adversary process so compromised by imbalance between the parties—in terms of resources and access to evidence—that true adversary testing is virtually impossible.”).

194. See Thomas H. Cohen, *Who’s Better at Defending Criminals? Does Type of Defense Attorney Matter in Terms of Producing Favorable Case Outcomes* (July 1, 2011) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1876474](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1876474), at 15 (most recent data indicate that in felony cases in the nation’s seventy-five most populous counties, seventy-nine percent of defendants are represented by either public defenders or assigned counsel, while only twenty percent are represented by private counsel).

195. See L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2631–32 (2013).

196. See Lester B. Orfield, *Trial Jurors in Federal Criminal Cases*, 29 F.R.D. 43, 52 (1962) (stating that the reasons given by the Bar Committee for the Western District of Tennessee for always providing the defense with more challenges than the government include the fact that “the defendant’s attorney does not have the means to investigate the background of prospective jurors, and so must rely more on hunches than the government”).

197. See 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, 519 (1978) (noting that strikes by the defense are more likely to “work,” and that “cases in which peremptory challenges have an important effect on the verdict occur with some frequency”). Some caution is needed in assessing the empirical data in this area. The Zeisel & Diamond study, which is “the only controlled study of peremptory strikes on record,” Ogletree, *supra* note 113, at 1146, has become the most influential empirical study in this area. See Roger Allan Ford, *Modeling the Effects of Peremptory Challenges on Jury Selection and Jury Verdicts*, 17 GEO. MASON L. REV. 377, 387–88 (2010). The study is thirty-five years old and also contains warnings that “the [twelve] cases that formed the basis of [their] study are not a probability sample of anything,” and that the experiment “should be regarded as only the first step toward an understanding of the effect of peremptory challenges on jury verdicts.” Zeisel & Diamond, *supra*, at 493 (describing the results as “preliminary,” the conclusions as “tentative[],” and the sample as possibly “biased”).

target of bias,<sup>198</sup> criminal defendants have a greater chance than the prosecutor of being able to detect juror bias.<sup>199</sup> Second, while the peremptory challenge is not a constitutional right,<sup>200</sup> it serves to help secure constitutional rights to an impartial jury and a fair trial.<sup>201</sup> These constitutional rights, as well as the constitutionally protected values of life and liberty, are at stake for defendants, and not for the prosecution.<sup>202</sup>

These differences in the application of the peremptory-challenge critiques to prosecution and defense tend not to be emphasized by the judges calling for abolition.<sup>203</sup> That may be understandable. At least some of the asymmetry stems from inequities in the court system over which the judges preside. Yet this silence, and the move from critique to blanket condemnation that it permits, risks imposing, in the words of Katherine Goldwasser, “the cost of the disparity between our aspirations and our reality on individual criminal defendants, rather than on society as a

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198. See EQUAL JUSTICE INITIATIVE, *supra* note 56, at 41–42 (contrasting the demographics of defendants with those of prosecutors).

199. See Jennifer A. Richeson & J. Nicole Shelton, *Brief Report: Thin Slices of Racial Bias*, 29 J. NONVERBAL BEHAVIOR 75 (2005) (finding that African Americans, and probably other marginalized races, have an advantage in detecting bias in others because they are more sensitive to bias, as a result of being inundated by it); Samuel R. Sommers & Michael I. Norton, *Lay Theories About White Racists: What Constitutes Racism (and What Doesn't)*, 9 GROUP PROCESSES & INTERGROUP REL. 117, 134 (2006) (“[N]on-Whites are more likely to consider subtle forms of bias to be indicative of racism than are Whites.”); see also *Betts v. United States*, 132 F. 228, 235 (1st Cir. 1904) (“[T]he right to challenge peremptorily . . . is among the most useful weapons of defense put in the hands of an accused person. It is the only method of cutting off underground, malevolent currents, visible at some times to no one except the accused and his counsel, and sometimes not even to both of them. Without its uncontrolled exercise, justice would be absolutely unobtainable in many cases.”).

200. *Georgia v. McCollum*, 505 U.S. 42, 57 (1992); Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 825 (1997) (“The Constitution is and always has been utterly silent when it comes to the peremptory challenge.”).

201. See *McCollum*, 505 U.S. at 57 (“[P]eremptory challenges are not constitutionally protected fundamental rights; rather, they are but one state-created means to the constitutional end of an impartial jury and a fair trial. This Court repeatedly has stated that the right to a peremptory challenge may be withheld altogether without impairing the constitutional guarantee of an impartial jury and a fair trial.”); *Holland v. Illinois*, 493 U.S. 474, 481–82 (1990) (“One could plausibly argue (though we have said the contrary) that the requirement of an ‘impartial jury’ impliedly *compels* peremptory challenges.”); Maureen A. Howard, *Taking the High Road: Why Prosecutors Should Voluntarily Waive Peremptory Challenges*, 23 GEO. J. LEGAL ETHICS 369, 372 n.16 (2010) (“[B]ecause the purpose of the peremptory challenge is a back-up for the for-cause challenge and a further guarantee of juror impartiality, it is noteworthy that only the defendant, and not the government, has a constitutional guarantee of an impartial jury under the Sixth Amendment.”); *id.* at 379 (noting that for cause challenges are constitutionally guaranteed to criminal defendants, “as the primary method by which the court endeavors to seat an impartial jury in satisfaction of the Sixth Amendment”).

202. See *Ogletree*, *supra* note 113, at 1147 (“If the state loses, it does not lose its liberty, as the defendant does if he or she loses.”).

203. See, e.g., *State v. Saintcalle*, 309 P.3d 326, 348 (Wash. 2013) (González, J., concurring) (no mention of asymmetrical application of critiques).

whole.”<sup>204</sup> The next Part urges that trends from asymmetry to symmetry in peremptory challenge allocation be reversed, so that this cost can be more equitably distributed.

### III. PRESERVING ASYMMETRICAL APPROACHES

Part II demonstrated that several of the leading critiques of the *Batson* regime and of peremptory challenges apply with more force to the prosecution’s peremptory challenges than to the defense’s peremptory challenges. This asymmetry in application militates in favor of an asymmetrical approach to the question of the peremptory challenge, rather than across-the-board abolition.

This Part uncovers an asymmetrical approach to the peremptory challenge that is quietly being erased and suggests that the erasure should be halted and reversed. The asymmetry, laid out in Subpart A, is in the allocation of peremptory challenges to the prosecution and the defense. Numerous states have moved away from an asymmetrical allocation of peremptory challenges that provided a greater number to defense than to prosecution. Subpart B suggests that reversing this trend will be beneficial not only in the peremptory context but as a concrete form of resistance to a broader criminal justice trend toward symmetry, and, potentially, away from the fairness that asymmetry can help guarantee.

#### A. *Asymmetrical Allocations of Peremptory Challenges*

##### 1. *Origins of Asymmetrical Allocations*

The allocation of peremptory challenges in the United States is rooted in asymmetry. At the time of their importation from England, peremptory challenges were the “exclusive right” of defendants.<sup>205</sup> The English Parliament had passed a statute in 1305 that eliminated the government’s peremptory challenge and allocated thirty-five to the defense.<sup>206</sup> This

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204. Goldwasser, *supra* note 72, at 838.

205. Frederic M. Bloom, *Information Lost and Found*, 100 CAL. L. REV. 635, 651 (2012); *see also* Orfield, *supra* note 196, at 94. This right, however, seems to have been rarely exercised. *See* Hoffman, *supra* note 200, at 821 (“[T]he actual use of the peremptory challenge in English criminal trials appears almost nonexistent over its entire seven-hundred-year history, and rare even at its zenith.”).

206. VAN DYKE, *supra* note 73, at 147. The picture is complicated, however, by the existence of a common law procedure known as “standing aside,” which was available to the prosecution in England, and in some of the colonies, and which resembled a hybrid of the modern challenge for cause and peremptory challenge. *Id.* at 148 (noting that “[c]ourt practice thus allowed the crown to continue a procedure that Parliament had explicitly eliminated”).

allocation of peremptory challenges to defendants was adopted as part of the common law in the early colonial and state courts in North America.<sup>207</sup>

The first federal statute allocating peremptory challenges, enacted in 1790, allocated peremptory challenges only to the defense.<sup>208</sup> The second federal statute, passed in 1865, allocated a small number of peremptory challenges to the prosecution,<sup>209</sup> with more for the defense.<sup>210</sup> While a symmetrical allocation of peremptory challenges was considered during the drafting of the Federal Rules of Criminal Procedure, the proposal was rejected,<sup>211</sup> and ever since those Rules came into effect in 1946, they have allocated more peremptory challenges to the defense than to the prosecution in non-capital felonies.<sup>212</sup> Once states began devising their own statutory allocations, they typically awarded them only to criminal defendants.<sup>213</sup> By 1870, almost all states allocated some peremptory

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207. *Id.* at 148. Some states continued to authorize “standing aside,” however. *Id.* at 149.

208. This statute awarded peremptory challenges to the defense in trials for treason and other offenses punishable by death. *See Morgan v. Commonwealth*, 189 S.W.3d 99, 128 (Ky. 2006) (Cooper, J., dissenting) (“In 1790, Congress enacted An Act for Punishment of Certain Crimes Against the United States, ch. 9, § 30, 1 Stat. 119 (1790), which explicitly afforded the defendant thirty-five peremptory challenges if charged with treason and twenty if charged with any other capital offense. No provision was made either for peremptory strikes by the prosecution or for the common law practice of ‘standing aside.’”), *overruled by* *Shane v. Commonwealth*, 243 S.W.3d 336 (Ky. 2007). There is some indication that prosecutorial challenges were permitted in trials not covered by the act, and even that some were permitted in trials that were covered by the act. *See United States v. Marchant*, 25 U.S. (12 Wheat.) 480, 483 (1827) (asserting in dictum that “standing aside” had been inherited as common law from England); *but see United States v. Shackelford*, 59 U.S. (18 How.) 588, 590 (1855) (clarifying that “standing aside” was not rooted in federal common law).

209. Bloom, *supra* note 205, at 651 (“In 1865, Congress provided for a small number of prosecutor peremptories in federal criminal trials—and many states followed suit.”); Note, *Due Process Limits on Prosecutorial Peremptory Challenges*, 102 HARV. L. REV. 1013, 1033 n.129 (1989) (“[W]hen Congress first provided for peremptories, it gave them only to defendants. Although courts implied a government right of peremptory challenge, Congress did not grant one by statute until 1865.”).

210. *See Orfield, supra* note 196, at 95 (noting that in capital cases the defendant was given twenty and the government five, whereas in other cases the defendant was given ten and the government two).

211. *See id.* at 44 (discussing initial draft of Federal Rules that provided that “[t]he number of peremptory challenges which will be permitted to the defendant or his attorney and the number which shall be permitted to the defendant shall be the same”).

212. *See id.* at 53 (“If the offense was punishable by imprisonment for more than one year the government was to have six challenges but the defendant or defendants jointly were to have ten.”); FED. R. CRIM. P. 24(b)(2) (in non-capital felony cases, “[t]he government has 6 peremptory challenges and the defendant or defendants jointly have 10 peremptory challenges”).

213. *See Goldwasser, supra* note 72, at at 828. Some state courts held that the prosecution’s right to the “standing aside” procedure as to some jurors survived these statutes; others held the opposite.



challenges to the prosecution,<sup>214</sup> but these early statutes typically awarded a smaller number to the prosecution than to the defense.<sup>215</sup>

## 2. *Contemporary Methods of Allocation*

Currently, each state fixes the number of peremptory challenges available to each side by statute,<sup>216</sup> procedural rule,<sup>217</sup> or both.<sup>218</sup> While peremptory challenges are not constitutionally required,<sup>219</sup> every state allocates a certain number of peremptory challenges to the defense and a certain number to the prosecution.<sup>220</sup> The number of peremptory challenges allocated frequently varies according to the seriousness of the charge.<sup>221</sup> A particular state may allocate a symmetrical number of peremptory challenges for one type of charge (misdemeanors, for example), while allocating an asymmetrical number for another type of charge (felonies, or capital felonies, for example).<sup>222</sup>

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214. See Hoffman, *supra* note 200, at 827 & n.93 (noting that “the slave states were first to enact statutes giving the peremptory challenge to the prosecution, with Alabama and Georgia leading the way in 1802 and 1833, respectively”) There were holdouts, however. See VAN DYKE, *supra* note 73, at 148–49 (“The two most populous states, New York and Virginia, both denied the prosecution any peremptory challenges for most of the nineteenth century.”).

215. See Goldwasser, *supra* note 72, at 828 (“Even after statutes began to allow prosecution peremptories, most jurisdictions gave a greater number of peremptories to the defense.”); VAN DYKE, *supra* note 73, at 167 (“It would clearly not be revolutionary to deprive the prosecution of its right to challenge without explanation. The two most populous states in the first century of this country’s existence operated under such a system. New York, which had abolished the standing aside privilege by statute in 1786, did not accord the state peremptory challenge rights until 1881. The state of Virginia, which never recognized the practice of standing aside, did not allow the prosecution peremptory challenges until 1919.”) When Maryland was founded as a colony, only the defendant was afforded peremptory challenges: thirty-five in cases of treason and twenty in other felony cases. See *Booze v. State*, 698 A.2d 1087, 1091 (Md. 1997). It was “not until 1860 that the State was allowed peremptory challenges in criminal cases, and then only in Baltimore City, where it was allowed five.” *Id.*

216. See, e.g., 1982 Ala. Acts No. 82-221, 267 (establish “one-for-one strikes in criminal cases”).

217. See, e.g., KY. R. CRIM. P. 9.40(1).

218. See, e.g., 1995 Tenn. Pub. Acts 339, § 1 (equalizing the number of peremptory challenges in all types of offense); TENN. R. CRIM. P. 24(e) (allocating equal numbers of peremptory challenges to prosecution and defense).

219. See *supra* notes 200–01 and accompanying text.

220. See Hoffman, *supra* note 200, at 827 (“Today, every state recognizes some form of peremptory challenges for both sides in criminal and civil cases.”).

221. See, e.g., DEL. CT. C.P.R. 24 (in capital cases, twelve for prosecution, and twenty for defense; otherwise symmetrical).

222. See, e.g., *id.*

### 3. *Trend Toward Symmetry*

In the decade before *Batson*, twenty states, in addition to the federal system, allocated peremptory challenges in an asymmetrical fashion, with more allocated to the defense than the prosecution with respect to at least some types of charges.<sup>223</sup> The consistent trend since then, however, has been toward symmetry,<sup>224</sup> and the number of jurisdictions espousing some form of asymmetry has decreased by more than fifty percent, to nine states

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223. See FED. R. CRIM. P. 24(b) (in non-capital felonies, six for prosecution and ten for defense); ALA. CODE tit. 30 § 60 (1980) (“struck jury” system, in which the defendant removes two jurors from the list for each one removed by the government); ALASKA R. CRIM. P. 24 (in felonies, six for prosecution and ten for defense); ARK. CODE ANN. § 16-33-305 (1936) (in capital cases, ten for prosecution and twelve for defense; in non-capital felonies, six for prosecution and eight for defense); DEL. SUPER. CT. CRIM. R. 24; DEL. CT. C.P.R. 24 (in capital cases, twelve for prosecution, and twenty for defense); GA. CODE ANN. § 15-12-165 (1982) (in capital cases, ten for prosecution and twenty for defense; in non-capital felonies, six for prosecution and twelve for defense; in misdemeanors, six for prosecution and twelve for defense); KY. R. CRIM. P. 9.40 (1978) (in capital cases, five for prosecution and eight for defense; in non-capital felonies, five for prosecution and eight for defense); ME. REV. STAT. tit. 15, § 1258 (1980); ME. R. CRIM. P. 24(3) (1983) (in murder cases, ten for prosecution and twenty for defense); MD. CODE ANN., CRIM. PROC. § 4-313 (West 1984) (in capital cases, ten for prosecution and twenty for defense); MICH. COMP. LAWS ANN. §§ 768.12, 768.13 (West 1982) (in capital cases, fifteen for prosecution and twenty for defense); MINN. R. CRIM. P. 26.02(6) (in capital cases, nine for prosecution and fifteen for defense; in non-capital felonies, three for prosecution and five for defense); MO. REV. STAT. §§ 546.180 (asymmetry in all types of offense); 1933 Neb. Laws 243 (in cases where “the offense is punishable with death or imprisonment for life,” ten for prosecution and twelve for defense); N.H. REV. STAT. ANN. §§ 606:3, 606:4 (2014) (in capital cases other than first-degree murder, ten for prosecution and twenty for defense); N.J. STAT. ANN. § 2B:23-13 (West 2007) (in capital cases, twelve for prosecution, twenty for defense); N.M. DIST. CT. R. CIV. P. 5-606 (in capital cases, eight for prosecution and twelve for defense; in non-capital felonies, three for prosecution and five for defense; in misdemeanors, three for prosecution and five for defense); N.C. GEN. STAT. ANN. § 15A-1217 (West 1977) (moving the state from unequal to equal allocations); OR. REV. STAT. § 136.230 (1981) (in capital cases, six for prosecution and twelve for defense; in non-capital felonies, three for prosecution and six for defense; in misdemeanors, three for prosecution and six for defense); S.C. CODE ANN. § 14-7-1110 (1976) (in capital cases, five for prosecution and ten for defense); TENN. R. CRIM. P. 24(d) (in capital cases, eight for the prosecution and fifteen for the defense; in non-capital felonies, four for the prosecution and eight for the defense); W. VA. R. CRIM. P. 24(b); W. VA. CODE § 62-3-3 (2014) (in capital cases, two for the prosecution and six for the defense; in non-capital felonies, two for the prosecution and six for the defense).

224. This trend has involved eleven states moving to symmetry between 1977 and 2006. It appears to have been fueled by the recommendations of two national organizations in the 1970s. See NAT’L ADVISORY COMM’N ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT ON THE COURTS 100 (1973) (“[R]egardless of the number of peremptory challenges allocated to the defense, the prosecution should be allowed to exercise an equal number. Unless the prosecution is afforded this opportunity, the defense has an unjustifiable opportunity to select a jury biased in its own behalf.”); NAT’L CONFERENCE OF COMM’RS ON UNIFORM STATE LAWS, UNIFORM RULES, Rule 512(d) (1974) (“Each side is entitled to . . . peremptory challenges.”); N.C. GEN. STAT. ANN. § 15A-1217 (West 1977) (Editor’s Note stating that the equalization was done to “follow[] the lead” of these organizations). An earlier group of twenty-seven states moved to symmetry between 1854 and 1939: Rhode Island, Colorado, Illinois, Massachusetts, Mississippi, Idaho, Iowa, Nevada, Florida, Vermont, Texas, Pennsylvania, Connecticut, South Dakota, Wisconsin, Virginia, Washington, Montana, California, North Dakota, Ohio, Louisiana, Arizona, Hawaii, Kansas, Wyoming, and New York.

plus the federal system.<sup>225</sup> Further, in two of the states whose allocations are currently asymmetrical—South Carolina and West Virginia—the past year saw legislative proposals to move from asymmetry to symmetry.<sup>226</sup> In two additional states—Minnesota and New Jersey—earlier unsuccessful efforts were made to erase the asymmetry.<sup>227</sup> Repeated efforts to obtain symmetry have also been made in the federal system.<sup>228</sup>

The state in which *Batson* originated—Kentucky—provides a good example of the general trend. In that state more than any other, there might have been concern about broad prosecutorial allocation of peremptory challenges. However, the trend toward symmetry has been constant.<sup>229</sup>

225. Since the 1970s, asymmetry has been abandoned in Alabama, Alaska, Georgia, Kentucky, Maine, Michigan, Missouri, Nebraska, North Carolina, Oregon, and Tennessee. *See* 1982 Ala. Acts No. 82-221, 267 (“establish[ing] one-for-one strikes in criminal cases”); ALASKA R. CRIM. P. 24 (Editor’s Notes to SCO 1204: “The provision granting ten peremptory challenges to each side [for felonies] was added by ch. 117 § 1 SLA 1994.”); 2005 Ga. Laws, Act 8, § 7 (same number for each side in misdemeanor, felony, and death penalty cases); KY. R. CRIM. P. 9.40(1) (same number for each side in both felony and misdemeanor cases); Order Amending Rules of Civil Procedure, Rules of Criminal Procedure, Rules of Supreme Court, 94-1, at 8 (eff. Oct. 1, 1994); ME. R. CRIM. P. 24(c)(3) (same number for each side in all kinds of cases); 1 CLUCHEY & SEITZINGER, *supra* note 24, at 24-6.1 (quoting Advisory Committee Note relating to 1991 Amendment, which stated that “[t]he Advisory Committee sees no reason to continue the practice of giving to a defendant in a murder case twice as many peremptory challenges as are given to the state”); MICH. R. CRIM. P. 6.412(E)(2) (equalizing the peremptory challenges for defense and prosecution); MICH. COMP. LAWS ANN. § 768.13 (West 2006) (same, in order “to conform [the Code of Criminal Procedure] with current court rules”); MO. REV. STAT. § 494.480 (1979); 1981 Neb. Laws LB 213, § 1 (twelve peremptory challenges for each side in cases where “the offense is punishable with death or imprisonment for life”); N.C. GEN. STAT. ANN. § 15A-1217 (West 1977); OR. REV. STAT. § 136.230 (1987) (in trials involving charges “punishable with imprisonment in . . . the penitentiary for life” or “capital offense[s],” twelve peremptory challenges for each side; six for each side in all other cases); 1995 Tenn. Pub. Acts 339, § 1 (equalizing the number of peremptory challenges in all types of offense); TENN. R. CRIM. P. 24(e) (amended in 2006 to conform the rule to TENN. CODE ANN. § 40-18-118).

226. *See* H.B. 3188, 2013–14 Leg., 120th Sess. (S.C. 2014) (a bill to equalize the number of peremptory challenges for the defendant and the state in a criminal case); S.B. 0270, 2013–14 Leg., 120th Sess. (S.C. 2014); S.B. 87, 2013 Leg., Reg. Sess. (W. Va. 2014) (changing the number of challenges in jury selection in felony cases); H.B. 2892, 2013 Leg., Reg. Sess. (W. Va. 2014).

227. *See* State v. Dolan, No. C5-99-86, 1999 WL 1011967, at \*6 (Minn. Ct. App. Nov. 9, 1999); Symposium, *A Matter of Life and Death: New Jersey’s Death Penalty Statute in the 21st Century*, 23 SETON HALL LEGIS. J. 249, 275 (1999) (remarks of The Honorable Richard A. Zimmer).

228. *See* Goldwasser, *supra* note 72, at 828 n.118 (“In 1977, the Supreme Court proposed a change that would have equalized the number of challenges in all federal criminal proceedings, but Congress rejected the proposal.”); Judith Heinz, *Peremptory Challenges in Criminal Cases: A Comparison of Regulation in the United States, England, and Canada*, 16 LOY. L.A. INT’L & COMP. L.J. 201, 216 n.84 (1993) (“Several new crime control bills are currently pending in the United States Congress, all of which would reduce the number of peremptory challenges accorded defendants from 10 to 6, thereby equalizing, in federal cases, the number of peremptory challenges available to the defense and prosecution.”); William T. Pizzi & Morris B. Hoffman, *Jury Selection Errors on Appeal*, 38 AM. CRIM. L. REV. 1391, 1415 n.123 (2001) (mentioning efforts to make the federal allocation symmetrical in 1976, 1990, and 1998).

229. *See* Morgan v. Commonwealth, 189 S.W.3d 99, 138 (Ky. 2006) (Cooper, J., dissenting), *overruled by* Shane v. Commonwealth, 243 S.W.3d 336 (Ky. 2007).

Prior to 1854, the defense received twenty peremptory challenges and the prosecution none.<sup>230</sup> In 1854, the allocation was changed to twenty and five,<sup>231</sup> in 1893 to fifteen and five,<sup>232</sup> in 1978 to eight and five,<sup>233</sup> and in 1994, eight years after *Batson*, to eight and eight.<sup>234</sup>

Efforts to equalize the allocation of peremptory challenges are explained on the basis that there is no apparent justification—other than attempting to give an unfair advantage to the defense—for maintaining asymmetry.<sup>235</sup> State legislators and members of the executive admit to ignorance about the historical picture<sup>236</sup> and bafflement about the current need for these provisions. In New Jersey, for example, one state legislator stated, in support of a proposal to equalize the number of peremptory challenges, that “no one has been able to explain to me why there should be this disparity, other than that you want to give advantage to the defense.”<sup>237</sup> The next Subpart provides that missing explanation.

### *B. Maintaining Asymmetry in Peremptory Allocations*

This Subpart proposes that the trend toward symmetrical allocation of peremptory challenges should be halted, and, where possible, reversed. Part II laid out some of the asymmetries that justify this approach. This Subpart lays out three additional justifications. First, asymmetry does not equate to unfairness and, indeed, has been a foundational component of

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230. *See id.*

231. *See id.*

232. *See id.*

233. *See id.*

234. *See id.*

235. *See* Symposium, *supra* note 227, at 276 (remarks of The Honorable Richard A. Zimmer); 1 CLUCHEY & SEITZINGER, *supra* note 24, at 24-6.1 (quoting Advisory Committee Note relating to 1991 Amendment to the Rules of Criminal Procedure, which stated that “[t]he Advisory Committee sees no reason to continue the practice of giving to a defendant in a murder case twice as many peremptory challenges as are given to the state”).

236. *See Hearing on S.B. 353 Before the H. Comm. on State Affairs, supra* note 24 (“Representative Ulmer inquired whether or not [a proposed bill designed to bring about symmetry] was similar to how the law was previously in the state of Alaska. She assumed at one point there had been an equal number and it was changed. If so, why was it changed and why is it being changed back. Chairman Vezey answered . . . [that] [t]he legal history of the change . . . went too far back for him to have knowledge of. . . Margot Knuth, Assistant Attorney General, Department of Law, answered Representative Ulmer’s question. . . [She] did not know why the discrepancy had existed for so many years.”).

237. Symposium, *supra* note 227, at 276 (remarks of The Honorable Richard A. Zimmer); *see also* 1 CLUCHEY & SEITZINGER, *supra* note 24, at 24-6.1 (quoting Advisory Committee Note relating to 1991 Amendment to the Rules of Criminal Procedure, which stated that “[t]he Advisory Committee sees no reason to continue the practice of giving to a defendant in a murder case twice as many peremptory challenges as are given to the state”).

efforts to create a fair criminal justice system. Second, asymmetrical allocation of peremptory challenges offers particular opportunities with respect to the difficulties of the *Batson* doctrine. Finally, asymmetrical allocation has potential value beyond the context of the peremptory challenge and *Batson*, in that it provides a concrete example of resistance to a troubling trend toward symmetry that is seeping into various aspects of criminal justice.

### *1. Asymmetry in Service of Fairness*

The notion of asymmetry in the allocation of peremptory challenges may be anathema to those for whom the notion of Justice, and her pair of scales, suggests that both sides in a trial must be treated equally in all respects.<sup>238</sup> Yet an examination of some of the core structures of the criminal justice system reveals that asymmetry is a central component of the system's design and of its attempts to achieve fairness.

The Constitution is of course asymmetrical, in that it guarantees rights to the defendant rather than the prosecution.<sup>239</sup> Thus one sees in the text of the Constitution that the defendant—and not the prosecution<sup>240</sup>—has the right to an impartial jury,<sup>241</sup> the right to confront adverse witnesses,<sup>242</sup> and the right not to be compelled to be a witness against him or herself.<sup>243</sup> Constitutional doctrine also provides that the defendant has the right to be presumed innocent unless and until proven guilty under the highly asymmetrical “beyond a reasonable doubt” standard;<sup>244</sup> greater access than

238. See *Batson v. Kentucky*, 476 U.S. 79, 107 (1986) (Marshall, J., concurring) (quoting *Hayes v. Missouri*, 120 U.S. 68, 70 (1887)) (rejecting notion that peremptory challenges should be prohibited for the prosecution but not the defense, on the basis that “[o]ur criminal justice system ‘requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held’”).

239. See *Georgia v. McCollum*, 505 U.S. 42, 68 (1992) (O’Connor, J., dissenting) (“The concept that the government alone must honor constitutional dictates . . . is a fundamental tenet of our legal order, not an obstacle to be circumvented. This is particularly so in the context of criminal trials, where we have held the prosecution to uniquely high standards of conduct.” (citing *Brady v. Maryland*, 373 U.S. 83 (1963); *Berger v. United States*, 295 U.S. 78 (1935))); Barbara Flagg & Katherine Goldwasser, *Fighting for Truth, Justice, and the Asymmetrical Way*, 76 WASH. U. L.Q. 105, 109–11 (1998).

240. See Susan Bandes, *Taking Some Rights Too Seriously: The State’s Right to a Fair Trial*, 60 S. CAL. L. REV. 1019, 1019 (1987) (“Although an argument might be made that the state possesses rights, that argument would be difficult to support. Yet courts ascribing rights to the state do not even attempt to support their facile assumption.”).

241. See U.S. CONST. amend. VI.

242. See *id.*

243. See U.S. CONST. amend. V.

244. See *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (“[T]he requirement of proof beyond a reasonable doubt in a criminal case . . . [is] bottomed on a fundamental value

the prosecution to pretrial discovery,<sup>245</sup> including a right to the production of favorable material;<sup>246</sup> greater ability to appeal the outcome of a criminal case, thanks to the protections of double jeopardy;<sup>247</sup> and, because of the federal unanimous verdict requirement,<sup>248</sup> an ability—not shared by the prosecution—to “win” on the basis of just one juror vote.<sup>249</sup>

In addition to the constitutional allocation of rights, so also the roles of defense and prosecution are designed to be asymmetrical. The defense is to strive for acquittals, or the next best alternative, and is not obliged to seek other objectives.<sup>250</sup> The prosecution, however, is supposed to aim at objectives other than obtaining convictions. It is not for the prosecutor to tack “as many skins of victims as possible to the wall.”<sup>251</sup> Rather, the prosecutor has a distinct ethical (and constitutional) duty to “seek justice,”<sup>252</sup> which means something other than merely duking it out with an adversary.<sup>253</sup>

These asymmetries in rights and roles demonstrate that in the design of the criminal justice system there has been recognition that asymmetry may be the best route to fairness. This recognition has been obscured in the discussion of peremptory challenges. Representatives of state executives and the state judiciary frequently invoke the notions of “restoring balance”<sup>254</sup> and bringing about a “level playing field”<sup>255</sup> in support of a

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determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.”); Richard D. Friedman, *An Asymmetrical Approach to the Problem of Peremptories?*, 28 CRIM. L. BULL. 507, 518–19 (1992) (“Blackstone’s statement that it is better to let ten guilty defendants go free than to convict one innocent person may be a cliché, but it only became a cliché because it expresses a fundamental value. The principal expression of that value in our criminal law system is the standard of proof beyond a reasonable doubt . . .”).

245. See Mark A. Esqueda, Note, *Michigan Strives to Balance the Adversarial Process and Seek the Truth with Its New Reciprocal Criminal Discovery Rule*, 74 U. DET. MERCY L. REV. 317, 325 (1997).

246. See Richardson, *supra* note 142, at 357 (“Generally, defense lawyers are not required to disclose evidence favorable to the prosecution’s case or to inform the government of their client’s guilt.”).

247. These protections prevent the prosecution from appealing an acquittal. See *Fong Foo v. United States*, 369 U.S. 141 (1962).

248. See *Johnson v. Louisiana*, 406 U.S. 356, 362 (1972).

249. See Hoffman, *supra* note 200, at 852 n.193 (“[A] hung jury is ordinarily considered a victory for the defense . . .”).

250. See Howard, *supra* note 201, at 372.

251. *Donnelly v. DeChristoforo*, 416 U.S. 637, 648–49 (1974) (Douglas, J., dissenting).

252. See AM. BAR ASS’N, *supra* note 142, § 3-1.2 (“The duty of the prosecutor is to seek justice, not merely to convict.”).

253. See *id.*

254. See Press Release, Office of the Governor of Ga., Governor Perdue Signs Criminal Justice Act of 2005 (Apr. 5, 2005), available at [http://sonnyperdue.georgia.gov/00/press/detail/0,2668,780,06749\\_79688147\\_93022154,00.html](http://sonnyperdue.georgia.gov/00/press/detail/0,2668,780,06749_79688147_93022154,00.html) (“‘The Criminal Justice Act of 2005 revises provisions in Georgia’s criminal law that restore balance in the prosecution of criminal cases,’ said Governor Sonny

push for symmetry in the allocation of the peremptory challenge. Dissenting voices do occasionally pipe up in these discussions. For example, when Alaskan legislators considered a bill that would equalize the number of peremptory challenges, defense attorneys tried to point out that, because of some of the disparities described in this Article, asymmetrical peremptory challenge allocations were the best route to a level playing field.<sup>256</sup> Those arguments were unsuccessful,<sup>257</sup> but they should be given more prominence.

## 2. *Benefits of Asymmetry in the Context of the Peremptory Challenge*

While the proposal to resist symmetry in the allocation of peremptory challenges may appear to be a modest approach to some of the problems laid out in this Article, it presents significant opportunities. Subpart 3 will lay out the opportunities that it creates beyond the context of the peremptory challenge. This Subpart lays out the opportunities that it creates in the peremptory challenge context, some of which stem from its apparent modesty.

It is true that the proposal is in some ways modest. It takes a conservative approach, in that it seeks to return the peremptory challenge to its asymmetrical roots. It does not call for the ultimate asymmetry, namely abolition of the prosecutorial peremptory challenge. It also does

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Perdue.”); OR. REV. STAT. § 136.230 (1987) (“By this measure we seek to secure balanced justice by eliminating unbalanced rules.”).

255. See *Morgan v. Commonwealth*, 189 S.W.3d 99, 138 (Ky. 2006) (Cooper, J., dissenting) (describing the motivation for abandoning asymmetry in that state as a “gradual[] recogni[tion] that in criminal cases, as has always been true in civil cases, there should be a level playing field between prosecution and defense”), *overruled by* *Shane v. Commonwealth*, 243 S.W.3d 336 (Ky. 2007); *Peremptory Challenge for Jurors: Hearing on S.B. 353 Before the S. Comm. on the Judiciary*, 1993–94 Leg., 18th Sess. (Alaska 1994) (committee minutes) (Assistant Attorney General endorsing proposed move to symmetry because “it is appropriate to level the playing field”); *Hearing on S.B. 353 Before the H. Comm. on State Affairs*, *supra* note 24 (An Assistant Attorney General “did not care what the number [of peremptory challenges] was as long as there was a level playing field.”).

256. Alaska’s Deputy Public Defender tried to raise this point before the State Senate Judiciary Committee, stating that “she does not believe that the goals of the bill, to level the playing [field] and to save time and money, will be satisfied by passage of the legislation. She said when selecting [prospective] jurors, the goal is to get fair jurors, so the number being allocated on the defense side is recognition of the fact that we don’t start out evenly, that many people come into the court room with preconceived ideas and that it is necessary to give extra peremptory challenges in order to make sure that the presumption of innocence is followed by everyone in the court room.” *Hearing on S.B. 353 Before the S. Comm. on the Judiciary*, *supra* note 255. These sentiments were echoed by an attorney who testified before the same committee to the effect that “the playing field is relatively level right now and by changing it to six and six would make it a lot less even than it is right now and make it an unfair process. . . . [since] most people think that most criminal defendants are guilty when they walk in the room.” *Id.*

257. See ALASKA R. CRIM. P. 24 (symmetrical allocation).

not call for changes to the *Batson* doctrine. In the view voiced by one recent judicial opinion, it would therefore fall into the category of “half-measures”<sup>258</sup>: mere efforts to reduce the harms associated with the prosecutorial peremptory challenge.

There are, however, practical reasons for taking this apparently modest approach. Abolition of the prosecutorial peremptory challenge is a measure that has both historical precedent and contemporary adherents,<sup>259</sup> but despite its theoretical appeal, it seems unlikely as a practical matter.<sup>260</sup> Prosecutors, like other litigators, appear to be addicted to the peremptory challenge<sup>261</sup> and are ready and able to lobby for its retention.<sup>262</sup> Reforming the *Batson* doctrine is also far from an easy task. The state courts have been given twenty-eight years of flexibility in their implementation of it,<sup>263</sup>

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258. *State v. Saintcalle*, 309 P.3d 326, 348 (Wash. 2013) (González, J., concurring) (“There are half-measures that may reduce the amount of bias in the jury selection process, such as tighter control of questioning based on the federal court model or reduction of the number of peremptory challenges that may be exercised.”).

259. *See, e.g.*, Abbe Smith, *A Call to Abolish Peremptory Challenges by Prosecutors*, 27 *GEO. J. LEGAL ETHICS* 1163 (2014); Ogletree, *supra* note 113, at 1148 (“There is ample historical precedent for the allotment of peremptories to defendants but not to the government.”).

260. *See* Baldus et al., *supra* note 116, at 129 (“Judicial abolition . . . seems unlikely, as the United States Supreme Court and most state and federal courts appear content with the symbolic compromise they have created. The prospects of abolition by State legislatures seem equally unlikely.”).

261. *See* Georgia Wilemon, *Book Review*, 8 *B.U. PUB. INT. L.J.* 209, 210 (1998) (reviewing SUSAN ESTRICH, *GETTING AWAY WITH MURDER: HOW POLITICS IS DESTROYING THE CRIMINAL JUSTICE SYSTEM* (1998)) (“[S]ince both prosecutors and criminal defense lawyers would fight strongly to save them in their respective state legislatures, the proposal to end peremptory challenges is not practical.”).

262. *See* Rhea Arledge, *Number of Peremptory Challenges Provided to the Prosecution and Defense, Parity vs. Disparity*, *THE PROSECUTOR*, Mar./Apr. 2003, at 16, 16, 45 (decrying asymmetrical arrangements, on the grounds that “[t]he very procedure developed and intended to ensure that a fair and impartial jury is selected is often times applied to the prosecution, responsible for representing the people of the community, and the defense in an unfair manner,” and stating that “[i]t is imperative that prosecutors lobby for changes in court rules and state statutes that currently promote this inequality”); Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 *SYRACUSE L. REV.* 1079, 1091 (1993) (“Police and prosecutors face performance evaluations, and their performance is, perhaps understandably, judged by measuring the offenses cleared and convictions won, rather than by any positive changes in the rate of crime. It follows that these bureaucracies devote substantial effort to persuading legislators not to impose statutory restraints on their pursuit of these objectives.”); Adam M. Gershowitz, *Raise the Proof: A Default Rule for Indigent Defense*, 40 *CONN. L. REV.* 85, 120–21 (2007) (“[L]egislatures are inclined to give prosecutors what they want because their interests are aligned. Just like prosecutors, legislators want to highlight convictions and punishment that occurred on their watch. Second, legislators will listen to district attorneys’ demands because they will fear the consequences. Prosecutors frequently seek higher office, and the failure of legislators to eliminate obstacles to convicting defendants will provide a good campaign issue for the district attorneys.”); Richard Lempert, *The Economic Analysis of Evidence Law: Common Sense on Stilts*, 87 *VA. L. REV.* 1619, 1627–28 (2001) (“When prosecutors scream loudly, they are usually heard by legislators.”).

263. *See* *Batson v. Kentucky*, 476 U.S. 79, 97 (1986) (“We have confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the



and no winning solution has emerged. Indeed, a recent report into the implementation of *Batson* indicates that in many cases, state courts have undermined, rather than strengthened, its protections.<sup>264</sup> Courts considering adjustments to the *Batson* doctrine face tremendous new challenges, including whether and how a doctrine limited to protection against *purposeful* discrimination might be modified in order to take account of the growing data on implicit bias,<sup>265</sup> and whether and how they might respond to the Ninth Circuit's decision to recognize sexual orientation as a prohibited basis for peremptory challenges.<sup>266</sup> This Article's proposal is easier to effect than abolition or doctrinal change.<sup>267</sup> It aims to reduce the harm threatened by the prosecutorial peremptory challenge, while the *Batson* doctrine continues to evolve.<sup>268</sup> If the peremptory challenge is indeed an addiction, harm reduction may be the most feasible approach.<sup>269</sup>

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prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors.").

264. See EQUAL JUSTICE INITIATIVE, *supra* note 56, at 26; see also Ogletree, *supra* note 113, at 1105 ("Without clear direction from the Supreme Court as to its application, state and lower federal courts have interpreted the commands of *Batson* and its progeny differently and, in many cases, these interpretations have undermined the protection *Batson* was meant to offer.").

265. See Montoya, *supra* note 60, at 1024 ("*Batson* also fails to recognize that much discrimination in jury selection, like discrimination generally, is the product of unconscious racism and sexism.").

266. See *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (9th Cir. 2014); see also *State v. Saintcalle*, 309 P.3d 326, 360 (Wash. 2013) (González, J., concurring) ("[I]t remains unclear exactly which groups are to be protected from discrimination in jury selection.").

267. See Ogletree, *supra* note 113, at 1149 (pointing out the ease with which the legislative allocation of peremptory challenges could be altered).

268. See Robert William Rodriguez, Note, *Batson v. Kentucky: Equal Protection, the Fair Cross-Section Requirement, and the Discriminatory Use of Peremptory Challenges*, 37 EMORY L.J. 755, 793 (1988) ("With a reduction in the number of challenges that counsel could exercise, the peremptory challenge could return to its fundamental nature as arbitrary and capricious. Lacking the capability to systematically exclude all members of a single race from the petit jury, the urgent need for judicial review of the exercise of such challenges would be reduced significantly."); Baldus et al., *supra* note 116, at 130 (proposing the introduction in Pennsylvania of asymmetry, with the prosecution given five and the defense ten peremptories, on the grounds that this "would have significantly reduced race and gender discrimination and limited its adverse impact on the jury decision making system" and adding that "[i]f peremptories are critical to protect each side against truly oddball jurors, then fewer than five strikes should be enough").

269. See Ernest Drucker, *Drug Law, Mass Incarceration, and Public Health*, 91 OR. L. REV. 1097, 1099 (2013) (recommending harm reduction approach to drug use); Baldus et al., *supra* note 116, at 121 ("[A] dramatic reduction in the number of strikes available to each side, plus a larger share for defense counsel (10 vs. 5) would also eliminate the adverse effects of overly aggressive strike strategies by the two sides. And even though this alternative contemplates the continued influence of race and gender as substantial factors in the use of peremptories, the significant reduction in the number of authorized strikes would limit their possible damage. Also, the two-to-one advantage for defense counsel would offset somewhat the comparative advantage the Commonwealth currently enjoys in the competition to influence jury composition.").

Even though the approach may appear modest, the effects could be significant. First, reducing the number of prosecutorial peremptory strikes would help combat one of the ways in which lower court implementation has weakened the *Batson* doctrine. One common justification for rejecting a *Batson* challenge is that the prosecution had a number of peremptory challenges left over that were not used to remove others on the jury who share the same protected characteristics as those whose removal is being queried.<sup>270</sup> This argument is often used to support a finding that the party bringing the *Batson* challenge has failed even to make out a prima facie case of discrimination.<sup>271</sup> This argument, which the Supreme Court itself has rejected,<sup>272</sup> would be harder to mount were the prosecution's peremptory allocation to be reduced. Second, significant trial reform could be achieved. As one state Attorney General put it, "this type of nuts and bolts legislation can really make a difference in an extraordinary number of cases."<sup>273</sup>

### 3. *Benefits of Asymmetry Beyond the Context of the Peremptory Challenge*

This Subpart points out that resisting asymmetry in the peremptory challenge context has broader benefits, in that it helps reveal and reinforce the notion that throughout our criminal justice system asymmetry has been key to fairness. It also shows that the erosion of asymmetries that have been foundational to the structure of the criminal justice system needs to be scrutinized. The erosion of such asymmetries contributes to a public perception of the criminal justice system that fails to grasp its fundamental asymmetry. The trends in both perception and reality need to be resisted.

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270. See Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 95 n.466 (1990) ("Since *Batson* was decided, some courts have rejected a defendant's equal protection argument and showing of a prima facie case of purposeful discrimination, and have not required a prosecutor to provide a 'neutral reason' when the prosecutor allowed some black jurors to serve on the trial jury."); EQUAL JUSTICE INITIATIVE, *supra* note 56, at 26; Roberts, *supra* note 111, at 1394–96 (citing cases).

271. See Colbert, *supra* note 270, at 95 n.466.

272. See *Miller-El v. Dretke*, 545 U.S. 231, 240–41, 250 (2005) ("This late-stage decision to accept a black panel member willing to impose a death sentence does not . . . neutralize the early-stage decision to challenge a comparable venireman . . . . In fact, if the prosecutors were going to accept any black juror to obscure the otherwise consistent pattern of opposition to seating one, the time to do so was getting late.")

273. *Peremptory Challenge of Jurors: Hearing on S.B. 353 Before the S. Comm. on State Affairs*, 1993–94 Leg., 18th Sess. (Alaska 1994) (committee minutes) (statement of Ed McNally, Deputy Att'y Gen., Dep't of Law) (on whether to move to a symmetrical allocation of peremptory challenges).

a. *Constitutional Rights*

Each of the areas of constitutional asymmetry identified in Subpart 1 has been subject to incursions. In an era in which plea bargains are by far the most common means by which convictions are garnered,<sup>274</sup> all of the trial-related rights held up as foundational examples of asymmetry—rights to an impartial jury, to confront witnesses, to proof beyond a reasonable doubt, to a unanimous verdict—typically become moot.<sup>275</sup> The plea involves no jury, no confrontation, no verdict, and no requirement of proof beyond a reasonable doubt:<sup>276</sup> the standard of proof required for the acceptance of a plea is no higher than probable cause.<sup>277</sup> It is also constitutionally permissible for plea bargains to include waivers of other traditionally asymmetrical protections, such as the right to appeal,<sup>278</sup> the right to exculpatory material,<sup>279</sup> and the right to any pre-plea discovery.<sup>280</sup> Even when a trial does occur, threats to foundational asymmetries are apparent. First, the provision of pretrial discovery is increasingly required of the defense, rather than just the prosecution.<sup>281</sup> Second, several states have established provisions permitting non-unanimous jury verdicts, thus

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274. See Michael T. Cahill, *Retributive Justice in the Real World*, 85 WASH. U. L. REV. 815, 853 (2007) (“Well over ninety percent of cases are resolved with guilty pleas, almost all of which involve plea bargains . . .”).

275. See FED. R. CRIM. P. 11(b)(1)(F) (requiring the court, before accepting a plea of guilty, to advise the defendant of the trial rights that are waived if the court accepts the plea).

276. See Darryl K. Brown, *American Prosecutors’ Powers and Obligations in the Era of Plea Bargaining*, in THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE 200, 204 (Erik Luna & Marianne L. Wade eds., 2012) (“[W]hen pleas replace trials, most of the systemic components of public adjudication that serve the objectives of factual reliability and accurate normative judgment are missing—the jury, evidentiary disclosure, rules of evidence, formal adversarial challenges to state evidence, and so on.”).

277. See Anna Roberts, *Impeachment by Unreliable Conviction*, 55 B.C. L. REV. 563, 580–81 & n.133 (2014) (pointing out the fallacy in the impeachment context that convictions rest on proof beyond a reasonable doubt and therefore can reliably be used to bring about the secondary hardship of impeachment by prior conviction).

278. See Alexandra W. Reimelt, Note, *An Unjust Bargain: Plea Bargains and Waiver of the Right to Appeal*, 51 B.C. L. REV. 871, 873 (2010) (“Increasingly, many criminal defendants are required to waive their right to appeal as a condition of the plea bargain.”).

279. See *United States v. Ruiz*, 536 U.S. 622 (2002).

280. See Erica Hashimoto, *Toward Ethical Plea Bargaining*, 30 CARDOZO L. REV. 949, 949 (2008) (“[P]rosecutors in some jurisdictions require as a condition of all pleas that defendants waive any rights they may have to pre-plea disclosures from the government.”).

281. Compare *Williams v. Florida*, 399 U.S. 78, 81–82 (1970) (holding that the requirement that the defense give notice of alibi was not unconstitutional, particularly in light of the fact that the adversary system is not “a poker game,” but a “search for truth,” which is enhanced by giving each party equal access to the other side’s information), with *id.* at 111–14 (Black, J., dissenting) (claiming that majority failed to appreciate the importance of the defense’s constitutional rights to protection against state power, and that the parties were not on equal footing). See also Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541, 577.

creating the possibility of conviction by majority.<sup>282</sup> Finally, research into jurors' attitudes, explicit and implicit, is raising questions about the extent to which the right to an impartial jury can be realized,<sup>283</sup> and the extent to which jurors presume innocence unless and until the prosecution proves guilt beyond a reasonable doubt.<sup>284</sup>

In at least one of these areas—the risk that implicit bias may be threatening both impartiality and the standard of proof beyond a reasonable doubt—courts have not yet made significant efforts to address the threats to asymmetry.<sup>285</sup> The same may be true in the area of bias more generally.<sup>286</sup> Courts and other decision makers should remain vigilant about each of these threats, lest distinctive components of our asymmetrical system continue to be quietly eroded.<sup>287</sup>

*b. Roles of Prosecution and Defense*

A second area where foundational asymmetry is under threat is in the respective roles of prosecution and defense. The theory was laid out above<sup>288</sup>: the prosecutor has a special role—and, indeed, special ethical rules.<sup>289</sup> Whereas the defense attorney strives for acquittals or the next best alternative, and is not obliged to seek other objectives,<sup>290</sup> it is not the prosecutor's job solely to seek convictions. Rather, prosecutors have a distinct ethical (and constitutional) duty to “seek justice,”<sup>291</sup> which means

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282. Four states—Louisiana, Oregon, Idaho, and Oklahoma—currently permit non-unanimous verdicts in at least some criminal cases. See Kim Taylor-Thompson, *Empty Votes in Jury Deliberation*, 113 HARV. L. REV. 1261, 1265 n.16 (2000).

283. See Levinson et al., *supra* note 96, at 190 (demonstrating that mock jurors “held strong associations between Black and Guilty, relative to White and Guilty, and [that] implicit associations predicted the way mock jurors evaluated ambiguous evidence”).

284. Jurors are commonly said to want to hear both sides of the story. See Roberts, *supra* note 277, at 574 (“Despite the presumption of innocence, a defendant’s silence is generally thought to raise suspicions of guilt among jurors . . . .”); Massaro, *supra* note 176, at 518 n.102 (noting studies that suggest that sixty percent of prospective jurors reject the presumption of innocence).

285. See Roberts, *supra* note 27, at 862 (describing the absence of discussion on implicit bias in juror orientation materials).

286. See *id.* (noting that some jurisdictions’ juror orientation videos fail to mention bias at all).

287. See *United States v. Werbrouck*, 589 F.2d 273, 277 (7th Cir. 1978) (“A criminal conviction entails a finding of guilty beyond a reasonable doubt in a forum which abides by specific rules of evidence and procedure designed to protect the defendant.”).

288. See *supra* Part III.B.1.

289. See AM. BAR ASS’N, *supra* note 142, § 3-1.2; MODEL RULES OF PROF’L CONDUCT R. 3.8 (2014).

290. See Howard, *supra* note 201, at 372.

291. See AM. BAR ASS’N, *supra* note 142, § 3-1.2 (“The duty of the prosecutor is to seek justice, not merely to convict.”).

something other than merely duking it out with an adversary.<sup>292</sup> In practice, however, the incentive structure in prosecutors' offices has helped to obscure these asymmetrical objectives,<sup>293</sup> because what frequently "counts" for prosecutors is convictions.<sup>294</sup> The foundational difference between the roles of prosecution and defense needs to be reinforced, lest the notion of "seeking justice" becomes, as Paul Butler fears it has already become, just "words on paper."<sup>295</sup>

*c. Public Perception of the Criminal Justice System*

Perhaps as a result of these erosions of foundational asymmetries in rights and roles, one sees further threats to foundational asymmetries in public perceptions of the criminal justice system.

On the issue of rights, for example, the notion that constitutional rights are accorded to the defendant, and not to either the prosecution or the alleged victim, is frequently obscured. One does not have to look further than the discussions about moving toward symmetrical allocation of peremptory challenges to see examples of a notion that rights not only exist on both sides but also are equal on both sides.<sup>296</sup> Thus, for example, the Georgia Governor's Office heralded the state's move to symmetry, declaring that the abandoned asymmetry "[g]ave] more rights to the

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292. *See id.*

293. *See* Ferguson-Gilbert, *supra* note 149, at 289 ("The competitive and combative nature of modern adversary proceedings . . . has changed many prosecutors from champions of justice to advocates of victory." (citing JOSEPH F. LAWLESS, JR., PROSECUTORIAL MISCONDUCT 23 (2d ed., Matthew Bender & Co. 1999) (1985))).

294. *See* Alschuler, *supra* note 90, at 647 ("[A]lthough it has often been contended that policemen 'count' arrests and not convictions, the same thing cannot be said of prosecutors."); Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089, 2091 (2010) ("[C]onvictions are the lodestar by which prosecutors tend to be judged."); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 58–59 (1991) ("[B]ecause [a federal prosecutor's] success is measured by her conviction rate, she may be tempted to ignore the rights of defendants, victims, or the community in order to obtain pleas or guilty verdicts.").

295. *Compare* *Berger v. United States*, 295 U.S. 78, 88 (1935) (interest of government in a criminal prosecution "is not that it shall win a case, but that justice shall be done"), *with* Paul Butler, *Gideon's Muted Trumpet*, N.Y. TIMES, Mar. 17, 2013, at A21 (describing this statement, in the current system as "just words on paper").

296. *See* Office of the Governor of Ga., *supra* note 254 ("The Criminal Justice Act of 2005 revises provisions in Georgia's criminal law that restore balance in the prosecution of criminal cases," said Governor Sonny Perdue. "With these changes to our criminal procedures, prosecutors will be better able to remove dangerous criminals from the streets and uphold the rights of crime victims, leading to a safer Georgia.").

defendant than to the victim.”<sup>297</sup> Similarly, in Oregon, symmetry was enacted as the result of a “Crime Victims’ Bill of Rights,”<sup>298</sup> in which “the people of the State of Oregon” declared “that victims of crime are entitled to fair and impartial treatment in our criminal justice system.”<sup>299</sup> Fair and impartial treatment is hard to oppose, yet the encroachment upon terms reserved by constitutional doctrine to the rights of defendants is troubling.<sup>300</sup> Indeed, despite the existence of the Constitution, the Oregon bill went on to “reject the notion that a criminal defendant’s rights must be superior to all others.”<sup>301</sup>

On the issue of role, asymmetry often goes unnoticed, with defense and prosecution viewed instead as mirror images, duking it out in a zero-sum game,<sup>302</sup> with maximum liberty the goal for one, and maximum imprisonment (otherwise known as “justice”) the goal for the other. One represents a client; the other is seen as representing a “victim,”<sup>303</sup> for whom the smaller the constraint on the defendant’s liberty the greater the loss. Under this view, the two sides resemble private parties to a civil suit; the “minister of justice” has abdicated her position.<sup>304</sup> Under this view, one hears nothing about the fact that prosecutorial “justice” may equate to something other than imprisonment, or that imprisonment may indeed leave the complainant’s needs unaddressed.<sup>305</sup>

One sees an example of both role asymmetries and rights asymmetries being overlooked in what has been described as “the ‘Cocktail Party

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297. *See id.* (“[The new legislation] [p]rovides an equal number of jury strikes for both the defense and prosecution. The current system of unequal strikes gives more rights to the defendant than to the victim.”).

298. *See* OR. REV. STAT. § 147.410 (1987).

299. *Id.*

300. *See* *Georgia v. McCollum*, 505 U.S. 42, 57 (1992) (“[P]eremptory challenges are not constitutionally protected fundamental rights; rather, they are but one state-created means to the constitutional end of an impartial jury and a fair trial.”)

301. *See* OR. REV. STAT. § 147.410 (1987).

302. Note the way in which even commentators critical of the workings of the peremptory challenge fail to critique on ethical grounds the notion that the prosecution uses it in order to create a jury that looks as favorably as possible on the government’s case. *See supra* notes 145–50 and accompanying text.

303. *See* Uviller, *supra* note 75, at 1070 (“[The prosecutor] has no client, no interest save the interest of justice.”); *Berger v. United States*, 295 U.S. 78, 88 (1935) (“The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all . . .”).

304. MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. [1] (2014) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”).

305. *See* Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15, 18 (“Many victims are, in fact, quite ‘lenient’ in their own views about sentencing. Large proportions of crime victims surveyed are willing to consider alternatives to imprisonment for their offenders if they can play a part in the way their case is handled.”).

Question' asked of every criminal [defense] lawyer<sup>306</sup>: "How could you represent someone who was guilty?" Prosecutors are supposed to screen their cases with an eye to which ones are viable.<sup>307</sup> Criminal defense lawyers—or at least those representing clients who are indigent<sup>308</sup>—are not.<sup>309</sup> Criminal defense lawyers fulfill a constitutional mandate,<sup>310</sup> and their zealous advocacy is supposed to extend from the guilty to the innocent, and to encompass everyone in between. Yet still they must explain this basic precept.<sup>311</sup>

In each of these three areas—erosion in asymmetry of rights, erosion in asymmetry of roles, and erosion in the public's understanding of both—vigilance is needed in order to ensure that foundational aspects of our criminal justice system, and the way in which it is understood, are not lost. Halting the trend toward symmetry in one area of the criminal justice system—the allocation of peremptory challenges—therefore offers benefits not only in the context of jury selection but also through exposing and reinforcing the notion that, in the criminal justice system more broadly, asymmetry may act not as a threat to, but as a protector of, fairness.

### CONCLUSION

Equating symmetry with fairness has obvious appeal. In the criminal justice system, however, asymmetry is often a key component of

306. See *Back Cover to HOW CAN YOU REPRESENT THOSE PEOPLE?* (Abbe Smith & Monroe H. Freedman eds., 2013), available at [palgrave.com/page/detail/?k=971137311948](http://palgrave.com/page/detail/?k=971137311948) (describing the book as "the first-ever collection of essays offering a response to the 'Cocktail Party Question'"); Linda Meyer, *Between Reason and Power: Experiencing Legal Truth*, 67 U. CIN. L. REV. 727, 727 (1999) ("How can you lawyers defend the guilty?").

307. See MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 219 (1990) ("[C]onscientious prosecutors do not put the destructive engine of the criminal process into motion unless they are satisfied beyond a reasonable doubt that the accused is guilty."); MODEL RULES OF PROF'L CONDUCT R. 3.8(a) ("The prosecutor in a criminal case shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause . . .").

308. At least eighty to eighty-five percent of all criminal defendants are indigent. Barbara Mantel, *Public Defenders: Do Indigent Defendants Get Adequate Legal Representation?*, 18 CONG. Q. RESEARCHER 337, 339 (2008).

309. See Jesse Wegman, *The Senate's Hierarchy of Victimhood*, N.Y. TIMES (Mar. 5, 2014), <http://takingnote.blogs.nytimes.com/2014/03/05/the-senates-hierarchy-of-victimhood/?hp&rref=opinion> (saying of the Senate's refusal to confirm Debo Adebile as head of the Justice Department's Civil Rights Division, because of his earlier representation of Mumia Abu-Jamal, "Some have called Mr. Adebile a 'cop-killer advocate.' Another word for that might be 'lawyer.'").

310. See U.S. CONST. amend. VI.

311. See *HOW CAN YOU REPRESENT THOSE PEOPLE?*, *supra* note 306 (describing itself as "the first-ever collection of essays offering a response to the 'Cocktail Party Question' asked of every criminal lawyer").

structures designed to protect fairness. Given the differing roles, resources, and responsibilities of prosecution and defense, across-the-board abolition of peremptory challenges would be far from fair. Yet legislative trends, and the legislative record, reveal that the fact that asymmetry can protect fairness has been obscured in the peremptory challenge context. The concept of asymmetry, and legislation that embodies it, need to be reinforced, not only so that an unhelpful trend within the peremptory challenge context can be reversed, but also so that broader trends toward symmetry within the criminal justice system can be uncovered, analyzed, and, where appropriate, resisted.