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Reaching Batson's Challenge Twenty-Five Years Later: Eliminating the Peremptory Challenge and Loosening the Challenge for Cause Standard

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REACHING *BATSON'S* CHALLENGE TWENTY-FIVE YEARS LATER: ELIMINATING THE PEREMPTORY CHALLENGE AND LOOSENING THE CHALLENGE FOR CAUSE STANDARD

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I. INTRODUCTION: RACE MATTERS

Race matters. Gender matters. Age matters. These immutable traits shape the lens through which we view the world, and they shape the lens through which the world views us.[1] Take the response to Hurricane Katrina as an example. More than six out of ten black Americans "believe that the slow response to the hurricane was because the vast majority of victims were poor and African American."[2] Conversely, nine out of ten white Americans "believe neither race nor poverty were factors in the government's response."[3]

Because these traits matter, and because they are readily apparent to the naked eye, attorneys have the ability to manipulate the makeup of a jury in a discriminatory manner to best serve their clients.[4] Thus, the courts' role in ensuring the fairness of the jury selection process, for the jurors, parties, and the system's legitimacy, is critically important to achieving the "constitutional guaranties of 'an impartial jury' and fair trial."[5] Yet, as we reach the twenty-fifth anniversary of *Batson v. Kentucky*,[6] the Supreme Court's first major attempt to combat discriminatory jury selection practice, current jurisprudence shows that our justice system still is not even close to living up to its Constitutionally mandated ideals.[7]

A jury's purpose under the Sixth Amendment is to "act as the conscience of the community."[8] Juries, at their essence, are meant to

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1. See infra text accompanying notes 2–3 and 146–53.

2. Meera Adya et al., *Cultural Differences in Perceptions of the Government and the Legal System: Hurricane Katrina Highlights What Has Been There All Along*, 8 J.L. & SOC. CHALLENGES 27, 32 (2006).

3. *Id.*

4. *See infra* text accompanying notes 156–62.

5. Frazier v. United States, 335 U.S. 497, 505 n. 11 (1948).

6. 476 U.S. 79 (1986).

7. *See infra* Part VI.

8. Stephanie Domitrovich, *Jury Source Lists and the Community's Need to Achieve Racial Balance on the Jury*, 33 DUQ. L. REV. 39, 40 (1994).

be "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."[9] If the jury does not accurately represent the community, the jury's function, to fashion appropriate remedies within the community, is lost. Accurate community representation on the jury "depends upon both the selection of the venire panel and the selection of prospective jurors from that panel."[10] This article focuses solely on the selection of the jury, and on the discriminatory use of peremptory challenges.[11]

While peremptory challenges "occup[y] an important position in our trial procedures,"[12] they have been used "to discriminate against black jurors,"[13] which in turn harms black defendants, potential jurors, and the judicial system's integrity and perceived legitimacy.[14] Although the judiciary has taken several steps to include black and minority jurors and eradicate this bias,[15] the Court has not done enough to combat the racially discriminatory use of peremptory challenges. Part II of this article discusses the purpose and use of peremptory challenges, and illustrates how the Supreme Court did nothing to truly combat discriminatory jury selection practices until *Batson*. Part III of this article analyzes *Batson*, discussing the major shift away from previous case law, which left the use of peremptory challenges virtually undisturbed. Part IV of this article analyzes *Batson's* current application, illustrating its current three step test. Part V of this article argues that *Batson* has fallen short of its constitutionally mandated goal to end racially discriminatory jury selection practices. It also argues that *Batson* is inherently flawed because it places too much trust in the litigant's proffered race-neutral

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9. Strauder v. West Virginia, 100 U.S. 303, 308 (1880), *abrogated by* Taylor v. Louisiana, 419 U.S. 522 (1975).

10. Sheri Lynn Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21, 23 (1993)

11. Peremptory challenges are typically defined as challenges that are "exercised without a reason stated, without inquiry and without being subject to the court's control." Swain v. Alabama, 380 U.S. 202, 220 (1965) (citing Lewis v. United States, 146 U.S. 370, 378 (1892)), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986).

12. *Batson*, 476 U.S. at 98.

13. *Id.* at 99.

14. *See id.* at 88 (citing *Strauder*, 100 U.S. at 308) (stating that such practices are an "impediment to securing to [black citizens] that equal justice which the law aims to secure to all others."). This reasoning would also apply to harming women or any other cognizable minority, as recent cases have expanded *Batson*'s reach in acknowledgement of this point. *See, e.g.*, J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 128–29 (1994).

15. *See infra* Parts III, IV.

reasons for their strikes, and because courts are ill-equipped to truly curb the discriminatory use of peremptory challenges. Part VI argues that, as many scholars and judges have argued in the past, the only way to truly reach *Batson's* promise is to eliminate peremptory challenges and slightly loosen the standards on challenges for cause.

II. PEREMPTORY CHALLENGES: PURPOSE, USE, AND PRE-*BATSON* JUDICIAL ACQUIESCENCE TO THE OPENLY RACIST USE OF THE PEREMPTORY CHALLENGE

While the Constitution does not confer a right to peremptory challenges,[16] they "traditionally have been viewed as one means of assuring the selection of a qualified and unbiased jury."[17] Although Congress "has never legislatively defined what a peremptory challenge is in the federal system,"[18] peremptory challenges are typically defined as challenges that are "exercised without a reason stated, without inquiry and without being subject to the court's control."[19] In contrast, a challenge for cause is a "request from a party to a judge that a certain prospective juror not be allowed to be a member of the jury because of specified causes or reasons."[20]

The supposed purpose of peremptory challenges is to "reassure litigants . . . of the fairness of the jury that will decide their case."[21] Put another way, peremptory challenges are supposed to be used to "eliminate extremes of partiality on both sides," and to "assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise."[22] Litigants believe that challenges for cause are insufficient to assure fairness at trial because "hints of bias not sufficient to warrant challenge for cause" may arise, and litigants believe that being able to dismiss these jurors assures obtaining a fair and impartial jury.[23] Peremptory challenges are often used "upon the sudden impressions

16. Stilson v. United States, 250 U.S. 583, 586 (1919).

17. *Batson*, 476 U.S. at 91 (citing Swain v. Alabama, 380 U.S. 202, 219 (1965)).

18. United States v. Leslie, 783 F.2d 541, 574 (5th Cir. 1986) (Williams, J., dissenting), *vacated*, 479 U.S. 1074 (1987).

19. *Swain*, 380 U.S. at 220 (citing Lewis v. United States, 146 U.S. 370, 378 (1892)). States have generally defined peremptory challenges as "an objection to a juror for which *no reason need be given*, but upon which the court shall exclude him." Hawkins v. United States, 116 F. 569, 572 (9th Cir. 1902) (emphasis added).

20. Poet v. Traverse City Osteopathic Hosp., *445 N.W.2d 115, 118–19 (Mich. 1989)*.

21. United States v. Annigoni, 96 F.3d 1132, 1137 (9th Cir. 1996).

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

23. *See* McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 554 (1984).

and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another, upon a juror's habits and associations, or upon the feeling that the bare questioning [of a juror's] indifference may sometimes provoke a resentment."[24] Yet, rather than using peremptory challenges to exclude biased venirepersons,[25] peremptory challenges have been used to create racially imbalanced and biased juries.

Scholars who are familiar with American legal, social, and political history likely will not be surprised that litigants use legal tools to discriminate against African Americans and minorities.[26] Prior to *Batson*, the Supreme Court allowed litigants in a criminal trial to use peremptory challenges in a racially discriminatory manner by deferring to their discretion, and by refusing to scrutinize their use of peremptory challenges.[27]

Starting in 1880, in *Strauder v. West Virginia*,[28] the Court began to slowly recognize and disallow discriminatory selection practices, at least ostensibly, in the jury selection process. In *Strauder*, an African American man was indicted, convicted, and sentenced for murder.[29] The defendant was convicted and sentenced by an all white jury, because West Virginia law at that time allowed only "white male persons who are twenty-one years of age and who are citizens of this State . . . to serve as jurors."[30] The Court held that this statute violated the Equal Protection Clause of the Fourteenth Amendment, stating that this discrimination in selection of jurors "amounts to a denial of the equal protection of the laws to a colored man when he is put upon trial for an alleged offence against the State."[31]

While this was an important case because it moved the Court in the proper direction to some extent, the Court severely limited this holding. First, the Court stated that its holding did not mean to prohibit a state from prescribing "the qualifications of its jurors."[32] The Court

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24. *Swain*, 380 U.S. at 220 (internal citations and quotation marks omitted).

25. A venireperson is a prospective juror. BLACK'S LAW DICTIONARY 1695 (9th ed. 2009). An individual is a "venireperson" after arriving at court for jury duty, but before he or she is selected to serve on a specific jury. *See id.*

26. *See, e.g.*, Scott v. Sandford, 60 U.S. 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

27. *See Swain*, 380 U.S. at 221–22 (stating that "[t]o subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge.").

28. 100 U.S. 303 (1880), *abrogated by* Taylor v. Louisiana, 419 U.S. 522 (1975).

29. *Id.* at 304.

30. *Id.* at 305.

31. *Id.* at 310.

32. *Id.*

then noted that states may make distinctions based on, among other things, land ownership or educational qualifications.[33] States used this mandate in their "black codes," essentially negating any advance in allowing African Americans to serve on juries.

More importantly, the Court noted that the issue was "not whether a colored man, when an indictment has been proffered against him, has a right to a grand or a petit jury composed in whole or in part of persons of his own race or color."[34] Criminal defendants only had the right to a jury in which "all persons of his race or color" are not excluded by law "solely because of their race or color. . . so that by no possibility can any colored man sit upon the jury."[35] Essentially, the Court states that a criminal defendant does not have the right to have persons of his race or color on the jury; the only right the Court guarantees is that the law will not prohibit persons of a criminal defendant's race or color from serving on his jury.[36] This holding did not add many, if any, African Americans to juries in this country.[37]

The Court continued to acquiesce to racially discriminatory jury selection practices in its 1965 decision in *Swain v. Alabama*.[38] In *Swain*, the defendant, a black man, was convicted of rape, and sentenced to death.[39] In selecting the jury, the prosecution peremptorily struck all six prospective African Americans .[40] The Court stated that "we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws."[41] The Court reasoned that it could not subject a prosecutor's challenges in every case to "the demands and traditional standards of the Equal Protection Clause [because doing so] would entail a radical change."[42] Continuing its deferential theme, the Court also stated that "[t]he

33. *Id.*

34. *Id.* at 305.

35. *Id.*

36. *See* Swain v. Alabama, 380 U.S. 202, 203–04 (1965) (stating "[a]lthough a Negro defendant is not entitled to a jury containing members of his race, a State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause."), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986).

37. *See* Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1262 (2000) (stating that even since *Batson*, which followed *Swain* and took further steps to eliminate racial discrimination in jury selection, "the complexion and composition of juries have barely changed[, and] [j]uries remain overwhelmingly white and male.").

38. 380 U.S. 202 (1965).

39. *Id.* at 203.

40. *See id.* at 210.

41. *Id.* at 221.

42. *Id.* at 222.

presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury."[43]

The Court stubbornly took this deferential stance despite a strong showing that it should hold otherwise. The defense argued that every available black juror who survived challenges for cause was excluded in this case. [44] Further, the Court even acknowledged that there had not been an African American on a jury in that county since 1950; a fifteen-year period without one black juror, in a county that is twenty-six percent African American.[45] Unlike *Strauder*, African Americans in *Swain* were not prohibited by law from serving on juries, but the effect was the same. Again, over a span of fifteen years, in a county where African Americans comprised twenty-six percent of the population, not one African American was selected to serve on a jury.[46] Yet, the Court still held that the defendant failed to demonstrate that the prosecutor used peremptory challenges in a systematically discriminatory manner, reasoning that the record before it "does not with any acceptable degree of clarity, show when, how often, and under what circumstances th[is] prosecutor alone has been responsible for striking those Negroes who have appeared on petit jury panels in Talladega County."[47] This argument is easily countered by the fact that zero black jurors had been selected in this county for fifteen years.[48] Therefore, it necessarily follows that if this prosecutor had ever tried a case in Talladega County in the previous fifteen years, he had not ever allowed a black juror to sit on one of his cases.

In the twenty years that followed, *Swain* was "extensively criticized by commentators."[49] Yet, following *Swain's* holding, many lower courts adhered to the rule that defendants must prove "systematic exclusion" to establish each particular prosecutor's discriminatory use of peremptory challenges.[50] This burden of proof was nearly insurmountable, as "defendants in state and federal courts [were] overwhelmingly unable to establish a prima facie case of

43. *Id.*

44. *Id.* at 210.

45. *Id.* at 226.

46. *Id.*

47. *Id.* at 224. The Court is referring to the fact that the defendant did not show that this specific prosecutor had a history of striking black jurors. *Id.* The only way the Court would find an improper use of peremptory strikes is if the defendant could prove that the prosecutor "systematically excluded" black jurors. *See infra* note 52.

48. *Id.* at 226.

49. United States v. Childress, 715 F.2d 1313, 1316 (8th Cir. 1983).

50. Batson v. Kentucky, 476 U.S. 79, 82 n.1 (1986).

systematic exclusion."[51] In 1983, almost twenty years after *Swain*, the Court of Appeals for the Eighth Circuit stated that its research indicated "that a defendant has successfully established systematic exclusion in only two cases since *Swain* was decided in 1965."[52] Two years later, the Supreme Court would shift away from this standard.

III. *BATSON'S* SHIFT AWAY FROM SWAIN

In 1986, the Supreme Court in *Batson v. Kentucky*[53] overturned the principal holding in *Swain* that "the Constitution does not require. . . an inquiry into the prosecutor's reasons for using his peremptory challenges to strike blacks from the petit jury panel in the criminal trial of a black defendant."[54] In *Batson*, the black male defendant "was indicted in Kentucky on charges of second-degree burglary and receipt of stolen goods."[55] The prosecutor struck all four African Americans on the venire using peremptory challenges, and the jury was "composed only of white persons."[56]

Despite the factual similarity to *Swain*, the Court in *Batson* held that the use of "peremptory challenges[] is subject to the commands of the Equal Protection Clause."[57] The Court continued by noting that in equal protection cases, the burden is "on the defendant who alleges discriminatory selection of the venire to prove the existence of purposeful discrimination."[58] Successfully proving purposeful discrimination is a three-step process; the defendant must make out a prima facie case of discrimination, the burden then shifts to the prosecution to provide a race-neutral reason for its strike, and if the prosecution is successful, the defendant then must show that totality of circumstances indicates that this strike is discriminatory.[59]

To meet its burden, a defendant "alleging that members of his race have been impermissibly excluded from the venire may make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory

51. *Childress*, 715 F.2d at 1316.
52. *Id.*
53. 476 U.S. 79 (1986).
54. *Batson*, 476 U.S. at 100 (White, J., concurring).
55. *Batson*, 476 U.S. at 82 (majority opinion).
56. *Id.*
57. *Id.* at 89.
58. *Id.* at 93.
59. *See* text accompanying notes 65–81.

purpose."[60] Further, to successfully make this prima facie case of purposeful discrimination, the defendant "must show that he is a member of a racial group capable of being singled out for differential treatment."[61]

The defendant then has two options to successfully complete his prima facie case. First, the defendant may make his prima facie case "by proving that in the particular jurisdiction members of his race have not been summoned for jury service over an extended period of time. . . because the 'result bespeaks discrimination.'"[62] Second, even without such evidence, the defendant can still make a prima facie case by "relying solely on the facts concerning its selection *in his case*."[63] The defendant must show that the facts in his case, along with any other relevant facts, "raise an inference that the prosecutor used [peremptory challenges] to exclude the veniremen from the petit jury on account of their race."[64] The Court noted that the "trial court should consider all relevant circumstances" to determine if the defendant has met his burden.[65] Examples of "relevant circumstances" include "a pattern of strikes against black jurors included in the particular venire," or "the prosecutor's questions and statements during *voir dire* examination."[66] If the defendant successfully makes his/her prima facie case, "the burden shifts to the State to explain adequately the racial exclusion."[67] Moving away from *Swain's* holding, the *Batson* Court held that"[t]he State cannot meet this burden on mere general assertions that its officials did not discriminate or that they properly

60. *Id.* at 93–94. The court further stated that "[i]n deciding if the defendant has carried his burden of persuasion, a court must undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* at 93 (citing Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977)). The Court went even further when it stated "[w]e have observed that under some circumstances proof of discriminatory impact may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds." *Id.* For example, the Court stated that the "total or seriously disproportionate exclusion of Negroes from jury venires is itself such an unequal application of the law . . . as to show intentional discrimination." *Id.* (quoting Washington v. Davis, 426 U.S. 229, 241 (1976)).

61. *Id.* at 94.

62. *Id.* (quoting Hernandez v. Texas, 347 U.S. 475, 482 (1954)).

63. *Id.* at 95. The Court made this extension because it found that "[a] single invidiously discriminatory governmental act is not immunized by the absence of such discrimination in the making of other comparable decisions." *Id.* at 95 (internal citations omitted). The Court continued to state that "to dictate that 'several must suffer discrimination' before one could object would be inconsistent with the promise of equal protection to all." *Id.* at 96 (quoting McCray v. New York, 461 U.S. 961, 965 (1983) (Marshall, J., dissenting)).

64. *Id.* at 96.

65. *Id.*

66. *Id.* at 97.

67. *Id.* at 94.

performed their official duties."[68] Instead, the State must demonstrate that it used "race neutral selection criteria and procedures," and that these criteria and procedures, and not race-based criteria, produced the lack of a certain race on the jury.[69] Essentially, if the defendant makes his prima facie case, the prosecutor must provide a "race-neutral reason" for excluding the African American venirepersons in question.[70]

The Court emphasized "that the prosecutor's [race neutral] explanation need not rise to the level justifying exercise of a challenge for cause."[71] Thus, while a prosecutor cannot rebut a prima facie case of discriminatory use 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,"[72] the prosecutor may simply rebut defendant's prima facie case by offering some "race-neutral reason" for the use of a peremptory challenge.[73]

Last, if the prosecutor rebuts the defendant's prima facie case, the Court must weigh both parties' submissions and determine "whether the defendant has shown purposeful discrimination."[74] In *Batson*, the Supreme Court remanded the case because under its holding, the prosecutor must give a race-neutral explanation for his strike, and the prosecutor was afforded no opportunity to do so.[75]

Batson has continued to expand. In *Powers v. Ohio*, decided five years after *Batson*, the Court held that a "criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded jurors share the same race."[76] The defendant in *Powers* was a white man who made a *Batson* challenge to the prosecution's peremptory striking of a black juror.[77] Therefore, any defendant, regardless of his or her race, can institute a *Batson* challenge to a peremptory strike because the Equal Protection Clause "prohibits a prosecutor from. . . exclud[ing]

68. *Id.*

69. *Id.*

70. *See* Snyder v. Louisiana, 552 U.S. 472, 477 (2008) (explaining the three-step test from *Batson*).

71. *Batson*, 476 U.S. at 97.

72. *Id.*

73. *See id.* at 98.

74. *See Snyder*, 552 U.S. at 477.

75. *Batson*, 476 U.S. at 100.

76. Powers v. Ohio, 499 U.S. 400, 402 (1991).

77. *Id.* at 402–03.

otherwise qualified and unbiased persons from the petit jury solely by reason of their race."[78]

The Court continued to build upon *Batson* in *Georgia v. McCullom*,[79] where the Court held that the prosecution, and not just the defense, could challenge the racially discriminatory use of peremptory challenges.[80] In *McCullom*, the prosecution attempted to ensure that the defense would not be able to strike black jurors on the basis of race because the victims were African American, and the defendant was white.[81] The Court held that prosecutors and defendants alike could make *Batson* challenges.[82]

Last, in *J.E.B. v. Alabama ex rel. T.B.*,[83] the Court extended the allowable use of *Batson* challenges to gender, holding that peremptory challenges exercised solely on the basis of gender, much like challenges exercised solely on the basis of race, violated the Equal Protection Clause.[84] Thus, the *Batson* challenge has become an expansive doctrine. Although it has expanded, and although it took a "historic step toward eliminating the shameful practice of racial discrimination in the selection of juries,"[85] *Batson*, as Justice Marshall forecasted, "did not end the racial discrimination that peremptories inject into the jury selection process."[86]

IV. *BATSON'S* PROGENY- SOLIDIFYING THE THREE-STEP *BATSON* CHALLENGE PROCESS

Following *Batson*, the Supreme Court clarified the three-step *Batson* challenge process. The Court clarified *Batson's* first inquiry in *Johnson v. California*,[87] holding that the party making the *Batson* challenge meets this first inquiry making out "a prima facie case []showing that the totality of the relevant facts gives rise to an

78. *Id.* at 409.

79. 505 U.S. 42 (1992).

80. *Id.* at 59.

81. *Id.* at 44–45.

82. *Id.* at 59.

83. 511 U.S. 127 (1994).

84. *Id.* at 146. A further extension came in Edmonson v. Leesville Concrete Co., 500 U.S. 614, 631 (1991). There, the Court held that private litigants in a civil case cannot exercise their peremptory strikes in a racially discriminatory manner. This is also important, and the same arguments apply to civil trials as do criminal trials.

85. Batson v. Kentucky, 476 U.S. 79, 102 (Marshall, J., concurring)

86. *Id.* at 102–03.

87. 545 U.S. 162 (2005).

inference of discriminatory purpose."[88] In *Johnson*, California attempted "to require at step one that the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias."[89] The Court held that this requirement was impermissible, and held that the party making a *Batson* challenge meets their burden of establishing a prima facie case by simply raising an "inference[] that discrimination may have occurred."[90]

Second, the Court has clarified the second prong of a *Batson* challenge, whether the challenged litigant justifies the peremptory strike based on a race neutral reason, in *Purkett v. Elem*[91] and *Hernandez v. New York*,[92] stating that this standard "does not demand an explanation that is persuasive, or even plausible." Rather, the Court will find that the challenged party's explanation is race neutral "[u]nless a discriminatory intent is inherent in the prosecutor's explanation."[93] Further, the Court stated that a neutral explanation merely means "an explanation based on something other than the race of the juror."[94]

To illustrate, in *Hernandez*, the prosecutor struck two Latino venirepersons because he felt "very uncertain that they would be able to listen and follow the interpreter."[95] The prosecutor clarified by stating that he was concerned that Spanish-speaking jury members would not accept the interpreter's translation of the Spanish speaking witness testimony.[96] The prosecutor added that these Latino venirepersons "each looked away from me and said with some hesitancy that they would try, not that they could, but that they would try to follow the interpreter."[97] The Court held that the prosecutor offered a facially race neutral reason for his peremptory strikes.[98]

The Court's third inquiry is whether the litigant using the peremptory challenges did so in a purposefully discriminatory

88. *Id.* at 168.
89. *Id.*
90. *Id.* at 173.
91. 514 U.S. 765 (1995).
92. 500 U.S. 352 (1991).
93. *Purkett*, 514 U.S. at 768 (quoting *Hernandez*, 500 U.S. at 360).
94. *Hernandez*, 500 U.S. at 360.
95. *Id.* at 356.
96. *See id.* at 356–57.
97. *Id.* at 356.
98. *Id.* at 361.

manner.[99] Currently, most of the Court's ultimate decisions to uphold or deny a *Batson* challenge are determined in this third step, because "[i]t is not until the *third* step that the persuasiveness of the justification [for the peremptory challenge] becomes relevant."[100] This third step can be highly subjective and heavily dependent on the trial court's rulings.

To illustrate this third step, in *Hernandez*, the Supreme Court held that the prosecutor's facially race neutral reasons for exercising peremptory strikes on these two Latino venirepersons did not amount to purposeful discrimination.[101] The Court made this finding even though the prosecutor's reasons for his challenges were based on the challenged venireperson's ability to speak Spanish, which is highly correlated with being Latino.[102] The Court stated that trial courts are to be afforded great deference in these types of appeals,[103] mostly because the "best evidence [for determining whether counsel's facially neutral reason should be believed] often will be the demeanor of the attorney who exercises the challenge," which can best be ruled upon by the trial judge.[104] The Court also stated that "where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous."[105]

The Court set the outer limit of permissibility in this third prong in *Miller-El v. Dretke*,[106] where the Supreme Court held that the prosecutor's use of peremptory challenges was purposefully discriminatory.[107] In *Miller-El*, there were twenty available black venirepersons, nine were excused for cause, the prosecutor peremptorily struck ten, and only one served on the jury.[108] Put another way, the prosecution struck ninety-one percent of the eligible

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99. Johnson v. California 545 U.S. 162, 171 (2005); *see also Hernandez*, 500 U.S. at 359–60.

100. *Johnson*, 545 U.S. at 171 (quoting *Purkett*, 514 U.S. at 768).

101. *Hernandez*, 500 U.S. at 369. The prosecutor's challenges "rested neither on the intention to exclude Latino or bilingual jurors, nor on stereotypical assumptions about Latinos or bilinguals." *Id.* at 361. The prosecutor divided jurors into two classes; those who might have difficulty in accepting the translator's rendition of Spanish-language testimony and those indicated no difficulty. *Id.* The Court acknowledged that this criteria might "result in the disproportionate removal of prospective Latino jurors," but that this did not equal a "*per se* violation of the Equal Protection Clause." *Id.*

102. *See id.* at 361.

103. *Id.* at 364.

104. *Id.* at 364–65.

105. *Id.* at 369.

106. 545 U.S. 231 (2005).

107. *Id* at 237.

108. *Id.* at 240–41.

African American venire members.[109] At the same time, the prosecutor only struck twelve percent of non-black jurors.[110] The Court stated that "[h]appenstance is unlikely to produce this disparity."[111]

Moreover, the Court found dubious similarities between black venire members who were struck, and white venire members who the prosecution did not strike. The Court used these similarities as "evidence tending to prove purposeful discrimination."[112] For example, the prosecutor struck a black venire member who actually strongly supported the death penalty, mischaracterizing the venire member's sentiments as only supporting the death penalty if the defendant could not be rehabilitated.[113] In stark contrast, the prosecutor did not strike a white venire member who "believed in the death penalty if a criminal cannot be rehabilitated and continues to commit the same type of crime," and who doubted that a convicted murderer could commit a crime in the future.[114] The prosecutor did not strike, and did not question, several other jury members who showed a similar leaning towards rehabilitation, tending to show purposeful discrimination.[115]

The Court found many more inconsistencies in the prosecutor's treatment of venirepersons based on race.[116] The prosecutor used the state's jury shuffle procedure in an attempt to bring the non-black venire members to the front of the line, and send the black venire members to the back, where "they were likely to avoid *voir dire* altogether."[117] The Court found that use of this procedure "raise[d] a suspicion that the State sought to exclude African-Americans from the jury."[118] The Court also found evidence of the prosecutor seeking to exclude black venire members in the "contrasting *voir dire* questions posed respectively to black and nonblack panel members, on two different subjects."[119] The Court believed that the prosecutor used

109. *Id.* at 241.

110. *Id.* at 266.

111. *Id.* at 241.

112. *Id.*

113. *Id.* at 242. After the defense pointed out the mischaracterization, the prosecutor changed his reason for the strike, stating that he struck the venire person because his brother was convicted of a crime. The Court refused to credit this reason, as it "reek[ed] of afterthought." *Id.* at 246.

114. *Id.* at 244.

115. *Id.* at 244–45.

116. *See id.* at 247–52.

117. *Id.* at 253–54.

118. *Id.* at 254.

119. *Id.* at 255.

different lines of questioning to make it seem as though black venire members were biased, and use this as ammunition to "make a case for excluding black panel members."[120] Lastly, the Court noted that in the "decades leading up to the time this case was tried, prosecutors in the Dallas County office had followed a specific policy of systematically excluding blacks from juries."[121] Again, the Court found this to be evidence of a likely racially discriminatory motive for excluding a disproportionately high number of black venire members.[122] For all of the above reasons, the Court held that the prosecutor had unlawfully used peremptory challenges to strike venire members on the basis of race.[123]

Litigants today are unlikely to act in an egregiously discriminatory manner as the prosecutor in *Miller-El* did, making the Supreme Court's decision in *Snyder v. Louisiana*[124] highly important. In *Snyder*, the Court again refined the third prong of the *Batson* inquiry by discussing the common use of strikes invoking a juror's demeanor, including nervousness and inattention.[125] The Court stated that in cases where a litigant strikes a venire member by invoking their demeanor, "the trial court must evaluate not only whether the [litigant's] demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor."[126]

In *Snyder*, the prosecutor struck an African-American venire member, Mr. Brooks, because "he looked very nervous to me throughout the questioning," because he was a student-teacher who may want to go home quickly, and because he was therefore supposedly more likely "to come back with guilty of a lesser verdict so there wouldn't be a penalty phase."[127] Importantly, the trial judge simply stated that he was going to allow the strike, and did not make a specific determination regarding the credibility of the attorney and the reasons for his strike.[128] Therefore, the Court found that there was no evidence that the "trial judge credited the prosecutor's assertion that

120. *Id.* at 260.
121. *Id.* at 263.
122. *Id.* at 266.
123. *See id.*
124. Snyder v. Louisiana, 552 U.S. 472 (2008).
125. *Id.* at 477.
126. *Id.*
127. *Id.* at 478.
128. *Id.* at 479.

[juror] was nervous," meaning the typically high deference to the trial judge did not attach.[129]

The Court held that the prosecutor's second reason for the strike, Brooks' teaching obligation, "fails even under the highly deferential standard of review."[130] Brooks was one of more than fifty venire members who "expressed concern that jury service or sequestration would interfere with work, school, family, or other obligations."[131] Yet, Brooks contacted the dean of his school, who said that Brooks would be able to make up time missed, the prosecutor knew of this fact, and Brooks made no further complaints about serving on the jury.[132]

The Court also found several problems with the prosecutor's third reason for the strike–that Brooks would want to leave quickly and therefore was more likely to come back with a lesser verdict.[133] First, the Court found this reasoning to be highly speculative, because even if Brooks wanted a quicker solution, it may have been quicker for Brooks to come back with a first-degree murder verdict if a majority of the other jurors favored this finding.[134] More importantly, the prosecutor anticipated a short trial "on the record during *voir dire*—mean[ing] that serving on the jury would not have seriously interfered with Mr. Brooks' ability to complete his required student teaching."[135] At the same time, the prosecutor did not strike a venire member whose obligations were "substantially more pressing than Mr. Brooks'," and the prosecutor attempted "elicit assurances that he would be able to serve despite his work and family obligations."[136] As such, the Court held that the prosecutor failed to satisfy the third prong of the *Batson* inquiry.[137] *Miller-El* and *Snyder* show that courts must make a serious and searching inquiry into the actual reasons for either party's use of peremptory challenges. Yet, as discussed below, *Batson* and its

129. *Id.*

130. *Id.* at 480.

131. *Id.*

132. *See id.* at 480–81.

133. *Id.* at 478.

134. *Id.* at 482.

135. *Id.*

136. *Id.* at 483–84. The more pressing obligations were explained as,"[m]y wife just had a hysterectomy, so I'm running the kids back and forth to school, and we're not originally from here, so I have no family in the area, so between the two things, it's kind of bad timing for me." *Id.* at 484.

137. *See id.* at 486.

progeny have still failed to prevent racially motivated peremptory challenges.[138]

V. *BATSON* AND ITS PROGENY'S FLAWS

Batson was a large and historic step towards eliminating racial discrimination in the selection of juries,[139] so it may be unfair, to a certain extent, to criticize *Batson* for not going far enough. Yet, *Batson* and its progeny remain inherently flawed because the Court trusts litigants too much, and it simply does not possess the tools necessary to determine if a litigant's strikes are legitimate. Therefore, *Batson* has done little to remedy the problem it intended to fix[140]–to properly ensure that defendants receive their "right to be tried by a jury whose members are selected pursuant to non-discriminatory criteria."[141]

First, *Batson* and its progeny are inherently flawed because the Court still places too much trust in the litigant's proffered reasons for their peremptory challenges. Notably, in *Batson*, the Court stated that it had "no reason to believe that prosecutors will not fulfill their duty to exercise their challenges only for legitimate purposes."[142] Reality contradicts this sentiment. As Justice White pointed out in *Batson*, "the practice of peremptorily eliminating blacks from petit juries in cases with black defendants remains widespread."[143] In fact, prosecutors openly explained to the courts that they "routinely strike black jurors,"[144] and at least one prosecutor's office had an instruction book that "explicitly advised prosecutors that they conduct jury selection so as to eliminate any member of a minority group."[145] No real change

138. *See infra* Part V.

139. Batson v. Kentucky, 476 U.S. 79, 102 (1986) (Marshall, J., concurring).

140. Edward S. Adams & Christian J. Lane, *Constructing a Jury that is Both Impartial and Representative: Utilizing Cumulative Voting in Jury Selection*, 73 N.Y.U. L. REV. 703, 706 (1998).

141. *Batson*, 476 U.S. at 85–86.

142. *Id.* at 99 n. 22.

143. *Id.* at 101 (White, J., concurring); *see also id.* at 103 (Marshall, J., concurring) (discussing several racially discriminatory practices in several areas in the mid-1970s, in which prosecutors, for example, peremptorily challenged eighty-one percent of black jurors, eighty-two percent of black jurors in a different locale, or used 68.9% of their peremptory challenges on black venire members who made up less than twenty-five percent of the venire).

144. *Id.* at 103–04 (Marshall, J., concurring).

145. *Id.* at 104 (discussing Dallas County, Texas, where in 100 felony trials from 1983-1984, prosecutors peremptorily struck 405 out of 467 eligible black jurors).

has been achieved since 1986, as *Batson* has failed to effectively end the discriminatory use of peremptory challenges.[146]

Litigants continue to use peremptory challenges in a discriminatory manner, either consciously or unconsciously, likely because race matters in this country. Today, black Americans "live in a society in which racism is a part of their everyday reality."[147] Shaped by their many centuries of struggles in this country, black Americans have acquired a cohesive and distinct identity.[148] Put another way, "[r]ace is still a major shaper of African American lives."[149] "Black group identity includes a particular sensitivity to issues of racism and oppression,"[150] and the lens through which black Americans view the world is inherently different than the lens through which white Americans look. Black Americans are more likely to understand the culture of other black Americans, are more likely to see the world as other black Americans do, and are less likely to judge other black Americans on character traits that are uniquely black.[151]

In the legal context, black Americans view the police and the judicial system with "deep cynicism" and mistrust.[152] According to studies, black Americans are more likely than white Americans to "perceive racial disparities in policing, with African Americans feeling as though they are the targets of the police."[153] Due to these different views regarding the police and the judicial system, "persons of different races often evaluate evidence by different criteria."[154] With this in mind, if a prosecutor is attempting to convict a defendant in a jury trial, and his main witnesses are police officers, the prosecutor has every reason to try to strike as many black venire members as

146. Kenneth J. Melilli, Batson *in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 503 (1996).

147. Shani M. King, *Race, Identity, and Professional Responsibility: Why Legal Services Organizations Need African American Staff Attorneys*, 18 CORNELL J. L. & PUB. POL'Y 1, 12 (2008).

148. *See id.* at 12–13.

149. *Id.* at 14 (citation omitted).

150. *Id.* at 16.

151. *Id.* King discusses why black clients would prefer black lawyers, because they are less likely to be stereotypically judged, but the same reasoning applies to the context of this paper.

152. *See* David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 298 (1999).

153. Adya et al., *supra* note 2, at 35 (analyzing the CNN/USA Today/Gallop Race Relations Survey and the NBC News/The Wall Street Journal Survey in 1998).

154. Adams & Lane, *supra* note 140, at 710 (noting that "[i]t is less than clear whether the racial, ethnic, gender, or other demographics of a jury actually effect a change in verdicts.").

possible.[155] When a prosecutor knows that he can statistically improve his chances of having a jury with more favorable jurors, he is likely to jump at this chance.[156] The same can be said for the defense, who is more likely to strike white jurors in a case where police testimony is used because white jurors statistically, are likely to view police testimony more favorably.[157]

Put simply, litigants' use "of race as a factor in selecting juries is irrefutable."[158] Litigants receive limited information from jurors, so when they are "[f]aced with making exclusionary decisions on the basis of limited information, attorneys naturally rely on group stereotypes, assisted by personal experience, lawyering tradition, and an extensive body of instructional material."[159] This is not to necessarily blame litigants, or to even assign a racially discriminatory or hateful label to these litigants.[160] But, as former Dallas County assistant district attorney McMahon advised in a training video, it is the prosecutor's job to win convictions, and any prosecutor who does not "aggressively try to get a . . . jury that's favorable to [his or her] side . . . [is] a fool."[161] In this video, McMahon advocates striking black venire persons, and later stated that it "'may appear . . . racist or what not,' but that 'the other side's doing the same thing.'"[162]

Unfortunately, McMahon is correct. The legal community in general recognizes that "reliance on stereotypes is a common–though not necessarily desired–practice."[163] Acting rationally upon these

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155. *Id.* at 748 (stating that "[a]s with the prisoners' dilemma, using peremptory challenges to discriminate gives the striking party an edge in seating a preferred jury."). Because black Americans are less likely to trust police officers, they are logically less likely to trust a police officer's testimony than white Americans, who do not the same troubled history with law enforcement.

156. *See id.* at 748–49. It is important to note that I am not stating that black jurors in a case with a black defendant would be unfairly biased, and the same holds true with white jurors. Yet, in certain scenarios, black or white jurors are likely to view cases or certain types of witnesses more or less favorably. Favorable jurors and impartial jurors are completely separate ideas.

157. *See id.*

158. *Id.* at 705. This is not to say that it is the only factor, it is simply the most contentious. *Id.* at 705 n. 7.

159. *Id.* at 707.

160. Ethically and legally, litigants are blameworthy for purposefully using strikes based on race against the letter and spirit of *Batson*. Lawyers are not merely instruments for their clients to win a case, they also owe duties to the courts and to the profession in general. However, one cannot discount the pressure put on litigants to win, regardless of the morality of their use of peremptory challenges.

161. Adams & Lane, *supra* note 140, at 708.

162. *See id.* (internal citations omitted).

163. *Id.*

stereotypes, "[t]he discriminating litigant improves his or her chances of seating a jury 'favorable' to her case regardless of the approach taken by the opposition."[164] Thus, even though litigants must be more careful with their challenges after *Miller-El* and *Snyder*, they will still discriminate in the jury selection process and attempt to cloak their strikes based on some race neutral reason.

In addition to placing too much trust in litigants who still use race to strike jurors, the second, and more troubling, problem with *Batson* and its progeny is the fact that courts are incompetent, through no fault of their own, to discover the litigant's true reason for their strikes.[165] Cases in which litigants use demeanor-based challenges highlight the court's inadequacy and inability to determine the motive behind a litigant's strikes. Peremptory challenges, by their nature, allow litigants to strike venire members if they do not like their tone, attitude, inattentiveness, or the way in which the venireperson looks at the litigant and responds to questioning. To illustrate, in *United States v. Ellison*,[166] the prosecutor struck a black venireperson because she "seemed disinterested because she had rolled her eyes and sighed during *voir dire* examination."[167] Although this juror answered the questions she had been asked, the prosecutor "didn't think that she could be a fair and impartial juror."[168] While the Eighth Circuit noted that "a prosecutor's subjective judgment about attentiveness may be particularly susceptible to the kinds of abuse prohibited by *Batson*,"[169] the appellate court still credited the prosecutor's peremptory challenge as being non-discriminatory, even though the lower court made no specific finding as to the individual's behavior.[170] With this statement, the court recognizes that there may be some hint of a racially motivated challenge, but also recognizes that it has no way to enter the litigant's mind to determine if their challenge was legitimate.

Although *Miller-El* and *Snyder* requires courts to compare the attorney's treatment of venire members who were not struck to those who were struck, the court, nor anyone else for that matter, is simply ill equipped to handle non-egregious demeanor-based challenges. As the Court noted in *Hernandez*, the "best evidence [for determining whether counsel's facially neutral reason should be believed] often

164. *Id.* at 749.
165. Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring).
166. 616 F.3d 829 (8th Cir. 2010).
167. *Id.* at 832.
168. *Id.*
169. *Id.* (internal citations omitted).
170. *Id.*

will be the demeanor of the attorney who exercises the challenge."[171] Therefore, according to *Hernandez*, the trial judge must watch the attorney closely, and determine if the litigant's demeanor is suggestive of an improper motive. Not only is this a seemingly impossible and entirely subjective standard, but it places trial judges in the uncomfortable position of having to rule on an attorney's demeanor with no clear guidelines.

To further illustrate, if a litigant claims to strike a venire member because "the juror had a son about the same age as defendant, or seemed uncommunicative, or never cracked a smile," or that the venire member's tone and demeanor suggest prejudice, the court will have an extremely difficult time upholding a *Batson* challenge on such a subjective strike.[172] Do we really want the judge to say, "Counsel, based on your demeanor, I can see your intent is to strike these individuals because of their race?" If we have peremptory challenges, do we really want judges telling litigants that their gut instincts are wrong and racially biased? Since the nature of peremptory challenges is to allow litigants to act based on their "gut feelings," replacing the litigants' gut feelings with the judge's gut feelings undermines the entire purpose of peremptory challenges.

Moreover, it is highly likely that litigants will use their strikes because they actually do get a bad vibe from a juror, but this too could have an unconscious basis in race. For example, in the United States, "[b]lack people's style of walking, glances, dress, and haircuts, has historically engendered fear in those who find it foreign, unfamiliar, or uncivilized."[173] As Justice Marshall correctly noted, a litigant's "own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is sullen, or distant, a characterization that would not have come to his mind if a white juror had acted identically."[174]

People also gravitate towards those similar to them;[175] so, even the most racially-sensitive white Americans are less likely than black Americans to be completely familiar and comfortable with black

171. 500 U.S. 352, 364–65 (1991).

172. Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring) (internal citations omitted).

173. King, *supra* note 147, at 17 (internal citations omitted).

174. *Batson*, 476 U.S. at 106 (Marshall, J., concurring) (internal citations omitted).

175. Brian J. Serr & Mark Maney, *Criminal Law: Racism, Premptory Challenges, And The Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 J. CRIM. L. & CRIMINOLOGY 1, 8 (1988).

Americans.[176] Furthermore, "[a] judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported."[177] Therefore, even if litigants have no ulterior motive to strike black jurors, they are likely to be less comfortable with a black juror than a white juror. This makes them more likely to strike black jurors, citing race-neutral reasons, and judges are more likely to see nothing wrong with these strikes. Judges are ill-equipped to handle these problems because unconscious bias is almost undetectable, and conscious bias is too easy to hide.[178]

Moreover, there is an inherent difficulty with *Batson's* requirement that a litigant have an "acceptable" race neutral reason for a peremptory strike. If a venire member cannot be struck for cause, there are usually no truly persuasive reasons for a juror's removal.[179] By nature, peremptory challenges are used "upon the sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another, [or] upon a juror's habits and associations."[180] As the dissenting justices in *Batson* and several commentators correctly note, prior to *Batson*, the Supreme Court saw a peremptory challenge as an "arbitrary and capricious right, [which] must be exercised with full freedom, or it fails of its full purpose."[181] In other words, the purpose of peremptory challenges is to allow litigants to strike individuals on arbitrary grounds without a truly "legitimate" reason. By not allowing litigants to exercise peremptory challenges with full freedom, *Batson* seemingly attempts to have the best of both worlds–keeping peremptory challenges and limiting discrimination simultaneously–when only one is possible.[182]

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176. *See* King, *supra* note 147, at 17. The article discusses how black attorneys would be better able to work with black clients and less likely to judge them. Black attorneys will be less likely to judge their black clients who possess traits and styles that white attorneys would not understand as well.

177. *Batson*, 476 U.S. at 106 (Marshall, J., concurring).

178. Brian W. Stoltz, Note, *Rethinking the Peremptory Challenge: Letting Lawyers Enforce the Principles of* Batson, 85 TEX. L. REV. 1031, 1041 (2007). Noting that critics of Batson's current system believe that "all but the most incompetent attorneys can think of some racially neutral explanation for their actions." *Id.*

179. Melilli, *supra* note 146, at 483 n.105. This is, of course, assuming that challenges for cause are expanded.

180. Swain v. Alabama, 380 U.S. 202, 220 (1965). (internal citations and quotation marks omitted).

181. Stoltz, *supra* note 178, at 1031 (citing Swain v. Alabama, 380 U.S. 202, 219 (1965)).

182. *See Batson*, 476 U.S. at 102–03 (Marshall, J., concurring). History has shown that "*Batson* and its progeny have not only stopped short of destroying peremptory challenges but have been so ineffective that they have rarely stopped peremptory challenges based only on unambiguously unconstitutional criteria such as race or gender." Daniel M. Hinkle,

Since racial differences and lawyers' tendencies are not likely to change, a more fundamental change is required, or else the "jury selection system will remain effectively the same as before *Batson*."[183] If the system remains the same, the integrity of the American court system's decisions will continue to be undermined, as minorities continue to be blocked from juries disproportionately and white Americans become more aware of this problem.[184]

VI. REACHING *BATSON'S* CHALLENGE: ELIMINATING PEREMPTORY CHALLENGES AND EXPANDING "FOR CAUSE" CHALLENGES

Despite *Batson's* effort to curb discrimination, its dual-goals of keeping peremptory challenges and assuring litigants of the "right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria" cannot truly coexist. Completely eliminating the peremptory challenge, and slightly loosening of the "for-cause" challenge standard, is the only way to realize *Batson's*, and the Constitution's, promise.[185]

To that end, first, although many litigators see peremptory challenges as essential to a jury trial, the fact remains that the use of the peremptory challenge is not a Constitutional right; it is purely statutory.[186] On the other hand, the right to have a jury selected pursuant to non-discriminatory criteria is a constitutional right.[187] Accordingly, in deciding "between the right [] to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the [statutory] right to challenge peremptorily, the Constitution

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Peremptory Challenges Based on Religious Affiliation: Are They Constitutional?, 9 BUFF. CRIM. L. REV. 139, 199 (2005)

183. Adams & Lane, *supra* note 140, at 707.

184. *Id.* at 709. Our court system's legitimacy will be undermined because black Americans will continue to see themselves shut out of jury service, and white Americans are becoming aware of the justice system's inequities. *See* Harris, *supra* note 152, at 299. A system that does not have legitimacy cannot last as it is.

185. Jonathan B. Mintz, Note, Batson v. Kentucky*: A Half Step in the Right Direction (Racial Discrimination and Peremptory Challenges Under the Heavier Confines of Equal Protection)*, 72 CORNELL L. REV. 1026, 1026 (1987). Mintz notes that peremptory challenge to potential jurors is "probably the single most significant means by which . . . prejudice and bias [are] injected into the jury selection system." *Id. Batson* itself recognized this fact, stating that "there can be no dispute [sic] that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate." *Batson*, 476 U.S. at 96 (internal citations omitted). This is not to say all litigants discriminate, but those who want to win at any cost seem likely to.

186. *See* Mintz, *supra* note 185, at 1041.

187. *Batson*, 476 U.S. at 85–86.

compels a choice of the former."[188] Therefore, "the system, not the Constitution, must be changed."[189]

There can be no middle ground; it is impossible to allow litigants to use peremptory challenges and ensure that jury members are selected pursuant to non-discriminatory criteria simultaneously.[190] Total elimination of peremptory challenges is necessary because racial differences will continue to exist, and lawyers, either consciously or unconsciously, will continue to exercise peremptory challenges in a discriminatory fashion because doing so increases their chance of winning.[191] Although *Miller-El* and *Snyder* have made it more difficult for litigants to get away with blatant discriminatory practices, all but the least astute trial lawyers will always be able to stay one step ahead of the Court in finding ways to strike venire members in a way that will increase their chances of winning.[192] Thus, a total elimination of peremptory strikes is necessary to protect individuals' Constitutional right to a fair jury trial.

Admittedly, eliminating the peremptory challenge and loosening the "for cause" challenge would be a significant change, and although this idea has been popular amongst academics for years, it has not made significant headway amongst judges.[193] Further, critics of this plan often argue that without peremptory challenges, litigants cannot be assured a fair and impartial jury.[194] Similarly, critics also argue that venirepersons often have hidden biases, so without

188. Mintz, *supra* note 185, at 1042 (internal citations omitted).

189. *Id.* Furthermore, "Marbury v. Madison settled beyond a doubt that when a constitutional claim is opposed by a nonconstitutional one, the former must prevail." Serr & Maney, *supra* note 175, at 10.

190. *See supra* note 192.

191. *See supra* Part V.

192. *See* Stolz, *supra* note 178, at 1041.

193. Stoltz, *supra* note 178, at 1043 n.95.

194. *See* Montz & Montz, *supra* note 188, at 484–85. There is also a concern that this proposal will increase the length of the voir dire. *See* Melilli, *supra* note 146, at 484. While true, eliminating peremptory challenges will save "time and judicial resources, both in the exercising of such challenges and in the voir dire that occurs as a means for discovering the targets of such challenges." *Id.* Also, *Batson* litigation is likely to be far less, further reducing a waste of judicial resources and litigant's time and money. *Id.* at 485. Further, critics also argue that this change would create an administrative nightmare. But, purely administrative concerns regarding changing trial procedures should never trump individual Constitutional rights. Moreover, as discussed below, this article argues that a committee should be formed to deal with the transition to these new trial procedures. This committee would eliminate feasibility concerns.

peremptory challenges, these biased individuals will be able to serve on the jury.[195]

These arguments are flawed for two reasons. First, these arguments confuse the litigant's actual right to have a fair and impartial jury with a litigant's non-existent right to a favorable jury.[196] It is true that eliminating peremptory challenges may hamstring litigants' ability to obtain the most favorable jury for their clients; but, this does not mean that the jury is not fair and impartial. On the contrary, it seems likely that juries will be composed of a more representative sample of the community, which is how juries should be composed,[197] by disallowing litigants from arbitrarily striking jurors.[198] Moreover, a litigant's "expectation that any juror, much less twelve, will ever be truly without bias borders on fantasy."[199] People's life experiences naturally make them biased one way or another, and there is no possible way for litigants to remove these biases from members of a jury panel.

Secondly, parties will still have a fair and impartial jury without peremptory challenges because there is "little evidence that attorneys' peremptory challenges are reliably related to jurors' verdict preferences."[200] More pointedly, litigants' use of peremptory strikes often fails to "adequately predict jurors' responses, support[ing] [the argument for] its abolition."[201] If litigants use peremptory challenges ineffectively, as they do, disallowing their use will not change the dynamics of the jury.

Further, expanding challenges for cause would largely eliminate these bias concerns. "Both the critics and the defenders of the peremptory challenge agree that challenges for cause are unrealistically narrow, both as defined and as applied."[202] For example, in the current system, a "venireperson's representation that he or she can lay even the most manifest prejudice aside will generally

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195. *See* Stephen A. Saltzburg & Mary Ellen Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 MD. L. REV. 337, 382 (1982).

196. *See* Melilli, *supra* note 146, at 503.

197. *See supra* text accompanying note 8.

198. By eliminating peremptory challenges, it seems likely that jury members will be selected more by probability and chance. Therefore, if the system for selecting venirepersons accurately represents the community, the jury panel will represent the community as well, because eliminating peremptory challenges eliminates the last possible opportunity for conscious or unconscious bias to destroy a jury's representative character.

199. Adams & Lane, *supra* note 140, at 742.

200. Norbert L. Kerr et al., *On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity: An Empirical Study*, 40 AM. U.L. REV. 665, 668 (1991).

201. Montz & Montz, *supra* note 188, at 453.

202. *See* Melilli, *supra* note 146, at 486.

insulate the venireperson from a challenge for cause."[203] Interestingly, if challenges for cause were expanded, a significant portion of the peremptory challenges used by litigants in real cases would have resulted in the jurors being stricken for cause.[204]

Specifically, this number, forty-four percent, is taken from Kenneth Melilli's article, which analyzes the reasons that litigants gave for using a peremptory challenge in real cases. Under Mellili's proposed model for expanding challenges for cause, which this article endorses, forty-four percent of all peremptory challenges used would have resulted in a juror's removal with an enlarged for cause standard. [205] This leaves roughly fifty-two percent of challenges which were based on group stereotypes, and almost four percent of challenges made based on subjective judgments.[206] Since the Court began requiring a more searching analysis of the litigant's rationale in *Miller-El* and *Snyder* cases, decided after Melilli's article, challenges based on subjective judgments rather than on group stereotypes have likely increased. But, the fact remains that litigants' proffered reasons for forty-four percent of their peremptory challenges will be sufficient to remove jurors under a properly expanded for cause challenge system. Melilli analyzes each peremptory challenge used, and places them in the descriptive categories. Courts should generally follow Mellili's model, expanding challenges for cause to include several of Mellili's categories, and not including several others. More specifically, a court should not allow challenges for cause to include gender, prior jury service, personal appearance (unless egregiously inappropriate for court), location of home, work or other activities (unless the juror has not lived in the jurisdiction), family situation (marital and parental status), economic characteristics, intelligence and education (as long as the individual is not unable to read in a case where reading would be important, or unable to understand questions), occupation, and age.[207]

Similarly, trial courts should remove jurors with extrajudicial bias or information regarding the case, including familiarity with the parties, admitted bias, prior information on the case, expressed predisposition on the credibility of witnesses, expertise in the relevant field, incapacity (such as physical hardship and extreme inability to

203. *Id.*

204. *Id.* at 487.

205. *Id.* at 497.

206. *Id.*

207. *Id.* at 487–97. My views here are consistent with Melilli's, as there is no reason other than stereotyping to strike jurors with these characteristics, so they should not be included in challenges for cause.

see or hear), and personal experience very similar to the subject of the litigation.[208] Removing such jurors for cause would remedy one of the biggest problems with the current for cause standard; a juror who admits having bias but who claims to be, and promises to be impartial, would not be struck for cause in the current system.[209] In the proposed system without peremptory strikes, he or she would be.

The more contentious categories include the following: prior involvement with criminal activity, behavior during *voir dire*, and difficulty following instructions.[210] First, in regards to prior involvement with criminal activity, which includes the venireperson's prior criminal activity, his or her friends or relatives engaging in criminal activity, and his or her status as a victim of a crime, Melilli argues that none of these individuals could be excluded for cause on these bases alone.[211] I agree because Mellili's model still allows for removal of jurors whose experiences with crime would make them biased in the specific case at hand. Such a juror could be removed in an expanded challenge for cause because Melilli's categories do not overlap, meaning that the acceptable extension of the for cause challenges listed above would still be available to litigants.[212] To illustrate, if the "venireperson's relative was a victim of the same crime which is the subject of the instant prosecution or [] the same individual prosecutor successfully convicted the venireperson's relative," this person could not be struck under the "prior crime" category, but could be removed for cause under the "personal experience very similar to the subject of the litigation" category.[213] Thus, Melilli's model successfully removes venire members who are truly biased due to personal experiences with law enforcement.

The categories of "behavior during *voir dire*" and "difficulty following instructions" could also be contentious because the court and the parties have an interest in removing clearly inattentive venirepersons. At the same time, courts must avoid allowing challenges based on whether the venireperson was timid, assertive, liberal, or formed an unfavorable impression because these types of challenges are highly subjective, and have the most potential to hide a litigant's discriminatory use of strikes. Thus, the court must err on the side of inclusion, and only strike the most obviously inattentive or

208. *Id.*
209. Stoltz, *supra* note 178, at 1046.
210. *See* Melilli, *supra* note 146, at 487–97.
211. *Id.* at 487–88.
212. *Id.* at 487.
213. *Id.* at 487 n. 122.

polarizing venirepersons. Either way, the judge ruling on the challenge for cause must make a record of why he or she did or did not strike the venireperson. This would allow appeals courts to rule more effectively on cold appellate records, and would enhance its ability to create consistent parameters. Further, the *Batson* challenge will not be eliminated, though it would surely be used in far fewer cases, because lawyers should still be able to effectively appeal strikes that they feel are made on the basis of race.

Admittedly, numerous grey areas likely exist in Melilli's system. Therefore, if peremptory challenges are removed, and the proposed system is generally enacted, the courts should create a panel or advisory committee regarding how to truly implement this system. Much like committees regarding the Federal Rules of Civil Procedure, this committee would be composed of experienced prosecutors, defense attorneys, civil litigants, and judges.

With Melilli's system in place, an advisory committee filling in the gaps, and *Batson* challenges available, the discriminatory use of peremptory challenges will be eliminated and the litigant's right to a fair and impartial jury will not be destroyed.[214] This is what the Constitution requires. Although the Court has taken positive steps to eliminate racially motivated strikes, these steps have proven insufficient, and the only way to guarantee non-discriminatory jury selection is to completely eliminate peremptory challenges. Under the current system, racism persists. Individuals are discriminated against on the basis of gender, class, and age. It is time for the court to rid itself from this system of discrimination. Eliminate the peremptory challenge, and allow juries to truly act as the conscious of the community. Twenty-five years later, *Batson's* challenge must finally be met.

214. Another positive step in the right direction, if the true final step is not to be taken as suggested, comes in Covey's article, arguing that any mixed motive strike, which includes a valid and non-discriminatory reason for a strike, along with any improper reason, the court should ignore the valid reason and find that the strike violates *Batson*. Russell D. Covey, *The Unbearable Lightness of Batson: Mixed Motives and Discrimination in Jury Selection*, 66 MD. L. REV. 279, 282–83 (2007).