Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge

Antony Page
Florida International University College of Law, apage@fiu.edu

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* Assistant Professor of Law, Indiana University School of Law – Indianapolis. B.Comm., McGill University; M.B.A., Simon Fraser University; J.D., Stanford Law School. I would like to thank in particular Katy Yang, esq., and John Malcolm and Professors Dan Cole, Robin Craig, Kenneth Crews, George Fisher, Nicholas Georgakopoulos and R. George Wright who commented on earlier drafts, and Ms. Adrienne Smith and the editorial team at the Boston University Law Review. In addition, thanks are due to my research assistants on this article, Kaveri Kumar and Gordon Akuwirowara.
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Every day in the United States the following scenario is repeated countless times. A lawyer challenges a potential juror. The opposing party objects, arguing that the juror was challenged on the basis of the juror’s race or gender. The judge then asks the deceptively simple question, “Why? Why did you challenge that juror?” The lawyer responds, in good faith and as truthfully as she can, with a race- or gender-neutral reason. The vast majority of the time the judge believes the lawyer — after all, she will appear credible, since she believes she is telling the truth — and the peremptory challenge is upheld. But what if the lawyer is wrong? What if her awareness of her mental processes is imperfect? What if she does not know, or even cannot know, that, in fact, but for the juror’s race or gender, she would not have exercised the challenge?

This article examines the findings from recent psychological research to conclude that the lawyer often will be wrong, will be unaware of her mental processes, and would not have exercised the challenge but for the juror’s race or gender. As a result (and not because of lying lawyers), the Batson peremptory challenge framework is woefully ill-suited to address the problem of race and gender discrimination in jury selection. Current reform proposals are hit or miss, because they do not directly address this source of injustice. Although abolishing the peremptory challenge would be optimal, in the alternative this article recommends several steps that lawyers and judges should take to reduce the impact of unconscious bias on jury selection.

INTRODUCTION

The peremptory challenge “has very old credentials,”¹ dating back to at least the Roman Empire.² The United States initially adopted the peremptory

² See Batson, 476 U.S. at 119 (Burger, C.J., dissenting) (citing WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY 175 (1852) (explaining that the Romans used the peremptory challenge in criminal cases)).
challenge from English common law,\(^3\) then explicitly codified it in 1790.\(^4\) Although not found in the U.S. Constitution,\(^5\) the Supreme Court has said that the peremptory challenge is "one of the most important of the rights secured to the accused."\(^6\) At least in theory, it helps ensure both the reality and perception of an impartial jury and thus a fair trial.\(^7\)

The peremptory challenge, almost by definition,\(^8\) was permitted "without

\(^3\) See id. at 120 (Burger, C.J., dissenting) (tracing the history of the peremptory challenge in the United States).

\(^4\) See An Act for the Punishment of Certain Crimes Against the United States, ch. 9, § 30, 1 Stat. 113, 119 (1790) (securing a defendant’s right to peremptory challenges in trials for treason and other capital crimes).

\(^5\) See Batson, 476 U.S. at 91 (remarking that the Federal Constitution does not confer a right to peremptory challenges). In 1789, Congress considered including language guaranteeing "the right of challenge" in a constitutional amendment that in final form became the Sixth Amendment. Douglas L. Colbert, Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges, 76 CORNELL L. REV. 1, 10 (1990) (quoting GAZETTE OF THE UNITED STATES, Aug. 29, 1789, at 158). The right to peremptory challenges is found in some state constitutions and statutes.

\(^6\) Pointer v. United States, 151 U.S. 396, 408 (1894) ("Any system for the empanelling of a jury that prevents or embarrasses the full, unrestricted exercise by the accused of th[e] right [to peremptory challenge], must be condemned."); see also Holland v. Illinois, 493 U.S. 474, 484 (1989) ("We have acknowledged that th[e] device [of peremptory challenge] ... has indeed been considered 'a necessary part of trial by jury.'" (quoting Swain, 380 U.S. at 219)).

\(^7\) See Batson, 476 U.S. at 91 (peremptory challenges "traditionally have been viewed as one means of assuring the selection of a qualified and unbiased jury"); Lewis v. United States, 146 U.S. 370, 376 (1892) ("The right of challenge ... has always been held essential to the fairness of trial by jury."). See generally 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 1024 (3d ed. 1894) (asserting that the peremptory challenge helps to leave a criminal defendant with a "good opinion of his jury" because it permits the removal of disliked potential jurors even if the defendant is not "able to assign a reason for such his dislike"); Barbara Allen Babcock, Voir Dire: Preserving "Its Wonderful Power," 27 STAN. L. REV. 545, 552 (1975) (remarking that the peremptory challenge "form[s] a system ... for meeting the constitutional requirement that juries be impartial"). Lawyers often view jury selection, of which the peremptory challenge is a significant part, as the most important part of a trial. See John H. Blume et al., Probing "Life Qualification" Through Expanded Voir Dire, 29 HOFSTRA L. REV. 1209, 1209 (citing more than twenty sources for the claim that "[t]he conventional wisdom is that most trials are won or lost in jury selection"). A lawyer’s goal, of course, is to select a jury partial to her side.

\(^8\) See BLACK’S LAW DICTIONARY 1136 (6th ed. 1990) (defining a peremptory challenge as "[t]he right to challenge a juror without assigning, or being required to assign, a reason for the challenge"). A later edition defined the peremptory challenge as one "that need not
cause, without explanation, and without judicial scrutiny." In contrast, a challenge for cause requires a "narrowly specified, provable and legally cognizable basis of [a juror's] partiality." In practice, because few attorneys actually exercise peremptory challenges without any basis at all, a peremptory challenge is one based on evidence that persuades the attorney, but is insufficient to persuade the judge, that the potential juror tends to be more hostile to the litigant's position than the likely replacement. At best, a peremptory challenge is an educated guess, whereas at worst it is merely the expression of naked prejudice.

Nevertheless, attorneys cannot necessarily challenge a juror without providing a reason for the challenge. The Supreme Court, in the 1965 case Swain v. Alabama, recognized that a "[s]tate's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." The difficult question was how to reconcile the dictates of the Constitution with the tradition of the unfettered "arbitrary and capricious" peremptory challenge.

Twenty-one years after Swain, the Supreme Court in Batson v. Kentucky outlined a three-step procedure by which a criminal defendant could attack racially motivated peremptory challenges. In step one, the defendant must raise an inference that the prosecutor used a peremptory challenge to exclude the person from the jury on account of her race. In step two, the trial court judge, in order to determine whether the peremptory challenge was exercised unconstitutionally, asks the prosecutor to supply a race-neutral reason. If the prosecutor meets this burden, in step three the judge decides whether the prosecutor exercised the peremptory challenge with the requisite purposeful discrimination. This step primarily concerns the attorney's credibility. Is the attorney telling the truth about her neutral reason? Although Batson involved racial discrimination in the context of a criminal trial, the Court subsequently extended the protections of Batson to all civil and criminal litigants and to

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9 See Swain, 380 U.S. at 212 (finding merit in the argument that history supports using peremptory challenges to strike potential jurors for any reason at all).
10 Id. at 220. Typical reasons that permit an excuse for cause were described in Hopt v. Utah, 120 U.S. 430, 432-34 (1886), such as "being the party adverse to the defendant in a civil action," and "having served on the grand jury which found the indictment."
11 Swain. 380 U.S. at 203-04.
12 Id. at 212 n.9 (quoting 4 BLACKSTONE COMMENTARIES 353 (15th ed. 1809)).
14 See infra Part I.C.1.
15 See infra Part I.C.2.
16 See infra Part I.C.3.
challenges based on gender.\textsuperscript{17}

If the Batson procedure's goal is to eliminate racial and gender discrimination in the selection of juries, then the crucial question regarding that discrimination should not be whether the attorney was \textit{consciously} discriminating – this article assumes that most attorneys act in good faith\textsuperscript{18} –

\textsuperscript{17} See infra Part I.C.1.

\textsuperscript{18} This article does not address the attorney who, in bad faith, deliberately discriminates against protected potential jurors. Put in psychological terms, this paper will not address the dominitive or old-fashioned racist (or her sexist counterpart) but rather focuses on the "aversive racist," "symbolic racist," or "modern racist" (and their sexist counterparts). See infra notes 120-129 and accompanying text. This paper focuses on this second type of racist for three reasons.

First, it appears as though this latter type of racist is now far more common than the first type; thus, this type of racist may pose the bigger threat. Although precise numbers are impossible to obtain, some estimates run as high as eighty percent of the U.S. population. \textit{E.g.} Susan T. Fiske, \textit{What's in a Category?: Responsibility, Intent, and the Avoidability of Bias Against Outgroups}, in \textit{THE SOCIAL PSYCHOLOGY OF GOOD AND EVIL} 127, 127 (Arthur G. Miller ed., 2004).

Second, given that "[t]here are any number of bases" on which an attorney may reasonably strike a venire person, see McCray v. Abrams, 750 F.2d 1113, 1132 (2d Cir. 1984), \textit{reh'g denied}, 756 F.2d 277 (2d Cir. 1985) (en banc), vacated by 478 U.S. 1001 (1986), it seems unlikely that Batson will stop someone who is of a mind to discriminate. The vast majority of academic scholarship that focuses on the "deliberate discriminator" has reached this conclusion. See, \textit{e.g.}, Leonard L. Cavise, \textit{The Batson Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection}, 1999 Wis. L. Rev. 501, 505 ("Any trial attorney with the wherewithal to refrain from using gender or race words in the explanation and the discipline to avoid accepting a juror to whom the exact same 'neutral explanation' would apply has beaten what one court called the Batson 'charade.'"); Susan N. Herman, \textit{Why the Court Loves Batson: Representation-Reinforcement, Colorblindness, and the Jury}, 67 Tul. L. Rev. 1807, 1830 (1993) ("As many others have noted, allowing peremptory challenges following an acceptable race-neutral explanation also invites any inventive prosecutor to create subterfuges to articulate acceptable reasons for excluding jurors when the prosecutor's actual reasons would be unacceptable."); Sheri L. Johnson, \textit{The Language and Culture (Not to Say Race) of Peremptory Challenges}, 35 WM. & MARY L. Rev. 21, 59 (1993) (arguing that any attorney who wishes to circumvent Batson will find it easy to do so); see also Amnesty International, \textit{Killing with Prejudice: Race and the Death Penalty in the U.S.A.}, at http://www.amnesty.org/library/index/engamr510521999 (accessed Nov. 18, 2004) ("Batson . . . has manifestly failed to prevent racial bias in the jury selection process . . . since prosecutors need only fabricate a vaguely plausible non-racial reason [sic] for dismissing potential jurors to conceal their real intent.").

Third, (perhaps naively), absent persuasive evidence to the contrary I would prefer to believe that the vast majority of lawyers in this country, as professionals and officers of the court, take their legal, moral, and ethical obligations seriously and thus do not consciously attempt to circumvent the law. I am not alone in this belief. \textit{See, e.g.}, \textit{Batson}, 476 U.S. at 99 n.22 ("We have no reason to believe that prosecutors will not fulfill their duty to exercise their challenges only for legitimate purposes."); People v. Muhammad, 133 Cal. Rptr. 2d
but rather whether the attorney would have challenged the potential juror but for the juror’s race or gender. Psychological research demonstrates that the attorney’s conscious truthfulness at *Batson’s* second step may not be dispositive in answering this larger question. In fact, race- and gender-based stereotypes almost inevitably affect people’s judgment and decision-making, even if people do not consciously allow these stereotypes to affect their judgment. This includes attorneys making peremptory challenges.

Part I describes the *Batson* procedure and its subsequent development in greater detail. Part II examines how people can form and maintain racial and gender stereotypes unconsciously, even as their beliefs in these stereotypes have changed greatly over the last fifty years. People habitually and automatically categorize others by race and gender. Categorization, a normal cognitive process, results in stereotyping, whereby we assign perceived group attributes to individuals. Whereas racists and sexists may stereotype overtly or covertly (but consciously), those who believe themselves fair-minded and unbiased often stereotype unconsciously. In addition, we have all learned stereotypes from our culture and environment. Importantly, a stereotype need not be consciously believed to affect us – mere knowledge can be sufficient to influence our decisions.

Once stereotypes have formed, they affect us even when we are aware of them and reject them. Stereotypes can greatly influence the way we perceive, store, use, and remember information. Discrimination, understood as biased decision-making, then flows from the resulting distorted or unobjective information. The attorney exercising the peremptory challenge will be unaware of this biased information processing and so will be unaware of her gender- or race-based discrimination. Because she is unaware of her actual thought processes, she may not be able to completely or correctly answer why she chose to exercise a peremptory challenge.

To put it simply, good people often discriminate, and they often discriminate

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19 See infra Part III (explaining how an attorney may be unaware that her reason for challenging a potential juror is in fact race- or sex-based, and therefore she will likely appear to be telling the truth when she offers a neutral reason for the strike).

20 See infra Part II.A.

21 See infra notes 173-185 and accompanying text.

22 See infra Part III.B-C.

23 See infra Part III.D.
without being aware of it.\textsuperscript{24} Or, as one psychologist recently observed, "[s]ubtle forms of bias are automatic, unconscious, and unintentional . . . . The implication of these subtle forms of bias is that people – observers and actors alike – cannot so easily detect, name, and control them. They escape notice, even the notice of those enacting the bias."\textsuperscript{25} This is the heart of the Batson problem, rather than the deliberately dishonest racist and sexist lawyer. Part III explores how racial and gender stereotypes affect decision-making, without the awareness of the decision-maker, and examines the implications of unconscious stereotyping on the Batson inquiry.

Finally, Part IV evaluates various current proposals in light of the psychological issues. These proposals, generally designed to address the problem of the dishonest lawyer, will in some cases nevertheless have a beneficial effect. The best proposal, abolishing the peremptory challenge,\textsuperscript{26} would, of course, eliminate the problem of its discriminatory use. Absent the political or judicial will for this action, however, there are more moderate steps that attorneys and judges should take to reduce the problem. These steps include judicial warnings about unconscious stereotyping before jury selection, enhancing voir dire through the use of race- and gender-blind questionnaires, and expanding the time allowed for voir dire.\textsuperscript{27} Although much bias is automatic, unconscious, and unintentional, unconscious bias can be reduced by both raising the visibility of our society’s egalitarian norms and by increasing the amount of information about potential jurors available to litigants.

I. THE BATSON APPROACH TO DISCRIMINATION AND THE PEREMPTORY CHALLENGE

A. The Peremptory Challenge Before Batson

The Equal Protection Clause guarantees that a state will not exclude even one member of the defendant’s race from the jury on the basis of race.\textsuperscript{28} The Supreme Court first recognized this principle in the 1965 case of Swain v. Alabama.\textsuperscript{29} Nevertheless, the Swain Court imposed a stringent evidentiary

\textsuperscript{24} I am deliberately paraphrasing Professor John F. Dovidio and colleagues who recently wrote, "[g]ood people are often racist, and they are often racist without being aware of it." See John F. Dovidio et al., Contemporary Racial Bias: When Good People Do Bad Things, \textit{in} \textit{THE SOCIAL PSYCHOLOGY OF GOOD AND EVIL}, supra note 18, at 141, 141 (examining the nature of aversive racism, including its operation in the behavior of whites toward blacks, its contribution to interracial miscommunication and distrust, and its social implications).

\textsuperscript{25} Fiske, \textit{supra} note 18, at 127-28.

\textsuperscript{26} See \textit{infra} notes 463-466 and accompanying text.

\textsuperscript{27} See \textit{infra} notes 447-448, 501-519 and accompanying text.

\textsuperscript{28} Batson v. Kentucky, 476 U.S. 79, 86.

\textsuperscript{29} 380 U.S. 202 (1965) (considering defendant’s motions to strike the trial jury venire and declare void the petit jury on account of the state’s peremptory challenges of African Americans during jury selection).
burden on the defendant to prove unconstitutional discrimination. The defendant was able to allege a prima facie case for unconstitutional discrimination by showing that no African American had been on a petit jury since 1950, even though roughly six or seven African Americans were called for the typical venire.30 The defendant failed to show, however, that it was the prosecutor alone who had been responsible for the lack of African American representation on the petit jury.31 For the Swain defendant to have prevailed, he would have had to produce detailed information on the composition of the venires and how parties had exercised their challenges over a long period of time.32 Given that court records frequently did not show the race of the members of the venire,33 and that the voir dire was often not transcribed, this would have been a near impossible task. The Court required this difficult showing because the Court believed that the peremptory challenge “must be exercised with full freedom, or it fails of its full purpose.”34

Notwithstanding the ruling in Swain, however, there remained a serious problem with the representation of minorities on petit juries. “The reality of practice . . . shows that the [peremptory] challenge may be, and unfortunately at times has been, used to discriminate against black jurors.”35 If jury selection guides and anecdotal evidence accurately reflect the reality of practice, peremptory challenges were in fact often exercised because of race, gender or ethnicity.36 A recent Supreme Court opinion, for example, summarizes

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30 Id. at 205. The Court also considered whether the striking of African Americans in this particular case alone was impermissible, and concluded that the Court would not inquire as to the prosecutor’s reasons for striking any member of the venire. Id. at 222.

31 Id. at 224 (“[T]he record . . . does not with any acceptable degree of clarity, show when, how often, and under what circumstances the prosecutor alone has been responsible for striking those Negroes who have appeared on petit jury panels . . . .”).

32 Id. at 226-28 (explaining the evidence that the Swain defendant might have presented to prove that the prosecutor purposefully discriminated during the jury venire).

33 See id. at 240 (Goldberg, J., dissenting) (arguing that in light of the lack of evidence a prima facie rule, whereby the consistent absence of any African Americans on the jury makes out a prima facie case for discrimination, is more sensible and realistic).

34 Id. at 219 (quoting Lewis v. United States, 146 U.S. 370, 378 (1892) (holding that preventing the defendant from knowing which venire people had been challenged by the prosecution was substantial error)).

35 Batson v. Kentucky, 476 U.S. 79, 99 (1986) (asserting that the Court’s decision would alleviate the discrimination by requiring trial courts to be more sensitive to the racially discriminatory use of peremptory challenges).

36 See Solomon M. Fulero & Steven D. Penrod, Attorney Jury Selection Folklore: What Do They Think and How Can Psychologists Help?, 3 Forensic Rep. 233, 234 (1990) (discussing the widespread use of stereotypes in jury selection guides); see also Melvin M. Belli, Sr., 3 Modern Trials §§ 51.50-.84 (2d ed. 1982) (discussing considerations in selecting a jury including those based on race and sex, and stating that “if counsel challenges a juror of an obvious racial group, a Negro, he will have to challenge another Negro on, or coming up on that panel”). Clarence Darrow is particularly prominent for his
extensive evidence of the Dallas County prosecutor’s office systematic pattern and practice of attempting to exclude minorities from jury service before the defendant’s 1986 trial. The Court had to reexamine Swain.

B. The Batson Decision: The Three Step Process

The Supreme Court revisited the constitutionality of the peremptory challenge in Batson v. Kentucky. In Batson, the Court recognized that the required showing in Swain was a “crippling burden of proof,” which rendered “prosecutors’ peremptory challenges ... largely immune from constitutional scrutiny.” Batson outlined a three-step framework to produce a much-needed new evidentiary standard.

In step one of the Batson framework the defendant must raise an inference that the prosecutor used peremptory challenges to exclude one or more members of the venire from the petit jury on account of their race. In step two, the burden of production (but not the burden of proof or persuasion) shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Finally, in step three, the trial court must determine whether the defendant has carried her burden of proving purposeful discrimination. The

advice on the use of racial and ethnic stereotypes in jury selection. See Clarence Darrow, Attorney for the Defense, ESQUIRE, May 1936, at 35-37 (describing how to choose the best jurors by observing their subtleties and by making assumptions about the jurors based on those subtleties).

See Miller-El v. Cockrell, 537 U.S. 322, 334-35 (2003) (evaluating defendant’s evidence of a 1963 circular from the District Attorney’s Office that contained these instructions to prosecutors: “Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated”). The defense also presented a jury selection manual outlining the reasons for excluding minorities from jury service. Id.

476 U.S. at 82.

48 Id. at 96.

49 Id. at 96-98.

50 Batson, 476 U.S. at 92-93.

51 Id. at 97.

52 Id. at 96 (“[T]he defendant must first show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant’s race.” (citation omitted)).

53 Id. at 97 (stating that the prosecutor may not permissibly claim that she removed a potential juror because she felt that the person would be sympathetic to the defendant on account of their shared race).

54 Id. at 98.
Court overruled *Swain*,\(^45\) in that a litigant could establish a constitutional violation based only on the facts of the defendant’s case, rather than requiring the demonstration of a pervasive pattern across many cases.\(^46\)

C. Batson’s Progeny

1. Expanding the Applicability of Step One

Since *Batson*, the Court in *Powers v. Ohio*,\(^47\) *Edmonson v. Leesville Concrete Co.*,\(^48\) *Georgia v. McCollum*,\(^49\) and *J.E.B. v. Alabama ex. rel. T.B.*,\(^50\) has expanded the scope of the decision, in terms of defining the parties to which *Batson* applies and the juror characteristics that are protected.\(^51\) These

\(^{45}\) The *Batson* court characterized its holding as overruling *Swain*. Id. at 100 n.5 (“To the extent that anything in *Swain v. Alabama* is contrary to the principles we articulate today, that decision is overruled.” (citation omitted)). Others have suggested that *Swain* in fact found no equal protection violation in the exercise of peremptory challenges on the basis of race. See Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 450 (1996) (“[W]hile the *Batson* Court characterized its decision as merely overruling *Swain* as to the ‘evidentiary formulation’ necessary to establish radically motivated discrimination, the truth is that *Batson* radically recharacterized a form of discrimination, previously endorsed in *Swain*, as a violation of equal protection.” (footnote omitted)).

\(^{46}\) *Batson*, 476 U.S. at 96 (observing that requiring “‘several [to] suffer discrimination’ before one could object would be inconsistent with the promise of equal protection to all” (quoting McCray v. New York, 461 U.S. 961, 965 (1983) (Marshall, J., dissenting from denial of certiorari)).

\(^{47}\) 499 U.S. 400, 402 (1991) (holding that a criminal defendant may object to race-based exclusions of jurors through peremptory challenges, even if the defendant and the excluded jurors are not of the same race).


\(^{50}\) 511 U.S. 127, 146 (1994) (expanding *Batson* to peremptory challenges made on the basis of gender).

\(^{51}\) The Supreme Court has also stated in dicta that ethnic origin is a protected class. See *United States v. Martinez-Salazar*, 528 U.S. 304, 314-15 (2000) (“Under the Equal Protection Clause, a defendant may not exercise a peremptory challenge to remove a potential juror solely on the basis of the juror’s gender, ethnic origin, or race.”); see also *State v. Levinson*, 795 P.2d 845, 849 (Haw. 1990) (holding that a party may not exclude a juror on the basis of ancestry under the state constitution).

Lower courts, however, are still looking for guidance, asking “[w]hat, though, does ‘ethnicity’ or ‘ethnic origin’ mean and how does one define the ‘cognizable racial group’ to which *Batson* itself referred?” See *Rico v. Leftridge-Byrd*, 340 F.3d 178, 183 (3d Cir. 2003). In *Rico*, the court explained that most courts avoid this difficult question by “assum[ing] without deciding that *Batson* has applicability to racial or ethnic groups other than black Americans . . . .” Id.

Religious affiliation will perhaps be the next federal category added. See *United States v.
cases have also served to clarify that the constitutional violation at issue is primarily of the potential juror’s equal protection rights as opposed to simply the rights of the litigants. In essence, these cases have begun to clarify the first step: who can make a prima facie case and who Batson protects. More recently, Miller-El v. Cockrell has, among other things, elaborated on what should constitute a prima facie case.

52 See, e.g., McCollum, 505 U.S. at 48 (“[T]his court [has] recognized that denying a person participation in jury service on account of his race unconstitutionally discriminates against the excluded juror.”); Edmonson, 500 U.S. at 618 (“A prosecutor’s race-based peremptory challenge violates the equal protection rights of those excluded from jury service.”); Powers, 499 U.S. at 409 (“An individual juror . . . possess[es] the right not to be excluded from [a petit jury] on account of race.”). Batson itself suggested two additional harms: the criminal defendant’s right to an impartial jury that can view him without racial animus, and preserving “public confidence in the fairness of the justice system.” Id. at 87. Professor Sheri Lynn Johnson has criticized the Court for this evolution, arguing that it suggests that “the appearance of racial neutrality matters more than racially fair outcomes.” See Sheri Lynn Johnson, Batson Ethics for Prosecutors and Trial Court Judges, 73 CHI-KENT L. REV. 475, 485 (1998) (criticizing Supreme Court cases subsequent to Batson for ignoring Batson’s focus on fairness to defendants in peremptory challenges).

53 See Miller-El v. Cockrell, 537 U.S. 322, 331, 342 (2003) (concluding that where the prosecutors used their peremptory challenges to strike ten out of eleven African American venire members but only four out of thirty-one non-black jurors “the statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors”). The court went on to state that “[h]appenstance is unlikely to
Notwithstanding Batson's three step framework, courts have sometimes moved on to step two without deciding whether or not the prima facie case of step one has been demonstrated. Even though this approach has generated a mixed response from higher courts, to the degree that step one is easier to meet, it increases the importance of the later steps of the Batson test in determining whether a peremptory challenge is unconstitutional.

2. Eviscerating Step Two

Once a party has raised the inference that the other party has exercised one
or more peremptory challenges on an impermissible basis, the burden of production shifts to the proponent of the challenge to articulate a neutral explanation.\textsuperscript{56} Batson stated that the proponent may not rebut a prima facie showing merely by denying that she had a discriminatory motive or affirming her good faith in making individual selections.\textsuperscript{57} Rather, citing language from a Title VII case, Batson required the prosecutor to articulate a "clear and reasonably specific" neutral explanation of his "legitimate reasons" for exercising the challenges.\textsuperscript{58} This explanation "need not rise to the level justifying exercise of a challenge for cause."\textsuperscript{59} Further, the reason or reasons had to be related to the particular case being tried.\textsuperscript{60}

In Hernandez v. New York\textsuperscript{61} and Purkett v. Elem,\textsuperscript{62} however, the Supreme Court elaborated on the nature of reasons that would satisfy Batson's second step. The Court explained away the requirement that the reason be related to the particular case.\textsuperscript{63} Instead, facial neutrality became paramount.

The Court defined a race-neutral explanation to explicitly mean "an explanation based on something other than the race of the juror."\textsuperscript{64} In fact,

\begin{itemize}
\item \textsuperscript{56}Batson v. Kentucky, 476 U.S. 79, 97 (1986).
\item \textsuperscript{57}Id. at 98.
\item \textsuperscript{58}Batson, 476 U.S. at 97-98 & n.5 (quoting Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 258 (1981) (requiring that the defendant employer be "clear and reasonably specific" in its explanation of how its actions regarding the plaintiff employee were nondiscriminatory)). The Supreme Court continues to use the Title VII analysis to inform the Batson test. See, e.g., Miller-El, 537 U.S. at 340-41 (referencing a Title VII case in discussing the role of evidence in proving discriminatory intent); Purkett v. Elem, 514 U.S. 765, 768 (1995) (per curiam) (citing the Title VII case of St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993), with regards to burden shifting); Hernandez v. New York, 500 U.S. 352, 359 (1991) (plurality opinion) (referring to a Title VII case while analyzing alleged discrimination against potential Latino jurors during a jury selection).
\item \textsuperscript{59}Batson, 476 U.S. at 97.
\item \textsuperscript{60}Id. at 98.
\item \textsuperscript{61}500 U.S. at 369 (holding that striking Latino jurors based on their proficiency in Spanish does not constitute racial discrimination).
\item \textsuperscript{62}514 U.S. at 768-69 (1995) (per curiam) (stating that a "legitimate reason" for a peremptory challenge need not be "a reason that makes sense, but a reason that does not deny equal protection").
\item \textsuperscript{63}Purkett explained that the Batson language requiring that the reason for the strike be "related to the particular case to be tried," see Batson, 476 U.S. at 98, was no more than a warning "meant to refute the notion that a prosecutor could satisfy his burden of production by merely denying that he had a discriminatory motive or by merely affirming his good faith." Purkett, 514 U.S. at 769. The dissent argued that the Court was in fact overruling a portion of Batson. Id. at 770 (Stevens, J., dissenting).
\item \textsuperscript{64}Hernandez v. New York, 500 U.S. 352, 360 (1991) (plurality opinion) (addressing how to determine whether the reasons given by a prosecutor for his peremptory strikes were race-neutral). The Court has said the same thing about gender-neutral reasons. See J.E.B. v. Alabama ex. rel. T.B., 511 U.S. 127, 145 (1994) (stating that the challenge "merely must be based on a juror characteristic other than gender").
\end{itemize}
“unless a discriminatory intent is inherent in the [attorney’s] explanation, the reason offered will be deemed race neutral.”

Race-neutral reasons thus include those that are “implausible,” “fantastic,” “silly,” or “superstitious,” just as long as the reason itself is race-neutral.

Not surprisingly, lower courts have also applied this reasoning to the evaluation of gender reasons. As an example, that a venire person’s name begins with a certain letter may be a silly reason to exercise a peremptory challenge, but it is undoubtedly a race- and gender-neutral reason and satisfies Batson’s second step.

Likewise, with respect to a criterion closely associated with race, as long as the criterion is not race itself, the principle of race neutrality is satisfied, even though that criterion will have a disparate impact. Accordingly in

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65 Hernandez, 500 U.S. at 360 (emphasis added).

66 See Purkett, 514 U.S. at 776 (Stevens, J., dissenting); see also People v. Payne, 666 N.E.2d 542, 549 (N.Y. 1996) (allowing “outlandish or entirely evanescent” reasons for challenges). Not all states, however, have agreed with the Purkett approach. See Bruner v. Cawthon, 681 So. 2d 173, 173 (Ala. 1996) (per curiam) (disapproving the Court of Civil Appeal’s reliance on Purkett); Haile v. State, 672 So. 2d 555, 557 (Fla. Dist. Ct. App. 1996) (acknowledging that Florida’s constitution may be more stringent than required under Purkett); State v. Gill, 460 S.E. 2d 412, 415 n.3 (S.C. Ct. App. 1995) (noting that the South Carolina Supreme Court might apply a stricter standard than required by Purkett), vacated on other grounds, 489 S.E.2d 478 (1997). U.S. military courts have also applied a stricter standard. See United States v. Tulloch, 47 M.J. 283, 288 (C.A.A.F. 1997) (finding that an African American’s blinking and seeming uncomfortable did not constitute “reasonable” race- or gender-neutral reasons for a peremptory challenge).

67 See, e.g., Pruitt v. McAdory, 337 F.3d 921, 928 (7th Cir. 2003) (declaring that any gender-neutral reason, no matter how implausible or fantastic, is sufficient to rebut a prima facie case of discrimination); United States v. Yang, 281 F.3d 534, 548 (6th Cir. 2002) (explaining that the government’s gender-neutral explanation for its challenge need not be persuasive or even plausible).

68 People appear to have a strong preference for the letters in their name, and this preference (bizarrely) appears to affect choices in areas such as occupation and place of residence. See Brett W. Pelham et al., Why Susie Sells Seashells by the Seashore: Implicit Egotism and Major Life Decisions, 82 J. PERSONALITY & SOC. PSYCHOL. 469, 483 (2002) (examining studies which show that people are significantly more likely to live in places with names that resemble their own names and to choose careers with labels that resemble their names); see also infra note 221.

69 See Hernandez, 500 U.S. at 360 (“Unless a discriminatory intent is inherent in the prosecutor’s explanation [for the peremptory strike], the reason offered will be deemed race neutral.”). Other courts have subsequently found such reasons as the country of one’s birth to be race-neutral. See Wamget v. State, 67 S.W.3d 851, 859 (Tex. Crim. App. 2001) (holding that the state’s challenge of a juror because she was “born in Liberia” did not establish race discrimination).

70 For example, attending Alabama State University, where the student body is approximately ninety percent African American, see Black American Colleges and Universities, at www.petersons.com/blackcolleges/profiles/alabama_state.asp?sponsor=2904 (accessed
Hernandez, a potential juror’s ability to speak Spanish, while closely associated with being Hispanic, was not exclusively Hispanic, and thus was not an impermissible reason on its face.\footnote{Hernandez, 500 U.S. at 361-62.} Under this definition, a trial court may even find appearance to be race-neutral.\footnote{See State v. Williams, 97 S.W.3d 462, 471-72 (Mo. 2003) (rejecting defendant’s argument “that striking the venire person based upon physical appearance was inherently race-based because both he and [the defendant were] African-Americans”); see also State v. Bolton, 49 P.3d 468, 479 (Kan. 2002) (finding that the prosecutor’s challenge of a potential juror who, like defendant, had hair braids, was race-neutral even though “the vast majority of those with that particular hairstyle are African Americans”).} At least one lower court has accepted a race-neutral reason that was objectively false.\footnote{See, e.g., Hurd v. Pittsburg State Univ., 109 F.3d 1540, 1547 (10th Cir. 1997) (holding that a subjectively held but erroneous belief about a juror’s testimony as a reason for a peremptory challenge could withstand both steps two and three of Batson); see also United States v. Chandler, 36 F.3d 358, 367 (4th Cir. 1994) (holding that a peremptory challenge survives Batson, where the race-neutral reason cited was false, but no evidence showed that lawyer did not believe the falsehood); Salinas v. State, 888 S.W.2d 93, 98 (Tex. Ct. App. 1994) (“Even if the prosecutor was mistaken in some of these beliefs, the judge could still conclude that the strike was race-neutral because the prosecutor based his peremptory strike on an honest belief.”).}

Satisfying Batson’s second step is trivial. Even before Purkett, a commentator observed, “[i]f prosecutors exist who have read Hernandez and cannot create a ‘racially neutral’ reason for discriminating on the basis of race, bar examinations are too easy.”\footnote{Batson v. Kentucky, 476 U.S. 79, 106 (Marshall, J., concurring) (criticizing the Court’s decision for allowing “easily generated” race-neutral explanations to sustain peremptory challenges); see also Minetos v. City Univ. of N.Y., 925 F. Supp. 177, 185 (S.D.N.Y. 1996) (“[L]awyers can easily generate facially neutral reasons for striking jurors and trial courts are hard pressed to second-guess them . . . .”). Of course just because a lawyer could easily fabricate a neutral reason does not mean that she deliberately would do so.} Justice Marshall, foreseeing the direction Batson would take, noted in his concurrence, “[a]ny prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons.”\footnote{Johnson, supra note 18, at 59.} The trial court, however, must second-guess those reasons because for the

Nov. 16, 2004), is race-neutral because some of the students are not African American. See Scott v. State, 599 So. 2d 1222, 1227-28 (Ala. Crim. App. 1992) (accepting as race-neutral a challenge on the basis of attendance at Alabama State University). Accordingly, anything to do with demeanor will also be race-neutral because it will never be exclusive to one race. It is worth noting that although disparate impact does not bear on the question of facial neutrality, it may be given some weight in deciding stage three. See Hernandez, 500 U.S. at 362 (stating that disparate impact should be given “appropriate weight” in determining whether the prosecutor acted with a forbidden intent, but not in determining whether the second step of the Batson inquiry was satisfied).
selection of the petit jury, mere disproportionate impact on a group is insufficient to violate the Equal Protection Clause. Second-guessing an attorney's reasons is the focus of the next step.

Disproportional impact alone is rarely sufficient for equal protection cases. See Washington v. Davis, 426 U.S. 229, 239 (1976) (remarking that the Supreme Court has never found a law unconstitutional solely because it had a racially disproportionate impact without regard to whether it had a racially discriminatory purpose). Without a showing of discriminatory intent, the actual effect on the protected group must be sufficient so that intent itself can be presumed. See, e.g., Gomillion v. Lightfoot, 364 U.S. 339 (1960) (holding that a change of a square electoral district to a twenty-eight sided electoral district could only have been motivated by intent); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (finding discrimination when all but one white applicant and zero Chinese applicants were granted a permit to operate a laundry, and one hundred fifty Chinese owners were prosecuted whereas none of eighty similarly situated white owners were prosecuted for operating laundry facilities without permits).

It is also interesting to note that the Court did not need to rely on an equal protection analysis to protect minority representation on the petit jury. The highest courts in California, Florida, and Massachusetts achieved the same goal using Batson-like procedures in reliance on the fair cross-section guarantees contained in their respective state constitutions and analogous to the Sixth Amendment of the U.S. Constitution. See People v. Wheeler, 583 P.2d 748, 757 (Cal. 1978) (holding "that in this state the right to trial by a jury drawn from a representative cross-section of the community is guaranteed equally and independently by the Sixth Amendment to the federal Constitution and by article I, section 16, of the California Constitution"); State v. Neil, 457 So. 2d 481, 486 (Fla. 1984) (basing its decision on Florida's constitutional guarantee of an impartial jury); Commonwealth v. Soares, 387 N.E.2d 499, 516 (Mass. 1979) (holding that both parties are constitutionally entitled to expect "a petit jury that is as near an approximation of the ideal cross-section of the community as the process of random draw permits" (quoting Wheeler, 583 P.2d at 762)); see also Riley v. State, 496 A.2d 997, 1012 (Del. 1985) (concluding "that the use of peremptory challenges to exclude prospective jurors solely upon the basis of race violates a criminal defendant's right under [Delaware's equivalent of the U.S. Constitution's Sixth Amendment] to a trial by an impartial jury"); State v. Crespin, 612 P.2d 716, 718 (N.M. Ct. App. 1980) (following the California and Massachusetts approach). Two federal courts of appeal also used a Sixth Amendment fair trial analysis to evaluate peremptory challenges. See, e.g., Booker v. Jabe, 775 F.2d 762, 770 (6th Cir. 1985) ("The Sixth Amendment guarantees that a criminal charge will not be tried before a jury that fails to represent a cross-section of the community as a consequence of a method of jury selection that systematically excludes a cognizable group from jury service."); vacated, Michigan v. Booker, 478 U.S. 1001 (1986), reinstated, Booker v. Jabe, 801 F.2d 871 (6th Cir. 1986); McCray v. Abrams, 750 F.2d 1113, 1124-28 (2d Cir. 1984). In fact, the equal protection claim that prevailed in Batson was not even raised in the petitioner's brief, which relied on the Sixth Amendment fair trial claim. See Petitioner's Brief at 4-5, Batson v. Kentucky, 476 U.S. 79 (1986) (No. 84-6263). The Court did not reject the Sixth Amendment claim until 1990. See Holland v. Illinois, 493 U.S. 474, 480 (1990) ("The Sixth Amendment requirement of a fair cross section on the venire is a means of assuring, not a representative jury (which the Constitution does not demand) but an impartial one (which it does.").
3. Step Three: All About Credibility

Once the attorney has offered a neutral basis for the peremptory challenges, in step three the trial court must determine whether the movant has established "purposeful discrimination." The Supreme Court, however, has never directly clarified what it means by "purposeful discrimination" in the exercise of peremptory challenges. There is a conflict between the Court’s language that suggests a subjective intent requirement and the Court’s statements endorsing the use of evidence that will not invariably illuminate the attorney’s state of mind.

Discriminatory intent or purpose, as used by the Supreme Court, implies more than intent as volition or intent as awareness of consequences. "It


78 In one instance, two justices dissenting from the denial of certiorari argued that deciding the case would have clarified the meaning of “racial discrimination.” See Wilkerson v. Texas, 493 U.S. 924, 927-28 (1989) (Marshall, J., dissenting from denial of certiorari). In contrast, cases decided under the Sixth Amendment’s guarantee of an “impartial jury,” starting with Strauder v. West Virginia, 100 U.S. 303, 309 (1879), concentrated on the “prejudices [that] often exist against particular classes in the community, which sway the judgment of jurors.” Justice Thomas, for one at least, believes that this is still accurate. See Georgia v. McCollum, 505 U.S. 42, 61 (1992) (Thomas, J., concurring in the judgment) (“I do not think that this basic premise [prejudice]... has become obsolete.”).

79 See Miller-El, 537 U.S. at 339 (citing evidentiary factors such as the attorney’s demeanor, reasonableness of the explanations and whether the “rationale has some basis in accepted trial strategy”). The Court has recognized this problem of proof and evidence in other equal protection contexts. See Washington v. Davis, 426 U.S. 229, 253 (1976) (Stevens, J, concurring) (stating that “[f]requently, the most probative evidence of intent will be objective evidence of what actually happened”). For a general discussion of the evidence that can be used to prove intent or purpose, see David Crump, Evidentiary Evidence, Race, Intent and Evil: The Paradox of Purposelessness in the Constitutional Racial Discrimination Cases, 27 Hofstra L. Rev. 285, 333 (1998), arguing that Washington v. Davis is “dubious” as it fails to “recognize that the government’s lack of an articulable explanation for the disparate impact is relevant, as are all of the pragmatic circumstances that impede its eradication or explanation.” See also Michael Selmi, Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric, 86 Geo. L.J. 279, 287 (1997) (arguing that the “real question” is the kind of evidence the Court will “require as proof of intent”).

80 Interestingly, venire-selection cases decided under the Sixth Amendment’s guarantee of an “impartial” jury – as opposed to the Equal Protection Clause of the Fourteenth Amendment that governs the peremptory challenge analysis – often depended on statistical proof with little attention being paid to the intent of the decision-maker. See, e.g., Norris v. Alabama, 294 U.S. 587, 598-99 (1935) (reversing a conviction where defendant successfully showed “long-continued exclusion of negroes from jury service”). The framework established in Norris, a Sixth Amendment decision, was a precursor to the framework eventually used in Batson, decided under the Equal Protection Clause. Under Norris, the defendant could make a prima facie case that African Americans were
implies that the decision-maker . . . selected . . . a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." 81 The Court's language suggests that the striking attorney

under-represented in the venire by presenting only statistical evidence. Id. The prosecution would then have the burden of showing that the statistical differences either resulted from chance, or due to a lack of sufficiently qualified African Americans. Id.; see also Eric L. Muller, Solving the Batson Paradox: Harmless Error, Jury Representation, and the Sixth Amendment, 106 YALE L.J. 93, 149 (1996) (arguing that Batson would be less inconsistent if based on the Sixth Amendment); The Supreme Court, 1993 Term: Leading Cases, 108 HARV. L. REV. 139, 246 (1994) (arguing that although Batson "expressly disavowed any reliance upon the defendant's Sixth Amendment claim . . . [i]mplicit in Batson's emphasis . . . was a deep respect for the defendant's . . . Sixth Amendment right to an impartial jury").

Sixth Amendment cases have held that a statistical disparity alone is sufficient to demonstrate a constitutional violation. E.g., Castaneda v. Partida, 430 U.S. 482, 501 (1977) (finding that a large statistically disproportionate representation of Mexican Americans on grand juries presented a presumption that prosecution failed to rebut); Alexander v. Louisiana, 405 U.S. 625, 630-31 (1972) (reversing a conviction in an indictment returned by a grand jury from which certain ethnic groups had been systematically excluded); Whitus v. Georgia, 385 U.S. 545, 551 (1967) (reversing a conviction where prosecution failed to rebut the presumption of discrimination demonstrated by showing that the grand jury was selected from segregated tax rolls). In all of these cases, objective reality, as exemplified by history and population composition, rather than a trial court's finding regarding subjective intent, was dispositive. Weak but honest explanations were insufficient to rebut a defendant's prima facie case. See, e.g., Norris, 294 U.S. at 598-99 (holding that although the jury commissioner knew no qualified African Americans, this did not negate the defendant's case).

This rule, developed in cases decided under the Sixth Amendment, would have a simple application to the peremptory challenge context decided under the Equal Protection Clause. The defendant's presentation of a prima facie case would be dispositive, as there can never be a strong reason for a peremptory challenge. (Any strong reason becomes a challenge for cause). Intent and effect would thus be collapsed, as has essentially already occurred in the venire-selection cases. See Johnson, supra note 18, at 91 (stating that applying venire cases to peremptory challenges would "mean that prima facie cases are the only inquiry"). There are exceptions to this. Even in the fair venire-selection cases, at times intent rather than effect has been the critical inquiry. See, e.g., Cassell v. Texas, 339 U.S. 282, 290 (1950) (plurality opinion) (finding intentional discrimination where the white jury commissioners chose grand jurors only from among people with whom they were acquainted); Akins v. Texas, 325 U.S. 398, 406-07 (1944) (holding that the jury commissioner's admission that they "had no intention of placing more than one Negro on the panel" left the Court "unconvinced that the commissioners deliberately and intentionally limited the number of Negroes on the grand jury list").

must have subjective discriminatory intent.\textsuperscript{82} It also suggests that the Court is ignoring or is blind to unconscious bias.\textsuperscript{83}

Assuming subjective discriminatory intent is necessary, whether it is sufficient remains undecided. Some courts have upheld peremptory challenges despite the striking attorney admitting on the record that race or gender was a factor in the decision, provided that the striking attorney can also demonstrate that she would have struck the venire person for a neutral reason anyway.\textsuperscript{84}

\textsuperscript{82} See Cavise, \textit{supra} note 18, at 529 (noting that “evil intent” is required to overrule a strike); Robin Charlow, \textit{Tolerating Deception and Discrimination After Batson}, 50 STAN. L. REV. 9, 31-38, 37 (1997) (evaluating arguments, and after analyzing \textit{Batson, Edmonson, Hernandez,} and \textit{Purkett}, concluding that “the court intends to leave us with a subjective understanding of the concept of discriminatory intent in the peremptories context”); Sheri Lynn Johnson, \textit{Respectability, Race Neutrality, and Truth}, 107 YALE L.J. 2619, 2659 (1998); K.G. Jan Pillai, \textit{ Shrinking Domain of Invidious Intent}, 9 WM. & MARY BILL RTS. J. 525, 538-48 (arguing that following \textit{Purkett}, the focus is “the subjective motivation of errant attorneys”); see also infra note 89.

\textsuperscript{83} Some members of the Court have accepted the possibility of unconscious bias. See, \textit{e.g.}, Georgia v. McCollum, 505 U.S. 42, 68 (O'Connor, J., dissenting) (“It is by now clear that conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence.”); \textit{Batson v. Kentucky,} 476 U.S. 79, 106 (1986) (Marshall, J., concurring) (“[I]t is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal.”); see also \textit{Grutter v. Bollinger,} 539 U.S. 306, 345 (2003) (Ginsburg, J., concurring) (stating that “conscious and unconscious race bias... remain alive in our land”). In one case, a dissenter joined by three other members of the Court suggested that the decision was the “unconscious product” of the majority’s views. See \textit{Alexander v. Sandoval,} 532 U.S. 275, 317 (2001) (5-4 decision) (Stevens, J., dissenting) (“Like much else in its opinion, the present majority’s unwillingness to explain its refusal to find the reasoning in \textit{Cannon} persuasive suggests that today’s decision is the unconscious product of the majority’s profound distaste for implied causes of action rather than an attempt to discern the intent of the Congress that enacted Title VI of the Civil Rights Act of 1964.”). Any acceptance of unconscious bias, however, has not (yet) affected the \textit{Batson} procedure’s focus on the striking attorney’s discriminatory intent. One reason for this may be that the Court still believes discrimination is “easy to identify.” Johnson, \textit{supra} note 18, at 67.

\textsuperscript{84} To date at least five circuit courts have accepted this analysis and none have rejected it. See, \textit{e.g.}, King v. Moore, 196 F.3d 1327, 1335 (11th Cir. 1999) (“When the motives for striking a prospective juror are both racial and legitimate, \textit{Batson} error arises only if the legitimate reasons were not in themselves sufficient reason for striking the juror.”); Howard v. Senkowski, 986 F.2d 24, 27-30 (2d Cir. 1993) (applying the “dual motivation analysis” to a \textit{Batson} claim); \textit{accord} Gattis v. Snyder, 278 F.3d 222, 235 (3d Cir. 2002); Weaver v. Bowerson, 241 F.3d 1024, 1032 (8th Cir. 2001); Jones v. Plaster, 57 F.3d 417, 421-22 (4th Cir. 1995). Various states have also adopted this approach. See \textit{e.g.}, State v. Hodge, 726 A.2d 531, 544 (Conn. 1999); People v. Hudson, 745 N.E.2d 1246, 1258 (Ill. 2001); State v. Weaver, 912 S.W.2d 499, 509 (Mo. 1995); Guzman v. State, 85 S.W.3d 242, 244 (Tex. Crim. App. 2002). The approach has been described as a “mixed motive” analysis. Rico v. Leftridge-Byrd, 340 F.3d 178, 186 (3d Cir. 2003). Justice Marshall, joined by Justice Brennan in a dissent from the denial of certiorari argued that “[t]o be ‘neutral’ the
Under this approach, once the movant has succeeded in establishing that a discriminatory purpose in part motivated the non-movant, the burden of proof then shifts to the non-movant to establish that she would have made the same decision regardless of race or gender.

These courts, as in other equal protection cases, are applying a 'but-for' test. A court, given the existence of a discriminatory purpose, is determining whether, but for the potential juror's race or gender, she would have been struck. If the woman were a man, or if the African American were white, would she have been challenged anyway? If and only if the answer is 'no,' is there but-for causation.

This but-for test has not gone uncriticized. Other courts have found that any subjective discriminatory motivation, even when there are legitimate neutral motivations, is sufficient to uphold a Batson challenge. The courts find these peremptory challenges unconstitutional because they have been "irredeemably" tainted by the impermissible intent.


86 See, e.g., Murray v. Groose, 106 F.3d 812, 814 (8th Cir. 1997) ("We often frame the question as one of 'but-for' causation, that is, we ask whether the prosecutor would have kept a particular juror but for his race."); Burnett v. State, 27 S.W.3d 454, 458 (Ark. Ct. App. 2000) (explaining that in Batson's third step, "we ask whether the juror would have been kept but for his race").

87 This is a variation on the "reversing the groups tests." See David A. Strauss, Discriminatory Intent and the Taming of Brown, 56 U. CHI. L. REV. 935, 956-57 (1989) (attempting to define the meaning of discriminatory intent); see also Selmi, supra note 79, at 291 (describing it as "the best test developed to date for identifying intentional discrimination").


89 See, e.g., Lucas, 18 P.3d at 163 (citing cases that applied the "tainted approach"). The but-for (or reversing the groups) test could also be used in order to capture unconscious bias. Strauss argues that this test's ability to address unconscious bias is one of its advantages. See Strauss, supra note 87, at 960-62 (arguing that the reversing the groups test would catch unconscious discrimination as it simply asks what would happen under different
Regardless of whether the Supreme Court adopts the ‘but-for’ or ‘tainted view’ approach, it has made clear that the *Batson* inquiry typically becomes one of credibility:

> [T]he decisive question will be whether counsel’s race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. . . .

. . . The credibility of the prosecutor’s explanation goes to the heart of the equal protection analysis, and once that has been settled, there seems nothing left to review.\(^{90}\)

... circumstances, rather than trying to discern subjective intent). The question would then be, even if the attorney has no subjective discriminatory intent, would the juror have been challenged but for her race or sex? Did race or gender, consciously or unconsciously, make the difference in the exercise of the challenge?

Arguably, the *Batson* framework already “allows unconscious bias to satisfy the discriminatory purpose standard.” See Sheila Foster, *Intent and Incoherence*, 72 Tul. L. Rev. 1065, 1094 (1998); see also Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 Stan. L. Rev. 1105, 1120 (1989) (arguing, before the Court decided *Hernandez* and *Purkett*, that “[it is simply wrong to say . . . that [the *Batson* standard] hinge[s] on intent”); Selmi, *supra* note 79, at 286-94 (arguing that the key question in the equal protection contexts is “whether race made a difference in the decisionmaking process, a question that targets causation, rather than subjective mental states”). At least one member of the Supreme Court believes that unconscious bias should be able satisfy the requirement, but that it does not. See Hernandez v. New York, 500 U.S. 352, 377 (Stevens, J., dissenting) (arguing that “the ‘discriminatory purpose’ . . . can sometimes be established by objective evidence that is consistent with a decisionmaker’s honest belief that his motive was entirely benign”). Most commentators would agree, as a normative matter, that equal protection should apply to unconscious bias. See, e.g., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317, 323 (1987) (arguing that “equal protection doctrine must . . . come to grips with unconscious racism”); Strauss, *supra* note 87, at 1000 (arguing that “the ‘disparate impact’ standard . . . is in fact the only effective way to implement the discriminatory intent standard”).

Commentators are thus in agreement, in the sense that subjective discriminatory intent either should not be required, or is not required. For the purposes of this article, the Court’s meaning of intent is only relevant for emphasis. If subjective discriminatory intent is not required, the more important issue becomes understanding unconscious bias and attempting to address it. See *infra* Parts II, III, IV. If, however, as is likely, subjective discriminatory intent is required, the psychological research discussed *infra* Parts II, III demonstrates the impoverished nature of this conception of bias, and the weakness of the Court’s so-called “unceasing efforts to eradicate racial discrimination” in the jury selection process. See Batson v. Kentucky, 476 U.S. 79, 85 (1986). Accordingly, the *Batson* standard should be changed so that subjective discriminatory intent is no longer required, and the issue becomes addressing the problem of unconscious bias. See *infra* Part IV.

\(^{90}\) Miller-El v. Cockrell, 537 U.S. 322, 339-40 (2003) (citations omitted); see also United States v. Bentley-Smith, 2 F.3d 1368, 1375 (5th Cir. 1993) (“[T]he ultimate inquiry for the
The trial court is intended to focus in step three on "the genuineness of the motive" rather than the "reasonableness" of the reason,\textsuperscript{91} even as the reason's reasonableness helps determine the motive's genuineness.\textsuperscript{92} Accordingly, a judge may find an attorney's reason for exercising a strike trivial, but if the judge also believes that the attorney has been honest, she must sustain the challenge.\textsuperscript{93}

The Court assumes that an attorney exercising a peremptory challenge can correctly determine the reason for the challenge, so that if gender or race made the difference, she will know it.\textsuperscript{94} It is as though the Supreme Court believes that attorneys are hooked up to a wonderful machine, an "Inner Self

\begin{quote}
judge is not whether counsel's reason is suspect, or weak, or irrational, but whether counsel is telling the truth in his or her assertion that the challenge is not race-based." (emphasis added)); cf. Barbara Underwood, \textit{Ending Race Discrimination in Jury Selection: Who's Right is it Anyway?}, 92 COLUM. L. REV. 735, 770 (1992) (claiming that determining whether an explanation is pretextual is merely a fact-finding problem no more acute in the jury selection context than in any other).
\end{quote}

\textsuperscript{91} Purkett v. Elem, 514 U.S. 765, 769 (1995) (upholding the trial court's finding that the prosecutor satisfied \textit{Batson} step three after explaining that he exercised a challenge against a black juror because of his long hair and excessive facial hair).

\textsuperscript{92} See \textit{Miller-El}, 537 U.S. at 339 (listing reasonability as a factor in credibility).

\textsuperscript{93} See \textit{id.} at 339-40 ("[I]f an appellate court accepts a trial court's finding that a prosecutor's race-neutral explanation for his peremptory challenges should be believed, we fail to see how the appellate court nevertheless could find discrimination." (alteration in original) (quoting \textit{Hernandez}, 500 U.S. at 367)); People v. Sprague, 721 N.Y.S.2d 205, 207 (N.Y. App. Div. 2001) ("[T]here is no authority for the court to conclude, as it did here, that a proffered race-neutral reason for seeking the peremptory strike of a prospective juror, while actually non-pretextual, was so insignificant as to be the equivalent of pretext.").

\textsuperscript{94} The Court also assumes that an attorney exercising a peremptory challenge will act objectively. The attorney is seen as the quintessential rational decision-maker, so that absent discriminatory intent, the attorney will have a facially neutral reason for her actions, and this reason will be at least somewhat persuasive to others. An implausible reason is likely a false reason. So too is a reason that appears inconsistent with other decisions. An error of judgment, such as striking someone on poor or even merely sub-optimal grounds, is treated in the very same way as an impermissible challenge. The Court has essentially created a dichotomy between real reasons and pretextual reasons, where the persuasiveness or plausibility of the reason helps determine the veracity of the reason. Discriminatory intent is inferred through defects in the striking attorney's thought processes.

In the peremptory challenge context, the decision to strike is often made on very limited information. A venire person's occupation or residence and the assurance that she can be impartial does not necessarily reveal anything about how she will think. In addition, the limited information will be processed subjectively. It is legitimate to strike a venire person who is actually hostile towards the striking attorney. It may be difficult, however, to judge what set of behaviors constitute hostility, or sufficient hostility, to warrant the strike. The rational decision-making attorney exercising a peremptory challenge is thus expected to act on both limited and possibly inaccurate information. This is a dubious assumption, given the peremptory's "arbitrary and capricious" nature. \textit{See} Swain v. Alabama, 380 U.S. 202, 212 (1965).
The "Inner Self Detector" explains what reasons really and truly lead to a decision. From this point, there are two types of lawyers. Conscientious lawyers will in good faith evaluate their decision-making processes to eliminate the impermissible gender or race considerations from their decisions. Lawyers with invidious motives who do not wish to curb them will be aware of their intent, and so they will invent pretextual reasons to keep from being discovered. The trial court's job is merely to sort the conscientious lawyer from the invidiously motivated lawyer.

In many situations, however, the attorney will neither know what the reason actually was nor even know that she does not know. Accordingly, she states what she thinks the reason is, and presumably her demeanor will suggest that she is telling the truth. After all, she is telling her subjective truth. The assumption that asking an attorney for a neutral explanation will reveal the real basis for the strike is flawed, not because, or not solely because, attorneys can lie, but more importantly, because attorneys, like everyone else, can lack self-awareness.

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

D. A Chorus of Criticism

Not surprisingly, Batson has engendered an enormous amount of often virulent criticism. "Batson and the cases which followed merely heightened

101 See Charlow, supra note 82, at 11 (reporting a conversation with a judge who related that after finding a Batson violation, the "implied accusation affected the remainder of the trial, producing continued discomfort whenever she interacted with the rebuked attorney").

102 See, e.g., Alschuler, supra note 18, at 199 (criticizing Batson for acting only symbolically against racism, without doing enough to alter the preemptory challenge); 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, 44-46 (2001) (methodically identifying and answering a number of empirically testable assumptions about the mechanics of the peremptory strike that authors claim underlie the Batson decision); Jeffrey S. Brand, The Supreme Court, Equal Protection and Jury Selection: Denying That Race Still Matters, 1994 Wis. L. Rev. 511, 524-25 (1994) (arguing that Batson is part of a "flawed methodology for eliminating racist influence in the jury selection process and supported by naive assumptions regarding the influence of race on the judicial process"); Lonnie T. Brown, Jr., Racial Discrimination in Jury Selection: Professional Misconduct, Not Legitimate Advocacy, 22 REV. LITIG. 209, 214 (2003) (arguing that Batson's burden shifting framework actually makes trial judges "more willing to accept proffered race-neutral explanations for alleged discriminatory use of peremptory challenges, no matter how suspect"); Cavise, supra note 18, at 505 (describing Batson and progeny as "this curiously twisted bundle of cases that leaves nothing more in its wake than a confusing and time-consumining procedural morass"); Morris B. Hoffman, Peremptory Challenges Should be Abolished: A Trial Judge's Perspective, 64 U. CHI. L. REV. 809, 835 (1997) (attacking as absurd the idea that a right to be on a jury can be abrogated for "a universe of other unstated and unstatable reasons" but not for other certain reasons); Johnson, supra note 18, at 91 (attacking anything short of a truly community representative jury and the acceptance of alternative explanations to rebut a prima facie case); 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, 981 (1996) (proposing a system of blind voir dire to avoid problems with the Batson framework); Jere W. Morehead, When a Peremptory Challenge Is No Longer Peremptory: Batson's Unfortunate Failure to Eradicate Invidious Discrimination from Jury Selection, 43 DEPAUL L. REV. 625, 638-43 (1994) (proposing the elimination of the peremptory challenge system); Charles J. Ogletree, Just Say No!: A Proposal To Eliminate Racially Discriminatory Uses of Peremptory Challenges, 31 AM. CRIM. L. REV. 1099, 1105 (1994) (asserting that "Batson has... become impotent in preventing discrimination"); Brian J. Serr & Mark Maney, Racism, Peremptory Challenges and the Democratic Jury: The Jurisprudence of a Delicate Balance, 79 J. CRIM. L. & CRIMINOLOGY 1, 65 (1988) (recognizing Batson as a difficult attempt to balance complex interests and calling for a more exacting effort to implement Batson by the lower courts); Tania Tetlow, How Batson Spawned Shaw - Requiring the Government to Treat Citizens as Individuals When It Cannot, 49 LOY. L. REV. 133, 157-69 (2003) (criticizing Batson for asking the impossible in requiring "the government to disentangle race from the web of stereotypes it uses when guessing at the beliefs of citizens"); David D. Hopper, Note,
the rhetoric of equality and inclusion, but did little to bring those goals to fruition. Justice Marshall himself, concurring in Batson, wrote that attorneys were still free to discriminate, "provided that they hold that discrimination to an 'acceptable' level." One even less charitable commentator has said, "Batson is either a disingenuous charade or an ill-conceived sinkhole." A federal district court judge has commented:

[T]he awkward analyses set forth in Batson and its progeny... have proved... to be uncertain in their application and... have caused great consternation to the courts. A brief review of case law shows that judicial interpretations of Batson are all over the map.

... 

It is time to put an end to this charade... Batson and Purkett's protections [are] illusory.

...[J]udicial experience with peremptory challenges proves that they are a cloak for discrimination...

Most of the criticism of Batson is justifiable, but focuses only or primarily on dishonest racist and sexist lawyers. A major part of the problem with Batson is its inability to address the honest, well-intentioned lawyer who nevertheless still discriminates. As some commentators have argued, "courts are not equipped to evaluate the validity of a litigant's purportedly neutral explanations."

This is not primarily because litigants are good liars. Rather,
it is because, even though they are telling the truth about their neutral explanations, the potential juror would not have been challenged but for their race or gender. The attorney is both honest and discriminating on the basis of race or gender. Such unconscious discrimination occurs, almost inevitably, because of normal cognitive processes that form stereotypes. The next section explores how stereotypes are formed and maintained.

II. STEREOTYPE FORMATION, DEVELOPMENT AND MAINTENANCE

Over a century ago, Emile Durkheim proposed that “social life should be explained, not by the notions of those who participate in it, but by more profound causes which are unperceived by consciousness,” and “that these causes are to be sought mainly in the manner according to which the associated individuals are grouped.”

Despite Durkheim’s ideas, until roughly thirty years ago most mainstream psychological research analyzed racial discrimination through observable behavior and self-reports. Researchers saw racial discrimination primarily as a function of the discriminator’s motivation and personality, in part because they also principally saw racism as “an ideology, doctrine, or set of beliefs”

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109 Racial discrimination can be understood as the negative behavior towards the racial group, as opposed to the attitudes towards the group (prejudice). John F. Dovidio & Samuel L. Gaertner, Prejudice, Discrimination, and Racism: Historical Trends and Contemporary Approaches, in PREJUDICE, DISCRIMINATION, AND RACISM 1, 3 (John F. Dovidio & Samuel L. Gaertner eds., 1986).


111 Tamas Pataki, Introduction, in RACISM IN MIND, supra note 110, at 1, 10 (recounting an early definition for racism before proceeding to chronicle development of understandings of prejudice).
or as a problem of "disordered personality."\textsuperscript{112}

In the late 1970s, however, as part of the "cognitive revolution,"\textsuperscript{113} psychologists began to explore the notion that discrimination and other forms of biased intergroup judgment may result from ordinary, routine and completely normal cognitive mental processes.\textsuperscript{114} The results of this research\textsuperscript{115} suggest that a basic way in which people try to understand their world – categorization – can, of its own accord, lead to stereotyping and discrimination.\textsuperscript{116}

Since the late 1980s researchers have closely examined the role of the unconscious in these processes.\textsuperscript{117} Motivation, intent, purpose, and, most
importantly, conscious awareness, under this newer analysis, are not necessary pre-requisites for stereotyping and any resulting discrimination.

This change in emphasis of psychological research does not mean that the old studies were necessarily incorrect or misguided, but rather that contemporary forms of racism are “qualitatively different from the old-fashioned, blatant kind.” Over the years the nature of racism had changed. In the 1960s and before, racist acts were generally blatant, overt and easy to recognize, performed by a “dominative racist” – the typical bigot. In subsequent years, however, expressions of prejudice have also changed, as


Researchers have labeled this distinction between consciousness, and unconsciousness or nonconsciousness, as explicit-implicit, aware-unaware, direct-indirect, and automatic-controlled. See Anthony G. Greenwald & Mahzarin R. Banaji, Implicit Social Cognition: Attitudes, Self-esteem, and Stereotypes, 102 PSYCHOL. REV. 4, 4 n.1 (1995) (listing word-pair possibilities and settling on implicit-explicit due to its connotations in memory research). “Unconscious” itself is an extremely challenging word to adequately define. For sixteen distinct definitions of unconscious, see JAMES G. MILLER, UNCONSCIOUSNESS 21-44 (1942). For a similar number of definitions of conscious, see GILBERT RYLE, THE CONCEPT OF MIND 154 (Univ. Chi. Press 1984) (1949). Fortunately, there is no need in this article to closely parse the many sometimes subtly different definitions of unconscious and conscious.

For the purposes of this article, “unconscious” can best be thought of as “mental processes that are inaccessible to consciousness but that influence judgments, feelings, or behavior.” WILSON, supra note 95, at 23. Note that this is a very different conception from the repressive unconscious described by Sigmund Freud involving the id, ego, and superego. See generally SIGMUND FREUD, THE EGO AND THE ID (James Strachey ed. & trans., 1962). In contrast, automatic thinking, including the tendency to categorize and stereotype other people, is characterized in varying degrees as “nonconscious, fast, unintentional, uncontrollable and effortless.” WILSON, supra note 95, at 52-53. Not all of these criteria need be present, and in fact they rarely are. See Irene V. Blair, The Malleability of Automatic Stereotypes and Prejudice, 6 PERSONALITY & SOC. PSYCHOL. REV. 242, 242-43 (2002) (reviewing the extent to which categorization is truly automatic and unavoidable).

See Dovidio et al., supra note 24, at 144 (negative feelings and beliefs about minorities “may occur spontaneously, automatically, and without full awareness”); see also Fiske, supra note 18, at 128 (“By far the biggest news in the last decade of research on bias is how underground it can be. Automaticity characterizes stereotypes, prejudices, and associated behavior.” (citation omitted)).

Dovidio et al., supra note 24, at 143 (defining aversive racism).

Public lynching, Jim Crow laws, and other open expressions of racial antipathy are easy to see as racist. See also id. at 141-42 (commenting on the decreasing instances of overt racism).

Gaertner & Dovidio, supra note 114, at 62 (contrasting traditional and aversive racism).

Prejudice is the term usually used for exclusively negative and unjustifiable attitudes towards a member of an outgroup. See Nilanjana Dasgupta, Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations, 17 SOC. JUST. RES. 143, 145
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racism has become not only recognized as morally wrong, but, as a result of civil rights cases\textsuperscript{124} and legislation,\textsuperscript{125} legally wrong as well.\textsuperscript{126} Obvious, explicit or open expressions of prejudice have dwindled substantially.\textsuperscript{127}

A more modern racist will "sympathize with the victims of past injustice; support public policies that, in principle, promote racial equality and ameliorate the consequences of racism;... regard themselves as non prejudiced and discriminatory; but almost unavoidably, possess negative feeling and beliefs about blacks.... [that] are typically excluded from awareness."\textsuperscript{128} A similar narrative, albeit less extreme, describes modern-day

\textsuperscript{124} Brown v. Board of Education, 347 U.S. 483 (1954), is only the most prominent of these cases.


\textsuperscript{126} See Dovidio et al., supra note 24, at 141-142; John B. McConahay, Modern Racism, Ambivalence, and the Modern Racism Scale, in PREJUDICE, DISCRIMINATION, AND RACISM, supra note 109, at 91, 91.

\textsuperscript{127} See Dasgupta, supra note 123, at 144 (citing studies showing that "prejudice and stereotypes have declined steadily over the past few decades, especially towards African Americans [and] women" (citations omitted)); Patricia G. Devine et al., Classic and Contemporary Analyses of Racial Prejudice, in BLACKWELL HANDBOOK OF SOCIAL PSYCHOLOGY: INTERGROUP PROCESSES 198, 200-01 (Rupert Brown & Samuel L. Gaertner eds., 2001) [hereinafter INTERGROUP PROCESSES] (citing survey evidence and studies of stereotyping in mass media and concluding that “[i]n sum, overt, direct forms of prejudice... have declined”); Dovidio et al., supra note 24, at 143 (citing several sources which contrast the decline in overt expressions of racism to continuation of subtler forms of racism). Pundits in the popular press agree. See Michael Barone, A Very Civil Act, WALL ST. J., July 2, 2004 at A10 (“Today, the American people believe almost unanimously that racial discrimination is wrong.”).

\textsuperscript{128} Gaertner & Dovidio, supra note 114, at 62 (emphasis added); see Dovidio et al., supra note 24, at 145 (explaining that many racists express their unconsciously harbored negative feelings about blacks in "subtle, rationalizable ways that disadvantage minorities"). Other theorists agree that racism is now much more subtle and often below the level of consciousness. See McConahay, supra note 126, at 91 (portraying the mindset of modern racism); T. F. Pettigrew & R. W. Meertens, Subtle and Blatant Prejudice in Western Europe, 25 EUR. J. SOC. PSYCHOL. 57 (1995) (analyzing the distinction between blatant and subtle prejudice); David O. Sears et al., Egalitarian Values and Contemporary Racial Politics, in RACIALIZED POLITICS: THE DEBATE ABOUT RACISM IN AMERICA 75, 77 (David O. Sears et al. eds., 2000) (describing a system of symbolic racism which consists of the belief that blacks are no longer discriminated against, that blacks do not follow American values, and that blacks demand and receive special treatment). Some legal commentators agree with these psychology studies. See, e.g., Judith Olans Brown et al., Some Thoughts About Social Perception and Employment Discrimination Law: A Modest Proposal for Reopening the Judicial Dialogue, 46 EMORY L.J. 1487, 1492-1503 (1997) (presenting evidence of
sexism.\textsuperscript{129}

As a result of these changes, the old tools of detecting racism—asking people to report on their own attitudes—were much less effective because they could not distinguish between people who were racist and lying about it (those giving the socially desirable responses) and people who genuinely did not think they were racist.\textsuperscript{130} Increasingly researchers realized "that a great deal of what they [we]re interested in measuring [wa]s not consciously accessible to their participants, forcing them to rely on alternative methods."\textsuperscript{131} Researchers developed new tests,\textsuperscript{132} including indirect self-report measures, latency response measures, and physiological measures such as respiratory activity, electromyographical activity, and eyeblink startle reflex,\textsuperscript{133} that have allowed researchers a window into people's unconscious attitudes and associations.

This research has compellingly demonstrated the existence of unconscious race- and gender-based stereotyping.\textsuperscript{134} Many people may simultaneously hold continued subtle employment discrimination); Linda Hamilton Krieger, \textit{Civil Rights Perestroika: Intergroup Relations After Affirmative Action}, 86 CAL. L. REV. 1251, 1286-91 (1998) (discussing the role of unconscious stereotypes in discrimination).


\textsuperscript{130} Attempts were made to address the problem with self reports, such as the "bogus pipeline" procedure in which participants were incorrectly led to believe that they were hooked up to a machine that would monitor their muscle movements and thus function as a lie detector. \textit{See} Neal J. Roese & David W. Jamieson, \textit{Twenty Years of Bogus Pipeline Research: A Critical Review and Meta-Analysis}, 114 PSYCH. BULL. 363, 372 (1993) (arguing that bogus pipeline research was moderately effective at reducing responses tailored to be socially desirable); \textit{see also} Timothy D. Wilson, \textit{Knowing When to Ask: Introspection and the Adaptive Unconscious}, 10 J. CONSCIOUSNESS STUD. 131, 134 (2003) ("The search for indirect measures of attitudes also has a long history . . . ").

\textsuperscript{131} Wilson, \textit{supra} note 130, at 133; \textit{see also} Dasgupta, \textit{supra} note 123, at 144 (explaining the adaptation of cognitive science tools to study memory without conscious awareness).

\textsuperscript{132} McConahay, \textit{supra} note 126, at 92 (discussing why the Modern Racism Scale was developed).

\textsuperscript{133} Some physiological measures, such as galvanic skin response, had been in use since the 1950s, but the measure did not adequately differentiate the valence of whites' affective race-based responses. David M. Amodio et al., \textit{Individual Differences in the Activation and Control of Affective Race Bias as Assessed by Startle Eyeblink Response and Self-Report}, 84 J. PERSONALITY & SOC. PSYCHOL. 738, 738 (2003).

\textsuperscript{134} See Dovidio et al, \textit{supra} note 24, at 143-44 ("A critical aspect of the aversive racism framework is the conflict between the denial of personal prejudice and the underlying unconscious negative feelings and beliefs."). Several studies have illustrated negative
conscious, or explicit, egalitarian attitudes and unconscious, or implicit, negative attitudes. The impact of this type of bias on minorities can be as insidious as the older traditional form of discrimination.

This section begins by looking at the nature and origin of stereotypes and how they are formed and maintained. It then looks at the distinctions between the different kinds of knowledge that people possess. Finally, it looks at some of the cognitive processes identified by researchers that make stereotypes resistant to change.

A. The Roots of Stereotypes: Categorization

"The human mind must think with the aid of categories . . . . We cannot possibly avoid this process . . . . Life is just too short to have differentiated concepts about everything."  

Although some are critical of the process, people inevitably generalize, or categorize. Categorization has been defined as "the process of understanding unconscious beliefs that some people have about blacks. See, e.g., Russell H. Fazio et al., Variability in Automatic Activation as an Unobtrusive Measure of Racial Attitudes: A Bona Fide Pipeline?, 69 J. PERSONALITY & SOC. PSYCHOL. 1013, 1025 (1995) (presenting findings on the limited ability of subjects to suppress negative racial feelings); Anthony Greenwald et al., Measuring Individual Differences in Implicit Cognition: The Implicit Association Test, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1478 (1998) (confirming the usefulness of the implicit association test for assessing stereotypes about blacks); Bernd Wittenbrink et al., Evidence for Racial Prejudice at the Implicit Level and its Relationship With Questionnaire Measures, 72 J. PERSONALITY & SOC. PSYCHOL. 262, 273 (1997) (finding the presence of implicit prejudice by using explicit questionnaires). Similar studies have shown gender stereotyping. See, e.g., Mahzarin R. Banaji & Curtis D. Hardin, Automatic Stereotyping, 7 PSYCHOL. SCI. 136, 136-37 (1996) (finding some success using reaction time studies to assess automatic responses in gender prejudice experiments).

See Cunningham et al., supra note 116, at 1342 (noticing a "growing consensus" that implicit and explicit attitudes towards minorities can be "dramatically opposed to each other in valence"); see also Dovidio & Gaertner, supra note 109, at 6 (explaining how inconsistent internalization of cultural values and influences is an important component of aversive racism).


William Blake famously wrote that "[t]o Generalize is to be an Idiot. To Particularize is the Alone Distinction of Merit." WILLIAM BLAKE, Annotations to Sir Joshua Reynolds' Discourses, in THE COMPLETE WRITINGS OF WILLIAM BLAKE: WITH ALL THE VARIANT READINGS 445, 451 (Geoffrey Keynes ed., 1957) (1808). Psychologist Charles Stangor said "going beyond categorization . . . is the right thing to do in almost every case." Charles Stangor, Content and Application Inaccuracy in Social Stereotyping, in STEREOTYPE ACCURACY: TOWARD APPRECIATING GROUP DIFFERENCES 275, 286 (Yueh-Ting Lee et al. eds., 1995) (citation omitted) (comparing the often positive effects of behavioral experience to the often negative effects of socializing based on category membership). A generalization, when it becomes a stereotype, has even more negative connotations. Perhaps the most opprobrium is reserved for a developed set of generalizations or stereotypes that have become a profile. Regardless of the nomenclature, however, in each
what some thing is by knowing what other things it is equivalent to and what other things it is different from.\textsuperscript{138} It is probably "the most basic and essential of all cognitive processes."\textsuperscript{139}

At the simplest level, categorization allows us to make identifications. For example, we may categorize an object in increasing order of specificity as a vehicle, car, sedan, Honda, Accord, or a friend's Accord. We may also categorize by function, such as categorizing baseball gloves, hockey sticks, and tennis racquets as "sports equipment." Similarly we may categorize people, such as Aristotle, Plato, Spinoza, and Kant as "philosophers."

At a more complex level, by allowing us to act and reach conclusions based on imperfect or limited information, categorization helps people understand the world and predict future occurrences.\textsuperscript{140} It serves to simplify the world, so that "non identical stimuli can be treated as equivalent."\textsuperscript{141}

Although in a sense all things are different, categorization guards against our perceiving all of the differences, even if we were capable of this. If we were unable to categorize, we would be engulfed in a tidal wave of details. Our minds would be unable to cope.\textsuperscript{142} Consequently, categorizing simplifies the most (or is most effective) when the categories and the constituents of the categories are distinct. Anything that does not easily fit in a specific category (such as gray when the categories are black and white) may be forced into a category regardless, thus reducing complexity, but introducing inaccuracy.\textsuperscript{143} Perceived intracategory differences are reduced (assimilation) and

\textsuperscript{138} CRAIG McGARTY, THE CATEGORIZATION PROCESS IN SOCIAL PSYCHOLOGY 1 (1999).

\textsuperscript{139} Michael A. Hogg, Social Categorization, Depersonalization, and Group Behavior, in BLACKWELL HANDBOOK OF SOCIAL PSYCHOLOGY: GROUP PROCESSES 56, 58 (Michael A. Hogg & Scott Tindale eds., 2001) [hereinafter GROUP PROCESSES] (using categorization processes to explain a number of intergroup phenomenon).

\textsuperscript{140} Id.; see also Hamilton & Trolier, supra note 116, at 128-33 (working through the mechanics and consequences of categorization).

\textsuperscript{141} Eleanor Rosch, Human Categorization, in STUDIES IN CROSS-CULTURAL PSYCHOLOGY 1, 2 (Neil Warren ed., 1977).

\textsuperscript{142} WALTER LIPPMAN, PUBLIC OPINION 16 (1922) ("For the real environment is altogether too big, too complex, and too fleeting for direct acquaintance. We are not equipped to deal with so much subtlety, so much variety, so many permutations and combinations.").

\textsuperscript{143} For a real world example, consider how the Energy Policy and Conservation Act of 1975 imposed lower fuel efficiency standards on light trucks than on passenger cars. See 49 U.S.C. § 32902(a)-(b) (2004) (authorizing the Secretary of Transportation to regulate fuel economy standards for vehicles); 49 C.F.R. § 533.5(a) (2004) (increasing the fuel economy of light trucks). Since then, car manufacturers have introduced vehicles with features of both trucks and cars, such as the minivan and the PT Cruiser. These vehicles are shoehorned into the light truck category, resulting nationally in lower gas mileage. See generally Kyler Smart, Losing Ground: How SUVs Are Making the United States Less Fuel-Efficient and Options for Reversing the Downward Trend, 7 ENVTL. LAW. 159 (2000).
intercategory differences are increased (contrast).\textsuperscript{144}

1. Stereotyping as Categorization

Normal, routine and unconscious cognitive processes lead to the formation of categories. These same processes cause our categorization of other people.\textsuperscript{145} Stereotyping is perhaps best understood as merely a subset of categorization called social categorization.\textsuperscript{146} In this view, “people categorize other people by race, sex, ethnicity and the like in the same way that they categorize furniture as chairs, tables, couches and the like.”\textsuperscript{147}

From this perspective, everyone has and uses stereotypes, not just invidiously motivated racists or sexists. Stereotyping, like categorizing, consists of inferring a relatively complete idea about a specific subject based on a small amount of information. A stereotype can be understood as a cognitive structure that contains sweeping concepts of the behaviors, traits and attitudes associated with the members of a social category.\textsuperscript{148} It is simply a

\textsuperscript{144} See infra note 201-216 and accompanying text (discussing how people assess others within their own group versus people in different groups).

\textsuperscript{145} The important difference between categorizing objects and categorizing people is that in the latter situation the comparisons often implicate the one doing the categorization. See Hogg, supra note 139, at 59-60 (discussing the self-esteem and identity values implicated in categorization).

\textsuperscript{146} See Kimberly A. Quinn et al., Functional Modularity in Stereotype Representation, 40 J. EXPERIMENTAL SOC. PSYCHOL. 519, 519 (2004) (writing that “[c]ategorization is central to the process of social perception”); Henri Tajfel, Cognitive Aspects of Prejudice, 25 J. SOC. ISSUES 79, 81-82 (1969) (defining stereotyping simply “as the attribution of general psychological characteristics to large human groups”); Shelley E. Taylor et al., Categorical and Contextual Bases of Person Memory and Stereotyping, 36 J. PERSONALITY & SOC. PSYCHOL. 778, 778 (1978) (proposing that there is “no theoretical or empirical reason” to assume that stereotyping is very different from generalizing about other categories of objects); see also Lippman, supra note 142, 65-69 (using the word stereotype in social science for the first time to mean a schema).

\textsuperscript{147} Susan T. Fiske, Examining the Role of Intent: Toward Understanding Its Role in Stereotyping and Prejudice, in UNINTENDED THOUGHT 253, 253 (James S. Uleman & John A. Bargh eds., 1989) (arguing that the ease of categorization should not be taken to imply a lack of intent or responsibility).

\textsuperscript{148} See Ziva Kunda, SOCIAL COGNITION: MAKING SENSE OF PEOPLE 315 (1999) (defining stereotypes as “cognitive structures that contain our knowledge, beliefs, and expectations about a social group”); Hamilton & Trolier, supra note 116, at 133 (characterizing stereotypes as “a cognitive structure that contains the perceivers knowledge, beliefs, and expectancies about some human group”). See generally David L. Hamilton & Jeffrey W. Sherman, Stereotypes, in 2 HANDBOOK OF SOCIAL COGNITION 1 (Robert S. Wyer, Jr. & Thomas K. Srull eds., 2d ed. 1994) (surveying a wide swatch of literature on the cognitive processes associated with stereotype formation and mutation). Other definitions of “stereotype” have limited the term to generalizations that are incorrectly learned, factually inaccurate and rigid. See Allport, supra note 136, at 187 (defining stereotype to mean the perceivers exaggerated beliefs regarding a category of people); Ashmore & Del Boca,
correlation, not necessarily negative in nature, and not necessarily false, as simple as "the British are reserved" or "Canadians are funny." For the selection of jurors in the criminal law context, stereotyping may lead lawyers to believe that "African Americans make better defense jurors," or that female jurors are more likely to convict in rape or child abuse cases.

At the same time, just like other kinds of categorization, stereotypes distort what we experience by making our world seem simpler and less surprising. Stereotypes and stereotyping necessarily lead to oversimplified conceptions and misapplied knowledge. As a result, stereotyping "per se, propels the individual down the road to bias." Or, as psychologist John Bargh puts it,

\textit{supra} note 110, at 14-15 tbl.1.2 (providing numerous definitions).

This is not to say that people are necessarily good at accurately determining correlations or covariations consciously. In fact, people often are "notoriously bad," especially if they have pre-existing expectations. See \textit{Wilson, supra} note 95, at 62 (stating that the correlation must be very strong in order for people to consciously detect it). See generally Lauren B. Alloy & Naomi Tabachnik, \textit{Assessment of Covariation by Humans and Animals: The Joint Influence of Prior Expectations and Current Situational Information}, 91 PSYCHOL. REV. 112 (1984) (analyzing people's and animals' assessments of covariation); Tina K. Trolier & David L. Hamilton, \textit{Variables Influencing Judgement of Correlational Relations}, 50 J. PERSONALITY & SOC. PSYCHOL. 879 (1986) (investigating "subjects' ability to assess correlational relations").

Susan T. Fiske et al., \textit{A Model of (Often Mixed) Stereotype Content: Competence and Warmth Respectively Follow from Perceived Status and Competition}, 82 J. PERSONALITY & SOC. PSYCHOL. 878, 879 (2002) ("[S]tereotypes often include a mix of more and less socially desirable traits, not just the uniform antipathy so often assumed about stereotypes."); see Don Operario & Susan T. Fiske, \textit{Stereotypes: Content, Structures, Processes, and Context}, \textit{in INTERGROUP PROCESSES, supra} note 127, at 22, 24-25 (concluding that most social stereotypes are ambivalent).

See generally Clark R. McCauley et al., \textit{Stereotype Accuracy: Toward Appreciating Group Differences, in STEREOTYPE ACCURACY: TOWARD APPRECIATING GROUP DIFFERENCES, supra} note 137, at 293, 297 (arguing that there is often a kernel of truth to most stereotypes).

These examples are chosen because I am a citizen of Canada and of the United Kingdom (and neither particularly reserved nor funny).

See \textit{infra} note 364 and accompanying text (citing article finding blacks jurors more likely to acquit criminal defendants).

See \textit{infra} note 365 and accompanying text (citing court opinion referring to numerous studies that female jurors are slightly less likely to acquit).

See David A. Wilder, \textit{Social Categorization: Implications for Creation and Reduction of Intergroup Bias, in 19 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY} 291, 292 (Leonard Berkowitz ed., 1986) ("[T]he mere categorization of persons into different groups engages a series of assumptions that foster intergroup biases."); see also Albert F. Eldridge, \textit{IMAGES OF CONFLICT} 22-23 (1979) (describing stereotyping as a method used to simplify the "cognitive world" that leads to reactions to perceived stimulus that are usually not real).

Wilder, \textit{supra} note 155, at 292; \textit{see also} Galen V. Bodenhausen & C. Neil Macrae,
"[s]tereotypes are categories that have gone too far."\textsuperscript{157}

2. Stereotyping as Schemas

Researchers have developed these ideas through studies that have viewed stereotypes as "social schemas."\textsuperscript{158} Social schemas can exist at any level of abstraction and along any dimension, such as identity group (for example, race), character traits (for example, dominance), physical traits (for example, tall), social roles (for example, occupation), or general person impressions. Whites in America may attribute to blacks character traits such as laziness or hostility, physical traits such as kinky hair, roles such as entertainer or drug-dealer, and an overall negative person impression.\textsuperscript{159} Within schemas are sub-schemas, organized hierarchically, wherein specific examples constitute the lowest level of schema abstraction.\textsuperscript{160}

People generally match and compare incoming information with the most

\textit{Stereotype Activation and Inhibition, in 11 Stereotype Activation and Inhibition: Advances in Social Cognition 1, 7} (Robert S. Wyer, Jr. ed., 1998) (asserting that "the road to . . . discrimination begins with the simple act of categorization"). But see Penelope Oakes, \textit{The Root of All Evil in Intergroup Relations? Unearthing the Categorization Process}, in \textit{Intergroup Processes, supra} note 127, at 1, 16 (arguing against the "widely endorsed view" that categorization results in intergroup discrimination and concluding instead that it has been a "scapegoat").


\textsuperscript{158} The term "schema" originally comes from F.C. Bartlett, \textit{Remembering: A Study in Experimental and Social Psychology} 201 (1932) ("'Schema' refers to an active organization of past reactions, or of past experiences, which must always be supposed to be operating in any well-adapted organic response."). Scholars have also referred to schemas as frames, scenes, scenarios, and scripts, among others. See Ronald W. Casson, \textit{Schemata in Cognitive Anthropology}, 12 Ann. Rev. Anthropology 429, 430 (1983) (defining schemas as "conceptual abstractions that mediate between stimuli received by the sense organs and behavioral responses," and stating that they "serve as the basis for all human information processing, e.g. perception and comprehension, categorization and planning, recognition and recall, and problem-solving and decision-making"). Other terms reflecting this notion that pre-existing knowledge has an impact on new data include anticipatory schemas, implicit personality theories, category-based expectations, and causal schemata. See David F. Barone et al., \textit{Social Cognitive Psychology: History and Current Domains} 193 (1997) (detailing the researchers who popularized these terms).

\textsuperscript{159} See Patricia G. Devine, \textit{Stereotypes and Prejudice: The Automatic and Controlled Components}, 56 J. Personality & Soc. Psychol. 5, 8-9 (1989) (citing studies documenting subjects' perceptions of the personality traits of blacks).

\textsuperscript{160} See Shelley E. Taylor & Jennifer Crocker, \textit{Schematic Bases of Social Information Processing}, in 1 Social Cognition: The Ontario Symposium 89, 92 (E. Tory Higgins et al. eds., 1981) (describing schema as a "pyramidal structure" which can be connected to other schemas through "a rich web of associations").
relevant schema or sub-schema. They then tend to order and process new related stimuli in keeping with other elements of the schema. A schema essentially operates as an implicit theory, which reflexively "directs the perceiver's attention . . . mediates inferences . . . guides judgment and evaluation; and . . . fills in . . . values for unexpected attributes." It is a way to integrate new material into familiar understanding and a way to draw conclusions beyond the information given. Not only do we assume the British are reserved or that Canadians are funny (if they are), but we also expect the British to act reserved and Canadians to be funny.

Schemas thus serve to provide an organizational structure, or sort of filing system, for stimuli. Although they improve efficiency, they also may cause people to ignore, trivialize or simply fail to notice individual differences. Of critical importance, however, is that a schema's positive and negative functions both occur "without any intentional or conscious recollection."

3. Stereotypes: Knowledge Versus Personal Beliefs

Stereotypes and the resulting biases that they promote may result from unconscious cognitive processes, as opposed to conscious discriminatory purposes. Note that people's conscious (or explicit) attitudes and their unconscious (or implicit) attitudes (or associations, or beliefs) are often different, or to use the psychological term, dissociated.

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161 See id. at 94 ("This process of ordering and structuring the elements of the stimulus configuration is important because it lays the groundwork for subsequent inferences").

162 See id. at 97-8 (remarking that the processing of schemas has a critical influence on memory).

163 Elliot R. Smith, Mental Representation and Memory, in 1 HANDBOOK OF SOCIAL PSYCHOLOGY, supra note 110, at 391, 404 (citations omitted) (explaining how "[w]e just ‘know’ that someone’s nasty comment means that he is a boorish person, rather than ‘remembering’ this connection between a behavior and a trait").


165 Smith, supra note 163, at 404 (explaining that while the process may not be conscious, it nevertheless causes the perceiver to play "an active rather than passive role in perception and cognition"). This process is explored further at Part III.B.

166 See supra notes 77-92 and accompanying text (discussing how the courts define discriminatory purpose).

167 See Mahzarin R. Banaji, Implicit Attitudes Can Be Measured, in THE NATURE OF REMEMBERING: ESSAYS IN HONOR OF ROBERT G. CROWDER 117, 143 (Henry L. Roediger III et al. eds., 2001) (citing psychometric evidence that "implicit and explicit attitudes are indeed disassociated"); Timothy D. Wilson et al., A Model of Dual Attitudes, 107 PSYCHOL. REV. 101, 104-06 (2000) (building on the dual attitude model by hypothesizing that implicit attitudes are more readily retrieved from memory than explicit attitudes but are harder to change); see also William A. Cunningham et al., Implicit Attitude Measures: Consistency, Stability, and Convergent Validity, 12 PSYCHOL. SCI. 163, 169 (2001) (finding a "dissociation between implicit and explicit measures of race attitude").
Psychologists have conceived attitudes (and related concepts such as feeling and evaluation) as occurring at three distinct levels. First, there are public attitudes, which are those that people will admit and state publicly. ("I believe that everyone should be treated equally.") They tend to be socially desirable, as people are generally concerned about their self-presentation or image to others. Today, few Americans are prepared to publicly state that they have racist, or to a lesser degree, sexist beliefs, since holding those beliefs is generally no longer socially acceptable.

Second, there are also private attitudes, which are those beliefs that a person has consciously, but may not wish to express publicly. ("I think black people are poor because they are lazy.") The Supreme Court's Batson procedure is addressed towards peremptory challenges exercised on the basis of these private attitudes. ("I think black people make lousy jurors.") These beliefs are generally consistent with the individual's principles and values.

Sometimes, maybe even often, a person's private and public attitudes are the same.

Finally, and most controversially, there are unconscious or implicit attitudes that "materialize in ways that elude conscious awareness, seem oblivious to conscious intention, and defy conscious control." Implicit attitudes have been defined as "introspectively unidentified (or inaccurately identified) traces of past experience that mediate favorable or unfavorable feeling, thought, or action toward social objects." These implicit attitudes may also be, and often are, inconsistent with the person's public or private attitudes.

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168 This framework is adapted from John F. Dovidio et al., On the Nature of Prejudice: Automatic and Controlled Processes, 33 J. EXPERIMENTAL SOC. PSYCHOL. 510, 519 (1997) (conducting an experiment examining how conscious and nonconscious "racial attitudes predict Whites' spontaneous and deliberative interracial responses").

169 Id. ("Individuals may publicly express socially desirable (nonprejudiced) attitudes even though they are aware that they privately hold other, more negative attitudes.").

170 See supra notes 120-132 and accompanying text (tracing the changing nature of racism and sexism).

171 Dovidio et al., supra note 168, at 519.

172 Id. ("In contrast to public attitudes that are related to impression management, these personal attitudes are influenced by an individual's private standards and ideals.")

173 Banaji, supra note 167, at 118 (addressing the challenges in measuring implicit attitudes).

174 Greenwald & Banaji, supra note 118, at 8.

Researchers believe that they predict different kinds of behavior, with implicit attitudes being more relevant to "subtle or spontaneous expressions of bias."\(^{176}\) Whereas most studies have found that men have more explicit negative racial stereotypes than women,\(^{177}\) the reverse may be true with respect to implicit racial stereotypes.\(^{178}\)

Psychologist Patricia G. Devine has contrasted private beliefs with mere knowledge of stereotypes.\(^{179}\) She has argued persuasively that it is both stereotypes and personal beliefs that represent an individual's knowledge about a social group,\(^{180}\) and that peoples' personal beliefs are unlikely to be completely consistent with all the stereotypes of which they are aware.\(^{181}\) So while nearly all Americans know about stereotypes of blacks, only some Americans actually believe in the stereotypes. Therefore, although the stereotypes of blacks remain largely negative (for example, low in intelligence, poor, lazy, loud, criminal, hostile),\(^{182}\) people's "personal beliefs toward Blacks have progressively become more favorable over the years, to the point that they are, at present, predominately positive."\(^{183}\)

The significant aspect of this framework, however, is that despite a person's beliefs about a social group, the stereotypes remain "a well-organized, frequently activated knowledge structure"\(^{184}\) that can affect judgment and decision-making.\(^{185}\) We turn now to how the "knowledge structures" of
stereotypes are developed and maintained.

B. Stereotype Formation

It is easy enough to see how people may develop stereotypes that are based on real group differences.\(^{186}\) People can observe whether race or sex is positively or negatively correlated with some other attribute. Race or sex (which is easy to see) is in effect used as a proxy for another attribute that may be more difficult to observe directly.\(^{187}\) Stereotypes based on some social categories, such as age, may have some factual validity. For example, it is unarguable that many important physical faculties, such as vision, hearing, and speed of reflex, decline with age.\(^{188}\) In contrast, there are few racial or gender stereotypes that are incontestably correct.

The more interesting topic for discussion concerns the formation of stereotypes when there are either no underlying real group differences or when any real group differences are small relative to the strength of the stereotype. Psychological research has suggested several cognitive processes by which people form and maintain stereotypes in this context. These are examined in the following sections.

1. Ingroup and Outgroup Bias/Perceptual Accentuation

As the preceding discussion of categorizing suggests, placing something or someone in a group can alter people’s perceptions of the item.\(^{189}\) The pioneering study in this field involved an experiment in which researchers asked people to estimate the differences in the length of certain lines.\(^{190}\) When participants saw the lines as part of a group, they judged them to be more

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\(^{186}\) This is not to say that a stereotype based on a real group difference is necessarily an appropriate basis to judge others. See generally Frederick Schauer, Profiles, Probabilities, and Stereotypes 131-54 (2003) (arguing that gender based stereotypes should not guide a person’s decisions, even when the stereotypes represent real group differences). It is also not to say that people are good at observing real group differences. See supra note 149.


\(^{188}\) Stereotypes about age are the justification for the Federal Aviation Administration’s regulation regarding age and pilots for passenger airplanes. See FAA, DOT Airman and Crewmember Requirements, 14 C.F.R. § 121.383(c) (2004) (providing that “[n]o person may serve as a pilot on an airplane engaged in [passenger] operations . . . if that person has reached his 60th birthday”). Of course, the fact that those aged over sixty are more likely to have declining faculties is not to say that all of those aged over sixty will have declining faculties. See Schauer, supra note 186, at 131-34 (discussing the “Age Sixty Rule”).

\(^{189}\) See Wilder, supra note 155, at 296 (answering in the affirmative the question “[d]oes the mere act of categorizing actors into a group lead to a different set of inferences than if they are perceived to be unrelated to one another?”).

\(^{190}\) See Tajfel, supra note 146, at 83-86 (describing the original experiments).
similar in length to each other than when the identical lines were ungrouped.\textsuperscript{191} Likewise they saw the grouped lines as more dissimilar to lines in other groups.\textsuperscript{192} Significantly, participants were much more accurate in judging and comparing lengths when lines were ungrouped.\textsuperscript{193}

A more recent study demonstrated the importance of categorization on judgments of people’s attitudes.\textsuperscript{194} Experimenters asked subjects to judge how similar male actors were to each other on a continuous percentile scale of political liberalism.\textsuperscript{195} For example, an actor at the seventieth percentile mark (meaning that he was more liberal than seventy percent of the population) and another at the eightieth percentile mark would be ten units apart.\textsuperscript{196} In some cases, the researchers marked off the scale at the twenty-fifth, fiftieth, and seventy-fifth percentile marks, forming quartiles.\textsuperscript{197} When experimenters used the quartile marks, participants judged an actor at the seventieth percentile to be more similar to an actor at the fifty-fifth percentile, fifteen units apart (but in the same quartile), than one at the eightieth percentile, only ten units apart (but in a different quartile).\textsuperscript{198} Subjects appeared to treat the quartile marks as denoting groups, and thus providing additional data, while ignoring the unchanged underlying reality.\textsuperscript{199}

Researchers have found similar, albeit much more complex, results in

\begin{itemize}
  \item \textsuperscript{191} Id. at 84 (finding a “subjective reduction of differences within each of the classes”).
  \item \textsuperscript{192} Id.
  \item \textsuperscript{193} Id.
  \item \textsuperscript{194} See Myron Rothbart et al., Effects of Arbitrarily Placed Category Boundaries on Similarity Judgments, 33 J. EXPERIMENTAL SOC. PSYCHOL. 122, 132 (1997) (designing a study to “assess the effect of category boundaries on inter- and intracategory similarity”).
  \item \textsuperscript{195} Id. (using fifteen pairs of actors that varied by ten, fifteen, or thirty-five percentile points).
  \item \textsuperscript{196} Id.
  \item \textsuperscript{197} Id.
  \item \textsuperscript{198} Id. at 136-37 (“Clearly, in this experiment, the effects of interposed category boundaries were successful in nullifying differences in perceived similarity due to actual scale position.”).
  \item \textsuperscript{199} Id at 140-42 (showing “evidence that the presence of boundary markers produced both within-category assimilation and between-category accentuation”). The study also found the same effect when experimenters added verbal labels to the percentile scale. \textit{See Myron Rothbart, Category Dynamics and the Modification of Outgroup Stereotypes, in INTERGROUP PROCESSES, supra note 127, at 46, 56 (describing this effect as though “it is as if a farmer living at the boundary of Poland and Russia, after learning that his house is just inside the Polish border, exclaims with relief, ‘Thank God, no more Russian winters!’”). One wonders if a similar effect occurs with perceptions of law schools. Prospective students may well see the University of Kentucky (ranked fiftieth) as closer in “quality” to the University of Utah (ranked forty-seventh) than to Arizona State University (ranked fifty-third), where the top fifty appear on one page and the remaining schools in the top hundred appear two pages later. \textit{See America’s Best Graduate Schools: Rankings, U.S. NEWS & WORLD REP., Apr. 12, 2004, at 64, 69-70.}"
\end{itemize}
studies where people themselves are grouped, rather than just lines or others’ attitudes. Grouping people, even on a completely arbitrary basis such as a coin toss, leads to strong biases regarding others’ assessments of the people in the group and the way they behave toward them. People experience more positive feelings towards those individuals in the same group as they are, and see those people as being more similar to themselves than ungrouped individuals or those in other groups. They judge same-group members more positively, see and describe failures as more situational than dispositional, overrate achievements considerably, punish more leniently, and are more


201 See id. at 59 (citing numerous studies “leaving little doubt that the trivial or random classification of a group of people into two subgroups is sufficient to induce” intergroup bias); cf. Oakes, supra note 156, at 15 (suggesting that grouping in the minimal group paradigm may matter because participants expect it to matter).

202 See Sabine Otten & Gordon B. Moskowitz, Evidence for Implicit Evaluative In-Group Bias: Affect-Based Spontaneous Trait Inference in a Minimal Group Paradigm, 36 J. EXPERIMENTAL SOC. PSYCHOL. 77, 86-88 (2000) (concluding that positive in-group stereotypes exist, but finding no support for negative out-group stereotypes).

203 Fiske, supra note 18, at 129 (“The mere fact of categorizing people into ‘us’ and ‘them,’ ingroup and outgroup, tends to exaggerate intercategory differences and diminish intracategory differences.”); see also David A. Wilder, Perceiving Persons as a Group: Categorization and Intergroup Relations, in COGNITIVE PROCESSES, supra note 110, at 213, 217-18 (citing study showing that “categorization of a person into a group establishes expectations about the person... that are formed before actually seeing the person’s behavior”).

204 See Maria Rosaria Cadinu & Myron Rothbart, Self-Anchoring and Differentiation Processes in the Minimal Group Setting, 70 J. PERSONALITY & SOC. PSYCHOL. 661, 661-62 (1996) (describing the process of conferring positive self-image to in-group members); W. Doise et al., An Experimental Investigation into the Formation of Intergroup Representations, 2 EUR. J. SOC. PSYCHOL. 202, 203-04 (1972) (judging physical traits and showing that the degree of discrimination depends on whether intergroup interaction is expected); Miles Hewstone, The “Ultimate Attribution Error”?: A Review of the Literature on Intergroup Causal Attribution, 20 EUR. J. SOC. PSYCHOL. 311, 331 (1990) (documenting that in-group members were favored with respect to “positive and negative outcomes”); Brian Mullen et al., Ingroup Bias as a Function of Salience, Relevance and Status: An Integration, 22 EUR. J. SOC. PSYCHOL. 103, 116-19 (1992) (meta-analysis confirming that ingroups are perceived more positively than outgroups).

205 See Gillian Finchilescu, Intergroup Attributions in Minimal Groups, 134 J. SOC. PSYCHOL. 111, 116 (1994) (“In-group favoritism in marks for failure was positively correlated with favoritism in external attributions (task difficulty and bad luck) and negatively correlated with internal attributions (lack of ability and effort).”); see also infra note 359 (citing studies showing how people evaluate information that is consistent with their tentative theory less critically than inconsistent information).

206 Finchilescu, supra note 205, at 117 (finding a correlation between same-group bias in both attributions of success and allocations of rewards).
likely to offer assistance to members in their group. Nearly one hundred studies have now demonstrated this ingroup favoritism.

People see those in other groups as a more homogeneous mass (outgroup homogeneity), and in a more negative manner (outgroup derogation). Not surprisingly, they remember out-group negative behaviors more easily. Put succinctly, “[t]hey are all alike and different from us, besides.” People even selectively process information that will reinforce these views over information that does not. Perhaps most tellingly, when permitted to allocate financial

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207 Norbert L. Kerr et al., Defendant-Juror Similarity and Mock Juror Judgments, 19 LAW & HUM. BEHAV. 545, 563 (1995) (concluding that juror-defendant similarity generally resulted in greater leniency in cases of weak or moderately strong evidence).

208 See John F. Dovidio et al., Extending the Benefits of Recategorization: Evaluations, Self-Disclosure and Helping, 33 J. EXPERIMENTAL SOC. PSYCHOL. 401, 401 (1997) (finding that “the manipulation of the intergroup contact situation that created stronger impressions of one group reduced intergroup bias in evaluations, self-disclosure, and helping”).

209 See Dasgupta, supra note 123, at 146 (citing studies documenting ingroup favoritism and outgroup derogation).

210 See e.g. Miles Hewstone et al., Models of Crossed Categorization and Intergroup Relations, 64 J. PERSONALITY & SOC. PSYCHOL. 779, 782 (1993) (“[T]here is a consistent tendency to view in-groups as more variable than out-groups.”); Patricia W. Linville, The Heterogeneity of Homogeneity, in ATTRIBUTION AND SOCIAL INTERACTION: THE LEGACY OF EDWARD E. JONES 423, 446-48 (John M. Darley & Joel Cooper eds., 1998) [hereinafter ATTRIBUTION AND SOCIAL INTERACTION] (reviewing studies of out-group homogeneity); Patricia W. Linville et al., Stereotyping and Perceived Distributions of Social Characteristics: An Application to Ingroup-Outgroup Perception, in PREJUDICE, DISCRIMINATION, AND RACISM, supra note 109, at 165, 167 (calling out-group homogeneity a “truism” but adding that twenty percent of studies have been unable to document it); cf. Diane M. Mackie, Integrating Social and Cognitive Processes Underlying the Out-Group Homogeneity Effect: The Homogeneity of Homogeneity, in ATTRIBUTION AND SOCIAL INTERACTION, supra, 471, 472-73 (observing that out-group homogeneity has yet to be fully explained); Thomas M. Ostrom & Constantine Sedikides, Out-Group Homogeneity Effects in Natural and Minimal Groups, 112 PSYCHOL. BULL. 536, 536-37 (1992) (finding strong evidence for outgroup homogeneity with preexisting group memberships, but criticizing the widespread conclusion that it obtains in the strict minimal group paradigm).

211 See Dasgupta, supra note 123, at 146 (commenting that “a hundred studies have documented people’s tendency... to associate negative characteristics with outgroups more easily than ingroups”).

212 See John W. Howard & Myron Rothbart, Social Categorization and Memory for In-Group and Out-Group Behavior, 38 J. PERSONALITY & SOC. PSYCHOL. 301, 303-06 (1980) (conducting three experiments related to ingroup favoritism and its effect on memory); see also Myron Rothbart & Bernadette Park, On the Confirmability and Disconfirmability of Trait Concepts, 50 J. PERSONALITY & SOC. PSYCHOL. 131, 135 (1986) (studying the ease or difficulty of disconfirming beliefs about an individual or group).

213 Fiske, supra note 18, at 129 ( remarking that “[m]oderates rarely express open hostility toward outgroups, but they may withhold basic liking and respect”).

214 David A. Wilder & Vernon L. Allen, Group Membership and Preference for Information About Others, 4 PERSONALITY & SOC. PSYCHOL. BULL. 106, 109 (1978)
rewards to members of their group and members of the other group, the most common choice was to maximize the difference in rewards between the members of each group, rather than selecting an egalitarian choice or a choice that maximized the reward for the member of their group. This is not to say, of course, that all people will always judge their own group more positively than the groups of others.

People's language about ingroup and outgroup behavior helps illustrate how group bias functions. Positive behavior by a member of the ingroup tends to be portrayed in broader more abstract, and general terms, such as "we are diligent," whereas negative behavior is depicted as narrow and specific, "Mary didn't finish her work." In contrast, the reverse tends to be true for positive and negative behaviors by a member of the outgroup (for example, "Joe finished his work on time," and "they are lazy"). The more abstract (showing these results in both competitive and noncompetitive group settings).

See Marilynn B. Brewer & Rupert J. Brown, Intergroup Relations, in 2 HANDBOOK OF SOCIAL PSYCHOLOGY, supra note 110, at 554, 567 (summarizing studies that show "a reliable tendency to award more money to ingroup members than to outgroup members" and to "maximize group differences" even when this "in absolute terms" made the ingroup member worse off); see also Michael Billig & Henri Tajfel, Social Categorization and Similarity in Intergroup Behavior, 3 EUR. J. SOC. PSYCHOL. 27, 37-48 (1973) (finding subjects distributed more money to in-group members even when better alternatives existed and subjects had no personal interest at stake). See generally Richard Y. Bourhis & André Gagnon, Social Orientations in the Minimal Group Paradigm, in INTERGROUP PROCESSES, supra note 127, at 89 (discussing extensive subsequent research expanding on Tajfel's minimal group paradigm).

For example, some minority group members may "respond to discrimination and prejudice by attempting to disassociate themselves from the group, even to the point of adopting the majority's negative attitudes." Castaneda v. Partida, 430 U.S. 482, 503 (1977) (considering a claim that Mexican Americans were discriminated against during grand jury selection). In a similar vein, when Justice Marshall was asked whether his replacement should be an African American, he replied, "there's no difference between a white snake and a black snake. They'll both bite." Justice Thurgood Marshall, Press Conference on Supreme Court Retirement (June 28, 1991), quoted in Neil A. Lewis, Marshall Urges Bush to Pick "the Best," N.Y. TIMES, June 29, 1991, at A8; see also Dasgupta, supra note 123, 148-150 (summarizing research on implicit majority group favoritism by minority groups); Jost et al., supra note 175 (manuscript at 38-39) (contending that minorities will sometimes favor the majority group, especially implicitly, in order to justify the existing social order). Usually, however, own groups are judged more favorably. See generally Oliver C. S. Tzeng & Jay W. Jackson, Effects of Contact, Conflict and Social Identity on Interethnic Group Hostilities, 18 INT'L J. INTERCULTURAL REL. 259 (1994) (studying the effects of social identity theory, which postulates that ingroup bias "is an omnipresent feature of intergroup relations").

See Anne Maass et al., Language Use in Intergroup Contexts: The Linguistic Intergroup Bias, 57 J. PERSONALITY & SOC. PSYCHOL. 981, 983 (1989) [hereinafter Maass et al., Language Use] (arguing that the storage of information at a higher level of abstraction is more resistant to disconfirmation); Anne Maass et al., Linguistic Intergroup Bias: Evidence for In-Group- Protective Motivation, 71 J. PERSONALITY & SOC. PSYCHOL. 512, 512-14
description allows people to apply an attribution to the whole group, whereas
the more specific description is applicable only to an individual.

It is hard to conclude that a person would have any invidious motivation
against someone where the only information she has is that the other person is
in group X, all by the determination of a coin toss. Rather, these biases appear
to develop not because of an invidious dislike of the outgroup, but rather
"because positive emotions such as admiration, sympathy, and trust are
reserved for the ingroup." 218 In addition, although these biases (if not their
causes) may be conscious, they are also implicit. 219 Psychologists have
concluded that this intergroup bias results virtually automatically and
concurrently with the very process of perceiving someone in a group. 220
Although perhaps some are surprised by these conclusions regarding group
bias, several studies support them by demonstrating how seemingly trivial
similarities affect people's significant life decisions. 221

(1996) [hereinafter Maass et al., Linguistic Intergroup Bias] (concluding that the study
supported the hypothesis "that positive in-group and negative out-group behaviors are
described more abstractly than are negative in-group and positive out-group behaviors"). 218 Marilyn B. Brewer, The Psychology of Prejudice: Ingroup Love or Outgroup Hate?,
55 J. SOC. ISSUES 429, 438 (1999) (observing that ingroup favoritism precipitates racism);
see also Brewer & Brown, supra note 215, at 559 (describing empirical evidence showing
that ingroup favoritism and outgroup derogation are independent phenomena).

219 See Leslie Ashburn-Nardo et al., Implicit Associations as the Seeds of Intergroup
Bias: How Easily Do They Take Root?, 81 J. PERSONALITY & SOC. PSYCHOL. 789, 797
(2001) (concluding that "intergroup bias emerges at the implicit level, without people's
intent or conscious awareness"); Anthony G. Greenwald et al., Implicit Partisanship: Taking
implicit partisanship); see also Sabine Otten & Dirk Wentura, About the Impact of
Automaticity in the Minimal Group Paradigm: Evidence From Affective Priming Tasks, 29
EUR. J. SOC. PSYCHOL. 1049, 1065-68 (1999) ("There is firm evidence that a minimal social
categorization is already sufficient to automatically activate positive attitudes towards the
self-inducing category and negative or rather neutral attitudes towards the other (non-self)
category."). 220

220 See, e.g., Fiske, supra note 110, at 367 (asserting that this automatic categorization
"saves cognitive resources"); Gaertner & Dovidio, supra note 114, at 85 (describing
intergroup bias as "an indirect attitudinal process"); Taylor & Crocker, supra note 160, at
101 (citing data showing that information that conforms to a schema will be processed more
quickly than information that does not).

221 Pelham and colleagues summarize a series of studies based on the "name letter
effect," which is the finding that people tend to prefer letters that appear in their own names
-especially the first letter- over other letters. See Pelham et al., supra note 68, at 470. These
studies demonstrated that people are more likely to live in a place with a name that
resembles their own first or last names than chance would predict (for example, people
named Jack are more likely to live in Jacksonville). Id. at 471. Other studies suggested that
people are more likely to choose occupations that resemble their names (for example, there
are more lawyers named Lawrence, dentists named Dennis, and geoscientists named George
than chance would predict). Id. at 478-80. Similar behavioral effects have been found
2. Illusory and Other Inaccurate Correlations

Another cognitive process that can lead to the formation of stereotypes, particularly those with negative implications, is referred to as an "illusory correlation." This occurs when people mistakenly believe that two things are correlated, either more than they actually are correlated or when they are actually negatively correlated.222 In the interpersonal context, people create stereotypes when an attribute is incorrectly associated with a social category.

People appear particularly prone to an "overestimation of the relative degree of association between an infrequent category of behavior and a minority group."223 Psychologists David Hamilton and Robert Gifford demonstrated this effect in an influential 1976 study.224 In their study, participants read descriptions of behaviors of two artificial groups, both of which had an approximate two to one ratio of positive to negative behaviors.225 One group, however, was twice as large and had twice as many total behaviors listed as the other group.226 The results showed that people considerably overestimated the performance of negative behaviors by the smaller group and rated the members of the smaller group less favorably.227 The authors of the study explained that the co-occurrence of two infrequently occurring stimulus items were more

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based on people's preference for their own birthdays. See Dale T. Miller et al., Minimal Conditions for the Creation of a Unit Relationship: The Social Bond Between Birthdaymates, 28 EUR. J. SOC. PSYCHOL. 475, 479-80 (1998) (demonstrating that individuals cooperate more with others who share their birthday, even though there are no other perceived similarities). I am perhaps an extreme example of this – my wife and I are birthdaymates.

222 See Loren J. Chapman, Illusory Correlation in Observational Report, 6 J. VERBAL LEARNING & VERBAL BEHAV. 151, 151 (1967) (defining "illusory correlation" as "the report by observers of a correlation between two classes of events which, in reality, (a) are not correlated, or (b) are correlated to a lesser extent than reported, or (c) are correlated in the opposite direction from that which is reported"). Illusory correlation has also been viewed more narrowly as the finding of "causal patterns and relationships in matters that are the product of random chance." Donald C. Langevoort, Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review, 51 VAND. L. REV. 1499, 1502 (1998).


224 See David L. Hamilton & Robert K. Gifford, Illusory Correlation in Interpersonal Perception: A Cognitive Basis of Stereotypic Judgments, 12 J. EXPERIMENTAL SOC. PSYCHOL. 392, 405-06 (1976) (concluding that "distortions in judgment can result from the cognitive mechanisms involved in processing information about co-occurring events").

225 Id. at 394-95 (using "27 moderately desirable and 12 moderately undesirable" behavior descriptions).

226 Id. (assigning twenty-six members and traits to group A and thirteen to group B).

227 Id. at 396-99.
noticeable and attracted more attention in the smaller group; thus these items were remembered as occurring much more frequently than they actually did.\textsuperscript{228} Because minority group members are salient,\textsuperscript{229} and negative behaviors are less common and tend to be more salient than those that are positive,\textsuperscript{230} people can create an "illusory correlation," or stereotype, between minority groups and negative behaviors.\textsuperscript{231} The empirical finding that increased contact between groups can reduce intergroup bias by increasing the information known about those other group supports this notion.\textsuperscript{232} These types of illusory

\textsuperscript{228} Id. at 405. Others have argued that illusory correlations result simply from social categorization. See Thorsten Meiser & Miles Hewstone, \textit{Crossed Categorization Effects on the Formation of Illusory Correlations}, 31 EUR. J. SOC. PSYCHOL. 443, 446-47 (2001) (reviewing studies supporting and opposing this argument). In other words, the mere placement of people in groups causes the perceiver to look for evidence of group differentiation. See id.

\textsuperscript{229} In one sense, minority group members are salient by definition, as there always exists the more familiar majority.

\textsuperscript{230} See Felicia Pratto & Oliver P. John, \textit{Automatic Vigilance: The Attention-Grabbing Power of Negative Social Information}, 61 J. PERSONALITY & SOC. PSYCHOL. 380, 381 (1991) (reconfirming that negative traits attract more attention than positive traits). Experts attribute this phenomenon to the smaller number of negative behaviors compared to positive behaviors, and to "automatic vigilance, a mechanism that serves to direct attentional capacity to undesirable stimuli." Id. at 380. Something that is negative is more likely to be associated with a threat and thus requires more and quicker conscious attention. See generally Christine H. Hansen & Ranald D. Hansen, \textit{Finding the Face in the Crowd: An Anger Superiority Effect}, 54 J. PERSONALITY & SOC. PSYCHOL. 917 (1988) (studying the effect of positive and negative facial expressions on a person's ability to detect certain faces). An angry face is more likely to be a threat than a face with any other expression. See id. at 922-23 (finding that angry faces are detected faster than happy or neutral faces); see also Kurt Hugenberg & Galen V. Bodenhausen, \textit{Ambiguity In Social Categorization: The Role of Prejudice and Facial Affect in Race Categorization}, 15 PSYCHOL. SCI. 342, 342-45 (2004) (finding that racially ambiguous faces are more likely to be characterized as black when presenting angry facial expressions than when presenting happy expressions).

\textsuperscript{231} See SCHAUER, supra note 186, at 179-80 ("Because race is salient for most people, they are consequently likely to amplify the extent to which members of a race other than their own are represented in a larger population with negative attributes, such as the population of apprehended drug couriers, just because the observer is likely to focus more on the 'out group' members of that population, and consequently take those 'out group' members as being more representative of the group than they in fact are."); Mark Schaller, \textit{Social Categorization and the Formation of Group Stereotypes: Further Evidence for Biased Information Processing in the Perception of Group-Behavior Correlations}, 21 EUR. J. SOC. PSYCHOL. 25, 32-34 (1991) (showing an "illusory group-behavior correlation"). This can also be seen as a result of the "availability heuristic." See RICHARD H. THALER, QUASI RATIONAL ECONOMICS 152 (1991) (stating that "[w]hen using the availability heuristic people estimate the frequency of a class by the ease with which they can recall specific instances in that class" (citation omitted)).

correlations have proved very easy to create in the laboratory, and have been extended to other contexts.

While the preceding discussion refers to research subjects' conscious detection of relationships (correlations) that do not exist, subjects can also unconsciously detect relationships. The unconscious detection of relationships can be surprisingly good. Studies have also demonstrated that

93, 98 (Stuart Oskamp ed., 2000) (concluding, based on a meta-analysis of 203 studies, that "intergroup contact generally does relate negatively to prejudice"); see also Samuel L. Gaertner et al., The Contact Hypothesis: The Role of a Common Ingroup Identity on Reducing Intergroup Bias, 25 SMALL GROUP RES. 224, 242-46 (1994) (studying how contact between groups reduced bias); Miles Hewstone, Contact and Categorization: Social Psychological Interventions to Change Intergroup Relations, in STEREOTYPES AND STEREOTYPING 323, 327-43 (C. Neil Macrae et al. eds., 1996) (summarizing the main points of the contact hypothesis and noting the importance of the quality of the contact). See generally Walter G. Stephan, The Contact Hypothesis in Intergroup Relations, 9 GROUP PROCESSES & INTERGROUP REL. 13 (1987) (tracing the development of the contact hypothesis since the 1940s). Not surprisingly, unfavorable contact experience leads to even higher in-group bias. See Tzeng & Jackson, supra note 216, at 259-60 (testing contact theory across three ethnic samples).

See Brian Mullen & Craig Johnson, Distinctiveness-based Illusory Correlations and Stereotyping: A Meta-analytic Integration, 29 BRIT. J. SOC. PSYCHOL. 11 (1990) (reviewing hundreds of studies documenting illusory correlations); see also David L. Hamilton, Illusory Correlation as a Basis for Stereotyping, in COGNITIVE PROCESSES, supra note 110, at 115, 131-137 (documenting multiple studies of illusory correlation); David L. Hamilton & Steven J. Sherman, Perceiving Persons and Groups, 103 PSYCHOL. REV. 336 (1996) (analyzing numerous studies documenting how information is processed differently when an impression is formed about an individual and a group).

See, e.g., Christine Jolls et al., A Behavioral Approach to Law and Economics, in BEHAVIORAL LAW AND ECONOMICS 13, 37-38 (Cass Sunstein ed., 2000) (commenting that legislation is affected by the overestimation of the frequency of salient events and the underestimation of the frequency of low-salience events); Jon K. Maner et al., Sexually Selective Cognition: Beauty Captures the Mind of the Beholder, 85 J. PERSONALITY & SOC. PSYCHOL. 1107, 1113 (2003) (finding that "female attractiveness captures the initial attention of both male and female observers" and can result in the overestimation of the proportion of attractive women).

See WILSON, supra note 95, at 26 (stating that the unconscious is capable of learning complex information, sometimes even faster than the conscious mind). See generally Thomas Hill et al., Self-Perpetuating Development of Encoding Biases in Person Perception, 57 J. PERSONALITY & SOC. PSYCHOL. 373 (1989) [hereinafter Hill et al., Encoding Biases] (concluding that an individual's subconscious encoding processes are an important factor which stimulates the self-perpetuation of biases); Thomas Hill et al., The Role of Learned Inferential Encoding Rules in the Perception of Faces: Effects of Nonconscious Self-Perpetuation of a Bias, 26 J. EXPERIMENTAL SOC. PSYCHOL. 350 (1990) (discussing how, in the context of perception of faces, inferential encoding rules based on previous experience operate without the percever's conscious awareness); Pawel Lewicki et al., Acquisition of Procedural Knowledge About a Pattern of Stimuli That Cannot Be Articulated, 20 COGNITIVE PSYCHOL. 24 (1988) (determining that the human cognitive
unconsciously detected correlations are capable of creating attitudes, and hence stereotypes. 236

An unfortunate aspect of unconscious detection, however, is that the learned patterns prove remarkably resistant to change. Once the unconscious has detected an initial correlation, a person will continue to behave as though the correlation exists long after it has disappeared. 237 In many situations, the person will even behave as though the correlation has strengthened, even in the presence of contradictory information. 238 This self-perpetuation of the correlation occurs unconsciously, so that a person's behavior is the appropriate measure of the correlation's strength; a person cannot consciously articulate the reasons for his behavior. 239

James Hilton and William Von Hippel have argued that exposure to a few stereotypic individuals is all that is required to form a stereotype and that once formed, the stereotypes may then strengthen, even without supportive evidence. 240 They note that because of stereotyping in the media 241 and because of self-fulfilling prophecies, 242 "it seems highly likely that there will always be at least a few (actual or portrayed) stereotype-congruent individuals available to initiate such self-perpetuating stereotypes. 243

system is able to memorize more information about encountered stimuli than can be consciously processed).

236 See Michael A. Olson & Russell H. Fazio, Implicit Acquisition and Manifestation of Classically Conditioned Attitudes, 20 SOC. COGNITION 89, 102 (2002) (suggesting that an individual need not engage in conscious attitude construal in order to form attitudes, which in turn can operate unconsciously).

237 See WILSON, supra note 95, at 53-54 (stating that "[a] disadvantage of a system that processes information quickly and efficiently is that it is slow to respond to new, contradictory information").

238 Id. at 54 ("[O]nce a correlation is learned, the nonconscious system tends to see it where it does not exist, thereby becoming more convinced that the correlation is true."); Hill et al., Encoding Biases, supra note 235, at 413-14 (finding that the strength of a bias gradually increased even though there was no objective support for the bias).

239 One study deliberately used psychology professors, who researchers believed were particularly sensitive about complex influences on their behavior. Even though the researchers told the professors that the study involved nonconscious cognition, the professors were unable to determine whether they had unconsciously learned the correlation. See Lewicki et al., supra note 235, at 24 ("Subjects in this experiment were found to have very little choice or influence over whether or not they learned the pattern and, after they acquired some knowledge, whether or not to use this knowledge.").


241 See infra note 249 (discussing the effects that stereotyping in the media has on the attitudes of both whites and blacks).

242 See infra notes 256-260 and accompanying text (describing how a person's expectations can bring about the expected event).

243 Hilton & von Hippel, supra note 240, at 245 (explaining that subtle stereotyping in the media and other places will assure that there will always be some "stereotype-congruent
3. Social Origins

Of course, people may also form some stereotypes even before processing (consciously or unconsciously) any data derived from one’s direct experience with others. Regardless of any motivation to discriminate, in an often-quoted excerpt Howard J. Ehrlich observed that:

[S]tereotypes about ethnic groups appear as a part of the social heritage of society. They are transmitted across generations as a component of the accumulated knowledge of society. They are as true as tradition, and as pervasive as folklore. No person can grow up in a society without having learned the stereotypes assigned to the major ethnic groups.244

Scholars have made similar statements about gender stereotypes.245 In either case, once people learn these associations, their frequency can be exaggerated, and the stereotypes thereby become self-reinforcing.246

Stereotypes often arise developmentally,247 and at an early age.248 People learn stereotypes not only from direct contact with the members of the categorized group, but also from parents, peer groups, and the popular media.249 Children as young as three years old have already formed individuals” from whom others can form “self-perpetuating stereotypes”).

244 HOWARD J. EHRLICH, THE SOCIAL PSYCHOLOGY OF PREJUDICE 35 (1973). Ehrlich observes that the argument that stereotypes are “based on properties of the target” is “without empirical confirmation.” Id.; see also ALLPORT, supra note 136, at 291-92 (“[W]e must expect ethnic attitudes to be handed down from parent to child. So universal and automatic is it that somehow heredity seems to be involved. Actually, the course of transmission is one of... learning...”); Lawrence, supra note 89, at 322 (“Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual’s race and induce negative feelings and opinions about nonwhites. To the extent that this cultural belief system has influenced all of us, we are all racists. At the same time, most of us are unaware of our racism.” (footnote omitted)).

245 E.g. EHRLICH, supra note 244, at 33-34 (citing evidence that stereotypes of women as subordinate are prevalent in the United States).

246 See generally Olsen & Fazio, supra note 236 (concluding that attitudes can form unconsciously through classical conditioning, even without any conscious consideration of the attitude object or attitude toward it).

247 See Wilson et al., supra note 167, at 101-02 (discussing how stereotypes formed during childhood remain latent and sometimes reappear automatically, even if they conflict with explicit learned attitudes).

248 See Devine, supra note 159, at 6 (stating that “stereotypes are well established in children’s memories before children develop the cognitive ability and flexibility to question or critically evaluate the stereotype’s validity or acceptability”).

249 See Frances E. Aboud & Maria Amato, Developmental and Socialization Influences on Intergroup Bias, in INTERGROUP PROCESSES, supra note 127, at 65, 73-76 (parents and peers); Leonard M. Baynes, White Out: The Absence and Stereotyping of People of Color by the Broadcast Networks in Prime Time Entertainment Programming, 45 ARIZ. L. REV. 293,
stereotypes. These learned stereotypes become unconscious as a result of their frequent presentation and, eventually, overlearning. Even as people later develop their non-prejudiced views, the original beliefs remain in the unconscious, waiting to be activated.

4. Resistance to Change: Subtyping and Self-fulfilling Prophecies

It seems relatively easy to maintain stereotypes, even in the presence of contradictory data. The relationship between the attributes of a member of a stereotyped group and the attributes of the stereotype itself are relatively flexible. Put another way, "data are more likely to be assimilated to the stereotype than the stereotype is likely to accommodate to the data . . .". Even if the data cannot be assimilated because they do not conform to the stereotype, the subconscious can create subtypes to preserve the stereotype.

304 (2003) (explaining that both the absence of and stereotyping of minorities in the media affect attitudes that whites and minorities have toward minorities); Devine et al., supra note 127, at 200-01 (media); see also Elizabeth A. Phelps et al., Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation, 12 J. COGNITIVE NEUROSCIENCE 729, 734 (2000) (suggesting that biased cultural learning and evaluation is based on types of brain activity). Recently, there have been complaints of "subtle" and "insidious" racial stereotyping in video games. See Michel Marriott, The Color of Mayhem, N.Y. TIMES, Aug. 12, 2004, at E1. In general, people tend to agree on the content of many of the stereotypes of most major social groups. See Devine & Elliot, supra note 180, at 1145-46 (concluding that there is a clear and highly negative contemporary black stereotype, but also that there is a contrasting positive stereotype).

250 Aboud & Amato, supra note 249, at 69-70 (reviewing studies).

251 See John F. Dovidio, On the Nature of Contemporary Prejudice: The Third Wave, 57 J. SOCIAL ISSUES 829, 839 (2001); Patricia G. Devine et al, Breaking the Prejudice Habit: Progress and Obstacles, in REDUCING PREJUDICE AND DISCRIMINATION, supra note 232, at 185, 192 ("Although prejudice reduction is not easy and clearly requires effort, time, and practice, prejudice appears to be a habit that can be broken").

252 See Wilson et al., supra note 167, at 103-04 (hypothesizing that unconscious implicit attitudes can coexist with learned explicit attitudes, but that implicit attitudes may still uncontrollably override explicit attitudes in certain situations); see also supra notes 179-183 and accompanying text (explaining that most Americans are aware of negative stereotypes of blacks and that these stereotypes are frequently activated, despite professed personal beliefs that are more positive).

253 BARONE ET AL., supra note 158, at 190 (declaring that an individual will seek to prove that a target conforms to a predetermined stereotype rather than to create a new schema); see also Denise Sekaquaptewa & Penelope Espinoza, Biased Processing of Stereotype- Incongruency is Greater for Low than High Status Groups, 40 J. EXPERIMENTAL SOC. PSYCHOL. 128, 128 (2004) ("Research in social cognition has documented several information processing biases in response to expectancy violation or stereotype inconsistency . . . .")

254 See Lucy Johnston & Miles Hewstone, Cognitive Models of Stereotype Change, 28 J. EXPERIMENTAL SOC. PSYCHOL. 360, 363 (1992) (defining the subtyping model as one where "extremely disconfirming members" of a minority subgroup are isolated so that the group
In essence, if there is a member of a category that is atypical of the category (for example, an effusive engineer), then a person may create a new subordinate category instead of altering her perception of the stereotype. A commonly used illustration is the "black businessman" who is commonly ascribed characteristics that "overlap very little with the global stereotype of Blacks."^{255}

The process of subtyping leaves perceptions unchanged in the face of incongruent information, and thus the overarching category remains homogeneous. Subtyping helps explain the person who holds racist beliefs and yet can sincerely say "some of my best friends are black." Positive attributes of the friends do not necessarily affect the negative attributions made to the racial group. The expectancy effect, behavioral confirmation effect, or self-fulfilling prophecy occurs when the decision-maker's expectations unconsciously brings about the event she expects.^{256} For example, in a famous

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s\footnote{See generally Zoë Richards & Miles Hewstone, Subtyping and Subgrouping: Processes for the Prevention of and Promotion of Stereotype Change, 5 J. PERSONALITY & SOC. PSYCHOL. REV. 52 (2001) (discussing a number of studies conducted on subtyping and subgrouping). Subtyping may not be useful if either the person's behavior is too incongruent with the category, or a large amount of information is known about the person. In such a situation individuation or personalization may occur. This is illustrated by the story of a researcher interviewing girls with mothers that worked in male-dominated occupations. See Rothbart, supra note 199, at 53-54. One girl, whose mother was a cross-country truck driver, was asked whether women could be truck drivers. \textit{Id.} She replied no, and when asked about her own mother responded, "that is my mother, that is not women." \textit{Id.; see also} Laurie A. Rudman & Kimberly Fairchild, Reactions to Counterstereotypic Behavior: The Role of Backlash in Cultural Stereotype Maintenance, 87 J. PERSONALITY & SOC. PSYCHOL. 157, 157-61 (2004) (concluding that targets may conform to a stereotype to avoid backlash and social rejection for counterstereotypical behavior, thereby reinforcing stereotypes in perceivers and the general culture).}

^{255} Patricia G. Devine & Sara M. Baker, Measurement of Racial Stereotype Subtyping, 17 PERSONALITY & SOC. PSYCHOL. BULL. 44, 48 (1991); \textit{see also} Matthew Weeks & Michael B. Lupfer, Complicating Race: The Relationship Between Prejudice, Race and Social Class Categorizations, 30 PERSONALITY AND SOC. PSYCHOL. BULL. 972, 982 (2004) (finding that race was more likely to "dominate[] the categorization of lower-class \[b\]lack\[s]\) than middle-class blacks).

^{256} See generally Lee Jussim & Christopher Fleming, Self-Fulfilling Prophecies and the Maintenance of Social Stereotypes: The Role of Dyadic Interactions and Social Forces, in STEREOTYPES AND STEREOTYPING, supra note 232, at 161 (explaining that self-fulfilling prophecies occur when people interpret, explain or remember others' behavior so as to confirm their beliefs, even if those beliefs are erroneous and unsupported by objective evidence). Of course, sometimes the effect occurs when people conform their behavior to the expectancies of others. \textit{See} Mark P. Zanna & Susan J. Pack, On the Self-Fulfilling Nature of Apparent Sex Differences in Behavior, 11 J. EXPERIMENTAL SOC. PSYCHOL. 583, 585-86, 589 (1975) (studying male and female behavioral responses to meeting a new friend or potential date, and concluding that "female subjects presented themselves in ways that conformed to the ideal stereotypes that desirable males held for women in general").
experiment researchers told teachers that some students, actually selected at random, were "bloomers" who would show dramatic increases in intelligence over the year.\footnote{257} At the end of the year the bloomers performed better on intelligence tests than the other students.\footnote{258} Because nobody told the students of their expected improvement, the researchers concluded that the teachers' expectations and the way they behaved towards the students brought about the expected effect.\footnote{259} In this respect, researchers have found that self-fulfilling prophecies can maintain stereotypes about both race and gender.\footnote{260}

The example above describes how grouping can alter perception and result in inaccurate stereotypes. Outside the laboratory, however, an experimenter does not assign people to groups. Rather, an individual does the assigning. It appears as though people assign other individuals to groups based on the most salient aspects of the person being grouped.\footnote{261} When grouping, a person often

\footnote{257} See ROBERT ROSENTHAL & LENORE JACOBSON, PYGMALION IN THE CLASSROOM: TEACHER EXPECTATION AND PUPILS' INTELLECTUAL DEVELOPMENT 174-76 (1968).

\footnote{258} Id. Rosenthal and Fode had previously demonstrated a similar effect with rats. See Robert Rosenthal & Kermit L. Fode, The Effect of Experimenter Bias on the Performance of the Albino Rat, 8 BEHAV. SCI. 183, 184-85 (1963). "Bright" rats learned to run mazes better than "dull" rats, where the only difference between the two groups was the experimenters' expectations. Id. at 188.

\footnote{259} ROSENTHAL & JACOBSON, supra note 257, at 180 (speculating that the teachers may have treated the "bloomer" group children in a more friendly and encouraging fashion, which has been shown to improve intellectual performance). A similar self-fulfilling prophecy operating at an unconscious level was found with respect to the treatment of boys and girls in the classroom. See MYRA SADKER & DAVID SADKER, FAILING AT FAIRNESS: HOW AMERICA'S SCHOOLS CHEAT GIRLS 42-76 (1994) (discussing how girls "receive less time, less help, and fewer challenges" in school than boys, who are "reinforced for breaking the rules . . . [and] rewarded for grabbing more than their fair share of the teacher's time and attention").

\footnote{260} See generally Mark Snyder, On the Self-Perpetuating Nature of Social Stereotypes, in COGNITIVE PROCESSES, supra note 110 (discussing studies which have shown how stereotypes such as physical attractiveness, race, and sex roles may channel interaction between a perceiver and target in a way that causes the target's behavior to conform to the stereotype).

\footnote{261} See Jason P. Mitchell et al., Contextual Variations in Implicit Evaluation, 132 J. EXPERIMENTAL SOC. PSYCHOL. 455, 458 (2003) (presenting the results of experiments where subject's attitudes changed depending on the most salient feature of the object under observation). People also appear to assign themselves to groups. To test this hypothesis, Steele and Aronson conducted an experiment in which they manipulated the salience of African American identity by including a question about racial demographics on some, but not all, pre-test questionnaires. See Claude M. Steele and Joshua Aronson, Stereotype Threat and the Intellectual Test Performance of African Americans, 69 J. PERSONALITY & SOC. PSYCHOL. 797, 806-08 (1995). The African American students asked the demographic question, the higher salience condition, performed more poorly on the accompanying test of verbal ability. Id. (showing that priming black participants with racial identity lowered their performance on a difficult verbal test, even when the test was not presented as indicative of
creates an image of the "typical" member of a group. A new person is then matched with the most accessible stereotype to determine how far apart (or how different) the category and the person might be. Salient aspects of the person are most important in activating the relevant stereotype, and race and gender (two categories that cannot constitutionally serve as a basis for a peremptory challenge) are two of the most salient aspects of a person.

III. STEREOTYPE ACTIVATION: HOW UNCONSCIOUS STEREOTYPING INFLUENCES INFERENCE, JUDGMENT AND BEHAVIOR

A peremptory challenge results from the attorney's decision, often by the "seat-of-the-pants," that a potential juror would not be good her side at trial. The challenge is unconstitutional if the lawyer purposefully discriminates on the basis of the potential juror's race or gender, and, but for the potential juror's race or gender, she would not have exercised the peremptory challenge.

See Rosch, supra note 141, at 46 (explaining how humans categorize around "perceptually salient points" such as color and form, and that these points form "cognitive prototypes" for categories). This is generally known as the "prototype" model because it is not necessary for the "typical" member of a group to actually exist. Another theory, the "exemplar" model, posits that the image considered for comparison is an actual category member. See Smith, supra note 163, at 391 (contrasting earlier abstract models of categorization, where people store information about typical tendencies of a category, with an "exemplar-based" model, where people store more specific information, such as details of certain category members).

See Mitchell et al., supra note 261, at 460.

"Activating," rather than "selecting," is the correct term, as this process is not conscious.

See sources cited infra note 286. Categorization of biracial people might be more difficult than categorization of uniracial people. See Hugenberg & Bodenhausen, supra note 230, at 345 (finding that prejudiced subjects categorized facial expressions in a stereotypic manner).

Batson v. Kentucky, 476 U.S. 79, 138 (Rehnquist, J. dissenting) (declaring that preemtpory challenges are based on "seat-of-the-pants instincts," which are stereotypical and many times mistaken).

See supra Part I.C.3 (discussing purposeful discrimination in the Batson context and
A challenge may, however, have been caused by a racial or gender-based stereotype that affected the way the attorney (decision-maker) processed information about the potential juror. In this case, the stereotype, or schema, acted as an implicit theory that affected how the attorney perceived, registered, stored, assigned meaning, and remembered information about the venire person, all without the attorney's awareness or intention. Put slightly differently, stereotypes can lead to a peremptory challenge by altering the way an attorney unconsciously sees and uses information. "[T]he activated stereotypic concepts serve to simplify and structure the process of social perception by providing a ready-made framework for conceptualizing the [other person]."

explaining tests applied by courts to determine whether a Batson violation has occurred, including the “but-for” and “tainted view” approaches).

268 See Mahzarin R. Banaji et al., Implicit Stereotyping in Person Judgment, 65 J. Personality & Soc. Psychol. 272, 279-80 (1993) (discussing one of many ways in which exposure to information can influence an individual’s judgment of a target without that individual’s knowledge of the influence); John A. Bargh, The Automaticity of Everyday Life, in THE AUTOMATICITY OF EVERYDAY LIFE: ADVANCES IN SOCIAL COGNITION 1, 1-2 (Robert S. Wyer Jr. ed., 1997) (arguing that much of everyday life is driven by automatic cognitive processing); Irene V. Blair & Mahzarin Banaji, Automatic and Controlled Processes in Stereotype Priming, 70 J. Personality & Soc. Psychol. 1142, 1158-59 (1996) (stating that the "present research supports proposals that stereotypes operate in an automatic fashion"); Joshua Correll et al., The Police Officer’s Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals, 83 J. Personality & Soc. Psychol. 1314, 1327-28 (2002) (finding that knowledge of the cultural stereotype depicting blacks as violent may produce bias, and that even blacks may show this bias); Devine, supra note 159, at 15 (explaining that “automatically activated stereotype-congruent or prejudice-like responses” can become independent of an individual’s actual attitudes or beliefs and function automatically, like a bad habit); Greenwald & Banaji, supra note 118, at 20 (writing that “most social cognition occurs in the implicit mode”); Wittenbrink et al., supra note 134, at 271-73 (commenting that data show that implicit stereotypes and implicit prejudices exist).

269 See WILSON, supra note 95, at 22, 31 (“Some very important tasks that we usually ascribe to consciousness can be performed nonconsciously, such as deciding what information to pay attention to [and] interpreting and evaluating that information . . . .” Thus, the unconscious is “a spin doctor that interprets information outside of awareness.”); Bodenhausen & Macrae, supra note 156, at 20 (stating that the effects of automatic stereotyping are “typically not consciously intended . . . rather they arise spontaneously because of basic properties of the human information processing system”); Jay J. J. Christensen-Szalanski & Cynthia Fobian Willham, The Hindsight Bias: A Meta-analysis, 48 Organizational Behav. & Hum. Decision Processes 147, 163-64 (1991) (suggesting that cognitive factors rather than motivational factors may be the main cause of bias); Terry Connolly & Edward W. Bukszar, Hindsight Bias: Self-Flattery or Cognitive Error, 3 J. Behav. Decision Making 205, 208-09 (1990) (supporting a cognitive rather than motivation account of certain kinds of bias).

Moreover, the decision-maker will generally assume that her perception of the world is its truthful representation, as opposed to a subjectively constructed representation.\footnote{See Robert J. Robinson, Actual Versus Assumed Differences in Construal: "Naive Realism" in Intergroup Perception and Conflict, 68 J. PERSONALITY & SOC. PSYCHOL. 404, 404-05 (1995) (describing people as "naive realists" for their tendency to "not fully appreciate the subjective status of their own construals").} The automatic use of these stereotypes is not necessarily related to whether the decision-maker consciously agrees or disagrees with the particular stereotype.\footnote{See Devine, supra note 159, at 15 (stating that "automatically activated stereotype-congruent or prejudice-like responses" can operate independently of an individual's current attitudes and beliefs); Dovidio, supra note 168, at 553-36 (asserting that implicit and negative racial attitudes held by whites may be unconscious and automatic); Fazio et al., supra note 134, at 1013 (concluding that there are truly non-prejudiced individuals, truly prejudiced individuals, and individuals who make conscious efforts to inhibit and control their automatically activated racial reaction); Greenwald, supra note 134, at 1464 (finding that implicit attitudes can show up as judgments controlled by automatic evaluation, without an individual's awareness). But see Kerry Kawakami et al., Racial Prejudice and Stereotype Activation, 24 PERSONALITY & SOC. PSYCHOL. BULL. 407, 413-14 (1998) (finding some correspondence between automatic stereotyped responses and personal agreement with the stereotypes).} "[S]cores of studies now support the essentially automatic aspect of stereotyping."

The following section analyzes some cognitive means by which stereotypes could lead to the biased exercise of a peremptory challenge.\footnote{Fiske, supra note 18, at 128; see also Tadesse Araya et al., Reducing Prejudice Through Priming of Control-Related Words, 49 EXPERIMENTAL PSYCHOL. 222, 222 (2002) (documenting extensive research showing that stereotypes can be spontaneously or automatically activated); Blair & Banaji, supra note 268, at 1143 (asserting that "theories of stereotyping generally hold that stereotype activation is an automatic process that operates when the appropriate situational cue is present"); Irene V. Blair, supra note 118, at 243 (summarizing "impressive evidence for the automatic operation of stereotypes and prejudice"); Fiske, supra note 110, at 364 ("According to current wisdom, automatic categorization and automatic associations to categories are the major culprits in the endurance of bias."); Tamara Towles-Schwen & Russell H. Fazio, Choosing Social Situations: The Relation Between Automatically Activated Racial Attitudes and Anticipated Comfort Interacting With African Americans, 29 PERSONALITY & SOC. PSYCHOL. BULL. 170, 170 (2003) ("[A]utomatically activated attitudes and stereotypes can exert powerful effects on judgments and behavior.") (citations omitted).} "[P]eople's perceptions are somewhere between usually and always filtered through their own biases, prejudices, and preconceptions; they simply forget or misremember what they saw . . . ."\footnote{Stereotypes, caused by categorization, can of course lead to far worse consequences than merely the unconstitutional use of a peremptory challenge. See, e.g., Miles Hewstone et al., Intergroup Bias, 53 ANN. REV. PSYCHOL. 575, 594 (2002) (referring to ethnic cleansing in Bosnia and genocide in Rwanda and asserting that "[s]ocial categorization clearly contributes to the most extreme forms . . . of bias").} Some psychological theories predict that
unconscious bias is most likely to occur in ambiguous situations where it is hard to determine conclusively what is or is not prejudiced. The peremptory challenge, where attorneys are legitimately allowed to use their non-discriminatory hunches, or even exercise a challenge for no reason at all, is precisely such an ambiguous situation.

Psychologists have shown that stereotypes influence the inferences that people draw from another person's social behavior, including what the person's behavior actually was, what stimulus the person responded to, and why a person reacted the way he did. For the purposes of illustration, I have occasionally used plausible examples to demonstrate how these processes might work for jury selection. In each case, I have assumed that the attorney exercising the peremptory challenge is a prosecutor with good intentions.

A. Activation and Accessibility

A social schema helps identify or classify people and predict how they will act or what they will be like. The initial categorization occurs extremely rapidly, in a matter of fractions of a second. Once a person is initially classified, the schema acts as an implicit and unconscious theory to be

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Illusory Memories, in MEMORY DISTORTION: HOW MINDS, BRAINS, AND SOCIETIES RECONSTRUCT THE PAST 47, 65-66 (Daniel Schacter ed., 1995) (stating that misinformation can lead an individual to have false memories that the individual believes as much as genuine memories).

276 Dovidio et al., supra note 24, at 145 (explaining how discrimination is likely to occur when the appropriate behavior is not obvious or when the "aversive racist" can rationalize the negative response on the basis of a factor other than race). On the other hand, in clear-cut situations where a response is indisputably prejudiced, the actor will consciously avoid the response in order to maintain her self-image as egalitarian and unprejudiced. Id.

277 See David Dunning & David A. Sherman, Stereotypes and Tacit Inference, 73 J. PERSONALITY & SOC. PSYCHOL. 459, 459-461 (1997) (proposing that "stereotypes alter the tacit inferences people make when comprehending descriptions of social behavior").

278 See supra notes 158-165 and accompanying text (explaining how social schemas operate unconsciously to help a person efficiently organize and integrate new material into familiar understanding).

279 See Banaji & Hardin, supra note 134, at 137 (implementing techniques designed to assess the rapidity of automatic stereotype responses); Devine, supra note 159, at 7 (discussing the implications of automatic stereotype activation). It is worth noting that unconscious processes can occur much more quickly than conscious processes. See DANIEL M. WEGNER, THE ILLUSION OF CONSCIOUS WILL 56-58 (2002) (stating that whereas a conscious response takes a half second or longer, a pre- or unconscious response can occur in as little as a tenth of a second). Sometimes an attorney may be aware that he has made his judgment quickly, even if he cannot explain why. See People v. Francisco C., No. F034910, 2002 WL 110580, at *15 (Cal. Ct. App. Jan. 25, 2002) (affirming trial court's acceptance of prosecutor's peremptory challenges, who when asked why he had eliminated a Hispanic woman from the panel, said, "I don't have an explanation as to her... In my mind I eliminated her right off the bat").
To determine whether a person falls into a particular category, in uncertain situations decision-makers often use a "representativeness heuristic" to make predictions and judgments. The decision-maker unconsciously matches salient attributes of a social schema with salient attributes of the person she is categorizing. The closer the match, the more likely the decision-maker will initially judge the person to be a member of the category.

The features decision-makers use to categorize others are those that are most accessible, which tend to be those that have proved useful for understanding and predicting behavior in similar situations. Typically, the initial categorization involves using salient visual cues. Race, ethnicity, and gender, because they are "visually accessible, culturally meaningful, and interactionally relevant," are often the most salient features of a person.

See Susan T. Fiske et al., The Continuum Model: Ten Years Later, in DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY 231, 234 (Shelly Chaiken & Yaacov Trope eds., 1999) ("[O]nce perceivers categorize the encountered individual, they automatically tend to feel, think, and behave toward that individual in the same way they tend to feel, think, and behave toward members of that social category more generally . . . .").


Sometimes the most salient information is merely the information received first. See S E. Asch, Forming Impressions of Personality, 41 J. ABNORMAL & SOC. PSYCHOL. 258, 258-59 (1946) (demonstrating, in a classic study, that the overall evaluation of a person depended upon the presentation order of traits on a list).

See Fiske et al., supra note 280, at 233-34 (proposing that certain categories, such as gender and race, are available to perceivers instantaneously because they are so easily applied to virtually every person in every encounter).

See Susan T. Fiske, supra note 110, at 375 (explaining that visual clues are "useful categories" because they are "physically manifest," "socially functional," and "can shape encounters from the outset").

Id. (observing that stereotypes can be triggered by visual and immediately accessible clues).

See id.; see also Dovidio, supra note 24, at 158 (asserting that "race is a fundamental type of social categorization"); John F. Dovidio et al., Racial Stereotypes: The Contents of Their Cognitive Representations, 22 J. EXPERIMENTAL SOC. PSYCHOL. 22, 32-33 (1986) (investigating racial stereotypes and social cognition); Charles Stangor & James E. Lange, Mental Representations of Social Groups: Advances in Understanding Stereotypes and Stereotyping, in 26 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 357, 358 (Mark P. Zanna ed., 1994) (stating that people use the "physically apparent social-category memberships of others"); Taylor et al., supra note 146, at 779 (hypothesizing that people would categorize others by "physical and social discriminators such as race and sex"). The third commonly used category, in addition to race and sex, is age. See Fiske, supra note 110, at 375 (referring to race, sex and age as the "Top Three" in categorical stereotypes).

Race and gender have perhaps been made even more noticeable by virtue of anti-discrimination and affirmative action laws. Even the prospect of being viewed as racist or sexist may render these characteristics more salient, as it is notoriously difficult for
Perceiving different races may even involve varying physiological responses from parts of the brain. Using race or sex for the initial categorization is likely particularly frequent in a situation like voir dire, where there is generally little beyond race and sex on which an attorney could make an initial categorization.

In addition, a decision-maker may increase her use of stereotypes if she is strongly motivated to predict the behavior of a person. Clearly, a zealous advocate is likely to be strongly motivated to predict potential biases of a juror. Researchers have also demonstrated that other factors that increase stereotype use include “time pressure, need for closure, [and] moderate cognitive load.”

An interesting issue is how people categorize others who are salient in more than one category, such as an African American woman. Here, it is clear that contextual clues often help determine the type of schema that is activated.

people to consciously avoid thoughts. See generally Daniel M. Wegner et al., *Paradoxical Effects of Thought Suppression*, 53 J. PERSONALITY & SOC. PSYCHOL. 5 (1987) (describing subjects’ unsuccessful attempts to suppress thoughts). In addition, people may find it challenging to not think of others in terms of their social categories. There is a Saturday Night Live skit in which an account executive becomes increasingly frustrated – eventually jumping out of a window – because he cannot determine the gender of a new employee. *Saturday Night Live* (NBC television broadcast, Oct. 24, 1992).

See generally Ziva Kunda & Steven J. Spencer, *When Do Stereotypes Come to Mind and When Do They Color Judgment? A Goal-Based Theoretical Framework for Stereotype Activation and Application*, 129 PSYCHOL. BULL. 522, 529-30 (2003) (finding that a stereotype may be prompted if it is necessary for an individual to predict another’s attributes or likely behavior).


See Mitchell et al., * supra* note 261, at 46 (demonstrating that both overt and subtle contextual cues unconsciously affect whether race or gender based automatic attitudes are activated). Furthermore, there is evidence that automatic prejudice against blacks may vary somewhat based on the person’s facial features. See Robert W. Livingston & Marilyn B.
For example, a decision-maker is more likely to categorize an Asian female performing a female stereotypic action, such as putting on lipstick, as a "woman," and an Asian female performing an Asian stereotypic action, such as eating with chop sticks, as "Asian." In voir dire, however, there are likely to be few additional contextual clues that could mediate the categorization.

As far back as 1954, researchers hypothesized that race- or sex-based schemas could be activated automatically or unconsciously. This was conclusively demonstrated in 1989. In a ground-breaking study, psychologist Patricia Devine showed that even the preconscious presentation of racial material (material that is shown so quickly that the perceiver cannot consciously register it) was sufficient to trigger the use of racial stereotypes. Later research has demonstrated the same triggering effect for gender stereotypes.

Those who are skeptical of the claim that race or sex will differentially activate schemas may be even more surprised to learn that they subconsciously

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Brewer, What Are We Really Priming? Cue-Based Versus Category-Based Processing of Facial Stimuli, 82 J. PERSONALITY & SOC. PSYCHOL. 5, 17 (2002) (concluding that "affective responses to visual facial features occur at early automatic stages of processing, independent of elicitation of category stereotypes"). The more "black" the features, such as a broader nose or more pigmented skin, the greater the prejudice. Id. Similarly, the more familiar the male or female name, such as Joe or Jennifer, the faster the automatic response than with less familiar names such as Cole or Carly. See C. Neil Macrae et al., What's in a Forename? Cue Familiarity and Stereotypical Thinking, 38 J. EXPERIMENTAL SOC. PSYCHOL. 186, 187-88 (2002) (hypothesizing that subjects would need less time to verify the gender of a familiar forename than an unfamiliar forename).


292 See ALLPORT, supra note 136, at 17-27.

293 See generally Devine, supra note 159 (using three studies to test automatic processes in prejudice).

294 Id. at 12 (finding that both high- and low-prejudice individuals produce stereotypic responses when their ability to consciously monitor a stereotype activation is inhibited). This is not to say that racial material will always prompt the automatic use of a category-based stereotype. See Livingston & Brewer, supra note 290, at 15-16 (finding support for the theory that an individual's automatic evaluation of a facial prime might reflect a response to a perceptual cue rather than an evaluation of the racial category the cue represents).

activate behaviors as well. For example, researchers have demonstrated that when an African American stereotype is activated, without the conscious awareness of the subject, the subject is more likely to exhibit hostile nonverbal actions. A similar study has shown that when experimenters prompt subjects with a stereotype of senior citizens, subjects will reduce their walking speed. In fact, stereotype activation affects "how polite, how rude, how
aggressive, how smart, or how dumb people appear.”

A prosecutor will likely have a representative picture of a “good juror.” She will match and compare salient attributes of each potential jury member to salient attributes of the “good juror.” If, for example, the prosecutor envisions that a “good juror” has the “moral courage to say that someone is guilty,” those potential jury members who have this feature will be more likely to be categorized as good jurors.

This process is not conscious. It is not clear which features might lead the prosecutor to the conclusion that someone has “moral courage,” and thus fits the “good juror” schema. The prosecutor’s representative picture of a “good juror” might, for example, be based on an image of those jurors who had voted to convict in the past. Her picture might also be based on an image of a white juror or a male juror. The salient features of the schema, however, can greatly impact the prosecutor’s initial categorization, which is really an implicit assessment of the person’s suitability for the category.

The activation of the initial schema, or the priming of the initial theory, can occur unconsciously. This initial theory acts like a hypothesis, deeply mediating how people process additional information. Researchers have frequently shown that a tentative hypothesis can bias judgment and decision-making, affecting nearly all aspects of cognitive functioning.

B. Selective Search, Attention and Recall

Once a decision-maker has a tentative hypothesis about a person, she must process information in order to support or reject the hypothesis. Keeping in mind that our senses receive more than eleven million pieces of information every second, and that the highest number of pieces that we can consciously process is roughly forty, much of our information processing can and must occur unconsciously. Generally, our unconscious minds act as a filter to


300 More specifically, there may be a conscious process, but there will also be an unconscious process.

301 To illustrate, picture in your mind a wise and just judge (not a specific judge you know, or may have seen on television). I suspect that most people will at least initially picture an elderly white male, as opposed to any other race or gender. Similarly, the default schema for “person” tends to be a “white, heterosexual, able-bodied, youngish man.” Fiske, supra note 110, at 366.

302 See infra notes 306-321 (describing how decision-makers seek out data to confirm their expectations and neglect to search for inconsistent data, which results in biased conclusions and judgments).

303 WILSON, supra note 95, at 24. Researchers generated the figure of eleven million by counting receptor cells of each sense organ. Id. Wilson notes that “[i]t would be terribly wasteful to design a system with such incredible sensory acuity but very little capacity to use the incoming information.” Id.
determine what information the brain will consciously address. It is this unconscious filter that allows us to hear our name when spoken across the room at a cocktail party.

A decision-maker will usually attempt to evaluate an uncertain proposition, such as "that juror should be challenged," by constructing a case to support the proposition rather than by attempting to discredit it. Decision-makers will tend to actively seek out data that confirms the theory and neglect to search for inconsistent information, even when given rewards for an accurate assessment. This "cognitive confirmation effect" appears to apply to both

304 The modifier "generally" is necessary because we often choose – or attempt to choose – what we do pay attention to, such as reading this article instead of noting smell, temperatures, or sounds.

305 This "cocktail party effect," which is the recognition of information in an unattended auditory channel, has been empirically tested. In practice, although it appears to function roughly one third of the time, it clearly demonstrates the presence of an unconscious monitoring system. See generally Donald E. Broadbent, Perception and Communication (1958); Barry Arons, A Review of the Cocktail Party Effect, J. Am. Voice I/O Soc'y, July 1992, at 35, available at http://xenia.media.mit.edu/~barons/cocktail.html (accessed Nov. 8, 2004).

306 See Hillel J. Einhorn & Robin M. Hogarth, Confidence in Judgment: Persistence of the Illusion of Validity, 85 Psychol. Rev. 395, 397 (1978) (explaining the difficulty people have in using "disconfirming information," or information gained by the nonoccurrence of an action); Mark Snyder & Nancy Cantor, Testing Hypotheses About Other People: The Use of Historical Knowledge, 15 J. Experimental Soc. Psychol. 148 (1979) (demonstrating how a perceiver's expectations about a target's hostility caused the target to behave in a more hostile manner than a target whose perceiver did not anticipate hostility); Yaacov Trope & Erik P. Thompson, Looking for Truth in All the Wrong Places? Asymmetric Search of Individuating Information About Stereotyped Group Members, 73 J. Personality & Soc. Psychol. 229, 239-40 (1997) (concluding that "category-based expectancies" influence how perceivers encode, retrieve, integrate, and gather information because a perceiver's processing is often biased toward confirming expectancies). This effect may be related to the general dislike that people have for uncertainty. See Thomas Gilovich, How We Know What Isn't So: The Fallibility of Human Reason in Everyday Life 9 (1991) ("Human nature abhors a lack of predictability and the absence of meaning."); Gideon Keren & L6onie E.M. Gerritsen, On the Robustness and Possible Accounts of Ambiguity Aversion, 103 Acta Psychologica 149, 170 (1999) ("Uncertainty, in whatever form, is an undesirable situation that . . . we try to reduce or minimize.").


positively and negatively valued hypotheses.

The famous Wason card test demonstrates this effect. It involves four face-up cards, showing, for example, the letters E and K and the numbers 4 and 7. Participants are instructed to turn over those cards required to determine the truth of the following hypothesis: if a card has a vowel on one side, then it has an even number on the other side. Only a small percentage of participants get the right answer, E and 7, with many of the remaining participants choosing E and 4. Researchers interpret turning over the 4 as an example of trying to confirm the accuracy of the hypothesis. Failing to turn over the 7, the most common error, represents a failure to try to disprove the hypothesis, since turning over the 7 would prove the hypothesis false if there is a vowel on the other side.

questions that confirmed the presence of a social trait).

See John M. Darley & Paget H. Gross, A Hypothesis-Confirming Bias in Labeling Effects, 44 J. PERSONALITY & SOC. PSYCHOL. 20, 20 (1983) (defining the “cognitive confirmation effect” as an “expectancy-confirmation effect” that happens in the absence of interaction between perceiver and target, due to the fact that perceivers selectively interpret and recall aspects of the target’s actions so as to confirm the perceiver’s expectations). This effect is similar to a self-fulfilling prophecy, see supra notes 256-260 and accompanying text, except that it occurs when there is little or no interaction between the perceiver and the perceived. Two individuals with different hypotheses can thus view an identical situation and both find their contradictory hypotheses confirmed. In Darley & Gross’s study subjects watched a videotape of a child taking an academic test. See Darley & Gross, supra, at 22. Those subjects who had been told the child was from a high socioeconomic background rated the child’s performance much higher than those who had been told she was from a low socioeconomic background. Id. at 28. Subjects in both conditions referred to episodes from the videotape to justify their judgment. Id. In addition, subjects who saw only socioeconomic data and did not see a videotape tended to rate the child as average. Id.

See Douglas C. Strohmer et al., Personal Hypothesis Testing: The Role of Consistency and Self-Schema, 35 J. COUNSELING PSYCHOL. 56, 63 (1988) (finding partial support for the theory that individuals will evaluate themselves so as to match their own self-evaluations; for example, an individual with a negative view of himself will evaluate himself to confirm with that negative view and to disconfirm a positive view, and vice versa).

See P. C. Wason, Reasoning, in NEW HORIZONS IN PSYCHOLOGY 135, 139-42 (Brian M. Foss ed., 1966) (conducting various experiments to demonstrate that subjects sought out only evidence to confirm their hypotheses and then announced the hypotheses as rules to see if their hypotheses were correct).

See Joshua Klayman & Young-Won Ha, Confirmation, Disconfirmation, and Information in Hypothesis Testing, 94 PSYCHOL. REV. 211, 213 (1987) (discussing Wason’s interpretation that subjects were “seeking confirmation” by predominantly looking for cases that fit their hypotheses).

See Laurence Fiddick et al., No Interpretation Without Representation: The Role of Domain-Specific Representations and Inferences in the Wason Selection Task, 77 COGNITION 1, at 1 (2000) (commenting on how “the task is conceptually so simple”); see also Klayman & Ha, supra note 312, at 222 (commenting on the tendency of research
Interestingly, this is perhaps one cognitive bias of which the courts are aware. Disparate questioning of the venire is sometimes used as evidence of purposeful discrimination. In Miller-El, the Supreme Court noted "that, if the use of disparate questioning is determined by race at the outset, it is likely a justification for a strike based on the resulting divergent views would be pretextual." Thus, if a prosecutor consciously or unconsciously expects that black jurors will be against the death penalty, then she is more likely to ask black venire members questions that would reveal their views on the death penalty (or would be more likely to ask, if she were not aware of trial courts' potential sensitivity to this factor).

Partially as a result of the cognitive confirmation effect, decision-makers require less information to reach theory-confirming decisions than theory-disproving decisions, even when there is no objective basis for them to hold the particular theory. They may ignore or reinterpret inconsistent information. Not surprisingly, they may also reach such decisions more

314 See Ex parte Pressley, 770 So. 2d 143, 146 (Ala. 2000) (stating that "disparate examination of members of the venire" is one kind of evidence that a movant may use for a Batson motion (quoting Ex Parte Branch, 526 So. 2d 609 (Ala. 1987))).

315 Miller-El v. Cockrell, 537 U.S. 322, 344 (2002). On remand the court of appeals found that the record revealed that the disparate questioning was based "on the member's views on capital punishment and not race." See Miller-El v. Dretke, 361 F.3d 849, 860 (5th Cir. 2004), cert. granted, 124 S. Ct. 2908 (2004); see also Batson v. Kentucky, 476 U.S. 79, 97 (1985) ("[T]he prosecutor's questions ... during voir dire examination ... may support or refute an inference of discriminatory purpose"); Devose v. Norris, 53 F.3d 201, 204-05 (8th Cir. 1995) (holding that the prosecutor's failure to apply the same criteria to strike both black and white jurors was pretextual); Splunge v. Clarke, 960 F.2d 705, 708-09 (7th Cir. 1992) (asserting that non-black and black jurors who were asked the same questions and had identical answers were treated differently); Norfolk S. Ry. v. Gideon, 676 So. 2d 310, 312 (Ala. 1996) (displaying that counsel's lack of adequate voir dire of a black juror led to a failure to provide "legitimate race-neutral reasons for its strike"); Kaczmarek v. State, 91 P.3d 16, 30 (Nev. 2004) (finding no evidence of disparate questioning); State v. Lamon, 664 N.W.2d 607, 632 (Wis. 2003) (Abrahamson, C.J, dissenting) (stating that a circuit court should examine the totality of the circumstances, including disparate questioning of venire members).

316 Peter H. Ditto & David F. Lopez, Motivated Skepticism: Use of Differential Decision Criteria for Preferred and Nonpreferred Conclusions, 63 J. PERSONALITY & SOC. PSYCHOL. 568, 573 (1992); see also Rothbart & Park, supra note 212, at 135 (finding fewer instances of behavior were required to confirm the attribution of a trait to a person than to disconfirm the attribution); Trope & Thompson, supra note 306, at 232 (finding that subjects posed fewer questions to those in groups about which they had strong stereotypes).

317 See Susan T. Fiske et al., Category-Based and Attribute-Based Reactions to Others: Some Informational Conditions of Stereotyping and Individuating Processes, 23 J. EXPERIMENTAL SOC. PSYCHOL. 399, 420 (1987) (finding that information that is inconsistent with a certain category is often reinterpreted to fit into the established category); William B.
quickly.318

A decision-maker often will also pay closer attention to, and thus register more securely,319 theory-confirming rather than theory-disproving information.320 “The knowledge stored in memory is one’s cognitive representation of information that has been previously processed.”321 People store information in many different and unequal ways.322 The more visually salient the information, the more likely people will encode and retain information as a picture than as verbally encoded material.323 People

Swann, Jr. & Mark Snyder, On Translating Beliefs into Action: Theories of Ability and Their Application in an Instructional Setting, 38 J. PERSONALITY & SOC. PSYCHOL. 879, 884 (1980) (finding that individuals labeled as having low ability who outperformed individuals labeled as having high ability were still perceived as having low ability, notwithstanding the powerful contradictory evidence).

318 See B. Keith Payne, Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon, 81 J. PERSONALITY & SOC. PSYCHOL. 181, 190 (2001) (finding that people identified guns faster than tools when they had been shown black faces rather than white faces, in both cases without their conscious awareness); see also Correll et al., supra note 268, at 1325 (finding that in a video game participants would shoot at an armed African American target more quickly than an armed Caucasian).

319 Because most peremptory challenges are exercised shortly after the relevant information is received, the problem is usually one of roughly contemporaneous recall, depending, of course, on when the other party makes its Batson motion. The difficulties of inaccurate recall are likely to be greater as the time elapsed between event and recall increase. Fortunately, this is not usually a problem with Batson inquiries, although it is not unheard of. See State v. Marlowe, 89 S.W.3d 464, 469 (Mo. 2002) (stating that “post-hoc justifications are irrelevant,” as the “focus of the third stage is the plausibility of the contemporaneous explanation”). But see Zachary R. Dowdy, Judge Must Explain an Old Jury Choice, NEWSDAY, Jan. 28, 2004, at A22 (reporting the case of a prosecutor who had to explain peremptory challenges from a twenty year old trial).


321 Steven J. Sherman et al., Social Inference and Social Memory: The Interplay Between Systems, in THE SAGE HANDBOOK OF SOCIAL PSYCHOLOGY 65, 74 (Michael A. Hogg & Joel Cooper eds., 2003) (examining “several ways in which memory can guide and influence the inferences we make”).


323 Shelley E. Taylor & Susan T. Fiske, Salience, Attention, and Attribution: Top of the Head Phenomena, in 11 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 249, 271-73
remember information encoded as a picture more accurately and vividly, and thus it has greater impact.

Thus, people will more readily recall behaviors and traits that confirm their stereotypes than behaviors that either have no relation to or contradict the stereotypes. As a result, once a person has been categorized into a group, observers will tend to remember the person's behaviors that are associated with that group. For example, if an observer has categorized someone as a lawyer, it will be easier to remember that she is articulate and was captain of the debate team (and it may also be easier to remember that she is argumentative). In addition, people perceive information that is more readily recalled as more accurate, regardless of whether the information is in fact objectively true.

(Leonard Berkowitz ed., 1978). The idea goes back to Lippman, who wrote that stereotypes were "picture[s] . . . we carry about in our heads." LIPPMAN, supra note 142, at 89.

See Taylor & Fiske, supra note 323, 271-73 ("subjects remembered the information best 'seen' from their particular vantage point"). A picture may in fact be worth a thousand words.

See Jack Fyock & Charles Stangor, The Role of Memory Biases in Stereotype Maintenance, 33 BRIT. J. SOC. PSYCHOL. 331, 339-40 (1994) (supporting the hypothesis that people tend to more readily recall expectancy-confirming information about social groups than expectancy-disconfirming information following a meta-analysis of twenty-six relevant experiments); C. Neil Macrae et al., On the Regulation of Recollection: The Intentional Forgetting of Stereotypical Memories, 72 J. PERSONALITY & SOC. PSYCHOL. 709, 711 (1997) (illustrating that stereotyping an individual facilitates finding stereotypical attributes in the individual); C. Neil Macrae et al., Stereotypes as Energy-Saving Devices: A Peek Inside the Cognitive Toolbox, 66 J. PERSONALITY & SOC. PSYCHOL. 37 (1994) (showing the tendency to remember traits of individuals who are placed in stereotype categories as opposed to individuals not associated with a category); see also Myron Rothbart et al., Recall for Confirming Events: Memory Processes and the Maintenance of Social Stereotypes, 15 J. EXPERIMENTAL SOC. PSYCHOL. 343, 350 (1979) (discussing an experiment which showed the effect of expectancy on categorization); Stangor & McMillan, supra note 320, at 42 (presenting a meta-analysis on "how social expectations influence when and how. . .information that is congruent or incongruent with expectations. . .is stored in, and retrieved from, long-term memory"). See generally Hamilton & Sherman, supra note 148, at 1 (reviewing studies conducted on social cognition). This result applies even when there is no self-serving need for consistency. See James K. Beggan & Scott T. Allison, The Landslide Victory That Wasn't: The Bias Toward Consistency in Recall of Election Support, 23 J. APPLIED SOC. PSYCHOL. 669, 674-76 (1993) (finding a recall bias in a situation where there was no implication for self-evaluation).

Norbert Schwartz et al., Ease of Retrieval as Information: Another Look at the Availability Heuristic, 61 J. PERSONALITY & SOC. PSYCHOL. 195, 196-97 (1991). In this study, researchers asked test subjects to recall examples of their own assertive behavior. Id. Those who were asked to recall only six examples judged themselves as higher in assertiveness than those asked to recall twelve examples. Id. The authors concluded that recalling six instances was significantly easier than recalling twelve instances because six instances were more accessible in memory for most people. Id. The subjects saw the more readily accessed memories as a better indicator of their underlying character, and judged
In fact, people also create "memory illusions," in which they recall stereotype-confirming behaviors that never actually transpired. These memory illusions do not mean that we are dishonest; rather, it just means that we have innocently associated the categorized person with behaviors that strongly resemble our expectations of persons of that "type." Not surprisingly, people assume that they reached their conclusions about the categorized person because of the "objective" evidence, rather than because of their biased recall of information.

C. Interpretation and Assigned Meaning: Biased Evaluation

An activated schema, acting as an implicit hypothesis, affects how people interpret new stimuli, and thus may lead to inaccurate biased judgment.  

themselves accordingly.  Id.  This impact was found notwithstanding that twice as many instances of assertive behavior were recalled by those who judged themselves less assertive.  Id.  The same effect occurred when researchers asked test subjects to recall unassertive behaviors.  Id.

327 See Tadesse Araya et al., Remembering Things That Never Occurred: The Effects of To-Be-Forgotten Stereotypical Information, 50 EXPERIMENTAL PSYCHOL. 27, 27 (2003); Nancy Cantor & Walter Mischel, Traits as Prototypes: Effects on Recognition Memory, 35 J. PERSONALITY & SOC. PSYCHOL. 38, 41-45 (1978) (describing an experiment that showed the tendency to recall "nonpresented but conceptually related material as opposed to nonpresented, unrelated material"); Alison P. Lenton et al., Illusions of Gender: Stereotypes Evoke False Memories, 37 J. EXPERIMENTAL SOC. PSYCHOL. 3, 5 (2001) (showing how stereotypes exaggerate "stereotype-confirming cognitive tendencies" by "adding' false information"); C. Neil Macrae et al., Creating Memory Illusions: Expectancy-Based Processing and the Generation of False Memories, 10 MEMORY 63 (2002) (examining the methods of creating false memories). A close variant of this effect occurs when people confuse what they inferred or imagined with what was actually presented. See Morgan P. Slusher & Craig A. Anderson, When Reality Monitoring Fails: The Role of Imagination in Stereotype Maintenance, 52 J. PERSONALITY & SOC. PSYCHOL. 653, 658-60 (1987) (finding that stereotyped traits and situations imagined about a target were confused with the information actually presented about the target, leading participants to believe that the reality matched the stereotype). The invention and subsequent recall of stereotype-consistent information also occurs with physical objects. See William F. Brewer & James C. Treyns, Role of Schemata in Memory for Places, 13 COGNITIVE PSYCHOL. 207, 210-24 (1981) (finding that people told they were waiting in an office often recalled office-consistent items such as books, which were really not there, and omitted items that were, such as a skull). For a general discussion of stereotype-based memory distortions, see B. Keith Payne et al., Memory Monitoring and the Control of Stereotype Distortion, 40 J. EXPERIMENTAL SOC. PSYCHOL. 52, 52-62 (2004). Courts have occasionally accepted false reasons for exercising a peremptory challenge. See sources cited supra note 73.


329 Wilson, supra note 95, at 53-54 (asserting that "we often unconsciously bend new information to fit our preconceptions"); Russell H. Fazio, On the Automatic Activation of Associated Evaluations: An Overview, 15 COGNITION & EMOTION 115, 129 (2001) (stating
In essence, the schema is the structure through which people interpret information. For example, here is a simple illustration from when I lived in Thailand. Almost every morning I used to see a thin elderly man in the street, begging for food. I knew he owned nothing besides his clothes, lived nearby with a transient group of males, had never married, and had no living family. I might have thought his life rather sad, had I not also known that he was a Buddhist monk, and that begging for food was a religious practice. The fact that he was a monk, however, affected my interpretation of all the other information.

1. Ambiguous Events

People interpret ambiguous events differently depending on which schemas are activated. For example, in one classic study experimenters activated a "hostility" schema in subjects.331 First, they subliminally presented to the subjects words such as "hostile" and "insult."332 Then they asked subjects to interpret a number of ambiguous actions, such as a tenant refusing to pay rent until repainting was completed or refusing to let a salesman enter the house.333 Those subjects who had the activated hostility schema (even though they were

that automatically activated schemas can "determine how objects are construed"); Taylor & Crocker, supra note 160, at 91 ("The schema provides hypotheses about incoming stimuli, which include plans for interpreting and gathering schema-related information."); see also Howard Lavine et al., Threat, Authoritarianism, and Voting: An Investigation of Personality and Persuasion, 25 PERSONALITY & SOC. PSYCHOL. BULL. 337, 340 (1999) ("people's prior attitudes can bias their judgments of the validity of attitude relevant information"); Charles G. Lord et al., Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence, 37 J. PERSONALITY & SOC. PSYCHOL. 2098, 2098, 2108 (1979) (examining the affects of existing impressions on interpreting data).

Joshua Correll et al., supra note 268, at 1319 (finding that subjects responded more inaccurately to stereotype-inconsistent targets); Ap Dijksterhuis & Ad van Knippenberg, The Knife That Cuts Both Ways: Facilitated and Inhibited Access to Traits as a Result of Stereotype Activation, 32 J. EXPERIMENTAL SOC. PSYCHOL. 271, 273 (1996) (asserting that "compared to the absence of a stereotype activation . . . the activation of a stereotype may enhance or reduce retrieval probabilities"); Payne, supra note 318, at 190 (demonstrating how activating different schema influenced the test subjects' ability to accurately identify tools).


Bargh & Pietromonaco, supra note 331, at 441.

Id.
not consciously aware of it) were more likely to judge the person performing the ambiguous behaviors to be aggressive and antisocial. These subjects were also more likely to judge the person more negatively on traits unrelated to hostility, such as intelligence.

These findings are "important not because of the subliminality per se but because one cannot be aware of the influence of subliminally presented stimulus." The unconscious affects judgment without the person's awareness or control, and thus without any knowledge of the actual causes.

Experimenter's have demonstrated this effect with respect to race, in that people will assign different significance to identical actions depending on the actors' race, or depending on whether a racial stereotype has been activated. Once a person has assigned meaning to a behavior, it is this assigned meaning, rather than the raw stimulus, that the person will use in making future judgments and predictions. For example, an ambiguous shove is remembered as either playful or violent rather than being remembered as a shove. People assume that their memories were "generated exclusively by the objects or episodes they are remembering." The impact of this

334 Id. at 446-47.
335 Id.
336 Bargh, supra note 331, at 237.
337 Joshua Correll et al., supra note 268, at 1325 (arguing that traits associated with African Americans "can act as a schema to influence perceptions of an ambiguously threatening target"); Birt L. Duncan, Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks, 34 J. PERSONALITY & SOC. PSYCHOL. 590, 596 (1976) (showing that differing perceptions of a given behavior can depend on race); H. Andrew Sagar & Janet Ward Schofield, Racial and Behavioral Cues in Black and White Children's Perceptions of Ambiguously Aggressive Acts, 39 J. PERSONALITY & SOC. PSYCHOL. 590, 594-95 (1980) (finding that a black actor's behavior was categorized as more threatening and less friendly that the identical actions performed by a white actor); see also Kurt Hugenberg & Galen V. Bodenhausen, Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat, 14 PSYCHOL. Sci. 640, 640 (2003) (demonstrating that people's implicit racial stereotypes influence their perceptions of facial expressions). This effect has also been demonstrated with stereotypes other than race. See Paul R. D'Agostino, The Encoding and Transfer of Stereotype-Driven Inferences, 18 SOCIAL COGNITION 281 (2000) (relating occupation to stereotypes); Darley & Gross, supra note 309, at 20 (socioeconomic background).
338 Devine, supra note 159, at 11-12 (finding that activating components of a stereotype about blacks, such as laziness or poverty, would also activate other components of the stereotype, such as hostility).
340 See Duncan, supra note 337, 596-97 (finding that subjects recalled a black person shoving someone as more violent than a white person performing the same action).
encoding on future decisions grows as more time elapses between stimulus and decision.\textsuperscript{342}

2. Differential Criteria

In other situations, people will differentially weight criteria in order to reach their unconsciously preferred outcome. People will tend to evaluate information that is consistent with their tentative theory less critically than inconsistent information.\textsuperscript{343} For example, in one recent study experimenters asked subjects to assist with admissions decisions to their university.\textsuperscript{344} Subjects gave weaker recommendations to black students who were strong on one dimension but weak on another, such as high test scores but low grades, than to comparable white students, because they would weight the dimensions differently.\textsuperscript{345} If the black student had weaker test scores, subjects would weigh test scores more heavily, whereas if the white student had weaker test scores, subjects would weigh grades more heavily.\textsuperscript{346} Participants were not aware of their bias.\textsuperscript{347}

Because people remember expectancy confirming events more easily than disconfirming or irrelevant events,\textsuperscript{348} the schema or stereotype is strengthened even though the stereotype helped influence the encoding in the first place. For example, a prosecutor looking for "deferential" jurors might interpret a venire woman's words as "aggressive," but interpret the same words stated in the same way by a man merely as "assertive," or perhaps not even notice the words at all.\textsuperscript{349} The prosecutor remembers this evaluation, rather than simply

\textsuperscript{342} See Thomas K. Srull & Robert S. Wyer, Jr., The Role of Category Accessibility in the Interpretation of Information About Persons: Some Determinants and Implications, 37 J. PERSONALITY & SOC. PSYCHOL. 1660, 1661-62 (1979) (discussing the theory that "once a concept is activated . . . its relative accessibility is enhanced, and its likelihood of being used to encode subsequent information increases").

\textsuperscript{343} See Ditto & Lopez, supra note 316, at 573 (finding that subjects were able to affirm their tentative theories with consistent data more quickly than they could disconfirm such theories with inconsistent data); Einhorn & Hogarth, supra note 306, at 397 (arguing that people have difficulty making effective use of "disconfirming information"); Lord et al., supra note 329, at 2105-06 (concluding that acceptance of a study's findings depends much more on whether the findings coincide with their "existing beliefs" as opposed to how the study was performed).


\textsuperscript{345} Id. at 467-68.

\textsuperscript{346} Id. at 469-70.

\textsuperscript{347} Id. at 460-61 (providing background information regarding aversive racism, the type of racism examined in the study).

\textsuperscript{348} See supra notes 319-324 and accompanying text (describing situations where people remember events that coincide with their expectations more easily than conflicting events).

\textsuperscript{349} See generally Monica Biernat et al., Judging and Behaving Towards Members of Stereotyped Groups: A Shifting Standards Perspective, in INTERGROUP COGNITION AND
the words themselves, and might therefore strike the woman from the venire. But for the potential juror’s gender, the prosecutor would not have exercised the strike. A court in this situation, however, would be unlikely to find a violation in step three of the *Batson* inquiry because the prosecutor would be telling the truth about the reasons for her strike. She subjectively believes that she struck the juror because she was too aggressive, which is a gender-neutral reason. To the degree that people telling the truth appear credible, the judge would likely uphold the strike.

3. Attributing Cause

Attribution is “an inference about why an event occurred or about a person’s dispositions.”

Our understanding about why an action occurred is often critical to our judgment regarding its importance and its predictive value. Attribution theories suggest that the causes of all human action may either be internal (in the actor), external (the environment or situation), or a combination of both. Furthermore, the cause may be stable or transitory. People will see and respond differently to results attributed to a person’s enduring character or dispositional factors than those same results ascribed to variable situational factors. Thus, we will view an investor that strikes it rich on the

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Intergroup Behavior 151, 164 (Constantine Sedikides et al. eds., 1998) (finding that equally assertive men and women are judged differently because of stereotype-based shifting standards of evaluation, for example, people conclude she’s “very good, for a female”). The Supreme Court appears to be aware of the possibility of this phenomenon in the employment context. See Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989) (White, J., concurring) (“Thus, even if we knew that [the plaintiff] Hopkins had “personality problems,” this would not tell us that the partners who cast their evaluations of Hopkins in sex-based terms would have criticized her as sharply (or criticized her at all) if she had been a man.”).


352 See Heider, supra note 351, at 153 (discussing attribution that evolves from “fluctuating personal state[s]”).

353 For example, those who do not believe that there is discrimination against blacks (a situational factor) will assume that the results blacks achieve are attributable to their internal characteristics (dispositional factors). See Lawrence, supra note 89, at 325 (“If there is no discrimination, there is no need for a remedy; if blacks are being treated fairly yet remain at
stock market, or a punter at the racetrack, as more likely to repeat if the gains are ascribed to skill rather than luck. The more we attribute the cause to the actor and to stable factors, the greater will be the perceived predictive value of the action.\textsuperscript{354} There is such a robust tendency to overattribute other peoples’ behavior to stable, character factors that psychologists have called it “fundamental attribution error.”\textsuperscript{355}

Overattribution is particularly common for stereotype-consistent events.\textsuperscript{356} We are more likely to see events that confirm our expectations or fit our schemas as having stable internal causes, and those events that clash with our expectations as having fleeting situational causes.\textsuperscript{357} We thus perceive stereotype-consistent events as more useful for prediction.

An exception to the above error can occur when group identity is salient, such as when there are only a few members of an outgroup. In this circumstance people are more likely to attribute outgroup members’ positive


\textsuperscript{356} See Fiske, \textit{supra} note 110, at 369 (“By attributing stereotype-confirming information to the underlying disposition of a person, the perceiver asserts that the stereotypic material resides in the nature . . . of the target individual.”); see also Susan K. Green et al., \textit{A General Model of the Attribution Process}, 6 Basic & Applied Psychol. 159, 159-61 (1985) (proposing a model of attribution largely dependent on the salience of the schema and whether the event is expected).

\textsuperscript{357} See Duncan, \textit{supra} note 337, at 597 (comparing the likelihood of attributing violent behavior to an individual’s race when the individual was black as opposed to attributing the same violent behavior to external factors when the individual was white); David L. Hamilton, \textit{A Cognitive-Attributional Analysis of Stereotyping}, in \textit{12 Advances in Experimental Social Psychology} 53, 65 (Leonard Berkowitz ed., 1979) (“[B]ehaviors which confirm stereotypic expectations are attributed to the actor’s dispositional characteristics, but . . . behaviors inconsistent with one’s stereotype tend to be attributed to external factors.”); Linda A. Jackson et al., \textit{Stereotype Effects on Attributions, Predictions, and Evaluations: No Two Social Judgments are Quite Alike}, 65 J. Personality & Soc. Psychol. 69, 69 (1993) (citing studies); Maass et al., \textit{supra} note 205, at 512 (explaining how an “in-group member may be described as ‘hurting somebody,’ whereas the out-group member may be described as ‘aggressive’”).
actions to transient situational causes, thereby “explain[ing] away” such actions, and their negative actions to stable dispositional causes.\textsuperscript{358} The reverse is true for people’s attributions about ingroup members’ actions.\textsuperscript{359} This attribution bias may help explain the empirical finding that a demographic similarity between juror and defendant affects how the juror evaluates the defendant and how lenient the juror will be, at least when cases are weak or ambiguous.\textsuperscript{360} It is often unconscious cognitive bias, rather than conscious motivation or intent, that leads to this intergroup bias.\textsuperscript{361}

Thus a prosecutor may attribute different causes to the same event, depending on the nature of the potential juror and the attorney exercising the strike. A prosecutor who sees a potential juror with messy hair as similar to herself may attribute the curious hairstyle to windy conditions (transient, external) whereas if she sees the potential juror as dissimilar she may attribute it to a slovenly character (stable, internal). Alternatively, if slovenly appearance is linked to a stereotype then the prosecutor is also more likely to

\textsuperscript{358} See Thomas F. Pettigrew, \textit{The Ultimate Attribution Error: Extending Allport’s Cognitive Analysis of Prejudice}, 5 \textit{PERSONALITY \\ & SOC. PSYCHOL. BULL.} 461, 464-66 (1979); see also Fiske, supra note 110, at 369 (stating that people tend to explain discrepancies by attributing them to situational factors); Maass et al., supra note 217, at 521 (observing that “participants did describe negative out-group behaviors more abstractly than positive out-group behaviors”); Joseph G. Weber, \textit{The Nature of Ethnocentric Attribution Bias: Ingroup Protection or Enhancement?}, 30 J. EXPERIMENTAL SOC. PSYCHOL. 482, 499 (1994) (stating that subjects “tended to explain outgroup positive behaviors more in terms of external causes”).

\textsuperscript{359} Our attribution bias in favor of ingroups and against outgroups is in many ways an extension of our self-serving habit of crediting external causes for failure and internal causes for success and a similar bias in favor of our friends. See Daniel T. Gilbert et al., \textit{Looking Forward to Looking Backward: The Misprediction of Regret}, 15 \textit{PSYCHOL. SCI.} 346, 349 (2004) (remarking that people “did not realize how readily they would absolve themselves of responsibility for their disappointing outcomes”); Shelley E. Taylor & Judith Hall Koivumaki, \textit{The Perception of Self and Others: Acquaintanceship, Affect, and Actor-Observer Differences}, 33 J. PERSONALITY \\ & SOC. PSYCHOL. 403, 404 (1976) (referring to a positivity bias for intimate others). This self-serving attribution bias is so prevalent that it is known as the “ultimate attribution error.” Pettigrew, supra note 358, at 464 (relating the “fundamental attribution error” to subjects views of their intimate others).

\textsuperscript{360} See Dennis J. Devine et al., \textit{Jury Decision Making: 45 Years on Deliberating Groups}, 7 \textit{PSYCHOL. PUB. POL’Y \\ & LAW} 622, 674 (2001) (concluding that jury-defendant bias, occurring across a number of studies and contexts, “appears to be a robust phenomenon”); Kerr et al., supra note 317, at 561 (finding that when evidence against the accused was so strong the juror-defendant similarity and resulting leniency effect did not hold); David Landy & Elliot Aronson, \textit{The Influence of Character of the Criminal and His Victim on the Decision of Simulated Jurors}, 5 J. EXPERIMENTAL SOC. PSYCHOL. 141, 151 (1969) (finding that jurors will be more lenient on defendants that they can identify with).

\textsuperscript{361} See Graham C. L. Davey, \textit{Preparedness and Phobias: Specific Evolved Associations or a Generalized Expectancy Bias?}, 18 \textit{BEHAV. \\ & BRAIN SCI.} 289, 296-97 (1995) (proposing that cultural factors are also important in determining expectancy bias).
make attributions to stable and internal causes. Naturally, if a "good juror" is a well-groomed juror, then the slovenly person is more likely to be struck than the person unluckily caught in the wind. The prosecutor will be completely oblivious to the fact that a stereotype or similarity may have affected her decision. Rather, because of the different causal attributions, she will see the two potential jurors as not similarly situated.\textsuperscript{362}

In short, social psychological research strongly supports the conclusion that "[t]he interpretation of a behavior in line with a chronically accessible or primed social construct [e.g. a stereotype] is seen by the subject to be due to a property of the behavior; there is no awareness of the interpretative work done by the capturing construct . . . ."\textsuperscript{363} When a lawyer sees a potential juror, she will almost instantaneously categorize that person, likely on the basis of race or sex. This categorization activates stereotypes, or schemas, so that the lawyer will tentatively assign the attributes contained in the stereotype to the potential juror. The lawyer will not necessarily be conscious of the stereotypes, or if she is aware of them, she will not necessarily believe that they are true. She will, however, search for, and pay greater attention to information that confirms her expectations. She will encode the information in a different way, and recall it more easily. She will also interpret ambiguous information to confirm the expectancy.

If it is true, for example, that lawyers consciously or unconsciously know that there is a perception that blacks are more likely to acquit defendants,\textsuperscript{364} or that women are more likely to convict in rape cases\textsuperscript{365} then this perception will likely affect lawyers' initial expectations regardless of whether they believe the perception is accurate. By the time the lawyer exercises the peremptory challenge, stereotypes may have thoroughly affected her observation and interpretation of the information upon which she makes her decision.\textsuperscript{366} This

\textsuperscript{362} It is also worth noting that the common denominator of most theories in personality analysis is that accurate dispositional assessment is extremely difficult and time consuming. See generally Richard I. Lanyon & Leonard D. Goodstein, Personality Assessment (2d ed. 1982).


\textsuperscript{364} See, e.g., Billy M. Turner et al., Race and Peremptory Challenges During Voir Dire: Do Prosecution and Defense Agree?, 14 J. CRIM. JUS. 61, 66-68 (1986) (finding that prosecutors and criminal defense lawyers believed that black jurors are more likely to acquit a criminal defendant).

\textsuperscript{365} See J.E.B. v. Ala. ex rel. T.B., 511 U.S. 127, 149 (1994) (O'Connor, J., concurring) (referring to "a plethora of studies" that demonstrate "female jurors are somewhat more likely to vote to convict than male jurors"); see also Jennifer McEwan, Decision Making in Legal Settings, in BEHAVIOUR, CRIME AND LEGAL PROCESSES: A GUIDE FOR FORENSIC PRACTITIONERS 111, 112 (James Maguire et al. eds., 2000) (stating "all-women juries are more likely to convict for rape" when commenting on the effect of gender on the verdict).

\textsuperscript{366} The lawyer may still be acting in good faith, and have a race- and gender-neutral
kind of peremptory challenge, although based on or resulting from race or gender, is unlikely to be detected by the *Batson* procedure because the lawyer would disclose her subjective truth, and presumably be credible.

D. The Accuracy of Our Self-Awareness

*Batson* is based on the common-sense notion that we know why we do what we do. In fact, it can almost be painful to think otherwise.\(^{367}\) Psychologists and philosophers, however, have challenged this notion. Long before psychology developed experiments by which to test this proposition, Benedictus de Spinoza observed in 1677 that men's "opinion is made up of consciousness of their own actions, and ignorance of the causes by which they are determined."\(^{368}\)

Based on recent studies, many have now concluded that "[t]he mind is a system that produces appearances for its owner. ... [The mind] leads us to think that it causes its own actions ... it really doesn't know what causes its own actions."\(^{369}\) This more modern understanding is underpinned by the knowledge that processes beyond our conscious awareness perform, at least sometimes or at least in part, numerous critical cognitive tasks.\(^{370}\) These tasks include "deciding what information to pay attention to, interpreting and evaluating that information, learning new things, and setting goals for ourselves."\(^{371}\) Whereas Freud suggested that consciousness was merely the tip of the iceberg,\(^{372}\) modern research suggests that consciousness may in fact be more akin to a "snowball on top of that iceberg."\(^{373}\) In truth, people often do not know the reasons for their own behavior.

The problem is that we do not see the intricate set of physical and mental explanation.

\(^{367}\) See Marvin Minsky, *The Society of Mind* 306 (1985) ("[N]one of us enjoys the thought that what we do depends on processes we do not know.").


\(^{369}\) Wegner, *supra* note 279, at 28. Wegner in fact goes further, asserting that "in fact the mind can't ever know itself well enough to be able to say what the causes of its actions are." *Id.* (emphasis added).

\(^{370}\) See Wilson, *supra* note 95, at 23-24 (explaining that one characteristic of the adaptive unconscious is that people do not know how it selects, interprets, and evaluates information). It is perhaps easier to accept the critical role of the unconscious in cognitive tasks when one considers the numerous other tasks performed by the unconscious. *Id.* One of the most important involves the "sixth sense," proprioception, or the way we know what position our body parts are in. *Id.* at 19. The unconscious monitoring of these body positions allows people to sit up, walk and run. *Id.*

\(^{371}\) *Id.* at 22.


\(^{373}\) Wilson, *supra* note 95, at 6.
processes, including psychological mechanisms, that determine our actions.\textsuperscript{374} We often experience causation as "as a result of an interpretation of the apparent link between the conscious thoughts that appear in association with action and the nature of the observed action... [or] as the result of self-perceived apparent mental causation."\textsuperscript{375}

In essence, we make a simple mistake of equating correlation with causation. Rather than our conscious thought bringing about an observed action, in some situations there will be an unconscious thought that leads to both. Because (by definition) we are contemporaneously unaware of the unconscious thought, we think it is the conscious thought that brought about the action. Accordingly "we readily accept [this] far easier explanation of our behavior: We intended to do it, so we did it."\textsuperscript{376}

Researchers have demonstrated this point in a study showing how people may learn and act on information, but not know how or even what they have learned.\textsuperscript{377} The study involved a gambling game using one of four decks of cards.\textsuperscript{378} If played repeatedly, two of the four decks would result in small

\textsuperscript{374} Of course, the inability to understand our actions is not only a consciousness related problem. Scholars also describe human judgment as a contributor. See, e.g., Amos Tversky & Daniel Kahneman, Belief in the Law of Small Numbers, 76 PSYCHOL. BULL. 105, 108-09 (1971) (describing human judgment as indefensible and ludicrous). More recently, scholars have described the ordinary person (and presumably the ordinary attorney) as oblivious, ignorant and beset by misconceptions. See, e.g., LEE ROSS & RICHARD E. NISBETT, THE PERSON AND THE SITUATION 124, 69, 86, 139 (1991) (asking "[h]ow could people be so wrong...?").

\textsuperscript{375} WEGNER, supra note 279, at 65-66.

\textsuperscript{376} Id. at 27. Wegner goes on to note the application of science fiction writer Arthur C. Clarke's insight that "any sufficiently advanced technology is indistinguishable from magic" to self-perception. Id. (quoting ARTHUR C. CLARKE, PROFILES OF THE FUTURE: AN INQUIRY INTO THE LIMITS OF THE POSSIBLE 21 (1973)).

When we turn our attention to our own minds, we are faced with trying to understand an unimaginably advanced technology. We can't possibly know (let alone keep track of) the tremendous... influences on our behavior because we inhabit an extraordinarily complicated machine... We believe in the magic of our own causal agency.

Id. at 27-28. More importantly for the peremptory challenge, the Supreme Court appears to believe in the magic of the striking attorney's causal agency.

\textsuperscript{377} See Antoine H. Bechara et al., Deciding Advantageously Before Knowing the Advantages Strategy, 275 SCIENCE 1293 (1997) (exhibiting behavior based on nonconscious information before having conscious knowledge of the information). Thus, people may learn stereotypes without knowing how they were learned the stereotype, or knowing what stereotype they learned. Other examples of learning without knowledge thereof include the well-proven cases of amnesiacs who learn new things, and of people who act on suggestions received while under general anesthesia. See WILSON, supra note 95, at 25 (examining amnesiacs ability to learn unconsciously).

\textsuperscript{378} Bechara et al, supra note 377, at 1293 (explaining the rules of an experiment to show the occurrence of nonconscious learning before conscious learning).
losses to the subject and two would result in small gains. Participants learned to select cards from the decks that would result in gains, but they were not consciously aware that they were making a choice and that the choice was informed. At an unconscious level, however, the subjects' nervous system "knew" what was occurring. Subjects' skin conductance response changed when they considered choosing cards from the losing decks. In this situation at least, the unconscious learned well before the conscious mind knew what was occurring.

In the above experiment, when asked "[t]ell me all you know about what is going on in this game," subjects responded that "they did not have a clue" and later that they had a "hunch." The former answer is particularly unlikely in the Batson inquiry, but lawyers have occasionally offered the latter answer as a reason for striking a venire member. The problem with the latter answer is that although a hunch is facially race- or gender-neutral, but for the venire member's race or gender there might have never been the hunch. Sometimes in response to the judge's question, the lawyer "would be more honest to say, 'My decision was determined by internal forces I do not understand.'"

The studies mentioned previously in which people's behaviors changed in direct response to subliminally primed stereotypes make the same point. If asked "why?" the actor would not know, or have access to, the real reason.

Posthypnotic suggestion demonstrates an extreme example of our inability to pinpoint the reasons for our behavior. Posthypnotic suggestion occurs when a hypnotized subject is instructed to do something ("clap your hands three times and stand on one leg") after the hypnosis session has ended. One might think subjects, knowing that they had been hypnotized, would reasonably assume that anything peculiar that they did could be attributed to the hypnosis. Instead, subjects may go to astonishing lengths to explain their behavior:

I tell a hypnotized subject that when he wakes he is to take a flower-pot from the window, wrap it in a cloth, put it on the sofa and bow to it three times. All of which he does. When he is asked for his reasons he answer, "You know, when I woke and saw the flower-pot there I thought that as it was rather cold the flower pot had better be warmed a little, or else the

379 Id.
380 Id.
381 Id.
382 Id. (finding that some participants never consciously learned how the game worked, but still made advantageous choices).
383 Id.
384 See sources cited supra note 97.
385 MINSKY, supra note 367, at 306.
386 See sources cited supra note 296 (discussing experiments on responses to subliminal schema activation).
plant would die. So I wrapped it in the cloth, and then I thought that as the sofa was near the fire I would put the flower-pot on it; and I bowed because I was pleased with myself for having such a bright idea.' He added that he did not consider the proceeding foolish, [since] he had told me his reasons for so acting.\textsuperscript{388}

Researchers have found similar effects in people with split-brains (where the left and right hemispheres of the brain cannot communicate). In such patients, the left half of the brain, which controls verbalization, will make up explanations for actions controlled by the right half of the brain that cannot be true, all without the patients' awareness.\textsuperscript{389} Certain kinds of amnesiacs do the same thing.\textsuperscript{390}

Of course, just because amnesiacs, players of a certain card game, split-brain patients, those performing post-hypnotic suggestions, and others faced with subliminal priming make up clearly false reasons for their behavior, without any knowledge of their creativity, does not prove that everyone else does as well. They do, however, illustrate the possibility dramatically, and various cleverly designed studies have shown the effect, albeit somewhat more subtly, among the rest of us.

Research demonstrates that people's ability to gauge the impact of different stimuli, such as race or sex, on their behavior can be modest or minimal.\textsuperscript{391} Subjects in numerous experiments could rarely state correctly which stimulus led to which emotional response, but rather listed non-significant factors as crucial and neglected to list significant factors.\textsuperscript{392} The results of another

\textsuperscript{388} Id. at 170-71. Moll notes that "when subjects [who have undergone hypnosis] are questioned as to their motive they make different answers; they either believe that they have so acted of their own accord, and invent reasons for their proceedings, or they say they felt impelled to act so, or they only say, "It came into my head to do it." Id. at 171. An alternative to giving a false causal explanation was for subjects to occasionally deny having performed the behavior that they had just performed. Id. at 162-63.

\textsuperscript{389} See Wilson, supra note 95, at 95-97.

\textsuperscript{390} See Oliver Sacks, The Man Who Mistook His Wife for a Hat and Other Clinical Tales 109 (1987) (stating that "[a]bysses of amnesia" were bridged by "fictions of all kinds").

\textsuperscript{391} See Daniel T. Gilbert et al., supra note 341, at 698 (stating that "people have little appreciation for the ease with which internal processes can shape and reshape their memories of an event").

\textsuperscript{392} Id. ("Numerous studies demonstrate the difficulty people encounter when trying to identify the particular external event that caused an affective experience."); see Wilson, supra note 95, at 97-104 (describing situations in which people might not accurately identify what made them act a certain way); see also Donald G. Dutton & Arnold P. Aron, Some Evidence for Heightened Sexual Attraction Under Conditions of High Anxiety, 30 J. Personality & Soc. Psychol. 510, 510-11 (1974) (evaluating the link between emotion and sexual attraction); Richard E. Nisbett & Timothy D. Wilson, Telling More Than We Can Know: Verbal Reports on Mental Processes, 84 Psychol. Rev. 231, 242 (1977) (evaluating stimulus factors when asked to name particular types of consumer products);
experiment showed that although subjects were undoubtedly organizing information by means of sex and race, they plainly did not know that they were using these attributes.393

Researchers have argued that if people are asked to identify the reasons for their decisions they merely produce seemingly plausible explanations for their behavior, sometimes without introspection.394 This is not to say that introspection, the idea that we can determine our motives by thinking about why we have done something, is necessarily helpful.395 Introspection can, in fact, increase inaccuracy.396 For example, researchers asked college students to consider and record the reasons their romantic relationships were proceeding in a certain direction.397 Compared to a control group, the introspecting


393 Shelley E. Taylor, *A Categorization Approach to Stereotyping*, in COGNITIVE PROCESSES, supra note 110, at 90-94 (illustrating two experiments where subjects unconsciously used sex and race to organize information).

394 See WEGNER, supra note 279, at 146. See also E-mail from Dan Wegner, Professor of Psychology, Harvard University, to Antony Page, Assistant Professor of Law, Indiana University School of Law – Indianapolis (Nov. 19, 2004) (on file with author) (describing an experiment where people attributed their thoughts to non-existent subliminal voices, and assigned attributes to the (non-existent) voices).

395 See Wilson, supra note 130, at 133 (noting that “a fundamental problem [of introspective reports] is whether participants have access to their thoughts and feelings”) (citations omitted). The assumption is almost as though the mind is a dark cave, and introspection is a flashlight that can reveal the unconscious contents to consciousness. See WILSON, supra note 95, at 160. One must merely aim the flashlight at whatever it is one wishes to discover and it shall be illuminated. Id. To mix metaphors, in reality our minds are “an inscrutable cauldron of mental activity.” Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 PSYCHOL. BULL. 117, 129 (1994).

396 From the perspective of a Batson inquiry, the only clearly demonstrable positive impact of introspection is that it may actually increase guilt among those who consciously believe themselves not to use stereotypes, perhaps resulting in increased cognitive effort to reduce stereotype use. See Corrine I. Voils et al., *Evidence of Prejudice-Related Conflict and Associated Affect Beyond the College Setting*, 5 GROUP PROCESSES & INTERGROUP REL. 19, 30-31 (2002) (citing three studies concerning prejudice reduction hypotheses).

397 Wilson & Kraft, supra note 392, at 411-12 (explaining the methodology used for the
students were less consistent, if not less accurate, about the state of their relationships, at least based on their predictions of how long the relationships would last.\textsuperscript{398} Experiments have also demonstrated that introspection reduces the accuracy of people's predictions about their own actions,\textsuperscript{399} affects their post-choice satisfaction-levels,\textsuperscript{400} and inhibits people's ability to predict real-world occurrences.\textsuperscript{401} Introspection also may reduce recall for certain kinds of stimuli.\textsuperscript{402}

Judges expect self-knowledge or self-awareness when they ask lawyers why they exercised peremptory challenges.\textsuperscript{403} The prosecutor may answer $x, y,$ or $z$ as the relevant reason for her peremptory challenge, without ever knowing that the reason she interpreted $x, y,$ or $z$ negatively, remembers $x, y,$ or $z,$ or even study).

\textsuperscript{398} Id. at 412-15. Feelings were also changed in that the introspecting students reported more changes in happiness (both positive and negative). Id. at 415-16. That introspection can change the underlying feelings was also demonstrated by a study in which the accessibility of positive and negative attributes of a person was varied. See Timothy D. Wilson et al., \textit{Effects of Introspecting About Reasons: Inferring Attitudes from Accessible Thoughts}, 69 J. PERSONALITY & SOC. PSYCHOL. 16, 18-19, 24-26 (1995) (asking subjects to relay their impressions of a target person, sometimes from memory, based on various presented descriptions of that person). Subjects who then analyzed their thoughts about the person reported more extreme evaluations than those who did not analyze their thoughts, but still remembered the accessible attributes just as well. Id. (explaining that the subjects often changed the way they thought about another person when their existing attitudes were readily available in memory).


\textsuperscript{400} See Timothy D. Wilson et al., \textit{Introspecting About Reasons Can Reduce Post-Choice Satisfaction}, 19 PERSONALITY & SOC. PSYCHOL. BULL. 331, 337 (1993) (arguing that analyzing reasons can lead to post-choice dissatisfaction).


\textsuperscript{403} In one case the Supreme Court appeared to acknowledge the possibility of people's lack of self-knowledge, but concludes that sincerity is an adequate safeguard. See Dennis v. United States, 339 U.S. 162, 171 (1950) ("One may not know or altogether understand the imponderables which cause one to think what he thinks, but surely one who is trying as an honest man to live up to the sanctity of his oath is well qualified to say whether he has an unbiased mind . . . .")
noticed \(x, y, \) or \(z\) in the first place is because of her own unconscious and the potential juror's race or gender. An attorney may well in good faith think she has identified her reasons, without knowing that her reasons were distorted by her unconscious expectations. The decision-maker is not dishonest; she just lacks adequate self-awareness.

It is worth stressing again that we are not consciously aware of our misjudgment or guesswork. As a result, when the judge asks for an explanation for a strike, the lawyer gives a plausible but invented reason. The lawyer believes the reason, so she can hardly be said to be lying. She may, in fact, be very confident in her reasoning, regardless of its accuracy.\(^{404}\) Similarly, since the lawyer actually believes the reason, she will presumably appear credible, and thus have little difficulty surviving the third step of Batson.\(^{405}\)

These results imply that few attorneys will always be able to correctly identify the factor that caused them to strike or not strike a particular potential juror.\(^{406}\) The prosecutor may have actually struck on the basis of race or gender, but she plausibly believes she was actually striking on the basis of a race- or gender- neutral factor. Because a judge is unlikely to find pretext, the peremptory challenge will have ultimately denied potential jurors their equal protection rights.

\(^{404}\) Wilson, supra note 95, at 113 (arguing that we have a “misleading feel of confidence” about our inaccurate judgments because we have access to large amounts of internal information and believe we must be accurate even when we are not. Wilson refers to this as the “illusion of authenticity”).

\(^{405}\) See supra Part I.C.3 (explaining Batson’s third step, where the trial court decides whether the movant has proven “purposeful discrimination”).

\(^{406}\) This invention – in subjective good faith – of explanations serves as a basis for several psychological theories. The most important of these is Leon Festinger’s cognitive dissonance theory. He proposed simply that people will change or revise their attitudes to justify their actions. Leon Festinger, A Theory of Cognitive Dissonance 18-19 (1957) (arguing that people attempt to reduce their internal dissonance by altering their thoughts to relate to their actions). So, for example, a person that believes they have chosen to write an essay arguing a particular perspective (or compensated a small amount for writing the essay) will come to support the position more than another for whom choice was not emphasized (or who was compensated a larger amount). Darwynn E. Linder et al., Decision Freedom as a Determinant of the Role of Incentive Magnitude in Attitude Change, 6 J. Personality & Soc. Psychol. 245, 245-46 (1967). Even in a situation where people state their beliefs initially, their subsequent actions cannot only change those beliefs, but also their memories of those initial beliefs. Those people who had written essays in the condition of perceived choice (and low compensation) not only changed their beliefs but also claimed that their beliefs were unchanged. See Daryl J. Bem & H. Keith McConnell, Testing the Self-Perception Explanation of Dissonance Phenomena: On the Salience of Pre-Manipulation Attitudes, 14 J. Personality & Soc. Psychol. 23, 24, 28 (1970).
IV. WHAT SHOULD BE DONE?

As noted above, judges and scholars have strongly attacked Batson. Many of these critics have also advanced various proposals to solve, or at least reduce, the problems they perceive in Batson. This section evaluates various proposals in light of the social psychology research described in the previous two sections, and recommends solutions.

A. Attorney Responses

There is a "near-perfect consensus" that stereotypes are "[a] sluggard's best friend." They have clear benefits, in the sense that they permit the decision-maker to make rapid inferences and reduce cognitive effort, which can be of critical importance in the stressful context of jury selection. "The ability to understand new and unique individuals in terms of old and general beliefs is certainly among the handiest tools in the social perceiver's kit." On the other hand, if the unconscious use of stereotypes violates potential jurors' equal protection rights, then this negative factor outweighs the benefits of using stereotypes. In addition, decision-making on the basis of stereotypes is morally undesirable for all attorneys who believe in egalitarian, non-prejudicial standards.

Independently of any legal changes to the Batson framework, an attorney may (and hopefully will) thus want to eliminate any unconscious

407 See supra Part I.D.

408 Nearly all commentators agree that the equal protection framework on which Batson is based either already addresses, or should address, unconscious bias. See discussion supra note 89. If Batson does not address unconscious bias, the first requirement would be to change the standard so that the question is not about the striking lawyer's subjective state of mind but rather whether the race or gender of the juror made the difference in the exercise of the strike. See discussion supra note 89.


411 Macrae et al., supra note 325, at 44 (demonstrating that participants who had a stereotype available to facilitate information processing performed better on a concurrent cognitive task than participants without the available stereotype). Interestingly, stereotypes may help with the efficient processing of both congruent and incongruent information. See Jeffrey W. Sherman et al., Stereotype Efficiency Reconsidered: Encoding Flexibility Under Cognitive Load, 75 J. PERSONALITY & SOC. PSYCHOL. 589, 601 (1998).

412 Gilbert & Hixon, supra note 409, at 509.

413 Professor Johnson notes [t]hat the defendant may not be able to prove on appeal that a prosecutor does not strike white jurors for the stated reason does not mean that the ethical prosecutor is free to strike for that reason; constitutional law is enforced through burdens of proof, but constitutional obligations are not defined by them. Johnson, supra note 52, at 502.
discrimination in determining whether to exercise the peremptory challenge.\footnote{414}{See Margo J. Monteith, Self-Regulation of Prejudiced Responses: Implications for Progress in Prejudice-Reduction Efforts, 65 J. PERSONALITY & SOC. PSYCHOL. 469, 471 (1993) (demonstrating subjects' attempts to alter their own behavior when their past behavior violates or is perceived to violate their subjectively held egalitarian beliefs). See also Johnson, supra note 52, at 500-07 (setting forth steps for ethical prosecutors to take before exercising a challenge).}

Non-use, however, is not necessarily easy. "[R]eviews of the literature reveal that attempts to reduce prejudice and discrimination have, at best, yielded mixed findings."\footnote{415}{Nilanjana Dasgupta & Anthony G. Greenwald, On the Malleability of Automatic Attitudes: Combating Automatic Prejudice With Images of Admired and Disliked Individuals, 81 J. PERSONALITY & SOC. PSYCHOL. 800, 800 (2001). See also Voils et al., supra note 396, at 30 (stating that "an implied goal of the hundreds of publications on prejudice and stereotyping . . . has been to understand how prejudice might be alleviated").}

In order to make any adjustments for unconscious stereotyping, the attorney must first become aware that such stereotypes exist and that she may be using them.\footnote{416}{See Fritz Strack & Bettina Hannover, Awareness of Influence as a Precondition for Implementing Correctional Goals, in THE PSYCHOLOGY OF ACTION: LINKING COGNITION AND MOTIVATION TO BEHAVIOR 579, 579 (Peter M. Gollwitzer & John A. Bargh eds., 1996) (explaining that people must be motivated to correct stereotypes, which requires that they are aware of the stereotypes); see also Dovidio et al., supra note 24, at 154 ("Aversive racists recognize that prejudice is bad, but they do not recognize that they are prejudiced."); Bertram Gawronski et al., Implicit Bias in Impression Formation: Associations Influence the Construal of Individuating Information, 33 EUR. J. SOC. PSYCHOL. 573, 585 (2003) (suggesting that teaching people about the effect of their potential unconscious stereotypes may induce people to attempt to adjust for them); Timothy D. Wilson et al., Mental Contamination and the Debiasing Problem, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 185, 190 (Thomas Gilovich et al. eds., 2002) (explaining that their hunch is that people's default response is to assume that their judgments are unbiased and observing "that people are more willing to attribute bias to other people's judgment than to their own").}

In this respect, it is interesting to note that the Implicit Association Test\footnote{417}{For a description of the test, see Anthony G. Greenwald et al., supra note 134, 1464-67. Various implicit association tests (IATs) can be found at https://implicit.harvard.edu/implicit/demo/selectatest.html (accessed Nov. 6, 2004). The IAT has been shown to be a significant predictor of discriminatory behaviors and judgments. See Allen R. McConnell & Jill M. Liebold, Relations Among the Implicit} has shown, based on over one million iterations, that "most Americans
have an automatic preference for white over black.\textsuperscript{418} The data is more nuanced with respect to gender, but there is no shortage of evidence of widespread implicit stereotypic beliefs about women.\textsuperscript{419}

Assuming an attorney is aware that her unconscious may be affecting her behavior and that she is motivated to change, can she change?\textsuperscript{420} If this article were written ten years earlier, social psychology would probably have answered “no.”\textsuperscript{421} Based on more recent research, however, the answer is probably “yes, but not without struggle.”\textsuperscript{422} Several different strategies are

\textit{Association Test, Discriminatory Behavior, and Explicit Measures of Racial Attitudes}, 37 J. EXPERIMENTAL SOC. PSYCHOL. 435, 435 (2001) (conducting a study testing the legitimacy of IATs for predicting behaviors). The IAT has also been shown to correlate with amygdalar activation. See Phelps, supra note 249, at 5 (finding that the amygdala may be related to unconscious responses to racial stimuli). Although there has been a “research explosion” due to the IAT, there remains dispute over what, precisely, the test is actually measuring, and whether the IAT actually distorts some findings. See Michael A. Olson & Russell H. Fazio, \textit{Reducing the Influence of Extrapersonal Associations on the Implicit Association Test: Personalizing the IAT}, 86 J. PERSONALITY & SOC. PSYCHOL. 653, 653 (2004) (criticizing the IAT and proposing an alternative). See generally Nilanjana Dasgupta et al., \textit{The First Ontological Challenge to the JAT: Attitude or Mere Familiarity?}, 14 PSYCHOL. INQUIRY 238 (2003) (explaining and critiquing the IAT).

\textsuperscript{418} See Implicit Association Test, \url{https://implicit.harvard.edu/implicit/demo/selectatest.html} (accessed Oct. 27, 2004); see also Dasgupta, supra note 123, 146-47 (“White Americans, on average, show strong implicit preference for their own group and relative bias against African Americans . . . [and] other ethnic minority groups such as Latino . . . Asians . . . and non-Americans.”) (citations omitted). Researchers recently demonstrated that capital defense attorneys and Cornell law students have implicit attitudes about race, as measured by the Implicit Associate Test, that closely resemble those of the general population. See, e.g., Theodore Eisenberg & Sheri Lynn Johnson, \textit{Implicit Racial Attitudes of Death Penalty Lawyers}, 53 DEPAUL L. REV. 1539, 1553 (2004).

\textsuperscript{419} See Dasgupta, supra note 123, at 147 (citing studies explaining ingroup favoritism among racial groups, age groups, and sexes).

\textsuperscript{420} An unwanted unconscious influence on mental processes has been referred to as “mental contamination.” See Wilson et al., supra note 416, at 185. Their model of debiasing requires that in addition to awareness and motivation, the decision-maker must be aware of the direction and magnitude of the bias. \textit{Id.} at 187.

\textsuperscript{421} Mahzarin R. Banaji et al., \textit{The Social Unconscious}, in BLACKWELL HANDBOOK OF SOCIAL PSYCHOLOGY: INTRAINDIVIDUAL PROCESS 134, 143 (Abraham Tesser & Norbert Schwarz eds., 2001) (finding that there is "abundant evidence that stereotypes that operate unconsciously defend their territory fiercely, influencing social interactions even when perceivers are consciously vigilant and motivated to defeat them") (citations omitted).

\textsuperscript{422} See Patricia G. Devine et al., \textit{Prejudice With and Without Compunction}, 60 J. PERSONALITY & SOC. PSYCHOL. 817, 817 (1991) (writing that “efforts to defeat prejudice are likely to involve a great deal of internal conflict”); see also Patricia G. Devine et al., \textit{The Regulation of Explicit and Implicit Race Bias: The Role of Motivations to Respond Without Prejudice}, 82 J. PERSONALITY & SOC. PSYCHOL. 835, 845 (2002) (“[F]ully overcoming the prejudice habit presents a formidable task . . . .”), cf. ALLPORT, supra note 136, at 408 (“To
possible. As discussed below, one could attempt to correct for the stereotyping (correction), prevent the stereotype from having an effect (suppression), or reduce or alter the implicated stereotype (reduction and change).

1. Correction

There are several ways of attempting to correct for bias. In one method, if an attorney's decision rule is to strike when factors reach a total of 100, possibly in the case of African Americans the attorney might raise the total to 125. Or, for those who do not think in numerical terms, the attorney's decision rule might change from striking when there is a slight possibility of bias against her client to when there is a significant possibility.

Professor Johnson suggests that ethical prosecutors should ask themselves several questions before exercising a strike. "Would I allow this person to sit as a juror if she were white?" Is my explanation for the challenge "inextricably linked with race or racial stereotypes?" If it is, is there "any other accessible trait that has less of a linkage with race" that is almost as effective? Professor Johnson argues that a prosecutor in doubt should not exercise the strike.

In essence, both of these approaches use a correction strategy. They accept that there will inevitably be bias in judgments but attempt to remedy the impact of those judgments through debiasing.

One major problem for any correction strategy is determining the magnitude of the correction required. Unfortunately, people are not very good at this determination. Some research suggests that among those who are very motivated to avoid discrimination, overcorrection is a common problem. In
A second problem is that a correction strategy appears to require significant cognitive resources, and cognitive resources are scarce for busy lawyers during voir dire.

2. Suppression

A more aggressive and controversial intervention is for the attorney to attempt to suppress the stereotypes and thereby prevent them from affecting her decision-making. Although this self-regulation requires significant cognitive effort, a strongly motivated lawyer may be able to avoid the impact of stereotypes provided that she is not too distracted or under too much time pressure. Professors John Bargh and Tanya Chartrand have reasoned that

324 (1997) (illustrating that those who wished to control their feelings of discrimination tended to overcompensate); Michael A. Olson & Russell H. Fazio, Trait Inferences as a Function of Automatically Activated Racial Attitudes and Motivation to Control Prejudiced Reactions, 26 BASIC & APPLIED SOC. PSYCHOL. 1, 9 (2004) (reporting results of their study that are “similar to occasional reports of Whites ‘bending over backwards’ to favor Blacks”) (citations omitted); Towles-Schwen & Fazio, supra note 273, at 179 (explaining the occurrence of overcorrection among those who wish to avoid discrimination).

431 A court would have to decide whether the conscious correction and possible overcorrection of unconscious bias deserves the same level of strict scrutiny as conscious bias. One state appellate court has held that a failure to exercise a peremptory challenge may be sufficient to show discrimination (but for the fact that the juror was a particular race, she would have been struck), but the Arizona Supreme Court overturned this decision. See State v. Paleo, 5 P.3d 276, 279 (Ariz. Ct. App. 2000), overruled by State v. Paleo, 22 P.3d 35, 37 (Ariz. 2000) (overruling the court of appeal’s finding that waiver of a peremptory by itself could create the inference of discriminatory purpose). The Arizona Supreme Court overruled on the basis that waiver of a peremptory by itself was inadequate to meet step one of Batson. Id. The court noted, however, that waiver plus some other evidence could create an inference of discrimination. See id.; see also Wilkerson v. Texas, 493 U.S. 924, 927 (1989) (Marshall, J., dissenting from denial of certiorari) (“[t]he court must determine . . . whether a prosecutor’s explanation for his lack of objection to white jurors is credible . . . .”).

432 See Daniel T. Gilbert et al., Blurry Words and Fuzzy Deeds: The Attribution of Obscure Behavior, 62 J. PERSONALITY & SOC. PSYCHOL. 18, 18 (1992) (suggesting that correction will be “impaired by competing cognitive demands”); Kunda & Spencer, supra note 288, at 535-36 (summarizing research that demonstrates that the availability of cognitive resources can moderate the use of stereotypes).

433 See Daniel M. Wegner, Ironic Processes of Mental Control, 101 PSYCHOL. REV. 34, 34-35 (1994) (explaining that attempts to control one’s thoughts can lead to the complete opposite of the intended effect); Daniel M. Wegner & Ralph Erber, The Hyperaccessibility of Suppressed Thoughts, 63 J. PERSONALITY & SOC. PSYCHOL. 903, 911-12 (1992) (explaining that a person in a stressful situation has a diminished ability to suppress unwanted thoughts); see also Laura Smart & Daniel M. Wegner, Covering Up What Can’t Be Seen: Concealable Stigma and Mental Control, 77 J. PERSONALITY & SOC. PSYCHOL. 474, 474 (1999) (commenting that the “effect has been observed repeatedly”).
“[t]o consciously and willfully regulate one’s own . . . evaluations [and] decisions . . . requires considerable effort and is relatively slow. Moreover, it appears to require a limited resource that is quickly used up, so conscious self-regulatory acts can only occur sparingly and for a short time.”

Even without this difficulty, the mere fact of attempting to suppress stereotypic thoughts may result in the “hyperaccessibility” of the stereotypes. This, paradoxically, may result in even more stereotypic judgments. In other words, despite a conscious and deliberate attempt to minimize the impact of stereotypes, the conscientious — but busy — attorney may end up being more likely to exercise a peremptory on the basis of race or gender. This ironic result, the “rebound effect,” has led researchers to conclude “that suppression is not simply an ineffective tactic of mental control; it is counterproductive, helping assure the very state of mind one had hoped to


435 Wegner & Erber, supra note 433, at 908-10 (comparing recall of words that subjects were to suppress with words upon which they were to concentrate).

436 See C. Neil Macrae et al., On the Regulation of Recollection: The Intentional Forgetting of Stereotypical Memories, 72 J. PERSONALITY & SOC. PSYCHOL. 709, 716-17 (1997) (arguing that memorization of stereotype consistent information facilitated by stereotype activation resulted in subjects finding it harder to forget such information); B. Keith Payne et al., Best Laid Plans: Effects of Goals on Accessibility Bias and Cognitive Control in Race-Base Misperceptions of Weapons, 38 J. EXPERIMENTAL SOC. PSYCHOL. 384, 394-95 (2002) (finding that instructions to avoid racial bias made race salient, resulting in an equal amount of stereotyped misidentifications as those who had not received the instructions); Jeffrey W. Sherman et al., Stereotype Suppression and Recognition Memory for Stereotypical and Nonstereotypical Information, 15 SOC. COGNITION 205, 205 (1997) (observing that recall and recognition of stereotypical behavior by an Asian woman were increased among subjects who were instructed to suppress their use of stereotypes); Richard M. Wenzlaff & Daniel M. Wegner, Thought Suppression, 51 ANN. REV. PSYCHOL. 59, 79-80 (2000) (citing studies that support the conclusion that trying to suppress stereotypes can actually increase the use of stereotypes); Natalie A. Wyer et al., The Spontaneous Suppression of Racial Stereotypes, 16 SOC. COGNITION 340, 348 (1998) (finding that subjects rated African Americans more stereotypically when subjects were attempting to suppress stereotype use); see also C. Neil Macrae et al., Out of Mind but Back in Sight: Stereotypes on the Rebound, 67 J. PERSONALITY & SOC. PSYCHOL. 808, 813-14 (1994) [hereinafter Macrae, et al., Stereotypes on the Rebound] (explaining that the process of suppressing stereotypes may paradoxically promote the use of the stereotypes); C. Neil Macrae et al., Saying No to Unwanted Thoughts: Self-Focus and the Regulation of Mental Life, 74 J. PERSONALITY & SOC. PSYCHOL. 578, 586 (1998) (explaining that self-focus may help regulate mental stereotypes). But see Margo J. Monteith et al., Consequences of Stereotype Suppression: Stereotypes on AND Not on the Rebound, 34 J. EXP. SOC. PSYCHOL. 355, 372-73 (1998) (finding no rebound effect for subjects with low-prejudice towards homosexuals).

437 Macrae et al., Stereotypes on the Rebound, supra note 436, at 578 (describing a study in which participants exhibited this “rebound effect”).
avoid."

3. Reduction or Change

Interestingly, experimenters have shown that retraining can affect the unconscious use of stereotypes, provided that the retraining is sufficiently extensive. Specifically, Kawakami and her colleagues' theory was that since practice (or repetition) was a key process by which stereotypes become automatically activated, then perhaps repeated practice at negating the stereotypic association would stop the automatic activation.

The "negation" training itself was very simple, albeit extensive, involving 480 repetitions. Experimenters taught participants to respond negatively to stereotypic traits and positively to non-stereotypic traits. The results of the study showed that people could learn to reduce their activation of stereotypes, not only of the stereotypic associations included in the training but of other related stereotypes as well. In addition, the results did not immediately disappear following the experiment. The psychologists hypothesized that because, in general, goals eventually become internalized with repeated practice, then the goal of "not stereotyping" would also become automatic. Sensitivity training, at least in some situations, can also reduce automatic stereotyping.

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438 Wenzlaff & Wenger, supra note 436, at 83.
439 See Kerry Kawakami et al., Just Say No (to Stereotyping): Effects of Training in the Negation of Stereotypic Associations on Stereotype Activation, 78 J. PERSONALITY & SOC. PSYCHOL. 871, 884 (2000) (explaining that participants who received training in negating stereotypes were able to reduce their unconscious use of stereotypes).
440 Id. at 872 (theorizing that people can be trained in negating stereotypic associations, which would then reduce the automatic activation of those stereotypes).
441 Id. at 873-81 (explaining the methodologies of the experiments).
442 Id. at 881-83. For example, subjects were shown photographs of black faces and one half a second later subjects were shown a word. Id. If the word was stereotypic of black people, such as athletic or poor, the subjects were directed to respond "no," whereas if the word was non-stereotypic, such as ambitious or uptight, the subjects were directed to respond "yes." Id. at 881.
443 Id. at 885.
444 Id. at 884 (discussing that the results were still "clearly visible" 24 hours after the training).
445 Id. ("participants may have learned spontaneously to implement a self-regulatory process"); see also Gordon B. Moskowitz et al., Preconscious Control of Stereotype Activation Through Chronic Egalitarian Goals, 77 J. PERSONALITY & SOC. PSYCHOL. 167, 168 (1999) (arguing that some people may become so practiced at reducing the activation of stereotypes that the inhibition itself becomes preconscious).
446 See generally Lauri A. Rudman et al., Unlearning Automatic Biases: The Malleability of Implicit Prejudice and Stereotypes, 81 J. PERSONALITY & SOC. PSYCHOL. 856, 865 (2001) (finding in two quasi-experimental studies that a semester long diversity course significantly reduced automatic stereotyping with regards to race). But see Valian,
Although negation and sensitivity training might be too costly or time-consuming, other reduction strategies are relatively straightforward. Some evidence demonstrates that merely increasing "the salience of egalitarian norms" can reduce the use of stereotypes.\textsuperscript{447} It appears possible that having judges remind lawyers, or having senior lawyers remind junior lawyers, of the constitutional and moral requirement not to discriminate would have a beneficial impact.\textsuperscript{448}

Behavioral control may also lead to the reduction of stereotype activation. If an individual is presented with the opportunity to behave in an unprejudiced way, and then that individual does behave in an unprejudiced way, her unconscious processes may change in two ways. First, the unprejudiced behavior provides the unconscious with more data from which to infer a person's "true" beliefs.\textsuperscript{449} Second, the more often a behavior is performed, the less conscious attention and effort is required to perform the behavior again.\textsuperscript{450} "Changing our behavior to match our conscious conceptions of ourselves is thus a good way to bring about changes in the . . . unconscious."\textsuperscript{451}

Another possibility is that people may reduce or alter their use of stereotypes through more "frequent exposure to admirable members of stigmatized groups (e.g., famous African Americans) and disliked members of valued groups (e.g., infamous European Americans) . . . ."\textsuperscript{452} Participants in a relevant study first performed a general knowledge test involving identification

\textsuperscript{447} See Kunda & Spencer, supra note 288, at 532.

\textsuperscript{448} Professor Brown has recommended, albeit for different reasons, that judges should state in open court that prospective jurors have a constitutional right not to be treated in a racially or sexually discriminatory manner. See Brown, Jr., supra note 102, at 302-03. Similarly, Professor Armour has suggested that "reminding decisionmakers of their personal beliefs . . . may help them to resist" unconscious discrimination. Jody Armour, Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit, 83 CAL. L. REV. 733, 759-60 (1995). Interestingly, researchers have been able to reduce the automatic use of stereotypes by subliminally priming participants with words like "fair" and "friendly." See John A. Bargh et al., The Automatic Will: Nonconscious Activation and the Pursuit of Behavioral Goals, 81 J. PERSONALITY & SOC. PSYCHOL. 1014, 1017 (2001).

\textsuperscript{449} WILSON, supra note 95, at 212.

\textsuperscript{450} Id. This is similar to the negation training discussed earlier in this article. See supra text accompanying notes 439-445.

\textsuperscript{451} Id. In some ways this is not a new idea. Aristotle wrote "we become just by doing just actions, temperate by temperate actions, and courageous by courageous actions." ARISTOTLE, NICOMACHEAN ETHICS 23 (Roger Crisp ed. & trans., Cambridge Univ. Press 2000)

\textsuperscript{452} Dasgupta & Greenwald, supra note 415, at 801; see also Irene V. Blair et al., Imagining Stereotypes Away: The Moderation of Implicit Stereotypes Through Mental Imagery, 81 J. PERSONALITY & SOC. PSYCHOL. 828, 837 (2001) (finding that the visualization of strong women leads to a reduction in automatic gender stereotyping).
of people such as Colin Powell (U.S. Secretary of State), Tiger Woods (golf champion), Timothy McVeigh (convicted of the Oklahoma bombing) and Ted Kaczynski (the Unabomber), and then were tested for their implicit racism. Exposure to admirable blacks reduced automatic race bias against blacks, compared to those in control conditions, and the effect lasted at least one day. Interestingly, this exposure did not change people’s explicit attitudes.

In another study, automatic racial bias was also reduced when a black, rather than white, experimenter gave participants their instructions. Exposure to a counterstereotypic person, such as a competent black, may have prompted this effect. Alternatively, the cause may have been “social tuning,” which is an attempt to match one’s perspective to the presumed perspective of one’s interviewer. Support for the “social tuning” hypothesis is provided by the finding that learning of a perceived social consensus consistent or inconsistent with one’s racial beliefs can affect one’s automatic stereotyping. If these findings are accurate, one might expect fewer improper racial challenges before black judges and improper gender-based challenges before female judges.

A final way of altering the impact of automatic stereotyping is by varying the conditions of the voir dire process. Conscious attitudes, as opposed to unconscious stereotypes, are more likely to control responses where the decision-maker has enough time and opportunity to consider the decision carefully, and where she is more alert. Judges could, therefore, allow...
additional time for voir dire, which would also have the advantages described in Part IV.B.4.

B. Legal Responses

1. Eliminating the Peremptory

For the peremptory challenge, the most extreme solution is the best solution. In Justice Marshall's *Batson* concurrence, he argued that eliminating the discriminatory use of the peremptory challenge “can be accomplished only by eliminating peremptory challenges entirely.”\(^6\) Justice Marshall was only the most prominent of those calling for the elimination of the peremptory challenge. Many other judges and academics have strongly supported this view,\(^6\) or have argued that the legal system should at least reduce the use of

spontaneous behaviors); Steven J. Stroessner et al., *Affect and Stereotyping: The Effect of Induced Mood on Distinctiveness-Based Illusory Correlations*, 62 *J. Personality & Soc. Psychol.* 564, 574 (1992) (finding that the mood of participants can affect how they process information).


the peremptory challenge. There is no need to repeat their arguments here.

The psychological research reviewed here demonstrates the prevalence of unconscious, automatic stereotype use and the difficulty in eradicating it, even among those who are not of a mind to discriminate. This finding provides one more powerful reason to eliminate the peremptory challenge. Because the legislatures and courts show little or no likelihood of eliminating the peremptory challenge, however, other proposals must be evaluated.

2. Category-Conscious Jury Selection

"[S]ecuring 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." In order to achieve this goal (or at least in order to achieve the appearance of a fair trial), various commentators have suggested different forms of race-conscious jury selection. The strongest proposals ensure a


466 See, e.g., Commonwealth v. Maldonado, 788 N.E.2d 968, 975 (Mass. 2003) (Marshall, C.J., concurring) ("I am therefore persuaded that, rather than impose on trial judges the impossible task of scrutinizing peremptory challenges for improper motives, it is time either to abolish them entirely, or to restrict their use substantially." (quoting Commonwealth v. Calderon, 725 N.E.2d 182, 188 (Mass. 2000))); People v. Brown, 769 N.E.2d 1266, 1273 (N.Y. 2003) (Kaye, C.J., concurring) ("My nearly 16-year experience with Batson persuades me that, if peremptories are not entirely eliminated (as many have urged), they should be very significantly reduced."); Ogletree, supra note 102, at 1146-48 (1994) (arguing in favor of eliminating the peremptory challenge for all parties except the criminal defendant).

467 Notwithstanding this view, England and Wales abolished the peremptory challenge in 1988. Criminal Justice Act, 1988, c. 33, § 118(1) (Eng.). These countries enacted the statute primarily for reasons of efficiency, however, rather than to combat race or gender-based discrimination in jury selection.

468 Georgia v. McCollum, 505 U.S. 42, 61 (1992) (Thomas, J., concurring) (stressing that the composition of a jury may affect the outcome of a case); see also Leslie Ellis & Shari Seidman Diamond, Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy, 78 CHI.-KENT L. REV. 1033, 1038-40 (2003) (describing advantages of racially representative juries); Deborah A. Ramirez, The Mixed Jury and the Ancient Custom of Trial by Jury De Medietate Linguae: A History and a Proposal for Change, 74 B.U. L. REV. 777, 798 (1994) ("To the extent that persons of color can contribute points of view that may not be readily apparent to majority jurors, the deliberative process may be substantially fairer and wiser.").

certain minimum number or percentage of minorities on the petit jury. For example, several commentators have proposed legislation that would guarantee that at least half of the members of a jury pool are of the same race as the defendant in a criminal trial. A similar proposal sets the minimum number of same-race jurors for a petit jury at three. A more nuanced version jurisdiction that follows race conscious selection, Hennepin County in Minnesota requires that at least two out of twenty-three grand jurors be members of a minority group. According to census results, Hennepin County has a minority population of nearly 10%. If there are no minority group members on the grand jury panel after 21 grand jurors have been selected (or only one member after 22 have been selected), then the remaining two (or one) grand jurors must be minority members. \textit{Id.} at 726 (quoting TASK FORCE ON RACIAL COMPOSITION OF THE GRAND JURY, OFFICE OF THE HENNEPIN COUNTY ATTORNEY, FINAL REPORT 45 (1992)). At least five states do not mandate the random selection of grand jurors, thus other counties (assuming no constitutional issues) may also follow a similar method. See Hiroshi Fukurai & Darryl Davies, \textit{Affirmative Action In Jury Selection: Racially Representative Juries, Racial Quotas, and Affirmative Juries Of The Hennepin Model And The Jury De Medietate Linguae}, 4 VA. J. SOC. POL’Y & L. 645, 659 (1997) (attempting to determine the prevalence of the \textquotedblleft Hennepin County race-balancing model of jury selection\textquotedblright{} in other states and counties). By contrast, the federal government does require random selection of grand jurors. See \textit{Jury Selection and Service Act of 1968}, 28 U.S.C. § 1863(a) (2000) (\textquotedblleft Each United States district court shall devise and place into operation a written plan for random selection of grand and petit jurors . . . .\textquotedblright{}).

Previously, the U.S. District Court for the Eastern District of Michigan had introduced a program that had the effect of reducing the number of whites available to serve as grand jurors (thereby increasing the percentage of minority grand jurors), however, this program was struck down as unconstitutional. See United States v. Ovalle, 136 F.3d 1092, 1105-07 (6th Cir. 1998) (holding such a balancing plan unconstitutional as it was not narrowly tailored to meet the State’s compelling interest in ensuring that jury pools represented fair cross section of the community); see also United States v. Greene, 971 F. Supp. 1117, 1121-24 (E.D. Mich. 1997) (describing efforts to achieve racial parity in jury pools in Eastern Michigan). See generally Albert W. Alschuler, \textit{Racial Quotas and the Jury}, 44 DUKE L.J. 704 (1995) (asserting the fairness and constitutionality of race sensitive jury selection methods similar to the one used in Hennepin County); Avern Cohn & David R. Sherwood, \textit{The Rise and Fall of Affirmative Action in Jury Selection}, 32 U. MICH. J.L. REFORM 323 (1999) (tracking the course of racial balancing programs from inception in the Eastern District of Michigan to its end as a result of the Sixth Circuit decision in Ovalle).


\textit{470} See Sheri Lynn Johnson, \textit{Black Innocence and the White Jury}, 83 MICH. L. REV. 1611, 1698 (1985) (choosing three jurors of the same race as the defendant based on social psychological research indicating that this was the minimum number required to influence the remaining jurors); see also LORD JUSTICE AULD, \textit{REVIEW OF THE CRIMINAL COURTS OF ENGLAND AND WALES} 156-59 (2001) (proposing that at least three ethnic minority jurors
requires that the racial composition of the petit jury mirror the racial composition of the community where the trial occurs.471

Applied to gender, these proposals would require a specific number of men and women on the jury (for example, mandating a jury of half men and half women). In fact, to the degree that gender may be more transparent than race or ethnicity, and because there are only two sexes rather than many races or ethnicities, these proposals more easily apply to gender-based jury selection than to race-based jury-selection.

Commentators have previously noted two problems with this approach. The first problem is that classifications on the basis of race are likely unconstitutional, as they must face strict scrutiny.472 The second problem is that jurors may feel that they must represent a particular constituency, be it the defendant, the victim, or their own racial or ethnic group or gender, and make their decision accordingly.473

The research discussed previously on the strong effects of grouping474 should be seated in trials where race is an issue), available at http://www.criminal-courts-review.org.uk/auldconnts.htm (accessed Oct. 29, 2004). Other research has shown that an initial minority of less than four rarely produces a hung jury. See HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 462 (1971) (confirming with evidence from an extensive study that “juries which begin with an overwhelming majority in either direction are not likely to hang”). Henry Fonda’s performance in the film TWELVE ANGRY MEN (Metro-Goldwyn-Mayer 1957), in which a sole juror is able to convince the remaining eleven jurors, is apparently very much the exception.

471 See Note, The Case for Black Juries, 79 YALE L.J. 531, 548 (1970) (exploring the creation of jury districts on a state and federal level). But see Batson v. Kentucky, 476 U.S. 79, 86 n.6 (1986) (“It would be impossible to apply a concept of proportional representation to the petit jury in view of the heterogeneous nature of our society.”).

472 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, 728-29 (1998) (comparing race-conscious jury selection with unconstitutional voting districts). Classifications on the basis of sex generally only face intermediate scrutiny, and thus are more likely to survive constitutional challenges. See J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 134 (1994) (highlighting historic cases upholding treating women differently with regards to jury service); id. at 154 (Rehnquist, C. J., dissenting) (arguing in his dissent that Batson should not be extended to preemptory challenges based on gender because gender-based classifications are subject to a lesser standard of scrutiny as compared to race classifications).

473 See JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEA OF DEMOCRACY 140 (1994) (calling any jury system based on proportional or particular representations an “invitation to jurors” to serve as an interested representative of a particular group to which they belong); see also Ellis & Diamond, supra note 467, at 1037 (commenting that “not endorsing a particular allocation of seats on the jury to members of a particular group [avoids] the lure of a legislature-like jury drawn from, and potentially beholden to, particular parts of the community”).

474 See supra Part II.1 (discussing the effects on perception and bias of placing an individual within or outside of a group).
provides a third critique of this approach. By treating the juror as a member of a group, group membership will become more salient, and this can affect judgment and decision-making, often negatively.475

Other commentators have suggested proposals that, although not necessarily explicitly race-conscious, would likely result in greater diversity on the petit jury. A particularly promising suggestion is offered by Professor Kim Forde-Mazrui who, analogizing juries to legislatures, suggests a scheme he calls “jural districting,” which would create twelve sub-districts within the jury district.476 The scheme would require the petit jury be comprised of one member from each sub-district. This procedure may well satisfy the Equal Protection Clause and might create more diverse juries, to the degree that sub-districts are both more homogeneous than the districts from which they are derived and different from each other.477 The proposal does not, however, affect gender-based peremptory challenges in any way. In addition, the same problem arises that jurors may perceive themselves as representing particular communities, and this “may reinforce divisions between those communities and groups.”478

Many commentators have suggested a system that is almost the reverse of the peremptory challenge system. In place of peremptory challenges, parties would have the right to choose affirmatively some or all of the potential jurors, and generally could use race or any other protected category as a basis for their selections.479 Under some versions of this proposal, peremptory challenges or

475 See supra notes 200-220 and accompanying text.
477 Forde-Mazrui, supra note 476, at 395 (stressing the benefits of “jural districting” as compared to “at-large methods,” which include more proportionate and diverse representation as well as likely endorsement by courts).
478 See King, supra note 476, at 1199 (concluding that any attempt to require representation from each community or group will worsen the dividing line between groups as well as cast a negative light on districts without such representation requirements).
479 The first proponent of “affirmative selection” appears to have been Tracey Altman. See Tracey L. Altman, Note, Affirmative Selection: A New Response to Peremptory Challenge Abuse, 38 STAN. L. REV. 781, 806-08 (1986) (describing in detail the actual procedure of an “affirmative selection” system). This system was then advocated for capital cases. See, e.g., Hans Zeisel, Comment, Affirmative Peremptory Juror Selection, 39 STAN. L. REV. 1165, 1170-71 (1987) (examining the benefits of an affirmative selection process in capital jury selection). Since that time there have been several proponents of different variations of affirmative selection, some involving chance or cumulative voting. See, e.g., Adams & Lane, supra note 472, at 739-746 (describing a system resembling cumulative
functional equivalents (sometimes subject to *Batson*) would also be available.\textsuperscript{480} Some of the objections to the affirmative selection systems are similar to those for the explicitly race-conscious proposals. To the degree that they permit attorneys to act on the basis of race, or to a lesser degree gender, they are constitutionally suspect.\textsuperscript{481} Furthermore, to the degree that *Batson* is applicable, the same *Batson* problems apply.\textsuperscript{482} Likewise, if jurors are aware that the parties selected them on the basis of their group membership, then they may see themselves as group representatives,\textsuperscript{483} and the problems of salient group identity would increase. An additional, important objection is that affirmative selection proposals are more likely to result in hung juries because parties are likely to select more polarized jurors,\textsuperscript{484} assuming that the parties voting in corporate law, where litigants receive votes equal to the size of the jury but may choose to utilize them positively or negatively for as few or as many seats as they wish); Anderson, *supra* note 99, at 392 (proposing a system "permitting the defendant to trade some of his peremptory challenges to place qualified jurors, that he believes are favorable, to judge his case"); Geoffrey Cockrell, *Batson Reform: A Lottery System of Affirmative Selection*, 11 NOTRE DAME J. L. ETHICS & PUB POL’Y 351, 381-82 (1997) (proposing a "modified lottery" system in which attorneys give venire persons lottery tickets and a judge draws the twelve tickets and the holders become the jurors); Donna J. Meyer, *A New Peremptory Inclusion to Increase Representativeness and Impartiality in Jury Selection*, 45 CASE W. RES. L. REV. 251, 280-87 (1994) (describing a system called "peremptory inclusion" which allows the defendant to use one of his challenges to secure a person's spot on the jury); Deborah Ramirez, *Affirmative Jury Selection: A Proposal to Advance Both the Deliberative Ideal and Jury Diversity*, 1998 U. CHI. LEGAL F. 161, 171-74 (1998) (advocating a system providing each litigant with a fixed number of affirmative peremptory choices).

\textsuperscript{480} See, e.g., sources cited *supra* note 479. Although such systems would have the potential of increasing minority representation on juries, they only address the problem of *Batson* to the degree that a lack of minority representation is the problem. Clearly it would not address the specific problem of the exercise of peremptory challenges because of a potential jurors' minority status.

\textsuperscript{481} The argument is set forth in detail at King, *supra* note 468, at 745-760 (predicting the likely failure of race-conscious jury selection procedures to meet the strict scrutiny standard). One might argue that in light of *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003), which held that a law school had a "compelling interest in a diverse student body," jury diversity is a compelling interest. A proponent would have to show that allowing attorneys to use racial classifications is reasonably necessary to achieve this compelling objective. This would require, among other things, the court to accept that *Batson* had failed.

\textsuperscript{482} See *supra* Part I.D (providing a critique of *Batson*).

\textsuperscript{483} See ABRAMSON, *supra* note 473, at 140 (concluding that any categorical method for selecting jurors known to jurors would inevitably lead to jurors acting as representatives of the community, voting in terms of their "preconceptions or preferences of their group").

\textsuperscript{484} Acknowledging this criticism, Adams and Lane have suggested exploring the adoption of nonunanimous juries. See Adams & Lane, *supra* note 472, at 763 (offering nonunanimous jury verdicts as a solution to the increased likelihood of hung juries that may
are successful in identifying jurors who have biases in their favor.485

The above suggestions, while arguably helping to ensure the Sixth Amendment's fair cross section of the community requirement, do not address the constitutional right that Batson and its progeny was supposed to guarantee: the potential juror's right to serve on a jury irrespective of race or gender.486 Although such proposals might mitigate some of the harm caused by the discriminatory use of the peremptory by ensuring that petit juries include more minority group members, the unconscious discriminatory use of the peremptory would continue.487

3. Harsher Sanctions

Other approaches attempt to change the incentive structure for lawyers. The argument is that the remedy at the trial court level for the improper use of a peremptory challenge does not serve as an adequate deterrent.488 Generally, in the face of a Batson violation the trial court calls a new venire panel, which may well be more inconvenient for the judge than for the litigants.489 This

result from polarized juries selected through a cumulative voting system). Currently, Oregon and Louisiana permit nonunanimous jury verdicts for felony trials. See LA. CONST. art. 1, § 17 (allowing a guilty verdict to be rendered by concurrence of ten out of twelve or five out of six jurors for non-capital punishment criminal cases); OR. CONST. art. I, § 11 (requiring only ten out of twelve jurors to render a guilty verdict for all criminal prosecutions except first degree murder). In federal trials, "[u]nanimity in jury verdicts is required where the Sixth and Seventh Amendments apply." Andres v. United States, 333 U.S. 740, 748 (1948). Since 1967, England has permitted nonunanimous juries, provided the jury deliberates for at least two hours. See Juries Act, 1974, ch. 23 § 17 (Eng.).

485 This assumption may well be incorrect. See Reid Hastie, Is Attorney-Conducted Voir Dire an Effective Procedure for the Selection of Impartial Juries?, 40 AM. U. L. REV. 703, 721 (1991) (rejecting the conclusion that attorneys are effective at identifying favorable or unfavorable jurors).


487 In fact, it might be reasonable to assume that a lawyer that consciously discriminates will be encouraged to discriminate more in an attempt to ensure that minority representation does not exceed any guaranteed level.

488 See People v. Willis, 43 P.3d 130, 139 (Cal. 2002) (holding that courts should consider more effective relief for Batson violations, including "imposing sanctions severe enough to guard against a repetition of the improper conduct"); Alschuler, supra note 18, at 178 (arguing that the Batson remedy of dismissing the entire jury panel does not provide a strong incentive against discrimination and may in some instances even aid in discrimination); Brown, supra note 102, at 266 (concluding that the remedies for Batson violations are highly ineffectual); Cavise, supra note 18, at 544 (questioning the effectiveness of existing penalties for the improper use of peremptory challenges).

489 Ogletree, supra note 102, at 1116. At least one court has created an incentive for defendants to exercise discriminatory challenges. See United States v. Huey, 76 F.3d 638, 641 (5th Cir. 1996) (reversing defendant's conviction, even though it was defendant's counsel who made the discriminatory strikes). But see United States v. Boyd, 86 F.3d 719,
outcome does not put the litigant in a worse position than if she had refrained from attempting to strike the juror, and the result may even be preferable if the old panel is undesirable.\footnote{\cite{Huey} (7th Cir. 1996) (disagreeing with the Huey court).} The other main sanction is for the judge to place the potential juror who has been the target of the improper peremptory challenge on the jury.\footnote{See Williams, 31 Cal. Rptr. 2d at 774 (explaining that conducting preliminary peremptory challenges at the sidebar would prevent potential bias against a party who has unsuccessfully attempted to challenge a juror); Alschuler, supra note 18, at 177 (commenting on the “difficult interpersonal situation for the juror, the prosecutor, and others in the courtroom” that may result from restoring jurors who faced discriminatory challenges); Brown, supra note 490, at 410 (“[T]he potential reinstatement of an excluded juror is a strong incentive for avoiding discriminatory challenges because the jury may no longer be impartial once an excluded juror has been reseated.”). To help prevent this bias, the American Bar Association has recommended that “[a]ll challenges, whether for cause or peremptory, should be addressed to the court outside the presence of the jury, in a manner so that the jury panel is not aware of the nature of the challenge, the party making the challenge, or the basis of the court’s ruling on the challenge.” ABA STANDARDS FOR CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY 167 (3d ed. 1996).}

This sanction creates a disincentive to exercise an improper challenge because the targeted juror may be biased against the party that attempted to strike her.\footnote{See Gordon, supra note 107, at 712 n. 282 (discussing case where court costs for thirty-nine members of the venire at forty dollars per juror were imposed on an attorney improperly exercising a strike); see also People v. Muhammad, 133 Cal. Rptr. 2d 308, 319 (Cal. Ct. App. 2003) (overturning a trial court’s imposition of monetary sanctions for Batson violation because the trial court failed to comply with statutory provisions for imposing the monetary sanctions); People v. Willis, 43 P.3d at 133 (trial court imposed, but later vacated, monetary sanctions for Batson violation).}

At least four additional options could help deter improper challenges. First, occasionally courts have imposed financial penalties on violators.\footnote{Brown, supra note 102, at 308-09 (arguing that first and foremost there must be a uniform rule unequivocally stating that any Batson violation is professional misconduct);} Second, the American Bar Association or state bar associations could implement a specific ethical rule against the discriminatory exercise of the peremptory.\footnote{Brown, supra note 102, at 308-09 (arguing that first and foremost there must be a uniform rule unequivocally stating that any Batson violation is professional misconduct);}

\footnote{\cite{Batson} at 99 (“[W]e express no view on [...] for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case, or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire.” (citation omitted)).}

\footnote{See Willis, 43 P.3d at 135 (describing how defendant’s counsel admittedly engaged in improper challenges in order to cure “a perceived imbalance in the initial jury venire”); see also People v. Williams, 31 Cal. Rptr. 2d 769, 771 (Cal. Ct. App. 1994) (commenting on trial court’s view that repeated dismissals of panels could result in “never getting to trial,” which could be an incentive for defendant); Cheryl A. C. Brown, Comment, Challenging the Challenge: Twelve Years After Batson, Courts Are Struggling to Fill in the Gaps Left by the Supreme Court, 28 U. BALT. L. REV. 379, 409 (1999) (suggesting that a new venire may be an incentive for parties to improperly strike jurors). See also People v. Muhammad, 133 Cal. Rptr. 2d 308, 319 (Cal. Ct. App. 2003) (overturning a trial court’s imposition of monetary sanctions for Batson violation because the trial court failed to comply with statutory provisions for imposing the monetary sanctions); People v. Willis, 43 P.3d at 133 (trial court imposed, but later vacated, monetary sanctions for Batson violation).}\footnote{\cite{Batson} court accepted both of these as remedies. See Batson v. Kentucky, 476 U.S. 80, at 99 (“[W]e express no view on [which remedy] is more appropriate . . . for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case, or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire.” (citation omitted)).}

\footnote{\cite{Williams} at 774 (explaining that conducting preliminary peremptory challenges at the sidebar would prevent potential bias against a party who has unsuccessfully attempted to challenge a juror); Alschuler, supra note 18, at 177 (commenting on the “difficult interpersonal situation for the juror, the prosecutor, and others in the courtroom” that may result from restoring jurors who faced discriminatory challenges); Brown, supra note 490, at 410 (“[T]he potential reinstatement of an excluded juror is a strong incentive for avoiding discriminatory challenges because the jury may no longer be impartial once an excluded juror has been reseated.”). To help prevent this bias, the American Bar Association has recommended that “[a]ll challenges, whether for cause or peremptory, should be addressed to the court outside the presence of the jury, in a manner so that the jury panel is not aware of the nature of the challenge, the party making the challenge, or the basis of the court’s ruling on the challenge.” ABA STANDARDS FOR CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY 167 (3d ed. 1996).}
Third, judges could either give additional challenges to the non-striking lawyer or reduce the remaining number of challenges available to the party improperly exercising the challenge. Fourth, at least with respect to prosecutors improperly exercising the challenge, one commentator has gone as far as to advocate the “dismissal of the criminal prosecution with prejudice,” arguing by analogy to the exclusionary rule. At least one court has dismissed a civil case with prejudice; the ruling, however, was overturned on appeal on the grounds that this remedy was “excessive and inappropriate” where the challenge of only one juror was at issue and other remedies were available.

Creating additional disincentives or punishment for the discriminatory exercise of the peremptory challenge would presumably make attorneys more vigilant about their use, if only by virtue of an in terrorem effect. It is also clear that a high motivation to avoid using stereotypes can in some circumstances reduce the unconscious use of stereotypes. In this respect, change is desirable.

Under the current framework, however, increased penalties are unlikely to make much difference. An attorney acting in subjective good faith would continue to act in subjective good faith (albeit perhaps a bit more cautiously), and judges would still have the same difficulty in determining why a juror was in fact struck. In addition, the above suggestions for increased penalties discount an already existing penalty—namely having a judge determine in open court that the attorney’s explanation lacks credibility, or put more bluntly, 

Gordon, supra note 107, at 713-17 (proposing that the legal profession, in addition to the courts, should do its part in preventing discrimination in jury selection by adopting an ethical rule). But see Abbe Smith, “Nice Work if You Can Get It”: “Ethical” Jury Selection in Criminal Defense, 67 FORDHAM. L. REV. 523, 546-48 (1998) (arguing that it can be “unethical for a defense lawyer to disregard what is known about the influence of race and sex on juror attitudes in order to comply with Batson”).

Hopper, supra note 102, at 837; see also Koo v. McBride, 124 F.3d 869, 873 (7th Cir. 1997) (stating that granting the defendant additional peremptory challenges might be a remedy for a Batson violation).

Ogletree, supra note 102, at 1117 (proposing “a version of the exclusionary rule” for Batson violations). Ogletree has also recommended that judges should at least consider disciplinary actions, such as complaint citations, censure or suspension, against prosecutors. Id. at 1122.

See Hunt v. Harrison, 707 N.E.2d 232, 234-35 (Ill. App. Ct. 1999) (stating that the trial court could have substituted a juror or dismissed the venire and brought in a new panel as possible remedies instead of dismissing the case).

that the attorney is lying and may be even racist or sexist as well. In addition, given the difficulty of the trial court’s factual determination, a judge may be less likely to find a Batson violation if there are additional penalties.

4. Enhanced Voir Dire

Voir dire may be as limited as brief “yes” or “no” group questioning by the judge, or as extensive as the open-ended individual questioning of potential jurors by both judge and attorneys. Many have suggested expanded voir dire. Especially when the attorneys conduct the voir dire process, both parties would have the opportunity to learn more about potential jurors and, theoretically at least, whether they are more or less likely to render the desired verdict. The hope is that more information would enable attorneys to use “challenges intelligently in a case-specific manner, rather than relying on improper stereotypes.”

499 See sources cited supra note 99 (equating a judge’s rejection of a peremptory challenge to labeling an attorney as a liar, racist or sexist).

500 See Charlow, supra note 82, at 60-61 (arguing that trial judges would be less inclined to find Batson violations “if personal sanctions attached to errant attorneys”).


502 See id. at 1200-01 (“For greater effectiveness, voir dire should include a large number and broader range of case-specific questions.”); see also Anderson, supra note 99, at 392-96 (arguing for a jury selection procedure which affords the defendant more flexibility). For a psychological perspective on the importance of a thorough voir dire, see Valerie P. Hans, The Conduct of Voir Dire: A Psychological Analysis, 11 JUST. SYS. J. 40, 41-42 (1986).


504 See Rodriguez, supra note 102, at 795 (“[B]oth a prosecutor and defense counsel must be allowed a sufficiently thorough inquiry into the background and attitudes of prospective jurors to enable them to make intelligent use of the [peremptory challenge] right.”).

505 Ogletree, supra note 102, at 1126; see also Babcock, supra note 7, at 561-62 (arguing that more information is needed to prevent the use of stereotypes); Smith, supra note 494, at 526-28 (attributing limited voir dire as the cause of the author’s use of stereotypes in jury selection). The Supreme Court has also accepted that voir dire can assist counsel with peremptory challenges, see Mu’min v. Virginia, 500 U.S. 415, 431 (1991), even as it accepts extremely limited voir dire. See, e.g., Ristaino v. Ross 424 U.S. 589, 598 (1976) (holding that examination of the voir dire process was not constitutionally required where
One obvious problem is efficiency — there is cost in acquiring information. The more time spent selecting the jury, the less time there is available for other use of court and attorney time. Another problem is that even with limited voir dire, jurors often feel that judges and lawyers have inadequately respected their privacy, and that the information sought encourages the use of stereotyping.

Finally, the research discussed previously suggests that additional information, although desirable, is no panacea. The categorization of people is automatic and virtually instantaneous, and greatly affects how information is perceived, evaluated and remembered. Perceptions, evaluations, and memories based on increased information will therefore likely be biased in favor of the automatically prompted conclusion.

On the other hand, there is also some evidence that increasing individuating information will reduce the impact of automatically activated stereotypes.

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506 POSNER, supra note 187, at 17 (stating that positive information costs, including the “costs of acquiring information,” are a widely-held assumption in economic theory). There is also the cost of “absorbing or processing information.” Id.


508 See Mary R. Rose, Expectations of Privacy, 85 JUDICATURE 10, 16 (2001) (reporting survey findings in which jurors stated they felt that personal questions regarding family and employment seem to “invite” stereotyping).

509 See supra Part III.B.C.

510 See Thomas E. Nelson et al., Irrepressible Stereotypes, 32 J. EXPERIMENTAL SOC. PSYCHOL. 13, 32 (1996) (observing that some studies suggest “continuing category effects even under conditions that favor individuation”).

511 See James L. Hilton & Steve Fein, The Role of Typical Diagnosticity in Stereotype-Based Judgments, 57 J. PERSONALITY & SOC. PSYCHOL. 201, 201 (1989) (stressing the strong effects of individuating information on subjects’ judgment of others); Joachim Krueger & Myron Rothbart, Use of Categorical and Individuating Information in Making Inferences About Personality, 55 J. PERSONALITY & SOC. PSYCHOL. 187, 194 (1988) (concluding on the basis of three experiments that the combination of categorical and case information play a not insignificant role on judgment); Ziva Kunda & Paul Thargard, Forming Impressions from Stereotypes, Traits and Behaviors: A Parallel-Constraint-Satisfaction Theory, 103 PSYCHOL. REV. 284, 300 (1996) (stating that the impact of stereotypes is “diluted or eliminated” when individuating information is available); Kunda & Spencer, supra note 288, at 528 tbl.1 n.c (noting that evidence that individuating information reduces the use of stereotypes has been “obtained in many . . . studies”); Nelson et al., supra note 403, at 31-36 (arguing that providing or obtaining individuating information may be the best and only real way to reduce the automatic use of stereotypes).
Moreover, when there is an increase in available information, there is a greater chance a lawyer will classify a potential juror on a basis other than, or in addition to, the visible categories of race and gender.512 Everyone is categorizable across multiple dimensions, provided those other dimensions are known. For example, automatic attitudes regarding well-known black athletes and white politicians varied based on whether the individual was unconsciously categorized by race or occupation.513

Some commentators have recommended a variant of expanded voir dire based on the greater use of questionnaires.514 Questionnaires can be relatively private, efficient (both in not using court time and in highlighting areas that require further individual questioning of jurors), and provide thorough information. Most importantly, they may also be at least somewhat race- and gender-blind,515 allowing lawyers to examine data without having a gender or race schema imposed thereon.516 Even questionnaires that are not race and gender-blind may prove preferable to "live" voir dire because race and gender are far less salient on the written page than they are in the flesh. The less

see also Kahneman & Tversky, supra note 281, at 243 (finding that prior probabilities (analogous to stereotypes) may be ignored when individuating information is also available).

512 See Frasher, supra note 503, at 1348 (concluding that in the absence of meaningful information, parties rely on stereotypes to make peremptory challenges).

513 See Mitchell, supra note 261, at 457 (conducting five experiments which show that changes in context can rapidly reverse automatic attitudes). This effect can depend on the salience of the category. Id.


515 Information that can serve as a proxy for race, like occupation and residence, would still be permitted. See Montoya, supra note 514, at 1018 (allowing information closely linked to race and gender to appear on "blind" jury questionnaires).

516 Perhaps the whole process can be made race and sex neutral, if lawyers do not have the opportunity to visually or orally examine potential jurors. See Montoya, supra note 514, at 1016-19 (proposing jury selection by blind questionnaire and without visual or oral examination). There are several disadvantages with this proposal, including concerns about its constitutionality, and that it would deny parties the opportunity to use demeanor evidence. Id. at 1019-23. See also People v. Johnson, 71 P.3d 270, 282 (Cal. 2003) (observing that in voir dire there is "the unspoken atmosphere of the trial court – the nuance, demeanor, body language, expression and gestures of the various players").
salient the stereotype, the less likely it will be activated automatically,517 which would be a worthwhile improvement.

It is important to note that if attorneys are able to obtain more and better information about prospective jurors such that they are better able to determine who will be sympathetic to their cases, and if different races or genders have significantly differing views,518 then lawyers will still exercise peremptory challenges in a manner that produces a disparate impact on gender or race. For example, if it is really true that black jurors are more sympathetic to black criminal defendants than white jurors,519 then, assuming this sympathy is detected in voir dire, prosecutors will strike more black potential jurors. The difference is that lawyers will no longer exercise the peremptories on the basis of race or gender, and thus there will no longer be a violation of potential jurors’ equal protection rights.

5. Changing the Step Three Evaluation

Many commentators have suggested changing the way courts scrutinize the reason offered at the second step of Batson.520 One commentator has suggested a three-part test to determine whether an attorney’s reason is

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517 See supra notes 281-287 and accompanying text (explaining in detail the way individuals automatically categorize others after observing salient attributes).

518 See Kim Taylor-Thompson, Empty Votes in Jury Deliberations, 113 HARV. L. REV. 1261, 1264 (2000) (stating that it “is often true [that] the views of jurors of color and female jurors diverge from the mainstream”). Some members of the Supreme Court also believe that this is true. See J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 148-49 (1994) (O’Connor, J., concurring) (“We know that like race, gender matters. . . . [I]n certain cases a person’s gender and resulting life experience will be relevant to his or her view of the case.”); id. at 156 (Rehnquist, C.J., dissenting) (“The two sexes differ, both biologically and, to a diminishing extent, in experience. . . . [T]hese differences may produce a difference in outlook which is brought to the jury room.”); Georgia v. McCollum, 505 U.S. 42, 61 (1992) (Thomas, J., concurring) (“[S]ecuring representation of the defendant’s race on the jury may help to overcome racial bias . . . .”); see also Grutter v. Bollinger, 539 U.S. 306, 333 (2003) (concluding that being a member of a racial minority in the U.S. is “likely to affect an individual’s views”). For a general discussion of the Supreme Court’s inconsistent views on whether the race of jurors affects jury decisions, see Nancy J. King, Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions, 92 MICH. L. REV. 63, 67-72 (1993).


520 McMillian & Pettrini, supra note 464, at 369 (“[i]neffective scrutiny of . . . [neutral] explanations is the single greatest problem hindering the effective implementation of Batson.”); see DiPrima, supra note 54, at 889 (claiming that judges can better police discrimination in the use of peremptory challenges through increased and improved fact-finding and evidence-gathering).
The reason must be specific, rationally related to a characteristic affecting juror qualifications, and must be "bona fide."

Others have focused on objective elements as inherently less suspect than a "vague and highly subjective explanation," and have argued in favor of the striking attorney being required to provide additional "on-the-record reasons whenever their stated explanations involve a substantial risk of being pretextual." Another variant is for the trial court to determine whether the reason cited for the challenge applies to other unchallenged venire members. A judge would find pretext, for example, if a lawyer challenged a potential juror because she is an elementary school teacher, but did not challenge every elementary school teacher in the venire panel. Courts have already adopted this approach in some circumstances.

This proposal ignores the fact that a lawyer’s strategy for the exercise of a challenge may not remain constant. The Supreme Court and others have recognized that a lawyer may be more willing to exercise a challenge when she has a lot of challenges remaining than when she has very few. In addition,

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521 Serr & Maney, supra note 102, at 64.
522 Id.
524 Id. at 1565 (providing examples of potentially pretextual explanations, such as striking a juror based on his or her residence in a high-crime area, prior attendance at a predominantly black university, or unemployment).
525 This rationale has been referred to as "disparate treatment." See Melilli, supra note 45, at 479 (listing disparate treatment as the most common reason for "rejecting proffered neutral explanations"); see also Karen Bray, Comment, Reaching the Final Chapter in the Story of Peremptory Challenges, 40 UCLA L. REV. 517, 543 (1992) (arguing that judges should not permit venire members of a cognizable racial group to be challenged for a claimed reason, when a white person with the same characteristic is not so challenged).
526 Melilli, supra note 45, at 479-80 (finding that disparate treatment, "is by far the most prevalent rationale for rejecting proffered neutral explanations" based on a survey of almost all published court decisions applying Batson before December 31, 1993); see, e.g., Turner v. Marshall, 121 F.3d 1248, 1251 (9th Cir. 1997) ("A comparative analysis of jurors struck and those remaining is a well-established tool for exploring the possibility that that facially race-neutral reasons are a pretext for discrimination."); Doss v. Frontenac, 14 F.3d 1313, 1316-17 (8th Cir. 1994) ("It is well-established that peremptory challenges cannot be lawfully exercised against potential jurors of one race unless potential jurors of another race with comparable characteristics are also challenged."); United States v. Sowa, 34 F.3d 447, 452 (7th Cir. 1994) (concluding that counsel’s proffered reasons were pretext where the same reasons applied to others); United States v. Chinchilla, 874 F.2d 695, 698 (9th Cir. 1989) (finding pretext for Hispanic juror challenged on the basis of residence when white juror residing in same area was not challenged).
527 See, e.g., Gray v. Mississippi, 481 U.S. 648, 665 (1987) ("[T]he number of peremptory challenges remaining for counsel’s use clearly affects his exercise of those challenges. A prosecutor with fewer peremptory challenges in hand may be willing to accept certain jurors whom he would not accept given a larger reserve of peremptories.");
lawyers may consider the composition of the rest of the jury and the remainder of the venire when deciding whether to exercise a challenge, both of which keep changing during the jury selection process. The fact that a lawyer, in some circumstances, is less likely to exercise a challenge than in other circumstances does not mean that the exercise was necessarily based on race or gender.

Another problem with comparing challenges with non-challenges is that different characteristics may in some cases have different meaning depending upon the race or gender of the person involved. For example, one might draw different conclusions about a white person wearing a t-shirt imprinted with a racial slur than about a black person wearing the very same t-shirt. The

Miller-El v. Dretke, 361 F.3d 849, 857 (5th Cir. 2004) ("[A]n attorney's strategy regarding the use of peremptory challenges necessarily changes as jury selection progresses and peremptory challenges either remain unused or get used more rapidly"), cert. granted, 124 S. Ct. 2908 (2004); Hopp v. City of Pittsburgh, 194 F.3d 434, 440 (3d Cir. 1999) (holding that discriminatory motive was not shown because "[a]n attorney with a general plan to strike jurors who have a certain characteristic (such as jurors who are government employees or jurors with prior involvement in a discrimination suit) may decide, as the attorney's peremptory challenges dwindle, that it is important to strike a juror who lacks this characteristic but who seems unappealing for some other, more compelling reason"); People v. Allen, 653 N.E.2d 1173, 1178 (N.Y. 1995) (holding that an "uneven application of neutral factors may not always indicate pretext... but [may] simply [indicate] an incomplete understanding of the full reasons for the prosecutor's decision to seat some jurors while challenging others"); People v. Johnson, 255 Cal. Rptr. 569, 767 (Cal. Ct. App. 1989) ("Near the end of the voir dire process a lawyer will naturally be more cautious about 'spending' his... challenges.") quoted in People v. Dunn, 47 Cal. Rptr. 2d 638, 645-46 (Cal. Ct. App. 1995).

People v. Reynoso, 74 P.3d 852, 862 (Cal. 2003) ("[I]f one or more of the supposed favorable or strong jurors is excused either for cause or peremptory challenge and the replacement jurors appear to be passive or timid types, it would not be unusual or unreasonable for the lawyer to peremptorily challenge one of these apparently less favorable jurors even though other similar types remain. These same considerations apply when considering the age, education, training, employment, prior jury service, and experience of the prospective jurors.... Moreover... a lawyer necessarily evaluates whether the prospective jurors remaining in the courtroom appear to be better or worse than those who are seated."); People v. Johnson, 71 P.3d 270, 281 (Cal. 2003) ("[T]he particular combination or mix of jurors which a lawyer seeks may, and often does, change as certain jurors are removed or seated in the jury box."); cert. granted in part, 124 S. Ct. 817 (2003), dismissed for lack of jurisdiction, 124 S. Ct. 1833 (2004)

See Howard v. Moore, 131 F.3d 399, 408 (4th Cir. 1997) ("Batson is not violated whenever two veniremen of different races provide the same responses and one is excused and the other is not.").

This example is similar to that faced by the court in United States v. Hinton, 94 F.3d 396, 397 (7th Cir. 1996), where the court upheld, as race-neutral, a prosecutor's strike of a black juror wearing a "Malcolm X" hat, even where the defense lawyer stated that he too had a Malcom X hat. The example also resembles the reasoning of the prosecutor quoted in Davis v. State, 596 So. 2d 626, 628 (Ala. Crim. App. 1991). The prosecutor claimed that it
question can perhaps be finessed by examining the actual reason rather than the evidence leading to the reason for striking. Thus a lawyer might challenge the white person wearing the offensive t-shirt because she suspects racism, of which the offensive t-shirt is merely evidence.

These proposals, aimed at improving the detection of pretext, may increase the uncovering of subjective discriminatory intent. They are not, however, well suited to discovering the unconscious discrimination described here, since they tend to focus on the objective reasonableness of the reason. Objective reasonableness might be a good step in the right direction, but the peremptory challenge would then become no different from a weak challenge for cause.\(^5\)

There are “very profound difficulties involved in reconciling a juror challenge system that is theoretically based on the attorney’s inexplicable personal hunch with a constitutional rule that requires attorneys to offer satisfactory ‘neutral’ explanations for their choices.”\(^6\)

In addition to the possibility of improved detection, by eliminating the Batson procedure’s requirement of subjective discriminatory intent,\(^7\) judges will no longer be forced to make the difficult finding that the lawyers before them are dishonest.\(^8\) Instead, judges would be able to deny the strike without

was his experience that black women who dyed their hair blonde are “not cognizant of their own reality and existence” and are undesirable jurors. \(Id.\) When questioned by the judge, he stated that he would also strike a white woman who had her hair in “Jheri curls.” \(Id.\) The appellate court concluded that this reason was suspect. \(Id.\) at 629.

\(^5\) See Batson v. Kentucky, 476 U.S. 79, 127 (Burger, C.J., dissenting) (“A ‘clear and reasonably specific’ explanation of ‘legitimate reasons’ for exercising the challenge will be difficult to distinguish from a challenge for cause.”). These proposals have not reconciled, and cannot reconcile, the fundamental conflict between the peremptory challenge that is the sole prerogative of the attorney and the peremptory challenge that is supervised by the judiciary. Perhaps notions of rationality cannot consistently be applied to something as “arbitrary and capricious” as the peremptory challenge. See Swain v. Alabama, 380 U.S. 202, 212, 220 (1965) (“The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court’s control.”).

\(^6\) People v. Hernandez, 552 N.E.2d 621, 625 (N.Y. 1990) (Titone, J., concurring) (questioning the ability of any procedure to completely eradicate racial bias in peremptory challenges).

\(^7\) See discussion supra note 89 (examining the role of unconscious bias in the Batson analysis).

\(^8\) Finding dishonesty clearly troubles some judges. See, e.g., William C. Smith, Challenges of Jury Selection, A.B.A. J., Apr. 2002, at 34, 37 (quoting John Thomas Marten, judge for the U.S. District Court, District of Kansas, as saying, “Except in the most egregious case . . . you have to accept [the lawyer’s facially neutral explanation] at face value unless it flies in the face of everything you know.”); see Cavise, supra note 18, at 531 (“To doubt the integrity of an attorney who has, in most cases, been in that trial courtroom before and who is perhaps well-known to the trial judge is indeed asking a lot.”); see also sources cited supra note 99 (commenting on the unavoidable result of labeling an attorney a potential liar when a judge questions an attorney’s denial of any level of bias or
such a stigmatizing finding. The judge would essentially be saying “although I believe you acted in good faith, I also believe that the peremptory challenge would not have been exercised but for the potential juror’s race or gender.” Admittedly, this might still be a difficult finding, but it would surely be easier than the accusation of falsity.

In summary, the best solution is to completely eliminate the peremptory challenge. In the alternative, lawyers should be made aware of the possibility, or likelihood, that they are unconsciously using race- and gender-based stereotypes, and should actively and vocally affirm their commitment to egalitarian non-discriminatory principles. Judges should explicitly note the problems of race- and gender-bias before the start of jury selection. Judges should also allow for the increased use of questionnaires, preferably those that are race- and gender-blind. In addition, judges should permit more time for jury selection, both for questioning potential jurors and for allowing lawyers adequate time to think and combat their biases. Finally, judges should be prepared to find less stigmatizing reasons for disallowing peremptory challenges than the dishonesty of the lawyer before them. While these measures clearly will not eradicate unconscious stereotyping and the resulting discrimination, they will reduce their impact and frequency.

CONCLUSION

In our society race and gender, because they are highly salient characteristics, still unconsciously form and trigger the use of stereotypes. These stereotypes, once triggered, can greatly affect how we process information and thus ultimately affect our decision-making. Stereotyping almost inevitably introduces categorization related errors in social perceptions. Worst of all, these processes are rarely accessible to our conscious minds.

Even though there are no issues of determining an organization’s or a legislature’s intent, the peremptory challenge poses perhaps the most difficult equal protection setting to address unconscious bias for two reasons. First, lawyers often have very little information on which to exercise their peremptory challenges, which encourages stereotype use. In other equal protection contexts generally much more information is available. Second, lawyers have traditionally exercised the peremptory challenge on an arbitrary and capricious basis. In other contexts decision-makers generally do not act on

535 Electoral re-districting is perhaps the only other area that resembles peremptory challenges. See generally Tetlow, supra note 102 (arguing Batson incorrectly relied on the equal protection clause and that the Shaw court further misapplied the equal protection clause in extending the Batson analysis to reapportionment). Even in this context, however, there is normally highly probative (and race-neutral) party registration and election data. See Hunt v. Cromartie, 526 U.S. 541, 549 (1999) (requiring testimony and affidavits from several key experts, including one who “reviewed racial demographics, party registration and election result data”).
an arbitrary basis.\footnote{See Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) ("[W]e know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting.").} If the reasons for a peremptory ever become strong and objective then the peremptory challenge itself becomes a challenge for cause.

Notwithstanding these unique problems of the peremptory challenge and assuming that it is not abolished, the measures endorsed in Part IV would help reduce the impact of its discriminatory use. If lawyers and judges fail to take these measures, the promise of \textit{Batson}, "to continue to progress as a multiracial democracy,"\footnote{Edmonson v. Leesville Concrete Co., 500 U.S. 614, 630 (1991).} will remain as distant as ever.