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# WHEN A PEREMPTORY CHALLENGE IS NO LONGER PEREMPTORY: *BATSON*'S UNFORTUNATE FAILURE TO ERADICATE INVIDIOUS DISCRIMINATION FROM JURY SELECTION

*Jere W. Morehead\**

The inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal justice system.<sup>1</sup>

## INTRODUCTION

In *Batson v. Kentucky*,<sup>2</sup> the Supreme Court declared that the use of peremptory challenges<sup>3</sup> by prosecutors in criminal cases to exclude jurors on the basis of race violated the Equal Protection Clause of the Fourteenth Amendment.<sup>4</sup> In *Batson*, a prosecutor used peremptory challenges to strike four African-Americans from the jury so that the defendant, also an African-American, was tried by an all-white jury.<sup>5</sup>

The Supreme Court's decision in *Batson* has sparked considerable

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1. *Batson v. Kentucky*, 476 U.S. 79, 107 (1986) (Marshall, J., concurring).

2. 476 U.S. 79 (1986).

3. A peremptory challenge has been defined as "[t]he right to challenge a juror without assigning, or being required to assign, a reason for the challenge." BLACK'S LAW DICTIONARY 1136 (6th ed. 1990). Generally, once a jury venire has been gathered, each side in a given case is allowed two kinds of challenges: an unlimited number of challenges "for cause," for which a basis must be articulated to and accepted by the trial judge; and a limited number of peremptory challenges, for which no reason at all must be provided. See JOHN GUINTEHER, THE JURY IN AMERICA 49 (1988); JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 139-40 (1977).

4. *Batson*, 476 U.S. at 82-84. In writing for the Court's majority, Justice Lewis Powell observed that "[t]he 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 defendant." *Id.* at 89.

5. *Id.* at 82. The trial judge in *Batson* had observed "that the parties were entitled to use their peremptory challenges to 'strike anybody they want to.'" *Id.*

scholarly interest and debate.<sup>6</sup> The Court has expanded its holding in *Batson* to protect all defendants of a different racial classification than that of the excluded juror as well as to ban discriminatory peremptory challenges by civil litigants and criminal defendants.<sup>7</sup>

6. Over the past several years, a myriad of academic articles have scrutinized the various questions left unresolved by *Batson* and its progeny. See, e.g., Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153 (1989) (discussing three Supreme Court decisions regarding the jury and the selection process); Katherine Goldwasser, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in A Criminal Trial*, 102 HARV. L. REV. 808 (1989) (discussing whether a defendant should have limited peremptory challenges); Susan N. Herman, *Why the Court Loves Batson: Representation-Reinforcement, Colorblindness, and the Jury*, 67 TUL. L. REV. 1807 (1993) (finding that the courts must do more to eradicate racism in the criminal justice system); Bonnie L. Mayfield, *Batson and Groups Other Than Blacks: A Strict Scrutiny Analysis*, 11 AM. J. TRIAL ADVOC. 377 (1988) (discussing the possibility of extending strict scrutiny review to jury selection procedures); Jere W. Morehead, *Exploring the Frontiers of Batson v. Kentucky: Should the Safeguards of Equal Protection Extend to Gender?*, 14 AM. J. TRIAL ADVOC. 289 (1990) [hereinafter Morehead, *Exploring the Frontiers*] (arguing in support of extending *Batson's* holding to prohibit the gender-based use of peremptory challenges); Jere W. Morehead, *Prohibiting Race-Based Peremptory Challenges: Should the Principle of Equal Protection Be Extended to Private Litigants?*, 65 TUL. L. REV. 833 (1991) [hereinafter Morehead, *Private Litigants*] (advocating the use of the peremptory challenge in civil cases); Jere W. Morehead, *Racism in Jury Selection: A Response to Pryor*, 22 CUMB. L. REV. 269 (1992) [hereinafter Morehead, *Racism in Jury Selection*] (supporting a greater protection against jury discrimination); Robert M. O'Connell, *The Elimination of Racism From Jury Selection: Challenging the Peremptory Challenge*, 32 B.C. L. REV. 433 (1991) (supporting the proposition that peremptory challenges cannot be used on racial or ethnic grounds); William H. Pryor, *Applying Batson in Civil Trials: The Greatest Sideshow on Earth*, 22 CUMB. L. REV. 49 (1991) (opposing an expansion of *Batson's* protection to civil cases); J. Alexander Tanford, *Racism in the Adversary System: The Defendant's Use of Peremptory Challenges*, 63 S. CAL. L. REV. 1015 (1990) (arguing for the elimination of a defendant's racially-motivated use of peremptory challenges); Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right is It, Anyway?*, 92 COLUM. L. REV. 725 (1992) (explaining how jury discrimination harms the jurors rather than the defendant); Karen M. Bray, Comment, *Reaching the Final Chapter in the Story of Peremptory Challenges*, 40 UCLA L. REV. 517 (1992) (arguing for the elimination of the peremptory challenge altogether); Dave Harbeck, Comment, *Eliminating Unconstitutional Juries: Applying United States v. De Gross to All Heightened Scrutiny Equal Protection Groups in the Exercise of Peremptory Challenges*, 77 MINN. L. REV. 689 (1993) (arguing that the Supreme Court should prohibit peremptory challenges for all groups that receive heightened scrutiny under the Equal Protection Clause); Robert L. Harris, Jr., Note, *Redefining the Harm of Peremptory Challenges*, 32 WM. & MARY L. REV. 1027 (1991) (focusing on the need to protect any qualified juror from discrimination); Michael M. Raeber, Note, *Toward an Integrated Rule Prohibiting All Race-Based Peremptory Challenges: Some Considerations on Georgia v. McCollum*, 26 GA. L. REV. 503 (1992) (arguing for an extension of the *Batson* principle to criminal defendants); Joshua E. Swift, Note, *Batson's Invidious Legacy: Discriminatory Juror Exclusion and the "Intuitive" Peremptory Challenge*, 78 CORNELL L. REV. 336 (1993) (arguing that an attorney's reasons for using a peremptory challenge should be able to be objectively verified by the juror's own statements during voir dire).

7. See *Georgia v. McCollum*, 112 S. Ct. 2348 (1992) (holding that a criminal defendant is prohibited from engaging in purposeful racial discrimination in the exercise of peremptory challenges); *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991) (holding that the *Batson* rule applies to both plaintiffs and defendants in civil trials); *Hernandez v. New York*, 111 S. Ct.

Clarifying the extent of *Batson's* reach has become an almost annual event for the Supreme Court. The Court held just this term that the Equal Protection Clause prohibits discrimination on the basis of gender in jury selection.<sup>8</sup>

This Article summarizes the evolution of the peremptory challenge from the common law of England to the Supreme Court's decision in *Batson* in 1986. The Article then reviews the recent expansion of *Batson* by the Court in several subsequent cases and considers the growth and permutation of innumerable problems associated with attempts to eradicate invidious discrimination from the jury selection process. Finally, this Article analyzes the arguments in favor of a broader remedy to combat the problems created by discrimination in jury selection: an integrated rule proscribing the use of peremptory challenges in selecting juries.<sup>9</sup> Such a rule, by its very nature, would provide equality for all parties before a court and, at the same time, provide greater efficiency in the judicial system.

## I. A HISTORICAL OVERVIEW

The peremptory challenge has been around for centuries.<sup>10</sup> In the initial days of jury trials in England, a defendant was permitted thirty-five peremptory challenges in felony trials,<sup>11</sup> and the Crown

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1859 (1991) (holding that a prosecutor's use of peremptory challenges to exclude Latino jurors does not violate *Batson* when exercised on the race-neutral basis of governmental uncertainty that the challenged jurors will accept official translations of witness testimony); *Powers v. Ohio*, 499 U.S. 400 (1991) (holding that criminal defendants have standing to object to the racially-motivated use of peremptory challenges regardless of the race of the defendant or the excluded juror).

8. *J.E.B. v. State ex rel T.B.*, No. 92-1239, 1994 WL 132232, at \*2 (U.S. Apr. 19, 1994). *J.E.B.* involved the state's use of peremptory strikes to eliminate men from the venire in paternity actions. The defendant used all but one of his peremptory strikes to eliminate women from the venire. *Id.* The use of gender-based peremptory challenges has not been an issue until recently. Indeed, the Supreme Court expressed approval of all-male juries in *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880), and the great majority of states continued to exclude women from juries even after they were granted the right to vote in 1920. See Carol Weisbrod, *Images of the Woman Juror*, 9 HARV. WOMEN'S L.J. 59, 60 n.5 (1986). The last state law barring women from juries was not repealed until 1968. Susan L. McCoin, Note, *Sex Discrimination in the Voir Dire Process: The Rights of Prospective Female Jurors*, 58 S. CAL. L. REV. 1225, 1243 (1985).

9. This author first broached the idea of eliminating peremptory challenges, albeit in a cursory manner, in Morehead, *Private Litigants*, *supra* note 6, at 840-41, 848.

10. A detailed history of the development of the peremptory challenge in both England and the United States can be found in *Swain v. Alabama*, 380 U.S. 202, 212-20 (1965), *overruled by Batson v. Kentucky*, 476 U.S. 79 (1986). In his dissenting opinion in *Batson*, Chief Justice Warren Burger traced the peremptory challenge as far back as 104 B.C. *Batson*, 476 U.S. at 119 (Burger, C.J., dissenting).

11. *Swain*, 380 U.S. at 212-13.

was effectively permitted to hand-pick the jury.<sup>12</sup> In 1305, Parliament chose to eliminate the Crown's right to use peremptory challenges.<sup>13</sup> Although the accused retained the authority to use peremptory challenges in England, that practice became largely extinct in criminal cases<sup>14</sup> and was never developed at all in civil cases.<sup>15</sup>

In contrast, the peremptory challenge in the United States has prospered. In 1790 — just three short years after the Constitution was approved — Congress statutorily granted federal defendants thirty-five peremptory challenges in cases involving treason and twenty in other cases punishable by death.<sup>16</sup> In the years that followed, many courts began to permit peremptory challenges by both the defendant and the government for other offenses as well.<sup>17</sup> Subsequently, in 1865, the government was granted five peremptory challenges in capital and treason cases while a defendant's number was reduced to twenty.<sup>18</sup> Shortly thereafter, in 1872, Congress extended a defendant's right in *all* noncapital felony cases to ten challenges and allowed the government three challenges.<sup>19</sup>

Under current federal law, when the charged offense is a felony, a defendant is entitled to ten peremptory challenges and the government is allotted six.<sup>20</sup> Three peremptory challenges are also provided for both sides in federal civil cases.<sup>21</sup> The formation of individual state practice has closely followed the federal contour;<sup>22</sup> every state has developed a jury selection procedure that includes the use of peremptory challenges by both sides.<sup>23</sup>

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12. VAN DYKE, *supra* note 3, at 147.

13. *Id.* (citing the Ordinance for Inquests Statute, 33 Edw. Stat. 4 (1305)). The Crown's attorneys are still able to remove jurors without cause by the using the judicially-created doctrine known as "standing aside." Raeber, *supra* note 6, at 509 n.28 (citing VAN DYKE, *supra* note 3, at 148). However, the practice of removing jurors by this or any other procedure has fallen into disuse. See *Regina v. Sheffield Crown Court, ex parte Brownlow*, 1980 Q.B. 530, 542 (Eng. C.A.) (noting that English courts no longer allow prosecutors to ask potential jurors to "stand by for the Crown," or remove themselves from service).

14. *Swain*, 380 U.S. at 218.

15. WILLIAM R. CORNISH, *THE JURY* 45 (1968).

16. *Swain*, 380 U.S. at 214 (citing the Act of April 30, 1790, ch. 9, § 32, 1 Stat. 119).

17. Raeber, *supra* note 6, at 509 (citing *Swain*, 380 U.S. at 214).

18. *Swain*, 380 U.S. at 214-15 (citing the Act of March 3, 1865, ch. 86, § 2, 13 Stat. 500).

19. *Id.* at 215 n.14 (citing 17 Stat. 282 (1872)).

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

21. 28 U.S.C. § 1870 (1988).

22. *Swain*, 380 U.S. at 215.

23. See Clara L. Meek, Note, *The Use of Peremptory Challenges to Exclude Blacks From Petit Juries in Civil Actions: The Case for Striking Peremptory Strikes*, 4 REV. LITIG. 175, 216-

II. *BATSON* AND ITS PROGENY

In *Batson*, the Supreme Court acknowledged that racial discrimination in jury selection violates both a defendant's fundamental right to equal protection and the excluded juror's prerogative to serve on a jury regardless of skin color.<sup>24</sup> The Court devised a method to eliminate this problem by establishing a three-part prima facie test to evaluate claims of racial discrimination in the use of peremptory challenges. The test requires the defendant to show: (1) that the defendant is a member of a cognizable racial group; (2) that the prosecutor used peremptory challenges to remove venire members of the defendant's race; and (3) that the relevant evidence raised an inference of racial discrimination by the prosecutor.<sup>25</sup> Once the defendant establishes a prima facie case, the burden shifts to the prosecutor to present race-neutral reasons for the peremptory strikes under review.<sup>26</sup>

*Batson* was followed by four other Supreme Court decisions on the use of discriminatory peremptory challenges: *Powers v. Ohio*,<sup>27</sup> *Edmonson v. Leesville Concrete Co.*,<sup>28</sup> *Hernandez v. New York*,<sup>29</sup> and *Georgia v. McCollum*.<sup>30</sup> In *Powers*, the Court expanded the second prong of the *Batson* test, holding that *all* criminal defendants have standing to object to the racially-motivated use of pe-

19 (1984).

24. *Batson v. Kentucky*, 476 U.S. 79, 86 (1986). "The very idea of a jury is a body . . . composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds." *Id.* (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880)). "*Batson* represented a determined effort by the Court to prevent actions aimed at striking black venire-persons based on the misguided opinion that blacks, as a group, are unfit to serve as jurors." Morehead, *Racism in Jury Selection*, *supra* note 6, at 270.

25. *Batson*, 476 U.S. at 96 (citations omitted).

26. *Id.* at 97. The Court held:

[T]he prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause. . . . But the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption — or his intuitive judgment — that they would be partial to the defendant because of their shared race.

*Id.*

27. 499 U.S. 400 (1991); *see supra* notes 31-33 and accompanying text (discussing the decision in *Powers*).

28. 111 S. Ct. 2077 (1991); *see supra* notes 34-37 and accompanying text (detailing the Court's decision in *Edmonson*).

29. 111 S. Ct. 1859 (1991); *see supra* notes 38-41 and accompanying text (discussing the Court's opinion in *Hernandez*).

30. 112 S. Ct. 2348 (1992); *see supra* notes 42-45 and accompanying text (describing the holding in *McCollum*).

remptory challenges by the prosecutor, regardless of whether the defendant and the challenged juror share the same race.<sup>31</sup> The Court observed that the "Fourteenth Amendment's mandate that race discrimination be eliminated from all official acts and proceedings of the State is most compelling in the judicial system."<sup>32</sup> The Court's 7-2 opinion was severely criticized by Justice Antonin Scalia in his dissent over the Court's decision to depart from its prior holdings, which had permitted an equal protection challenge only when the stricken juror was of a different race than the defendant.<sup>33</sup>

In *Edmonson*, the Court further extended *Batson's* protection to civil trials involving private parties represented by private attorneys, holding that a private litigant in a civil case may not use peremptory challenges to exclude jurors on account of their race.<sup>34</sup> To justify the Court's application of the constitutional equal protection doctrine, the Court held that the state action requirement was satisfied by finding that a private party "becomes a government actor for the limited purpose of using peremptories during jury selection."<sup>35</sup> This 6-3 decision, expectedly, resulted in two stinging dissenting opinions: one written by Justice Sandra Day O'Connor, who argued that "[t]he Government is not responsible for everything that occurs in a courtroom";<sup>36</sup> and the other by Justice Scalia, who added that the ruling would also prove to be a hindrance to the minority litigants it was intended to benefit.<sup>37</sup>

In *Hernandez*, the Court confronted both the sufficiency of a

31. *Powers*, 499 U.S. at 409-10. The Court noted: "To bar petitioner's claim because his race differs from that of the excluded jurors would be to condone the arbitrary exclusion of citizens from the duty, honor, and privilege of jury service." *Id.* at 415.

32. *Id.*

33. *Id.* at 417-31 (Scalia, J., dissenting). Justice Scalia noted:

Until *Batson*, our jurisprudence affirmed the categorical validity of peremptory strikes so long as they were not used as a substitute for segregated jury lists. *Batson* made an exception, but one that was narrow in principle and hence limited in effect. It announced an equal-protection right, not of prospective jurors to be seated without regard to their race, but of *defendants* not to be tried by juries from which members of *their* race have been intentionally excluded.

*Id.* at 425 (Scalia, J., dissenting).

34. *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2080 (1991). Prior to the *Edmonson* decision, this author had urged the same result in *Morehead*, *Private Litigants*, *supra* note 6.

35. *Edmonson*, 111 S. Ct. at 2086. The Court held that "[t]he selection of jurors represents a unique governmental function delegated to private litigants by the government and attributable to the government for purposes of invoking constitutional protections against discrimination by reason of race." *Id.* The Court thus found that state action was present.

36. *Id.* at 2095 (O'Connor, J., dissenting).

37. *Id.* (Scalia, J., dissenting).

prosecutor's excuse for using peremptory challenges and the fate of facially neutral peremptory challenges that have a disproportionate impact upon a particular racial group. On the latter point the Court found that a prosecutor's peremptory challenges are not discriminatory simply because they might have a disproportionate impact on a racial group.<sup>38</sup> Instead, intent or purposeful discrimination is necessary for a successful *Batson* challenge.<sup>39</sup> With regard to the sufficiency of the excuse offered by the prosecutor for her challenge, the Court noted that the issue of discriminatory intent will "largely turn on [an] evaluation of credibility"<sup>40</sup> with respect to the explanation offered by counsel.<sup>41</sup>

Finally, in *McCullum*, the Court enlarged *Batson's* grasp to prohibit the discriminatory use of peremptory challenges by criminal defendants.<sup>42</sup> The Court followed the analysis previously used in *Edmonson*<sup>43</sup> and concluded that a defendant's right to a fair trial does not permit the utilization of a peremptory challenge "based on either the race of the juror or the racial stereotypes held by the party."<sup>44</sup> Justices O'Connor and Scalia once again dissented, largely on the question of state action, with Justice Scalia sarcastically ridiculing the majority's conclusion that "[a] criminal defendant, in the process of defending himself against the state, is held to be acting on behalf of the state."<sup>45</sup>

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38. *Hernandez v. New York*, 111 S. Ct. 1859, 1867 (1991).

39. *Id.* The Court observed that "[e]qual protection analysis turns on the intended consequences of government classifications. Unless the governmental actor adopted a criterion with the intent of causing the impact asserted, that impact itself does not violate the principle of race-neutrality." *Id.*

40. *Id.* at 1869 (quoting *Batson v. Kentucky*, 476 U.S. 79, 98 n.21 (1986)).

41. *Id.* The Court also stated:

A neutral explanation in the context of our analysis here means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.

*Id.* at 1866. Of course, appellate review on this factual question is very limited since "evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.'" *Id.* at 1869 (citations omitted).

42. *Georgia v. McCollum*, 112 S. Ct. 2348, 2357 (1992).

43. *Id.* at 2354-57. The Court found that: (1) the criminal defendant's discriminatory action harmed the juror and the public's confidence in the jury system; (2) the defendant's exercise of a peremptory challenge constituted state action for purposes of the Equal Protection Clause; and (3) the state had third-party standing to challenge the defendant's action. *Id.*

44. *Id.* at 2359.

45. *Id.* at 2364 (Scalia, J., dissenting). Justice Scalia also observed that:

In the interest of promoting the supposedly greater good of race relations in the soci-



Just this term, the Court resolved yet another issue created by *Batson* and its progeny. In *J.E.B. v. State ex rel T.B.*,<sup>46</sup> which involved a father's challenge to a state's elimination of men from juries in paternity actions, the Court prohibited gender-based peremptory challenges. Since gender and race traditionally have been evaluated by applying different levels of scrutiny under the Equal Protection Clause,<sup>47</sup> the outcome of this case was uncertain.<sup>48</sup>

### III. BATSON HAS NOT ACHIEVED ITS GOAL

*Batson* sought to increase public confidence and fairness in the judicial system by eliminating the use of discriminatory peremptory challenges.<sup>49</sup> Justice Thurgood Marshall, in his concurring opinion in *Batson*, cited alarming statistics which showed the flagrant misuse of peremptory challenges to exclude black jurors.<sup>50</sup> In recent years, several vivid examples of that misuse have led to race riots and a great deal of public outrage;<sup>51</sup> there is no question that the

ety as a whole (make no mistake that is what underlies all of this), we use the Constitution to destroy the age-old right of criminal defendants to exercise peremptory challenges as they wish, to secure a jury that they consider fair.

*Id.* at 2365 (Scalia, J., dissenting).

46. *J.E.B. v. State ex rel T.B.*, No. 92-1239, 1994 WL 132232, at \*2 (U.S. Apr. 19, 1994). This author endorsed extending *Batson*'s protection to apply to gender in *Morehead, Exploring the Frontiers*, *supra* note 6.

47. *Craig v. Boren*, 429 U.S. 190 (1976) (holding that classifications based on gender receive a lesser degree of scrutiny than those based on race). Gender discrimination is permitted only if it is substantially related to the achievement of an important governmental objective. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982); *Craig*, 429 U.S. at 197.

48. Despite the appeal of the proposition that jury selection should be free from gender discrimination, it is easy to imagine the practical problems of policing this expansion of *Batson*. Unlike other protected classifications, everyone in the jury pool is subject to scrutiny now that all males and females have been added to *Batson*'s scope.

49. *Batson v. Kentucky*, 476 U.S. 79, 99 (1986). The Court held: "In view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race." *Id.*; see also *Taylor v. Louisiana*, 419 U.S. 522, 530-31 (1975) (noting that jury integrity is imperiled by laws encouraging public nonparticipation in the jury process).

50. *Batson*, 476 U.S. at 103-04 (Marshall, J., concurring). Marshall also cited an instruction book used in Texas that advised prosecutors to eliminate any minority group member. *Id.* at 104 (citing *VAN DYKE*, *supra* note 3, at 152).

51. See William T. Pizzi, *Batson v. Kentucky: Curing the Disease But Killing the Patient*, 104 SUP. CT. REV. 97, 153 (1987) (discussing the race protests and public outrage over two Florida cases involving defendants acquitted by all-white juries after the defendants peremptorily struck all the African-American venirepersons); Milo Geyelin & Martha Brannigan, *Jury Selection in Racially Charged Cases Becomes More Difficult After Rioting*, WALL ST. J., May 5, 1992, at B1 (commenting on the riots after the first Rodney King verdict); Jack Reed, *Miami Officer's Retrial May Begin at Last*, ST. PETERSBURG TIMES, Mar. 7, 1993, at 1B (quoting the trial judge's comments on the retrial of Miami police officer William Lozano: "This court cannot ignore the na-

turmoil in Los Angeles following the acquittal of the accused white assailants of Rodney King was exacerbated by the fact that an all-white Simi Valley jury decided their fate.<sup>52</sup>

Regrettably, the stereotypical attitudes that have guided the use of the peremptory challenge have been difficult to change.<sup>53</sup> In 1936, Clarence Darrow observed that “[t]he Irishman and the Jew, because of their national background, will put a greater burden on the prosecution and prove more sympathetic and lenient to a defendant, than an Englishman or a Scandinavian whose passion for the enforcement of the law and order is stronger.”<sup>54</sup> *Batson* cannot secure the guarantee of equality in jury selection because lawyers still harbor those same beliefs today. This fact was vividly demonstrated in a comprehensive manual for defense attorneys, published in 1991:

Stereotypically, people from a Mediterranean population are considered desirable as jurors for the plaintiff. Those of Italian, Spanish, and French descent are thought to empathize more readily with the human and emotional side of a lawsuit. Also, those of Slavic, Irish, and Mexican descent, as well as American blacks, are thought to fall into this stereotypical category. Persons of German, Scandinavian, Swedish, Finnish, Dutch, Nordic, Scottish, Asiatic and Russian heritage tend to be stereotypically better for the criminal prosecution. Law and order is highly regarded among these groups.<sup>55</sup>

Despite the *Batson* rule’s noble purpose, it cannot prevent clever lawyers from using peremptory challenges to strike potential jurors based upon impermissible rationales so long as they pretend to use other, permissible bases. Lawyers will continue to strike, with impunity, potential jurors for any reason they please — religion, occupancy, sexual orientation, body language, educational background, or dress — even if the unstated reason is not permissible under

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tional tragedy of the urban riots that followed the Rodney King verdict. . . . That so many of our fellow Americans feel shut out from our judicial system demands our attention.”); Jeffrey Rosen, *Jurymandering: A Case Against Peremptory Challenges*, NEW REPUBLIC, Nov. 30, 1992, at 15 (reviewing the tensions created by racial exclusion in the first Rodney King trial in Simi Valley and the Yankel Rosenbaum trial in Brooklyn); E. R. Shipp, *Must a Jury of One’s Peers Be a Panel of One’s Race?*, N.Y. TIMES, Sept. 20, 1987, § 4, at 6 (commenting on the tensions created by jury selection in the Howard Beach case).

52. The use of an all-white jury in the first Rodney King trial received heavy criticism. See, e.g., Terry McMillan, *This is America*, N.Y. TIMES, May 1, 1992, at A4 (“I’m mad. Everybody should be mad. How did this trial ever manage to take place before a jury with no blacks?”).

53. Harris, *supra* note 6, at 1032. Harris observed that it “perpetuates invidious stereotypes, as each party applies both limited knowledge of the jurors and generalizations shaped by experience to eliminate jurors seemingly unsympathetic to a litigant.” *Id.*

54. Rosen, *supra* note 51, at 16 (quoting Clarence Darrow).

55. *Id.* (citation omitted).

*Batson*.<sup>56</sup>

The Chief Justice of the Pennsylvania Supreme Court pointedly explained the problem with enforcing *Batson* when he noted that "[d]espite the facile lip-service generally paid to the above constitutional principles, they are effectively nullified by evidentiary requirements that virtually insulate a prosecutor's use of the peremptory challenge to exclude jurors."<sup>57</sup> A recent survey of seventy-six cases in the federal circuits found only three in which the attorneys' proffered reasons were deemed unacceptable.<sup>58</sup> The following recent cases from the Eighth, Ninth, and Third Circuit Courts of Appeal illustrate this unfortunate point all too well.

In *United States v. Sandoval*,<sup>59</sup> the Eighth Circuit upheld a prosecutor's explanation for striking one of the two black jurors from the panel because she was a cosmetologist, very youthful, and probably did not have a high level of education.<sup>60</sup> Moreover, in *Sandoval*, the trial judge interpreted *Batson* to permit race to be used as a factor in peremptory challenges, so long as it is not the predominant or controlling factor.<sup>61</sup>

In *United States v. Lorenzo*,<sup>62</sup> the Ninth Circuit allowed the exclusion of the last remaining potential juror with a Hawaiian or Polynesian surname from a case arising out of Hawaii, based on the prosecutor's explanation that the juror had "long, unkept" hair, a

56. *Id.* Professor Susan Herman has noted that "[r]equiring the prosecutor to articulate a race-neutral reason for a peremptory challenge seems to allow the prosecutor to exclude a potential juror partially on the basis of race — as long as the prosecutor can also articulate a race-neutral reason." Herman, *supra* note 6, at 1830.

57. *Pennsylvania v. Hardcastle*, 546 A. 2d 1101, 1113 (Pa. 1988) (Nix, C.J., dissenting). The Chief Justice, in advocating the end of peremptory strikes altogether, also noted:

Even if the defendant succeeds in establishing a prima facie case of such discrimination, the prosecutor can defeat the claim if the hearing court accepts his "neutral explanation" for excluding jurors of the defendant's race. . . . The arbitrary nature of the concept of peremptory challenges renders it impossible to effectively prevent its use as a discriminatory tool.

*Id.* at 1113-14 (Nix, C.J., dissenting).

58. Swift, *supra* note 6, at 358. "The lawyers' stated reasons for challenges in these seventy-six cases focused consistently on certain qualities of potential jurors: prior involvement with the law, prosecutorial intuition, body language and appearance, employment and residence, knowledge of the defendant, and age." *Id.* at 359.

59. 997 F.2d 491 (8th Cir. 1993).

60. *Id.* at 491-92.

61. *Id.* at 492; *see also* *Howard v. Senkowski*, 986 F.2d 24, 30 (1993) (holding that peremptory jury strikes motivated only in part by race do not violate the Equal Protection Clause if the prosecutor can sustain the burden of showing he would have exercised his peremptory challenge for race-neutral reasons as well).

62. 995 F.2d 1448 (9th Cir. 1993).

“long” beard, and an appearance otherwise associated with the counterculture beliefs of “hippies.”<sup>63</sup> Despite expressing some reservations about the government’s attitude toward persons with long hair and beards, the trial judge upheld the peremptory challenge.<sup>64</sup>

Perhaps the most glaring incident demonstrating the ease of side-stepping *Batson* occurred recently in the Third Circuit in *United States v. Uwaezhoke*.<sup>65</sup> In publishing an amazing colloquy between the trial judge, the prosecutors, and the defense attorney, the court of appeals upheld the use of a peremptory challenge against a black female on the basis that she was a “postal worker,” a “single parent,” and lived in “rental property” in the city of Newark.<sup>66</sup> The appellate court conceded that, based on the information available to the government, the juror was qualified to serve on the jury.<sup>67</sup> However, as the court noted, “that is not what peremptory challenges are all about.”<sup>68</sup> Because the court could not find intentional racial discrimination when faced with the government’s explanation, the prosecutor’s use of the peremptory challenge was upheld.<sup>69</sup> The Third Circuit conceded that the proffered explanation — that the juror was a postal worker, single parent, and property renter — would likely have a disparate impact on African-Americans in the vicinity.<sup>70</sup>

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63. *Id.* at 1454.

64. *Id.*

65. 995 F.2d 388 (3d. Cir. 1993).

66. *Id.* at 391. The appellate court found “that the government’s explanation for excusing the juror was not facially invalid as a matter of law, and that the district court was not clearly erroneous in finding an absence of actual discriminatory intent.” *Id.*

67. *Id.* at 394 n.5.

68. *Id.*

69. *Id.* The Court observed:

While it is certainly conceivable, as [counsel for the defense] suggests, that the prosecutor took one look at [the juror’s] color and thought, “Blacks who live in poor neighborhoods cannot be trusted to fairly enforce drug laws against other blacks,” it is equally possible that the prosecutor concluded that anyone, regardless of color, who lives in a poor neighborhood in Newark may have had personal experience with drug trafficking that would make their reaction to trial evidence unpredictable.

*Id.*

70. *Id.* at 394-95. The dissent noted that 65.3 percent of Newark’s postal workers were black and that 58.5 percent of the city’s population was black. *Id.* at 397, 400 (Pollack, J., dissenting). The dissent argued that:

If the government’s explanation, generally applied, would have a disparate impact on a particular racial group, this fact should cause a trial judge to exercise special scrutiny during the third step of the *Batson* process to determine whether intentional discrimination, as a matter of fact, underlies the government’s peremptory challenge.

*Id.* at 401 (Pollack, J., dissenting) (citation omitted).

In arguing against restricting peremptory challenges before *Batson* was decided, a federal district court predicted that the foregoing enforcement problems would emerge:

Most important of all, attorneys, confronted with a rule completely or partially restricting their right to act with the internal motive of helping their clients when making peremptory challenges, will be under enormous pressure to lie regarding their motives. Such a rule will foster hypocrisy and disrespect for our system of justice. Indeed, it is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal.<sup>71</sup>

#### IV. THE COSTS OF *BATSON* ARE TOO HIGH

Against these obvious practical shortcomings, the exact cost of *Batson* in terms of judicial resources is difficult to measure.<sup>72</sup> Justice Powell noted in *Batson* that where discriminatory peremptory challenges had already been banned in state courts, those "courts [had] not experienced serious administrative burdens."<sup>73</sup> Justice Powell's claim, however, has been refuted in subsequent literature,<sup>74</sup> and his statement likely did not contemplate the extent of subsequent litigation needed to clarify the contours of the Court's equal protection holding in *Batson*.<sup>75</sup>

Moreover, *Batson* by its very nature requires another level of voir dire, both to defend and attack the use of peremptory challenges in a given case.<sup>76</sup> Assuming that counsel for both sides honestly intend to abide by the holdings in *Batson* and its progeny, they nevertheless must develop a record in voir dire to defend the peremptory challenges used against a claim of discrimination and a similar record to argue that the peremptory challenges were racially motivated. This fact led Chief Justice Burger to argue in his dissent from the *Batson* majority that the holding would imprint "racial differentiation" on

71. Pizzi, *supra* note 51, at 141 (quoting *King v. County of Nassau*, 581 F. Supp. 493, 501-02 (E.D.N.Y. 1984)).

72. *Id.* at 140.

73. *Batson v. Kentucky*, 476 U.S. 79, 99 (1986).

74. Pizzi, *supra* note 51, at 140-41.

75. Justice Scalia has noted that the amount of time that judges and lawyers devote to implementing the *Batson* rule is enormous. He suggested in *Edmonson* "[t]hat time will be diverted from other matters, and the overall system of justice will certainly suffer," and he conceded that one alternative would be for the states and Congress to simply eliminate peremptory challenges altogether. *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2096 (1991) (Scalia, J., dissenting).

76. Pizzi, *supra* note 51, at 140.

voir dire, because the parties would develop evidence to support their claims by asking jurors to state their race and national origin, even if those questions were personally offensive to the jurors.<sup>77</sup>

As voir dire has become more and more time-consuming and expensive, *Batson* has posed additional problems for a judicial system that many believe is already close to a breakdown.<sup>78</sup> Indeed, at a recent meeting of over 100 lawyers and judges, one of the special areas discussed was the burgeoning problem of voir dire.<sup>79</sup> Some participants called for a time limit of fifteen to twenty minutes on the examination of prospective jurors, to be expanded only in extraordinary circumstances.<sup>80</sup> One Massachusetts judge estimated that in his state, where there is a backlog of 60,000 civil and 6,000 criminal cases, superior court judges devote more time to voir dire in one year than three trial judges spend on their entire caseload during that same timespan.<sup>81</sup> And, of course, in the more celebrated cases, the time allotted for picking a jury can amount to several weeks.<sup>82</sup>

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77. *Batson*, 476 U.S. at 129 (Burger, C.J., dissenting).

78. See Deborah Marchini, *Trial by Jury, the Crisis in the Courts*, CNN INSIDE BUS., Apr. 25, 1993, available in LEXIS, Nexis Library, NEWS File. She stated:

Funding cuts and rising caseloads are delaying justice around the country, and it's going to get worse. . . . If you file a civil case in Philadelphia, it may take five years to come to trial. Delays like those are just one reason the American Bar Association recently concluded that the justice system in many parts of the U.S. is, in its words, on the verge of collapse, and it's having a serious impact on businesses and individuals around the nation.

*Id.* R. William Ide, President of the American Bar Association, recently observed that "[w]e need a revolution to take place" and that, "[f]rom a national perspective, the court system is too expensive, too slow and not accessible enough. We are facing a justice system crisis of epic proportions." Bill Rankin, *New ABA Chief Calls for Change*, ATLANTA CONST., Aug. 7, 1993, at B4.

79. Thomas Scheffey, *Making the Law A Better Workplace*, CONN. L. TRIB., March 22, 1993, at 19.

80. *Id.*

81. Barbara Rabinovitz, *Lawyer-conducted Voir Dire Encored*, MASS. LAW. WKLY., July 22, 1991, at 1. In that same article, Superior Court Judge Roger J. Donahue challenged the legitimacy of voir dire by questioning the motives of the trial attorneys: "This idea that they want an impartial jury, that's a farce. . . . What trial lawyer wants an impartial jury? He wants to win. He's not in the business for justice; he's in the business to make money." *Id.*

82. For example, in the Reginald Denny case — which involved the trucker beaten by rioters during the 1992 Los Angeles riots — the trial began on July 28, 1993. *Events in the Reginald Denny Beating Case*, S.F. CHRON., Oct. 19, 1993, at A6. Jury selection, however, was not completed until two weeks later. *Racially Mixed Jury Picked in Denny Beating Trial*, Reuters, Aug. 12, 1993, available in LEXIS, Nexis Library, CURRNT File.

## V. CURTAILING PEREMPTORY CHALLENGES IS NECESSARY

The decision in *Batson* symbolized a momentous alteration of the role of the peremptory challenge in jury trials.<sup>83</sup> The Supreme Court reaffirmed that the right to use peremptory challenges is not of constitutional magnitude and may be withheld altogether without affecting the parties' right to a fair trial.<sup>84</sup> Legislative bodies authorize the number of peremptory challenges, and the limits placed on them in both criminal and civil cases;<sup>85</sup> hence, peremptory challenges are used only when the government decides it is appropriate for parties to exclude otherwise qualified individuals from jury service.<sup>86</sup>

Since peremptory challenges are not required by law, Justice Marshall, in his concurring opinion in *Batson*, proposed complete elimination of these challenges to remove discrimination from the jury selection process.<sup>87</sup> Relying on Justice Arthur Goldberg's earlier dissent in *Swain v. Alabama*,<sup>88</sup> Justice Marshall argued that, given a choice between preserving peremptory challenges or ensuring that a jury is selected in conformity with the Fourteenth Amendment, the Constitution requires choosing the latter.<sup>89</sup> Marshall did not believe that *Batson's* rule would work because it leaves lawyers free to discriminate when using peremptory challenges, provided the action is not flagrant.<sup>90</sup> He accurately predicted that trial courts will be "ill equipped to second-guess" the reasons offered by the lawyer.<sup>91</sup>

83. Swift, Note, *supra* note 6, at 353.

84. *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2083 (1991); *Gray v. Miss.*, 481 U.S. 648, 663 (1987); *Swain v. Alabama*, 380 U.S. 202, 219 (1965); *Frazier v. United States*, 335 U.S. 497, 505 n.11 (1948); *Stilson v. United States*, 250 U.S. 583, 586 (1919).

85. *Edmonson*, 111 S. Ct. at 2083.

86. *Id.*

87. *Batson v. Kentucky*, 476 U.S. 79, 107 (1986) (Marshall, J., concurring). At the other end of the ideological spectrum, Justice Scalia has argued that peremptory challenges were practically eliminated anyway when the Court decided *Batson* and its progeny and held that the Equal Protection Clause applies to the striking of individual jurors. *Powers v. Ohio*, 499 U.S. 400, 419-26 (1991) (Scalia, J., dissenting).

88. 380 U.S. 202, 244 (1965) (Goldberg, J., dissenting).

89. *Batson*, 476 U.S. at 107 (Marshall, J., concurring).

90. *Id.* at 105 (Marshall, J., concurring).

91. *Id.* at 106 (Marshall, J., concurring). Justice Marshall questioned:

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 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" . . . ?

*Id.* (citations omitted).

When contrasted with what has happened since *Batson*, Marshall's call for the end of peremptory challenges is an attractive one.<sup>92</sup> First, it would eliminate the continued litigation pressures that *Batson* has placed on both trial and appellate courts. Trial courts would no longer be placed in the difficult posture of subjectively evaluating the hidden motives of attorneys in using peremptory strikes. Appellate courts, in turn, would not have to review those cases nor consider the endless permutations of *Batson* constantly proposed by litigants.<sup>93</sup>

Moreover, the elimination of peremptory challenges would reduce the need for extensive voir dire or the gathering of large jury panels for routine cases.<sup>94</sup> The plain truth is that a truly random selection of juries is far more representative of the population than the current system.<sup>95</sup> Questions about religious preferences, attitudes about particular institutions, or political views that have crept into voir dire could be eliminated with ease.<sup>96</sup> While empirical studies show that these personal and social characteristics have little impact on jury verdicts, lawyers continue to devote a great deal of time to

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92. By adopting Justice Marshall's concurring opinion in *Batson*, the Supreme Court could eliminate the use of peremptory challenges in order to safeguard a defendant's right to equal protection under the law. *Batson*, 476 U.S. at 102-03 (Marshall, J., concurring). Eliminating or reducing the number of peremptory challenges through rule or legislative changes, of course, would face a more dubious future. In 1976, the Supreme Court proposed a reduction in the number of peremptory challenges in felony cases from six to five for prosecutors, and from ten to five for defense attorneys. H.R. Doc. No. 94-464, 94th Cong., 2d Sess. 14 (1976). The proposal, however, was opposed by the powerful lobby of trial lawyers and ultimately rejected by Congress. Act of July 30, 1977, Pub. L. No. 95-78, § 2(c), 91 Stat. 319.

93. At oral argument in *J.E.B.*, the state of Alabama suggested that eliminating peremptory challenges altogether may be the best way to comply with a decision by the Supreme Court to extend *Batson* to apply to a gender-based discriminatory use of peremptory challenges. *J.E.B. v. State ex rel T.B.*, 62 U.S.L.W. 3329 (U.S. Nov. 9, 1993).

94. Pizzi, *supra* note 51, at 145.

95. Editorial, *Jury Selection — Peremptory Challenges Should Be Thrown Out*, SEATTLE TIMES, June 5, 1992, at A9. The editorial contended that:

Legal counsel, particularly prosecutors, seemed very eager to dismiss jurors who possess the following qualifications: 1) They answer questions clearly and honestly; 2) They are thinking people, professionals, managers, writers and teachers; 3) They are civic minded or politically active; 4) They have opinions and can express themselves; and 5) They are not intimidated if their views do not agree with the views of others.

These same prosecutors consider the ideal juror, on the other hand, to be one who possesses the following traits: 1) Does not read much, 2) Does not watch TV news, 3) Has few strong opinions, and 4) Is a team player and goes with the flow.

*Id.*

96. The curtailment of peremptory challenges also would eliminate the need for costly jury consultants during voir dire. Gay Jervey, *The Seer*, AM. LAW., June, 1993, at 56.



them because of the peremptory challenge.<sup>97</sup> The system would be able to handle more trials more efficiently if the questions focused entirely on matters supporting a challenge for cause — that is, a challenge based on a “narrowly specified, provable and legally cognizable basis of partiality.”<sup>98</sup>

Of course, one of the greatest dangers posed by the elimination of peremptory challenges is the possibility that a disruptive person — at one extreme — would be selected to a jury and distort the case to favor one side or the other.<sup>99</sup> Eliminating the safety valve that peremptory challenges provide against this sort of “unlucky” roll of the dice in jury selection cannot be dismissed out-of-hand.<sup>100</sup> Due to the double jeopardy provision of the Fifth Amendment, a prosecutor without a peremptory challenge would be particularly vulnerable to a trial judge who improperly fails to remove a biased juror for cause. Nonetheless, these speculative concerns are inherently unpersuasive when compared to the need to achieve fairness in jury selection. As Justice Powell noted, “[I]t is the jury that is a criminal defendant’s fundamental ‘protection of life and liberty against race or color prejudice.’ ”<sup>101</sup> That shield remains at risk so long as peremptory challenges are permitted to survive as part of the jury selection process.

Of course, one modest concession to the foregoing concerns might be to preserve in each case one or two peremptory challenges for each side.<sup>102</sup> The problem with even this concession, however, is that where minority representation is slight, the use of the one or two remaining peremptory challenges could perpetuate the complete exclusion of protected groups from juries.<sup>103</sup> Expanding challenges for cause to include biases inferred from statements that seem to indicate a prejudice toward one side of the case might prove to be the

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97. See RITA J. SIMON, *THE JURY: ITS ROLE IN AMERICAN SOCIETY* 41 (1980) (reviewing this research).

98. *Swain v. Alabama*, 380 U.S. 202, 220 (1965).

99. Pizzi, *supra* note 51, at 145-46.

100. *Id.* at 146.

101. *McCleskey v. Kemp*, 481 U.S. 279, 310 (1987) (quoting *Strauder v. West Virginia*, 100 U.S. 303, 309 (1880)).

102. A reduction in the number of peremptory challenges — rather than an outright ban — would mirror the approach followed in England. See Pizzi, *supra* note 51, at 147-49 (discussing England’s reduction in the number of peremptory challenges).

103. “The problem is that in a diverse society, the peremptory challenge is actually a stacking tool that favors majority interests while handicapping the party who would benefit from minority representation on the jury.” Tracey L. Altman, Note, *Affirmative Selection: A New Response to Peremptory Challenge Abuse*, 38 *STAN. L. REV.* 781, 800 (1986).

safer approach in addressing this concern.<sup>104</sup>

#### CONCLUSION

The exercise of the peremptory challenge has been altered over time because of the unfairness resulting from its use. The time has now come to eliminate it altogether in both criminal and civil trials. There is no constitutional right to use such challenges, and they provide tremendous opportunities for widespread abuse. The important goal of *Batson* — to achieve the end of discrimination in jury selection — has not been accomplished. That aspiration is too important to be conceded in favor of a current system that perpetuates discrimination. Although the Supreme Court has used high-minded rhetoric to defend peremptory challenges as a method of assuring a fair trial, the test of time indicates that such challenges continue to be used as the ultimate weapon to alter the outcome of a case by allowing the subtle use of discrimination. It is now time for the Court to take the final step and eliminate peremptory challenges altogether.

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104. Bray, Comment, *supra* note 6, at 557.

