Jury Selection and the Coase Theorem

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Peremptory challenges offer a unique application for the Coase Theorem.\(^1\) Taken in isolation from the rest of the litigation sequence, jury selection is distinct in its complete absence of negotiation between the parties, despite their physical presence together in the courtroom during voir dire. Every other component of American trials includes the opportunity for parties to negotiate either a settlement for the dispute or a stipulation regarding some item,\(^2\) such as the introduction of particular evidence or testimony. In contrast, the rituals for jury selection evolved in a way that excludes interchange between the parties. The procedures could have developed differently, of course, as we can imagine a world where the attorneys engage in “trading” exclusions of their least-desirable jurors. Nevertheless, for historical reasons shrouded in medieval history,\(^3\) we have approximately zero trading, or transacting, between the litigators. In Coasian terms, jury selection and peremptory challenges are an instance of maximum

\(^{1}\) See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). Coase’s article helped launch the law and economics movement in the legal academy; citations to it have become ubiquitous in the academic literature. For an excellent overview of the subsequent literature and Coase’s reaction to the impact of his article, see Daniel Farber, *Parody Lost/Pragmatism Regained: The Ironic History of the Coase Theorem*, 83 VA. L. REV. 397 (1997). Coase’s article helped launch the law and economics movement in the legal academy; citations to it have become ubiquitous in the academic literature.


transaction costs, and a rare instance where transaction costs peak despite the face-to-face location of two parties.\(^4\)

The Coase Theorem posits roughly that legal rules or rights matter least where parties have the most opportunity to negotiate; conversely, rules and rights matter more when parties have less opportunity to bargain around the laws.\(^5\) Transaction costs are the economist’s moniker for describing or measuring the obstacles to trades, or more properly, to negotiations. Thus, where transaction costs are at their peak, legal rules or assignments of rights have their greatest import. When such “costs” are low and the parties can readily negotiate, legal rules and rights fade in significance, because the parties can make a deal suiting their own goals.\(^6\) Applied to jury selection and peremptory challenges, therefore, the Coase Theorem would suggest that the rules and rights involved, such as the right to a certain number of peremptory strikes, are supremely important and have a high impact on the real-world results.\(^7\) This idea comports with

\(^4\) To this author’s knowledge, Coase himself never discussed jury selection, even though his writings discuss many cases and verdicts.

\(^5\) This is my paraphrasing; Coase himself did not provide a one-sentence version of his argument in his original article, and he attributed the moniker “Coase Theorem” to the economist Joseph Stigler. See R.H. COASE, THE FIRM, THE MARKET, AND THE LAW 157 (Univ. Chicago Press, 1988). Farber’s summary of the Theorem reads: “According to the Coase Theorem, assuming that transaction costs don’t prevent contracting around legal rules, the legal rules don’t matter—more precisely, the parties will always bargain their way to an economically efficient outcome, regardless of the legal rule. Bargaining washes out legal rules, in other words.” Farber, supra note 1, at 402.

\(^6\) As Coase observed, “It is always possible to modify by transactions on the market the initial legal delimitation of rights. And, of course, if such market transactions are costless, such a rearrangement of rights will always take place if it would lead to an increase in the value of production.” Coase, supra note 1, at 15.

\(^7\) See, e.g., Joseph B. Kadane and David Kairys, Fair Numbers of Peremptory Challenges in Jury Trials, 74 J. AMER. STATISTICAL ASSOC. 747 (Dec. 1979) (modeling a mathematical algorithm “for deciding how many peremptory challenges should be allowed each side as a general rule, whether more peremptory challenges should be allowed in a particular case, and how many more to allow.”); LeRoy A. Franklin, Bayes’ Theorem, Binominal Probabilities, and Fair Numbers of Peremptory Challenges in Jury Trials, 18 COLLEGE MATHEMATICS JOURNAL 291, 292-99 (1987)(explaining that equal numbers of peremptory strikes for prosecutors and defendants are not necessarily fair under probability theory).
earlier game theory models that suggest larger numbers of peremptory strikes for both parties will favor defendants under certain jury selection sequencing procedures.\textsuperscript{8}

This conclusion runs somewhat counter to the trend that is popular in legal academic literature, which is increasingly hostile to peremptory strikes and other protocols for jury selection.\textsuperscript{9} A number of jurists have argued the same;\textsuperscript{10} three Justices of the Supreme Court have recommended abolishing peremptory challenges completely.\textsuperscript{11} The opposite view seems to be

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\textsuperscript{11} See John Paul Stevens, \textit{Foreword}, 78 Chi.-Kent L. Rev. 907, 907-08 (2003); \textit{Miller-El}, 125 S. Ct. at 2344 (Breyer, J., concurring); Rice v. Collins, 546 U.S. 333, 344 (2006) (Breyer, J., concurring) (“I continue to believe that we should reconsider \textit{Batson’s} test and the peremptory challenge system as a whole.”); \textit{Batson}, 476 U.S. at 102-03 (1986) (Marshall, J., concurring). Justice O’Connor writes that “jury selection in this country has gone astray…” and advocates reform without a total abolition of peremptory challenges: “I am not prepared to abolish \textit{all} peremptory challenges; the person whose life or property is at stake must have the assurance that the juror selected
the consensus among practicing lawyers, who generally cherish their peremptory strikes and would not like to see them limited or abolished, according to recent empirical surveys.\textsuperscript{12}

Most of the academic literature since 1987, however, has focused on the effectiveness and boundaries of \textit{Batson} challenges, which force the proffering of a race-neutral justification for peremptory strikes of minority jurors.\textsuperscript{13} Whatever other merits or shortcomings \textit{Batson} challenges may have, they undermine the Coasian significance of the rules. The \textit{Batson} line of cases has left us with a scenario where subtle negotiation between the litigants – albeit highly scripted – actually does occur during part of the jury selection phase. After a lawyer lodges a \textit{Batson} objection to her opponent’s peremptory strikes,\textsuperscript{14} opposing counsel responds by alleging some sort of juror bias, a non-discriminatory reason for the strike.\textsuperscript{15} The judge deliberates over whether the reasons are pretextual, which functionally inserts a third party (the judge) into the

\begin{itemize}
\item \textsuperscript{13} \textit{Batson v. Kentucky}, 476 U.S. 79 (1986). The Supreme Court extended the rule to civil cases in \textit{Edmonson v. Leesville Concrete Co.}, 500 U.S. 614 (1991). See also \textit{Judging the Prosecution, supra} note 9, at 2134 (“Although the Supreme Court has expanded \textit{Batson}’s scope significantly since 1986, the doctrine has been largely ineffective.”) The article further discusses that while it is relatively easy for the challenging party to present a prima facie case of discrimination for the motive behind the peremptory strike, it is also just as easy for the challenged party to provide a race-neutral rationale that the court will accept.
\item \textsuperscript{14} A defendant must first make a prima facie showing that a peremptory challenge has been exercised on the basis of race. If that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. Then in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination. \textit{Miller-El v. Cockrell}, 537 U.S. 322, 328-29 (2003).
\item \textsuperscript{15} See \textit{Judging the Prosecution, supra} note 9, at 2134. For some examples of accepted non-discriminatory reasons for the strike, see \textit{Rice v. Collins}, 546 U.S. 333, 341 (2006) (Age: “It is not unreasonable to believe the prosecutor remained worried that a young person with few ties to the community might be less willing than an older, more permanent resident to impose a lengthy sentence for possessing a small amount of a controlled substance.”). See also Thaler v. Haynes, 130 S. Ct. 1171 (2010) (potential juror’s “nervous” demeanor and body language); Hernandez v. NY, 500 U.S. 352, 356-57 (1991) (the prosecutor felt that a bilingual potential juror’s hesitation in response to a question of whether he could “accept the interpreter as the final arbiter of what was said by each of the witnesses” demonstrated the juror’s possible inability to properly participate as a juror.).
\end{itemize}
process, with discretion to decide the legitimacy of the reasons. This standard “Batson banter” contains basic elements of negotiation and persuasion. From a Coasian standpoint, the lawyers are trading, though mostly in the form of intangible, unquantifiable personal equity. Each lawyer risks appearing unreasonable to her own client, alienating the judge and jurors, and provoking opposing counsel enough to make the ensuing trial more acrimonious. Raising a Batson challenge also carries the cost of prolonging the proceedings and forfeiting some potentially favorable jurors if the judge decides to start over with a new pool. The newer trend of permitting prosecutors to challenge the defendant’s peremptory strikes exacerbates this phenomenon (potentially doubling it), by introducing yet more discussion and deliberation about the strikes. Previously assigned rights would become less relevant to the outcome under these circumstances. This dilution of the Coasian substance underlying the peremptory rules is only partial, of course, because most strikes still follow the traditional ritual.

The main implication of this analysis, apart from the foregoing point about Batson, is that all the rules governing jury selection matter a great deal for the actual outcomes, whether rules

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16 See Bennett, supra note 9, at 161-62 (observing that judges usually accept whatever neutral-sounding explanation the lawyers offer, and that appellate courts usually uphold such rulings by trial judges); Judging the Prosecution, supra note 9, at 2134.

about the number of peremptory strikes or the sequencing of the strikes in the selection process.\(^{18}\) A secondary implication is that other exogenous influences on the voir dire process, such as the use of jury consultants, can have significant effects, regardless of the skill or accuracy of the consultants themselves.\(^{19}\) Even though most cases settle without going to trial, juries decide almost 70% of those that do in state courts;\(^{20}\) in fact, 90% of tort trials have jury verdicts.\(^{21}\) Juries still play a critical part in our legal system. 

This article tackles the previously unexplored area of how the Coase Theorem illuminates the jury selection process. The topic seems particularly suited for application of the Theorem, because the lack of negotiation and maximized transaction costs make voir dire distinct from all other phases of the trial. We can gain important insights into the significance and impact of \textit{Batson} by using this analytical tool. The article will proceed with a background section, Part II, on the jury selection process and the \textit{Batson} line of cases, with particular focus on the stability of the rules and the lack of bargaining room between the parties involved in this procedure. The substantive analysis commences in Part III, applying the Coase Theorem to voir dire and peremptory strikes, analyzing the rules and the transaction costs for the parties involved. A section on risk and uncertainty in jury selection follows (Part IV), describing and analyzing the problems with prediction and information asymmetries during voir dire, especially as they relate

\(^{18}\) See Brams and Davis, \textit{supra} note 8, arguing that any voir dire sequence besides the “panel challenge” method, as well as the sheer number of peremptory strikes allowed, provides too much room for parties to strategically stack a jury, based on game theory models. \textit{See also} VALERIE P. HANS AND NEIL VIDMAR, \textit{JUDGING THE JURY} 74 (1986), noting that nearly one-third of potential jurors become the subject of peremptory strikes.


\(^{21}\) \textit{Id.} at 2.
to the Coase Theorem. A central observation from this Part will be that the peremptory strike system actually maximizes uncertainty about the jury, rather than neutrality or fairness, by allowing lawyers on each side to de-select jurors who seem favorable to their opponent. In other words, we merely remove those whose biases seem most evident. Given the relationship between predictability and settlement, this means the peremptory strike system has a temporary chilling effect on settlements immediately following the voir dire segment of the litigation.

A final section, Part V, will recap the main points for the foregoing analysis, and will draw some modest policy suggestions for the future. Before proceeding, however, a point of clarification is in order: this article does not attempt to address the decisions made by the juries, nor whether the jury system is too costly, unreliable, or otherwise obsolete, nor the role of racism in jury composition or jurors’ decisions. In addition, the Condorcet Jury Theorem, which pertains entirely to jury deliberations and group decision-making, is outside the scope of this discussion; instead, the focus here is on the parties selecting jurors. Finally, this article does not venture into the thorny ethical issues of stereotyping and juror profiling. Rather, the focus here is on the antecedent issue (important for discussing the ethical questions in the future) of the effect or impact of jury selection protocols.

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II. BACKGROUND ON VOIR DIRE AND PEREMPTORY STRIKES

Two Supreme Court decisions from its 2010 term pertained to peremptory strikes for jurors, bringing the tally to five decisions in the last three years on this subject. Its prominence or frequency as an issue for higher courts does not necessarily correlate to a decisive trend for or against the continued use of this procedural device; the first of the two 2010 cases, *Thaler v. Haynes*, upheld a peremptory strike of a black prospective juror based on her demeanor during voir dire, a pro-peremptory ruling. In contrast, *Skilling v. United States*, a later case from that term, rejected the defendant’s argument that he needed additional peremptory strikes in order to obtain a fair trial in a highly-publicized case (the Enron scandal); in the abstract, as well as in the Court’s skeptical tone, this was a rather anti-peremptory decision. This back-and-forth ambivalence is an ongoing characteristic of the Court’s decisions in this area, which for the last two decades have generally preserved the status quo, declining to impose new limitations or to remove those already in place. If anything is remarkable in this line of cases, it is that so many Supreme Court decisions on a subject could change it so little. A subsequent section will revisit the *Skilling* case to discuss the application of the theory presented here to the Court’s holding in that decision.

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24 130 S.Ct. 1171 (2010)(defense counsel had raised a *Batson* challenge to the prosecutor’s peremptory strike, and a different judge overruled this challenge than had been in the voir dire room to observe the stricken juror’s demeanor).


26 See OVERLAND, supra note 19, at 84-97.

The Supreme Court first addressed the issue of peremptory challenges and racial discrimination in 1879,\(^{28}\) touching off the line of cases that led eventually to *Batson* and its progeny. After the initial spate of post-*Batson* decisions, however, the Court took a ten-year hiatus, during which it heard no cases involving jury selection.\(^{29}\) The silence broke in 2005, with *Johnson v. California*\(^ {30}\) and *Miller-El v. Dretke*,\(^ {31}\) which set off the recent burst of new decisions in this area.

A. *The Newest Cases*

Nearly all of the Supreme Court cases addressing jury selection pertain to one relatively minor procedural rule in the voir dire process, and result from one Supreme Court decision a quarter-century ago: *Batson v. Kentucky*.\(^ {32}\) “*Batson challenges*” are lawyers’ objections to opposing counsel’s peremptory strike where discrimination could be a motivator, usually where the removed juror is an ethnic minority. Most peremptory strikes pass without a stated explanation or rationale; but when a *Batson* challenge arises, the lawyer who wants to remove the juror must disclose a reason for the peremptory strike, and the reason must be non-

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\(^{28}\) *Strauder v. West Virginia*, 100 U.S. 303, (1879). At issue was the validity of a West Virginia statute, which provided, “All white male persons who are twenty-one years of age and are citizens of this State shall be liable to serve as jurors, except as herein provided.” *Id.* at 305.

\(^{29}\) See, e.g., OVERLAND, supra note 19, at 100; the last Supreme Court case before the interruption in the series was *Purkett v. Elem*, 514 U.S. 765 (1995).

\(^{30}\) 545 U.S. 162 (2005). For more discussion of the Court’s punctuated history of decisions in this area, see OVERLAND, supra note 19, at 100-12.

\(^{31}\) 545 U.S. 231 (2005).

\(^{32}\) 476 U.S. 79 (1986).
discriminatory or race/gender-neutral. The judge decides on whether the strike was intentionally discriminatory, seldom finds that it is, usually upholds the strike, and removes the juror from the pool. If the judge decides that this peremptory strike is, in fact, an instance of discrimination, the next step varies between jurisdictions and from court to court, partly depending on the local rules for impaneling the final jury. If the peremptory strike came after the juror was on the panel, the juror remains or the bailiff re-seats her. If the jurisdiction conducts the peremptory strikes before culling the final jurors from the pool, the juror who “survived” the strike remains in the pool, but may or may not end up on the final jury. Some judges’ remedy for a successful Batson challenge is to dismiss the entire jury pool and recommence the voir dire with a new pool on another day, to avoid having a jury tainted by the disruption caused by the challenge. The following recent cases demonstrate various scenarios where the Batson objection arose and the effect it has on the jury selection process.

Thaler v. Haynes, the most recent Batson-progeny case, addressed the rather obscure question of whether a judge can reject a demeanor-based rationale for a peremptory challenge without having been present during voir dire to make his own observations. In a 9-0 decision,

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33 See Bennett, supra, note 13, at 161 (First, the defendant must show it can be inferred that a peremptory strike was made for a discriminatory reason (race, gender), the prosecutor must provide a race-neutral explanation for the selection of this juror for a strike, and, if the burden of production is met, the trial judge must determine if the peremptory challenge was intentionally discriminatory). See also Snyder v. Louisiana, 552 U.S. 472, 476-77 (2008).

34 See OVERLAND, supra note 19, at 96-97.

35 See Bennett, supra note 9, at 161. (Prosecutors generally come up with a reason that is race-neutral enough that the defendant cannot prove intentional discrimination. Additionally, appellate courts notoriously give deference to the trial court in Batson cases and judges in the trial courts tend to accept prosecutors’ race-neutral explanations.)

36 Interview with Harris Country Assistant District Attorney Laura Killinger, Wednesday, February 16, 2011, 5:15 pm; see also OVERLAND, supra note 19, at 95.

the Supreme Court reversed the Fifth Circuit and rejected the suggestion that a judge who rules on *Batson* challenges must have made personal observations of the removed jurors.\footnote{See id at 1171, 1175, discussing the *Snyder* opinion, which stated when the juror’s demeanor is the rationale for the peremptory challenge, “the trial judge’s ‘first hand observations’ are of great importance.” In *Snyder*, the judge accepted the argument that the juror seemed nervous although the peremptory challenge occurred a full day - and multiple prospective jurors - after the questioning had taken place and it is argued he may not have remembered the juror’s demeanor. The opinion in *Thaler* then states, “These observations do not suggest that, in the absence of a personal recollection of the juror’s demeanor, the judge could not have accepted the prosecutor’s explanation.” The opinion then quotes *Hernandez v. NY* (500 U.S. 352, 365 (1991)), which stated, “The best evidence of the intent of the attorney making the strike is often that attorney’s demeanor.” \textit{See also Snyder v. Louisiana}, 552 U.S. 472, 477, 486 (2008) (In *Snyder* at 486, the Court determined it could not realistically remand the case to the trial court for additional details from the judge on the juror’s demeanor because more than ten years had passed.) (also quoting *Hernandez* from above at 477).}

Texas murder trials include special individual-interview voir dire procedures for the entire venire, so the judge overseeing some interviews may not be the same judge ruling on strikes and challenges later. This was the case in *Thaler*.\footnote{See *Thaler*, 130 S.Ct. at 1172.} An initial judge supervised many voir dire interviews, while another judge fielded the subsequent peremptory challenges.\footnote{Id. (“During voir dire, two judges presided at different stages. Judge Harper presided when the attorneys questioned the prospective jurors individually, but Judge Wallace took over when peremptory challenges were exercised.”)} The prosecutor used a peremptory challenge to strike potential juror Owens and two other African-Americans,\footnote{Id.} prompting the defendant to object.\footnote{Id. (“When the prosecutor struck an African-American juror named Owens, respondent’s attorney raised a *Batson* objection. Judge Wallace determined that respondent had made out a prima facie case under *Batson*, and the prosecutor then offered a race-neutral explanation that was based on Owens’ demeanor during individual questioning.”)} The prosecutor’s explanation for striking Owens was the juror’s demeanor: her “body language” evinced that she was not “serious” enough.\footnote{Id.} The judge determined the explanation for the strike was race-neutral and denied the objection.\footnote{Id.} The jury, which included one African-American but not the four others who had
been in the original venire, convicted Haynes of murdering a police officer and sentenced him to
death.\footnote{Id.} On appeal, Haynes argued that since the trial judge did not oversee both voir
dire and peremptory strikes, he should not rule on a \textit{Batson} challenge.\footnote{Id.} The Supreme Court disagreed;\footnote{Id.} this would have been a new rule governing peremptory challenges, and the Court was disinclined

to innovate in this area.

\textit{Rivera v. Illinois}, from the previous term, similarly preserved the status quo.\footnote{Rivera v. Illinois, 129 S.Ct. 1446 (2009).} This

murder case involved two uncommon twists on \textit{Batson} challenges – the challenge was \textit{sua sponte} from the judge, not one of the litigants, and it questioned a peremptory strike by the
defendant (the vast majority of \textit{Batson} challenges are against prosecutors).\footnote{Id. at 1450 (Gomez could not be challenged for cause because she met the requirements for serving on a jury.). “Without specifying the type of discrimination he suspected or the reasons for his concern, the judge directed River's counsel to state his reasons for excusing Gomez.” Id. at 1451.} During voir dire, the judge called the parties into his chambers to discuss defense counsel’s peremptory challenge
of juror Gomez,\footnote{Id. at 1451.} expressing concern that the attorney was discriminating against Hispanics.\footnote{Id.} He noted that the defense counsel had already used three peremptory challenges, two against
women, and one against an African American.\footnote{Id.} The lawyer replied that juror Gomez might
harbor a pre-existing bias because she saw violent crime victims on a daily basis as part of her

\begin{footnotes}
\item[45] Id.
\item[46] Id.
\item[47] Id.. at 1175. (“... where the explanation for a peremptory challenge is based on a prospective juror's demeanor, the judge should take into account, among other things, any observations of the juror that the judge was able to make during the \textit{voir dire}. But \textit{Batson} plainly did not go further and hold that a demeanor-based explanation must be rejected if the judge did not observe or cannot recall the juror's demeanor.”)
\item[49] Id. at 1451.
\item[50] Id. at 1450 (Gomez could not be challenged for cause because she met the requirements for serving on a jury.). “Without specifying the type of discrimination he suspected or the reasons for his concern, the judge directed River's counsel to state his reasons for excusing Gomez.” \textit{Id.} at 1451.
\item[51] Id.
\item[52] Id. (Each side in Illinois gets seven peremptory challenges for jury selection.)
\end{footnotes}
work; and he added that he thought Gomez had “some kind of Hispanic connection given her name.”\textsuperscript{53} The judge noted that Gomez “appears to be African American” and would be the second individual of that race stricken from the jury pool, and thereupon denied the peremptory challenge.\textsuperscript{54} The defense counsel continued his questioning of this same juror and renewed his peremptory strike.\textsuperscript{55} Outside of the jury’s presence, the judge again asked for an explanation for the strike;\textsuperscript{56} this time, defense counsel reasoned that the majority of the jurors already seated were women and he wanted some male perspective in this case.\textsuperscript{57} The judge denied the challenge again.\textsuperscript{58} Gomez served on the jury and even became the foreperson.\textsuperscript{59} The jury convicted the defendant of first-degree murder,\textsuperscript{60} and the defendant appealed, claiming the judge erred in denying his peremptory challenge.

The Supreme Court took the case to end a split between states about whether the remedy for an incorrect \textit{Batson} ruling is automatic reversal of the conviction as opposed to retrial or even a harmless-error affirmance.\textsuperscript{61} The Court held that states could resolve this issue for

\textsuperscript{53} \textit{Id.} Gomez worked at Cook County Hospital’s outpatient orthopedic clinic as a business office supervisor. “Gomez stated that she sometimes interacted with patients during the check-in process and acknowledged that Cook County Hospital treats many gunshot victims. She maintained, however, that her work experience would not affect her ability to be impartial.” \textit{Id.} The Defendant was Hispanic and was charged with first-degree murder for shooting and killing an African American individual. \textit{Id.} at 1450.

\textsuperscript{54} \textit{Id.}

\textsuperscript{55} \textit{Id.}

\textsuperscript{56} \textit{Id.}

\textsuperscript{57} \textit{Id.}

\textsuperscript{58} \textit{Id.}

\textsuperscript{59} \textit{Id.}

\textsuperscript{60} \textit{Id.}

\textsuperscript{61} \textit{Id.} at 1451-52. The appellate court affirmed the defendant’s conviction and the case was taken to the Illinois Supreme Court. The Illinois Supreme Court stated, “A trial judge...may raise a \textit{Batson} issue \textit{sua sponte} only when there is a prima facie case of discrimination.” The court went on to state that there was not sufficient evidence in the record for it to determine whether there was in fact a prima facie case. It remanded the case for the trial judge to
themselves, as peremptory challenges provide a benefit beyond that required for fair jury selection. A mistaken denial of a peremptory challenge, if done in good faith, does not by itself violate the Constitution or necessarily prevent one from receiving a fair trial.

In contrast, however, the Court had held in its previous term (2008) that certain *Batson* errors do merit reversal. In *Snyder v. Louisiana*, another murder case, the prosecutor removed all five African American jurors in the pool. The defendant’s appeal focused on two of the removed African American jurors; the Supreme Court focused on only one, finding that the trial court erred in allowing his removal. Juror Brooks was a college senior trying to meet a student-teaching requirement to graduate at the end of the semester. The prosecution gave two race-neutral reasons for its peremptory challenge of Brooks – that he had looked nervous during the trial.

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62 See id at 1453 (“If a defendant is tried before a qualified jury composed of individuals not challengeable for cause, the loss of a peremptory challenge due to a state court's good-faith error is not a matter of federal constitutional concern. Rather, it is a matter for the State to address under its own laws.”).

63 Id. When States provide peremptory challenges (as all do in some form, they confer a benefit "beyond the minimum requirements of fair [jury] selection," *Frazier v. U.S.*, 335 U.S. 497, 506 (1948).

64 Id. at 1454.

65 Id.


67 Id. at 476. (“Eighty-five prospective jurors were questioned as members of a panel. Thirty-six of these survived challenges for cause; 5 of the 36 were black (as is petitioner); and all 5 of the prospective black jurors were eliminated by the prosecution through the use of peremptory strikes.”).

68 Id. at 477.

69 Id. at 478. (“Petitioner centers his *Batson* claim on the prosecution's strikes of two black jurors, Jeffrey Brooks and Elaine Scott. Because we find that the trial court committed clear error in overruling petitioner's *Batson* objection with respect to Mr. Brooks, we have no need to consider petitioner's claim regarding Ms. Scott.”).

70 Id.
his questioning, and that he might try to find the defendant guilty of a lesser crime so he would not have to serve during a penalty phase, so as not to jeopardize his chances of graduating that semester.

The Court acknowledged that it usually defers to the trial judge on these matters unless there are “exceptional circumstances,” and that race-neutral explanations for a peremptory challenge tend to involve the juror’s demeanor, which the trial judge has the advantage of witnessing in person. Additionally, the best evidence of discriminatory intent is the demeanor of the attorney making the challenge, and trial judges are in the best position to observe this. The trial judge, however, leaves too much uncertainty when neglecting to record these observations or justifications; in this case, the record was silent about Brooks’ demeanor. The trial judge simply allowed the peremptory challenge without explanation. The demeanor problem was unverifiable, and the Court found the school-pressure problem too fraught with speculation and inconsistencies. The lapse of ten years since the trial made it infeasible to seek

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71 Id.
72 Id.
73 Id. at 477 (“On appeal, a trial court’s ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous.”).
74 Id.
75 Id.
76 Id. at 479.
77 Id.
78 Id.
79 Id. at 480, 482. During questioning, juror Brooks began by suggesting that he may not be able to graduate if he missed his student-teaching requirements. He then stated that he was missing events for his student-teaching that would “better [him] toward [his] teaching career.” When asked if he could make any of it up, he said it “may be possible.” After some discussion regarding this, the court’s law clerk contacted the Dean of Brooks’ school who said he did not believe there would be a problem with Brooks meeting his requirements to graduate if he participated in the trial as long as it lasted just the one week. The Dean stated that he would “work with” Mr. Brooks to fulfill his requirements. Id.
a clearer explanation of the judge’s thinking, so the Court reversed the defendant’s conviction and remanded the case.\(^80\)

In the 2006 term, the Court showed similar restraint in \textit{Rice v. Collins},\(^81\) a narcotics-possession case involving California’s three strikes rule.\(^82\) The defendant raised a \textit{Batson} challenge to the prosecutor’s peremptory strike of juror 16, a young African American female.\(^83\) When challenged, the prosecutor offered several race-neutral reasons for striking juror 16:\(^84\) she had rolled her eyes in response to a question from the court,\(^85\) she was only nineteen and might therefore be tolerant of drug use,\(^86\) and she was single and lacked any ties to the community.\(^87\) Juror 16’s gender also received mention, but the trial court properly denied any reliance on that ground.\(^88\) The trial court rejected the defendant’s \textit{Batson} objection.\(^89\)


\(^{82}\) \textit{Id.} at 336.

\(^{83}\) \textit{Id.}

\(^{84}\) \textit{Id.}

\(^{85}\) \textit{Id.}

\(^{86}\) \textit{Id.}

\(^{87}\) \textit{Id.}

\(^{88}\) \textit{Id.}

\(^{89}\) \textit{Id.} at 336-37. After observing the prosecutor throughout the proceedings, the trial court denied the defendant’s \textit{Batson} challenge:

With regard to 016, the court, frankly, did not observe the demeanor of Ms. 016 that was complained of by the District Attorney; however, Ms. 016 was a youthful person, as was [a white male juror the prosecutor also dismissed by peremptory challenge].
The Supreme Court received the case as a habeas appeal, and determined that the trial court’s factual determination was reasonable enough for the third part of the Batson test. This meant the criteria for habeas relief were not present, and the conviction could stand. As one can see in the cases above, the decision to sustain or overrule a Batson objection to one party’s peremptory challenge lies mainly with the trial court. The trial judge has discretion to make this decision, and receives great deference on appeal. On review, the Supreme Court generally defers to the trial judge’s decision or deems incorrect Batson rulings to be harmless.

B. The Issues

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90 Id. at 342. The third step of the Batson test involves the defendant fulfilling his burden of demonstrating “purposeful discrimination” to the court. Id. at 338.


Peremptory challenges presently seem out of favor with academic commentators and some judges, while litigators still value them. The academic literature abounds with calls to abolish peremptory challenges completely, which Britain did some time ago. Skeptics of peremptory strikes usually argue either that they allow too much room for invidious


94 See, e.g., Hon. Jack B. Weinstein, The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture, 30 CARDozo L. REV. 1, 121 (2008); Nancy S. Marder, Justice Stevens, the Peremptory Challenge, and the Jury, 74 FORDHAM L. REV. 1683, 1713 (2006) ("The chorus of judges calling for the elimination of the peremptory, while still small, is nonetheless growing."); Com. v. Rodriguez, 931 N.E.2d 20, 43-44 (Mass. 2010)(MARSHALL, C.J. concurring)("... it is time either to abolish them entirely, or to restrict their use substantially."); Com. v. Benoit, 892 N.E.2d 314, 332 n.1 (Mass. 2008); Booker v. State, 5 So.3d 411, 420 (Miss.App.,2008); Flowers v. State, 947 So.2d 910, 939 (Miss. 2007)("While we neither abolish peremptory challenges, nor adopt a limited voir dire rule, nor make any specific changes to our peremptory challenge system, we are inclined to consider such options if the attorneys of this State persist in violating the principles of Batson by racially profiling jurors... we would be well within our authority in abolishing the peremptory challenge system as a means to ensure the integrity of our criminal trials."); United States v. Martinez-Salazar, 528 U.S. 304 (2000)(upholding state statute that effectively compelled lawyers to forfeit peremptory strikes when a cause-based strike is unsuccessful); State v. Buggs, 581 N.W.2d 329, 347 (Minn. 1998) (Page, J., dissenting); Thorson v. State, 653 So.2d 876, 896 (Miss.1994); Ross v. Oklahoma, 487 U.S. 81 (1988) (upholding statute requiring similar spending of peremptory challenges); see also Judging the Prosecution, supra note 9, at 2137 ("In light of Batson's unimpressive track record, it is not surprising that scholars and judges alike have advocated the abolition of peremptory challenges.").

95 See Zalman and Tsoudis, supra note __, at 370-77 (recent surveys of lawyers indicate that practically none want to see the number of peremptory challenges reduced); see also REPORT BY THE EQUAL JUSTICE INITIATIVE, Illegal Racial Discrimination in Jury Selection: A Continuing Legacy, August 2010, available online at http://eji.org/eji/files/62510%20Edited%20Tutwiler%20version%20Final%20Report%20from%20printer%20online.pdf (last visited Feb.4, 2011) (hereafter EJI Report)("Today in America, there is perhaps no arena of public life or governmental administration where racial discrimination is more widespread, apparent, and seemingly tolerated than in the selection of juries.").

96 See supra note 7 and sources cited therein; see also Henry R. Chalmers, A Long Way to Go: Report Finds Lingering, Hard to Eradicate Discrimination in Jury Selection, 36 LITIGATION NEWS 7-8 (Fall 2010).

97 See, e.g., O’CONNOR, supra note 3, at 222-23 ("England abolished peremptory challenges in 1988, and we should give weight to this. Now their jury selection lasts only a few minutes; in this country it can last months.").
discrimination,\textsuperscript{98} or that juror profiling simply does not work as a means of influencing the final verdict.\textsuperscript{99} These are, of course, mutually exclusive arguments; if stacking the jury with whites produces more convictions, then jury selection makes a crucial difference. If, on the other hand, socio-statistical predictors are illusory, then there is little danger in peremptory strikes besides some parties foolishly investing their own resources into the selection process.\textsuperscript{100} In other words, one set of critics of peremptory strikes is arguing that they work too well, and the other set maintains that they do not work at all. The Supreme Court has wavered between these mutually exclusive views.\textsuperscript{101}

One could also argue that peremptory strikes have diminishing marginal value,\textsuperscript{102} thus justifying numerical limits at least. If a party has thirty-five peremptory strikes, for example, a thirty-sixth strike intuitively seems to add little relative value; and a thirty-seventh strike seems


\textsuperscript{99} See Kressel \& Kressel, \textit{supra} note 19, at 83, 130-35 for a survey of empirical studies regarding the efficacy of using jury consultants and profiling generally, reaching the conclusion that results are mixed at best. See also Michael O. Finkelstein and Bruce Levin, \textit{Clear Choices and Guesswork in Peremptory Challenges in Federal Criminal Trials}, 160 J. Royal Statistical Soc’y 275 (1997)(arguing that peremptory strikes do not produce better results than random selection most of the time); Overland, \textit{supra} note 19, at 16-19 (surveying several studies that found no correlation).

\textsuperscript{100} The price tag for a full-service jury consultant helping prioritize peremptory strikes during voir dire, and coaching with persuasion techniques throughout the trial, can be hundreds of thousands or millions of dollars; prices for simply conducting a mock jury too vet issues or arguments can range from $2000 to $20,000. See Kressel \& Kressel, \textit{supra} note 19, at 7, 91.

\textsuperscript{101} See Overland, \textit{supra} note 19, at 85-112 (describing the pendulum swings in the Court’s jurisprudence on this issue).

\textsuperscript{102} For an analogous problem with diminishing marginal values of strikes, albeit due to larger venires, see \textit{U.S. v. Patterson}, 215 F.3d 776, 779 (7th Cir. 2000)(“Moreover, the extra members in the pool diluted the utility of each challenge by the ratio 56/63. The 20 challenges that the defendants initially were allotted had the same practical effect with a 63-person pool as 18 challenges would have had with a 56-person pool. The pool’s extra size effectively deducted 2 challenges”).
to add less still. Of course, if this were true in practice, then the number of strikes would be self-limiting, especially if there were a knee in the curve\textsuperscript{103} of diminishing returns. Perhaps some parties would continue to use peremptories beyond the point where they have value, merely as a means of injecting delay in the trial process, but this is merely one of many ways to stall a trial.\textsuperscript{104} The diminishing marginal value argument has problems, though: given the unpredictability of a jury pool or venire, along with the infinite variation in case facts, any limit could disadvantage some parties, at least some of the time.\textsuperscript{105}

The anti-discrimination critics of the peremptory system can find some support in the Coase Theorem, because of the lack of negotiating over individual strikes of jurors; the rules here have a significant impact on outcomes. The critics who argue that jury selection is largely a hoax – the anti-statistical skeptics\textsuperscript{106} – would probably view the Theorem as irrelevant here, because they maintain that the voir dire process includes nothing of value for which the parties would negotiate or transact.\textsuperscript{107} The market seems to tell a different story.\textsuperscript{108} Lawyers frequently

\textsuperscript{103} “Knee of the curve” refers to the point on a graph where the results veer steeply upward or downward; when present with marginal costs or diminishing returns, it is a likely decision point. See, e.g., Sidney A. Shapiro and Thomas O. McGarity, \textit{Not So Paradoxical: The Rationale for Technology-Based Regulation}, 1991 DUKE L.J. 729, 743 n.77 (1991); Howard Brackney, \textit{The Dynamics of Military Combat}, 7 OPERATIONS RESEARCH 30, 39 (1959).

\textsuperscript{104} See \textsc{Morris J. Bloomstein}, \textit{Verdict: The Jury System} 71 (Rev. ed. 1972). Jury trials already take about twice as long on average as bench trials, at least in the federal courts. See Richard A. Posner, \textit{The Law and Economics of Contract Interpretation}, 83 TEX. L. REV. 1581, 1597 (2005); Langton & Cohen, \textit{supra} note __, at 8 (most state-court bench trials in civil cases took one day in 2005; jury trials in the same forum averaged two days).

\textsuperscript{105} This was precisely the argument made in the Supreme Court’s most recent case about peremptory challenges, \textit{Skilling v. U.S.}, 130 S.Ct. 2896, 2924-25 (2010).

\textsuperscript{106} See, e.g., \textsc{Hans and Vidmar}, \textit{supra} note 18, at 77; \textsc{Overland}, \textit{supra} note 19, at 16-19.

\textsuperscript{107} Historically, the jury consultant industry arose contemporaneously with the advent of marketing focus groups in the business world, and faces similar criticisms to that phenomenon, even though both seem quite entrenched in our society now. See \textsc{Kressel & Kressel}, \textit{supra} note 19, at 64.

\textsuperscript{108} See \textsc{O’Connor}, \textit{supra} note 3, at 219, estimating it to be a $200 million per year industry; \textsc{Hans and Vidmar}, \textit{supra} note 18, at 90, quoting brochures from jury consultants that boast a 95\% win rate.
request extra peremptory strikes from the judge in their cases, and most litigants use whatever strikes they have available; and there is a thriving industry of highly-paid jury consultants.\footnote{See KRESSEL & KRESSEL, supra note 19, at 75-79.}

The effectiveness of jury consultants is difficult to measure, partly due to what Hans and Vidmar call the “placebo effect” in voir dire:\footnote{See HANS AND VIDMAR, supra note 18, at 91.} where both parties are aware that one side is using jury consultants, this intimidates the opposing side, while bolstering the confidence of the side with the consultants. This can skew the results in favor of the consultants’ side regardless of the consultants’ own efficacy, making it impossible to measure their actual contribution.\footnote{Id. at 90.} This problem confounds the already thorny screening issues – higher-paid lawyers are more likely to hire expensive jury consultants, and no one knows whether to attribute higher win rates to the consultants or to the elite lawyers who usually hire them.\footnote{Id. at 90.}

III. THE COASE THEOREM

A. Basic Elements of the Coase Theorem

Ronald Coase’s heavily-cited article on social costs laid the groundwork for much of the “law and economics” literature that would follow.\footnote{Coase’s article is widely considered to be the most-cited article of all time in legal scholarship. See, e.g., Stewart Schwab, Coase Defends Coase: Why Lawyers Listen and Economists Do Not, 87 MICH. L. REV. 1171, 1189 (1989); R. H. Coase, The Problem of Social Cost: The Citations, 71 CHI.-KENT L. REV. 809 (1996); Farber, supra note 1, at 399.} Coase provided several examples – some hypothetical and some from actual court cases - of adjacent property owners or enterprises whose
activities impinge on each other.\textsuperscript{114} These examples illustrate that an individual’s legal rights and remedies are necessarily in relation to someone else’s, typically in a zero sum game. One person’s right is another’s restriction or legal liability. This point is often obvious to lawyers and judges,\textsuperscript{115} but frequently lost on economists.\textsuperscript{116} Jury consultants, on the other hand, embrace this Coasian concept as a type of anthem: “You can’t stack a jury. You can only unstack one,”\textsuperscript{117} says one prominent consultant, while another insists that they do not select jurors, but rather “deselect” them.\textsuperscript{118}

Less obvious to lawyers and judges is Coase’s next point, which is that legal rules or rights do not really change the final allocation of resources, as long as the parties can freely negotiate. If the farmer’s crops are more valuable than the rancher’s herd that damages the crops, the farmer will ultimately find it worthwhile to buy the right to have the fields untrammled by the herd, even if a court sides with the rancher.\textsuperscript{119} In other words, if transaction costs were zero – if negotiating and contracting took no time, effort, or resources – the law itself would make little difference in the final arrangement of things in the real world.

Yet transaction costs are usually present to varying degrees. Bargaining indeed consumes time, effort, and resources. These costs can be insurmountable where the parties are too numerous or hard to locate, or where the deal involves something difficult to value or quantify, like beauty, or convenience. As transaction costs go up, the legal regime has more and more

\begin{footnotesize}
\begin{enumerate}
\item[114] Coase, supra note 1, at 2-15.
\item[115] Id. at 20-21.
\item[116] Id. at 26-27.
\item[117] See KRESSEL & KRESSEL, supra note 19, at 79.
\item[118] Id.
\item[119] See Coase, supra note 1, at 3-6.
\end{enumerate}
\end{footnotesize}
impact on the final outcome, as it becomes harder to change or move from the entrenched starting place. In a sense, transaction costs – the things that prevent people from agreeing automatically – are what animate the law or give rights their verve. This is a major conclusion of Coase’s work. As he explained in a later publication:

The same approach which, with zero transaction costs, demonstrates that the allocation of resources remains the same whatever the legal position, also shows that, with positive transaction costs, the law plays a crucial role in determining how resources are used. But it does more than this. With zero transaction costs, the same result is reached because contractual arrangements will be made to modify the rights and duties of the parties so as to make it in their interest to undertake those actions which maximize the value of production. With positive transaction costs, some or all of these contractual arrangements will become too costly to carry out.

In many ways, litigation itself is an ideal example of Coase’s Theorem, because the zero sum game between the parties is so explicit: one party’s win is the opponent’s loss. Moreover, the ubiquity of settlements and stipulations in the litigation arena vividly models what Coase described in terms of the allocation of resources – parties settle cases based on expected values minus the projected litigation costs, even if they might win at trial. Settlement grows more likely as the outcome of a trial becomes more predictable. A plaintiff who is 100% certain to win should not waste time with a trial if the defendant offers to settle for more than the expected

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120 Id. at 15-19.


123 See, e.g., OVERLAND, supra note 19, at 13. See also Leibstein v. Lafarge N. Am., Inc., 2011 U.S. Dist. LEXIS 14203 (E.D.N.Y. Feb. 14, 2011), for an example of parties settling cases for their mutual benefit. The jury's verdict within high-low bracket of parties' stipulation in personal injury action fell within scope of stipulation's release, where parties stipulated that “under no circumstances would the defendants have to pay anything above the sum of $400,000 and in no event would plaintiffs receive any less than the sum of $100,000” regardless of jury's verdict, that amount of intra-bracket verdict “would be the number that the plaintiffs would receive,” and that amount of intra-bracket verdict “would be viewed as a settlement that would be paid within 21 days after service of the closing papers.”
verdict minus the plaintiff’s projected litigation costs.\textsuperscript{124} Coase’s point about the reciprocal nature of rights and liabilities, that helping one side harms the other, is never truer than in contest settings like litigation.

On the other hand, nearly all of Coase’s original examples involved nuisance problems for property owners,\textsuperscript{125} which is much more concrete than the contest for damages that we have in litigation.\textsuperscript{126} Further removed still is the contest of the criminal trial, where the interests of each side (the defendant’s liberty versus the state’s policy goals) are comparatively abstract, albeit no less important. Even so, it is easy to apply the Theorem to litigation overall and to particular components, even in the criminal area. For example, the exclusionary rules punish police for violating the warrant requirements, but necessarily confer a benefit (often undeserved) on the defendant at the same time, even for a defendant caught in the act.\textsuperscript{127} Similarly, protecting the defendant’s right against self-incrimination imposes significant costs on law enforcement and prosecutors as they strive to obtain “Miranda waivers,” or as they grant generous plea bargains to those willing to testify against co-defendants; the Supreme Court’s developing doctrinal of

\textsuperscript{124} See Klement, \textit{supra} note ___ at 262.

\textsuperscript{125} Coase, \textit{supra} note 1, at 3-6 (rancher vs. crop growers); 8-10 (noisy pharmacist adjacent to family physician’s office); 10-11 (smelly production of woven mats irritating neighbors); 11-13 (smoke nuisance). Most civil jury trials are tort cases rather than property, and most property cases today involve the government as one party. \textit{See} Langton & Cohen, \textit{supra} note ___ at 2-8.

\textsuperscript{126} My application of the Theorem, in contrast, is entirely to procedural matters.

\textsuperscript{127} See People v. DeFore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926)(“The criminal is to go free because the constable has blundered.”); Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527, 2550 (2009)(Kennedy, J. dissenting)(“The Court’s holding is a windfall to defendants, one that is unjustified by any demonstrated deficiency in trials...”); Giles v. California, 554 U.S. 353, 406 (2008)(Souter, J. concurring)(“To the extent that it insists upon an additional showing of purpose . . . [the Court] grants the defendant not fair treatment, but a windfall.”); Williams v. Taylor, 529 U.S. 362, 393 (2000); Lockhart v. Fretwell, 506 U.S. 364, 366 (1993).
“marginal deterrence” for exclusionary rules reflects the Coasian zero sum game of criminal procedure.\textsuperscript{128}

Probably no situations in the real world have transaction costs at zero, but some situations keep them particularly low.\textsuperscript{129} Coase himself postulated that firms exist in the business world primarily to minimize transaction costs; it is often efficient for a company to get individual tasks done, like billing, shipping, or payroll, without having to negotiate a contract or agreement every

\textsuperscript{128} For example, in \textit{Kansas v. Ventris}, 556 U.S. __, 129 S.Ct. 1841 (2009), the Court compared society’s “cost” of introducing unrebutted, untrue testimony from the defendant against the deterrent value of the Sixth Amendment exclusionary rule, which it found marginally insignificant. \textit{Id.} at 1846 (“The interests safeguarded by such exclusion are outweighed by the need to prevent perjury and to assure the integrity of the trial process.”). The Court upheld the defendant’s conviction despite a stipulated Sixth Amendment violation. In another 2009 case, \textit{Herring v. United States}, 555 U.S. __, 129 S.Ct. 695 (2009), the Court used a similar balancing test to uphold a conviction against a Fourth Amendment challenge. The year before, in 2008, the Court used a similar balancing analysis in \textit{Hudson v. Michigan}, 547 U.S. 586, a case addressing the “knock-and-announce” rule for police entry into a home. The “social cost” of exclusionary rules received a detailed explanation, laying the foundation for the subsequent cases discussed above. Writing for the majority, Justice Scalia explained:

The exclusionary rule generates “substantial social costs,” which sometimes include setting the guilty free and the dangerous at large. We have therefore been cautious against expanding it, and have repeatedly emphasized that the rule’s ‘costly toll’ upon truth-seeking and law enforcement objectives presents a high obstacle for those urging its application. We have rejected indiscriminate application of the rule, and have held it to be applicable only where its remedial objectives are thought most efficaciously served, that is, where its deterrence benefits outweigh its substantial social costs…

\textit{Id.} at 591 (internal citations omitted). Scalia briefly acknowledged that the Court’s holdings a generation ago were more tilted toward the exclusion of evidence for all Fourth Amendment violations, almost as a per-se rule, then returned to the zero sum game of criminal procedure:

The costs here are considerable. In addition to the grave adverse consequence that exclusion of relevant incriminating evidence always entails (viz., the risk of releasing dangerous criminals into society), imposing that massive remedy for a knock-and-announce violation would generate a constant flood of alleged failures to observe the rule . . . The cost of entering this lottery would be small, but the jackpot enormous: suppression of all evidence, amounting in many cases to a get-out-of-jail-free card. Courts would experience as never before the reality that the exclusionary rule frequently requires extensive litigation to determine whether particular evidence must be excluded.

\textit{Id.} at 595.

time. Extended family units can also minimize certain costs by allocating resources (assets or work) within a close-knit network of people whom they trust. In litigation, transaction costs for settlement are probably lowest during the pre-filing phase (when demand letters sail back and forth) and post-verdict (when the parties and issues are well-known and little remains unresolved). Procedural laws or regulations (those not touching substantive rights or liabilities) can also minimize transaction costs, such as those mandating employers’ withholding of FICA taxes from employee paychecks to ensure payment into the Social Security insurance program.

On the other end of the spectrum, there are some situations where transaction costs are at their zenith, whether due to laws, societal norms, or institutional rules and protocols. Some examples may be helpful here.


Legally, our country does not generally permit the sale of babies or organs, although there is room for argument around the fringes of this point. This means we have maximized the transaction costs of purchasing someone’s offspring or liver. In terms of societal norms, we simply do not combine wedding ceremonies and funeral ceremonies, even though this would reduce the travel expenses, time, and other resources used somewhat duplicatively by extended family members for these occasions. It sounds silly even to suggest such a combination, even though it would bring substantial savings. Our entrenched societal norms about the aesthetics of these ceremonies or rites forbid certain arrangements. In a Coasian sense, the transaction costs are probably at 100% if one were to propose that an engaged relative schedule her wedding for the same day and place as an upcoming funeral in the family. In the law school setting, we disallow most negotiations between students and professors over individual grades.


134 See United States v. Garber, 589 F.2d 843 (5th Cir. 1979) (holding that whether the sale of blood plasma is considered a product or a personal service, it constitutes taxable income)The fees for adoption, while not the same as payment for surrogate motherhood, could constitute “buying a baby” in some philosophical sense. In addition, even though no state allows the sale of one’s lungs, states do allow compensation for sperm or egg donors, and hospitals in possession of a donated organ might receive compensation for transferring it to a different hospital.

135 See Josh Rinschler, Students Or Employees? The Struggle Over Graduate Student Unions in America’s Private Colleges and Universities,36 J.C. & U.L. 615,632 (2010)(describing fears that unionized graduate students could force negotiations over grades); Kif Augustine-Adams, Playing The Ultimatum Game with Grades: Gender, Confidence, and Performance in Public International Law, 57 J. LEGAL EDUC. 375, 376-77 (2007)(describing a law school class experiment where students negotiated over their grades);Robert A. Epstein, Breaking Down the Ivory Tower Sweatshops, 20 ST. JOHN'S J. LEGAL COMMENT. 157, 186-87 (2005)(describing fears that unionized graduate students could force negotiations over grades); Russell L. Christopher, The Prosecutor's Dilemma: Bargains And Punishments, 72 FORDHAM L. REV. 93, 122 (2003)(describing an extended illustration of bargaining over grades); Sarah E. Gohl, A Lesson in English and Gender: Title IX and the Male Student-Athlete, 50 DUKE L.J. 1123, 1140 (2001)(describing athletic services organizations that negotiated grade changes for members).
institutional rule, partly to avoid exploitative transactions like sex-for-high-grades, partly to preserve the integrity of a meritocratic system, and partly to save professors the time it would take to negotiate with each student. These institutional rules intentionally maximize the transaction costs of making quid-pro-quo agreements for the assignment of grades.

These last three illustrations are examples of artificially imposed or exogenous transaction costs, as opposed to natural or endogenous transaction costs like multiplicity of parties, geographic distance, language barriers, or time constraints. Transaction costs span a large continuum from mildly inconvenient to extremely burdensome; this continuum-variation of costs in negotiation is true for both natural and artificially imposed transaction costs, such as the rules of criminal or civil procedure. Where transaction costs are lower, agreements are usually more abundant; where they are higher, agreements become rare.

Given that transaction costs are always present but span a continuum, the Coase Theorem posits that legal rules or rights matter least where parties have the most opportunity to bargain; conversely, rules and rights matter more when parties have less opportunity to negotiate around the laws. Where transaction costs are at their peak, legal protocols have maximum impact. This brings the discussion to jury selection and voir dire.

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136 See Brent Wible, Achieving the Promise of Girls' Education: Strategies to Overcome Gender-Based Violence In Beninese Schools, 36 COLUM. HUM. RTS. L. REV. 513, 525 (2005)(describing everyday sex-for-grades transactions in Benin).


The jury selection phase is distinct from the other segments of the trial sequence in the utter lack of negotiation that occurs between the parties, especially over something that both sides usually consider important. Negotiations occur throughout most of the trial sequence,\footnote{See, e.g., Allstate Ins. Co. v. Tricare Management Activity, 662 F.Supp.2d 883, 896 (W.D.Mich. 2009)("As a practical matter, the civil litigation system expects parties to engage in settlement negotiations throughout the life of the case that take into account the relative strength of the parties' arguments, the economic realities of the case and the parties, and the burdens of seeking and enforcing a government-imposed outcome in the form of a litigated final judgment."); Christian v. Dingle, Civil No. 06-3056, 2008 WL 2003089 (D.Minn. May 7, 2008)("parties continued plea negotiations throughout the trial... "); Grant v. AAA Michigan Wisconsin, Inc., 703 N.W.2d 196, 204 (Mich.App.2005); In re Corel Corp. Inc. Securities Litigation, 293 F.Supp.2d 484, 487 (E.D.Pa.,2003)("The parties have participated in settlement negotiations throughout the course of this litigation."). \textit{See also} Leonard L. Riskin and Nancy A. Welsh, \textit{Is That All There Is?: “The Problem” in Court-Oriented Mediation}, 15 GEO. MASON L. REV. 863, 878 (2008); Alon Klement, \textit{Threats to Sue and Cost Divisibility under Asymmetric Information}, 23 INT'L REV. L. \& ECON. 261, 268 (2003)("[T]he level of divisibility is determined by the number of possible negotiations throughout the litigation."); BARRY WERTH, DAMAGES: ONE FAMILY’S LEGAL STRUGGLES IN THE WORLD OF MEDICINE 185-212 (1998).} not only about the causus belli of the case, but also about admissibility of documents or testimony, scheduling, and issues for the court to decide. Most disputes find resolutions without the filing of lawsuits;\footnote{See Stephen Shavell, \textit{ECONOMIC ANALYSIS OF LAW} 80-83 (2004)(discussing private incentives to file lawsuits).} most lawsuits settle before going to trial,\footnote{\textit{Id.} at 93-94.} and most trials incorporate many small deals or agreements, whether stated or tacit, between the parties. Some cases even settle after the verdict, as the winning party makes a realistic assessment of the other’s ability to pay or likelihood of appeal.\footnote{See Gruner, \textit{supra} note __ at 1044 (discussing post-trial settlement rates).} The most visible transaction costs are the time involved, especially in light of the opportunity costs for the litigants.

Jury selection punctuates this ongoing negotiation process. The litigants do not engage in any discussion, dealing, or debate about who should sit on the jury. This is ironic given their physical proximity at that point – they are usually a few yards away from each other in the
courtroom during voir dire, so the natural or endogenous transaction costs probably could not be lower. Even so, usually the lawyers must submit their peremptory strikes without even knowing most of their opponents’ strikes, much less an awareness of the opponent’s relative assessments of all the veniremen. The only other segments of the trial that has this little opportunity for negotiation would be the litigators’ opening and closing arguments to the jury.  

It is worth pausing, for the sake of clarity, to emphasize that we are not talking here about the obvious costs to the parties of using juries in the first place. These are the time spent on voir dire, time and resources devoted to resolving the jury instructions, the extra time taken for the jury to deliberate, and the extra care (and time) devoted to evidentiary rulings when a jury is present. Rather, the transaction costs under discussion here are those artificially imposed in the sense of disallowing (or simply not having) discussion, negotiation, or bargaining between the parties about which jurors to empanel. Another point of clarification: admittedly, rigid procedural rules may help reduce transaction costs of litigation overall by choreographing and streamlining litigation; even so, sometimes the same rules, taken in isolation, can impose very high transaction costs during the specific trial segment that they govern, to the point of precluding bargaining or negotiation at that point. Rules to reduce systemic transaction costs are simultaneously constraints that impose another type of discreet transaction costs, and this is

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144 Opening and closing arguments are less susceptible to trading than would be jury picks or strikes, and less governed by a set of rules, so they are less interesting from a Coasian standpoint. At the same time, opening and closing arguments do reflect previous agreements the parties may have made about issues or evidence excluded from the trial.

145 Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 Tex. L. Rev. 1581, 1597 (2005) (“The added expense is due mainly to the fact that jury trials are on average longer than bench trials. This is because of the time required for the jury voir dire and jury instructions and deliberations, because matters have to be explained to juries at greater length than to a judge, and because more attention is paid to making and ruling on objections to the admission of evidence in a jury trial than in a bench trial.”).

146 Most of the bargaining would not have to take place in the presence of the prospective jurors, but this depends on the particular sequencing rules in each jurisdiction for the voir dire process.
particularly relevant to trial procedural rules, where settlements could occur anywhere in the process.

As mentioned in the introduction, it is easy to imagine the penchant for negotiation that pervades the rest of the trial sequence applying equally well to jury selection, but our traditions took a different turn centuries ago.\textsuperscript{147} Certainly parties would, if our norms or rules allowed, find plenty of room for bargaining, both about the number of peremptories each will use, and the individual jurors to strike or keep. Their interests inversely correlate as a general matter, as a juror who favors one party necessarily disfavors the other (except in multi-party litigation, beyond our scope here). Yet the lawyers’ assessments and weight may vary.\textsuperscript{148} Suppose the defense counsel estimates that Juror 27 is a “seven” on a scale of one to ten, with ten being the most pro-defendant. The prosecutor may think that Juror 27 is instead only a six, and be willing to keep her in the pool so that the remaining peremptory strikes can apply to jurors who are more hazardous. Conversely, the prosecutor may think this juror is a nine, and value the juror’s removal more than the defendant values her retention. If we assume that each litigator is, in fact, valuing the prospective jurors on a scale (regardless of whether it is a ten-point or a hundred-point scale), the range of values and the mix of dissimilar jurors provides ample space for bargaining.

As another illustration, suppose the plaintiff in a tort case realizes that the jury pool overall – the venire selected for her case – is unpromising. There seems to be no way to stack the jury

\textsuperscript{147} See Batson, 476 U.S. at 119-20 (detailing the evolution of peremptory challenges back to Roman times); BLOOMSTEIN, supra note 105, at 74; Hoffman, supra note __ at 819; Swain v. Alabama, 380 U.S. 202, 212-213 (1965) (citing Coke and other ancient authorities).

with a majority of pro-plaintiff panelists from this group. The lawyer may then adopt the strategy of trying to place one or two holdouts or contrarians – to force the majority to compromise a bit – instead of trying for a pure majority on the jury. The opposing party is likely to seize the opportunity to strive for a fully sympathetic jury, and may therefore be giving less weight to the strength of each juror’s bias or convictions. Again, if they could negotiate here, they could probably find a range of mutually agreeable options within the stretch of each side’s strategic preferences, which are subtler than simply pro or con.

Another implication of the Theorem for jury selection is that the current system raises the stakes of each peremptory strike such that the use of the strikes may not accurately reflect the values and priorities of the parties themselves. For example, a prosecutor in a drug possession case may use strikes to remove jurors based on her relatively weak preference to have no young people on the jury. Yet the assortment of rules governing the process may prevent that lawyer

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149 See WALTER F. ABBOTT, ANALYTIC JUROR RATER 8 (1987) (“The attorney should develop a prognosis of the probably composition of the jury and prepare to select jurors using probabilistic reasoning to attempt to achieve a majority of favorable jurors”).

150 See KRESSEL & KRESSEL, supra note 19, at 68 (describing this strategy).

151 A similar strategy is to strive for a hung jury when the majority seems unfavorable. See ABBOTT, ANALYTIC JUROR RATER, supra note 149, at 9.

152 See Brams & Davis, supra note 8, at 989:

[A] venireman that the model prescribes should be accepted as a juror at one stage of the game may have a higher or lower a priori probability than another whom the model prescribes should be rejected at a different stage of the game. Thus, the most partial veniremen may not always be removed—even when both sides play optimally.

153 Courts have consistently held that parties may use peremptory strikes to exclude potential jurors based on their youth. See, e.g., Rice v. Collins, 546 U.S. 333, 341 (2006) (young age accepted as a legitimate basis for peremptory strike, withstanding Batson challenge); Golphin v. Branker, 519 F.3d 168, 180 (4th Cir. 2008) (youth a legitimate basis for peremptory strike of minority juror, withstanding Batson challenge); U.S. v. Helmstetter, 479 F.3d 750, 754 (10th Cir. 2007); United States v. Williams, 214 Fed.Appx. 935 (11th Cir. 2007) (unpublished decision) (peremptory strike on basis of youth permissible); United States v. Bryce, 208 F.3d 346, 350 n. 3 (2d Cir.2000) (peremptory strike based on youth of juror permissible race-neutral justification); Johnson v. McCaughtry, 92 F.3d 585, 593 (7th Cir. 1996) (allowing peremptory strikes to remove jurors under 25 because young persons do not constitute distinct class); People v. Mack, 538 N.E.2d 1107, 1113 (Ill.1989) (prosecutor claimed to routinely strike “young jurors” who lived in rented apartments), cert. denied 493 U.S. 1093 (1990); Townsend v. State, 730 S.W.2d
from optimizing other preferences regarding the jury, such as education level for a case with complex scientific evidence. The defendant, in contrast, may place a much higher value on having young people on the jury than the opposing side places on removing them – perhaps that is the only demographic that the defendant expects to be sympathetic. The numerical limitations on peremptory strikes, however, constrain the parties, due to the stakes involved in each strike, to use some that are unaligned with their first-choice preferences.

A counterfactual thought experiment can shed light on the implications of this discussion for the use of jury consultants. Assume for a moment that we allow unlimited bargaining or negotiation between the parties about the composition of the jury. At first blush, one might assume that jury consultants would seem more valuable to the parties because there is more opportunity to deploy the insights or strategies they provide. Over time, however, this effect would certainly wash out, as parties could negotiate some points that would eliminate whole categories of consultants’ predictions, and the parties would learn more about each other’s preferences through the bargaining process, reducing guesswork and the need for experts. The stakes would be lower for each peremptory strike if the number of strikes were negotiable, as well as if the peremptory strikes were offset by negotiations around the other governing procedural rules. In other words, if the parties could easily negotiate, jury consultants might be

24, 26 (Tex.Ct.App.1989) (prosecutor strikes all young people including blacks is racially neutral explanation); United States v. Mitchell, 886 F.2d 667, 673 (4th Cir. 1989) (allowing the striking of a young juror); United States v. Clemons, 843 F.2d 741, 748-49 (3d Cir. 1988) (determining that a challenge against a young, single juror did not violate Batson); United States v. Garrison, 849 F.2d 103, 105-06 (4th Cir. 1988) (upholding strikes against young black jurors noting that “[n] either the Supreme Court nor this circuit has ever held that striking jurors because their age is similar to that of the defendant is impermissible discrimination”) cert. denied 488 U.S. 996 (1988); U.S. v. LaChance, 788 F.2d 856, 876-77 (2nd Cir. 1986); Barber v. Ponte, 772 F.2d 982 (1st Cir. 1985). See also Carlson, supra note ___ at 976.

154 See Bennett, supra note 9, at 160 (suggesting that using jury consultants along with other resources may aid in developing a strategy to tackle both explicit and implicit biases in potential jurors during voir dire).

155 Naturally, courts would have to delimit some boundaries as otherwise there could be too many potential jurors available.
far less valuable in the process.\textsuperscript{156} To reverse the counterfactual now, it is possible to conclude that jury consultants derive their marketability largely from the strength and rigidity of the current rules, which means their marketability derives ultimately from the lack of negotiation between the parties over jury selection.

\textit{C. Non-Negotiable Governing Rules}

Four types of rules govern jury selection: numerical rules about peremptory strikes, threshold rules for “cause” strikes, sequencing rules governing the order of proceedings, and \textit{Batson} rules for preventing illegal discrimination via the strikes. All of these rules vary from court to court; according to Judge Posner, “Every court system, including the federal, has its own criteria for jury selection, its own procedures for voir dire, [and] its own policy on whether to give preliminary instructions at the outset of a case (which may reduce the need for particular cautionary instructions at the end).”\textsuperscript{157}

The numerical rules vary widely between jurisdictions,\textsuperscript{158} and each jurisdiction allows different numbers of strikes depending on the case: civil, criminal misdemeanor, and felony.\textsuperscript{159} Some allow equal strikes for each side, while others give more strikes to defendants in criminal

\textsuperscript{156} Jury consultancies, however, provide more than peremptory picks for the lawyers; they also coach the lawyers on how to frame arguments and present the evidence in that case in a way to make a favorable impression on the jury that happens to be in the box.

\textsuperscript{157} Anderson v. Griffin, 397 F.3d 515, 520 (2005).

\textsuperscript{158} See \textit{REPORT, BUREAU OF JUSTICE STATISTICS: STATE COURT ORGANIZATION} 2004 at 227-31 Table 41, available at \url{http://bjs.ojp.usdoj.gov/content/pub/pdf/sco04.pdf} (last visited Feb. 11, 2011)(fifty-state tables showing the number of peremptory challenges for criminal and civil cases, per party).

\textsuperscript{159} \textit{Id}. (showing a number of states allow more peremptory strikes for capital cases than for felonies, and more for felony cases than for misdemeanors).
The numbers are standardized, but judges can increase the number if equity requires it in a rare special case. Numerical rules have the greatest variety of the four types of governing rules, and are therefore most often the subject of discussion. The existence of many alternative rules (i.e., numerical limits for peremptory strikes that other jurisdictions might use) makes these the most relevant for Coasian analysis in a situation where the parties do not negotiate or transact.

The threshold rules governing the striking of a juror “for cause” are, in contrast, much more uniform and stringent. “For cause” strikes must be based either on a statutory exclusion of the juror, perhaps due to citizenship or inability to speak English, or based on actual bias as demonstrated during voir dire, or “implied bias,” a legal presumption covering relatives and.

160 Id. Delaware (in capital cases only), Georgia, Maryland, Minnesota, New Hampshire, New Jersey, New Mexico, and South Carolina give more peremptory challenges to defendants than to prosecutors.

161 Id. (showing fifty-state breakdown of additional peremptory strikes permitted for alternates or multiple parties, with footnotes delineating the rules for additional equitable exceptions in certain states). See also Skilling v. U.S., 130 S.Ct. 2896, 2901 (2010)(trial judge gave each defendant two extra peremptory strikes upon request, but denied additional requests for more peremptories).

162 The ancient Greeks and Romans used very large numbers of jurors as a means to dilute biases; ancient Athens used five hundred jurors for most cases, culled by casting lots from a venire of six thousand veniremen. See RUSS VERSTEEG, LAW IN THE ANCIENT WORLD 214-16, 223 (Carolina Academic Press 2002). The ancient Romans eventually settled on seventy-five jurors, twenty-five senators, twenty-five equestrians, and twenty-five tribuni aerarii (property-owning citizens). Id. at 296. The Greeks had no peremptory strikes or voir dire, because the number was large enough to make individual bias essentially irrelevant; they were more concerned about preempting the bribing of jurors through this device than in addressing subjective biases and attitudes in the jurors. Id. at 216, 223. The five hundred jurors voted immediately after the final speeches without deliberation (or even jury instructions). Id. at 222. Perhaps the absence of deliberations reduces the need to ferret out individual biases. In contrast, the ancient Egyptians used groups of townspeople as magistrates (including women), somewhat blurring our modern distinction between judges and jurors, in numbers ranging from three to twelve. Id. t 124.

163 See Mary R. Rose and Shari Seidman Diamond, Judging Bias: Juror Confidence and Judicial Rulings on Challenge for Cause, 42 LAW & SOC’Y REV. 513, 513 (2008):

The U.S. Constitution entitles a criminal defendant to trial by an impartial jury. During jury selection questioning (called voir dire), trial judges are charged with evaluating whether each prospective juror is able and willing to evaluate evidence and to reach decisions with an open mind. This determination presents a challenging task. Ample evidence reveals that perceptions and decisions are necessarily influenced by prior beliefs and experiences. Indeed, the diversity of backgrounds and experiences on the jury is counted as one of its great strengths. The key, then, is to assess when the attitudes and beliefs that are formed by background and experience constitute
other close associates of the parties themselves. The strikes “for cause” that a party may assert have no numerical limit, but the threshold is so high that these are self-limiting; very few potential jurors will meet the requirements of a “cause” dismissal from the pool. In addition, unlike most peremptory challenges, “for cause” strikes always involve a decision or ruling by the judge, rather than the attorneys, so there would be almost no bargaining about these strikes even if such bargaining were otherwise common. Cause-based strikes are nonetheless important, at least as a safeguard or legal backstop, even if they are less interesting from a Coasian standpoint due to a paucity of alternate protocols. Critics have attacked the “cause” strikes as well as the peremptories; Justice O’Connor wrote that the “for cause” rules invite “courts to search for the most ignorant, poorly informed citizens in the community to serve as jurors.”

The sequencing rules are also important, but there are only three or four alternative rules across jurisdictions in this category; sequencing rules are more varied than “for cause” thresholds but less varied than numerical limits on peremptories. “Struck jury” methods deploy all peremptory strikes while potential jurors are still in the venire, and then cull the final panel from this “struck” pool, either in order of seating or by random selection. Many states, such as Texas, have the attorneys submit their respective lists of peremptory strikes to the judge at the end of

164 See HANS & VIDMAR, supra note 18, at 71-72.

165 O’CONNOR, supra note 3, at 218.

166 See, e.g., JEFFREY T. FREDERICK, MASTERING VOIR DIRE AND JURY SELECTION 6-9, 179-80 (ABA Publ. 1995) (describing the two main sequencing rules as “sequential” and “struck” methods, and explaining further variations within each category); WILLIAM J. BRYAN, JR., THE CHOSEN ONES: THE PSYCHOLOGY OF JURY SELECTION 117-18 (Vintage Press 1971).

167 See Michael T. Nietzel & Ronald C. Dillehay, The Effects of Variations in Voir Dire Procedures in Capital Murder Trials, 6 LAW & HUMAN BEH. 1 (1982), showing “significantly more sustained defense challenges for cause under conditions of individual sequestration of venirepersons during voir dire than when voir dire is conducted en masse in open court.” Id. See also JAMES P. LEVINE, JURIES AND POLITICS 54 (1992).
voir dire, so that the panel emerges from those remaining in the pool (the “for cause” strikes are done more publicly during voir dire itself). Other states have one-by-one peremptory strikes from the pool, sometimes alternating between the parties, more publicly than in the first model. In other words, “struck method” sequencing can vary significantly depending on whether the peremptory strikes are simultaneous/blind or alternating/visible, and whether the seating of the final panel follows the seating order of the venire or is random.

“Jury box” or “sequential” methods of voir dire postpone peremptory strikes until the impaneling of individual jurors in the box, which prevents the parties from “wasting” peremptory strikes on veniremen who were not going to be part of the panel anyway. The Supreme Court once described this as the traditional English sequence that was a minority rule in the States, but it is not clear which is more popular now; California uses the “jury box”

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168 See FREDERICK, supra note 166, at 7, describing a similar procedure.

169 See Frank, supra note __, at 2086 (describing Minnesota’s alternating sequence for peremptory strikes, with each party required to use all of their peremptories in the process).

170 See generally Roth, Kadane, and Degroot, supra note __. Seriatum jury selection has two interesting effects on the strategies of the parties: lawyers will sometimes pass on their turn in order to “get behind” the other party, in hopes that opposing counsel will strike some of the same undesirables from the jury pool using her peremptory strikes instead, and the practice of saving one unused peremptory strike in case a surprise happens when the last juror is seated. Zalman & Tsoudis, supra note __, at 358.


172 Note that the nomenclature varies in this area; for example, Pennsylvania refers to the “struck” method as the “list” system and the “sequential” method as the “individual” system. See, e.g., Rhodes v. Varano, No. 08-3236. 2009 WL 805506 *10 (E.D.Pa. March 26, 2009).

173 See FREDERICK, supra note167, at 179-80 (referring to this mechanism as “the sequential method”).

174 Id. at 180-82, discussing this feature of the “struck method” and suggesting strategies for addressing it.

175 St. Clair v. U.S., 154 U.S. 134 (1894)(upholding this method and describing it as the more common practice in England, but the minority rule in the States).
method, for instance. As with the struck methods, there are variations in when the parties use their strikes for the panel (most seem to use the strikes to remove individuals after a group of twelve or more is in the jury box, but others might move jurors into the box one by one, allowing strikes along the way). There is also variation in whether replacements come from the remaining pool in their seating order or by random selection. The jury box or sequential method presents different information problems for the parties than the struck method. The former reveals the overall composition of the final panel earlier, but keeps parties in the dark about who might replace whatever jurors they remove; the latter reveals more about the potential jurors in the pool but hides the composition of the final panel until the end.

A subset or component of the sequencing rules is the order for selecting the venirepersons to sit on the panel, regardless of the timing of the peremptory strikes (i.e., “struck” vs. “sequential”). Some jurisdictions pick members for the final panel in order of their assigned number or seating during voir dire, until reaching the requisite number. Texas follows this procedure, which is the justification for its controversial shuffle rule – if a lawyer observes that the front two rows of the venire have too many of the unfavorable prospective jurors, she can request a random reordering of the entire venire before proceeding with the strikes. The numerical-order selection process prompts those who want out of jury duty to linger at the back

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176 People v. Avila, 133 P.3d 1076, 1109 (Cal., 2006).
177 Id. at 1110 (“Defendant maintains that, under the variation of the “jury box” system employed here, he was unable to make informed exercise of peremptory challenges because he did not know the composition of the final jury.”); U.S. v. Esparza-Gonzalez, 422 F.3d 897, 902 n.7 (9th Cir. 2005).
179 See LEVINE, supra note 166, at 54; BRYAN, supra note ___ at 117-18.
of the line as they proceed into the courtroom. The opposing side can request a shuffle if the new seating is similarly prejudicial. Many other states use a random selection process, meaning jurors could come from anywhere in the venire pool. The governing rule in a given jurisdiction influences the strategy for using peremptory strikes.

The simultaneous/blind method for peremptory strikes (followed in Texas and some other states) prevents the lawyers from seeing how the other side’s strikes affect the remaining pool.\textsuperscript{181} Under the alternating/visible approach, as each side removes an individual from the panel or pool, it presents a new strategy scenario for the opposing counsel; the remaining venire can change a lawyer’s calculations about which of the remainders she should prioritize for her remaining strikes.\textsuperscript{182} The parties have more information than under the blind approach when exercising each strike, but it complicates the strategizing to have to modify the calculations repeatedly. The type of procedure affects not only the optimal strategy for each party, from a game-theoretical perspective, but also the impact of the other rules governing jury selection, such as the number of peremptory strikes or the difference in strikes available to the prosecutor and defendant.\textsuperscript{183}

The multiple-modifications problem has given rise to an obscure variant on sequencing that deserves mention: the “backstrike” procedure available in Louisiana\textsuperscript{184} and Florida,\textsuperscript{185} by which

\textsuperscript{181}See Finkelstein & Levin, \textit{supra} note 100, who focus on the problem of “overstrikes” or jurors whom both sides strike with a peremptory challenge because of the double-blind method of jury selection.

\textsuperscript{182}See \textit{Frederick}, \textit{supra} note 166, at 179-82; \textit{Levine}, \textit{supra} note 166, at 54.

\textsuperscript{183}Brams & Davis, \textit{supra} note 8, at 968.

a party may use a peremptory strike to remove a juror after previously accepting the juror on the panel. The backstrike method has obvious interplay with the other jury selection rules, allowing more hedging by the attorneys as they have a backup if their other selection strategies seem to fail. 

For purposes of game theory modeling, Brams and Davis provide a somewhat different taxonomy for sequencing rules, focusing on the decisions each lawyer must make when using a peremptory strike rather than on the physical movement of the jurors within the courtroom:

[T]hree procedures for the exercise of peremptory challenges seem most common, after challenges for cause have been rendered:

1. Individual challenge. Challenges are exercised after the examination of each venireman.

2. Group challenge. Challenges are exercised after the examination of a group of veniremen (usually 12). Those excused are replaced, and challenges exercised again, until both sides have exhausted all their challenges or indicated their satisfaction with the jury.

3. Panel challenge. Challenges are exercised only once after the examination of a panel of veniremen equal to the sum of the number of jurors to hear the case (usually 12) plus the number of peremptory challenges allowed each side.

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187 See Hamilton, supra note ___ at 977-93 (describing and critiquing the procedure in Louisiana);

188 Brams & Davis, supra note 8, at 968. They favor the panel challenge method:

The panel-challenge procedure is the only one of the three types of jury selection procedures that we discussed that can guarantee removal of the most partial veniremen, at least as perceived by the two players. With challenges rendered only after all veniremen who can possibly serve on the jury have been examined, each side can simply strike those it considers most unfavorable to its side up to the limit of its peremptories. Since this action requires no strategic calculation on the part of defense or prosecution, the selection of an impartial jury-one that eliminates the "extremes of partiality"-is ensured, given that each side can make valid judgments about the "partiality" of veniremen. We believe, therefore, that the cause of equal justice can best be advanced by the panel-challenge procedure, which renders strategic calculations irrelevant and thereby promotes the selection of an impartial jury.

Id.
The point here is that even if each of the possible sequential rules is fair and reasonable, the rules have a significant impact on the outcome because the parties are not free to bargain around it within the jurisdiction. The defendant cannot propose, for example, that a voir dire in Texas follow the Maryland pattern instead for their case. In Coasian terms, therefore, the rule has importance. Barry Sheck attributed his spectacular loss in the Louise Woodward murder trial (the notorious English au pair case in 1997) to “peculiarities of the jury system in Massachusetts,” which randomly selects jurors from the pool of remaining veniremen after the peremptory strikes are complete.

The final set of rules governing jury selection are the Batson progeny rules that check against racial or gender discrimination in the use of peremptory strikes. After one litigator strikes a minority juror, the opponent (usually the defendant) can challenge the strike, demanding a non-racial reason. Almost any reason will suffice, even if it falls below the “for cause”

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189 Some courts have disagreed, calling the struck method unacceptable. See, e.g., U.S. v. Esparza-Gonzalez, 422 F.3d 897 (9th Cir. 2005); People v. Miller, 307 N.W.2d 335, 336 (Mich. 1981) (finding struck method improper under state law).

190 See BRYAN, supra note ___ at 117 (explaining how the various sequencing rules may affect a trial).

191 See KRESSEL & KRESSEL, supra note 19, at 29 (citing Barry Sheck’s November 6, 1007 interview on Court TV’s Cochran and Company).

192 See Judging the Prosecution: supra note 9, at 2134.

193 See Bennett, supra note 9, at 162-63:

For example, a federal district court found no Batson violation, even though the prosecutor struck a potential juror, perceived to be Indian and probably Hindu, because "Hindus tend . . . to have feelings a good bit different from us" and the prosecutor preferred an "American juror." (States v. Clemmons, 892 F.2d 1153, 1160 (3d Cir. 1990)) Likewise, neither a state trial court nor a federal appellate court on habeas appeal found a Batson violation when a prosecutor struck the lone African American in the jury pool because he "worked" in an unknown capacity at a community college and gave "short form" answers on the juror questionnaire. The prosecutor claimed that he routinely struck everyone "involved in education," yet he left a retired schoolteacher on the panel. In addition, other prospective jurors who gave "short form" answers remained on the panel, and the judge even admitted that he "encouraged" the rapid completion of the forms by potential jurors. (Rankins v. Carey, 36 F. App’x 296, 297 (9th Cir. 2002)) Finally, another state trial court found no Batson violation where a black potential juror was struck, in part, for dying her hair blonde, where the prosecutor claimed that black women who dye their hair blonde are "not cognizant of their own
threshold, but the reason should appear to be more than a mere pretext for racial
discrimination.\textsuperscript{194} Obviously, this standard is ambiguous enough to allow leeway for invidious
discrimination to continue,\textsuperscript{195} which is the major source of criticism of the peremptory system
overall. Each of the methods, of course, has pros and cons, and each is a reasonable way to pick
fair juries.\textsuperscript{196}

The “\textit{Batson} banter” contains basic elements of bargaining and persuasion. From a Coasian
standpoint, the lawyers’ are “trading,” though mostly in the form of intangible, unquantifiable
personal equity – the impressions they make on the judge, jurors, and their own clients. Raising
a \textit{Batson} challenge also carries the “cost” of prolonging the proceedings and forfeiting some
potentially favorable jurors if the judge decides to start over with a new pool.\textsuperscript{197} Unlike the other
three types of rules, \textit{Batson} and its progeny undermine the Coasian significance for the other
rules by lowering transaction costs from their maximum level. \textit{Batson} rules create a scenario
where negotiation between the litigants – albeit highly scripted and limited to one juror at a time
– actually does occur during part of the jury selection phase. It is hard to quantify how much the
\textit{Batson} rules undermine the Coasian import of the other rules in jury selection. If \textit{Batson}
challenges occur in only 25\% or so of criminal cases, or 10-20\% of the time in civil cases, and if
the challenges are typically for only one or two of the jurors, the undermining effect may be

\textsuperscript{194} See \textit{Judging the Prosecution}, supra note 9, at 2134.

\textsuperscript{195} See id at 2135.

\textsuperscript{196} See Snyder v. Louisiana, 552 U.S. 472, 475 (2008) (describing procedure wherein the trial court removed jurors
who were excludable or ineligible, and then empaneled a 13-juror panel at random; both parties then questioned the
jurors as a whole and individually, and submitted their peremptory and for-cause challenges; judge also allowed the
parties “backstrikes,” whereby they could strike a juror even after they have accepted her, up until the jury is
sworn.).

\textsuperscript{197} See, \textit{e.g.}, \textit{OVERLAND}, supra note 19, at 95.
relatively minor. The fact that judges usually overrule the *Batson* challenge and allow the strike\(^\text{198}\) – accepting the lawyer’s proffered reason – further diminishes the effect compared to the overall regime.

In theory, all four types of rules governing jury selection would matter most where stakes are highest or where the merits do not seem to favor either party, which is true of all the procedural rules for trials. Their significance is not equal in every case, and even when they matter most, they may not be truly dispositive or determine the outcome. Even so, a rule can influence the outcome, and therefore have great significance, without necessarily being determinative.\(^\text{199}\)

The interplay between the rules is also significant and has strategic implications in the absence of bargaining. For example, the Ninth Circuit has held that the waiving peremptory strikes when using the “struck” sequencing regime can create grounds for a *Batson* challenge, as the waiver keeps minorities in the jury pool from replacing jurors already on the panel,\(^\text{200}\) but held that the “jury box” method would not.\(^\text{201}\) Texas appellate courts have reached the opposite conclusion on this same question;\(^\text{202}\) the point is that the rules do not function in isolation from one another.

To further highlight the interplay between the four types of rules, consider that the ancient Greeks made peremptory strikes, or other screening devices for individual bias, unnecessary by

\[^{198}\text{See OVERLAND, supra note 19, at 96-97; Judging the Prosecution, supra note 9, at 2136.}\]

\[^{199}\text{See Judging the Prosecution, supra note ___, at 2140 (observing that prosecutors make be more willing to negotiate a favorable plea bargain where they fear that they would not be able to control the racial composition – and hence the presumed bias – of a jury if they went to trial).}\]

\[^{200}\text{U.S. v. Esparza-Gonzalez, 422 F.3d 897 (9th Cir. 2005).}\]

\[^{201}\text{Id.}\]

\[^{202}\text{See Mayes v. State, 870 S.W.2d 695, 699 (Tex.App.1994); Russell v. State, 804 S.W.2d 287, 290-91 (Tex.App.1991). In both cases the trial court appears to have used a version of the struck jury system.}\]
having hundreds of jurors in each trial,\textsuperscript{203} a dilution that made bribery of the jury infeasible,\textsuperscript{204} and they selected jurors from a large venire through elaborate procedures to guarantee randomness.\textsuperscript{205} Further undermining the need for bias screening rules was their disuse of jury deliberations before voting on a verdict; there was no opportunity for one biased juror to influence the other 499 voting on the case.\textsuperscript{206} In other words, rules for screening individual biases are more necessary where juries are a handful of people, and even more so where the panel deliberates. Interestingly, the ancient Greeks also had a procedure for the parties to make agreements to use arbitration instead of a jury.\textsuperscript{207}

In our modern American system, game theory models offered by other commentators suggest that where both parties have equal numbers of peremptory strikes, additional strikes (even given equally) will favor the defense once the number exceeds seven apiece.\textsuperscript{208} Similarly, when the defense has a larger number of peremptory strikes, as occurs in some jurisdictions in criminal trials, not only does the defense have more opportunities to de-select jurors, but the number of jurors on the final panel impacts the strategic result – a twelve-member jury favors the defense more than a six-member jury in such circumstances.\textsuperscript{209}

\textsuperscript{203}See VERSTEEG, supra note 163, at 215-16 (Greeks customarily used five hundred jurors drawn by lot from an annual venire of six thousand; some special cases used more jurors).

\textsuperscript{204}Id. at 216, 223.

\textsuperscript{205}Id. at 215.

\textsuperscript{206}Id. at 222.

\textsuperscript{207}Id. at 221.

\textsuperscript{208}See Brams & Davis, supra note 8, at 989.

\textsuperscript{209}Id.
Returning to the Supreme Court’s most recent decision about peremptory strikes, the *Skilling* case,\(^{210}\) we can find a more nuanced reading of the holding in light of this discussion. Skilling argued, among other things, that it unfairly prejudiced his case for the judge to decline his request for several extra peremptory strikes beyond the first two the judge had granted.\(^{211}\) The Court found no prejudice in such a limitation, but based its conclusion on ambiguity of the specified jurors’ biases,\(^{212}\) the extensiveness of the voir dire questioning, and the fact that the empaneled jury acquitted Skilling on many of the charges.\(^{213}\) Interestingly, the Court also mentioned in passing that the parties had made some sort of agreement to exclude a broad category of potentially biased jurors, a rare exception to the general practice of zero coordination in jury selection.\(^{214}\)

The problem is that the Court answers Skilling’s point about the number of peremptory strikes by looking at the actual jurors for proof of actual pre-existing bias, insinuating that the number of strikes does not matter. The holding about what constitutes prejudice in this case may be correct, as a pure question of law, in the sense that the Court appropriately set thresholds for what passes for a fair enough trial. The point here is not that the Court reached the wrong result; rather, it probably reached the correct result, but missed Skilling’s point along the way. Skilling’s point, at least on this issue of the appeal, was that having more peremptory strikes

\(^{210}\) 130 S.Ct. 2896 (2010).

\(^{211}\) *Id.* at 2910-11. Skilling also objected to the brevity of the voir dire questioning – a mere five hours – but the Court concluded this was sufficient given that the entire venire had previously completed a 77-item questionnaire, mostly drafted by Skilling’s counsel. *Id.* at 2919.

\(^{212}\) *Id.* at 2924-25.

\(^{213}\) See *id*.

\(^{214}\) *Id.* at 2909 (“The parties agreed to exclude, in particular, ‘each and every’ prospective juror who said that a preexisting opinion about Enron or the defendants would prevent her from impartially considering the evidence at trial.”).
would have made a significant difference, and might have affected the outcome of the case. The Court ignored that question and instead found that a new trial was unwarranted based on the jurors who actually rendered the verdict, and therefore implied that the number of peremptory strikes was inconsequential. The reasoning is circular. The threshold for triggering a retrial is a separate question from whether additional peremptory strikes would have affected the outcome. The former is a purely legal question, an instance of necessarily arbitrary line-drawing; the latter is a pure question of fact, regardless of its legal consequences. A Coasian perspective would recognize that the number of strikes can matter in a situation where there is little or no negotiation, even if the law does not permit undoing the result due to other policy concerns or rules.

There are also rules about the breadth of coverage for summons, and commitment questions used by lawyers in voir dire, but these are a bit outside the scope here, as the former does not involve decisions by the parties and the latter pertains to a separate purpose from the parties’ viewpoint (persuasion rather than jury composition). Rules about what questions are appropriate for voir dire overlap with the issue of whether the judge or the attorneys ask the

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215 Id.

216 See generally Kadane & Kairys, supra note 7; Franklin, supra note 8 (using probability modeling to demonstrate that defendants should often have more peremptory strikes than prosecutors).

217 The more common terms for this is “challenging the entire pool,” arguing that the summons process was so defective that it failed to produce a representative jury. See BLOOMSTEIN, supra note 105, at 67-70.


219 Louise Kaplow has suggested, albeit in passing, that rules eliciting general rather than specific verdicts impact jury selection indirectly by limiting the information available after a verdict about what jurors find most persuasive, which would be useful for the litigators in subsequent cases. See Louis Kaplow, The Value of Accuracy in Adjudication: An Economic Analysis, 23 J. LEGAL STUD. 307, 330 n. 56 (1994) (“Prediction of jury behavior is impeded by using general verdicts rather than detailed special questions and by limiting lawyers’ abilities to interview jurors afterward.”). This is an important point, but is generally tangential to the discussion here because the impact of the rule is on cases other than the one it directly governs.
questions, but this is unlikely to be a subject for bargaining as discussed here, as lawyers think of it less as part of screening than beginning the persuasion process. These would be fertile subjects for future research, but would merely distract from the discussion here rather than contributing to it.

D. Some Caveats and Objections

One caveat to the foregoing discussion is that jury selection would still present transaction costs even if we customarily had bargaining or negotiation between the parties. The main point here is that we have artificially maximized the transaction costs in this phase of litigation, mostly through customs and norms rather than legal rules, and this gives particular import to the legal rules governing this area. Even if our trial routines changed, or if they had developed differently, there would still be some endogenous transaction costs involved. The legal rules would still have some bearing, albeit less than now. It is unavoidable that bargaining would consume some time, which translates into billable hours for defense lawyers and opportunity costs for plaintiffs or prosecutors. Some information asymmetries between the parties about

220 See PAULA DIPERNA, JURIES ON TRIAL: FACES OF AMERICAN JUSTICE 92 (Dembner Books 1984) (explaining the various practices in different courts and noting that most lawyers prefer to be engaged in the questioning instead of having the judge handle it).

221 Id.; see also FREDERICK, supra note 166, at 6 (noting that most attorneys believe prospective jurors are less open and honest when answering questions from judges out of respect or intimidation); Bennett, supra note 9, at 160 (“... empirical research suggests that potential jurors respond more candidly and are less likely to give socially desirable answers to questions from lawyers than from judges.”); Susan E. Jones, Judge-Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor, 11 LAW & HUM. BEHAV. 131 (1987).

222 The historical development of peremptory strikes and the procedures governing them appears to be a series of accidents and reactionary moves by legislatures, not a coordinated, well-thought program. For example, some writers attribute to Justice John Marshall the advent of the peremptory strike as a device for ferreting out subjective, latent biases in the jurors. See DIPIERNA, supra note 220, at 92. During the treason trial of Aaron Burr, Marshall held that a biased state of mind was as valid a ground for striking a juror as if he were a relative of the defendant. Id. “Marshall’s ruling made suspect terrain of the juror’s mind and gave license to attorneys to prospect, as well as cultivate there. Once this was done, it was very hard to undo.” Id.
juror characteristics, and especially about aspects of each side’s case that could provoke a strong reaction in jurors, would always be present. Finally, as with any type of negotiation within the litigation process, the actors’ reputational concerns and related professional interests come into play; but these are mostly agency costs between clients and lawyers.

A second caveat is that allowing bargaining would not necessarily eliminate whatever latent racism is currently present in jury selection. As parties would be freer to exchange based on their preferences, those with strong race preferences would probably have more opportunity to give weight to those values. This does not mean, however, that the jury itself would become more unfavorable toward minority defendants; the opposite would probably occur. The current non-negotiation system of jury selection significantly raises the stakes of each peremptory strike and does not allow the relative values or priorities of parties to manifest. Prosecutors may currently be using their peremptory strikes to remove minority jurors even if the prosecution values their removal less than the defendant values their presence. If prosecutors generally believe more strongly in the merits of their case, and minority defendants more strongly in the perspective of the jurors (i.e., shared race), then a negotiation regime for jury selection would presumably produce juries with more minorities. To the extent that Batson protections are partly

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223 See, e.g., DOUGLAS G. BAIRD, ROBERT H. GERTNER, AND RANDAL C. PICKER, GAME THEORY AND THE LAW, 244-51 (1994); LOUIS KAPLLOW AND STEVEN SHAVELL, DECISION ANALYSIS, GAME THEORY, AND INFORMATION 59-63 (2004).


225 See, e.g., OVERLAND, supra note 19, at 53-81.
for the jurors and their community,\textsuperscript{226} as opposed to the defendant’s benefit, there would be a positive externality or side effect of employing more bargaining in the jury selection process.

One anticipated objection to the application of the Coase Theorem in this article is that multi-party litigation may indeed involve negotiation and bargaining between the parties on the same side of a case; most jurisdictions have no rule preventing co-defendants from collaborating beforehand on jury selection to avoid duplicative use of their peremptory strikes.\textsuperscript{227} This is a good point, but it merely seems to validate, rather than undermine, the central point here, which is that the rules governing jury selection have more impact when there is zero bargaining; in those comparatively rare circumstances where there is limited bargaining over strikes by co-defendants or co-plaintiffs, it diminishes the effect of the rules commensurately.\textsuperscript{228}

A second anticipated objection might be that a system of negotiated jury selection could be nightmarish for many reasons. It could prolong the pre-trial process and waste (or at least consume more) judicial resources, it would allow parties to engage in more explicit jury stacking, and it could create an atmosphere where prospective jurors think less in terms of doing their civic duty and more in terms of rooting for one side or the other. These are all valid

\begin{itemize}
  \item \textsuperscript{226} \textit{Id.} at 105-07.
  \item \textsuperscript{227} One of the most interesting cases in this regard is \textit{U.S. v. Gibbs}, 182 F.3d 408, 435-36 (6th Cir. 1999):
    \begin{quote}
      Here the district court chose to conduct a majority vote when the defendants could not agree on particular jurors. When the vote resulted in deadlock, the district judge simply moved on. This resulted in the impaneling of two jurors that four of the original eight defendants wished to strike. Although we think, with the benefit of hindsight, that it would have been better for the district judge to have allocated a certain number of challenges to each defendant in light of the conflict that arose, none of the defendants explains how the district court’s method prejudiced the trial or interfered with the right to an impartial jury.
    \end{quote}
  \item \textsuperscript{228} \textit{See also} Skilling v. U.S., 130 S.Ct. 2896, 2900-01 (2010); U.S. v. Martinez-Salazar, 528 U.S. 304, 314 (2000); United States v. Polichemi, 219 F.3d 698, 705-06 (7th Cir. 2000).
\end{itemize}
concerns about departing from the way our system currently works, and there are probably many other potential pitfalls as well. Yet this misses the point of this article; the purpose is to highlight the lack of negotiation during jury selection, which is odd given its prevalence throughout litigation as a whole, and to explain that the lack of negotiation gives greater significance to the relevant rules than we might have otherwise imagined. The point is not to advocate for changing the amount of negotiation, but rather to argue that changes in the existing procedural rules can have a major impact.

IV. UNCERTAINTY, AMBIGUITY, AND BLACK SWANS IN VOIR DIRE

In the current system of jury selection, we presume that one side’s preferences are the inverse of the opposing party’s – a juror who seems sympathetic to the plaintiff will be as repugnant to the defendant as she is appealing to the plaintiff. As each lawyer strikes jurors that seem unfavorable, this is removing the other side’s favorites in the pool, except where their predictions are particularly divergent about one individual. In other words, each side cancels out the other’s first-order preferences and drives the panel toward maximum uncertainty for both sides, which makes settlement less likely until other developments come. “Uncertainty” here refers to Knightian uncertainty, also called “ambiguity” in the decision theory literature. Knightian

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uncertainty is the arena of “unknown unknowns,” situations where we cannot quantify the risks involved either due to lack of complete information, or to openings for unforeseeable events (the “black swan”\textsuperscript{230} events). In other words, with jury selection, we can subdivide the uncertainties involved into two main categories. The incomplete or unknowable “present” information would be the remaining jurors having hidden biases that the parties cannot discern.\textsuperscript{231} The black swan factor refers here to jurors having no pre-existing biases in the case, but instead being too “easy” or persuadable by extraneous, irrelevant information or events during the trial.

Ambiguity or uncertainty – whether from incomplete discernment of bias or from openings for strange turns of fortune – would make agreements like settlements or stipulations more difficult for the parties, as mentioned above. Greater predictability for an outcome, objectively speaking, fosters consensus about the expected value or losses from going through with the trial, so parties are more likely to settle as the outcome becomes more evident. Conversely, uncertainty discourages settlements and stipulations because the parties’ guesses about the outcome diverge,\textsuperscript{232} and because of a type of loss aversion called Ellsberg’s Paradox\textsuperscript{233} (fearing

\textsuperscript{230} See generally NICHOLAS NASSIM TALEB, THE BLACK SWAN: THE IMPACT OF THE HIGHLY IMPROBABLE (2007), which emphasizes the ubiquity of unforeseen or unforeseeable events, some of which have catastrophic consequences for certain individuals.

\textsuperscript{231} See Bennett, supra note 9, at 152.

A battery of state and federal laws are aimed at eradicating intentional discrimination, that is, discrimination based on explicit bias, from the workplace, from housing, and from the dissemination of public services. Implicit biases, on the other hand, are unstated and unrecognized and operate outside of conscious awareness. Social scientists refer to them as hidden, cognitive, or automatic biases, but they are nonetheless pervasive and powerful. Unfortunately, they are also much more difficult to ascertain, measure, and study than explicit biases.

\textsuperscript{232} See, e.g., OVERLAND, supra note 19, at 13; see also Gruner, supra note ___ at 1039 (discussing how the closeness of “case value estimates, in conjunction with the costs of litigation, seem likely to be determinants of case settlements at every stage of litigation.”).

\textsuperscript{233} See Daniel Ellsberg, Risk, Ambiguity and the Savage Axioms, 75 Q. J. ECON. 643 (1961). Ellsberg conducted now-famous experiments in which subject faced two urns, M and N, which each contained on hundred red or black balls. Subjects were informed that Urn M contained exactly half red and half black balls; the other contained an unknown proportion of each. They placed bets on the subject’s ability to draw a black ball from either urn.
“unknown unknowns” more than known risks). Most of the decision theory literature treats trials as unitary events when discussing the uncertainty for the parties, but lawyers and law students know that litigation is a sequence of distinct, severable segments, each presenting different odds (risks) and information problems to a litigant, and each presenting its own opportunity for settlement. The composition of the jury – that is, its tilt – is an unknown from the outset of litigation, of course. Even so, the voir dire process puts the litigants through the psychological process of watching the jury become increasingly uncertain as strikes remove the most predictable veniremen from the pool. The actual panel (twelve is the traditional and most common number), therefore, has mostly jurors whose pre-existing biases eluded the litigators during voir dire, and/or those whose prior commitments seem weakest, meaning they are easily swayable and therefore unpredictable.

For the parties observing and participating in this process, therefore, there is a crescendo of uncertainty building up to the seating of the final panel. This suggests that final settlements or stipulations about issues are comparatively less likely to occur at that moment in the trial sequence than at others, such as when a star witness fails to appear to testify (clearly changing the odds of winning) or when a witness surprises the parties with particularly damaging testimony during direct examination. Of course, the uncertainty about the jury may dissipate as the trial proceeds and the lawyers observe the jurors’ reactions to testimony and argument.

Participants showed a strong preference for Urn M, for which they knew the likelihood of winning (fifty percent). This represented a contradiction to the classic ration-actor model of economic thought, because the subjects had no rational basis for such a consistent preference—uncertainty was just as likely to favor them, especially when compared to a fifty-fifty chance, as it was to disfavor them. Numerous subsequent experiments have verified this pattern of human decision-making; which decision theorists now call Ellsberg’s Paradox. Uncertainty can take the form of straightforward ambiguity—the individual knows the set of possible outcomes, but cannot ascertain the relative likelihood of one as opposed to another.

See Finkelstein & Levin, supra note 100, emphasizing the increased uncertainty that results from larger numbers of peremptory strikes, albeit not connecting it to settlement prospects as I have done here.
There is a moment in the litigation sequence, however, where the jury is most opaque to the parties, and this moment of jury opacity is a significant obstacle to settlements or stipulations until the opacity or uncertainty fades and the jury’s reactions become increasingly observable.

This point escapes notice in most of the literature on jury selection. Our process of voir dire and peremptory strikes maximizes uncertainty for the parties, at least temporarily, by creating a significant moment of jury opacity, a segment when the likelihood of settlement is probably at its nadir. “Stacking” the jury is really stacking it for uncertainty or unpredictability, because both sides try to eliminate the predictably unfavorable jurors. The result or product of jury selection is a “fair” jury more in the sense of information symmetries for the parties (or better, ignorance symmetry) than having a panel guaranteed to be opinion-neutral for this case. Juries are therefore “fair” in the sense of equal – equally uncertain or unpredictable for each side – but not necessarily “fair” in the sense of being selected for objectivity or good judgment.

Jury consultants and voir dire manuals for lawyers suggest that a favorable jury is obtainable simply by eliminating the known undesirables from the pool. With each side trying to do the same thing, the only thing obtained is a pool with an unknown number of undesirables for each side.

There is a latent paradox in our jury selection system: having more strikes obviously will prolong the proceedings and thus add to the costs of trial, which lowers the incentives for plaintiffs to file a case at the outset. At the same time, allowing more strikes would raise uncertainty (by removing predictable jurors), and this increased uncertainty lowers settlement

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235 See, e.g., OVERLAND, supra note 19, at 20-28; Gillian Drake, Deselecting Jurors Like the Pros, 34 Md. B.J. 18, 23 (2001).

236 See United States ex rel. Darcy v. Handy, 351 U.S. 454, 462 (1956) for fairness as the justification for peremptory strikes.
occurrence once we get through this phase. Settlement negotiations before trial occur in the shadow of the trial, as do decisions about whether to file a case in the first place, so the numerical rules about peremptory strikes can have some screening effect on the cases that lawyers file, and which filed cases go to trial.

As any increase in the number of peremptory strikes usually benefits the opposing side as much as one’s own, why then do most attorneys want more strikes? Perhaps each perceives herself slightly better at selection; if so, the availability of more strikes should amplify the perceived advantage. The bilateralism of this overconfidence seems to cancel out; if each side is particularly good at jury selection, as they think they are, then neither has a real advantage. Moreover, the self-confidence seems lopsided toward the ability to discern pre-existing biases, ignoring the easily swayable jurors, who present the black swan problem. This is also a persistent feature of the jury selection literature (CLE manuals, handbooks, brochures from jury consultants, etc.). There is a pervasive underlying assumption that extreme opinions always go together with stubbornness or recalcitrance (in the prospective jurors). Many people who say extreme things quickly change their minds when exposed to an argument on the other side for the first time. The emphasis of the jury consultants and the lawyers’ training manuals is entirely

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237 See, e.g., OVERLAND, supra note 19, at 13.
239 See KRESSEL & KRESSEL, supra note 19, at 97 (describing empirical studies demonstrating remarkable attorney overconfidence and general incompetence at predicting juror biases).
240 Id. at 67, noting a few spectacular failures by jury consultants.
241 See HANS & VIDMAR, supra note 18, at 73, describing the contradictory rules of thumb one encounters in the jury selection literature about which stereotypes are the best predictors.
on predicting each juror’s bias as if those were static and stable. The literature seems to assume that everyone in the world is either enlightened (open-minded and fair) or bigoted (that is, both extreme AND stubborn). Yet many people cave quickly on their overboard positions, especially when they are merely parroting what they have heard other people say on the subject.\textsuperscript{243} Mainstream beliefs can be just as tenacious as deviant ones.

The mistake I am describing here is that litigators regularly eliminate jurors who have a bias that seems extreme (like hating or loving cops), but which the juror holds weakly, easily changing her mind if presented with any concrete evidence to the contrary in the case at hand.\textsuperscript{244} The lawyer or consultant correctly flags the juror’s “predictors” or preferences, but ignores the fact that some people within a group of shared viewpoints (like liberals or conservatives) waver easily while others are recalcitrant. Whether we call these jurors malleable, pliable, or gullible, they present an opaque hazard to each side. Worse, the lawyer allows jurors on the panel whose pre-existing biases may seem only mildly unfavorable, but who are recalcitrantly so – perhaps it would require overwhelming evidence or argument to move them from their slightly unfavorable position.\textsuperscript{245} Similarly, in their obsession with profiling the biases for or against defendants, many seem to ignore the leadership traits (or lack thereof) in potential jurors.\textsuperscript{246} A slightly

\textsuperscript{243} See generally Kaushik Mukhopadhaya, \textit{Jury Size and the Free Rider Problem}, 19 J.L. ECON. & ORG. 24 (2003)(arguing that in larger juries, each juror pays less attention due to the free-rider problem, thereby diminishing the quality or correctness of the jury’s decisions).

\textsuperscript{244} See John R. Hepburn, \textit{The Objective Reality of Evidence and the Utility of Systematic Jury Selection}, 4 LAW & HUMAN BEH. 89, 99 (1980)(discussing the interplay of demographic juror predictors with juror attitudes about evidence, proof, and causation).

\textsuperscript{245} According to the most recent survey data on juror beliefs, “53 percent believed ‘preponderance’ meant jurors need to believe a plaintiff’s case beyond a reasonable doubt, and 19 percent thought it meant they had to be 100 percent convinced by the plaintiff’s case.” Correy E. Stephenson, \textit{Study Offers Trial Lawyers Insights On Jurors’ Thinking}, LawyersUSA (October 25, 2010), available at http://lawyersusaonline.com/blog/2010/10/25/study-offers-trial-lawyers-insights-on-jurors%E2%80%99-thinking/ (last visited Feb. 1 2011).

\textsuperscript{246} But see HANS AND VIDMAR, supra note 18, at 74, noting that in earlier eras, jurors with leadership ability were unacceptable and lawyers instead sought those who seemed naïve. \textit{See also} Drake, supra note __, at 23 (“If you
unfavorable juror whose personal charisma allows her to influence the others can certainly be more problematic than an extremely-biased juror who is a follower by temperament. Influence may overlap with pliability, but these traits also do not always correlate – the person who is charismatic enough to win over the group may herself be fickle, changing her mind often.

The black swan problem resembles these errors but is a distinct issue. Most of the peremptory strikes by each side come from assessing the potential juror’s reaction to a few features of the case that the lawyer knows or can predict: defendant-vs.-plaintiff/prosecutor generally, police as witnesses or parties to the action, career criminals, or corporations, race, gender, economic status, etc. This ignores the unforeseeable, random events that ambush lawyers amid the trial, such as a laughter-inducing gaffe; disruptive outbursts from the gallery, unexpected delays that prolong the jurors’ inconvenience; and witnesses (or lawyers) who slip and utter a profanity or racial epithet.

Current consensus on jury selection assumes that pre-existing biases about a few predictable factors (race, gender, status of parties) will outweigh propensities to lurch in response to

have two jurors who look bad – one is a middle-aged man and the other a young man – strike the older guy because he has more potential to be a leader against you in the jury room.”. Another source that mentions this component, albeit in passing, is LEVINE, supra note 166, at 56.

247 See Mary R. Rose & Shari Seidman Diamond, Judging Bias: Juror Confidence and Judicial Rulings on Challenges for Cause, 42 LAW & SOC’Y REV. 513, 516 (2008). The fact that only a small amount of information about the case is offered to prospective jurors during voir dire was discussed in the context of explaining why it is hard for one to assess his or her own ability to be fair in deciding the particular case. This is in addition to the difficulty of one to be able to know whether previous life experiences or events would also affect his or her ability to be impartial along with the human element of wanting to provide a socially desirable response, which may not be the honest one.


information or events that are irrelevant to the legal issue in the case. Lawyers delude themselves that they cover this front by asking voir dire questions about how much evidence veniremen would require to reach a certain verdict, which is merely asking each juror to propose their own burden of proof for the case. The juror’s position about the cumulative weight of evidence has nothing to do with how whimsical the juror may be. In fact, the voir dire questions probably screen the jurors to put the most whimsical – most susceptible to extraneous, irrelevant influences – on the jury, as the questions eliminate those who can articulate their settled positions.

The sequencing rules for exercising peremptory strikes directly affect the amount of uncertainty in the process as well. The “sequential” or “jury box” method, which begins the process by impaneling jurors from the venire one by one, and subjects them to question and strikes (for cause or peremptory) at that time, creates a great deal of uncertainty, especially as the process nears its end and each lawyer has only one peremptory strike remaining. The attorneys know almost nothing about the remaining jurors in the pool once they use their last peremptory strike under this method. In contrast, sequencing rules that allow questioning and striking of prospective jurors while they are part of the entire venire, the “struck” method, may minimize the uncertainty for the parties about the possible final panel. The alternating-serial

250 Most indicative of this consensus in the widespread use of JuryQuest software and similar products, which compute values for each prospective juror based on such factors. See James R. Gadwood, The Framework Comes Crumbling Down: JuryQuest in a Batson World, 88 B.U. L. REV. 291 (2008).

251 See FREDERICK, supra note 166, at 8-10.

252 Id. at 6-7.

253 Id.

254 Id. at 8-10.

255 Id. This is true whether peremptories occur in an alternating-seriatum approach or simultaneously at the end of the process.
sequence for peremptory strikes presents the lawyers with less uncertainty that the simultaneous method used in a few states and some federal courts, but the former creates information asymmetries between the parties and disfavors whoever goes first.

Judges tend to manage the initial voir dire in many state and federal courts with little attorney involvement. Procedures in federal district courts have judges take the reins with voir dire more often. Judge Mark Bennett recently wrote that he believes attorneys are often in a better place than judges to discern from responses in voir dire which jurors might have biases that would improperly affect a verdict; he attributes this to how much more time the attorneys have spent on the case than the judge. Moreover, studies have shown that jurors are more likely to seek approval from judges, giving socially desirable responses to questions more so than they do with attorneys. One remedy would be to include attorneys more in the process, to prevent problems with judges’ implicit bias in selecting juries. This may also address the problem of jurors trying to please judges by giving them answers they think judges would want to hear.

Other commentators have raised similar concerns about the misleading nature of the conversations between prospective jurors and judges who conduct voir dire. During voir dire,

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256 Id. at 9 n.8, decrying this method and recommending that parties file a motion asking the judge to suspend this procedure in their case.

257 Id. at 9.

258 See Bennett, supra note 9, at 159.

259 Id.

260 Id. at 160.

261 Id.

262 See id at 165.

263 Id.

264 See, e.g., Rose & Seidman, supra note __.
judges often ask jurors if they can be impartial.\textsuperscript{265} Even if they say they cannot, a judge will continue asking questions, purportedly to determine the rationale behind the response, but often with the effect of badgering the prospective juror into feigning an open mind.\textsuperscript{266} In some cases, judges are trying to ensure that jury-duty shirkers cannot easily escape their duty by declaring a nonexistent bias.\textsuperscript{267} In addition, judges perceive those who speak or act confidently in interactions as more truthful than those who hesitate or are timid.\textsuperscript{268} Confidence is sometimes merely an indicator of public speaking ability rather than whether someone can be impartial.\textsuperscript{269}

In sum, voir dire and peremptory strikes screen out the jurors whose pre-existing bias is most obvious – usually because it is relatively extreme, the person who uses the words “always” and “never” when expressing opinions. The process does not screen particularly well for mild but recalcitrant biases, intentionally masked biases, or influence over others. The incomplete information problem resulting from this lopsided selection process is that the panel gets a disproportionate number of jurors whose pre-existing biases might be dangerous to one side but are hard to discern. The process also allows for – and probably increases – the seating of jurors who lurch in their decisions based on spontaneous random occurrences and information.

The Coase Theorem bears on this uncertainty problem because in normal contexts with lower transaction costs, parties bargain to reduce uncertainty. Contract negotiations, for example, regularly address provisions for unforeseen or unexpected future events, such as changes in

\textsuperscript{265} See id at 516.

\textsuperscript{266} Id.

\textsuperscript{267} Id.

\textsuperscript{268} See id at 518; DiPerna, supra note 220, at 94 (discussing painfully shy jurors).

\textsuperscript{269} See Rose & Seidman, supra note __, at 542; see also HANS & VIDMAR, supra note 18, at 86, mentioning incidents where lawyers viewed inarticulate jurors as favorable because they assumed they would not be persuasive in the deliberation room.
prices, unavailability of supplies or materials, labor disruptions, etc. Where transaction costs are high and bargaining does not occur – a poignant feature of the jury selection segment of trials – uncertainty remains unmanaged.

V. CONCLUSION

The foregoing discussing has been primarily analytical and descriptive, intentionally so, with a very modest normative agenda. Analytically speaking, the impact of legal rules on real world outcomes, and therefore on the ex ante decisions of litigants, correlates inversely with the availability of bargaining or negotiation. This means that among all the procedural rules governing litigation, those pertaining to jury selection are among the most significant, due to the absence of deliberation or bargaining at this segment of the process. Every procedural rule in this area is both a constraint and a license, in a Coasian sense. The abolition of one rule, in settings that preclude bargaining, merely intensifies the effect of the other rules, often disfavoring parties we find sympathetic. The Coase Theorem provides a much-needed (and hitherto neglected) framework for analyzing the impact and interplay of jury selection procedures and the correlation to the interactions between the parties.

Most of the academic literature about jury selection expresses frustration at the ineffectiveness of the current rules in achieving certain underlying policy objectives, i.e., representativeness of the community’s demographics or the defendant’s ability to have at least some jurors who can empathize with his background and worldview. Batson safeguards and peremptory strikes are thus the main target for the academy’s criticisms. This article has sought, in part, to show that Batson rules do not operate in isolation from the other rules governing jury
selection, and that treating *Batson* rules in isolation will fail to achieve the desired outcome. Nor are peremptory strikes the sole culprit for lingering racism in jury verdicts. Rather, it is the odd absence of bargaining that empowers and animates all the rules in this discreet arena. Tweaking the rules is more likely to produce a predictable benefit, from a policy perspective, than simply abolishing certain rules.

If there were no potential *Batson* challenges looming for an attorney's choice of peremptory strikes, then we would have a closed system of non-negotiation that would keep the transaction costs at 100% and make the established rules concerning jury selection the paramount factors in that part of the litigation. In a limited but significant way, *Batson* challenges offset or detract from the potency of the other local voir dire rules, i.e., sequencing methods and numerical limits on strikes. In contrast, if we allowed or fostered negotiation during the selection of peremptory strikes, this would obviate the need for *Batson* challenges, and *Batson* rulings would be unnecessary.

The peremptory strike system creates the illusion, for many at least, of maximizing the neutrality or fairness of the jury. Ironically, critics see peremptory challenges as doing the exact opposite, allowing parties to stack the jury in their favor by de-selecting jurors who are fair or biased toward the other side. Both may be mistaken. Instead, peremptory strikes maximize uncertainty rather than neutrality or bias, as the parties remove the most “predictable” jurors and leave those who are hardest to read. Maximizing the uncertainty or opacity of the jury squelches the likelihood of settlement immediately after the voir dire segment, until the ensuing trial begins to draw out visible juror reactions.
There is officially no rule against negotiation between the parties over which juror to keep or strike; it is simply not done, under our traditions. In fact, co-defendants can and do coordinate their peremptory strikes among themselves, normally without any checks or interference, and find it beneficial. Opposing parties never do this. The cautious normative suggestion here is that litigants begin to experiment with negotiating and coordinating over which jurors to keep and exclude. This would allow the selected jury to reflect more accurately the values and priorities of the parties themselves. Even though the parties’ interests in the trial outcome are inversely related, their juror preferences probably do not inversely match; rather, the defendant may value keeping a certain juror (or type of jurors) more than the prosecutor or plaintiff values removing the same person. Not only would negotiation obviate the need for Batson safeguards, it might actually increase minority representation on the juries if defendants generally place a greater value on seating them than the prosecutors/plaintiffs do in removing them. The preference-revealing function of bargaining would also help achieve juries that better fit the parties’ perceptions of fairness, instead of maximizing uncertainty for each side. Lawyers could begin this practice at any time, as the ban on negotiation is merely customary, not legal. This is not to suggest a radical or drastic abandonment of our current system, however, as the existing rules certainly serve a purpose and reflect legitimate policy concerns about fairness and integrity in the process. The transaction costs are currently at 100%, that is, there is zero opportunity for bargain and exchange; the suggestion is not to eliminate the transaction costs, but to consider lowering them just enough to give parties freedom to initiate dialog about this in the appropriate circumstances.

Even if we do not open the door to negotiation over jury selection, the analysis here should still prove helpful to lawyers and judges in understanding how the current rules influence the
outcome (the selected panel), and how the rules interrelate. Sequencing regimes can bolster or mitigate the power of *Batson* safeguards; the number of total jurors on the panel affects the value of each peremptory strike, as well as the tilting effects of an increase in the number of strikes. The Coase Theorem does not instruct as to which alternative rule is better or more fair, but is a valuable tool for making more intelligent decisions about instituting or changing certain jury selection rules.