2008

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Focus on *Batson*: Let the Cameras Roll

*Mimi Samuel*

INTRODUCTION

In his classic *How to Pick a Jury*, legendary trial lawyer Clarence Darrow advised young attorneys on how to use their peremptory challenges effectively to choose a jury sympathetic to their client. Among other pieces of advice, he exhorts members of the defense bar to choose an Englishman over an Irishman and a Catholic over a Presbyterian or a Baptist. He warns against choosing a Lutheran, especially a Scandinavian. And of the Unitarians, Universalists, Congregationalists, and “other agnostics,” he recommends keeping them, but not asking too many questions. Finally, he cautions that women take their newly granted privilege of jury service too seriously, and thus, he feels lucky that his “services were almost over when women invaded the jury box.”

Publicly promoting such blatant dependence on stereotype may seem shocking to contemporary attorneys. However, many attorneys continue to consider these characteristics to be useful predictors of a potential juror’s inherent biases and predilections. As a result, many attorneys still use peremptory strikes to remove prospective jurors based on characteristics such as race, gender, religion, and national origin. In fact, a 2005 survey revealed that every lawyer interviewed considered race and gender when picking a jury. Indeed, although they recognized that such strikes are impermissible, lawyers listed some of the following stereotypes that they rely on in jury selection: “Asians are conservative. African-Americans distrust cops. Latins are emotional. Jews are sentimental. Women are hard on women . . . .” Moreover, a recent psychological study reveals that attorneys rely on race in exercising...
peremptory challenges even when they do not admit (or may not even consciously acknowledge) that they are doing so.\(^4\)

It was not until forty years ago that the Supreme Court first declared that racial discrimination in jury selection was impermissible, but then only if the offending attorney was found to engage in a pattern of discrimination: a single instance of discrimination was not sufficient.\(^5\) However, in 1986, the Supreme Court decided *Batson v. Kentucky*,\(^6\) holding that a defendant may show discrimination in the selection of the jury in his case alone; he need not prove that the prosecutor consistently engages in discrimination.\(^7\) When such a claim of discrimination is raised, *Batson* requires that the trial court engage in a three-step burden-shifting analysis to assess the claim of discrimination.\(^8\) Under the burden-shifting scheme, the party opposing the strike must first make out a prima facie case of discrimination.\(^9\) After doing so, the proponent of the strike must come forward with a racially neutral reason.\(^10\) Finally, the trial court has "the duty to determine if the defendant has established purposeful discrimination."\(^11\)

While *Batson* provides broad and admirable protections, from the outset critics of the decision have expressed skepticism and concern both about *Batson*'s theoretical underpinnings\(^12\) and also about the workability of the scheme set down by the Supreme Court for a trial judge to assess claims of discrimination.\(^13\) This Article will focus on the latter: the practical problem of evaluating and resolving *Batson* challenges at the trial and appellate levels.

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\(^7\) *Id.* at 95.

\(^8\) *Id.* at 96.

\(^9\) *Id.* at 96-97.

\(^10\) *Id.* at 97.

\(^11\) *Id.* at 98.

\(^12\) At a theoretical level, the rule set down in *Batson* is problematic in that it gives attorneys conflicting signals about the propriety of using intangible factors in deciding which jurors to strike. As will be discussed in Part I.A, infra, historically trial attorneys were permitted to exercise peremptory challenges for any reason or no reason at all. Thus, attorneys could and would use hunches, instincts, and feelings to justify their strikes. Those hunches, instincts, and feelings could be based on a wide array of intangibles including eye contact (or lack thereof), tone of voice, and demeanor. But because the trial attorney was not required to justify her strikes, these reasons were never announced in court and were, therefore, not subject to scrutiny. However, after *Batson*, attorneys may be asked to explain and justify their reasons for a peremptory challenge. And, as a result, intangible reasons that have been and continue to be legitimate bases for striking jurors may now be seen as suspect. Therefore, without explicitly doing so, *Batson* may constrain attorneys' use of hunches, instincts, or feelings as a basis for peremptory strikes, particularly when exercising strikes against people of color or against women, effectively limiting the use of what is generally considered an important tool in arriving at an impartial jury.

Of course, no one knows exactly what goes on in an attorney’s mind (and the attorney herself might not even know what goes on in her subconscious): it is impossible to effectively police intentional or unintentional discrimination that motivates or informs decisions to strike a prospective juror based on hunch, instinct, or feeling. Thus, some might argue that Batson is not really intended to eliminate discrimination in jury selection—that such a goal might be admirable but not necessarily achievable. That is, the argument goes, Batson’s function is to let attorneys know that intentional discrimination is not acceptable behavior; Batson only sets up a moral or ethical worldview and an aspirational goal. And while this view might satisfy some critics, it is not likely to satisfy litigants who believe that they were judged by a jury tainted by discriminatory use of peremptory challenges. Nor is it likely to satisfy judges who have been charged with assessing the validity of the reasons for the strikes.

Proposed solutions to the problems with Batson range from abandoning Batson protections to eliminating the peremptory challenge entirely to limiting Batson’s applicability to criminal trials. However, assuming that, at least for the time being, both the peremptory challenge and the protections afforded by Batson are here to stay, this Article addresses one particular aspect of the Batson process: the assessment of neutral reasons that rely on intangibles such as eye contact, tone of voice, demeanor, posture, and laughing or coughing. When attorneys rely on such reasons, both trial and appellate courts are at a tremendous

15 In arguing that striking jurors based on race should not be prohibited, Justice Rehnquist noted the following:

The use of group affiliations, such as age, race, or occupation, as a “proxy” for potential juror partiality, based on the assumption or belief that members of one group are more likely to favor defendants who belong to the same group, has long been accepted as a legitimate basis for the State’s exercise of peremptory challenges.

16 See, e.g., Morris B. Hoffman, Peremptory Challenges Should Be Abolished: A Trial Judge’s Perspective, 64 U. CHI. L. REV. 809, 864 (1997). According to Judge Hoffman, one of “the most remarkable of these judicial criticisms is Judge Bellacosa’s concurrence in [People v. Bolling, 591 N.E.2d 1136, 1142-46 (N.Y. 1992)], in which he, joined by two of his colleagues on the New York Court of Appeals, pleads with the New York legislature to abolish peremptory challenges entirely.” Hoffman, supra, at 810 n.2.
18 That the majority of the Supreme Court does not intend to abandon the Batson scheme is underscored in its recent decisions of Johnson v. California, 125 S. Ct. 2410 (2005) and Miller-El, 125 S. Ct. 2317. Although Justice Breyer’s concurrence in Miller-El explains why “[t]oday’s case reinforces Justice Marshall’s concerns,” Miller-El, 125 S. Ct. at 2340, apparently he alone sees the merit in those concerns. See also Johnson, 125 S. Ct. at 2419 (Breyer, J., concurring) (adopting Miller-El concurring opinion).
disadvantage when attempting to discern whether the given reasons are in fact discriminatory because the courts have little or no evidence on which to rely in assessing the validity of the reason.

The problems with the implementation of the Batson scheme at the trial level lie in the lack of evidence upon which the trial judge will base her decision. First, for the scheme to work effectively, the trial judge is asked, at the end of what may have been a lengthy voir dire process, to recall the proceedings in their entirety with a degree of detail that is wholly unrealistic. Thus, after a prosecutor19 sets forth a neutral reason for the strike, unless the court can recall whether Juror X was or was not making eye contact with the prosecutor earlier in the day or whether Juror Y was dozing, fidgeting, or laughing on day two of a four day voir dire process, then the trial judge has no evidence upon which to evaluate the prosecutor’s credibility.20 Second, as noted in these hypothetical scenarios, many, if not most, of the neutral reasons given by prosecutors at the second step of Batson’s burden-shifting scheme involve not what a prospective juror has said in response to voir dire questions or what a juror has written on a juror questionnaire, but what a prospective juror has done (or not done) or how a prospective juror has looked during jury selection.21 Thus, even if a trial judge had access to a “real time”22 written transcript, that transcript, in so many cases, would not shed any light on the validity of the prosecutor’s neutral reason.

The problems are compounded when an appellate court reviews the trial judge’s decision on pretext,23 as it too lacks evidence to review.24 When the appellate court is limited to reviewing a written transcript,

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19 Batson protections apply to all litigants in both civil and criminal proceedings. See infra note 35 and accompanying text. However, because the issue still arises most frequently in a criminal trial with a challenge to a prosecution strike, this Article will assume a scenario in which a defendant raises a Batson challenge to a prosecutor’s strike in a criminal case. See James R. Gadwood, Note, The Framework Comes Crumbling Down: JuryQuest in a Batson World, 88 B.U. L. REV. 291, 309 n.136 (2008).

20 This problem was pointed out in the Supreme Court’s most recent Batson case. In Snyder v. Louisiana, 128 S. Ct. 1203 (2008), the majority noted that it was possible that the judge did not have any impression one way or the other concerning [the juror’s] demeanor. [The juror] was not challenged until the day after he was questioned, and by that time dozens of other jurors had been questioned. Thus, the trial judge may not have recalled [the juror’s] demeanor.

128 S. Ct. at 1209.

21 See infra Part II.

22 “Real time” court reporting converts the court reporter’s note-taking into words instantaneously. T. Mundt, Saving Real Time: How Instant Transcription Can Benefit You in the Courtroom, OR. ST. B. BULL., Aug.-Sept. 1997, at 31. Thus, a judge equipped with a laptop computer connected to the “real time” system can view the conversion of the spoken word into written transcript immediately and without leaving the bench. Id.

23 As will be discussed in note 167, infra, the appellate court reviews the trial judge’s decision at the third step of the Batson analysis under a clearly erroneous standard of review. See Batson v. Kentucky, 476 U.S. at 98 n.21.

24 See Snyder, 128 S. Ct. at 1209 (expressing frustration at relying on a “cold transcript” to assess whether counsel’s race-neutral reason of “nervousness” was, in fact, pretextual when the trial court had not made any findings regarding the prospective juror’s demeanor).
which does not reflect potential jurors' body language, tone, or other non-verbal communication, in many instances, the appellate court has no choice but to act as a rubber-stamp for the trial judge's decision.\footnote{At least one other commentator has advanced this position: [V]ideotaped \textit{voir dire} records could give new life to \textit{Batson}. In particular, that technology would permit the appellate court to meaningfully test a prosecutor's claim that she struck a particular juror based on his demeanor (for example, because the juror somehow nonverbally communicated hostility, disinterest, sympathy with the defendant, or stupidity). Without a videotaped record, such claims are completely insulated from review on appeal. It is not even possible for the defendant to demonstrate "clear error" on the trial court's part in accepting such a justification, since the written record by its very nature cannot reflect the presence or absence of such attitudes on the part of the prospective juror. With a videotaped record, however, the reviewing court could at least monitor whether some behavior of the juror appeared to be consistent with the prosecutor's defense.}

Thus, this Article proposes a practical solution to strengthen the enforcement mechanism: for the trial court to have sufficient evidence to adequately assess the validity of a \textit{Batson} objection and, even more importantly, for the appellate court to conduct a meaningful review of that assessment, the courts must review video recordings of the \textit{voir dire} proceedings in making their decisions. Granted, use of video is not a failsafe solution: video is not, in fact, the same as "being there." In addition, video equipment can malfunction, and videos can be lost or destroyed just like written transcripts. But using video would have several benefits: (1) attorneys would know that they were being taped, thus enhancing \textit{Batson}'s normative value; (2) judges, at both the trial and appellate levels, would have evidence to use to evaluate attorney credibility; and (3) litigants, particularly criminal defendants, would have an increased perception of fairness.

Part I of this Article will review the \textit{Batson} decision and the expansion of the scope of its protections. Part II will summarize criticisms of \textit{Batson} and its progeny levied by bench, bar, and commentators. Part III will examine the use of video evidence and video transcripts in trial and appellate courts and will address some of the concerns raised regarding the courts' review of videotapes.

Finally, Part IV will argue that for a trial judge to fulfill her obligations under the third step of the \textit{Batson} scheme, she must have evidence of what happened during the \textit{voir dire} proceedings to assess the credibility of the proponent of the peremptory strike. Moreover, because of the peculiar nature of the facts found by the trial judge, to adequately examine whether the finding of fact is clearly erroneous, the appellate court must review the same evidence relied upon by the trial judge. This Article will conclude that, in many cases, the only evidence available to both the trial and appellate courts is a videotape of the \textit{voir dire}
proceedings. Thus, when such video is available, to ensure meaningful implementation of the constitutional principles underlying the *Batson* protections, courts must review those videotapes.

I. *BATSON AND ITS PROGENY*

This section will provide a brief overview of the *Batson* decision and similar decisions that followed. It will then go into more depth explaining the burden-shifting test that courts must use when evaluating *Batson* challenges. Finally, it will explain the standard of review that appellate courts must use when reviewing trial court decisions on *Batson* challenges.

A. *Evolution of Batson Protections*

The peremptory challenge is deeply rooted in American jurisprudence.\(^{26}\) A peremptory challenge is distinguished from a "challenge for cause," which may be exercised when a juror does not meet the statutory qualifications for jury duty or when a juror is biased for or against one of the parties or as to the substance of the dispute in general.\(^{27}\) Traditionally, the peremptory challenge could be exercised to remove a potential juror for any reason or for no reason at all.\(^{28}\) As noted in the introduction, historically attorneys used peremptory challenges to strike prospective jurors for a wide variety of reasons, including but certainly not limited to, the jurors' race, national origin, ethnicity, and gender. However, strikes on the basis of race, national origin, ethnicity, or gender are no longer permissible.\(^{29}\)

In *Batson*, the Court considered whether an African American defendant's Fourteenth Amendment Due Process right was violated when, in a trial for burglary and receipt of stolen goods, the prosecutor struck the only four black members of the venire.\(^{30}\) Holding that the defendant's right was violated, the Court noted that the "Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black

\(^{26}\) 9B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2483 (3d ed. 2008) ("The use of the peremptory challenge is of ancient origin and is given to aid each party's interest in a fair and impartial jury.").

\(^{27}\) Id.

\(^{28}\) Id.; see also V. HALE STARR & MARK MCCORMICK, JURY SELECTION 24-26 (3d ed. 2001).

\(^{29}\) *Batson*, 476 U.S. at 83 (1986). As will be discussed infra, some federal courts and some state courts also prohibit strikes based on other discriminatory factors. See supra notes 36-37, 39 and accompanying text.

\(^{30}\) *Batson*, 476 U.S. at 83.
defendant.\textsuperscript{31} Prior to \textit{Batson}, a defendant could, in fact, claim discrimination in jury selection, but he had to prove that the prosecutor engaged in a pattern of discrimination over time, not just in an individual act of discrimination in his case.\textsuperscript{32} However, even after \textit{Batson}, protections against discrimination in jury selection were limited. Only racial discrimination was prohibited, and even then, a defendant could only challenge a prosecutor's peremptory strikes when both the defendant and the stricken jurors belonged to the same racial group.\textsuperscript{33}

Over time, \textit{Batson}'s protections have grown. First, as the Court recognized that discrimination in jury selection infringes on the rights of jurors as much as on the rights of the defendant, it eliminated the requirement that the defendant be a member of a cognizable racial group and that the stricken jurors be members of that same group.\textsuperscript{34} Thus, a white juror could object if she believed that the prosecutor unfairly struck black jurors from the panel. Second, the protections against discrimination were expanded to limit defendants in criminal cases from engaging in discrimination in selection as well as limiting plaintiffs and defendants in civil cases.\textsuperscript{35} Third, the types of discrimination prohibited have expanded. While \textit{Batson} itself was limited to protecting black defendants from discriminatory strikes against black jurors, the Court expanded that protection to prohibit discrimination against any racial group.\textsuperscript{36} It then expanded the protection to prohibit discrimination based on gender.\textsuperscript{37} And, while the Supreme Court has been reluctant to expand \textit{Batson}'s protections further,\textsuperscript{38} some lower federal courts and state courts have done so, for example, by prohibiting peremptory strikes based on religious affiliation and sexual orientation.\textsuperscript{39}

\begin{footnotesize}
\begin{enumerate}
\item Id. at 89. The court specifically declined to express a view on whether the same rule applies to challenges by defense counsel. Id. at 89 n.12.
\item Id. at 89-94.
\item Id. at 96.
\item Powers, 499 U.S. at 423.
\item See, e.g., State v. Davis, 504 N.W.2d 767 (Minn. 1993), cert. denied, 511 U.S. 1115 (1994) (denying certiorari to determine whether \textit{Batson} prohibits discrimination on the basis of religious affiliation).
\item See, e.g., United States v. Brown, 352 F.3d 654, 669 (2d Cir. 2003) (prohibiting discrimination based on religious affiliation); People v. Garcia, 92 Cal. Rptr. 2d 339, 347 (Ct. App. 2000) (prohibiting discrimination based on sexual orientation). But see, e.g., United States v. Girouard, 521 F.3d 110, 113 (1st Cir. 2008) (whether \textit{Batson} protections extend to cases of religious discrimination is an open question in the First Circuit); United States v. Ehrmann, 421 F.3d 774, 781-82 (8th Cir. 2005) (whether \textit{Batson} protections extend to cases of discrimination on the basis of sexual orientation is an open question in the Eighth Circuit); United States v. Santiago-Martinez, 58 F.3d 422, 423 (9th Cir. 1995) (declining to extend \textit{Batson} protection to obese persons); United States v. Pichay, 986 F.2d 1259, 1260 (9th Cir. 1993) (declining to extend \textit{Batson} protection to young adults).
\end{enumerate}
\end{footnotesize}
B. The Burden-Shifting Scheme

In assessing whether an attorney has violated Batson, the court must engage in the following burden-shifting analysis.

1. The First Step: The Prima Facie Case

First, the party claiming a Batson violation must make out a prima facie case. Originally, to make out a prima facie case of discrimination under Batson, the defendant had to show (1) that he was a member of a cognizable racial group and that the prosecutor struck venire members from the defendant’s race, and (2) any other relevant circumstances that raised an inference of discrimination. The defendant could also “rely on the fact . . . that peremptory challenges constitute a jury selection practice that permits ‘those to discriminate who are of a mind to discriminate.’” Some of the relevant circumstances that could raise an inference of discrimination include: (1) a pattern of strikes against black jurors, and (2) the prosecutor’s questions and statements during voir dire. The Court, however, declined to set out an exhaustive list of circumstances, noting that it had “confidence that trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor’s use of peremptory challenges creates a prima facie case of discrimination against black jurors.”

2. The Second Step: The Race-Neutral Reason

If the court finds that a prima facie case has been established, then the proponent of the strike must come forward with a race-neutral reason for the strike. The Court noted that this requirement, in fact, “imposes a limitation in some cases on the full peremptory character of the historic challenge,” but emphasized that the neutral reason need not rise to the level of a challenge for cause. With the Court’s decision in Purkett v. Elem, the burden on the proponent of the strike at this stage became even lower. To meet its burden at the second step of the Batson scheme, the reason need only be neutral on its face. Even a “silly or superstitious” reason may rebut the prima facie case.

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40 Batson, 476 U.S. at 96.
41 Id. (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).
42 Batson, 476 U.S. at 97.
43 Id.
44 Id.
45 514 U.S. 765, 768 (1995) (“[I]mplausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination.”).
46 Id. at 768.
47 Id.
3. The Third Step: Determining Pretext

Finally, the trial court must assess the validity of the neutral reason to determine whether it is, in fact, pretext for purposeful discrimination. Notably, in Batson, the Supreme Court provided no guidance to the trial courts as to how to make this determination. Indeed, the Court declined to formulate any procedures to be followed, noting the "variety of jury selection practices followed in our state and federal trial courts . . . ." To date, the Court has declined to provide guidance to lower courts. As a result, "[i]nadequate scrutiny of prosecution explanations is the single greatest problem hindering the effective implementation of Batson . . . [C]ourts are having an extremely difficult time distinguishing between legitimate reasons for the use of peremptory challenges and mere excuses or pretexts for discrimination."

C. Standard of Review on Appeal

If a trial court's decision on a Batson challenge is reviewed on appeal, the finding of purposeful discrimination in jury selection is a finding of fact to be reviewed for clear error. "Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." The Court later explained that "[i]n the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed." However, the Court noted that "[t]here will seldom be much evidence bearing on that issue and the best evidence

51 Batson, 476 U.S. at 98 n.21 (1986); see also Hernandez v. New York, 500 U.S. 352, 364 (1991) (plurality opinion) ("Batson's treatment of intent to discriminate as a pure issue of fact, subject to review under a deferential standard, accords with our treatment of that issue in other equal protection cases."). The inability of courts to adequately define the clear error standard of review has been the subject of much criticism. See Bryan L. Adamson, Federal Rule of Civil Procedure 52(a) as an Ideological Weapon?, 34 Fl A. ST. U. L. REV. 1025, 1051-53 (2007). The most commonly accepted definition provides that "clear error exists where 'although there is evidence to support' a district court's factual findings, the appellate court, 'on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" Id. at 1051 (quoting United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948)). Put in the negative, an appellate court can find clear error and overturn a trial court's finding of fact if it was "without adequate evidentiary support" or "without substantial support." Id. at 1052 (internal quotation marks and citations omitted). Despite these definitions, the standard has been deemed "elastic, capricious, malleable, and above all variable" and "at best, a nebulous concept." Id. at 1051 (internal quotation marks and citations omitted). Indeed, at least one commentator has questioned why this standard is used in the Batson context when "constitutional facts" are traditionally reviewed under a de novo standard. Id. at 1053-65. That issue, however, is beyond the scope of this Article.
52 Hernandez, 500 U.S. at 365.
often will be the demeanor of the attorney who exercises the challenge." As a result of this deferential standard, it appears that trial courts' decisions on Batson challenges are rarely overturned.

II. CRITICISM OF THE BATSON SCHEME

The Batson scheme has been criticized since its inception. Courts, litigants, and commentators have criticized it as difficult to implement and ineffective in protecting the rights granted to litigants and jurors by Batson and its progeny. Many courts are frustrated with their inability to second-guess the reasons behind an attorney's race-neutral reason given at the second step of the analysis, and empirical studies bear out that many of these reasons are difficult, if not virtually impossible, to assess given that they rest on intangible factors such as a juror's tone of voice, demeanor, or eye contact with the attorney. Indeed, several litigants have argued that they should be entitled to a videotape of the voir dire proceedings to make a record of these intangible factors. And some critics are so frustrated that they call for the elimination of peremptory challenges altogether.

First, judges have expressed concerns about their ability to effectively assess the validity of a prosecutor's reason for striking a juror. In his concurrence in Batson, Justice Marshall foresaw the inherent difficulties in determining whether a facially neutral reason was, in fact, pretextual. Noting the very low standard at the second step of the scheme, Justice Marshall concluded that any prosecutor can easily assert

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53 Id. (emphasis added).
55 See also Miller-El v. Dretke, 125 S. Ct. 2317, 2340-41 (2005) (Breyer, J., concurring); Page, supra note 49, at 178-79 n.102 (collecting fourteen articles criticizing Batson's ability to eliminate discrimination in jury selection).
56 See supra note 88.
57 See, e.g., Miller-El, 125 S. Ct. at 2344 ("I believe it necessary to reconsider Batson's test and the peremptory challenge system as a whole."); Batson, 476 U.S. at 102-03 (Marshall, J., concurring) ("The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely."); see also Minetos v. City Univ. of New York, 925 F. Supp. 177, 185 & n.9 (S.D.N.Y. 1996) (discussed infra notes 63, 87); Wamget v. State, 67 S.W.3d 851, 861 (Tex. Crim. App. 2001) (Meyers, J., concurring) ("Time has proven Justice Marshall right, and today I register my agreement with the growing ranks of other jurists and commentators who have come to the same conclusion."); Page, supra note 49, at 245-46 (advocating elimination of the peremptory challenge); Adam Liptak, Oddity in Picking Jurors Opens Door to Racial Bias, N.Y. TIMES, June 4, 2007, at A12.
58 Batson, 476 U.S. at 105-06 (The Batson scheme is not workable because (1) defendants can only establish a prima facie case when the evidence of discrimination is flagrant; (2) even if a prima facie case is established, the trial court faces the "difficult burden of assessing the prosecutors' motives"; and (3) discriminatory effect may not necessarily result from the prosecutor's intent as much as from her conscious or unconscious racism.)
a reason that is neutral on its face, and "trial courts are ill equipped to second-guess those reasons." He continued:

How is the court to treat a prosecutor's statement that he struck a juror because the juror had a son about the same age as [the] defendant, or seemed uncommunicative, or never cracked a smile and[,] therefore, did not possess the sensitivities necessary to realistically look at the issues and decide the facts in this case? If such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on nonracial grounds, then the protection erected by the Court today may be illusory.60

Justice Breyer, in the Supreme Court's recent pronouncement on Batson, echoed these concerns.61 He, however, was alone in venting his frustrations with the Batson scheme.62

Nonetheless, lower courts have also expressed frustration with attempts to implement Batson:

Time has proven Mr. Justice Marshall correct. Ten frustrating years have now passed since the Supreme Court's decision in Batson. . . . All peremptory challenges should now be banned as an unnecessary waste of time and an obvious corruption of the judicial process. Such a change would have the added benefit of putting an end to the awkward analyses set forth in Batson and its progeny[,] which have proved over ten years to be uncertain in their application and which have caused great consternation in the courts.63

In particular, courts have expressed concerns about the ability to adequately review the validity of neutral reasons based on non-verbal factors.64 For example, in a prosecution for possession of cocaine, the prosecution struck all six black venirepersons out of a panel of thirty-three.65 In response to the defendant's Batson challenge, the prosecution offered that it struck three of the African American jurors because they were "inattentive."66 In affirming the district court's denial of the challenge, the Eighth Circuit noted its concerns about the "generalities"

59 Id. at 106.
60 Id. (citations and internal quotation marks omitted).
61 Miller-El, 125 S. Ct. at 2340-44.
62 Id.
63 Minetos v. City Univ. of New York, 925 F. Supp. 177, 183 (S.D.N.Y. 1996); see also Wanget v. State, 67 S.W.3d 851, 860 (Tex. Crim. App. 2001) (Meyers, J., concurring) ("Batson and its progeny, have made a further muck of things by transforming voir dire into a lengthy ordeal involving inquires into inappropriate questions of race and ethnicity that not only have nothing to do with impartiality, but will also become increasingly muddled in the face of our changing society.").
65 United States v. Sherrills, 929 F.2d 393, 394 (8th Cir. 1991). One of the black jurors was struck for cause, and the other five were struck peremptorily. Id.
66 Id.
of an explanation such as inattentiveness, explaining that "[d]etermining who is and is not attentive requires subjective judgments that are particularly susceptible to the type of abuse prohibited by Batson." Moreover, "[t]his difficulty is compounded by the need to compare the attentiveness of the challenged venire members with those who were not challenged." The court cautioned the trial court to give "careful scrutiny" to challenges based on subjective grounds such as inattentiveness and admonished counsel to fully develop the record concerning the specific behavior by venire members at issue.

Though lower courts have expressed their dissatisfaction with the workability of the Batson scheme, the Supreme Court shows no sign of discarding or even modifying the scheme. Indeed, it reaffirmed its adherence to the Batson principles and methodologies in two recent cases. And, in both of those cases, it was only Justice Breyer who expressed his belief that the result in those cases "reinforces Justice Marshall's concerns." Second, empirical analyses demonstrate that Justices Marshall's and Breyer's concerns have been borne out. These empirical studies support the notion that Batson challenges have had limited effectiveness in reducing the number of race and gender based peremptory challenges. As one such study concluded: "Several reasons may be impeding the effectiveness of Batson, including the presumption of proper discretionary use of the peremptory privilege by attorneys and blithe acceptance of doubtful race-neutral reasons by the trial courts." The studies indicate that an ultimate finding of race or gender discrimination and a grant of relief for such discrimination is infrequent.

67 Id. at 395.
68 Id.
69 Id. Interestingly, the defendant in this case argued that the prosecutor's claim that a juror was inattentive "cannot be refuted without a complete record of the voir dire, such as a video tape, in order to determine whether white venire members were similarly inattentive." Id. While the Eighth Circuit noted this argument, it nonetheless did not address the merits of it. Id.; see also United States v. Scott, 26 F.3d 1458, 1466 (8th Cir. 1994) (admonishing counsel to fully develop the trial record regarding observations of behavior that form the basis of neutral strikes).
71 Johnson, 125 S. Ct. at 2419; Miller-El, 125 S. Ct. at 2331-32.
72 Miller-El, 125 S. Ct. at 2340 (Breyer, J., concurring).
at best.\textsuperscript{75} While a prima facie case of discrimination is often found by the court, only a small percentage of the race-neutral explanations for peremptory strikes are rejected.\textsuperscript{76} Frequently, the rejected explanations concern the clearest cases of \textit{Batson} violations, such as when the prosecutor provides a race-based reason\textsuperscript{77} or no reason at all.\textsuperscript{78}

The problem, in large part, lies in the fact that many, if not most, of the neutral reasons given for striking a juror are based on non-verbal communication or appearance.\textsuperscript{79} In only 10\% of 632 cases reviewed in one study did the trial court find that a prosecutor’s neutral reason was not supported by the record.\textsuperscript{80} Another study of 3,898 cases analyzed the most popular categories of accepted peremptory challenges. Of the sixteen categories seen, behavior during \textit{voir dire} was the second most-accepted reason by courts for a justified peremptory challenge.\textsuperscript{81} The study further broke this category into fifteen subcategories, with “inattentive” as the most common reason accepted as a peremptory challenge.\textsuperscript{82} Finally, a study of 532 cases found that personal appearance was successfully used to justify a peremptory challenge in ninety-five cases.\textsuperscript{83}


\textsuperscript{76} Mellilli, \textit{supra} note 73, at 478-79 (1996) (in 867 cases, 2994 peremptory challenges were the subject of neutral explanations, but only 533 [17.80\%] were found to violate \textit{Batson}).

\textsuperscript{77} Raphael & Ungvarsky, \textit{supra} note 75, at 235-36 n.39 (citing Goggins v. State, 529 So. 2d 649, 651-52 (Miss. 1988)).

\textsuperscript{78} \textit{Id.} at n.40 (citing United States v. Battle, 836 F.2d 1084, 1085-86 (8th Cir. 1987)).

\textsuperscript{79} Of course, relying on non-verbal factors is not in itself inherently suspect. Any experienced trial lawyer knows that non-verbal communication is critical, if not paramount, in the jury selection process. In fact, communications experts commonly assert that more than 50\% of human communication is non-verbal. See, e.g., Jim Goodwin, \textit{Articulating the Inarticulable: Relying on Nonverbal Behavioral Cues to Deception to Strike Jurors During Voir Dire}, 38 Ariz. L. Rev. 739, 751 n.122 (1996); Edward J. Imwinkelried, \textit{Demeanor Impeachment: Law and Tactics}, 9 A.M. J.Trial Advoc. 183, 187 (1985).

\textsuperscript{80} Mellilli, \textit{supra} note 73, at 478-79 (reasons for rejection of facially neutral reasons include the following: disparate treatment [172 or 27.22\%], insufficient \textit{voir dire} [102 or 16.14\%], no explanation offered [seventy-nine or 12.50\%], unsupported by record [sixty-one or 9.65\%]).

\textsuperscript{81} \textit{Id.} at 485 (prior involvement with criminal conduct or litigation [697 or 17.88\%]; behavior during \textit{voir dire} [532 or 13.65\%]; possession of extrajudicial information or bias [496 or 12.72\%]; difficulty following instructions [387 or 9.93\%]; Age [343 or 8.80\%]; employment or training [291 or 7.47\%]; economic characteristics [233 or 5.98\%]; family situation [231 or 5.93\%]; education and intelligence [140 or 3.59\%]; location of home, workplace or other activities [123 or 3.16\%]; incapacity [111 or 2.85\%]; personal appearance [95 or 2.44\%]; prior jury service [90 or 2.31\%]; gender [eighty-two or 2.10\%]; miscellaneous characteristics [26 or 0.67\%]; neutral explanation did not involve any objection to the challenged venireperson [21 or 0.54\%]).

\textsuperscript{82} Mellilli, \textit{supra} note 73, at 478-79 (inattentive [154 or 28.95\%], wished to avoid jury service [75 or 14.10\%], hostile toward the lawyer who later exercised the challenge [59 or 11.09\%], responsive to opposing lawyer or what opposing lawyer said [51 or 9.59\%], timid [46 or 8.65\%], unfavorable impression [36 or 6.77\%], inattentive to lawyer who later exercised challenge [30 or 5.64\%], strange [20 or 3.76\%], friendly toward opposing party [18 or 3.38\%], answered no \textit{voir dire} questions [11 or 2.07\%], assertive [11 or 2.07\%]).

\textsuperscript{83} \textit{Id.} at 488; see also Owen & Mather, \textit{supra} note 25, at 425 n.43 and cases cited therein (nonverbally communicated hostility, disininterest, sympathy with the defendant, or stupidity are most commonly cited neutral reasons for striking jurors).
Another study reviewed 824 cases decided within the first five years following the Supreme Court’s Batson decision. The study found that the demeanor of a juror is frequently accepted as a neutral explanation because the authenticity of many of the demeanor explanations is completely unverifiable by a judge. The study found that jurors were dismissed for acting “totally off the wall” during questioning, appearing inattentive, strong-willed, headstrong or opinionated, seeming weak or tentative, nervous, and too casual... [and displaying] grimaces, sympathetic looks, smiles, nods, and blank stares.

Third, some litigants have expressed concerns that their rights to an impartial jury are not being adequately protected because neither the trial court nor the appellate court can adequately evaluate the validity of a prosecutor’s race-neutral reason. Anticipating problems in the review of Batson challenges, several criminal defendants have even requested that the trial court be required to videotape the jury selection process. To date, however, while appellate courts may recognize the potential value of having the ability to assess the jurors’ demeanors and hear the tones of their voices, no court has accepted the argument that a criminal defendant has a right to have the voir dire in his case videotaped.

While this Article does not adopt the position that litigants have a right to have their jury selection processes videotaped, it will argue that

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84 Raphael & Ungvarsky, supra note 75, at 234-35.
85 Id. at 246-47.
88 See, e.g., Massey v. State, 933 S.W.2d 141, 151 (Tex. Crim. App. 1996) (trial court did not abuse its discretion in refusing to allow defendant to videotape voir dire proceedings because conduct of voir dire falls largely within the discretion of the trial court); see also State v. Taylor, 944 S.W.2d 925, 934 (Mo. 1997) (en banc) (trial court did not err in denying motion to videotape voir dire because “[t]here is no requirement that the trial court videotape voir dire, and this Court declines to impose such a requirement.”). In United States v. Sherrills, the defendant argued that the prosecutor’s claim that a juror was inattentive “cannot be refuted without a complete record of the voir dire, such as a videotape, in order to determine whether white venire members were similarly inattentive.” 929 F.2d 393, 395 (8th Cir. 1991). While the Eighth Circuit noted this argument, it nonetheless did not address it on the merits. In a similar case, although the assignment of error was overruled, the court noted the defendant’s “interesting public policy argument” that would dictate the court videotape voir dire in all capital cases. State v. Joseph, No. 1-91-11, 1993 WL 531858, at *37 (Ohio Ct. App. Dec. 23, 1993) (overruling assignment of error because the defendant did not identify any prejudice that he suffered as a result of the denial of motion) (this case involved a claim of juror bias, not a Batson issue), aff’d, 653 N.E.2d 285 (Ohio 1995). On appeal to the Ohio Supreme Court, the defendant argued that because, in a capital case, the appellate court must perform a de novo review of the entire record, without a video of the voir dire, “the reviewing courts are put in a position of giving deference to a trial court who sees and hears the juror.” Merit Br. of Appellant Richard Joseph at 197, State v. Joseph, 653 N.E.2d 285 (Ohio 1995) (No. 94-372) (citations and internal quotation marks omitted). And, responding to the intermediate court’s concern that the defendant had not demonstrated prejudice, the defendant agreed: “That is precisely the point. Absent the benefit of video tape, Appellant is at a fatal disadvantage in demonstrating that his jurors were biased.” Id. at 198.
when a videotape exists, as is becoming increasingly common in courtrooms across the country, both trial courts and appellate courts should review that tape in assessing the initial validity of the Batson challenge and then in reviewing the trial court’s decision on that challenge. Before explaining in more depth the reasons that support this position, the next section will review the current use of videotape in both trial and appellate courts.

III. THE USE OF VIDEO IN TRIAL AND APPELLATE COURTS

This section will first briefly review the use of videotape in both the trial and appellate courts. It will then summarize some of the criticisms of relying on video, particularly at the appellate level. Next, it will argue that courts should determine what type of evidence or information is contained in a video and what type of decision they are being asked to make before deciding whether to review a video. That is, courts should not have blanket rules regarding the use of video; instead, they should consider whether to review video on a case-by-case, or at least category-by-category, basis.

A. Introduction and Summary of Criticisms

While headlines like “Supreme Court Meets YouTube”9⁸ may be a bit of an overstatement, in the past four decades the use of video in trial and appellate courts has exploded.⁹⁰ And the Supreme Court’s recent reliance on, and hyperlink to, videotaped evidence certainly suggests that this trend will only continue and expand.⁹¹ As commentators have noted, the increasing availability of videotape and its use in judicial decision-making “is likely to become a trend”: “there will be more cases where judges at all levels can watch an incident for themselves and come to their own conclusions about what happened.”⁹² And, of course, this raises questions about whether and to what extent courts should rely on videotaped evidence.

Video was first introduced into the courtroom as a method of presenting evidence at trial, both in lieu of live witness testimony and to present evidence of underlying events.⁹³ In addition, many trial courts

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90 See Karen Martin Campbell, Roll Tape—Admissibility of Videotape Evidence in the Courtroom, 26 U. MEm. L. REV. 1445, 1482 (1996).
have begun to use “videorecords” 94 to replace or to supplement traditional stenographic records. 95 These videorecords allow the viewer to review not only the words spoken at trial but also the demeanor, body language, and tone of the speaker. 96 While the value of video in enhancing the viewer’s ability to assess these non-verbal aspects of trial proceedings has been widely accepted at the trial level, many appellate judges oppose review of video on appeal. 97

The criticisms of reviewing a videorecord include the obvious concerns about the reliability of the technology itself. 98 In addition, concerns exist among both courts and counsel about the time necessary to review video as opposed to a written transcript. 99

The greatest concerns, however, involve the blurring of the line between the role of the fact-finder and that of the reviewing court. 100

94 For purposes of this Article, “videorecord” refers to videotape of court proceedings.
96 An Iowa state trial judge viewed videotape from the news media to determine if a witness’s hand gestures to the jury were objectionable. David Ranii, ‘Instant Replay’ for Mistrial Motion, NAT’L L.J., Apr. 11, 1983, at 2. Because of the judge’s seat, he was not able to see the witness’s hand gestures when they were made and agreed to view a videotape shot by a television station. The judge denied a motion for mistrial, but did instruct the jury to disregard the movements. Campbell, supra note 90, at n.29.
98 Hedges & Higgason, supra note 97, at 24 (“Gaps in the tape and poor quality audio and video results are the basis for many complaints, but these problems can be solved through the use of better machines and technicians.”) (footnote omitted); see also Pottinger v. Warden, Northpoint Training Ctr., 716 F. Supp. 1005, 1008 (W.D. Ky. 1989) (complaining about quality of audio and video in a video record).
99 Hedges & Higgason, supra note 97, at 24 & n.6; DeBenedictis, supra note 95, at 85 (“The criminal appellate lawyers who represent Kentucky indigents have said it takes three to four times longer to prepare briefs from videotape than from a court reporter’s transcript.”). But see id. at 86 (noting that after eight years of experience using video transcripts, lawyers take on average one day longer to prepare briefs from video transcripts); see also Pottinger, 716 F. Supp. at 1008 (“The task of reviewing the record is one a judge cannot delegate, but must waste time watching what he could have read in one-tenth the time. This court spent nearly three hours watching the videotape record of the jury selection and other parts of the trial.”). The Pottinger court noted its desire for a written transcript to be furnished along with the videorecord. Id.; see also Foster v. Kassulke, 898 F.2d 1144, 1145 (6th Cir. 1990) (criminal defendant argued that length of time required to review videorecord made it nearly impossible for counsel to write effective briefs within time limits, and thus, rendered counsel ineffective); Travieso v. Golden, 643 So. 2d 1134, 1136 (Fla. Dist. Ct. App. 1994) (“While video may eventually provide useful supplements to a written record, efficient use of appellate court time requires the submission of a written transcript of trial proceedings.”); State v. Quintero, 823 P.2d 981, 983 (Or. App. 1991) (“Although review of a video recording may be more difficult and time consuming for the parties and reviewing courts on appeal, that, in itself, does not provide a basis for reversal.”); Henry H. Perritt, Jr., Video Depositions, Transcripts and Trials, 43 EMORY L. J. 1071, 1087 (1994) (An appellate decisionmaker can watch a video at the rate of human speech, about 100 words per minute, while it can read a written transcript about five times that fast.).
100 See Hedges & Higgason, supra note 97, at 24 (“It is in the appellate court’s evidentiary review that technological advances pose a threat. The increased use of video technology... promises[] to alter our method of appellate review in profound ways that are
Courts and commentators are concerned that permitting an appellate court to view a witness’s appearance and behavior over videotape “set[s] the stage for appellate courts to sit as thirteenth jurors.” For example, these criticisms have been levied at the Supreme Court’s recent reliance on videotape in *Scott v. Harris*. While no one has argued that the Court should not have reviewed the video, Justice Stevens in his dissent criticized the Court’s decision in *Scott*. He argued that in watching the tape and coming to its own conclusions about the events, the Court improperly put itself in the role of the fact-finder. Indeed, a reviewing court has an even greater ability than a juror to assess a witness’s credibility because “[v]ideo technology allows the appellate court to stop, freeze frame, rewind, and review endlessly—capabilities denied to the jury.”

However, when faced with the questions of whether and how an appellate court should review video on appeal, most courts and commentators do not focus on what type of information is contained in the video; whether the video was presented at trial or is in fact a video of the trial; or the legal question to be analyzed. That is, they do not consider (1) whether they are reviewing a video of “evidence” or of something else, or (2) whether a review of a video would enhance or detract from the court’s appellate function given the nature of the legal question before the court. But, as will be discussed in more detail below, whether the video contains testimonial or non-testimonial evidence and, thus, whether it contains evidence that has an effective non-video analogue, affects these determinations. For some types of issues, reviewing video is no better than (and some might argue worse than) reviewing a stenographic record or other traditional evidence. For other issues, reviewing a videorecord is far superior to reviewing a traditional dissonant with established authority.”). However, not all commentators view this development as inherently negative. See, e.g., Owen & Mather, supra note 25, at 412 (“Video technology refutes the rhetoric of necessity that has long been invoked to defend traditional standards of appellate court deference to trial court decisionmaking. Appellate courts, if they so choose, now can have access via video to the same ‘data’ that presumably inform the discretionary decisions of trial judges, and that were heretofore impossible to examine on appeal. The advent of video technology makes de novo appellate reviews of such trial court rulings a real possibility for the first time.”).

101 Hedges & Higgason, supra note 97, at 25.


103 127 S. Ct. 1769 (2007).

104 Id. at 1782 (Stevens, J., dissenting) (referring to the majority as “my colleagues on the jury”).

105 Hedges & Higgason, supra note 97, at 26. Yet another criticism involves the ability for parties to “find” errors that might not be revealed by a written transcript. See id. at 26 (discussing Deemer v. Finger, 817 S.W.2d 435 (Ky. 1990), in which the videotape of proceedings revealed possible juror disqualification that was not seen by counsel during trial).
record. As will be discussed in Part IV below, Batson demonstrates one of those latter issues.

B. Types of Videos Used in Trial and Appellate Courts

Before the advent of videotape, evidence was testimonial, documentary, or physical. The trier of fact gathered all of her information about the events underlying the trial by listening to witnesses describe the events, reviewing documents pertaining to the events, or viewing still photographs relating to the events. But with video, rather than hearing a description of what happened or seeing an isolated portion of what happened in a still photograph, the trier of fact and the reviewing court can actually see and hear underlying events as they happened.

The next section will explore the value of three different types of videos: (1) video of testimonial evidence (simply presenting video of witness testimony in place of live witness testimony); (2) video of out-of-court non-testimonial evidence (video of events or actions taking place outside of the courtroom); and (3) video of in-court non-testimonial evidence (video of events or actions taking place inside the courtroom). As will be discussed below, depending on the nature of the action in the video and the nature of the legal question, sometimes using video will assist both the trier of fact and the appellate court coming to its decisions; other times, however, it will not. The distinction will turn on (1) what is contained in video, and (2) what type of legal question is at issue.

1. Video of Testimonial Evidence

The use of videotaped witness testimony at the trial court level is now commonly accepted. For instance, courts frequently admit witness testimony via a videotaped deposition. Since 1993, the Federal Rules of Civil Procedure have allowed any party to record a deposition by video without prior permission from the court. Moreover, if any party so desires, it may present the deposition in its video form during a jury trial (so long as it is not being offered solely for impeachment purposes), unless the court for good cause orders otherwise.

Absent a videotaped deposition, a jury would typically hear the testimony of an absent witness from an attorney who would read that

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106 One might argue that certain still photos are superior to video in that they capture a moment frozen in time to be examined with a level of scrutiny that is not possible while watching a moving image; nonetheless, use of the freeze frame and slow motion functions of video playback can have the same result.

107 See FED. R. CIV. P. 30(b)(2).

108 FED. R. CIV. P. 32(c). However, if a party does so, it must also provide a stenographic transcript of the video offered. Id.; see also Perritt, supra note 99, at 1072 & n.12.
witness’s transcript aloud.\(^\text{109}\) Most courts recognize that “videotape depositions are a superior means of presenting an absent witness’s testimony because they allow the trier-of-fact to better judge the credibility of the witness . . . .”\(^\text{110}\) As one trial court explained:

> While we often make decisions by written word alone, when it comes to determining facts by comparing the testimonies of one or more persons, we do a better job by being able to employ as many of our senses as possible. Personally observing the witness is preferable. Next in rank would be viewing a video deposition where one directly uses the combined senses of hearing and seeing without the filtering process that occurs when one listens to a deposition being read or reads it himself from the cold record which excludes pitch and intonation of voice, rapidity of speech, and all the other aural and visual clues.\(^\text{111}\)

Not only do videotape presentations of testimonial evidence assist the trier of fact in making credibility determinations, they also assist the trial judge in making certain evidentiary decisions when those decisions turn on the witness’s demeanor. For instance, in a criminal case, the government videotaped testimony from a witness who was unavailable to testify at trial because he was hospitalized.\(^\text{112}\) When the tape was offered into evidence, the defense objected that the prosecutor had been leading the witness, and the prosecutor asked the court to deem the witness a hostile witness.\(^\text{113}\) The court agreed, and in affirming that decision, the Fifth Circuit noted that the videotape made it possible for the trial court to gauge the witness’s demeanor more accurately than it could have with “just a cold deposition record.”\(^\text{114}\)

However, while video of testimonial evidence is widely recognized as an effective tool at the trial level, appellate courts have been wary about reviewing testimony on video, whether deposition testimony or a videorecord of trial testimony, based on concerns about intruding on the role of the trier of fact.\(^\text{115}\)

\(^{109}\) See Fed. R. Evid. 804(b)(1); Thomas A. Mauet, Trial Techniques, 159-60 (6th ed. 2002).


\(^{111}\) Rice’s Toyota World, Inc. v. Se. Toyota Distrbs., Inc., 114 F.R.D. 647, 649 (M.D.N.C. 1987). This case was decided on plaintiff’s motion to videotape all the depositions in a large commercial case prior to the amendment of the Federal Rules of Civil Procedure to permit video depositions without a court order. Id.; see also Sandidge v. Salen Offshore Drilling Co., 764 F.2d 252, 259 n.6 (5th Cir. 1985) (discussing the legion of cases that have extolled the advantages of video depositions and preference for their use in a trial, noting that a witness’s demeanor reflected in his motions, expressions, voice inflections, give the fact-finder a unique advantage in evaluating evidence).

\(^{112}\) United States v. Tunnell, 667 F.2d 1182, 1186-87 (5th Cir. 1982).

\(^{113}\) Id. at 1187-88.

\(^{114}\) Id. at 1188 (“The trial judge was able to note [the witness’s] attitude reflected by his motions, facial expressions, demeanor, and voice inflections.”).

\(^{115}\) See, e.g., Briana E. Chua, Comment, Arizona’s Digital Record and Its Use on Appeal, 35 Ariz. St. L.J. 605, 611-13 (providing technical criticisms of the time involved in searching video
fact, review video of testimonial evidence, some refuse to do so. For example, in *Moustakas v. Dashavesky*, in declining to review a videotape on appeal even when no written transcript existed, the California Court of Appeals explained its reservations:

The rules of court do not address the most important implication of the videotaping of trial proceedings. Many aspects of the time-honored rules limiting the scope of appellate review are based on the trial judge’s opportunity to see and hear witnesses, attorneys, and jurors. A drastic change in the principles of appellate review would be needed before we could base our decisions on appeal on our own evaluation of the sights and sounds of the trial courtroom. Because of the far-reaching implications, any such change must come from the Legislature or from higher judicial authority. Accordingly, we do not regard the videotape as part of the record on this appeal.\(^{116}\)

However, even though it refused to review the videotape, the court noted that “the visible and audible information thus recorded might be of value to many people, including judges.”\(^{117}\)

Other courts will review video of witness testimony, but in doing so, retain the traditional deference to the fact-finder’s credibility determinations. For example, in *Mitchell v. Archibald*, in denying the appellant’s request to re-weigh the evidence and make an independent determination of the witness’s credibility, the appellate court noted that its decision not to expand the appellate court’s existing role in weighing and determining witness credibility does not mean that videotape records cannot be used either to point out other errors in the trial proceedings or to provide concrete, clear, and convincing evidence that a trial court’s conclusions regarding a witness’s credibility were erroneous.\(^{118}\)

Two important points arise from the courts’ decisions and comments in *Moustakas* and *Mitchell*. First, an appellate court’s review of testimonial evidence on video presents some dangers: appellate judges might, consciously or unconsciously, be tempted to second-guess the trier of fact’s credibility determination. And, in this case, an appellate court’s refusal to review video of testimonial evidence (whether that video contains deposition or trial testimony) does no harm to the litigants. The appellate court can effectively review legal questions raised (even if that question is a sufficiency of the evidence question) when the resolution of that question relies on testimonial evidence because the court has an effective non-video analogue: the stenographic transcript.

Given that the determination of witness credibility is one of the quintessential functions granted to the trier of fact, the concerns raised


\(^{117}\) Id. at 753-54; see also Conservatorship of McElroy, 128 Cal. Rptr. 2d 485, 491 (Cal. Ct. App. 2002) (quoting *Moustakas*, 30 Cal. Rptr. 2d at 754-55, which declined defendant’s request to reweigh factual determinations based on videotaped evidence).

\(^{118}\) Mitchell v. Archibald, 971 S.W.2d 25, 30 n.7 (Tenn. Ct. App. 1998) (citation omitted).
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about the blurring of the traditional lines between the role of the fact-finder and reviewing courts are greatest when an appellate court is asked to review video of testimonial evidence. Because the appellate court is not permitted to assess witness credibility, the videotape provides the appellate court with nothing more to consider than does the stenographic transcript. That is, the standard of review prohibits the appellate court from considering anything beyond the witness's words, and those words are adequately captured in the written transcript.

Second, these courts recognize that there is a difference between appellate review of testimonial evidence and its review of "visible and audible information" on a videotape to assess "other errors in the trial proceedings." This distinction, as will be discussed in more detail below, is critical in determining whether a court should review a videotape. Because a videotape that contains other "visible and audible information" that relate to "other errors in the trial proceedings" provides information that is not as likely to have been captured in a stenographic transcript, it will be more valuable to an appellate court. Moreover, these "other errors in the trial proceedings" will generally not be matters for the jury to assess, and, thus, the concern that a court will intrude upon the province of the fact-finder by reviewing video in these situations is reduced. As will be discussed in Part IV below, review of Batson decisions fits both of these criteria.

2. Video of Out-of-Court Non-Testimonial Evidence

When a video does not contain testimonial evidence, but instead contains other "visible and audible information," then review of the video, either by a finder of fact or by a reviewing court, is more helpful than its non-video analogue: witness testimony at the trial level or a stenographic transcript at the appellate level. Video of non-testimonial evidence lets the viewer see and hear information firsthand rather than having that information filtered through a witness. Further, regardless of the standard of review for the legal issue under consideration, the concerns about the distinction between the functions of the trial court and the appellate court are reduced as review of these tapes does not require (or permit) an assessment of credibility. Instead, an appellate court would assess the evidence to determine if it meets the applicable legal standard (i.e., clear error, sufficiency of the evidence, etc.) not to determine whether a particular witness is worthy of belief. Even though viewers of the same tape can come to different conclusions, these differences do not turn on an assessment of credibility. Moreover, the nature of the legal

119 Moustakas, 30 Cal. Rptr. 2d at 754.
120 Mitchell, 971 S.W.2d at 30 n.7.
issue will provide the court guidance on how to resolve these differences in interpretation.\footnote{For example, on a sufficiency of the evidence issue, the court will be required to resolve such disputes in favor of the appellee. See, e.g., Oldfather, \textit{infra} note 128, at 328.}

The kinds of information regarding out-of-court events that are presented via video run the gamut, from videos that are made purposefully to capture information that is likely to be reviewed in court ("staged" video)\footnote{Gruber, \textit{supra} note 93, \S~2, at 192.} to those that capture events spontaneously ("contemporaneous" video)\footnote{"Contemporaneous video evidence" is defined as "contemporaneously recorded videotape evidence of actual facts or original events in controversy, that is,. . . 'live' videotape recordings of the actual events or incidents in controversy or giving rise to the litigation." \textit{Id.} \S~1, at 189. Courts frequently admit videos of underlying events that are taken by happenstance. That is, friends or family, or maybe a bystander with a video camera, happen to record events that later become evidence in a lawsuit. These videos may be, and often are, admitted into evidence to be considered by the trier-of-fact, subject to the rules of evidence. \textit{Id.} \S~38, at 255.} to those that are created solely for evidentiary purposes ("retroactive" video).\footnote{One of the most common type of "retrospective" videos admitted into evidence is the "day-in-the-life" video offered in many tort cases to show the effects of allegedly tortious actions on the plaintiff. \textit{Id.} \S~2, at 191-92.}

For purposes of this discussion, this Article will focus on "staged" video as it closely parallels a videorecord. That is, videos that are "staged" are intentionally taken contemporaneously for the purpose of being reviewed later if necessary.

Courts often use staged videos or videos of underlying events that are taken to preserve a record for future court proceedings. One of the most common out-of-court activities captured on video is the police interrogation. These videos have been used as evidence both at trial and in pre-trial suppression hearings. For example, in \textit{People v. Al-Yousif},\footnote{49 P.3d 1165 (Colo. 2002) (en banc).} the Colorado Supreme Court relied on a videotaped confession to determine that the defendant understood that he waived his \textit{Miranda} rights and thus, reversed the trial court’s finding that his confession was not made voluntarily.\footnote{\textit{Id.} at 1167.} The court noted that it must review different "types" of facts differently: it reviews "historical facts"\footnote{"Historical facts" are those facts regarding what happened to form the basis of the lawsuit. Chad M. Oldfather, \textit{Appellate Courts, Historical Facts, and the Civil-Criminal Distinction}, 57 VAND. L. REV. 437, 439 (2004) (defining "historical fact" as the "who, when, what, and where" series of questions); see also Bryan Adamson, \textit{All Facts Are Not Created Equal}, 13 TEMP. POL. & CIV. RTS. L. REV. 629, 632 n.20 (2004). By definition then, these facts occur outside the courtroom.} for clear error, but it reviews the ultimate question of voluntariness, a constitutional fact, \textit{de novo}.\footnote{Al-Yousif, 49 P.3d at 1169.}

In \textit{Al-Yousif}, the court reviewed the historical fact of whether the defendant spoke English. Although the court agreed with most of the trial court’s factual findings on this point, it disagreed with the specific finding that the defendant misunderstood the word "statement," based in part upon viewing the defendant’s demeanor and in part upon his
words. When making its decision on the voluntariness of the defendant's waiver of his *Miranda* rights after reviewing the videotape of his confession, the trial court relied on evidence that would not be as readily discernible from testimony about, a written transcript of, or even an audiotape of the interrogation. For example, the trial judge considered "the rapid reading of the rights (eighteen seconds) and the fact that the position of the form did not allow Al-Yousif to read along." The appellate court, based on its own independent review of the videotape, came to the opposite conclusion, but also relied on evidence that would not be available from the "cold record": "[t]he video revealed that when the detectives spoke in lengthy sentences, the defendant was more apt to become confused, especially when those sentences were spoken rapidly." The Colorado Supreme Court noted "that the video's existence enable[d] [it] to undertake this review not just from the 'cold record,' but—at least in part—in precisely the same manner as the trial court." The dissent, however, raised concerns that precisely because the court could conduct the same review of the video as the trial court, the majority placed undue emphasis on the video, to the exclusion of other evidence offered at the suppression hearing. Thus, the dissent concluded, the majority failed to afford appropriate deference to the trial court's findings of historical fact.

More recently, in *Scott v. Harris*, the case in which the U.S. Supreme Court relied on video for the first time, the district court denied a police officer's motion for summary judgment on an excessive force claim. While the Eleventh Circuit affirmed, the Supreme Court reversed, placing substantial reliance on a videotape made during a police chase. In setting out the standard by which to review the decision on a motion for summary judgment, the Court noted the following: "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment."
And, in response to the dissent’s criticism of the majority’s reaction to the tape, Justice Scalia invited the reader to view the tape and “allow the videotape to speak for itself.” Indeed, the Court chastised the Eleventh Circuit for relying on the plaintiff’s version of the events rather than viewing “the facts in the light depicted by the videotape.”

What is striking about Scott is that none of the justices questioned whether the Court should view the videotape and, if so, how much weight they should give to it. Reliance on the tape seemed to be taken for granted. Instead, the dispute between the majority and the dissent was over the analysis, driving home the obvious, but unstated, problem that even contemporaneous video evidence is subject to interpretation.

In both of these cases, while the courts were divided as to how much weight to give the video and how to interpret the video, both courts recognized that the videos contained important information that would not be discernible from a written transcript. Thus, because the non-video

from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort...” Id. at 1775-76 (emphasis added). Not only does the Court tell the story that it saw, but it does so in vivid language that places the reader, along with the Court, in the driver’s seat: the respondent’s vehicle is “racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast.” The car “swerve[s] around more than a dozen other cars, cross[es] the double-yellow line, and force[s] cars traveling in both directions to their respective shoulders to avoid being hit.” Id. at 1775.

Id. at 1775 n.5 (providing hyperlink to the videotape); see also id. at 1780 (Breyer, J. concurring) (“Because watching the video footage of the car chase made a difference to my own view of the case, I suggest that the interested reader take advantage of the link in the Court’s opinion, and watch it.”) (internal citation omitted).

Id. at 1776. A similar outcome resulted from the court’s analysis in Tennessee v. Binette, 33 S.W.3d 215, 219 (Tenn. 2000). In that case, in reviewing a trial court’s determination that a police officer had reasonable suspicion to stop the defendant’s vehicle, the Tennessee Supreme Court reviewed a videotape that the officer made while following the defendant before pulling him over. On the audio portion of the tape, the officer “commented that [the defendant] had ‘already crossed the yellow line twice,’ observed that ‘the vehicle just made a hard swerve,’ and noted that [the defendant]... was ‘running about 60 miles per hour in a 45 mile per hour zone.’” Id. at 216 (quoting police officer). Reviewing the court’s finding of fact de novo, the court held that the officer’s statements made at the time of the investigation were “clearly contradicted by the visual portion of the tape, and thus, [the court gave] them little weight in [its] de novo review of the evidence.” Id. at 219. The court continued: “Contrary to what Officer Davis stated that he observed, we find that [the defendant] did not violate any rules of the road during the period in which the video camera recorded his driving.” Id.

The issue of interpretation was discussed more fully in Binette. There, the court employed the de novo standard to review findings of fact because the trial court’s decision was based solely on the videotaped evidence. Thus, the appellate court was in the same position to view the tape as the trial court was and there were no credibility decisions to be made. Binette, 33 S.W.3d at 217. However, the court reserved judgment on the issue of the proper standard of appellate review of a videotaped trial as that issue was not presented to the court. Id. at 217 n.1. The dissent, however, argued that, in fact, a credibility determination is necessarily made in every decision of a court. Id. at 220-21 (Holder, J., dissenting). In support of its argument, the dissent noted that the trial court, the intermediate court of appeals, and the Tennessee Supreme Court all interpreted the events on the tape differently. Thus, “[b]y failing to give any presumption of correctness to the trial court, the majority essentially endorses a ‘last in line is right’ rule.” Id. at 221. The dissent concluded that trial judges are better finders of fact, regardless of the form of the evidence, than are appellate judges. Id. at 220-21; see also Dan M. Kahan et al., Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism, 122 HARV. L. REV. (forthcoming 2009), available at http://ssrn.com/abstract=1081227 (last visited Sept. 17, 2008).
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analyses for non-testimonial evidence are not as valuable to the trier of fact or to the appellate court as video can be and because there is a reduced danger of encroaching on the role of the fact-finder, when non-testimonial video evidence is involved, there should be a preference for review of the video by the trial court and by the appellate court.

3. Video of In-Court Non-Testimonial “Evidence”

For each of the types of video just discussed, a non-video analogue (in fact, a non-video predecessor) exists. In general, that analogue would be witness testimony describing the underlying events perhaps accompanied by still photographs. But, as will be discussed below, when a trial court must decide, and an appellate court is faced with review of, questions of what happened in the courtroom (as opposed to what was said in the courtroom), the videorecord of the proceedings will more often than not be the only “evidence” available for consideration. Without a videorecord of the in-court activity, the trial judge is left to make decisions based on her own memory, observations, and perceptions, and the appellate court is left only with the trial judge’s report of these memories, observations, and perceptions. However, these memories, observations, and perceptions are not “evidence” in the legal sense of the term. And, a decision based on personal observation and perception is not necessarily reliable. Therefore, in these cases, the videorecord of in-court events, in fact, is the only “evidence” available.

For example, one case vividly demonstrates that “being there” does not always mean having a better view. During a pre-trial hearing on a suppression motion, a witness for the State attacked the defendant. Thereafter, the trial judge closed the proceedings to the defendant’s family based on her perception of the family’s response to the attack. Although the events directly before and after the fracas were recorded by the court reporter, the fight itself was not, though the reporter transcribed the trial judge’s recitation of the events about two hours after the fight. Even though the reviewing court could review the judge’s statement,

143 Other types of issues that might typically fall within this category are attorney and judicial misconduct. See, e.g., Kristina G. Van Arsdel, Burdine v. Johnson: The Fifth Circuit Wakes Up, but the Supreme Court Refuses to Put the Sleeping Attorney Standard to Rest, 39 HOUS. L. REV. 835, 868 (2002) (arguing for the use of videotape in the courtroom to evaluate claims of ineffective assistance of counsel when counsel falls asleep during trial).

144 Among several definitions of evidence, Black’s Law Dictionary includes the following: “The collective mass of things, esp. testimony and exhibits, presented before a tribunal in a given dispute.” BLACK’S LAW DICTIONARY 595 (8th ed. 2004). That is, evidence is something that is intentionally brought before the court and submitted in accordance with the rules of evidence. Neither the judge nor the jury may rely on matters outside the record as “evidence.”

145 See generally ELIZABETH F. LOFTUS ET AL., EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL (4th ed. 2007) (detailing the mistakes that occur in eyewitness testimony).


147 The written transcript merely stated that “[a]n altercation erupted in the courtroom between the witness and the defendant.” Id. at 928.
because the events had been recorded on video, the court included the tape as part of the record as well.\(^{148}\) The appellate court noted that "[i]n a sense, the judge relied on her own credibility and reliability as a witness in determining to issue a closure order," and concluded that "this case pits the videotape of the courtroom disturbance against the transcript, which contains the trial judge’s observations."\(^{149}\)

Reviewing the judge’s finding of fact for clear error, the appellate court determined that the judge’s account of the events was not, in fact, supported by substantial evidence based on the events in the videotape.\(^{150}\) Recognizing that a video transcript is not without limitations, the court noted several advantages of the use of video in this situation. First, "the video cameras that were used in the courtroom, were not ‘static,’" that is, they were not fixed on a particular point in the room; thus, "the video cameras [could] capture[] the details of the incident in a way that an ordinary eyewitness understandably could not."\(^{151}\) Second, "unlike an actual eyewitness caught in the frenzy of the moment, [the appellate court was] able to scrutinize, analyze, and repeatedly review the videotape, and [did] so in the calm, dispassionate milieu afforded to an appellate court."\(^{152}\) Third, the review also "benefitted from technological aids, such as slow motion and the use of freeze frames."\(^{153}\)

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\(^{148}\) Id. at 924.

\(^{149}\) Id. at 925.

\(^{150}\) The trial judge recalled the incident as follows:

For this record, [appellant’s family] left their seats. They approached this rail. They were all yelling. I told them to leave the courtroom and they made eye contact with me and refused to do that, while the deputies were trying to put this affray down and I’m not going to let them in here.

Id. at 929. After viewing the tape, however, the appellate court determined “it [did] not appear [that] either the family or appellant ‘decided to get into the affray.’” Id. at 931 (quoting trial court). The court observed that, although the family members were upset and moving around the courtroom, none of them passed the rail separating the public seating area of the courtroom from the well of the court. Id. In holding that the trial judge’s findings were not supported by the evidence, the court stated as follows:

Considering that the episode lasted less than a minute, we are not clear as to the basis for the judge’s determination that the family “refused” to comply with her directive to leave the courtroom. To be sure, the family members never verbally indicated that they were unwilling to exit the courtroom. Although the trial judge repeatedly said “get out” during the disturbance, and she claimed to have made “eye contact” with the family, we perceive no factual basis to determine that the family members immediately heard the judge over their own screams, or that they immediately realized, in the midst of such chaos, that the judge was actually speaking to them. Moreover, as we said, the family vacated the courtroom in less than a minute.

Id.

\(^{151}\) Id. at 926.

\(^{152}\) Id.

\(^{153}\) Id.; see also Suggs v. State, 589 A.2d 551, 554 & n.2 (Md. Ct. Spec. App. 1991) (on claim that judge’s tirade against defense counsel denied him a fair trial, appellate court reviewed video of proceedings to determine that jury was still in the courtroom when the court commanded the sheriff to take hold of defense counsel).
While this example is certainly an extreme and atypical courtroom occurrence, it vividly illustrates that (1) relying on one’s own memory and perception of events is not always the best “evidence,” and (2) no non-video analogue exists to allow review of events that happen—as opposed to words that are uttered—in the courtroom.

Thus, when appellate courts review trial court decisions that are based as much on what happened in the courtroom as on what was said in the courtroom, reviewing a videotape, if one is available, is superior to relying on the written record. As will be discussed in the next section, *voir dire*, a common courtroom occurrence, is made up of both words that are uttered and events that happen. Therefore, when reviewing decisions relating to what happened during *voir dire*, including decisions on *Batson* challenges, courts should review videotapes of the *voir dire* proceedings, if they are available.

IV. USING VIDEORECORDS TO EVALUATE *BATSON* OBJECTIONS

As discussed above, the *Batson* scheme to evaluate discrimination in jury selection has been repeatedly criticized as unworkable, in large part because so many of the neutral reasons given at the second step of the analysis are based on non-verbal factors, which are not captured in a stenographic transcript. While some have proposed that *Batson* be abandoned and others have argued that the peremptory challenge no longer serves a valid purpose, recent cases demonstrate that the Supreme Court is not inclined to alter the basic *Batson* scheme. Consequently, to secure the protections advanced by *Batson*, the courts must look beyond the way that they are currently implementing *Batson* to find strategies to make *Batson* work. One way is for courts to rely more heavily on videorecords when assessing the validity of challenged strikes.

One of the reasons that the *Batson* scheme is unworkable is that the burden-shifting analysis was imported from the employment discrimination arena.154 And while *Batson* certainly seeks to protect jurors and litigants from discrimination in jury selection, the differences between using such a scheme to determine the ultimate issue in a case and using it to attempt to ferret out discrimination during the trial are great enough to make the scheme unworkable in the latter situation.

In employment discrimination (and other discrimination) cases, the burden-shifting scheme is used at the summary judgment stage to determine whether the plaintiff has sufficient evidence to bring her case before the jury.155 In such a situation, unlike in the *Batson* situation, the

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154 *Batson* v. Kentucky, 476 U.S. 79, 94 n.18 (1986) ("Our decisions concerning 'disparate treatment' under Title VII of the Civil Rights Act of 1964 have explained the operation of prima facie burden of proof rules.").

court (first the judge at the first two steps of the scheme and then the jury at the last step) must resolve a question about something that has happened outside of the courtroom. For example, the court must determine whether the plaintiff has been denied promotion or has been terminated for a discriminatory reason.

In making that decision, the judge and jury consider the admitted evidence, in the form of documents, declarations, and deposition testimony at the first two steps, and witness testimony and documentary evidence at the third step. However, when a trial judge is asked to use the same framework to ferret out discrimination in jury selection, she does not have the same types of evidence available to her nor is she acting in the same role as she (or the jury) would in using the burden-shifting scheme to resolve questions of discrimination in the employment context. Indeed, without a videorecord, to assess the validity of a neutral reason based on nonverbal communication or behavior, the court has no evidence at all: the only thing she has to rely on in making her decisions are her own observations and the arguments of counsel.

Thus, to ensure that the constitutional rights of both jurors and litigants are protected when prosecutors proffer neutral reasons based on intangible factors such as demeanor, body language, and tone of voice, which cannot be evaluated from a written transcript, both trial and appellate courts should avail themselves of videotapes when assessing the validity of the neutral reason and when reviewing that determination on appeal.

A. Resolution of the Batson Challenge at the Trial Level

While much has been written about appellate court review of videorecords, little consideration has been afforded to the utility of review of videorecords by the trial judge during the course of the proceedings. In the Batson context, however, the review of a videorecord by the trial judge is critical: by using a videorecord, the trial judge’s role in assessing Batson objections will be closer to a finder of fact’s role in assessing a claim of employment discrimination.

First, although the judge is charged with assessing the validity of the prosecutor’s neutral reason based on the “evidence” before her, in fact, there is no “evidence” in the legal sense of the term. Instead, the judge must make her factual determination based on (1) her own observations and memory, and (2) the memory and observations of counsel, who are now required to act in the dual role of witness and advocate. When a fact-finder, either the jury or the court, finds a historical fact (that is, a fact regarding what happened to form the basis of the lawsuit\(^{156}\)), it does so based on evidence presented to it in the form

\(^{156}\) In contrast to historical facts, “constitutional facts” are those facts that are “fundamental to the existence of a constitutional right.” Adamson, \textit{supra} note 128, at 633 & n.28.
of witness testimony, documentary evidence, or physical evidence. (While the determination of the validity of a neutral reason is generally considered a finding of historical fact, this finding differs from the typical finding of historical fact. Thus, the use of the term "historical fact" is misleading. A more appropriate moniker is "courtroom fact.").

When a fact-finder makes a finding of historical fact, it does not rely on its own perception or memory of the underlying events, nor does it rely on counsel's perception or memory of the underlying events. However, in the Batson context, the trial judge is asked to take on multiple roles: she is participant, witness, and trier of fact. She participates in, and in fact controls, the jury selection; at the same time, she observes the jurors and counsel as a witness; but then, when a Batson objection is raised, she is transformed into the trier of fact.

One might argue that a finding of fact based on one's own perceptions of an event is more credible than a finding of a true historical fact, based on the fact-finder's assessment of the evidence presented, but that is not necessarily so. There are disadvantages to "being there." Trials are largely oral and visual productions. Just as jurors are expected to retain information that is presented only for an instant, without time or opportunity for reflection on that information or how it relates to other information in the trial, trial judges must do the same during voir dire. And, just as juries may be permitted to review video evidence, particularly when that evidence is non-testimonial evidence, then so too should trial judges review video of non-verbal communication during jury selection when making the decision on a Batson objection.

Although discussing the value of a stenographic record, not a videorecord, one commentator draws an analogy that is even more apt when discussing review of a videorecord:

(Quoting Martin B. Louis, Allocating Adjudicative Decision Making Authority Between The Trial And Appellate Levels: A Unified View Of The Scope Of Review, The Judge/Jury Question, And Procedural Discretion, 64 N.C. L. Rev. 993, 995 n.13 (1986)) (internal quotation marks omitted). That the finding of purposeful discrimination in violation of the Equal Protection Clause is not a constitutional fact (or even an ultimate fact) subject to a more searching standard of review has been discussed, see id. at 635-36 & nn.45-48, and whether that type of finding is mischaracterized is beyond the scope of this Article.

Indeed, typically witnesses to the underlying events can be challenged for cause if they are called for jury duty in a trial related to those events. See generally 50A C.J.S. Juries § 374 (1997) ("Ordinarily, at common law a juror is not incompetent merely because the juror is a witness in the case, but it has generally been held that either party may challenge such juror for cause. Some statutes provide that a witness shall not be competent as a juror if challenged for that reason.").

"[T]he trial judge's experience of the trial, like the jury's, consists primarily of oral testimony. This reality suggests that trial judges' evaluation of the evidence is subject to the same limitations as the jury's evaluation, and thus amenable to the same correctives." Id. at 454 n.67.

See 75B AM. JUR. 2D Trial §§ 1431-33 (trial generally has discretion to permit jurors to take video evidence into the jury room, but some courts do not allow jurors to review videotaped depositions).

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A second viewing of a play or movie, for example, will reveal details and nuances missed in the first viewing. The viewer has to expend less effort simply following the story and can thus allocate more attention to the details. Moreover, the repeat viewer knows where the story will lead, and as a result knows which details are worthy of that attention.  

As discussed above, when required to provide neutral reasons for exercising strikes, prosecutors routinely respond with non-verbal reasons, which, by their very nature, cannot be captured in a stenographic transcript. Thus, if the trial judge cannot remember which jurors were or were not paying attention, closing their eyes, or making faces during the *voir dire*, she has no choice but to rely on counsel to provide that information. Although most courts do not require the proponent of the strike to testify under oath as to the neutral reasons, the fact that the attorney does not become a witness in the legal sense of the term does not mean that the attorney is not essentially acting as a witness by telling the court what she did and did not see or hear during the *voir dire* proceedings. However, at the same time she is advocating for a position, and, in fact, the attorney who opposes the *Batson* objection is advocating on her own behalf. Moreover, the “evidence” is presented as argument, not in an orderly, question and answer fashion, with an opportunity for cross-examination. Combining the roles of witness and advocate has been recognized as inherently dangerous. Thus, the availability of video allows the trial court to have an “instant replay,” which would give the court the evidence that it needs to make its finding of fact without forcing the court to rely on its own observations, memories, and perceptions, and without putting counsel in the dual role of witness and advocate. 

Second, the trial judge is not given the proper tools to adequately make a finding of fact of purposeful discrimination in jury selection. A jury (or the judge in a bench trial) has the benefit of an opening statement and often preliminary instructions from the court that highlight the evidence that the parties expect to elicit during trial as well as the issue that the jury will be asked to decide at the close of evidence. Thus, the jury can view the evidence through the lens of the legal issue that it will ultimately be asked to decide. By contrast, while a trial judge is certainly aware that a *Batson* issue may arise in any *voir dire* proceeding, she has no idea which jurors the parties may strike or the neutral reasons that might be given for striking those jurors.

161 Oldfather, supra note 128, at 455-56. Oldfather notes that the analogy is not perfect because the opening statement allows counsel to tell the jurors where the story will lead. Id. at 456. he also notes that the trial judge does not have the advantage of reviewing details. Id. at 454-55.

162 See, e.g., People v. Young, 538 N.E.2d 453, 459-60 (Ill. 1989).

163 See MODEL RULES OF PROF'L CONDUCT R. 3.7 cmt. 2 (“A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.”).
In fact, a trial judge is at an even greater disadvantage in assessing a Batson challenge than a jury is in finding a historical fact. Given the nature of the Batson objection, the trial judge and defense counsel usually will not have any reason to focus their attention on the behavior or responses of any particular juror or jurors until the voir dire has concluded, the prosecutor has made his strikes, the defendant has challenged them, and the prosecutor has provided the requisite neutral explanations. Thus, the “evidence” is not put in context until the strikes are made and the reasons are given. In essence, the parties’ arguments on the validity of prosecutor’s strikes serve as retrospective opening statements.

Third, while the trier of fact focuses on the questioning of one witness at a time to assess the credibility of that witness, the trial judge is also expected to watch the entire venire and the attorneys for potential Batson violations. The trial judge cannot realistically be expected to recall the demeanor, behavior, and body language of each panel member over the course of the voir dire.164

Finally, because Batson objections are generally not raised until the end of a voir dire proceeding, once the parties have had an opportunity to assess both the individual strikes and a pattern of strikes, the judge is forced to recall a voir dire proceeding that may last from several hours to many days. In this way, the Batson objection is unlike other complaints a litigant might have about issues that arise during trial, such as evidentiary issues or even prosecutorial misconduct, which generally require a contemporaneous objection.165

B. Appellate Review of the Batson Decision

As noted above, when reviewing decisions on Batson challenges, appellate courts must give great deference to trial courts’ factual determinations. As the Supreme Court recognized, appellate review of a

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164 While voir dire in a simple matter might be completed in a matter of hours or a few days, in a complicated or high-profile case, jury selection can last weeks, even months, and hundreds, even thousands, of potential jurors may be questioned and excused. See, e.g., National Briefing West: California: Bid To Move Trial, N.Y. TIMES, May 4, 2004, at A26 (jury selection in murder prosecution against Scott Peterson lasted nearly two months); Robert Hanley, Jury Selection In Trial Of Rabbi, N.Y. TIMES, Sept. 3, 2002, at B6 (jury selection in murder prosecution of rabbi accused of killing his wife expected to last six weeks); Joseph P. Fried, Capital Case Has Jury of 12 After Queries On Attitudes, N.Y. TIMES, Apr. 29, 1998, at B4 (jury selection in first case to be tried under New York State’s new capital punishment statute lasted seven weeks and involved 350 potential jurors); Jury Selection Begins in Polly Klaas Case, N.Y. TIMES, July 12, 1995, at 15 (8500 prospective jurors summoned in Polly Klaas murder trial and voir dire expected to last four months).

165 See, e.g., FED. R. EVID. 103(a) (requiring contemporaneous objection to preserve evidentiary issue for appeal); United States v. Taylor, 514 F.3d 1092, 1095 (10th Cir. 2008) (“Where the defendant contemporaneously moves for a mistrial on the basis of prosecutorial misconduct, we review the denial of such a motion for abuse of discretion. By contrast, in cases of prosecutorial misconduct in which the defendant makes no objection, our precedent limits us to plain error review.”) (citations omitted).
Batson decision would "seldom" be based on "much evidence." In addition, the clear error standard is generally justified based on "reasoning thought to flow from the reality that appellate judges are not present in the courtroom to witness testimony and evidence firsthand." Another commentator has argued that it has "no intrinsic meaning" and is "elastic, capacious, malleable, and above all variable." But, as discussed above, a videorecord of the voir dire can provide the elusive evidence. Thus, to give teeth to the clear error standard, appellate courts should review videorecords of voir dire when the prosecutor's neutral reasons depend on a juror's non-verbal conduct or appearance.

To date, only a few reported cases involve appellate review of Batson decisions involving videorecords, but those cases have at least seen the potential benefits in doing so. In one case involving a Batson issue, the appellate court reviewed the videotape of the voir dire at the defendant's urging. The tape did not prove particularly illuminating, as the view of the juror in question was somewhat poor. Nonetheless, the court noted that viewing the tape did, in fact, "illustrate the necessarily subjective aspects of jury selection." The court was able to discern that the juror's "hesitation in answering the questions appeared to be his general characteristic rather than a sign he could not be fair juror," and that it could not, in fact, detect a "smirk" on the juror's face.

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167 A trial judge has committed clear error when the appellate court after reviewing all of the "evidence [would be] left with the definite and firm conviction that a mistake ha[d] been committed." Id. at 369 (quoting United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948)) (alteration in original). Interestingly, even though a clear error standard applies to a Batson factual finding, that standard of review is not, in fact, dictated by Federal Rule of Civil Procedure 52(a). That rule requires that "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous . . . [and due regard shall be given] to the trial court's opportunity to judge the witnesses' credibility." FED. R. CIV. P. 52(a)(6). However, Batson decisions are not based on oral or documentary evidence. Moreover, the rule applies only to cases "tried upon the facts without a jury," which, by definition, cases involving Batson issues are not. Hernandez, 500 U.S. at 395.
168 Oldfather, supra, note 128, at 439. Although other considerations, such as "judicial economy, the enhancement of public regard for the functioning of the judicial system, and the need for both consistent decisions and clear rules," contribute to the justification for appellate deference to trial-level fact finding, the notion of institutional competence is paramount. Id. at 445.
169 Adamson, supra note 128, at 631. That the finding of purposeful discrimination in violation of the Equal Protection Clause is not a constitutional fact (or even an ultimate fact) subject to a more searching standard of review has been discussed, see id. at 635-36 & nn.45-48, and whether that type of finding is mischaracterized is beyond the scope of this Article.
170 Edward H. Cooper, Civil Rule 52(a): Rationing and Rationalizing the Resources of Appellate Review, 63 NOTRE DAME L. REV. 645, 645 (1988)).
172 Id. at *4.
173 Id.
174 Id. However, the court noted that even with a videotape to review, a trial judge would be in a better position to view the subtle changes in a juror's expression. Id. Moreover, the court rejected the defendant's "suggestion that [the] existence of a videotape alters the standard of review or permits [the court] to give less deference to the [trial] court's findings." Id. at *4 n.17.
Review of a Batson decision is analogous to review of a claim of prejudicial nonverbal communication by a trial judge. In that situation, as in the Batson context, the appellate court is put in the difficult position of having to review what at least one party claims to have happened in the courtroom (as opposed to what was said in the courtroom). Without an “adequate” description of the behavior on the record, the appellate court is left with nothing to review. There too, commentators have suggested that videorecords would cure the lack of reviewable “evidence” of nonverbal communication by judges. And while, in certain cases, the appellate court may remand for a hearing in which the trial participants give sworn testimony to determine what happened, no such procedure generally occurs in Batson cases.

Moreover, the appellate court does not risk intruding on the trial court’s role as fact-finder in this situation. First, the “fact” that is being decided is not one that relates to the ultimate issue in the case. That is, while the composition of the jury is critical to the fairness of the trial, the “fact” that is being found is not related to the underlying charge or cause of action in the case. Second, the Batson determination differs significantly from the typical finding of fact in that in this situation, the finder of fact is not assessing the credibility of witnesses, but instead, the court is required to assess both the credibility of counsel when counsel acts as a witness and the persuasiveness of counsel’s argument when counsel acts an advocate. While the court typically makes the latter determination, it is rarely called upon to make the former. In fact, given their roles as officers of the court, attorneys are presumed credible. Because of this presumption, it is particularly important that the trial court have concrete evidence, in the form of a video, to adequately assess the validity of the neutral reason. Thus, the assessment is not one that is analogous to the determination of witness credibility.

In addition, the nature of the Batson inquiry alleviates some of the other concerns raised by appellate courts about reviewing videorecords. First, the length of time required to review the transcript, while perhaps longer than necessary to review a written transcript, is not

175 Shoretz, supra note 64, at 1282. ("[T]he unique nature of nonverbal errors—indeed, their very nonverbalness—makes the application of traditional appellate procedures to review of these gestures particularly difficult."). This problem arises because “[a]lthough court reporters transcribe the words spoken at trial, unspoken gestures ordinarily do not appear on the record unless specifically noted.” Id. at 1285.
176 Id. at 1285-86 (discussing People v. Maes, 607 P.2d 1028 (Colo. Ct. App. 1979) and Allen v. State, 276 So. 2d 583 (Ala. 1973)).
177 Id. at 1290 & nn.125-26. Shoretz, however, rejects this suggested solution, but does so not on the grounds that videorecords would not provide the necessary “evidence” of prejudicial nonverbal communication, but because the then-current problems in use of videotaping in the courtroom would not facilitate this type of review. Id. at 1290-91. Of course, as time progresses, these technical issues will be resolved. Id. at 1294-96.
178 See, e.g., People v. Young, 538 N.E.2d 453, 459 (Ill. 1989) ("The prosecutor and defense counsel, as officers of the court, should be regarded as under a high professional obligation to speak truthfully.").
on the order of reviewing a videorecord on a claim of insufficient evidence to support the verdict. That is, the *voir dire* is a limited portion of the trial, easily found at the beginning of the proceedings. Courts would not be required to fast-forward through an entire trial to locate the relevant "evidence." Furthermore, the fact that a harmless error analysis is generally not required alleviates much of the concern about the amount of video to be reviewed.179

Moreover, the concerns about the time involved in reviewing videorecords will be addressed as e-briefs180 become more common.181 Just as attorneys quote relevant portions from a written transcript, they are able to insert video clips into an e-brief to relieve the court from having to fast-forward through the tape while looking for the relevant excerpt.182 In addition, modern video technology is capable of generating a searchable written transcript to accompany the videorecord.183

Thus, as technology progresses, the vast majority of the practical concerns regarding the use of videorecords will disappear. In addition, the use of videorecords by the appellate courts will put some teeth into the clear error standard. Finally, the mere fact that attorneys know that both the trial court and appellate court will have greater "evidence" on which to evaluate the neutral reasons will likely deter attorneys from engaging in discriminatory behavior in the first place.

CONCLUSION

*Batson's* dual goals of ensuring (1) that litigants are entitled to a jury of their peers, and (2) that citizens are permitted to serve on juries without suffering discrimination based on race or gender are not being served by the current methods of evaluating attorneys' neutral reasons for striking jurors. In a recent pronouncement on *Batson*, upholding the

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179 Although the Supreme Court has yet to directly address whether a *Batson* violation necessitates reversal, that conclusion is implied in the results of *Batson, Powers, Edmonson*, and *J.E.B.* Eric L. Muller, *Solving The Batson Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93, 116-17 (1996). In each of those cases, when the Court found a violation of *Batson*, it reversed outright without considering the application of a harmless error analysis. *Id.* at 117. State courts, however, have taken conflicting positions, with some of them holding that a *Batson* violation can be harmless in certain circumstances. See *id.* at 116 n.148.

180 E-briefs are electronically submitted briefs, generally on CD-ROM's or DVD's, which allow the reader to hyperlink to exhibits, cases, and even video and audio clips. See Maria Perez Crist, *The E-Brief: Legal Writing for an Online World*, 33 N.M. L. REV. 49, 65 & n.104 (2003).


182 Crist, *supra* note 180, at 87 n.204 ("Nor will it be necessary to set up a VCR to play a videotaped excerpt of testimony or a live or animated filmed exhibit. By sitting at a desktop computer in chambers or using a laptop computer anywhere, the appellate judge can work on the hypertext brief undistracted by needing additional references not readily at hand.").

183 The federal courts and many state courts have settled on Adobe's PDF format, which provides a searchable written transcript. *Id.* at 57 n.47.
basic principles and framework, the Supreme Court noted that “[t]he very integrity of the courts is jeopardized when a prosecutor’s discrimination invites cynicism respecting the jury’s neutrality, and undermines public confidence in adjudication . . . .”184 But, the Court noted, “[t]he rub has been the practical difficulty of ferreting out discrimination in selections discretionary by nature, and choices subject to myriad legitimate influences, whatever the race of the individuals on the panel from which jurors are selected.”185 Thus, the problem in enforcement lies in making the subjective objective; video can help by allowing the courts at all levels to see and hear the jurors for themselves, rather than being forced to rely on the memory, observations, and perceptions of counsel and the trial court.

However, the use of videorecords is not a failsafe solution to the very real problem of discrimination in jury selection. Voir dire is a complex and often long proceeding. The ability to capture on video the words, expressions, and mannerisms of every player in the courtroom—all of the attorneys and the entire venire—will be a technical challenge. Moreover, whether a juror is paying attention or making eye contact with a questioning attorney may not always be obvious. Finally, while video may capture actions and words, it does not capture the feeling in the courtroom, something upon which experienced trial attorneys come to rely. Nonetheless, reliance on videorecords is a step in the right direction: It provides trial and appellate courts with at least some evidence on which to base their decisions where traditionally there was often none at all.

185 Id.