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## Jury Selection as Election: A New Framework for Peremptory Strikes

**ABSTRACT.** Peremptory strikes are a longstanding subject of controversy. Critics concerned with the continued discriminatory use of peremptory strikes after *Batson v. Kentucky* have called for their elimination. Defenders of peremptory strikes have resisted elimination by pointing to the value of impartiality that they believe peremptory strikes serve. Both sides of the controversy, this Note argues, have missed an additional value served by peremptory strikes: democratic legitimacy. The selection of jurors is analogous to the election of political representatives. Political elections give citizens a say in order to help legitimate the state's coercive power. Likewise, jury selections give parties a say in order to help legitimate the trial's coercive power. Viewing peremptory strikes through the lens of democratic legitimacy helps us to understand previously unjustified features of peremptory strikes—including the varying numbers of peremptory strikes across offenses and between parties, the default rule that parties need not justify their strikes, and the resistance to eliminating peremptory strikes in favor of expanded strikes for cause. But viewing peremptory strikes through this lens also highlights the need for certain reforms to current practices. The Note urges that we eliminate peremptory strikes by prosecutors in criminal proceedings and by the state in civil proceedings. Barring elimination, the Note asks us to require reasons for prosecutorial and state peremptories and to limit their numbers. It also asks us to give more peremptories to civil parties threatened with deprivations of liberty, on the theory that such deprivations require greater democratic justification than deprivations of property.

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**INTRODUCTION**

Why should parties to a trial have peremptory strikes? And why should the trial system retain peremptory strikes, even though peremptory strikes are prone to discriminatory misuse?

The standard response given by judges and scholars defending the status quo is that peremptory strikes (or peremptories) serve the value of impartiality.<sup>1</sup> Peremptories allow parties to eliminate potential jurors who hold extreme views on either side of the legal dispute. The resulting jury, shorn of biased jurors on both sides, is thus more impartial.

But impartiality cannot fully justify the practice of peremptories, for at least three reasons.<sup>2</sup> First, impartiality cannot justify the choice to retain peremptories after *Batson v. Kentucky*,<sup>3</sup> instead of expanding strikes for cause.<sup>4</sup> Second, impartiality cannot justify the legal community's failure to subject peremptories to a requirement that parties routinely give reasons for their strikes.<sup>5</sup> Third, impartiality cannot justify the varying numbers of peremptories that both the state and federal systems assign to parties, depending on the severity of the alleged offense and the requested punishment.<sup>6</sup> Nor can impartiality justify that, in the federal system and in some state courts, the prosecutor has fewer peremptories than the defendant.<sup>7</sup>

This Note argues that, in addition to impartiality, peremptories serve the value of democratic legitimacy.<sup>8</sup> Peremptories grant parties a say in who presides over them at trial. This say renders the trial's coercive power over the party that has been involuntarily haled into court more legitimate than it otherwise would be. Jury selection through peremptories is thus analogous to the election of legislators through votes.<sup>9</sup> Standard democratic accounts of the jury focus on how the jury legitimates the trial by representing the people and by involving the people in lawmaking.<sup>10</sup> This Note takes a different tack, offering the further insight that the jury advances the legitimacy of the trial by repre-

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1. See *infra* Section I.C.
  2. See *infra* Part II.
  3. 476 U.S. 79 (1986).
  4. See *infra* Section II.A.
  5. See *infra* Section II.B.
  6. See *infra* Section II.C.
  7. See *infra id.*
  8. See *infra* Part III.
  9. See *infra* Section III.A.
  10. See *infra* Section III.B.

senting the parties themselves. On this latter account of representation, jurors are trustees of the parties, but not delegates.<sup>11</sup> That is, jurors owe it to the parties who indirectly selected them through peremptories to wield their powers justly, but not to effectuate the parties' will.

In practice, my democratic legitimacy account of peremptories may come into conflict with existing democratic theories of the jury. Existing theories demand that every citizen be given an equal opportunity to serve on a jury and that the jury represent a fair cross section of the population.<sup>12</sup> My account demands that parties subject to the trial's coercion be given a say in selecting the jury. But giving parties a say in the form of peremptories diminishes citizens' equal opportunity to serve on a jury and the jury's representation of a fair cross section—especially when the parties use their peremptories in discriminatory ways.

My account helps us to understand that our current system of peremptories seeks to strike a balance between complementary yet conflicting demands of democratic legitimacy.<sup>13</sup> One way to view this balance is that the overarching value of the trial's democratic legitimacy has both an equal protection dimension and a due process dimension. The equal-opportunity and fair-cross-section demands give rise to an equal protection interest. My account's demand that the parties be given a say in choosing their jurors gives rise to a due process interest. Our current system prioritizes the equal protection interest at the initial stage when randomly selecting jurors by lot. It prioritizes the due process interest at the later stage when granting parties peremptories. And it seeks to reduce direct conflict between these interests through *Batson's* prohibition of discriminatory peremptories.

The democratic legitimacy account also helps us make sense of our current system in other ways. Understanding peremptories as serving democratic legitimacy, akin to the election of legislators, justifies the three formerly unsupported features of our peremptories practice.<sup>14</sup> First, it justifies the decision to retain peremptories as a default.<sup>15</sup> The legitimation value of jury selection would be lost if we eliminated peremptories in favor of expanded strikes for cause because elimination would reduce the parties' control over the judicial process. Second, the democratic legitimacy account justifies our resistance to requiring

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11. See *infra* Section III.A.

12. See *infra* Section III.B.

13. See *infra id.*

14. See *infra* Part IV.

15. See *infra* Section IV.A.

parties to disclose their reasons for peremptories.<sup>16</sup> As in legislative elections, we do not ask parties to disclose the reasons for their selection because the selection is about giving parties a say in the process, regardless of whether it leads to reasonable choices. Third, the democratic legitimacy account justifies the additional peremptories that every jurisdiction affords as the severity of the alleged offense increases.<sup>17</sup> More peremptories are allocated to parties at trials of more severe offenses because the greater the threat of punishment, the greater the need to legitimate the court's coercive power.

But my account of democratic legitimacy not only provides justifications for the status quo; it also calls for reforms.<sup>18</sup> This is because our current peremptories practice does not fully live up to the value of democratic legitimacy that partly supports it. In particular, my account urges three reforms.

First, the state should not receive any peremptories.<sup>19</sup> Prosecutors in criminal proceedings and federal, state, and territorial governments in their own courts' civil proceedings should not have peremptories. They have not been involuntarily haled into court.<sup>20</sup> And they do not advocate on behalf of an individual to whom we would need to legitimate coercive state power. Rather, they advocate on behalf of the state and wield its coercive power. If complete elimination of state peremptories turned out to undermine the jury's impartiality, then the democratic legitimacy account would still demand that we consistently give the state fewer peremptories than other parties. In the past, such asymmetric allocations of peremptories were widespread.<sup>21</sup> One of the distinct advantages of the democratic legitimacy account is that it can make sense of these historical allocations, whereas the impartiality account cannot.<sup>22</sup> But starting in the mid-nineteenth century, most jurisdictions began to increase prosecutorial peremptories and their asymmetric allocations gradually gave way to symmetric allocations.<sup>23</sup> The democratic legitimacy account would require resisting

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16. See *infra* Section IV.B.

17. See *infra* Section IV.C.

18. See *infra* Part V.

19. See *infra* Section V.A.

20. This is also true of federal, state, and territorial governments who are defendants in civil proceedings. After all, these governments can only be sued after having voluntarily waived their sovereign immunity. Local governments, by contrast, are excluded from this list because they lack sovereignty. See *infra id.*

21. See *infra* Section III.C.

22. See *infra id.*

23. See *infra* note 168 and accompanying text.

this trend and expanding asymmetric allocations of peremptories insofar as they still exist.

Second, if we reduced rather than eliminated state peremptories, the democratic legitimacy account demands that the state—unlike other parties—explain its peremptories.<sup>24</sup> After all, the state is exempt from the trial’s coercive power and does not require an unconditional say in choosing jurors.

Finally, the democratic legitimacy account suggests that we should give more peremptories to civil parties threatened with deprivations of liberty than to civil parties threatened with deprivations of property.<sup>25</sup> In particular, we should increase the number of peremptories for defendants in involuntary-commitment proceedings.

These three reforms would effectuate not only the value of democratic legitimacy, but also the constitutional value of equal protection of the laws. On the whole, they would lead to a reduced number of peremptories and an increased need for reason-giving, which would diminish parties’ opportunities to use peremptories in discriminatory ways. Moreover, the reforms would be compatible with the goal of selecting an impartial jury. This compatibility becomes apparent once we abandon the impartiality account’s undue focus on the median juror and conceive of an impartial jury instead as one that contains no jurors who should have been struck for cause.<sup>26</sup>

The Note proceeds in five Parts. Part I provides an overview of peremptories and presents the impartiality account that currently informs both their defenders and critics. Part II argues that the impartiality account offers at best an incomplete account of the normative purpose of peremptories. Part III proposes a new account of peremptories. It argues that peremptories facilitate democratic legitimacy and situates this account in the context of democratic and historical accounts of the jury. Part IV highlights the account’s ability to justify three central features that the impartiality account was unable to justify. Part V analyzes departures from my democratic legitimacy account in current practices and calls for their reform.

## I. THE STATUS QUO

This Part offers an overview of the current practices and defenses of peremptories. It lays the groundwork for evaluating the dominant impartiality account and supplementing it with my democratic legitimacy account in subse-

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24. See *infra* Section V.B.

25. See *infra* Section V.C.

26. See *infra* Section III.A.

quent Parts. Section I.A historically situates us by providing a brief background on peremptory strikes before and after *Batson*. Section I.B enters the existing scholarly debate over peremptories by summarizing the main criticism and reform proposal of the post-*Batson* status quo. Finally, Section I.C articulates the normative account of peremptories that dominates the ranks of both supporters and critics: the impartiality account.

### A. Background

Peremptories are a central element of the jury selection process in both civil and criminal trials in the United States. Peremptories form the last stage of eliminating members from the jury pool, following strikes for cause. In contrast to strikes for cause, peremptory strikes are exercised by the parties rather than the judge.<sup>27</sup> The adjective “peremptory” means determinative.<sup>28</sup> It conveys the unilateral nature of these strikes.

For centuries, going back to English common law courts, parties did not have to justify their peremptories.<sup>29</sup> They could exercise their allocated number of peremptories at will—that is, against any juror without stating any reason. The result was that parties could—and did—exercise peremptories in discriminatory ways without hindrance. In particular, prosecutors often used peremptories to eliminate black jurors.<sup>30</sup>

In *Batson v. Kentucky*,<sup>31</sup> the U.S. Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment mandates a three-step procedure for challenging strikes that are allegedly discriminatory.<sup>32</sup> At step one, a party can

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27. Typically, the judge will strike a juror for cause upon a party’s request rather than sua sponte. See RONALD H. CLARK & THOMAS M. O’TOOLE, *JURY SELECTION HANDBOOK: THE NUTS AND BOLTS OF EFFECTIVE JURY SELECTION* 48–53 (2018).

28. Merriam-Webster defines “peremptory” in the applicable legal sense as “putting an end to or precluding a right of action, debate, or delay” or as “admitting of no contradiction.” *Peremptory*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/peremptory> [<https://perma.cc/T6Q5-PUSB>]. The Oxford Dictionary defines it as “[n]ot open to appeal or challenge; final.” *Peremptory*, OXFORD LIVING DICTIONARIES, <https://en.oxforddictionaries.com/definition/peremptory> [<https://perma.cc/TTK3-5RFA>].

29. See JON M. VAN DYKE, *JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS* 147–48 (1977).

30. See, e.g., Roger S. Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235, 283 (1968).

31. 476 U.S. 79 (1986).

32. *Id.* at 96. See Jonathan Abel, *Batson’s Appellate Appeal and Trial Tribulations*, 118 COLUM. L. REV. 713, 718–22, 750 (2018). A detailed discussion of each step can also be found in Stephen

challenge a peremptory by making a prima facie case that the strike was discriminatory. At step two, the striking party must defend its strike by giving a race-neutral reason. At step three, the judge must weigh all of the evidence and determine whether the strike was a result of impermissible discriminatory motives.

The Court has held onto this three-step procedure ever since *Batson*. Moreover, it has expanded the procedure's scope of application along multiple dimensions. First, *Batson* challenges now apply not only to criminal trials, but also to civil trials.<sup>33</sup> Second, *Batson* challenges now can be made against not only prosecutors (and plaintiffs), but also defendants.<sup>34</sup> Third, *Batson* challenges now respond not only to racial discrimination, but also to discrimination on the basis of gender,<sup>35</sup> ethnicity,<sup>36</sup> and, in some jurisdictions, religion<sup>37</sup> and sexual orientation.<sup>38</sup>

Despite all of these changes, *Batson* and subsequent case law have retained the pre-*Batson* peremptory rules as their default. Parties can still unilaterally, and without justification, strike any jurors. Only if the other party succeeds at making a prima facie showing of discrimination will a judge abandon the default and inquire into the reasons for the peremptory. The retention of this default is the subject of severe criticism, as the subsequent Section will show.

### B. Under Siege

*Batson's* retention of peremptories as a default met immediate criticism. In a now famous concurrence, Justice Marshall warned the Court that the retention of peremptories would allow the problem of racially discriminatory strikes to persist.<sup>39</sup> The three-step process, Justice Marshall predicted, would be in-

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B. Bright, Discrimination in Jury Selection: Litigating *Batson v. Kentucky* 10-21 (Sept. 10, 2017) (unpublished manuscript) (on file with author).

33. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).

34. *Georgia v. McCollum*, 505 U.S. 42 (1992).

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

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

37. See, e.g., *People v. Johnson*, 767 P.2d 1047, 1054 (Cal. 1989) (applying *Batson* to peremptories directed at Jewish jurors).

38. See, e.g., *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 486 (9th Cir. 2014) ("*Batson* applies to peremptory strikes based on sexual orientation.").

39. *Batson v. Kentucky*, 476 U.S. 79, 102-03 (1986) (Marshall, J., concurring).



effective at purging peremptories of racial discrimination. Only the complete elimination of peremptories would effectively solve this problem.<sup>40</sup>

Justice Marshall's concurrence proved prescient. Peremptories have continued to facilitate racial discrimination, and the best available evidence suggests that *Batson's* three-step process has rarely provided redress for such discrimination.<sup>41</sup> During the thirty years following *Batson*, for instance, peremptories in capital cases in the state courts of Cumberland County, North Carolina, targeted eligible black jurors at double the rate compared to other jurors.<sup>42</sup> But despite such racially skewed usage, all but one of these peremptories were sustained at the appellate level.<sup>43</sup> Moreover, the North Carolina Supreme Court, in reviewing challenges to peremptories directed against minorities, never once found such strikes to be in violation of *Batson's* equal protection guarantee.<sup>44</sup>

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40. *Id.* ("The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely.")

41. In the first seven years after *Batson*, Kenneth Melilli found in a comprehensive survey of all published federal and state decisions that parties made 1,156 *Batson* challenges to peremptories, most of which claimed discrimination against black potential jurors. Only 191 of those challenges were ultimately successful. Moreover, the drop-off between successful step-one and step-three showings was steep in many jurisdictions. Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 457 tbl.A-1, 459 tbl.B-1, 462 tbl.E-1, 469-70 (1996). A recent study collected data for the jury selections of all felony trials in North Carolina from 2011 to 2015. It found that prosecutors used their peremptories against black jurors at more than twice the rate compared to white jurors (20.6% versus 9.7%). Defense lawyers used their peremptories against black jurors less than half as often compared to white jurors (9.9% versus 22.2%). See Ronald F. Wright et al., *The Jury Sunshine Project: Jury Selection Data as a Political Issue*, 2018 U. ILL. L. REV. 1407, 1426 (2018). A previous study of all North Carolina capital trials between 1990 and 2010 found that prosecutors struck black jurors 2.5 times as often as jurors who were not black. See Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials*, 97 IOWA L. REV. 1531, 1533 (2012). Additional studies document appellate courts' failures to redress allegedly discriminatory peremptories. See, e.g., Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson's Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075 (2011); Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate Batson Record*, 94 N.C. L. REV. 1957 (2016).

42. See Stephen B. Bright & Katherine Chamblee, *Litigating Race Discrimination Under Batson v. Kentucky*, 32 CRIM. JUST. 10, 11 (2017) (citing *State v. Golphin*, Nos. 97 CRS 47314-15; 98 CRS 34832, 35044; 01 CRS 65079, slip op. at 136-89 (N.C. Gen. Ct. Justice Dec. 13, 2012) (showing that in 173 capital cases, 52.6% of eligible black jurors were struck, but only 26.7% of other eligible jurors)).

43. Pollitt & Warren, *supra* note 41, at 1962.

44. *Id.* at 1959.

In light of these and similar empirical findings, critics have concluded that *Batson*'s attempt at solving the problem of discriminatory peremptories is ineffective. In particular, they argue, parties defending their facially discriminatory strikes at step two of the *Batson* inquiry can too easily dispel the challenge. All they need to do is provide a race-neutral reason.<sup>45</sup> Doing so is easy.<sup>46</sup> In fact, prosecutor manuals with lists of race-neutral reasons have surfaced that make a prosecutor's defense of challenged strikes at step two even easier.<sup>47</sup> Among the listed reasons were "body language," "air of defiance," and "lack of eye contact."<sup>48</sup> Some cases have shown that prosecutors simply read their reasons out of such a manual.<sup>49</sup>

Some critics have responded to *Batson*'s inefficacy by proposing reforms to the three-step test that would boost judges' likelihood of eliminating discriminatory peremptories at the trial and appellate level.<sup>50</sup> More commonly, howev-

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45. See, e.g., *Purkett v. Elem*, 514 U.S. 765, 769 (1995) (per curiam) (upholding a prosecutor's choice to strike a juror due to his "long, unkempt hair" and facial hair).

46. Jeffrey Bellin and Junichi Semitsu found, reviewing all race-based *Batson* challenges in federal courts between 2000 and 2009, that race-neutral reasons are often tendentious or correlate with race, yet succeed almost without exception both at trial and on appeal. Bellin & Semitsu, *supra* note 41, at 1093-99.

47. See Bright & Chamblee, *supra* note 42, at 11 ("At a meeting of the North Carolina Conference of District Attorneys, a handout was distributed at a trial advocacy course called *Top Gun II* that provided prosecutors a list of race-neutral reasons they could draw from to explain strikes of black jurors. The list, titled '*Batson* Justifications: Articulating Juror Negatives,' included reasons such as 'body language,' 'lack of eye contact, and 'air of defiance.'"); see also *Wilson v. Beard*, 426 F.3d 653, 655 (3d Cir. 2005) (discussing videotaped training in which Assistant District Attorney Jack McMahon advised Philadelphia District Attorneys on how to remove black potential jurors without succumbing to *Batson* challenges).

48. Bright & Chamblee, *supra* note 42, at 11.

49. One court recently found that a prosecutor had used the same list of reasons to defend peremptories against black jurors in four capital cases and had sometimes simply recited from the list. *State v. Golphin*, Nos. 97 CRS 47314-15; 98 CRS 34832, 35044; 01 CRS 65079, slip op. at 73-77 (N.C. Gen. Ct. Justice Dec. 13, 2012)

50. Adopting some of these reforms, the Washington Supreme Court recently introduced bright-line rules and an objective-observer standard for *Batson* step three. The bright-line rules specify a number of reasons that are presumptively invalid: "(i) prior contact with law enforcement officers; (ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling; (iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime; (iv) living in a high-crime neighborhood; (v) having a child outside of marriage; (vi) receiving state benefits; and (vii) not being a native English speaker." WASH. ST. CT. G.R. 37. The objective-observer standard instructs judges to disregard the question of intentional discrimination and invalidate any peremptory that would look discriminatory to an objective observer. *Id.*

er, critics have echoed Justice Marshall's more radical call for reform.<sup>51</sup> Like Justice Marshall, they have attacked the retention of peremptories as a default and called for their complete elimination. By now, this call for eliminating peremptories captures the most common critical position not only within the academy, but also within the judiciary. Justice Breyer, for instance, has twice called for the elimination of peremptories.<sup>52</sup> And a growing number of state and federal judges, before and since, have joined him in this call.<sup>53</sup> Judge Motley of the Southern District of New York even went so far as to unilaterally abolish peremptories from her courtroom, declaring that "[t]ime has proven Mr. Justice Marshall correct."<sup>54</sup>

But despite these widespread calls to eliminate peremptories, courts and legislatures have held onto them.<sup>55</sup> Moreover, despite widespread recognition of peremptories' persistent discriminatory use, many trial lawyers—including

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51. See, e.g., Mark W. Bennett, *Unravelling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 167 (2010) ("I join Justice Marshall and Justice Breyer's call for banning peremptory challenges entirely as the only means to eliminate lawyers' tendency to strike jurors due to stereotype and bias."); Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369 (1992).
52. *Rice v. Collins*, 546 U.S. 333, 342-44 (2006) (Breyer, J., concurring); *Miller-El v. Dretke*, 545 U.S. 231, 266-73 (2005) (Breyer, J., concurring).
53. See, e.g., *City of Seattle v. Erickson*, 398 P.3d 1124, 1134 (Wash. 2017) (Yu, J., concurring) ("In my view, the basic framework of *Batson* does not work . . . I now join Justice González in calling for the complete abolishment of peremptory challenges."); Broderick, *supra* note 51 (advocating for peremptories' elimination while serving as a federal district court judge in Pennsylvania); Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809 (1997) (advocating for peremptories' elimination while serving as a state court judge in Colorado); John Paul Stevens, *Foreword*, 78 CHI.-KENT L. REV. 907, 907 (2003) (suggesting that he had come to share Justice Marshall's position while serving on the U.S. Supreme Court); Arthur L. Burnett, Sr., *Abolish Peremptory Challenges: Reform Juries to Promote Impartiality*, CRIM. JUST., Fall 2005, at 26, 27 (arguing that "peremptory challenges could and should be abolished altogether" while serving as superior court judge in Washington, D.C.); Gregory E. Mize, *On Better Jury Selection: Spotting UFO Jurors Before They Enter the Jury Room*, CT. REV., Spring 1999, at 10, <http://aja.ncsc.dni.us/publications/courtrv/cr36-1/CR36-1Mize.pdf> [<https://perma.cc/PBR9-NHL8>] (advocating for peremptories' elimination after serving as a superior court judge in Washington, D.C.).
54. *Minetos v. City Univ. of N.Y.*, 925 F. Supp. 177, 181-85 (S.D.N.Y. 1996) (Motley, J.) (raising the question *sua sponte* whether peremptories are constitutional and holding that they are not because they are a *per se* violation of equal protection).
55. The most significant reforms to date—such as the Washington Supreme Court's introduction of bright-line rules and an objective-observer standard, see *supra* note 50—have merely modified judges' application of *Batson's* three-step inquiry, not eliminated peremptories.

criminal defense lawyers—want to retain peremptories.<sup>56</sup> Even public and private committees that otherwise push for jury reform have supported the continued retention of peremptories.<sup>57</sup> The American Bar Association, for instance, has recommended retaining peremptories in its *Principles for Juries and Jury Trials*.<sup>58</sup>

How can we make sense of the persistence and widespread support of peremptories? As a *descriptive* matter, status quo bias, entrenched power hierarchies that discount the interests of affected minorities,<sup>59</sup> and the costs and diffi-

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56. See, e.g., Nancy S. Marder, *Justice Stevens, The Peremptory Challenge, and the Jury*, 74 *FORDHAM L. REV.* 1683, 1685 (2006) (“Few trial lawyers want to relinquish the peremptory challenge.”); Jeff Adachi & Luis J. Rodriguez, Opinion, *Changing Jury Selection Is Bad for Justice*, *SACRAMENTO BEE* (July 13, 2015), <https://www.sacbee.com/opinion/op-ed/soapbox/article27159892.html> [<https://perma.cc/BR3N-9ZBT>] (writing as elected public defender of San Francisco and past president of the State Bar of California, respectively, that “prosecutors and defense attorneys alike—including Los Angeles District Attorney Jackie Lacey, the California Public Defenders Association and California Attorneys for Criminal Justice—all oppose SB 213,” “a bill that would reduce the number of peremptory challenges in any criminal case . . . .”); David Berg, *The Trial Lawyer*, *LITIGATION*, Summer 2005, at 8, 11 (arguing as a civil trial lawyer and white collar criminal defense lawyer that, “[b]ecause you can exercise ‘peremptories’ against a panelist for any reason (save race and gender), they are invaluable”); Toni Messina, *Criminally Yours: Don’t Strike That Juror!*, *ABOVE L.* (June 6, 2016, 12:45 PM), <https://abovethelaw.com/2016/06/criminally-yours-dont-strike-that-juror> [<https://perma.cc/GV2R-SWZP>] (arguing as a criminal defense lawyer that “[w]e don’t need fewer peremptories in jury selection,” but rather “more judges who take *Batson* challenges seriously”).
57. See, e.g., Ariz. Supreme Court Ad Hoc Comm. to Study Jury Practices and Procedures, *Final Report and Recommendations*, *ARIZ. JUD. BRANCH* 32 (2002), <https://www.azcourts.gov/Portals/15/Jury/juryrpt.pdf> [<https://perma.cc/9TLG-5WCF>]; Blue Ribbon Comm’n on Jury Sys. Improvement, *Final Report*, *CAL. JUD. BRANCH* 11 (1996), <https://www.courts.ca.gov/documents/BlueRibbonFullReport.pdf> [<https://perma.cc/ZX22-FS8L>]; D.C. Jury Project Comm., *Jury Service Revisited: Upgrades for the 21st Century*, *COUNCIL FOR CT. EXCELLENCE* 9 (2015), [http://www.courtexcellence.org/uploads/publications/CCE\\_Jury\\_Report\\_Web\\_Final.pdf](http://www.courtexcellence.org/uploads/publications/CCE_Jury_Report_Web_Final.pdf) [<https://perma.cc/22AV-RWW6>].
58. Am. Jury Project, *Principles for Juries and Jury Trials*, *A.B.A.* 14 (2005), [https://www.americanbar.org/content/dam/aba/administrative/american\\_jury/principles.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/american_jury/principles.authcheckdam.pdf) [<https://perma.cc/XFC6-G46E>] [hereinafter *A.B.A. Principles*] (“Peremptory challenges should be available to each of the parties.”).
59. Researchers have similarly noted that the U.S. political system leaps into action to make narcotic laws less punitive when they fall primarily on white Americans while leaving a harsher system in place for drugs primarily used by people of color. See Julie Netherland & Helena Hansen, *White Opioids: Pharmaceutical Race and the War on Drugs That Wasn’t*, 12 *BIOsociETIES* 217, 218 (2017) (“This less examined ‘White drug war’ has carved out a less punitive, clinical realm for Whites where their drug use is decriminalized, treated primarily as a biomedical disease, and where White social privilege is preserved . . . while leaving intact a punitive, carceral system as the appropriate response for Black and Brown drug use.”).

culties of achieving procedural change would probably go a long way toward explaining these phenomena. But how, if at all, can we make *normative* sense of lawyers' continued support for peremptories? In other words, what good, if any, do peremptories serve?

C. *The Impartiality Account*

Responses to the question of what good, if any, peremptories serve center around one value: impartiality. In *Batson*, impartiality was the value to which the dissenting Chief Justice Burger turned when opposing any change to parties' use of peremptories. Chief Justice Burger appealed to a traditional consensus that peremptories—or “challenges,” as he called them—serve the purpose of creating an impartial jury. Quoting William Forsyth's 1852 *History of Trial by Jury*, he wrote: “Long ago it was recognized that ‘[t]he right of challenge is almost essential for the purpose of securing perfect fairness and impartiality in a trial.’”<sup>60</sup>

Chief Justice Burger's rejection of procedural reform did not prevail. But impartiality has continued to capture the value of peremptories even for Justices who embraced *Batson*'s procedural reform and expanded its application during subsequent years. Thus, Justice O'Connor wrote that “[t]he principal value of the peremptory is that it helps produce fair and impartial juries.”<sup>61</sup> Supporters of *Batson* like Justice O'Connor differed from opponents like Chief Justice Burger simply in the weight they gave to the value of impartiality compared to equal protection concerns. The Justices who supported the new status quo after *Batson* saw the value of impartiality as outweighed by equal protection concerns. But they still valued peremptories for their supposed contribution to impartiality.

How do supporters of either the old status quo before *Batson* or the new status quo after *Batson* understand the value of impartiality? And how are peremptories supposed to facilitate impartiality? Justice Scalia in *Holland v. Illinois*<sup>62</sup> offers an often-quoted answer to both questions: “Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of ‘eliminat[ing] extremes of partiality on

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60. *Batson v. Kentucky*, 476 U.S. 79, 118-19 (1986) (Burger, C.J., dissenting) (quoting WILLIAM FORSYTH, *HISTORY OF TRIAL BY JURY* 175 (London, J.W. Parker 1852)).

61. *J.E.B. v. Alabama*, 511 U.S. 127, 147 (1994) (O'Connor, J., concurring).

62. 493 U.S. 474 (1990).

both sides,’ thereby ‘assuring the selection of a qualified *and unbiased* jury.’<sup>63</sup> In other words, an impartial jury, on this view, is one that is free of jurors who are biased against either party. And peremptories facilitate the selection of an impartial jury because they make room for adversarial control and lead to the elimination of biased jurors on both sides.

Justice Scalia’s articulation of impartiality captures the dominant accounts by legal practitioners and scholars. They see peremptories as an exercise of adversarial control that contributes to the creation of an impartial jury as required by the Sixth Amendment.<sup>64</sup> On these accounts, the potential jurors who comprise the jury pool prior to the parties’ peremptories fall across a spectrum of views. On one extreme are potential jurors with strongly pro-defendant views. On the other extreme are potential jurors with strongly pro-plaintiff or pro-prosecutor views. In the middle of this spectrum are potential jurors whose views are neutral as between the two parties. Prosecutors or plaintiffs, then, use peremptories to eliminate potential jurors who are strongly pro-defendant. Defendants use peremptories to eliminate potential jurors who are strongly pro-plaintiff or pro-prosecutor. As a result, the selected jurors cluster around the middle of the spectrum and approach the trial with more neutral views.

Furthermore, some impartiality accounts stress that parties’ elimination of extremes on both sides of the spectrum is valuable not only because it helps create a jury that is impartial, but also because it helps create a jury that the parties *perceive* to be impartial. Thus, the Court in *Swain v. Alabama* observed: “The function of the challenge is not only to eliminate extremes of partiality on both sides, but to *assure* the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise.”<sup>65</sup>

The Court in *Lewis v. United States* also emphasized the importance of perceived impartiality, writing: “[H]ow necessary it is that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom he has conceived a prejudice . . . .”<sup>66</sup> Perceived impartiality, the *Lewis* Court suggested, is valuable because it allows the parties—in

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63. *Id.* at 484 (first quoting *Swain v. Alabama*, 380 U.S. 202, 219 (1965); and then quoting *Batson*, 476 U.S. at 91 (emphasis added)).

64. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .”). One account that stresses the role of adversarial control in creating an impartial jury is Marder, *supra* note 56, at 1704.

65. 380 U.S. at 219 (emphasis added).

66. 146 U.S. 370, 376 (1892) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES \*353).

that case, the criminal defendant—to gain confidence in the trial’s fairness. But presumably the parties’ perception of impartiality is only valuable if the jury is also in fact impartial.<sup>67</sup> Otherwise their boost in confidence would be based on deception. Whatever value these accounts attribute to perceived impartiality is therefore inseparable from the value of actual impartiality and conditional upon peremptories’ supposed ability to produce a more impartial jury.

Does this dominant impartiality account adequately capture the purpose of peremptories? In short, no. As I argue in the next Part, the impartiality account falls short of explaining our continued practice of peremptories in at least three ways.

## II. UNRESOLVED PUZZLES

Impartiality, this Part argues, offers at best an incomplete account of the normative purpose of peremptories. Impartiality cannot make normative sense of three central features that mark our continued use of peremptories. First, Section II.A shows that impartiality cannot fully justify lawyers’ widely shared sense that something valuable would be lost if we eliminated peremptories—even if we eliminated peremptories in favor of expanded strikes for cause. Second, Section II.B reveals that impartiality does not offer a satisfying justification for why parties are initially exempt from having to justify their peremptories with reasons. Third, Section II.C argues that impartiality does not account for the varying numbers of peremptories parties possess, depending on the alleged offense and on whether they are the prosecutor, plaintiff, or defendant. In short, each of these three features forms a normative puzzle that the impartiality account cannot resolve.

### A. *Puzzle One: Sticky Default*

Lawyers broadly support the retention of peremptories.<sup>68</sup> They still appear to espouse the “long and widely held belief that peremptory challenge is a necessary part of trial by jury.”<sup>69</sup> This is true even though peremptories continue to enable discrimination without effective check. What, if anything, could possibly justify the retention of peremptories? What would be lost if we instead heeded Justice Marshall’s call and eliminated peremptories?

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67. This is not to deny that if a jury is in fact impartial, parties’ perception of its impartiality can have intrinsic value.

68. See *supra* note 56.

69. *Swain*, 380 U.S. at 219.

The impartiality account does not offer a satisfying answer to these questions. For one, it is empirically uncertain whether trial lawyers are effective at using peremptories to eliminate biased potential jurors.<sup>70</sup> But even granting for the sake of argument that lawyers do successfully use peremptories to eliminate biased jurors, peremptories are not *necessary* for doing so. Strikes for cause also facilitate the creation of an impartial jury. As long as we expanded the category of strikes for cause to include all forms of bias for which we consider the use of peremptories to be legitimate, we could eliminate peremptories without sacrificing impartiality.<sup>71</sup> Eliminating parties' peremptories in favor of an expanded category of judges' strikes for cause would still serve the value of impartiality, while cutting back on discrimination.

This optimistic outlook on an expanded category of strikes for cause is not to deny that judges, too, may use strikes in discriminatory ways or exhibit implicit bias. But due to their role as neutral adjudicators, judges at least lack a

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70. See Rodger L. Hochman, *Abolishing the Peremptory Challenge: The Verdict of Emerging Caselaw*, 17 NOVA L. REV. 1367, 1396-97 (1993); Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491, 517 (1978). This empirical uncertainty also extends to race-based stereotypes of jurors' biases. See Samuel R. Sommers, *Race and the Decision Making of Juries*, 12 LEGAL & CRIMINOLOGICAL PSYCHOL. 171, 176 (2007) (reporting the "consensus among mock jury researchers . . . that little, if any, reliable relationship exists between a juror's race and her decision-making tendencies").

71. The precise contours of an expanded category of strikes for cause would need to be worked out by publicly accountable legislators in conjunction with experienced trial judges and lawyers. But a good starting point for imagining and constructing such an expanded category is Nancy Marder's twofold proposal. See Marder, *supra* note 56, at 1715-17. First, judges, when in doubt, should err on the side of granting a party's request to strike a juror for cause. *Id.* at 1716. This first proposal is already implicit in the A.B.A. Principles recommendation that judges should strike jurors for cause whenever "there is a reasonable doubt that the juror can be fair and impartial . . ." A.B.A. Principles, *supra* note 58, at 14. Judges currently appear to be more reluctant to strike jurors for cause than this recommended standard—perhaps because they rely on parties' peremptories to compensate for their stringency. See Melilli, *supra* note 41, at 486. Second, the set of acceptable reasons for granting strikes for cause should be expanded to exclude not only jurors who have admitted their inability to be impartial, but also jurors whose actions undermine their appearance of impartiality. Marder, *supra* note 56, at 1716. For instance, "a juror who is a member of the Ku Klux Klan may be eliminated for cause in a case involving racial bias [even if he has insisted on his impartiality] because this juror has taken an individual action that suggests bias." Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041, 1109 (1995). Moreover, as Judge Bennett suggests, federal courts could improve judges' ability to eliminate partial jurors at the for-cause stage by following state courts in allowing lawyers to participate more actively in the questioning of jurors. See Bennett, *supra* note 51, at 165-66.



role-based motivation to discriminate against protected classes of jurors.<sup>72</sup> Attorneys, by contrast, play the role of adversarial advocates. They therefore have a role-based motivation to make use of all facts and stereotypes they believe to be true to increase their clients' chances of winning—including using race to assess and strike jurors.<sup>73</sup> Moreover, the requirement to articulate a valid reason for each strike for cause would make any openly discriminatory strike immediately subject to appeal. And articulation of a valid reason could also act as a self check on any covertly discriminatory strikes.

In short, there are good reasons to think that the replacement of peremptories with expanded strikes for cause would reduce the prevalence of discriminatory strikes. In any case, it would not make discriminatory strikes worse, nor would it sacrifice impartiality. Thus, the impartiality account struggles to justify that many lawyers prefer our current system of peremptories to a system of expanded strikes for cause, as well as that many lawyers feel something of value would be lost if we replaced peremptories with expanded strikes for cause, even if they favored such a replacement on net.

There are two main objections to this conclusion. Both objections reject the claim that expanded strikes for cause would indeed achieve the same level of impartiality. But they do so on different grounds. The first objection asserts that there are valid reasons for striking jurors that cannot be articulated.<sup>74</sup> A party, for instance, may correctly intuit that a potential juror is biased but be unable to put that intuition into words. By abolishing peremptories and requiring all strikes to show cause, we would therefore preclude strikes that would have eliminated biased jurors. As a result, the selected jury would be less impartial than it could have been in a system of peremptories.

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72. This role-based assessment is of course complicated by two possibilities. First, judges may want to advance in the judicial hierarchy or seek reelection. It is possible that these institutional incentives affect judges' behavior. Second, prosecutors may (rightly) understand their role as representatives of the state to require restraint. It is possible that their desire to achieve justice will outweigh their desire to achieve victory at trial. My role-based assessment does not deny these possibilities. It merely makes the comparative observation that the U.S. adversarial system gives judges more incentives to act impartially than parties.

73. Recent empirical research shows that judges in North Carolina strike 14.9% of black male jurors and 12.6% of black female jurors compared to 10.1% of white male jurors and 10.8% of white female jurors, whereas prosecutors strike 23.6% of black male jurors and 18.5% of black female jurors compared to 11.1% of white male jurors and 8.3% of white female jurors. See Wright et al., *supra* note 41, at 1427.

74. The *Lewis* Court, for instance, quoted Blackstone's *Commentaries* to this effect: "[T]he law wills not that [a prisoner] should be tried by any one man against whom he has conceived a prejudice even without being able to assign a reason for such his dislike." *Lewis v. United States*, 146 U.S. 370, 376 (1892) (quoting 4 WILLIAM BLACKSTONE, *COMMENTARIES* \*353).

This first objection is unconvincing. Every intuition of bias can be put into words. The words may be as simple as: “This juror looked at me with hostility.” But they are still words articulating a reason. To hold otherwise would underestimate the human ability to give reasons and also fly in the face of legal doctrine. By requiring parties to articulate reasons for peremptories at step two of *Batson*, the Supreme Court acknowledges that every strike has reasons and that legal professionals can be expected to articulate those reasons.<sup>75</sup>

The second objection is that our current system of peremptories facilitates a more impartial jury than an expanded system of strikes for cause would because parties can use peremptories where a judge *should* have struck a juror for cause but did not. In other words, peremptories introduce checks into an otherwise unilateral selection procedure and compensate for the potential shortcomings of a judge’s decisions. Nancy Marder, for instance, has proposed that “[t]he peremptory serves as a further check on the judge’s decision about a for-cause challenge. If the lawyer disagrees with the judge’s decision she can use a peremptory to remove the juror in question.”<sup>76</sup>

This second objection may well be right to claim that parties sometimes use peremptories to compensate for judges’ shortcomings.<sup>77</sup> But even if we concede this point, it is empirically uncertain whether peremptories on the whole therefore promote impartiality as conceived by the impartiality account. First, peremptories eliminate not only jurors whom judges should have struck for cause, but also jurors who fall within the range of constitutionally acceptable impartiality.<sup>78</sup> It is empirically uncertain what the overall effects of these eliminations for the jury’s biases are. Chances are that one of the two parties will use her peremptories more effectively than the other side. If so, then—contrary to the

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75. This rebuttal does not deny that legislators and judges may face a challenging task when distinguishing valid from invalid articulations of bias. But acknowledging this challenge is very different from asserting the impossibility of reason-giving. Unlike the assertion of impossibility, the line-drawing challenge between valid and invalid reasons does not imply that peremptories are necessary for achieving impartiality.

76. Marder, *supra* note 56, at 1691.

77. This is especially true once we acknowledge that impartiality and other values at stake during jury selection are subject to reasonable contestation. That is to say, judges and parties may reasonably disagree about the demands of impartiality and other values such as justice and fairness. My account will make more room for such reasonable disagreement than the impartiality account. See *infra* Section III.A.

78. Under the Constitution, a jury is impartial as long as it does not contain jurors who should have been struck for cause. See *Rivera v. Illinois*, 556 U.S. 148 (2009) (holding that there was no bias for which the juror in question should have been struck for cause and that the defendant’s constitutional right to an impartial jury was therefore not violated by erroneously denying the defendant’s peremptory against that juror).

impartiality account—peremptories will not move the jury toward an imagined neutral midpoint, but rather, will favor one side.

Moreover, even if peremptories succeeded at moving the jury toward an imagined midpoint, it is empirically uncertain that such a midpoint would make for a substantively more impartial jury. Perhaps a wider spread of viewpoints across the imagined spectrum might lead to jury deliberations with more impartial outcomes than a narrow range of views around the middle. Or the jury pool's midpoint might be systematically biased toward one side or the other.<sup>79</sup>

Finally, it is empirically uncertain whether peremptories better compensate for a judge's omitted strikes for cause than appeals would in a system of expanded strikes for cause. In fact, it is not even clear that the current system of peremptories is more cost effective. Rather, it is possible that the number and costs of new trials following parties' discriminatory peremptories upon appeal outweigh the number and costs of new trials following judges' omitted strikes for cause.<sup>80</sup> After all, the same role-based considerations discussed above would mean that judges have stronger incentives to avoid appeals of their strikes than parties.<sup>81</sup> Moreover, even if new trials following judges' omitted strikes for cause proved more numerous and costly than those following parties' discriminatory peremptories upon appeal, those costs are likely worth the prize of reducing discrimination in the courtroom.

In short, it is doubtful that the account of peremptories as checks on judges' selection succeeds at giving a full justification for why peremptories are necessary for ensuring impartiality. Impartiality, I conclude, cannot adequately justify the widespread preference for retaining peremptories. According to the impartiality account, an alternative system of expanded strikes for cause would be similarly attractive. And once equal protection considerations are taken into account, this alternative system should be preferable. How else, then, can we

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79. A recent study, for instance, suggests that the midpoint of majority white juries is systematically biased against criminal defendants who are members of racial minorities. See Samantha Bielen et al., *Racial Bias and In-Group Bias in Judicial Decisions: Evidence from Virtual Reality Courtrooms* 5 (Nat'l Bureau of Econ. Research, Working Paper No. 25355, 2018); see also Shamena Anwar, Patrick Bayer & Randi Hjalmarsson, *The Impact of Jury Race in Criminal Trials*, 127 Q.J. ECON. 1017, 1019-20 (2012) (“[T]here is a significant gap in conviction rates for black versus white defendants when there are no blacks in the jury pool . . .”).

80. When the defense rather than prosecution violates *Batson* and the trial court fails to deny the defense's peremptory, then the prosecution too can achieve an immediate appeal. See *Georgia v. McCollum*, 505 U.S. 42, 45 (1992).

81. See *supra* Section II.A.

make normative sense of “the long and widely held belief that peremptory challenge is a necessary part of trial by jury”?<sup>82</sup>

*B. Puzzle Two: Lack of Required Reasons*

Lawyers also believe that parties, at least as a default, should not be forced to give reasons for their strikes. This resistance to required reason-giving raises another normative puzzle that the impartiality account cannot resolve.

Justice Scalia, in his dissent to *J.E.B.*,<sup>83</sup> forcefully articulated his resistance to public reason-giving. He wrote: “The right of peremptory challenge ‘is, as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose.’”<sup>84</sup> Those who, unlike Justice Scalia, embrace *Batson*’s three-step inquiry, have qualified their resistance to required reasons by demanding reasons for an allegedly discriminatory strike. But even *Batson* supporters reject required reason-giving as an initial matter, only making an exception once the affected party has made a prima facie showing of discrimination. The default position they advocate remains one where parties must not be forced to give reasons for their strikes.

This advocated default is a puzzling one. If court procedures required parties to routinely give reasons for their strikes, we could avoid many of *Batson*’s shortcomings. For one, as suggested above, the need to articulate valid reasons would hopefully act as a self-check on discriminatory strikes.<sup>85</sup> The need to articulate valid reasons would also help to address discriminatory strikes that nonetheless occurred. If openly discriminatory, a trial judge could easily block the strike and an appellate judge could easily overturn the trial judge who failed to do so. If covertly discriminatory, the full record of reasons would facilitate invalidating the strikes—at least on appeal—because judges could conduct a more informed comparative analysis of parties’ reasons and detect incongruities. If, for instance, a party claimed it struck a black juror because that juror had once been arrested, but it did not strike a white juror who had also once been arrested, a judge would now be able to detect this inconsistency based on the record. Finally, routinely required reason-giving would also help trial judges and parties to normalize the *Batson* inquiry. In the past, trial judges and parties may have hesitated to reach *Batson* step two because they understood it to

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<sup>82</sup>. *Swain v. Alabama*, 380 U.S. 202, 219 (1965).

<sup>83</sup>. *J.E.B. v. Alabama*, 511 U.S. 127 (1994).

<sup>84</sup>. *Id.* at 162 (Scalia, J., dissenting) (quoting *Lewis v. United States*, 146 U.S. 370, 378 (1892)).

<sup>85</sup>. See *supra* Section II.A.

imply an accusation of racism.<sup>86</sup> In a system of routinized reason-giving, such stigma would no longer stand in the way of judges' enforcement of *Batson*.

What, despite these arguments, can justify the default that parties need not give reasons for their peremptories? Justice Scalia, as we saw, asserted that parties need not give reasons because reason-giving would make a peremptory "fail[] of its full purpose."<sup>87</sup> That purpose, according to the Court, is impartiality.<sup>88</sup> But neither Justice Scalia's account nor the many other accounts that embrace impartiality make clear why the absence of reasons would facilitate impartiality.

Proponents of the impartiality account may offer two causal accounts.<sup>89</sup> The first is the above account of inarticulability. On this account, the lack of reason-giving would facilitate impartiality because some intuitions about juror bias, albeit accurate, cannot be articulated as reasons. This account is unconvincing for the reasons articulated above.<sup>90</sup>

The second causal account of why the lack of reason-giving facilitates impartiality stresses the offense and division that would otherwise result. Barbara Allen Babcock, for instance, argued (in a passage that Chief Justice Burger found so compelling that he quoted it in full):

Common human experience, common sense, psychosociological studies, and public opinion polls tell us that it is likely that certain classes of people statistically have predispositions that would make them inappropriate jurors for particular kinds of cases. But to allow this

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86. See, e.g., *Coombs v. Diguglielmo*, 616 F.3d 255, 264 (3d Cir. 2010) ("No judge wants to be in the position of suggesting that a fellow professional—whom the judge may have known for years—is exercising peremptory challenges based on forbidden racial considerations."); Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1085 (2009) ("[R]epeated contact may lead to a close relationship and bond between the judge and the prosecutor. It therefore makes sense that the trial judges they appear in front of day after day would be reluctant to take prosecutors to task publicly.").

87. *J.E.B.*, 511 U.S. at 162 (Scalia, J., dissenting) (quoting *Lewis*, 146 U.S. at 378).

88. See *supra* note 63 and accompanying text.

89. Proponents of the impartiality account may also offer a third argument from efficiency. They may argue that requiring parties to give reasons would take more time and therefore require the court and the parties to expend more resources. I do not find this argument in the context of reason-giving particularly compelling. A reduction in discriminatory peremptories should be well worth a couple of extra minutes. But I consider a parallel efficiency argument in greater detail later on. See *infra* Section II.C. Here, as there, my conclusion is that even if the efficiency argument were persuasive, it would lead a defender of the impartiality account away from her commitment to impartiality as the main purpose of peremptories.

90. See *supra* Section II.A.

knowledge to be expressed in the evaluative terms necessary for challenges for cause would undercut our desire for a society in which all people are judged as individuals and in which each is held reasonable and open to compromise. . . . [For example,] [a]lthough experience reveals that black males as a class can be biased against young alienated blacks who have not tried to join the middle class, to enunciate this in the concrete expression required of a challenge for cause is societally divisive. Instead we have evolved in the peremptory challenge a system that allows the covert expression of what we dare not say but know is true more often than not.<sup>91</sup>

In other words, unexplained peremptories facilitate impartiality because they allow parties to rely on accurate stereotypes about jurors' biases.

But peremptories' alleged effects on impartiality turn out to be questionable. If, contrary to current practice, parties needed to articulate their reasons for peremptories, three outcomes are imaginable on Babcock's view. First, parties may continue to exercise the same peremptories and truthfully state their stereotypical reasons for doing so. Second, parties may continue to exercise the same peremptories, but lie about their true reasons to avoid exposing their stereotypes. Third, parties may stop exercising certain peremptories to avoid exposing their stereotypes. Note that only this third outcome would reduce the jury's impartiality on Babcock's view, assuming the stereotype proved accurate. The first outcome would lead to offense and the second to deception. But neither would reduce the jury's impartiality.

Impartiality, in short, is doing little work in explaining the widespread preference against mandatory reason-giving. Moreover, it is hard to imagine the third outcome—the withholding of peremptories—occurring, unless the contemplated reasons tap not merely into stereotypes but into histories of oppression. It is not by accident that Babcock's own example of such a stereotype is race-based. Stereotypes that tap into histories of oppression largely correspond to constitutionally barred classifications—such as classifications based on race, gender, ethnicity, nationality, and religion. Even if, for the sake of argument, we assumed that the result of omitting such stereotypes was a less impartial jury, this reduction in impartiality would be constitutionally mandated. In other words, it would not be the kind of reduction in impartiality that our current system of unexplained peremptories ought to avoid in the first place.

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91. *Batson v. Kentucky*, 476 U.S. 79, 121 (1986) (Burger, C.J., dissenting) (quoting Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545, 553-54 (1975)).

It follows that the impartiality account cannot offer a compelling justification for the widespread position that parties, at least as a default, should not be forced to give reasons for their strikes. Nor can Chief Justice Burger's fear of exposing offensive and divisive reasons—independently of any effects on impartiality—justify that widespread position. Chief Justice Burger's justification gives cover for discrimination.<sup>92</sup> Once we exclude constitutionally barred reasons, the risk of offense and divisiveness is greatly diminished. And whatever risk remains almost certainly does not outweigh the benefit that comes from requiring parties to give reasons: fewer discriminatory strikes. How else, then, can we make normative sense of this preference?

*C. Puzzle Three: Allocations*

There's yet another feature of our current system of peremptories that the impartiality account cannot justify. In both federal and state courts, the number of peremptories varies based on the alleged offense and sometimes based on a party's side in the dispute.

In federal civil trials, plaintiff and defendant have three peremptories each.<sup>93</sup> In federal criminal trials, the allocated number of peremptories depends on the alleged offense. In misdemeanor cases, prosecutor and defendant each have three peremptories.<sup>94</sup> In felony cases, the prosecutor has six peremptories, the defendant ten.<sup>95</sup> In death penalty cases, the prosecutor and defendant each have twenty.<sup>96</sup> In many state courts, the allocation of peremptories follows a similar sliding scale, with the lowest number of peremptories assigned to parties in civil trials and criminal trials involving misdemeanors; an intermediate number assigned to parties in criminal trials involving felonies; and the highest number assigned to parties in criminal trials involving the death penalty.<sup>97</sup>

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92. Scholars before me have criticized Chief Justice Burger's and Babcock's argument as giving cover for discrimination and undue stereotyping. *See, e.g.,* Melilli, *supra* note 41, at 497-99.

93. 28 U.S.C. § 1870 (2018) ("In civil cases, each party shall be entitled to three peremptory challenges."); FED. R. CIV. P. 47(b) ("The court must allow the number of peremptory challenges provided by 28 U.S.C. § 1870.").

94. FED. R. CRIM. P. 24(b).

95. *Id.*

96. *Id.*

97. For instance, Ohio allocates three peremptories in civil trials, three in misdemeanor trials, four in felony trials, and ten in capital trials. *See* OHIO REV. CODE § 2945.21 (LexisNexis 2019); OHIO R. CIV. P. 47(c). Pennsylvania allocates four in civil trials, five in misdemeanor trials, seven in felony trials, and twenty in capital trials. *See* PA. R. CIV. P. 221; PA. R. CRIM. P. 634. Texas allocates three (or six) in civil trials, five in misdemeanor trials, ten in felony tri-

The impartiality account cannot offer a compelling justification for these sliding scales.<sup>98</sup> Parties are entitled to an impartial jury; they are not entitled to a jury that is either more or less impartial depending on the alleged offense. At best, the impartiality account could explain that there should be various different allocations of peremptories depending on the size of the jury. For instance, in federal district courts, the size of the jury is typically twelve jurors in a criminal case<sup>99</sup> and can range anywhere between six and twelve jurors in a civil case.<sup>100</sup> To achieve an equally impartial jury in all cases, parties would require proportionately more peremptories for every additional empaneled juror.

But this explanation poorly approximates the current allocations of peremptories. For one, the impartiality account would call for many different allocations of peremptories in civil trials depending on the jury's size and for only one default allocation in criminal trials. Federal rules and most state rules, by contrast, delineate only one default allocation in civil trials and three different allocations in criminal trials. Furthermore, the impartiality account would call for a proportionate increase in peremptories depending on jury size—allocating, for instance, 1.5 times as many peremptories to a twelve-person jury in a capital case than to an eight-person jury in a civil case. Federal rules and many state rules, by contrast, impose a disproportionate increase in peremptories depending on the severity of the alleged offense—allocating, for instance, 6.7 times as many peremptories to a twelve-person jury in a federal capital case than to an eight-person jury in a federal civil case. By spelling out these differ-

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als, and fifteen in capital trials. See TEX. R. CIV. P. 233; TEX. C. CRIM. P. art. 35.15. Utah allocates three in civil trials, three in misdemeanor trials, four in felony trials, and ten in capital trials. See UTAH R. CIV. P. 47(e); UTAH R. CRIM. P. 18(d). Wyoming allocates three in civil trials, four in misdemeanor trials, eight in felony trials, and twelve in capital trials. See WYO. STAT. ANN. § 1-11-202 (2017); WYO. STAT. ANN. § 7-11-103 (2017). For more examples of such sliding scale allocations in state and territorial courts, see *infra* notes 104–112, 187. However, not all states allocate peremptories on a sliding scale. Vermont, for instance, allocates six peremptories for all offenses—civil and criminal. See 12 VT. STAT. ANN. tit. 12, § 1941 (2017); VT. R. CRIM. P. 24. Here and elsewhere I omit additional allocations for alternate jurors for the sake of simplicity.

98. The existing literature does not seem to engage with the rules allocating varying numbers of peremptories. But to the limited extent that legal practitioners do think about those numbers, they appear to assume that their underpinning value is impartiality. See *A.B.A. Principles*, *supra* note 58, at 14 (“The number of peremptory challenges should be sufficient, but limited to a number no larger than necessary to provide reasonable assurance of obtaining an unbiased jury, and to provide the parties confidence in the fairness of the jury.”).
99. FED. R. CRIM. P. 23(b) (“A jury consists of 12 persons unless this rule provides otherwise.”). But fewer than twelve persons can sit on juries in criminal cases if “the parties . . . , with the court’s approval, stipulate [thus] in writing.” *Id.*
100. FED. R. CIV. P. 48(a) (“A jury must begin with at least 6 and no more than 12 members . . .”).



ences, I do not mean to imply that the impartiality account would only offer a plausible explanation of our current allocations if it generated precisely the same mathematical ratios. Rather, the differences are stark enough to suggest that our current allocations are driven by values other than impartiality. The impartiality account thus falls short of justifying the varying numbers of peremptories that our current rules assign to parties depending on the alleged offense.

The strongest retort available to a defender of the impartiality account might be an argument from efficiency. She would concede that the value of impartiality cannot, on its own, justify the disproportionate increase in peremptories for trials with more severe alleged offenses. But she would insist that impartiality combines with efficiency to provide the following justification. Ideally, the judicial system would give parties in every trial many peremptories to increase the jury's impartiality. But the more peremptories there are, the bigger the initial jury pool must be and the longer the jury selection will take. Numerous peremptories cost citizens, the parties, and the court time and money. The more severe the alleged offense, the more reason we have to expend these resources for the sake of achieving an impartial jury. The less severe the alleged offense, the less reason we have to expend these resources. Hence, we assign more peremptories to trials with more severe alleged offenses.

This argument is compelling. But it leaves a crucial step unexplained. Why should we expend more resources when the alleged offense is more severe? We can imagine a number of different responses. Perhaps, for instance, a more severe allegation triggers more extreme emotions in jurors and therefore warrants expending more resources to select jurors who can withstand such emotions and decide impartially. But the most compelling response, as I will argue later in presenting my own account of peremptories, is that allegations of more severe offenses usually come with the threat of more severe punishment. This threat of more severe punishment requires greater legitimation of the trial vis-à-vis the parties who are subject to that threat.<sup>101</sup> Consequently, the primary purpose of peremptories turns out not to be the creation of an impartial jury, but the legitimation of the trial. To be sure, providing the parties with an impartial jury is one important way in which the trial becomes more legitimate. But, as I will argue in greater detail, it is neither the only nor the main way.<sup>102</sup> The efficiency explanation for the sliding scale of peremptories thus leads away from the impartiality account, and toward my account.

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101. See *infra* Section III.A.

102. See *id.*

The impartiality account also fails to justify that criminal defendants, at least in some cases, have more peremptories than prosecutors. In federal district courts such asymmetric allocation occurs in felony trials, where prosecutors have six peremptories and defendants have ten.<sup>103</sup> Among state courts, Arkansas,<sup>104</sup> Delaware,<sup>105</sup> Maryland,<sup>106</sup> Minnesota,<sup>107</sup> New Hampshire,<sup>108</sup> New Jersey,<sup>109</sup> New Mexico,<sup>110</sup> South Carolina,<sup>111</sup> and West Virginia<sup>112</sup> each allocate fewer peremptories to prosecutors than to defendants in certain criminal cases. Moreover, as the Note's historical discussion of peremptories will show, such asymmetric allocations are longstanding and used to be widespread.<sup>113</sup>

The impartiality account cannot make normative sense of these widespread asymmetric allocations in the past, nor of their persistence in ten jurisdictions in the present. These past and present allocations appear to prioritize the peremptories of defendants over those of prosecutors. But if the impartiality account is correct that prosecutors' peremptories eliminate jurors with pro-

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103. FED. R. CRIM. P. 24(b).

104. In Arkansas, the prosecutor gets fewer peremptories than the defendant in capital murder and felony cases (10:12 and 6:8), and an equal number in misdemeanors (3:3). *See* ARK. CODE ANN. § 16-33-305 (2017).

105. In Delaware, the prosecutor gets fewer peremptories than the defendant in capital cases (12:20), and an equal number in all other cases (6:6). *See* DEL. SUPER. CT. R. CRIM. P. 24(b); DEL. CT. COMMON PLEAS R. CRIM. P. 24(b).

106. In Maryland, the prosecutor gets fewer peremptories than the defendant in cases involving life imprisonment and imprisonment for twenty years or more (10:20 and 5:10), and an equal number in all other cases (4:4). *See* MD. R. 4-313(a).

107. In Minnesota, the prosecutor always gets fewer peremptories than the defendant (9:15 in cases involving life imprisonment; 3:5 in all other cases). *See* MINN. R. CRIM. P. 26.02, § 6.

108. In New Hampshire, the prosecutor gets fewer peremptories than the defendant in capital cases (10:20), and an equal number in all other cases (15:15 for first-degree murders and 3:3 for all other alleged crimes). *See* N.H. REV. STAT. ANN. §§ 606:3-:4 (2003).

109. In New Jersey, the prosecutor gets fewer peremptories than the defendant in certain listed felony cases (12:20), and an equal number in all other cases (10:10 when tried by a jury from the court's county and 5:5 when tried by a jury from a different county). *See* N.J. STAT. ANN. § 2B:23-13 (West 2018).

110. In New Mexico, the prosecutor always gets fewer peremptories than the defendant (16:24 in capital cases; 8:12 in cases involving life imprisonment; 3:5 in all other cases). *See* N.M. R. ANN. 5-606(D)(1).

111. In South Carolina, the prosecutor gets fewer peremptories than the defendant in certain listed felony cases (5:10), and an equal number in all other cases (5:5). *See* S.C. CODE ANN. § 14-7-1110 (2016).

112. In West Virginia, the prosecutor gets fewer peremptories than the defendant in felony cases (2:6), and an equal number in all other cases (4:4). *See* W. VA. R. CRIM. P. 24(b)(1).

113. *See infra* Section III.C.

defendant biases and that defendants' peremptories eliminate jurors with prosecutor biases, then allocating more peremptories to the defendant than to the prosecutor yields a biased jury. The only way to avoid this conclusion would require us to assume that the jury pools in the above cases and jurisdictions are somehow skewed against criminal defendants, whereas the jury pools in all other cases and jurisdictions are balanced in their biases. This assumption is too selective to be plausible. The asymmetric allocation of peremptories therefore defeats, rather than promotes, the purpose of impartiality. It is a feature that the impartiality account cannot justify.<sup>114</sup>

The impartiality account's inability to justify asymmetric allocations finds confirmation in the history of peremptories.<sup>115</sup> Legislative and judicial rule makers have been puzzled by asymmetric allocations.<sup>116</sup> In Maine, for instance, the Advisory Committee saw "no reason to continue the practice of giving to a defendant in a murder case twice as many peremptory challenges as are given to the state."<sup>117</sup> In Alaska, similarly, representatives of the House Committee on State Affairs asked the Assistant Attorney General what rationale could possibly justify peremptories' asymmetric allocations, to which she responded that "[s]he did not know why the discrepancy had existed for so many years."<sup>118</sup> In both of these cases, the state legislature subsequently amended its peremptory

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114. A defender of the impartiality account may object that while impartiality on its own cannot explain this feature, the impartiality account combined with Blackstone's principle ("better that ten guilty persons escape, than that one innocent suffer") can. 4 WILLIAM BLACKSTONE, COMMENTARIES \*352. I would agree that Blackstone's principle can offer a compelling explanation for why we sometimes assign more peremptories to defendants than to prosecutors. But the explanation of asymmetric allocations on the basis of Blackstone's principle does not vindicate the impartiality account. In fact, it is incompatible with the impartiality account. Blackstone's principle gives us reason to allocate more peremptories to defendants than to prosecutors so that defendants may skew the jury in their favor. In other words, Blackstone's principle gives us reason to allow defendants to select a biased jury. The impartiality account, by contrast, only justifies peremptories insofar as they achieve the opposite effect of selecting jurors who will not be biased toward either side. For further discussion of Blackstone's principle, see *infra* note 171.

115. See *infra* Section III.C.

116. See, e.g., Symposium, *A Matter of Life and Death: New Jersey's Death Penalty Statute in the 21st Century*, 23 SETON HALL LEGIS. J. 249, 276 (1999) (remarks of The Honorable Richard A. Zimmer) ("No one has been able to explain to me why there should be this disparity, other than that you want to give advantage to the defense. . . . So we adopted a recommendation by the Conference of Assignment Judges that we reduce the number of challenges to eight for the prosecution and eight for the defense.").

117. 1 DAVID P. CLUCHEY & MICHAEL D. SEITZINGER, MAINE CRIMINAL PRACTICE 24-6.1 (1991) (quoting Advisory Committee Note).

118. See *Peremptory Challenges of Jurors: Hearing on S.B. 353 Before the H. Comm. on State Affairs*, 1993-94 Leg., 18th Sess. (Alaska 1994) (committee minutes).

rules from asymmetric to symmetric allocations.<sup>119</sup> Legislators' puzzlement at asymmetric allocations should not surprise us in light of the dominant impartiality account's inability to justify them. In fact, this inability may have actively contributed to the gradual historical decline and replacement of asymmetric allocations. At least one of the two national organizations spearheading the most recent move toward symmetry – the National Advisory Commission on Criminal Justice Standards and Goals – justified its efforts explicitly on the basis of the impartiality account.<sup>120</sup>

The impartiality account thus raises a twofold normative puzzle when it comes to our allocations of peremptories. First, it cannot explain why procedural rules for both federal and state courts create a sliding scale of peremptories, allocating varying numbers of peremptories depending on the alleged offense. Second, it cannot account for why procedural rules have for a long time allocated more peremptories to the criminal defendant than the prosecutor.

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The analysis of the impartiality account in this Part has raised three unresolved normative puzzles. From these puzzles we can conclude that the impartiality account cannot justify central features of our current system of peremptories. Any one of the three puzzles suffices to show that the impartiality account, at best, possesses limited justificatory power. But limited justificatory power is hardly enough. Since peremptories continue to enable discrimination in the courtroom, we should demand a strong countervailing normative reason

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119. ALASKA R. CRIM. P. 24(d) (allocating an equal number of peremptories to defendants and prosecutors in all cases); ME. R. CRIM. P. 24(c)(3) (allocating an equal number of peremptories to defendants and prosecutors in all cases); *see also infra* note 168 (documenting amendments to asymmetric allocations between 1977 and 2006).

120. The two organizations spearheading the move toward symmetry between 1977 and 2006 were the National Advisory Commission on Criminal Justice Standards and Goals and the National Conference of Commissioners on Uniform State Laws. *See* Anna Roberts, *Asymmetry as Fairness: Reversing a Peremptory Trend*, 92 WASH. U. L. REV. 1503, 1536 n.224 (2015); *see also* N.C. GEN. STAT. ANN. § 15A-1217 (West 2017) (including an editor's note explaining that the move toward symmetry "follow[ed] the lead" of the National Advisory Commission on Criminal Justice Standards and Goals and the National Conference of Commissioners on Uniform State Laws). The National Advisory Commission on Criminal Justice Standards and Goals justified its efforts on the basis of the impartiality account in the following way: "[R]egardless of the number of peremptory challenges allocated to the defense, the prosecution should be allowed to exercise an equal number. Unless the prosecution is afforded this opportunity, the defense has an unjustifiable opportunity to select a jury biased in its own behalf." NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, COURTS 100 (1973); *see also* NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, UNIFORM RULES r. 512(d) (1974) ("Each side is entitled to . . . peremptory challenges.").

for retaining them. The three unresolved puzzles suggest that the impartiality account fails to provide such a reason.

The existing literature has yet to recognize the full extent of the justificatory shortcomings outlined in this Part. It does not appear to be the case, for instance, that anyone has asked why we allocate numbers of peremptories in the ways we do. But even without realizing the full extent of justificatory shortcomings that the dominant impartiality account suffers, some scholars have jumped to the conclusion that our current system simply does not make sense. Kenneth Melilli, for instance, has concluded:

*Batson* has provided us with the first opportunity to examine the reasons lawyers use peremptory challenges, and what has emerged is the legal version of the emperor's new clothes. Stripped of its mystique, the peremptory challenge turns out in large part to have operated as an excuse for the inadequate functioning of the challenge for cause. . . . It is time for the peremptory challenge to go. It will not be missed.<sup>121</sup>

If peremptories exclusively served the value of impartiality, as *Batson* and its progeny suggest, Melilli would be right. Our current system of peremptories would be stripped of its normative meaning, like the emperor of his clothes. As argued, there would be little reason to retain our three-tiered allocation of peremptories depending on the alleged offense and to assign more peremptories to criminal defendants than to prosecutors.<sup>122</sup> There would be little reason to retain our default of not requiring parties to justify their strikes.<sup>123</sup> And there would be little reason to hold onto peremptories at all.<sup>124</sup> Instead, there would be every reason to eliminate peremptories and expand strikes for cause.

But the dominant impartiality account has overlooked another value served by peremptories: the value of democratic legitimacy.

### III. THE DEMOCRATIC LEGITIMACY ACCOUNT

Peremptories, this Part argues, facilitate the value of democratic legitimacy. They give parties in a judicial trial a say in selecting the individuals who will wield the state's coercive power against them. Section III.A analogizes peremptories to citizens' votes in a political election. Section III.B then shows how this

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<sup>121.</sup> Melilli, *supra* note 41, at 503.

<sup>122.</sup> See *supra* Section II.C.

<sup>123.</sup> See *supra* Section II.B.

<sup>124.</sup> See *supra* Section II.A.

democratic legitimacy account of peremptories falls within a wider nexus of democratic theories of the jury to which it contributes in novel ways. Finally, Section III.C argues that the democratic legitimacy account, unlike the impartiality account, resonates with the history of peremptories in important ways.

#### A. Election Analogy

Peremptories serve the purpose of democratic legitimation. By allowing parties to veto a number of potential jurors, peremptories give parties a say in the selection of their jury. By saying no to one juror, a party opens that juror's hypothetical seat to the next eligible juror, influencing the jury's final composition. The parties' say in the selection of the jury is valuable because the judicial system exercises exceptional coercive force against parties. It often deprives a party of property, liberty, and even life if the jury finds against that party. By giving parties a say in who their jurors are, peremptories help to legitimate the trial to the parties who will be subject to a trial's coercive force.<sup>125</sup>

The argument that peremptories help to legitimate the trial to the parties may seem to suggest that I use the term "legitimacy" in a purely sociological sense.<sup>126</sup> Used in that sense, the argument would amount to the empirical claim that parties perceive the trial as more just and authoritative in the presence of peremptories than in their absence. Psychological research on the effects of participatory procedures in the trial suggests that this empirical claim is likely correct.<sup>127</sup> Moreover, legal theorists have argued that trial courts, going

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125. This say is meaningful because jurors are more than mechanical fact finders. They are individuals exercising judgment as well as discretion. After all, the fact/law distinction is somewhat blurry. Moreover, jurors can opt for nullification. See JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 64 (1994) ("The fact/law distinction, so starkly posed in judges' instructions to juries today, is, however, a fiction that seldom corrects the behavior of actual jurors."); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 *YALE L.J.* 677, 700-14 (1995). One might object that even if the say in selecting jurors is meaningful, a say in selecting judges or prosecutors would be more meaningful because they have more power in influencing the outcome of a trial than jurors. But my argument is not that peremptories are the most meaningful say a trial system can possibly give to parties. My argument is merely that peremptories give parties some meaningful say and thereby contribute to the trial's democratic legitimacy.

126. The distinction between sociological and moral legitimacy employed in this paragraph was helpfully outlined by Richard Fallon. See Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 *HARV. L. REV.* 1787, 1790-91 (2005).

127. See, e.g., TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 149 (1990) (finding that participation in the form of stating one's views contributes to the perception of fairness); Tom R. Tyler, *Conditions Leading to Value-Expressive Effects in Judgments of Procedural Justice: A Test of Four Models*, 52 *J. PERSONALITY & SOC. PSYCHOL.* 333 (1987) (finding that representation contrib-

back at least to Roman times, have employed participatory procedures to legitimate the trial to the parties.<sup>128</sup>

But my argument here and throughout is primarily about moral, not sociological legitimacy. That is to say, I argue that peremptories make the trial more legitimate than it otherwise would be as a matter of moral fact, not just perception.<sup>129</sup>

One moral theory supporting this argument begins with the observation that parties facing the state's coercive power in the courtroom are exceptionally

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utes to the perception of procedural justice); Tom R. Tyler, Kenneth A. Rasinski & Nancy Spodick, *Influence of Voice on Satisfaction with Leaders: Exploring the Meaning of Process Control*, 48 J. PERSONALITY & SOC. PSYCHOL. 72 (1985) (finding that process control, independently of decision control, contributes to the perception of procedural justice); Tom R. Tyler & Justin Sevier, *How Do the Courts Create Popular Legitimacy?: The Role of Establishing the Truth, Punishing Justly, and/or Acting Through Just Procedures*, 77 ALB. L. REV. 1095, 1105 (2013) ("Four issues are typically found to be important [to people's perceptions of procedural fairness]: *opportunities for participation*, a neutral forum, trustworthy authorities, and treatment with dignity and respect." (emphasis added)).

128. Martin Shapiro, for instance, highlights ways in which parties, since Roman times, have had a say in shaping the trial and argues that these elements of say have served the central purpose of legitimating the trial to the parties. See MARTIN M. SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 5-8 (1981). While Shapiro does not list parties' peremptories among his examples, he describes other elements of say that served to legitimate the trial. For instance, he recounts how parties in ancient Rome met and agreed upon the law that would govern their dispute and also on the fact-finding judge who would preside over their trial. *Id.* at 2. Shapiro's argument about the legitimacy-enhancing purpose and effect of these elements of say is sociological. It amounts to the argument that parties' say in various aspects of the trial has allowed parties to *perceive* the trial as legitimate. This perceived legitimacy, Shapiro adds, makes the losing party more likely to acquiesce in the outcome of the trial. *Id.*

129. This argument is meant to be agnostic between two competing conceptions of moral legitimacy that political philosophers have applied to coercive institutions. On the first conception, every step toward legitimacy is a gain in legitimacy. On the second conception, every step toward legitimacy is a lessening of objectionable coercion. In other words, I am agnostic between conceiving of peremptories as contributing either to a gain in the trial's democratic legitimacy or to a lessening of the trial's democratic illegitimacy. Democratic theorists tend to embrace the first conception, consent theorists the second. Compare Allen Buchanan, *Political Legitimacy and Democracy*, 112 ETHICS 689, 710 (2002) (a democratic theorist), with A. JOHN SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* 195 (1979) (a consent theorist).

I should also note that my conception of democratic legitimacy as a matter of degrees is unusual. Political philosophers tend to conceive of legitimacy as a binary concept. For an exception, see Ralf Bader, *Counterfactual Justifications of the State*, in 3 OXFORD STUDIES IN POLITICAL PHILOSOPHY 101 (David Sobel et al. eds., 2017).

vulnerable.<sup>130</sup> They are subject to the decisions of others, possessing very little agency themselves. To give them a say in choosing their jurors is a small but important way of restoring some decision-making power to the parties and, thus, of respecting them as agents. Respecting the parties as agents is a way of respecting their equal dignity as humans.<sup>131</sup> By respecting parties' agency and equal dignity, peremptories make the trial more morally legitimate than it otherwise would be. But on this account, the parties' perception of legitimacy still matters because one important way of respecting them as agents is to take their preferences—in this case, their preference for participatory procedures—seriously.

Peremptories' contribution to the trial's legitimacy is democratic because one of democracy's central promises—at least in modern representative democracies—is to give each citizen who is subject to the state's coercive power a say in choosing the individuals who will wield that power.<sup>132</sup> Democratic legitimacy demands that the state use its coercive power in ways that are not only just in substance, but also supported by participatory procedures.

On the democratic legitimacy account of peremptories developed here, peremptories are analogous to political elections. Political elections are valuable, in part, because they give citizens a say in selecting some of the individuals who will occupy legislative, executive, and—in certain states—judicial offices. Thus, they give citizens a say in who will wield the state's coercive power over the citizenry. It is in this sense that peremptories make jury selection akin to an election.<sup>133</sup>

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130. For the sake of brevity, I outline only one supporting moral theory. But I do not mean to imply that this theory is the only possible foundation for the democratic legitimacy account.

131. Ronald Dworkin is famous for grounding his conception of democracy, somewhat similarly, in the underlying value of equal dignity. See RONALD DWORIN, *JUSTICE FOR HEDGEHOGS* 388–92 (2011). There is much more to Dworkin's conception of democracy, though, than participation and authorship. To respect and show concern for each citizen's equal dignity, democratic government “means more than just that he has an equal vote. It means that he has an equal voice and an equal stake in the result.” *Id.* at 5. Dworkin's resulting partnership conception of democracy entails robust requirements of social and economic justice.

132. In a similar vein, the Declaration of Independence proclaimed that governments “deriv[e] their just powers from the consent of the governed.” *THE DECLARATION OF INDEPENDENCE* para. 2 (U.S. 1776).

133. The parties' representation through lawyers adds a layer of complexity to my account of peremptories that is usually absent from political elections. (I say “usually” because a guardian assisting a citizen with cognitive disabilities in voting adds a somewhat parallel layer of representation in the election context.) For the sake of simplicity, I speak throughout of “the parties' say”—with the understanding, however, that their say is usually articulated and executed by their lawyers. In the background of this simplification, I assume that lawyers are



But the analogy between jury selection and political election does not imply that the value of peremptories is confined to democratic states. Undemocratic states, too, would benefit from introducing peremptories in that peremptories would render their trials more democratically legitimate than they otherwise would have been. Nor does the analogy imply that peremptories contribute to a trial's democratic legitimacy as much as political elections contribute to a state's democratic legitimacy. Peremptories give parties some say with which they can hope to influence the outcome of the trial. But peremptories cannot—given the coercive nature of the trial—amount to voluntary consent.<sup>134</sup> Peremptories make a trial more democratically legitimate than it otherwise would have been. But if the trial otherwise would have been illegitimate, then peremptories will hardly render it legitimate—just a bit less illegitimate.

Parties to a trial should receive an additional say in the form of peremptories, beyond their preexisting say in the form of political elections, because they find themselves in a distinctly coercive environment. True, the individual parties—like their fellow citizens—may have already had a say in who their legislators, executives, and perhaps even judges are.<sup>135</sup> These democratic background conditions, together with the existence of just institutions, may be sufficient to establish the general democratic legitimacy of the state and its coercive power.<sup>136</sup> But when the state hales a criminal defendant involuntarily into court, uses its coercive power against her, and threatens to deprive her of her life, liberty, or property, then the state's general democratic legitimacy does not

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representatives in the sense of being delegates, not trustees. See *infra* note 140 and accompanying text.

134. It is for this reason that I resist Shapiro's terminology. Shapiro refers to the array of legitimacy-enhancing procedural features as "remnants of consent." SHAPIRO, *supra* note 128, at 8. His terminology of party consent, in contrast to my terminology of party say, presupposes voluntariness. Voluntariness, however, is largely absent from the coercive context of judicial trials—especially for a party who has been haled into court against her will. The language of party say recognizes that whatever voice or influence peremptories may give to a party takes place within a larger context of coercion.
135. I qualify this point because many individuals haled into court are noncitizens or not citizens of voting age. Moreover, some citizens will not have exercised their right to vote and some are former felons who no longer have a legal right to vote in certain states. See *Felon Voting Rights*, NAT'L CONF. ST. LEGISLATURES (Dec. 21, 2018), <http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx> [https://perma.cc/7FFS-2NJJ] (summarizing felony disenfranchisement laws by state).
136. I say "may be sufficient" because philosophical anarchists dispute the political legitimacy of existing states—even democratic states. See LESLIE GREEN, *THE AUTHORITY OF THE STATE* (1988); SIMMONS, *supra* note 129.

suffice.<sup>137</sup> Rather, the trial's particular instance of coercion must be legitimate as well. And arguably the same is true for civil trials, because civil trials might deprive the defendant – and, upon counterclaim, the plaintiff – of property.<sup>138</sup>

Daniel Markovits offers a helpful normative framework that supports the need for additional democratic legitimation in the trial context.<sup>139</sup> On his view, “political process” (which includes such political procedures as elections) aims to establish legitimacy only for the realm of lawmaking. This leaves another realm, the realm of law enforcement, in need of legitimation. “Legal process” (which presumably includes such trial procedures as peremptories) steps into this void. It aims at establishing legitimacy for the realm of law enforcement. In other words, Markovits's framework implies that elections and other political tools of legitimation do not reach the distinct coercive power of the trial. The task of legitimating the trial's coercive power falls instead to legal procedures. Moreover, Markovits's framework – like my analogy between jury selection and political election – suggests that legal procedures accomplish the task of legitimating the trial parallel to the ways in which political procedures legitimate lawmaking. Both facilitate legitimacy by engaging individuals in the process and thereby giving them authorship over outcomes.

Jurors, on my democratic legitimacy account, owe the parties not loyalty but justice. In the parlance of political theory, they are trustees and not delegates.<sup>140</sup> The trustee model of political representation conceives of political representatives as beholden to their constituency in the sense that they owe it to the voters who elected them to wield their newly gained powers in the public

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137. The Constitution's guarantee of due process can be understood as deriving its motivation from this insight. See U.S. CONST. amends. V, XIV.

138. For a more detailed discussion of the kinds of coercion that are present in criminal and civil trials, see *infra* Section IV.A. There, I argue that even civil plaintiffs who are not facing counterclaims are still subject to the trial's coercive power because they are bound, for instance, by the principle of *res judicata*.

139. See DANIEL MARKOVITS, *A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE* 184-85, 189-90 (2008); Daniel Markovits, *Adversary Advocacy and the Authority of Adjudication*, 75 *FORDHAM L. REV.* 1367, 1381, 1384 (2006).

140. See, e.g., EDMUND BURKE, *Speech to the Electors of Bristol, on His Being Declared by the Sheriffs Duly Elected One of the Representatives in Parliament for That City*, reprinted in 2 *THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE* 90-98 (London, John C. Nimmo 1887); HANNAH F. PITKIN, *THE CONCEPT OF REPRESENTATION* 146 (1967); Andrew Rehfeld, *Representation Rethought: On Trustees, Delegates, and Gyroscopes in the Study of Political Representation and Democracy*, 103 *AM. POL. SCI. REV.* 214 (2009).

interest.<sup>141</sup> Jurors, by analogy, are representatives of the parties in the sense that they owe it to the parties who selected them to wield their new powers justly.

By contrast, the delegate model of political representation conceives of political representatives as literally representing their constituency. Political representatives, on this model, ought to channel their voters' voices and act according to their preferences.<sup>142</sup> Underlying this stringent and often unfeasible conception of political representation is a robust conception of democracy according to which each citizen ought to govern—rather than merely have a say in who governs. Therefore, direct democracy is the ideal. And representative democracy at best approximates the ideal—adjusting it to the scales and complexities of modern states. As we have seen, it is a more modest participatory conception of democracy and not this more robust conception that captures how peremptories facilitate democratic legitimacy. Jurors represent the parties to a trial by acting as their trustees, and not as their delegates.

Legally speaking, the democratic legitimacy account proposed in this Section gives peremptories the status of a due process interest. Peremptories fall under the heading of due process because they are a procedural element that contributes to the legitimacy of the trial. The Supreme Court has yet to decide whether this due process interest rises to the magnitude of a constitutionally guaranteed right. So far, it has repeatedly denied that peremptories are guaranteed by the Constitution.<sup>143</sup> But it has done so each time with the Sixth Amendment's guarantee of an impartial jury in mind. Given the shortcomings of the impartiality account, the Court is certainly right to reject the idea that the constitutional guarantee of an impartial jury entails a guarantee of peremptories. But if the Court were to look beyond the value of impartiality to the value of democratic legitimacy, it could perhaps find that the Fifth and Fourteenth Amendments' guarantees of due process do entail a constitutional guarantee of

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141. See PITKIN, *supra* note 140, at 209; Rehfeld, *supra* note 140, at 215; Jonathan S. Gould, *The Law of Legislative Representation 43-45* (Aug. 2018) (unpublished manuscript) (on file with author).

142. See PITKIN, *supra* note 140, at 146; Gould, *supra* note 141, at 42-43.

143. See *Batson v. Kentucky*, 476 U.S. 79, 108 (1986) (Stevens, J., concurring) (“[T]his Court has . . . repeatedly stated that the right of peremptory challenge is not of constitutional magnitude, and may be withheld altogether without impairing the constitutional guarantee of impartial jury and fair trial.” (citing *Frazier v. United States*, 335 U.S. 497, 505 n.11 (1948); *United States v. Wood*, 299 U.S. 123, 145 (1936); *Stilson v. United States*, 250 U.S. 583, 586 (1919); and *Swain v. Alabama*, 380 U.S. 202, 219 (1965))).

peremptories.<sup>144</sup> It would require a constitutional inquiry beyond the scope of this Note to assess whether the Court should in fact make such a finding.

The democratic legitimacy account is compatible with the impartiality account in some respects and incompatible with it in other respects. It is compatible with the idea that one of the central goals of jury selection is the selection of an impartial jury. And it is compatible with the idea that peremptories supplement strikes for cause in achieving this goal where a judge erroneously failed to strike a juror for cause and a party then uses her peremptory to strike that juror instead. However, the democratic legitimacy account departs from the impartiality account in an important way. The impartiality account conceives of impartiality as a neutral midpoint on a spectrum of biases. By contrast, the democratic legitimacy account conceives of impartiality as a range of sufficiently unbiased viewpoints. This range is coextensive with the category of strikes for cause. Any juror who should be struck for cause falls outside the range of sufficiently unbiased viewpoints. Any juror who need not be struck for cause falls inside the range. This conception of impartiality is the same as the constitutional definition of an impartial jury as one that does not contain any jurors who should have been struck for cause.<sup>145</sup>

This conception of impartiality has two advantages over the impartiality account's conception. First, it accommodates competing viewpoints and values with which judges, parties, and observers evaluate the impartiality of a given juror and does so only within a reasonable range of disagreement. Second, it avoids committing itself arbitrarily to the midpoint of a spectrum of juror biases that is contingent on the makeup of any given jury pool.

According to the democratic legitimacy account, peremptories serve both the value of impartiality and the value of democratic legitimation when parties use peremptories to eliminate jurors outside of the acceptable range. This is the above scenario in which a party's peremptory compensates for a judge's shortcomings at the for-cause stage. But when parties use peremptories to eliminate jurors who fall within the acceptable range of impartiality, peremptories serve only the value of democratic legitimation, and the account makes no pretense that these peremptories further improve the jury's impartiality. This allows the democratic legitimacy account—in contrast to the impartiality account—to concede and even embrace the fact that a party who uses peremptories more effectively may influence the outcome of a trial in her favor. On my account, the party's chance at influencing the trial is what makes her say in the form of per-

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144. But this guarantee would only hold with respect to defendants' peremptories in criminal cases and nonstate parties in civil cases. See *infra* Section V.A.

145. See *supra* note 78.

emptories meaningful rather than a sham. And it is unproblematic because it occurs within the acceptable range of impartiality.

The following two Sections will situate the democratic legitimacy account of peremptories in the wider landscape of judicial thought and academic scholarship on the jury. These Sections will survey two adjacent topics – democratic theories of the jury and historical scholarship on peremptories – that intersect with the democratic legitimacy account in illuminating ways.

### *B. Democratic Jury*

The democratic legitimacy account of peremptories offers a new perspective on the jury as a democratic institution. First, it turns our attention to the democratic legitimacy of the trial. Second, it recognizes the parties as the center of normative concern. Third, it reveals the parties' democratic say in the trial. In these three respects, my account both differs from existing democratic theories of the jury and complements them in important respects.

Existing democratic theories of the jury tend to fall into two, sometimes overlapping, conceptual clusters. One conceives of the jury as an institution of self-government. The other conceives of the jury as the people's representatives in the courtroom. The first view emphasizes the right of every citizen to serve as a juror. Jury service, on this view, is one of the two fundamental activities of democratic citizenship. The other is voting.<sup>146</sup> Both are ways in which ordinary citizens influence the development and enforcement of law and thus participate in democratic governance.<sup>147</sup> And both juries and elections, according to Alexis

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146. See Melissa Schwartzberg, *Justifying the Jury: Reconciling Justice, Equality, and Democracy*, 112 AM. POL. SCI. REV. 446, 447 (2018) (“[S]ince ancient Athens, voting . . . and judging as jurors have constituted the two fundamental activities of democratic citizens. These rights frequently emerged in tandem, from the eligibility of the ‘forty-shilling freeholder’ in medieval England to vote and to serve as a juror; to the French Constituent Assembly’s debates over the role of citizens as electors and jurors; to the long history of United States constitutional jurisprudence linking voting rights under the Fourteenth, Fifteenth, and Nineteenth Amendments; to the right to serve as a juror.”). Perhaps we could add military service and the free participation in public discourse to the list. See Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1170 (1995) (“[F]reedom of the press was tightly linked to jury trial in the 1780s . . . . Militia service and jury service were twin duties of good citizenship . . .”).

147. See Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 860 (2017) (“The jury is a tangible implementation of the principle that the law comes from the people.”); Stevens, *supra* note 53, at 907 (“[S]ervice on a jury is . . . a privilege to play an official role in discharging the sovereign’s responsibility for the administration of justice.”).

de Tocqueville, also offer democratic education to citizens by teaching them to appreciate the value of self-governance.<sup>148</sup>

No doubt, the institution of the jury – on this first view – contributes to the value of democratic legitimacy. But this first view’s primary focus is on the *state’s* democratic legitimacy with regard to its *citizens*. By contrast, my democratic legitimacy account of peremptories focuses on the *trial’s* democratic legitimacy with regard to its *parties*.

The second cluster of democratic theories of the jury conceives of the jury as the people’s representatives in the courtroom. Proponents of this view suggest that the presence of ordinary citizens in the courtroom increases the trial’s fairness.<sup>149</sup> They speak, for instance, of a “jury of peers,” suggesting that fellow citizens stand in a relationship of greater equality to the parties than a judge.<sup>150</sup> This position may give them a better perspective on the parties’ dispute. It may supplement the judge’s legal reasoning with common sense. It also may provide an additional check on the justice of the legal system.<sup>151</sup>

This second view conceives of the jury, once again, as contributing to the value of democratic legitimacy. On this view, as in my account, the jury contributes to the *trial’s* democratic legitimacy and the presumed beneficiaries are the *parties*. But the second view differs from my account in that it traces the trial’s democratic legitimacy solely to the fact that the jury represents the people and not to the fact that the jury represents the parties. Another way of putting the difference is that democratic legitimacy on the second view is about outcomes, whereas democratic legitimacy on my account is about process. On the second view, the benefit to the parties consists of the positive outcomes that will result from the democratic presence of the jury. By contrast, on my account, the benefit to the parties consists of the democratic say that the jury selection gives to the parties irrespective of the outcome.

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148. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 275 (J.P. Mayer ed., George Lawrence trans., Anchor Press 1969) (1840); see also *Powers v. Ohio*, 499 U.S. 400, 406-07 (1991) (quoting Tocqueville to emphasize the jury’s democratic importance).

149. *Batson v. Kentucky*, 476 U.S. 79, 86 (1986) (“The petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge.” (citing *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968))).

150. *Id.* (“The very idea of a jury is a body . . . composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.” (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880))).

151. The jury could, for instance, resist unjust laws by nullifying. See Butler, *supra* note 125.

The point of emphasizing my account's differences from existing democratic theories of the jury is not to replace these theories, but to supplement them. Adding my democratic legitimacy account of peremptories to existing democratic theories of the jury gives us a fuller understanding of the ways in which the jury contributes to democratic legitimacy.

In practice, the demands made by the democratic legitimacy account of peremptories may come into conflict with the demands made by existing theories. The first view stresses every citizen's right to serve on juries. Presumably, therefore, every citizen should also be given actual and equal opportunity to serve on juries. Peremptories interfere with this demand by depriving potential jurors of the opportunity to serve and by doing so at unequal rates depending on jurors' identities. The second view conceives of the jury as representatives of the people. One of the demands stemming from this view is that the jury represent a fair cross section of the population.<sup>152</sup> The Supreme Court has never held that the fair-cross-section demand requires that the jury mirror the diversity of the community.<sup>153</sup> But it has held that the fair-cross-section demand prevents any group from being systematically excluded from the jury pool.<sup>154</sup> Peremptories interfere with this demand by excluding jurors from the pool and by doing so, potentially, based on jurors' group affiliations.

My democratic legitimacy account of peremptories casts these conflicts in a new light. Without it, peremptories appear to interfere with the jury's value in securing democratic legitimacy without providing any democratic value themselves. The proximate conclusion of such a view is to eliminate peremptories.<sup>155</sup>

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152. In the Constitution, the fair-cross-section guarantee is located in the Sixth Amendment. U.S. CONST. amend. VI; *see also* *Holland v. Illinois*, 493 U.S. 474 (1990) (rejecting a challenge based on the fair-cross-section guarantee of the Sixth Amendment to a prosecutor's peremptories against African Americans).

153. *See Taylor v. Louisiana*, 419 U.S. 522, 538 (1975) ("It should also be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population."); *see also Holland*, 493 U.S. at 498-99 (Marshall, J., dissenting) ("The majority's apparent concern that applying the fair-cross-section requirement to the petit jury would, as a logical matter, require recognition of a right to a jury that mirrors the population of distinctive groups in the community is chimerical."); *id.* at 512 (Stevens, J., dissenting) ("The fair-cross-section requirement mandates the use of a neutral selection mechanism to generate a jury representative of the community. It does not dictate that any particular group or race have representation on a jury."); Marder, *supra* note 56, at 1711-12.

154. *See, e.g., Taylor*, 419 U.S. at 538 (holding that the fair-cross-section requirement was violated by the systematic exclusion of women from the venire).

155. *See, e.g., Amar, supra* note 146, at 1182 ("Peremptory challenges should be eliminated: they allow repeat-player regulars—prosecutors and defense attorneys—to manipulate de-

As Justice Stevens explained, “[a] citizen should not be denied the opportunity to serve as a juror unless an impartial judge can state an acceptable reason for the denial. A challenge for cause provides such a reason; a peremptory challenge does not.”<sup>156</sup> With my account of peremptories, however, we can see that the above conflicts are not external, but rather internal, to the value of democratic legitimacy. The people’s right to serve on a jury, the presence of the people’s representatives in the courtroom, and the parties’ say in choosing their jurors through peremptories all contribute in different ways to democratic legitimacy. These contributions are often complementary, but they can come into conflict.

My account thus helps us to understand our current system of peremptories as seeking to strike a balance between complementary yet conflicting demands of democratic legitimacy. The initial random selection of jurors by lot honors both the first view’s demand that every citizen be given an equal opportunity to serve on a jury and the second view’s demand that the jury represent a fair cross section of the population.<sup>157</sup> Peremptories honor the demand that the parties be given a say in who exercises coercive government power over them. *Batson* attempts to reduce direct conflict between these demands by barring discriminatory peremptories and thus protecting the equal-opportunity and fair-cross-section requirements.

One way to understand this balance is that the overarching value of the trial’s democratic legitimacy has both an equal protection dimension and a due process dimension. The first view’s demand that every citizen be given an equal opportunity to serve on a jury and the second view’s demand that the jury represent a fair cross section of the population give rise to an equal protection interest. My account’s demand that the parties be given a say in choosing their jurors gives rise to a due process interest. *Batson* can then be read as trying to

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mographics and chisel an unrepresentative panel out of a cross-sectional venire.”). Amar reached this conclusion because his conception of the jury as a source of democratic legitimacy is limited to the first and second view outlined above. Contrary to my democratic legitimacy account of the jury, Amar maintained, “[j]uries should represent the people, not the parties.” *Id.*

156. Stevens, *supra* note 53, at 907-08.

157. See Schwartzberg, *supra* note 146, at 450 (“[T]he use of lot promotes the instrumental value of trials by securing the ‘cross-sectional ideal.’”). In federal courts, the Jury Selection and Service Act of 1968 grants litigants the right to “grand and petit juries selected at random from a fair cross section of the community in the district or division where the court convenes.” 28 U.S.C. § 1861 (2018); see *id.* § 1863 (requiring each district court to “devise and place into operation a written plan for random selection of . . . petit jurors that shall be designed to achieve the objectives of section[] 1861”).



balance the latter due process dimension of democratic legitimacy with the former equal protection dimension.<sup>158</sup>

Another way to understand this balance is that our current system prioritizes different beneficiaries of democratic legitimacy at different stages of the trial for the sake of achieving overall democratic legitimacy. Outside of the courtroom, when selecting the jury pool by lot, our system prioritizes the people at large. Inside of the courtroom, when granting the parties peremptories, it prioritizes the parties. This shift in priority makes sense because inside the courtroom, it is the individual party subject to the trial's coercive power who is most vulnerable and thus most in need of legitimation. By giving the vulnerable party a say in choosing her jurors, peremptories will usually increase the overall democratic legitimacy of the trial. However, where the party uses her peremptories, say, to strike all black jurors in a lynching trial or all female jurors in a rape trial, that calculus breaks down. Peremptories that blatantly discriminate on the basis of race or sex delegitimize the trial in the eyes of the people so severely that they diminish rather than increase the trial's overall democratic legitimacy. *Batson* can be read as trying to avoid such diminution by barring discriminatory peremptories.

The resulting picture of our jury procedures is one that seeks to honor complementary democratic values, balance their varying demands, and limit their potential conflicts. Whether our current procedures succeed at achieving the right balance is debatable. Our assessments will differ based on the weight we each give to the competing normative demands and competing empirical data points at play. Regardless of those final assessments, however, the picture that emerges from this discussion offers a more plausible interpretation of our existing practices than a picture in which peremptories are external sources of interference that ought to be eliminated. At the very least, this new picture implies that a critic of peremptories will have to grapple with their contribution to the trial's democratic legitimacy and due process before advocating for their elimination.

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158. This explanation of the competing demands of democratic legitimacy in the jury context can also help us understand why *Batson* limits peremptories, while no similar limitation exists for political elections. Candidates in political elections do not possess the same democratically motivated equal protection interests vis-à-vis the voters that jurors possess vis-à-vis the parties. For this reason, we need not apply *Batson*-like legal scrutiny to voters' choices, even when their choices are racially motivated. The analogy between jury selection and political election, in other words, extends only to the due process dimension of the trial's democratic legitimacy.

C. *Historical Resonance*

The democratic legitimacy account of peremptories, in contrast to the impartiality account, resonates with historical precursors of our current practices of peremptories and is compatible with their historical justifications.

In criminal trials under English law, defendants were the only parties who had the right to exercise peremptories.<sup>159</sup> Prosecutors had no such right. This one-sided allocation of peremptories had its origins in a 1305 statute in which the English Parliament eliminated prosecutorial peremptories and allocated thirty-five peremptories to the defendant.<sup>160</sup> In practice, implementation of the statute was limited. Defendants seem to have rarely exercised their right.<sup>161</sup> Moreover, courts often allowed prosecutors to engage in a procedure called “standing jurors aside” that largely undermined Parliament’s elimination of prosecutorial peremptories.<sup>162</sup> Nevertheless, as a matter of right, defendants alone had peremptories.

The same was true in the U.S. court system. The first federal statute granting peremptories allocated them only to criminal defendants, not prosecutors.<sup>163</sup> And states too usually allocated peremptories only to defendants.<sup>164</sup> Moreover, some federal and state courts resisted the procedure of standing jurors aside and did not allow it to temper the effect of these one-sided alloca-

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159. See Frederic M. Bloom, *Information Lost and Found*, 100 CALIF. L. REV. 635, 651 (2012); Lester B. Orfield, *Trial Jurors in Federal Criminal Cases*, 29 F.R.D. 43, 94 (1962); Roberts, *supra* note 120, at 1533-34.

160. VAN DYKE, *supra* note 29, at 147.

161. See Hoffman, *supra* note 53, at 821 (“[T]he actual use of the peremptory challenge in English criminal trials appears almost nonexistent over its entire seven-hundred-year history, and rare even at its zenith.”).

162. “Standing jurors aside” meant that prosecutors could ask the judge to exclude certain jurors temporarily from the pool of eligible jurors while the defendant exercised her peremptories. See VAN DYKE, *supra* note 29, at 148. Technically, these jurors were temporarily excluded for cause. But unless the court ran out of eligible jurors, the judge would never ask prosecutors to justify the jurors’ exclusion and would instead dismiss those jurors permanently at the end of the jury selection process. *Id.*

163. An Act for the Punishment of Certain Crimes Against the United States, ch. 9, § 30, 1 Stat. 112, 119 (1790) (allocating thirty-five peremptories to defendants charged with treason and twenty to defendants charged with any other capital offense).

164. VAN DYKE, *supra* note 29, at 148; see Katherine Goldwasser, *Limiting a Criminal Defendant’s Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 HARV. L. REV. 808, 828 (1989).

tions.<sup>165</sup> It was not until 1865 that a federal statute for the first time allocated peremptories to prosecutors, with many states following suit.<sup>166</sup>

Moreover, even once federal and state legislators provided for prosecutorial peremptories, prosecutors consistently had fewer peremptories than defendants.<sup>167</sup> Only gradually, over the course of decades, did these asymmetric allocations slowly give way to symmetric allocations in most jurisdictions.<sup>168</sup> Today, noncapital felony cases are the last remnant of these initial asymmetric

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165. While the prosecution's right to the "standing aside" procedure survived in some states, others denied it. See Goldwasser, *supra* note 164, at 828 n.116. Virginia, for instance, "never recognized the practice of standing aside." VAN DYKE, *supra* note 29, at 167. "Standing aside" was not recognized in federal common law. See *United States v. Shackelford*, 59 U.S. (18 How.) 588, 590 (1855).

166. An Act Regulating Proceedings in Criminal Cases, and for Other Purposes, ch. 86, § 2, 13 Stat. 500, 500 (1865) (allocating twenty peremptories to defendants and five peremptories to prosecutors when the charge is treason or a capital offense, and allocating ten peremptories to defendants and two peremptories to prosecutors when the charge is any other offense); see also Bloom, *supra* note 159, at 651 ("In 1865, Congress provided for a small number of prosecutorial peremptories in federal criminal trials—and many states followed suit."); Note, *Due Process Limits on Prosecutorial Peremptory Challenges*, 102 HARV. L. REV. 1013, 1033 n.129 (1989) ("[W]hen Congress first provided for peremptories, it gave them only to defendants. Although courts implied a government right of peremptory challenge, Congress did not grant one by statute until 1865." (citation omitted)).

The first states to allocate peremptories to prosecutors were slaveholding states. Alabama and Georgia led the way in 1820 and 1833, followed by Missouri, Tennessee, and Mississippi in the 1840s. See Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 11-12 n.39 (1990). It is striking that many more states followed suit and gave prosecutors peremptories as a matter of right at around the same time at which African American men began to serve on juries for the first time in many states. See James Forman Jr., *Jury and Race in the Nineteenth Century*, 114 YALE L.J. 895, 910 (2004).

167. See Goldwasser, *supra* note 164, at 828 ("Even after statutes began to allow prosecution peremptories, most jurisdictions gave a greater number of peremptories to the defense.").

168. Between 1854 and 1939, twenty-seven states moved from asymmetric to symmetric allocations: Arizona, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Louisiana, Massachusetts, Montana, Mississippi, Nevada, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, South Dakota, Texas, Vermont, Virginia, Washington, Wisconsin, Wyoming. See Roberts, *supra* note 120, at 1536 n.224. Between 1977 and 2006, eleven more states did the same: Alabama, Alaska, Georgia, Kentucky, Maine, Michigan, Missouri, Nebraska, North Carolina, Oregon, and Tennessee. *Id.* at 1537 nn.224-225. Elaborating on the striking example of Kentucky, Roberts writes: "Prior to 1854, the defense received twenty peremptory challenges and the prosecution none. In 1854, the allocation was changed to twenty and five, in 1893 to fifteen and five, in 1978 to eight and five, and in 1994, eight years after *Batson*, to eight and eight." *Id.* at 1538 (footnotes omitted) (citing *Morgan v. Commonwealth*, 189 S.W.3d 99, 138 (Ky. 2006) (Cooper, J., dissenting)).

allocations in federal courts.<sup>169</sup> Only Arkansas, Delaware, Maryland, Minnesota, New Hampshire, New Jersey, New Mexico, South Carolina, and West Virginia retain asymmetric allocations in some criminal cases.<sup>170</sup>

This common law history of one-sided and asymmetric allocations suggests that a special concern for criminal defendants has long underpinned peremptories.<sup>171</sup> The Court voiced this special concern when it declared in 1894 that peremptories are “one of the most important of the rights secured to the accused.”<sup>172</sup> In more recent decades, this same one-sided concern has motivated some scholars to call for the elimination of prosecutors’ peremptories, while calling for the retention of defendants’ peremptories.<sup>173</sup> And it motivated Jus-

169. FED. R. CRIM. P. 24(b)(2).

170. See *supra* notes 104-112 and accompanying text.

171. One window we have into common law jurists’ more specific justifications for peremptories’ one-sided allocations is John Fortescue’s 1470 treatise *De Laudibus Legum Angliae*. See JOHN FORTESCUE, COMMENDATION OF THE LAWS OF ENGLAND 45 (Francis Grigor ed. & trans., Sweet & Maxwell, Ltd. 1917) (1537) (justifying capital defendants’ one-sided peremptories by reasoning, “[i]ndeed, one would much rather that twenty guilty persons should escape the punishment of death, than that one innocent person should be condemned, and suffer capitally”). Fortescue’s is one of the earliest extant formulations of what has since become known as Blackstone’s principle: “[B]etter that ten guilty persons escape, than that one innocent suffer . . .” 4 WILLIAM BLACKSTONE, COMMENTARIES \*352; see Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 HARV. L. REV. 1065, 1087 (2015); see also J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 509 (4th ed. 2002).

Blackstone’s principle is different from my justification of one-sided peremptories. According to Blackstone’s principle, defendants should have peremptories because we should decrease the odds of convicting innocent defendants, not because we should give them a democratic say in selecting those who will wield the state’s coercive power over them. To put this difference another way, Blackstone’s principle extends protections to all defendants for the sake of innocent defendants alone, whereas my account extends protections to all defendants for the sake of all defendants – innocent and guilty.

But Blackstone’s principle also shares important commonalities with the democratic legitimacy account. (By contrast, as we saw, it is incompatible with the impartiality account. See *supra* note 114.) Both Blackstone’s principle and my account view peremptories as protections extended to the parties who are perceived to be most vulnerable in the context of the trial. Moreover, both allow the defendant to try to influence the outcome of the trial through peremptories. In fact, both attach positive normative significance to the defendant’s chance to influence the trial in her favor. In these ways, the democratic legitimacy account succeeds at capturing important historical intuitions about peremptories. I would also argue that Blackstone’s principle is a more attractive moral maxim if combined with my account. To rest procedural justice on our concern for innocent defendants alone risks disrespecting the agency and dignity of guilty defendants.

172. *Pointer v. United States*, 151 U.S. 396, 408 (1894) (emphasis added).

173. See, e.g., VAN DYKE, *supra* note 29, at 167 (proposing elimination of prosecutorial peremptories as an option for reform); Frederick L. Brown et al., *The Peremptory Challenge as a Ma-*

tices O'Connor and Thomas to resist the Court's expansion of *Batson's* three-step inquiry from prosecutors to criminal defendants.<sup>174</sup>

The democratic legitimacy account can make normative sense of these historical practices and underpinning sentiments in ways that the impartiality account cannot. It can explain the one-sided allocations of peremptories of the past, the remaining asymmetric allocations of the present, and their underlying concern with criminal defendants on the grounds that criminal defendants, unlike prosecutors, are subject to the trial's coercive power and therefore in special need of a say. The impartiality account, by contrast, will either have to denounce centuries of peremptories allocations for creating biased juries or provide compelling evidence that jury pools in the late nineteenth century suddenly moved from being overwhelmingly biased against the defendant to being balanced in their biases.

Perhaps these incongruities are the reason that proponents of the impartiality account seem to have regularly ignored or misrepresented the historical origins of our current system of peremptory strikes.<sup>175</sup> But despite its ahistoricism,

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*nipulative Device in Criminal Trials: Traditional Use or Abuse*, 14 NEW ENG. L. REV. 192, 193 (1978) (concluding "that the prosecutorial use of the challenge in criminal trials should be eliminated").

174. See *Georgia v. McCollum*, 505 U.S. 42, 62 (1992) (Thomas, J., concurring) ("In effect, we have exalted the right of citizens to sit on juries over the rights of the criminal defendant, even though it is the defendant, not the jurors, who faces imprisonment or even death. At a minimum, I think that this inversion of priorities should give us pause."); *id.* at 67 (O'Connor, J., dissenting) (rejecting the majority's holding that criminal defendants' peremptories are state action on the grounds that "[f]rom arrest, to trial, to possible sentencing and punishment, the antagonistic relationship between government and the accused is clear for all to see . . . [and] precludes attributing defendants' actions to the State").
175. These historiographic strategies include: (1) omitting mention of one-sided and asymmetric allocations entirely; (2) focusing on special periods and cases to render more plausible the empirical claim that jury pools at that time were overwhelmingly biased against criminal defendants, see Marder, *supra* note 56, at 1690; see also VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 35 (1986) (focusing on political trials in colonial America in which sheriffs would pick jurors loyal to the British Crown such that criminal defendants would face jury pools biased against them); (3) talking of the practice of "stand[ing jurors] aside" as though it was universal and equivalent to a legal right of peremptories, see *Batson v. Kentucky*, 476 U.S. 79, 119-20 (1986) (Burger, J., dissenting); and (4) resorting to speculations about the longstanding origins of symmetrically allocated peremptories in Roman law, see *id.* (citing FORSYTH, *supra* note 60, at 175; and JOHN PETTINGAL, *AN ENQUIRY INTO THE USE AND PRACTICE OF JURIES AMONG THE GREEKS AND ROMANS* 115, 135 (London, W. & W. Strahan 1769) (drawing on these two historical treatises from 1769 and 1852 to claim that two-sided peremptories in criminal trials went all the way back to the *Lex Servilia* in 104 B.C.E)). But see Harold B. Mattingly, *The Extortion Law of Servilius Glaucia*, 25 CLASSICAL Q. 255, 260-61 (1975) (showing that jury selection under the *Lex Servilia* and the *Lex Repetundarum* consisted of the prosecutor presenting a list of 125 or one hundred jurors and the defendant striking

the impartiality account has been politically and conceptually so successful that it continues to drive and justify legislative moves from asymmetric to symmetric allocations of peremptories.<sup>176</sup> Legislators faced with bills to amend asymmetric allocations see no reason to resist such amendments.<sup>177</sup> The democratic legitimacy account, as I will argue below, provides such a reason.<sup>178</sup> And it can, as I have argued here, make normative sense of our historical practices as op-

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seventy-five or fifty, leaving a trial jury of fifty); Harold B. Mattingly, *Acerbissima Lex Servilia*, 111 *HERMES* 300, 305-06, 310 (1983) (clarifying that we lack evidence to determine the jury selection method in the early years of the *Lex Servilia*, but that it subsequently took the two alternative forms above with defendants striking seventy-five jurors (under the *lex Licinia de sodaliciis*) or fifty jurors (under the *lex Bembina repetundarum*)). It is possible, however, that other kinds of criminal trials during the later Roman Republic provided for alternate rejections by prosecution and defense. See Andrew Lintott, *Crime and Punishment*, in *THE CAMBRIDGE COMPANION TO ROMAN LAW* 301, 311-312 (David Johnston ed., 2015).

176. Anna Roberts found that two national organizations spearheaded the move toward symmetry between 1977 and 2006. See Roberts, *supra* note 120, at 1536 n.224. At least one of them—the National Advisory Commission on Criminal Justice Standards and Goals—justified its efforts explicitly on the basis of the impartiality account. See NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, *COURTS* 100 (1973) (“[R]egardless of the number of peremptory challenges allocated to the defense, the prosecution should be allowed to exercise an equal number. Unless the prosecution is afforded this opportunity, the defense has an unjustifiable opportunity to select a jury biased in its own behalf.”); see also N.C. GEN. STAT. § 15A-1217 (West 2017) (including an editor’s note explaining that the move toward symmetry “follow[ed] the lead” of the National Advisory Commission on Criminal Justice Standards and Goals and the National Conference of Commissioners on Uniform State Laws); NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, *UNIFORM RULES* r. 512(d) (1974) (“Each side is entitled to . . . peremptory challenges.”).
177. When Maine, for instance, amended its peremptory rules in 1991 from asymmetric to symmetric allocations, the Advisory Committee stated in its Note: “The Advisory Committee sees no reason to continue the practice of giving to a defendant in a murder case twice as many peremptory challenges as are given to the state.” 1 DAVID P. CLUCHEY & MICHAEL D. SEITZINGER, *MAINE CRIMINAL PRACTICE* 24-6.1 (1991) (quoting Advisory Committee Note); see also ME. R. CRIM. P. 24(c)(3) (allocating an equal number of peremptories to defendants and prosecutors in all cases). Some legislative hearings suggest that legislators amending peremptory rules were ignorant of the longstanding history of one-sided or asymmetric allocations and puzzled by what could possibly justify such allocations. See *Peremptory Challenges of Jurors: Hearing on S.B. 353 Before the H. Comm. on State Affairs*, 1993-94 Leg., 18th Sess. (Alaska 1994) (committee minutes) (“Representative Ulmer inquired whether or not [a proposed bill designed to bring about symmetry] was similar to how the law was previously in the state of Alaska. She assumed at one point there had been an equal number and it was changed. If so, why was it changed and why is it being changed back. Chairman Vezey answered . . . [that] [t]he legal history of the change . . . went too far back for him to have knowledge of [it] . . . Margot Knuth, Assistant Attorney General, Department of Law, answered Representative Ulmer’s question . . . She did not know why the discrepancy had existed for so many years.”); see also Symposium, *supra* note 116, at 276.
178. See *infra* Section V.A.

posed to dismissing their one-sided and asymmetric allocations for biasing the jury.

#### IV. RESOLVED PUZZLES

Having presented the democratic legitimacy account and situated it in the context of democratic and historical accounts of the jury, the final two Parts draw out the implications of the account for our current practice of peremptories. This Part begins that work by highlighting the account's ability to justify central features of our current practice. It returns to the normative puzzles that the impartiality account left unresolved and shows that the democratic legitimacy account can resolve those puzzles. First, as Section IV.A argues, the democratic legitimacy account can resolve the puzzle that peremptories have remained a valued default. Second, as Section IV.B shows, the democratic legitimacy account can resolve the puzzle that parties as a default need not give reasons for their strikes. Finally, as Section IV.C demonstrates, the democratic legitimacy account can resolve the puzzle of why the allocation of peremptories varies depending upon the alleged offense and type of party.

##### *A. Explaining the Default*

On the democratic legitimacy account, peremptories are valuable because they give parties a democratic say in selecting the individuals who will exercise coercive power over them. This value justifies the widely shared sense that something of value would be lost if we were to replace peremptories with expanded strikes for cause. For even if it were true that expanded strikes for cause would lead to an equally impartial jury, that new system would reallocate all strikes to the judge and therefore deprive parties of their say. As a result, jury selection would no longer contribute to the value of democratic legitimacy.

This account explains the value of peremptories in both the criminal and civil contexts. In both contexts, the trial entails coercion and thereby triggers the need for democratic legitimacy that renders the contribution of peremptories valuable. In the criminal context, the trial's coercive power is most apparent. Conviction can deprive defendants of life, liberty, or property. The fact that prosecutors, by contrast, are immune from this coercion implies, as I will later argue, that we should strip or otherwise limit prosecutors' peremptories.<sup>179</sup>

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179. See *infra* Part V.

In the civil context, the trial's coercive power usually involves deprivations of property. But some civil proceedings—such as removal, child-custody, and involuntary-commitment proceedings—involve deprivations of liberty. In contrast to the criminal context, the party subject to the threat of coercion is often not only the defendant, but also the plaintiff. For one, the plaintiff is often exposed to the threat of counterclaims. Moreover, the plaintiff is at a minimum subject to the principle of *res judicata*, which will deprive her of the ability to press identical charges against the defendant if she loses. Finally, the plaintiff's right to recover—insofar as it is justified—might constitute a property right of which the court can deprive the plaintiff by finding against her. The democratic legitimacy account, therefore, usually justifies the value of peremptories on both sides of the civil trial. The only exceptions, I will later argue, occur when state and federal governments are parties in their own court proceedings.<sup>180</sup>

To be clear, to say that peremptories have value in both criminal and civil trials is not necessarily to say that their value outweighs all others and that we ought to retain peremptories. For instance, someone deeply concerned about the risk of discriminatory strikes may conclude that this risk outweighs peremptories' value and therefore advocate for their elimination. But here, too, the democratic legitimacy account has explanatory power because it justifies the belief that, even if eliminating peremptories was the right conclusion, their elimination would come at a real cost.

### *B. Explaining the Lack of Required Reasons*

The democratic legitimacy account also justifies the practice and widely shared belief that parties, as a default, need not give reasons to justify their peremptories. The election analogy is informative. When citizens vote for political representatives, they need not give reasons for their votes. Their votes count no matter what their underlying reasons. My respect-based conception of democratic legitimacy can explain this practice. The vote respects a citizen's agency and equal dignity by giving her a say in who will exercise coercive power over her.<sup>181</sup> If we instead forced citizens to justify their votes with reasons, we would render citizens' say conditional on unequally distributed human attributes, such as intelligence. To do so would be to miss one of the points of giving citizens a say: respect for their agency and equal dignity. The explanation for peremptories' lack of reasons is similar. To ask parties for reasons would miss the

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<sup>180</sup>. See *infra* Section V.A.

<sup>181</sup>. See *supra* Section III.A.



point of peremptories: to respect parties' agency and equal dignity by giving them a say in who exercises coercive power over them.<sup>182</sup>

*Batson's* three-step test has compromised this value to some extent because it has delineated circumstances under which parties must give reasons to justify their peremptories. The democratic legitimacy account helps us understand the dissenters' intuition that *Batson's* three-step test came at the cost of something valuable. Nonetheless, the post-*Batson* status quo is compatible with the democratic legitimacy account. For one, to say that the lack of required reasons has value is again not to say that it ought to outweigh all other values. In *Batson*, the Court held that the value of giving no reasons was outweighed by the demands of equal protection—a constitutionally mandated value.<sup>183</sup> Furthermore, the Court drew *Batson's* three-step test narrowly. Only upon a prima facie showing of discrimination would a judge demand reasons for a peremptory.<sup>184</sup> The default, in other words, has remained that parties need not give reasons for peremptories. This new status quo on which the *Batson* Court settled makes sense on the democratic legitimacy account. Even on the account's strongest reading, where peremptories are due process interests awaiting the Court's formal recognition as due process rights, these interests would still need to be balanced against the right to equal protection.<sup>185</sup> *Batson* strives for such a balance and retains the previous practice that parties need not give reasons for their strikes as a default. Unlike the impartiality account, the democratic legitimacy account explains this persistent default.

### C. Explaining the Allocations

The democratic legitimacy account, finally, also explains the varying numbers of peremptories allocated to parties. Varying allocations depending on the

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182. This argument is compatible with my earlier rebuttal of the inarticulability defense of the impartiality account. See *supra* notes 74-75 and accompanying text. There, I insisted on the widespread human ability to give reasons. Here, by contrast, I focus on humans' unequal ability to give good reasons. While many people can meet the threshold requirement of giving *some* reason for their peremptory, the requirement highlights an ability that is more pronounced in some and less pronounced in others. A requirement to give reasons for peremptories would therefore undermine the commitment that all parties should have an equal say by virtue of an attribute—such as dignity—that they equally share.

183. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986).

184. *Id.* at 93-94. Although the Court later clarified in *Johnson v. California*, 545 U.S. 162, 170 (2005), that most *Batson* claims should survive to the second step of the analysis, it is still the case that a judge will not request reasons unless and until a prima facie showing of discrimination is made.

185. See *supra* Section III.B.

party's side, as we saw, are historical remnants of one-sided and asymmetric allocations that the democratic legitimacy account can justify.<sup>186</sup> Furthermore, the account can justify the varying allocations of peremptories depending on the alleged offense. The four categories of alleged offenses that typically trigger varying numbers of peremptories come with different threats of punishment.<sup>187</sup> Civil offenses are typically punishable with deprivation of property. Misdemeanors are typically punishable with deprivation of property or liberty for one year or less. Felonies are typically punishable with deprivation of liberty for more than a year. Death penalty cases, of course, concern offenses punishable with the deprivation of life.

A threat of more severe punishment implies that the trial system is wielding more coercive power over the parties. More coercive power, in turn, implies that the need for legitimating the trial's coercive power is greater. Because peremptories contribute to legitimating the trial's coercive power, it makes sense that current procedural rules assign more peremptories when prosecutors allege offenses with more severe threats of punishment. Moreover, it makes sense that there are typically three tiers of peremptories roughly corresponding to the three categories of punishment: life, liberty, and property.

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<sup>186</sup>. See *supra* Section III.C.

<sup>187</sup>. In fact, states (and territories) often allocate peremptories on the basis of the punishment charged rather than the alleged offense. The District of Columbia, for instance, allocates twenty peremptories for offenses punishable with death, ten for offenses punishable with imprisonment for more than one year, and three for all other criminal offenses as well as for all civil trials. D.C. CODE § 23-105 (2019); D.C. SUPER. CT. R. CIV. P. 47(b). Washington allocates twelve peremptories for offenses punishable with death, six for offenses punishable with imprisonment, and three for all other criminal offenses as well as for all civil trials. WASH. REV. CODE ANN. § 4.44.130 (West 2019); WASH. R. CRIM. P. 6.4(e). Moreover, states sometimes add other categories of severe punishment besides (or instead of) capital punishment to the list. California, for instance, allocates twenty peremptories for offenses punishable with death or life imprisonment, ten for offenses punishable with imprisonment for more than one year, and six for all other criminal offenses as well as for all civil trials. CAL. CIV. PROC. CODE § 231 (West 2019). Connecticut allocates twenty-five peremptories for offenses punishable with death or life imprisonment without the possibility of release, fifteen peremptories for offenses punishable with life imprisonment with the possibility of release, six for offenses punishable with imprisonment of more than one year, and three for all other criminal offenses as well as for civil cases. CONN. GEN. STAT. ANN. § 54-82g (West 2019); CONN. GEN. STAT. § 51-241 (2019). Florida allocates ten peremptories for offenses punishable with death or life imprisonment, six for offenses punishable with imprisonment of more than one year, and three for all other criminal offenses as well as for civil cases. FLA. STAT. ANN. § 913.08 (West 2019); FLA. R. CIV. P. 1.431(d).

The democratic legitimacy account, as this Part has shown, can make normative sense of our current practices of peremptories in ways that the impartiality account cannot. It solves central normative puzzles that the impartiality account leaves unresolved. But the democratic legitimacy account not only has explanatory implications—it also has critical implications. These critical implications will be the subject of the next and final Part.

## V. REFORMS

The justificatory power of the democratic legitimacy account, analyzed in the previous Part, gives the account plausibility. If the account did not generate results that approximated the status quo, it would not be a plausible contender for a theory of peremptories. But practices often fall short of their underlying ideals. It is therefore to be expected that current practices do not fully align with my theory. This final Part analyzes departures from my theory in current practices and calls for the reform of these practices. Section V.A advocates for the elimination of the state's peremptories in criminal and civil proceedings. But if such elimination turns out to undermine the jury's impartiality, the democratic legitimacy account instead demands that we consistently assign fewer peremptories to the state than to its counterparties and that we reject pending bills that instead seek to render allocations symmetric. Section V.B goes on to argue that, in case of reduction rather than complete elimination, the democratic legitimacy account demands that the state routinely give reasons for its strikes. Finally, Section V.C suggests that we should give more peremptories to civil parties threatened with deprivations of liberty than to civil parties threatened with deprivations of property.

### A. Eliminate State Peremptories

The first reformist implication of the democratic legitimacy account is that the state should have no peremptories at all.<sup>188</sup> This implication follows because the state, unlike other parties, is not subject to the trial's coercive power. However, the implication is conditional on the jury selection achieving an adequate level of impartiality. If empirical evidence showed that selected jurors, as a result of eliminating state peremptories, no longer fell within an acceptable range of impartiality, the democratic legitimacy account would demand that we

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188. This reform suggestion has been advanced before, but as an ad hoc solution without the value-based argument that the democratic legitimacy account now provides. See, e.g., VAN DYKE, *supra* note 29, at 167; Brown et al., *supra* note 173, at 193.

reduce rather than completely eliminate prosecutorial and state peremptories. This Section will make the case for elimination and reduction in turn.

On the democratic legitimacy account, the state needs no peremptories. In criminal trials, the state is represented by prosecutors.<sup>189</sup> Prosecutors have not been involuntarily haled into court. Rather, they have initiated suit. Moreover, as representatives of the state, prosecutors are not threatened to be deprived of life, liberty, or property by the trial. Hence, there is no need to legitimate the trial's coercive power to prosecutors and to give them a democratic say in choosing the jurors who will wield coercive power during the trial.<sup>190</sup>

Similar considerations apply to the state in civil proceedings. When the state is a party to a civil suit in its own courts—that is to say, when the federal government is party to a civil suit in federal courts or when a state is a party to a civil suit in its own state courts—then the state is not subject to the court's coercive power in ways that warrant peremptories. For even if the state loses, the coercion applied to it is its own. Take, for instance, an involuntary-confinement proceeding. The defendant is subject to the trial's coercive power because the state will deprive her of liberty if she loses the trial. The state, by contrast, is not meaningfully subject to the trial's coercive power because the principle of *res judicata*, which would deprive it of the ability to press identical charges against the defendant if it lost, is a principle of its own making. Similarly, the state may be deprived of property if it is a defendant in a damages suit and loses. But the laws and regulations governing the case are of the state's own making.<sup>191</sup> Moreover, the state need not have waived its sovereign im-

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189. This conception of prosecutors as representatives of the state is compatible with the conception of prosecutors as representatives of the people. *But see* Jocelyn Simonson, *The Place of "the People" in Criminal Procedure*, 119 COLUM. L. REV. 249 (2019) (providing independent reasons for why we should refer to prosecutors as representatives of the state rather than the people).

190. Similarly, Markovits argues that lawyers representing the government have different obligations than lawyers representing private parties. Government lawyers should not engage in adversarial advocacy because such advocacy is only justified insofar as it contributes to the legitimacy or authority of adjudication—a justification inapplicable to government advocacy. “The government, after all, is not an ordinary disputant who confronts the authority of the state . . . but is, rather, itself in authority.” MARKOVITS, *supra* note 139, at 173 (emphasis omitted).

191. Similarly, too, the principle of double jeopardy does not subject the state to a criminal trial's coercive power, even though the principle imposes real practical constraints on the state. Because double jeopardy, like *res judicata* and damages, is part of positive law, the constraints it places on the state are self-imposed. This point is a normative conceptual point about legal authority rather than a descriptive causal point about the historical origin of these principles and rules. It therefore holds even for principles and rules that originate in English common law and predate the founding of the United States.

munity. Despite the deprivation, therefore, the state is not subject to coercion in ways that would require us to reaffirm its agency and respect its dignity by giving it a democratic say in the form of peremptories.<sup>192</sup> As sovereign in its own court, the state enjoys agency and dignity throughout the proceeding and needs no peremptories.

In short, there is no reason to retain state peremptories in criminal and civil proceedings. But there are good reasons to eliminate them. Eliminating prosecutorial and state peremptories would greatly reduce the risk of discriminatory strikes without reducing the trial's democratic legitimacy.

The proposed elimination of state peremptories will raise concerns among proponents of the impartiality account. Justice Marshall, for instance, rejected the one-sided elimination of prosecutors' peremptories due to concerns about impartiality. He wrote that "[o]ur criminal justice system 'requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.'"<sup>193</sup> The reasoning underlying this concern is readily apparent from the impartiality account. If it is indeed the case that each party uses its peremptories to eliminate jurors with biases against it, then the elimination of prosecutors' peremptories will result in a jury with antiprossecutor biases and without counterbalancing antidefendant biases. The result, in short, will be a biased jury.

The democratic legitimacy account, as we saw, operates with a different conception of impartiality and can therefore dismiss many impartiality concerns as unwarranted.<sup>194</sup> Its conception of impartiality adopts the constitutional definition of a jury as impartial as long as the jury does not contain jurors who should have been struck for cause.<sup>195</sup> If proponents of the impartiality account are concerned about the biases of jurors selected within the current constitutional range of impartiality, they should narrow that range by expanding

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192. Those who are skeptical of the concepts of state agency and sovereign dignity can replace those terms with the people's collective agency and dignity.

193. *Batson v. Kentucky*, 476 U.S. 79, 107 (1986) (Marshall, J., concurring) (quoting *Hayes v. Missouri*, 120 U.S. 68, 70 (1887)). But it is possible that Justice Marshall advocated for the symmetrical elimination of both prosecutors' and defendants' peremptories for strategic reasons more than for the above principled reasons. He wrote: "If the prosecutor's peremptory challenge could be eliminated only at the cost of eliminating the defendant's challenge as well, I do not think that would be too great a price to pay." *Id.* at 108. The conditional suggests that Justice Marshall, too, may have preferred my proposed elimination of prosecutors' peremptories alone but did not deem such a proposal capable of persuading the legal community. My hope is that the democratic legitimacy account of peremptories will contribute in some measure to the proposal's persuasive power.

194. See *supra* Section III.A.

195. See *supra* note 78.

the category of strikes for cause rather than insist on state peremptories. Within the range of impartial jurors, however, there is nothing wrong with criminal defendants and civil parties using peremptories to try to influence the trial outcome. Therefore, even if we were to assume for the sake of argument that one-sided peremptories created a biased jury, we need not give the state as many peremptories as we give to criminal defendants and ordinary civil parties.

However, the democratic legitimacy account would take impartiality concerns seriously if it turned out that the elimination of state peremptories led to a significant increase in juries that were not only biased but also partial. That is to say, if the elimination of state peremptories meant that judges' shortcomings at the for-cause stage would now often go unchecked, leading to juries with members who should have been struck for cause, then the democratic legitimacy account would no longer demand complete elimination. Instead, it would demand asymmetric allocations between the state and its counterparties.<sup>196</sup>

Asymmetric allocations would reflect the parties' underlying normative asymmetries. Criminal defendants and ordinary civil parties would possess peremptories for the sake of both having a democratic say in selecting the jurors and compensating for judges' impartiality shortcomings. The state, by contrast, would possess peremptories only to compensate for judges' impartiality shortcomings. It would therefore require fewer peremptories.

In practice, the demand of asymmetric allocations would mean two things. First, we should preserve asymmetric allocations where they still exist—for instance, the six-to-ten allocation in federal felony cases. Preserving asymmetry requires actively resisting the continuing historical current toward symmetry. As of this writing, one of the last remaining state courts with asymmetric allocations—West Virginia—has a bill pending that would equalize the number of prosecutorial and defendant peremptories.<sup>197</sup> We should reject such bills. Second, we should reintroduce asymmetric allocations of peremptories in all other

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196. Roberts also advocates for asymmetric allocations. But she does so only for criminal trials and on grounds that are different from (though compatible with) mine. See Roberts, *supra* note 120, at 1538-39.

197. See S.B. 142, 2018 Leg., Reg. Sess. (W. Va. 2018), [http://www.wvlegislature.gov/Bill\\_Text\\_HTML/2018\\_SESSIONS/RS/bills/SB142%20INTR.pdf](http://www.wvlegislature.gov/Bill_Text_HTML/2018_SESSIONS/RS/bills/SB142%20INTR.pdf) [<https://perma.cc/4CJ8-WS3P>] (reducing the number of defendant peremptories in felony cases from six to four and increasing the number of prosecutorial peremptories from two to four). Similar bills have been pending in other jurisdictions with remaining asymmetric allocations. See, e.g., H.B. 3188, 2013-14 Leg., 120th Sess. (S.C. 2014) (equalizing the number of peremptories for defendants and prosecutors in criminal cases in South Carolina); S.B. 0270, 2013-14 Leg., 120th Sess. (S.C. 2014); see also William T. Pizzi & Morris B. Hoffman, *Jury Selection Errors on Appeal*, 38 AM. CRIM. L. REV. 1391, 1415 n.123 (2001) (listing efforts to move from asymmetric to symmetric allocations in federal felony cases in 1976, 1990, and 1998).

criminal cases in both federal and state courts. And we should implement similar changes for state peremptories in civil proceedings.

*B. Require State Reasons*

If we reduce rather than eliminate state peremptories, then the democratic legitimacy account also demands that we should require the state to give reasons for its peremptories. The underlying argument is the same as above. The default that parties need not give reasons for their peremptories is premised on the need to give parties a say in choosing the jurors who will wield coercive power over them. This premise does not apply to the state because jurors will wield no coercive power over it. Hence, there is no reason to retain the default for the state. There is, however, reason to abandon this default. Above all, requiring reasons from the state may reduce discriminatory peremptories and make them more detectable by supplying trial and appellate judges with a fuller record.

*C. Increase Peremptories in Liberty-Threatening Civil Trials*

The final reformist implication of the democratic legitimacy account concerns civil proceedings that involve deprivations of liberty, not property. Such proceedings fall into three groups: removal, child-custody, and involuntary-commitment proceedings. Removal proceedings never involve juries. But child-custody proceedings sometimes (though very rarely) do.<sup>198</sup> And involuntary-commitment proceedings often do.<sup>199</sup>

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<sup>198.</sup> Texas is the one state that provides parties with the option of a jury trial in custody disputes. See TEX. FAM. CODE ANN. § 105.002 (West 2014).

<sup>199.</sup> At least seventeen states and the District of Columbia provide the defendant with the option of a jury trial in civil commitment proceedings. See ALASKA STAT. § 47.30.735(e) (2016) (granting the right to a jury trial in proceedings for civil commitment beyond thirty days); CAL. WELF. & INST. CODE § 5302 (West 2016); COLO. REV. STAT. ANN. § 27-65-109(3) (West 2012); D.C. CODE ANN. §§ 21-544 (West 2001); 405 ILL. COMP. STAT. ANN. 5/3-802 (West 2011); KAN. STAT. ANN. § 59-29b65 (2005); KY. REV. STAT. § 202A.076(2) (LexisNexis 2013); MICH. COMP. LAWS ANN. § 330.1453(2) (West 2017); MO. ANN. STAT. § 632.350 (West 2014); MONT. CODE ANN. § 53-21-125 (2017); N.M. STAT. ANN. §§ 43-1-12 to 13 (LexisNexis 2013); N.Y. MENTAL HYG. LAW § 10.07 (McKinney 2007) (granting the right to sex offenders facing civil commitment); OKLA. STAT. ANN. tit. 43A, § 5-415 (West 2014); TEX. HEALTH & SAFETY CODE ANN. § 574.032 (West 2017); VA. CODE ANN. § 37.2-821(B) (2014); WASH. REV. CODE ANN. § 71.05.300(2) (West 2008); WIS. STAT. ANN. § 51.20(11) (West 2015); WYO. STAT. § 25-10-110(g) (2017).

Insofar as these proceedings are jury trials, we should consider increasing the number of peremptories for parties whose liberty is at stake. After all, the deprivation of liberty is arguably more grievous than the deprivation of property. Moreover, compared to other deprivations of liberty, the loss of custody rights for a child and the loss of freedom of movement through involuntary commitment may be more akin to those of felony sentences than to those of misdemeanor sentences. Acknowledging the gravity of coercion in liberty-threatening civil proceedings would mean increasing the number of peremptories for the two parties in child-custody proceedings and for the defendant (though not for the state) in involuntary-commitment proceedings.

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The democratic legitimacy account thus asks us to eliminate state peremptories, or else to reduce their number. In the latter case, it also asks us to require reasons for state peremptories. Moreover, it suggests that we should give more peremptories to civil parties threatened with deprivations of liberty. These reforms would make our current practice more consistent with the underlying rationale of peremptories: to give parties a democratic say in choosing individuals who will wield coercive state power over them. On the whole, the reforms would also reduce the risk of discriminatory strikes and thereby contribute to securing defendants' and jurors' constitutional right to equal protection. Legislators, judges, lawyers, and citizens should therefore do what they can to advance these reforms.

## CONCLUSION

The democratic legitimacy account, this Note has shown, can justify central features of our current practices and beliefs about peremptories. By contrast, previous theories of peremptories, dominated by the impartiality account, cannot justify those features. The democratic legitimacy account therefore improves our normative understanding of peremptories. It also supplements existing democratic theories of the jury and gives us a fuller understanding of the various ways in which juries contribute to the value of democratic legitimacy. Finally, the democratic legitimacy account calls for reforms of our current practices. It calls upon us to eliminate state peremptories. Alternatively, it calls upon us to reduce the number of state peremptories and to require the state to give reasons for them. Moreover, it asks us to increase the number of peremptories for parties threatened with deprivations of liberty in civil trials. Implementing these reforms will make our practices more consistent with the underlying value of peremptories and will reduce the problem of discriminatory strikes.