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# Jurors and Litigants Beware-Savvy Attorneys Are Prepared to Strike: Has *Purkett v. Elem* Signaled the Demise of the Peremptory Challenge at the Federal and State Levels?

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# CASENOTE

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## I. INTRODUCTION

The peremptory challenge[1] has served a key role in the striking of

1. The peremptory challenge is essentially the attorney's tool in striking jurors for reasons that would not necessarily indicate bias, but often are based on hunches or "gut feelings" that a particular juror would not be fit to serve. *See* R. Stuart Phillips, *Without Cause: The Case for Abolishing the Peremptory Challenge in the Wake of* Adarand Constructors, Inc. v. Pena, 31 BEVERLY HILLS B. ASS'N J. 47, 47 (1996).

partially, perceivably, or actually biased jurors[2] from serving on jury panels. Original rationales for the use of the peremptory challenge[3] appeared to protect the litigants from jurors perceived to be unfair, for whatever reason,[4] to be seated in judgment of a case. Often, their challenges were based upon the race of the parties, the nature of the case, or the particular claims.[5]

Early Supreme Court cases addressing the use of peremptory challenges demanded that such peremptory strikes[6] create and maintain a certain minimum level of race-neutrality[7] in their application. Eventually, the Supreme Court decisions in *Batson v. Kentucky*[8] and *Georgia v. McCollum*[9] provided a constitutional basis[10] for the use of such strikes.

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2. Jurors may also be stricken "for cause" during the voir dire process, where any potential juror may be stricken for exhibiting a "specific bias which threatens the jury's impartiality." Stacey L. Wichterman, Note, J.E.B. v. Alabama ex rel. T.B.: *Gender-Based Peremptory Challenges on Trial*, 16 N. ILL. U. L. REV. 209, 212 (1995).

3. Early courts focused on the ability of each defendant to receive a fair trial by being granted the right to be tried by a jury that was not selected by discriminatory means. *See* Sheri Lynn Johnson, *The Language and Culture (not to Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21, 24 (1993) (focusing on *Strauder v. West Virginia*, 100 U.S. 303 (1880)).

4. "Indeed, evaluating people on the basis of stereotypes is an inherent aspect of the peremptory challenge system." Kenneth J. Melilli, Batson *in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 447 (1996).

5. Recently, these particular "reasons" for peremptory juror exclusion were illuminated in the O.J. Simpson criminal case. Based upon pretrial research, it was determined that black women would be the most harmful jurors for the prosecution's case. Black women, as a "group," were polled, and were thought to believe that Simpson was not guilty by a three to one margin over black men. Black men, in turn, were thought to believe that Simpson was not guilty by almost a three to one margin over whites. *See* William F. Fahey, *Peremptory Challenges*, FED. LAW., Oct. 1992, at 30, 32 (citing the work of DecisionQuest of Torrance, California, the polling group).

6. The terms "challenge" and "strike" will be used interchangeably throughout this Note.

7. Yet, it was nearly impossible until the 1980's for one party to prove that the other had purposely discriminated in its use of peremptory challenges. *See* Swain v. Alabama, 380 U.S. 202 (1965). Although the *Swain* Court recognized the important right of peremptory challenge, it noted that "a defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him nor on the venire or jury roll from which petit jurors are drawn." *Id.* at 208. Additionally, the Court placed a heavy burden on the party opposing the strike in proving purposeful discrimination. "We cannot say that purposeful discrimination based on race alone is satisfactorily proved by showing that an identifiable group in a community is underrepresented by as much as *10%*." *Id.* at 208-09 (emphasis added).

8. 476 U.S. 79 (1986).

9. 505 U.S. 42 (1992).

10. "In *Batson*, the United States Supreme Court held that the Equal Protection Clause prohibits a prosecutor's discriminatory use of peremptory challenges against individual jurors on the basis of race." Cheryl G. Bader, Batson *Meets the First Amendment: Prohibiting Peremptory Challenges that Violate a Prospective Juror's Speech and Association Rights*, 24 HOFSTRA L. REV. 567, 578 (1996) (citing *Batson*, 476 U.S. at 84). The juror's right to serve was protected in *McCollum*, as the state objected to the criminal defendant's discriminatory exercise of peremptory challenges. There, the Court held that "a criminal defendant exercising a peremptory challenge possesses no greater right to discriminate invidiously against prospective jurors on the basis of race than does a prosecutor or civil litigant." *Id.* at 581 (citing *McCollum*, 505 U.S. at 57-59).

The Court aimed primarily toward protecting the jurors and litigants from the "evil" of purposeful discrimination[11] in the exercise of peremptory challenges.[12]

Since the Supreme Court handed down the aforementioned decisions concerning the nondiscriminatory use of the peremptory challenge, many legal authors signaled its collapse as a method of eliminating potential jurors from the panel.[13] Attorneys could no longer excuse jurors without minimally adducing "clear and reasonably specific"[14] race-neutral explanations for the elimination of particular jurors. Additionally, lawyers had to clear the hurdle[15] of showing that their reasons for challenging particular jurors were "related to the particular case to be tried."[16] Consequently, the full peremptory nature of the challenge seemed to have been eroded by the Court's insistence on protecting the jurors' equal protection rights.

This Note, however, will attempt to illustrate that rather than dying, the peremptory challenge has actually survived to undermine the intent of the *Batson* Court. In fact, the skilled advocate can simply employ innovative questioning or investigative techniques to support a race-neutral juror excusal.[17] Hence, discriminatory practices in juror challenges still exist, as the savvy attorney need only articulate a race-neutral explanation for his or her actions in striking a particular juror.[18]

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11. *See* Melilli, *supra* note 4, at 449 ("The word 'discrimination' is defined as 'the making or perceiving of a distinction or difference.' The word is qualitatively neutral. Thus, the entire process of jury selection is one of discrimination. The *real* issue is whether the *criteria* upon which the discriminations are based are *reasonable* and *acceptable*.") (emphasis added; footnotes omitted).

12. This Note will focus primarily on the racially motivated uses of the peremptory challenge, although courts have dealt with similar issues of peremptory challenges based wholly or partially on gender, ethnicity, religion, and other potentially class-distinguishing characteristics.

13. *See generally* Jason Hochberg, *Peremptory Challenge: An American Relic—Like the Model-T Ford and the $2 Bill, Its Time Has Passed*, CRIM. JUST., Winter 1996. Hochberg states that "[t]he logical and practical effects of the Court's decisions on the constitutionality of the peremptory challenge foreshadow its certain demise." *Id.* at 10.

14. *Batson*, 476 U.S. at 98 n.20 (quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 258 (1981)).

15. However, "the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause." *Id.* at 97.

16. *Id.* at 98. The reader will note, however, that "[i]t is the role of the trial court to assess the race-neutral explanation proffered by the prosecution and to determine whether it is pretextual or sincere." Bader, *supra* note 10, at 579 (citing *Batson*, *id.* at 98).

17. The reader will note that the litigator need only arrive at *one* valid race-neutral articulation in order to support a juror excusal. This task would appear quite simple in light of the tools available to the able counselor, such as "ranking scales, community attitudinal surveys, . . . juror investigations, . . . focus groups, mock trials, . . . and even psychics." Jim Goodwin, Note, *Articulating the Inarticulable: Relying on Nonverbal Behavioral Cues to Deception to Strike Jurors During Voir Dire*, 38 ARIZ. L. REV. 739, 750 (1996) (footnote omitted).

18. *See supra* notes 14, 16, and accompanying text.

The Court's opinion in *Batson* was intended to give the individual juror the right to not be excluded from service through discriminatory efforts by counsel.[19] Additionally, *Batson*'s intent, at least in part, was to ensure that each party be tried by a jury of his or her peers.[20] Yet in its ongoing process of formulating the "steps"[21] to achieve this high-minded goal, the Court has given little, if any, guidance to trial judges in evaluating the validity of these race-neutral "reasons."[22]

In both federal and state court proceedings, judges have struggled with the application of the *Batson* standard,[23] and this author will argue that it is one which appears to be unworkable in practice. Recently, in *Purkett v. Elem*,[24] the Supreme Court again attempted to guide litigators toward a more efficient standard of requiring a "facially neutral"[25] reason for juror excusal. The Court decided, however, that the only issue a judge must determine when an attorney proffers a reason for the striking of the potential juror is its mere "facial validity."[26]

As the dissent in *Purkett* points out,[27] this analysis creates a situation in which a talented lawyer will now be able to effectively circumvent *Batson*'s intent. He or she can still rely on a "hunch" rationale[28] to

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19. The Court in *Batson* used several rationales in its disdain of the discriminatory strikes against potential jurors. The Court focused on the harm to the individual juror's right to serve, as well as the harm to the entire community by undermining the integrity of the judicial system as a whole. *See* Johnson, *supra* note 3, at 32.

20. Obviously, "[t]he jury trial is fundamental to our nation's system of justice." Bader, *supra* note 10, at 572 (footnote omitted).

21. *See infra* Part III.E.

22. See *infra* Part III.F-G.

23. Although *Batson* ostensibly guides the Court in determining whether a particular strike was exercised discriminatorily, trial judges have noted difficulty in its application. "One of the criticisms of *Batson*, which poses particularly acute difficulties for trial judges, is the problem of detecting pretextual explanations that mask race- or gender-motivated peremptory exclusions." Christopher E. Smith & Roxanne Ochoa, *The Peremptory Challenge in the Eyes of the Trial Judge*, 79 JUDICATURE 185, 185 (1996).

24. 115 S. Ct. 1769 (1995).

25. "[T]he issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered [to strike the potential juror] will be deemed race neutral." *Id.* at 1771 (citing *Hernandez v. New York*, 500 U.S. 352, 360 (1991)).

26. *Id.* The Court in *Purkett* emphasized this point further when it proclaimed that at this step of the process (the articulation of a race-neutral reason for striking the potential juror), the striking attorney need not even advance a plausible or persuasive reason. The court's role is solely to analyze if the reason is race-neutral on its face, not whether the court is indeed *convinced* that the reason is race-neutral. *See id.*

27. "Today, without argument, the Court replaces the *Batson* standard with the surprising announcement that any neutral explanation, no matter how 'implausible or fantastic,' . . . even if it is 'silly or superstitious,' . . . is sufficient to rebut a prima facie case of discrimination." *Id.* at 1774 (Stevens, J., dissenting).

28. Justice Stevens points out the simple irony of the Court forcing the advocate to articulate a race-neutral reason for the strike. He notes that "[t]he Court does not attempt to explain why a statement that 'the juror had a beard,' or 'the juror's name began with the letter 'S'' should satisfy

excuse jurors, an intuition that was basically permitted before the *Batson* decision. Essentially, the lawyer may use any reason to strike a juror as long as it does not implicate an impermissible group bias.[29]

Now, the able attorney will simply be able to use non-racial, facially "legitimate" reasons to survive any attacks on his or her use of the peremptory challenge. Even if the true underlying reason for the strike is indeed pretextual, all the counselor need do is articulate a reason to the judge which *appears* facially neutral. As a consequence, this "loophole" provides the attorney with the incentive to continue with lengthy questioning of potential jurors.

As the attorney elicits more and more personal facts and views from each potential juror, he or she will inevitably find a "race-neutral" reason to proffer before the judge as grounds for juror excusal. Hence, the trained attorney now knows exactly how to excuse potential jurors, while trial judges are still having difficulty evaluating the legitimate use of peremptory challenges.[30] Hence, the current state of the peremptory challenge is in jeopardy.

This Note analyzes the Supreme Court doctrines concerning the developing use of peremptory challenges, and their legitimate applications. In Part II, I discuss the historical and traditional rationales for maintaining the peremptory challenge. Focus is placed on individual and group rights that are theorized to be protected by the continual evolution of the peremptory challenge. Additionally, I illustrate the potential trauma that may come to pass with the continued application of the peremptory challenge in its current form.

Part III analyzes two major Supreme Court pronouncements on the use of the peremptory challenge, namely *Batson* and *McCollum*. Addi-

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step two [the articulation of the race-neutral reason for the strike], though a statement that 'I had a hunch' should not." *Id.*

29. *Id.* The reader should note the unfortunate effect of *Batson* and *Purkett*. Both cases ostensibly attempted to eliminate race as a determinant in exercising peremptory strikes, in order to secure the juror's constitutional rights against equal protection violations. Additionally, both Courts still revered the integrity of the peremptory challenge as a means of providing the litigant and the judiciary itself with a fair trial by a jury of peers.

Despite this intent, "[a] juror's 'hostility' also has been accepted as a race-neutral explanation. Jurors may be excused based on 'hunches,' and even arbitrary exclusion is permissible, so long as the reasons are not based on impermissible group bias." CATHY E. BENNETT & ROBERT B. HIRSCHHORN, BENNETT'S GUIDE TO JURY SELECTION AND TRIAL DYNAMICS IN CIVIL AND CRIMINAL LITIGATION 334 (Eda Gordon ed., Supp. 1995).

It appears that the Court has certainly taken a giant step toward eliminating discriminatory reasons for juror excusal. Evidently, though, the Court has not yet dealt with the other evasive race-neutral reasons that can be given to discriminate against jurors *indirectly*.

30. "*Batson* and its progeny have proven less an obstacle to discrimination than a road map to it. Parties now have a good idea of what they can and cannot get away with in eliminating jurors and adjust their means to suit their desired end." Smith and Ochoa, *supra* note 23, at 185 (footnote omitted).

tionally, I analyze the essential qualities of the "burden-shifting" steps which must be rebutted to maintain a claim of purposeful discrimination in juror strikes. These "steps" focus primarily on the form of the reasons articulated in challenging an allegedly discriminatory peremptory strike, and not necessarily on their substantive validity.

Furthermore, I suggest that the standard expressed in *Purkett*—that of articulating a facially neutral reason, but not necessarily a plausible one to the court at step two of the analysis—is an unworkable one in practice. Not only do judges and attorneys have difficulty understanding this race-neutral analysis, but the method itself may be inherently flawed. Judicial integrity, the rights of jurors to serve, and those of litigants to have some freedom in having their peers sit in judgment over them, have been impaired by the Supreme Court's insistence on the form of the challenge, and not on its substance. Additionally, in Part III, I focus on *Purkett* in detail and analyze its implications for the future.

Part IV of this Note analyzes the history of one state, Florida, as a paradigmatic example of the continued difficulty in the reformulation and application of the "steps" to be used in challenging allegedly discriminatory peremptory strikes. I argue that Florida, in an attempt to follow Supreme Court doctrine on the issue of peremptory challenges, has impinged, albeit unintentionally, on the rights of jurors and of those accused. In Part V of this Note, I expand this analysis by illustrating problems other states and courts are having in applying the *Batson* and *Purkett* pronouncements.

Finally, Part VI suggests some different implications for the future of the peremptory challenge. Many scholars have called for the end of the peremptory challenge, and these views have real merit. According to these proposals, the courts would simply abolish the peremptory challenge because it has now apparently become a ruse for unlawful and discriminatory juror excusal.

Nevertheless, there may be more meaningful alternatives available to abolition, by retaining the peremptory excusal, yet modifying it into a type of "quasi-cause" or "semi-cause" challenge. This preferred method can be achieved by granting jurors more rights in challenging their own excusals, perhaps allowing them to rebut the reason given for the peremptory strike. Alternatively, courts can truly re-establish the "peremptory" nature of the challenge by expanding the grounds for cause challenges to include perceptions of bias. These "perceptions" would be based on information elicited from the juror in light of the issues in the trial. This method would expand the grounds for cause challenges and address issues of bias, thereby allowing for unimpeded use of purely peremptory strikes. Either method would abolish the peremptory chal-

lenge as it currently exists. This is vital for its use and plausibility must currently meet undesirably minimal standards of fairness and judicial legitimacy.

## II. TRADITIONAL BASES FOR THE IMPOSITION OF THE PEREMPTORY CHALLENGE—WHOSE RIGHTS ARE BEING PROTECTED?

### A. *Juror Protection*

The juror is best viewed as the common citizen helping the judicial system by cooperating in the democratic process. In a very real sense, though, the potential juror, in many instances, has been pushed around the courthouse all day. This individual has likely been hurried from room to room, has been questioned all day, and has been treated like somewhat of a victim in the judicial process. Therefore, it is obvious that his or her exclusion may be accompanied by feelings that the juror did not have the ability to have his or her voice heard, or to make a difference in determining the outcome of a case involving a peer.[31] Additionally, when the juror is excused through discriminatory means, such a pardon may even infringe on the individual's constitutional rights.[32] In fact, by striking the juror on the basis of race, the juror's equal protection rights may be violated without any evidence by the attorney that such group status would bear negatively on the case at bar.[33] To serve the ends of justice, the use of the peremptory challenge should at least meet the juror's basic privilege to either serve on the jury, or to be stricken through nondiscriminatory means. These appear to be the only two constitutionally sound alternatives available to the courts.

### B. *Party Protection—History and Facts of the Case*

In many instances, especially in the criminal context, the challenging party itself has a strong interest in determining the jury composition. In particular, the criminal defendant often has a real stake in assuring a

31. In fact, juror selection has become a modern business, and individuals are stricken for not fitting the "ideal juror" profile on a given case. Such determinations are often made on the basis of occupation, appearance, and even facial features. *See* Wichterman, *supra* note 2, at 235.

32. *See* Bader, *supra* note 10, at 598-99. Bader notes that "by allowing speech and affiliation to be utilized as a basis for juror exclusion, a court is implicitly stating that a litigant's desire to influence the jury composition is more important than a juror's First Amendment freedoms." *Id.* at 599.

33. One scholar has even noted that there are equal protection harms implicit in discriminatory juror excusal. Nevertheless, "[f]or all of the Court's heated rhetoric about the evils of discrimination in the exercise of peremptory challenges, the Court has firmly rejected the idea that a juror's race . . . has any bearing on how that juror will view the evidence in a case or vote on the question of guilt or innocence." Eric L. Muller, *Solving the* Batson *Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93, 96 (1996).

fair composition of those seated in judgment of the case.[34] Yet, many decisions concerning the use of peremptory challenges inevitably turn on the history of discrimination against a particular group, or on the facts of the case itself.

First of all, early rationales for the imposition of the peremptory challenge were primarily based on the protection of the individual party.[35] Of course, litigants in actions have certain constitutional rights, for instance, the right to receive a trial by a jury of one's peers.[36] Additionally, litigants may even have a certain intrinsic right to be tried by a fair "representative" panel of potential jurors.[37]

Consequently, many litigants, due to racial reasons, find it patently unfair to be tried by certain racially combined groups of jurors.[38] The history of discrimination against certain classes, or in certain parts of this country, cannot be ignored.[39] Whether fair in its application, the peremptory challenge can still be an effective tool for the litigant to control the composition of the jury.[40] This holds true especially when there is evidence of potentially discriminatory pools of jurors. In many cases,

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34. To take this proposition to its logical extreme, one need only imagine the prosecution of a Skinhead for allegedly lynching an African-American. In this instance, the litigant may not be able to receive a fair trial if not allowed peremptory challenges, perhaps even those based on perceptions of group bias.

35. *See* Melilli, *supra* note 4, at 452-53 (noting that prior to *Batson*, the primary purpose of peremptory challenges had always been viewed as one of protecting litigants' rights). He notes that, "lawyers, of course, seek not an impartial jury, but rather jurors most favorable to their client's interests. As long as the validity of peremptory challenges was measured by the primary directive of protecting litigants' interests, nondiscriminatory jury selection could never be a realistic consideration." *Id.* at 453 (footnotes omitted).

36. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . [and] to be confronted with the witnesses against him . . . and to have the assistance of counsel for his defence." U.S. CONST. amend. VI.

37. Basically:

> [V]enire selection law comes close to assuring the defendant a "representative" venire . . . . [T]he Court has been adamant that no defendant has a right to a jury of any particular composition. . . . [H]owever, venire selection requirements produce a venire likely to contain a significant number of jurors who are not biased against them.

Johnson, *supra* note 3, at 26 (footnote omitted).

38. This creates the paradox where an individual must be tried by a jury of his peers, but when striking jurors, must ignore their group membership and strive for a "fair" jury. *See* Fahey, *supra* note 5, at 31.

39. In fact, the Court's focus on defendants' rights in receiving trials by juries which were racially "fair" led to changes in burden-shifting in certain areas. For instance, in *Norris v. Alabama*, 294 U.S. 587 (1935), "the Court held that a showing of the existence of a substantial number of black citizens in the community, coupled with their total exclusion from jury service, sufficed to shift to the state the burden of proving that the exclusion did not flow from discrimination." Johnson, *supra* note 3, at 25 (citing *Norris*, 294 U.S. at 594-95, 598).

40. *See* Bader, *supra* note 10, at 590. ("Similar to judge-shopping, the peremptory challenge enables the litigant to manipulate the selection of jurors. Accordingly, restricting a litigant's

group decisionmaking can serve as a key element in the outcome of a judicial proceeding, and hence the litigant would naturally have a vested interest in the selection of that powerful group.

Furthermore, the facts of a particular case may be essential in determining which jurors to select.[41] One need not be a behaviorist or legal scholar to understand this concept. For instance, eliminating parents from a jury pool where the defendant is on trial for child molestation may be a vital consideration in achieving justice. Similarly, a black defendant, viewed more favorably by his or her own community, might wish to select from a more racially balanced jury pool.[42] Therefore, the precise nature of the case and its participants also plays a key role in determining which jurors will be sought to be excluded.

### C. *Other Compelling Rationales*

The rudimentary concept of "peremptory" inheres the barring of a right of action.[43] Nonetheless, the courts appear to continue to expand the peremptory challenge into a series of questions before the judge as to its nondiscriminatory use. Has it not then been effectively transposed into a cause challenge? Alternatively, has not the essential nature of the "peremptory" challenge been undermined? Litigants can no longer challenge for "any" reason, which is perhaps a racially sound judicial policy. Yet it would appear that litigants have lost some basic constitutional protections in their rights to a fair jury. Consequently, scholars have long argued that the peremptory challenge is a relic whose time has passed.[44]

There are compelling rationales for the continued use of the per-

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control over the selection of jurors limits her ability to manipulate the selection of the trier of fact.").

41. Phillips, *supra* note 1, at 58, suggests that courts adopt a two-pronged approach. Essentially, each state should ratify its own voir dire questions which would be standardized. Yet, as this alone would not account for the particularized nature of each case on its own merit, attorney input should be encouraged in questioning. He argues for counsel submitting additional relevant questions to the judge, to be read to the jury. *See id.*

42. *See* Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?* 92 COLUM. L. REV. 725, 731 (1992). Underwood notes that the defendant not only has the right to equal protection of the laws, but also has the ability to select jurors biased in his or her favor. *Id.* She comments that where a black defendant desires blacks on the jury, "the exclusion of blacks from the jury on this view deprives the defendant not of the impartial factfinder to which he is entitled, but of the partial or sympathetic factfinder that every defendant seeks." *Id.*

43. The New Merriam-Webster Dictionary defines "peremptory" as "barring a right of action or delay." THE NEW MERRIAM-WEBSTER DICTIONARY 541 (1989).

44. *See* Hochberg, *supra* note 13, at 52. ("Discrimination, whether based on gender, religion, race, or social status, denigrates the potential juror and, in turn, casts doubt on the fairness of the judicial system. As Justice Marshall stated in *Batson*, '[O]nly by banning peremptories entirely can such discrimination be ended.'") (citing *Batson*, 476 U.S. 79, 108 (Marshall, J., concurring)).

emptory challenge; many of them are common sense by their very nature. Should the litigants not have at least some control over the real or perceived "fairness" of their jury panel? Additionally, the peremptory challenge provides the ability for lawyers to use their "hunches" and determine the makeup of the jury, without having to articulate any particular reason for so doing. Does it necessarily follow that in every situation there need be a colloquy to determine if the strike was racially motivated? Should it matter?[45] In a true sense, peremptories have real value.

Jurors, litigants, and the judicial integrity of the courts all serve to benefit from some form of peremptory challenge. Without it, litigants would be essentially powerless in formulating the jury, unless they could pass the rigid test of proving juror bias for cause. Jury pools, no matter how racially imbalanced, would remain unchecked. That system would inevitably erode popular faith in the jury system, and hence, juries and courts would appear improperly formed. Therefore, maintaining some form of peremptory challenge appears desirable in practice.

## III. SUPREME COURT PRONOUNCEMENTS

### A. Batson

*Batson* "held that the Equal Protection Clause assures that the State will not exclude members of the defendant's race from the jury on account of race and that such conduct also discriminates against the excluded juror."[46] By granting a constitutional protection to jurors, the Court enhanced the level of race-neutrality by which the peremptory challenge has to be exercised.[47] Additionally, the *Batson* Court, and those before it,[48] did not demand that the defendant be afforded a jury constructed solely from members of his or her own race.

Rather, the right addressed in *Batson* was the defendant's protection in having members of his or her own race purposely excluded from service.[49] The Court set up a system of "burden-shifting" in proving

45. Seemingly, although popular consensus indicates one belief, particular sets of jurors exhibit another. For instance, in the O.J. Simpson case, "group-think" and "group-bias" were prevalent among certain groups of races and classes, which were thought to believe differently concerning O.J.'s guilt than popular consensus. *See* Fahey, *supra* note 5, at 32.

46. Leonard B. Sand, Batson *and Jury Selection Revisited*, LITIGATION, Summer 1996, at 3 (footnote omitted).

47. *See* Melilli, *supra* note 4, at 453 (footnote omitted). ("*Batson* only makes analytical sense if one recognizes that it has shifted the primary focus from the rights of the litigants to the rights of the prospective jurors . . . . [T]he rights of citizens . . . to participate by service on juries, outweighs the rights of litigants to remove jurors without cause.") (footnote omitted).

48. *See, e.g.*, Swain v. Alabama, 380 U.S. 202 (1965) (holding that the defendant does not have the right to a jury made up of his or her own race).

49. *See* Bader, *supra* note 10, at 579.

such purposeful discrimination.[50] *Batson* finally gave voice to jurors' rights in being peremptorily excluded from service without legitimate, race-neutral reasons for such removals.

### B. McCollum

The Court had occasion to address a number of post-*Batson* cases concerning the use of peremptory challenges. In *McCollum*,[51] the Court was confronted with the scenario of white defendants who were charged with an attack on two African-Americans. The Court decided that the Equal Protection Clause prohibited the criminal *defendant* from engaging in racial discrimination by purposefully excluding jurors with the use of peremptory challenges.[52] Additionally, the Court commented that although the peremptory challenge is not constitutionally mandated, it still serves a vital role in the pursuit of justice.[53] Essentially, the Court did not stray from its general theme in *Batson*. Both *Batson* and *McCollum* protected the litigant from purposeful discrimination in the implementation of peremptory challenges.

### C. *The Progeny of the Peremptory Challenge in Supreme Court Doctrine*

*Batson* has spawned a number of similar challenges to the use of allegedly discriminatory peremptory strikes. In *Powers v. Ohio*,[54] the Court extended the protection from being discriminatorily excluded to other races, and not simply the defendant's own race. Additionally, in *J.E.B. v. Alabama ex rel. T.B.*,[55] the Court extended this protection to protection from discriminatory strikes on the basis of gender. *Batson* was further interpreted to extend to civil litigants in the case of *Edmonson v. Leesville Concrete Co.*[56] Essentially, the *Batson* standard and its protection of the peremptory challenge has survived, and indeed has been extended to other courts. Yet *Batson* is perhaps most important in the sense that it recognized the constitutional protections inherent in the peremptory challenge.

### D. *Constitutional Implications of the Use of Peremptory Challenges*

One interesting point regarding the argument over the continued

50. *See infra* Part III.E.
51. 505 U.S. 42 (1992).
52. *Id.* at 59.
53. *Id.* at 57.
54. 499 U.S. 400 (1991).
55. 114 S. Ct. 1419 (1994).
56. 500 U.S. 614 (1991).

plausible use of peremptories is whether they are even constitutionally protected or mandated. In the absence of specific language providing for peremptory challenges, they have been assumed not to be constitutionally required.[57] However, since *Batson*, the Court has recognized a certain constitutional protection to jurors and litigants from the exercise of discrimination in juror exclusion. Although not constitutionally mandated in the ordering of a fair trial by one's peers, peremptory challenges are often heralded as essential to juror, litigant, and public rights.[58] It is the *privilege* of the peremptory challenge, which was being used unconstitutionally in practice, that led the *Batson* Court to curb its abuse.[59]

Additionally, one could persuasively argue that the Sixth Amendment's guarantee of a right to trial by one's peers implicitly secures a number of safeguards to protect that right. Peremptory challenges allow the litigant to protect his or her claim or defense by allowing strikes of those jurors believed to be inherently harmful to his or her case. The importance of this safeguard cannot be overemphasized.

If the right is constitutionally guaranteed, then the current calls for the abolition of the peremptory challenge may be premature, and in fact violative of personal rights. The litigant's ability to protect his or her own case, with limited effrontery directed toward the juror or the public, may in fact serve a vital role in his or her own protection. Although many have not regarded the litigant's right to protection as fundamental,[60] the more cogent analysis requires an effort to protect the litigant's use of the peremptory challenge. In that vain, the *Batson* Court attempted to preserve litigants' right of challenge, while still maintaining the juror's right to be free from unconstitutional exclusion from jury service. The Court formulated a burden-shifting format when objecting to a peremptory challenge on the grounds that it is purposely discriminatory.

### E. *The Concept of "Burden-Shifting": What Are the "Steps" Required to Ensure "Race-Neutrality"?*

If one uses *Batson* as a guide in establishing a prima facie case of

57. *See McCollum*, 505 U.S. at 57; *Batson*, 476 U.S. at 91.

58. *See* Bader, *supra* note 10, at 583-85. Bader notes traditional lawyer arguments that cause challenges do not accomplish the goal of eliminating bias, but peremptory challenges add to the lawyer's innate "hunch" of bias that he or she would naturally prove on voir dire at some later point. The author argues that this rationale is unpersuasive. *Id.*

59. *See* Rodger L. Hochman, Note, *Abolishing the Peremptory Challenge: The Verdict of Emerging Caselaw*, 17 NOVA L. REV. 1367, 1373 (1993).

60. *See* Bader, *supra* note 10, at 594 ("The only governmental interest furthered by discriminatory treatment of potential jurors . . . is an interest in affording litigants greater freedom to use peremptory challenges. This interest is far from compelling. . . .") (footnote omitted).

discrimination, then one must follow the particular "steps" that the Court articulates. The analysis appears simple in its explanation, but is muddled in its application. Under the procedural posture illustrated in *Batson*, when a defendant feels that the prosecutor has engaged in intentional race discrimination in exercising peremptories, he or she can object at that time. At that point, if the court has found a prima facie case of discrimination, the burden "shifts" at this second step to the prosecutor to articulate a race-neutral reason for the strike. Finally, at the third "step" in the analysis, if the defendant can show the race-neutral reason to be pretextual, or if the court discredits the reason, the *Batson* standard has essentially been violated.[61]

This method seems intuitive and simple. Yet questions still abound, and continue to perplex judges and litigators. How can one analyze whether the "reason" given by the attorney suffices as "race-neutral"? The Court delineates and insists on the particular form of the objection, by continually shifting the burden to the other party to either prove or disprove discrimination. Yet the Court ostensibly fails to account for the lawyer's capacity to easily circumvent the system and continually utilize discriminatory practices. What prevents the savvy attorney from articulating a race-neutral reason while secretly harboring discriminatory intent? The Court in *Purkett* attempted to refine the *Batson* analysis.

### F. *Current Pronouncement*—Purkett v. Elem

In attempting to refine the "steps" articulated in *Batson*, the case of *Purkett v. Elem*[62] may have created even more confusion in the arena of the peremptory challenge. The Court attempted to delineate the nature of the race-neutral "reason" that need be given to combat a prima facie case of purposeful race discrimination in the use of peremptory challenges. Once again, the Court chose to focus on the form of the attack on the peremptory strike, and by so doing, lost sight of the real protections that the peremptory guarantees, while perhaps allowing for the abuse of the peremptory challenge.[63]

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61. The "steps" and their application can be found in *Batson*, 476 U.S. at 96-100.

62. 115 S. Ct. 1769 (1995).

63. *But see* D. John Neese, Jr., Note, *Purkett v. Elem: Resuscitating the Nondiscriminatory Hunch*, 33 HOUS. L. REV. 1267, 1281 (1996). The author believes that *Purkett* in fact *restores* integrity to the peremptory challenge by requiring a race-neutral explanation that does not deny equal protection. Furthermore, he notes that since the court is now not *required* to sustain a *Batson* objection to a challenge that is not discriminatory, and the burden of proof remains with the opponent to the challenge, the challenger is sufficiently protected. He cites the example of a weak man who objects to a large man serving on the venire simply because he feels "uncomfortable with bodybuilders." *Id.* at 1281. This "reason" would apparently pass judicial muster under the *Purkett* analysis.

In *Purkett*, the Court was faced with the situation of a prosecutor who wished to exclude prospective jurors because they had long, unkempt hair, and because he did not like the way they looked, among other things.[64] The Court determined that the ultimate burden of proving purposeful discrimination lies with the litigant opposing the striking party.[65]

The Court refined the *Batson* analysis, and proclaimed that at step two, the striking party need only articulate a "race-neutral" reason for the strike, one that need not be plausible or believable![66] It is only at step three, when the burden of ultimately proving purposeful discrimination must be carried by the opposing party, that the reason's "validity" is truly implicated. The party opposing use of the peremptory strike must now demonstrate that the "reason" given by the striking party is not to be believed, in order to support its charge of purposeful discrimination.[67]

The Court of Appeals for the Eighth Circuit had evaluated the "reasonableness" of the proffered "reason" for the strike (a step three analysis) at step two. *Purkett* held that the lower court should have determined the reason's "genuineness" only at step two. Therefore, the Supreme Court found the court of appeals' analysis to be in error, reversing and remanding the case.[68]

Has *Purkett* advanced the high-minded status that *Batson* seemed to envision for the use of the peremptory challenge, or has it actually denigrated peremptory challenges to the point where their abuse will become rampant? Early analyses have indicated some differences on the issue.[69] However, Justice Stevens' dissent seems to strike at the core of the problem—the Court has now given the savvy attorney clear guidelines in what "reasons" to give to *ensure* that his or her peremptory challenge will survive an attack based upon racial discrimination. This was surely not the intent of *Batson* or *Purkett*, and illustrates a clear flaw in their application.

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64. *Purkett*, 115 S. Ct. at 1770.

65. *See id.* at 1771.

66. *See id.*

67. *See id.*

68. *See id.* at 1771-72.

69. *See* Joan E. Imbriani, *Fourteenth Amendment, Section One—Equal Protection Clause—Prosecution's Explanation for Exercising Peremptory Challenge Need Only Be Race-Neutral, Not Persuasive or Plausible, Where Intentional Racial Discrimination Is Alleged*—Purkett v. Elem, 115 S. Ct. 1769 (1995) (per curiam), 6 SETON HALL CONST. L.J. 911, 915 (1996) (noting that *Purkett*'s standard is dubious, allowing a response to a *Batson*-based objection to be neither logical nor related to the facts of the case). *But see* Neese, *supra* note 63, at 1281-82 (commenting that the Court still protects the integrity of the peremptory challenge by examining the validity and logic of the proffered reason at step three of the analysis; at that point, the trial judge determines whether purposeful discrimination has been proven, and is likely to find pretext where it actually exists).

### G. *The Dissent in* Purkett

First of all, Justice Stevens, in his dissent, remains true to precedent in *Batson*. He requires that the reason articulated for the peremptory strike be "race neutral, reasonably specific, and trial related. Nothing less will serve to rebut the inference of race-based discrimination that arises when the defendant has made out a prima facie case. That, in any event, is what we decided in *Batson*."[70] Justice Stevens addresses this case on its facts, noting the silliness of the excuse proffered by the prosecutor at step two of the *Batson* analysis.[71] He confines his analysis to the *substance* of the case while foregoing the form[72] and theory of challenging a "reason" which is clearly pretextual.[73]

Justice Stevens captures the inherent flaws which *Purkett* implicates. Although that case ostensibly *protects* the guarantee of the peremptory challenge, the insistence on the form of the challenge necessitates needless inquiry and allows for abuse. Actually, *Purkett* may have revitalized the peremptory strike to the point where it is incapable of effective challenge on the basis of race discrimination.[74] In essence, *Purkett* does not further the rights of the juror, litigant, or public from having prospective jurors protected from discrimination in the exercise of peremptory challenges.[75]

## IV. An Unworkable Standard in Practice? Florida as a Case Study

The State of Florida has attempted, much as the Supreme Court has, to refine the burden-shifting analysis in opposing allegedly discrim-

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70. *Purkett*, 115 S. Ct. at 1774 (Stevens, J., dissenting) (citations omitted).

71. *See id.* at 1775-76 (Stevens, J., dissenting) ("The Court's unnecessary tolerance of silly, fantastic, and implausible explanations . . . demeans the importance of the values vindicated by our decision in *Batson*.").

72. *See id.* at 1775 (Stevens, J., dissenting) ("[P]reoccupation with the niceties of a three-step analysis should not foreclose meaningful judicial review of prosecutorial explanations that are entirely unrelated to the case to be tried.").

73. In the case at bar, Justice Stevens noted that the "reason" the prosecutor proffered concerning the way the jurors looked "may well be pretextual as a matter of law; it has nothing to do with the case at hand, and it is just as evasive as 'I had a hunch.'" *Id.*

74. *See* Richard C. Reuben, *Excuses, Excuses: Any Old Facially Neutral Reason May Be Enough to Defeat an Attack on a Peremptory Challenge*, A.B.A. J., Feb. 1996, at 20 ("If the Court won't look at the plausibility of a race-neutral strike, then it sounds to me like I have to prove purposeful discrimination—what's in the prosecutor's mind. Unless you have a prosecutor who messes up badly, you're never going to get that kind of proof.") (quoting Gary Guichard of Atlanta, a state public defender).

75. "The *Purkett* bottom line? . . . a legitimate reason must be given. But the reason does not have to make sense." *See An Explanation Is Necessary, but It Doesn't Have to Make Sense*, 10 Fed. Litigator 150 (1995).

inatory peremptory strikes. In the 1984 case of *State v. Neil*,[76] the Florida Supreme Court established a burden-shifting scheme for opposing peremptory strikes which departed from U.S. Supreme Court doctrine[77] as it then existed.[78] In fact, the *Neil* court[79] held that "[t]he Florida Constitution's[80] guarantee of the right to an impartial jury prohibits racially discriminatory use of peremptory challenges."[81]

The Florida Supreme Court had a chance to examine the issue again in the case of *State v. Slappy*.[82] There, the court applied the *Batson* standard in determining the validity of the "reasons" proffered in defense of a peremptory strike.[83] Essentially, procedure dictated that the judge sit in judgment over the "reasons" proffered, making his or her analysis at the time when the reason was proffered.[84]

However, the fundamental inquiries into the validity of the proffered "reasons" changed in the 1990's, in part reflecting the current U.S. Supreme Court doctrine. In *State v. Johans*,[85] the Florida Supreme Court regressed from its holding in *Neil*. The court there held that "from this time forward a *Neil* inquiry is required when an objection is raised that a peremptory challenge is being used in a racially discriminatory manner."[86]

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76. 457 So. 2d 481 (Fla. 1984).

77. Actually, after *Batson* was handed down, its similarity to *Neil* was widely noted, in that both cases attempted to arrive at fair juries and protection from impermissibly discriminatory peremptory strikes. *See* Steven M. Goldstein, *Constitutional Limitations on the Use of Peremptory Challenges*, FLA. B.J., Nov. 1993, at 75, 80.

78. The Florida Supreme Court instructed its lower courts to apply a different test than the Supreme Court's in *Swain*. Essentially, the party opposing a strike would have to raise a timely objection, and demonstrate that the challenged jurors are members of a distinct racial group, and there is a strong likelihood that they were excluded solely on the basis of race. If the court finds this to be the case, the initial striking party must show that the questioned challenges were not solely exercised based on racial motivations. This is the second and last step—either the court finds discrimination and dismisses the jury pool; or the party shows sufficiently to the court that the challenges were trial-related or not solely race-related, and the inquiry ends. *See Neil*, 457 So. 2d at 486-87.

79. *Id.* at 481.

80. FLA. CONST. art. I, § 16.

81. John W. Perloff, Note, State v. Neil: *Approaching the Desired Balance Between Peremptory Challenges and Racial Equality in Jury Selection*, 39 U. MIAMI L. REV. 777, 778 (1985) (footnote omitted).

82. 522 So. 2d 18 (Fla. 1988).

83. *Id.* at 22. The court noted that the judge must weigh the proffered reason as he or she would any disputed fact. The judge cannot merely accept the proffered reason at face value. The judge must determine that the reasons are first, neutral and reasonable, and second, not pretext, in accordance with *Batson* and *Neil*. *Id.*

84. *Id.* The reader will note that this analysis is quite similar to determining the reason's validity at step two of the *Batson* analysis.

85. 613 So. 2d 1319 (Fla. 1993).

86. *Id.* at 1321. Essentially, a *Neil* objection requires the striking party to articulate a race-neutral reason for the peremptory challenge. The court retracted its holdings in *Neil* and its

The Supreme Court's most recent pronouncement attempted to align its holding with that of *Purkett*. In so doing, the Florida Supreme Court will likely cause the same confusion for courts and litigators in determining race-neutrality and legitimacy in the exercise of peremptory challenges as exists in U.S. Supreme Court doctrine. In *Melbourne v. State*,[87] the Florida Supreme Court held that a party opposing the use of a peremptory must timely object, show that the potential juror is a member of a distinct racial, ethnic, or gender group, and ask the court to have the other party adduce a "reason" for the strike.[88] At that point, the *Purkett* analysis is essentially triggered.

As one can readily see, the Florida courts have struggled in determining which of the race-neutral "reasons" would suffice to survive an attack on the use of allegedly discriminatory peremptory challenges. As U.S. Supreme Court doctrine changes, so too does the state's law. Although comity evidently plays a role in such a trend, the unworkability of the *Batson* and *Neil* standards also inevitably led to the change in Florida's legal doctrine. Even though, as at the federal level, Florida state law still maintains the use of the peremptory challenge, its application is muddled by formalistic tests to determine race-neutrality. *Melbourne*, just as *Purkett*, cannot lend significantly more guidance to trial judges who are still having trouble applying the *Batson* standard. Even more troubling is that Florida is not alone in its difficulty in evaluating the nondiscriminatory use of peremptory challenges.

## V. UNWORKABILITY IN OTHER COURTS

### A. *Other States*

Other states have encountered similar problems in handling the use of peremptory challenges. Some states have considered suggestions to amend their constitutions to employ a more rigidly defined burden-shifting analysis in determining improper peremptory uses.[89] Yet other state

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progeny that would have required a showing of a strong likelihood of racial motivation for the peremptory challenge. *See id.* at 1321.

87. 679 So. 2d 759 (Fla. 1996). Just as *Johans* receded from the holding in *Neil*, this case recedes from the holding in *Slappy*. *Melbourne* requires that the proffered reason, just as in *Purkett*, need only be "genuine," not "reasonable." *See id.* at 764.

88. *See id.* This is step one of the analysis. Steps two and three mirror *Purkett*'s.

89. For example, New Mexico has amended its constitution in response to perceived harm imposed by the Supreme Court. After *Swain*, it amended its constitution so that one could establish improper use of peremptories either through the *Swain* framework or through the New Mexico Constitution, where in Article II, Section 14, a defendant could show that the absolute number of challenges in a case raised the necessary inference of purposeful discrimination. Additionally, and even more strikingly, the New Mexico Supreme Court noted in *State v. Aragon*, 784 P.2d 16 (1989), that the right to an impartial jury extends to the use of peremptory challenges. *See* Pamela C. Childers, Note, *Criminal Procedure—What Constitutes a Race-Neutral*

courts have added to current Supreme Court rationale by adding more procedural "steps," or by requiring extra safeguards that the proffered "reasons" for striking are non-racial.[90] Certain state courts have found themselves in a state of flux occasioned by the ongoing change in U.S. Supreme Court doctrine.[91] Finally, some state courts have taken lengths to ensure race-neutrality while still allowing for the utilization of peremptory challenges.[92]

In essence, courts are guided by U.S. Supreme Court doctrine. Nevertheless, in an effort to refine the analysis of burden-shifting in proving purposeful discrimination, some states have added constitutional protections for their citizens. In any regard, though, the current state of peremptory challenges at the state level appears to be in a general state of confusion.

*Purkett* will likely only add to that lack of guidance in evaluating the validity of "race-neutral" reasons. If the only analysis at step two is facial validity, will the skilled advocate not figure out the rules of the game and find a way to articulate a race-neutral reason? Courts, jurors, and litigants all have vested interests in the efficient use of nondiscriminatory jury selection. The current doctrine, though, essentially allows non-racial "hunches" when excusing jurors.

Here lies the ultimate paradox—both *Batson* and *Purkett* seem to insist on the continued use of the peremptory without perceptions of bias based in discrimination; yet both Courts ostensibly allow other non-gen-

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*Explanation for Using Peremptory Challenges?* State v. Guzman *and* Purkett v. Elem, 26 N.M. L. REV. 555, 562-63 (1996).

90. For instance, the Supreme Court of South Carolina, after *Batson*, seemed to do more to ensure race-neutrality than was federally demanded. In *State v. Grandy*, 411 S.E.2d 207, 208 (S.C. 1991), the South Carolina Supreme Court added a further requirement to *Batson*'s demand for race-neutrality by making the reasons for striking a juror be case-related, clear and reasonably specific, and legitimate. *Grandy* insisted that the reasons rest on a reasonable basis, and not on mere assertion or speculation. *See* C. Shawn Dryer, *Courts Examine Use of Peremptory Challenges*, 47 S.C. L. REV. 111, 115 (1995).

91. In Alabama, the case of *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994) has some authors worried that the peremptory challenge has reached its demise. One author notes, much as the author of this Note, that the current state of the peremptory challenge is not fixed. It is neither one "for cause," yet it does require explanation by the litigant or defendant. *See* Lisa Lee Mancini Harden, Note, *The End of the Peremptory Challenge? The Implications of J.E.B. v. Alabama ex rel. T.B. for Jury Selection in Alabama*, 47 ALA. L. REV. 243, 267 (1995) (noting the possible demise of the peremptory challenge in Alabama).

92. New York is one of the most innovative states in this regard. Not only has the state added constitutional protections against discriminatory uses of peremptories in its Equal Protection and Civil Rights clauses, but it has extended those protections beyond merely race, into both race and gender combined. Furthermore, the state has even recently formed the "Jury Project," a group organized to streamline the number of peremptory challenges so that they would be most efficiently and effectively used in criminal litigation. *See* James A. Domini & Eric Sheridan, Note, Batson *Challenges and the Jury Project: Is New York Ready to Eliminate Discrimination from Criminal Jury Selection?* 11 ST. JOHN'S J. LEGAL COMMENT. 169, 182-87 (1995).

uine reasons for excusal from service. This policy in practice does not protect the integrity of the judiciary, and mocks the true heart of the Court's intent in theory—to protect the judicial system and jurors from arbitrary, illegal excusals from jury service.

### B. *Civil Courts*

The Supreme Court extended the analysis used in *Batson* to the civil arena, in *Edmonson*.[93] Logically, since the roots for the peremptory challenge are based on protection for jurors, parties, and the public,[94] there exists no immediate reason why their nondiscriminatory use should not be implemented at the civil level. The Court has now effectively raised the status of civil litigants' rights to those of criminal defendants in selecting juries.[95] This can only serve to bolster civil litigants' assurances in a fair system of trial by an impartial jury.[96]

Furthermore, the rights implicated in civil trials, specifically with regard to damages,[97] can significantly elevate juror and litigant interest in seating a fair jury. Racial motivations can unfortunately factor into decisionmaking in civil trials, just as in criminal trials. Consequently, the elimination of racial bias in the civil arena can only serve to bolster judicial integrity and public morale in the civil court system.

Hence, in the civil arena as in the criminal, there exists a mechanism for the elimination of potential jurors without substantive cause. However, the race-neutral safeguards in achieving successful strikes may lead to wasteful inquiries into pretext, facial validity, and the neutrality of "reasons." Such questions mask the true intent of the peremptory challenge—to exclude a juror based on any reason, in order to both ensure partiality and eliminate bias, while still maintaining the right to control the makeup of a jury pool absent purposeful discrimination.

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

94. Interestingly, these parties' tangible or psychological interests in maintaining peremptories are often adverse. "[A] conflict exists between the litigant's interest in the unfettered exercise of peremptory challenges and the juror's right to be free of discrimination in the jury selection process." Bader, *supra* note 10, at 572.

95. *See* Michael Dennis Rawls Stevens, Note, *Constitutional Law—Equal Protection—Race Based Peremptory Challenge Exclusions No Longer Permitted in Civil Trials*, 62 MISS. L.J. 209, 226 (1992).

96. *Id.*

97. Bader notes that "[i]n civil disputes, jurors have the power to decide crucial questions, such as allocation and degree of fault and the nature and amount of any compensatory or punitive damage awards." Bader, *supra* note 10, at 572 (footnote omitted). It would then obviously follow that "[t]o the citizens who are afforded an opportunity to render a judgment on these weighty matters, and to the litigants whose interests will then be affected, jury selection methodology is significant." *Id.*

### C. *Criminal Courts*

Most of the discussion thus far, and most caselaw on peremptory challenges, deal with criminal suits, where a defendant or prosecutor wishes to remove potential jurors. In the criminal arena, it is logical that the litigants have a great deal at stake in eliminating potential, actual, or perceived bias. Therefore, the application or potential abuse of a peremptory strike must be examined carefully in deciding when to overturn a case for the grant or denial of a peremptory challenge.[98]

In the criminal arena, the peremptory challenge is closely tied to the constitutional right to receive a trial by a jury of one's peers, and hence, the use of the peremptory challenge is vital to most litigants' rights. Even if not constitutionally mandated, peremptories are powerful tools. They allow for perceived, psychological, or even capricious challenges,[99] and their availability in part protects the litigant's due process rights in facilitating fair trials.

## VI. SUGGESTIONS FOR THE FUTURE USE OF THE PEREMPTORY CHALLENGE

### A. *Abolition—Civil and Criminal*

The current state of the peremptory challenge is in question. Many scholars since the *Batson* decision have signaled its demise and called for its abolition.[100] Justice Marshall even gave lip service to this notion in his concurring opinion in *Batson*.[101] Certainly, this elimination would cut down on the great expense of jury profiling and research,[102] and

98. The United States Court of Appeals for the Ninth Circuit recently ruled that the improper denial of a peremptory challenge was to be afforded the remedy of automatic reversal. *See* Stephanie Hinz, *En Banc 9th Circuit Reaffirms Automatic Reversal Standard for Wrongfully Denied Peremptory Challenges*, WEST'S LEGAL NEWS, Sept. 27, 1996, at 10242 (citing *U.S. v. Annigoni*, 1996 WL 536490 (9th Cir. Sept. 23, 1996)). She further cites Circuit Judge Hawkins, writing for the majority, explaining that "peremptory challenges still serve the important purpose of enabling litigants to strike jurors who appear biased or hostile." *Id.*

99. *See* Hochberg, *supra* note 13, at 10 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES 353 (15th ed. 1809) for the proposition that at common law, the peremptory challenge was "unexplained, arbitrary, and capricious. . . .").

100. For instance, in a May 9, 1996 ruling, Judge Constance Baker Motley, a U.S. District Court Judge, barred the use of peremptory challenges in her civil courtroom. The judge added that the *Batson* standard appears to be unworkable in practice, and the permissibility of peremptory challenges is a cause of "great consternation" in the courts. *See* Mark Hansen, *Peremptory-Free Zone: A Judge Won't Allow Such Challenges in Her Courtroom*, A.B.A. J., Aug. 1996, at 26.

101. *See Batson*, 476 U.S. at 106 (Marshall, J., concurring). Justice Marshall noted that the Court's protection against race discrimination could really end up being an imaginary protection, as other makeshift non-racial reasons proffered might be accepted by the Court in making a strike. *See id.*

102. One example of the increased use of jury questioning and profiling is illustrated by a

would generally eliminate the seemingly arbitrary removal of jurors from service.

Yet elimination of the peremptory challenge would impinge on juror, litigant, and public rights. In reality, peremptories are likely on the rise, since *Purkett* has allowed for the mere articulation of a facially neutral reason at step two of the *Batson* analysis. Therefore, a different alternative to abolition would likely better serve the interests of the individual, the community, and judicial integrity.

### B. *Retention*

Viewed most favorably, *Batson* curbs the abuse of the peremptory challenge by forbidding racial discrimination in its application. Additionally, the opinion allows for the use of peremptories, and even encourages their use in a nondiscriminatory fashion.[103] There is much support today for the notion that peremptory challenges serve a vital and protective role in the judicial process.[104]

Perhaps the arguments against the current use of the peremptory challenge merely focus on the form of the objection. After all, *Batson* only outlaws racial discrimination in its application, and allows for all other uses. Hence, an attorney may still strike for any reason, and may vigorously question the potential juror in an effort to disqualify him or her for cause. Conversely, the litigator may pursue an unsuccessful cause challenge against a potential juror, and fall back on the peremptory as a means of last resort in attacking the juror.

The *Batson* Court seemingly provides a valid basis for the retention of the peremptory challenge in its current form. Yet by its mere insistence on a non-racial "reason" for the strike, the *Batson* and *Purkett* Courts have struck at the very "unfettered" nature of the peremptory strike. Therefore, a more innovative alternative is required in order to restore integrity to the juror, the litigant, and the judicial system as a whole.

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Sacramento multiple-murder trial judge having potential jurors fill out a 108-question survey. *See* Philip Hager, *Selective Service: Get Rid of Peremptory Challenges to Guarantee Impartial Juries*, CAL. LAW., Aug. 1995, at 33.

103. The objective reader will note that perhaps "savvy" attorneys represent each party in a litigation. Hence, perhaps *Batson* really accomplishes what it sets out to do—retain peremptories while eliminating invidious discrimination. After all, "if skilled lawyers are representing both sides the jury composition should be fairly balanced." Kathy Barrett Carter, *Lawyers, Judges Mull Top Court's Ruling on Race, Gender Jury Challenges*, THE STAR-LEDGER (Newark, N.J.), May 21, 1995 (quoting jury consultant John Lamberth of Temple University).

104. One will note that on today's Court, Justice Antonin Scalia is an ardent supporter of this age-old "right." *See* Smith & Ochoa, *supra* note 23, at 185.

### C. *Modification into "Quasi-Cause" Challenges and Limiting the Number of Uses*

As a merely objective exercise, one cannot truly say that the current state of exercising peremptory challenges has elevated their use to challenges "for cause." After all, the proponent of the strike need not articulate the actual bias of the juror. However, one also cannot truly say that the peremptory is one which may be exercised at will, arbitrarily and without reason. *Batson* and *Purkett* require the articulation of race-neutral reasons for the use of peremptories, to combat a charge of purposeful discrimination.

Is there a middle ground? One could argue that the Court has already articulated a semi- or quasi-cause rationale supporting a new use of the peremptory challenge.[105] Essentially, by viewing the litigant, in a civil or criminal setting, as a state actor, his or her racially invalid peremptory strike could be challenged.[106] Consequently, no peremptory challenge would be truly free from a challenge for lack of non-racial "cause."

However, I would argue for a new "quasi-cause" proposal which takes into account the desire for race-neutrality, as well as the unfettered use of peremptories. Such a method could take the form of expanded cause challenges to include factors such as race. Attorneys could inquire at length on voir dire into jurors' backgrounds. This would be accomplished solely in an effort to determine whether their racial status would prevent them from making fair and honest decisions in the case, or from conforming with the rule of law propounded by the judge.

By expanding the arena which may be pursued for cause, the judge could then allow each party a certain number of limited peremptories. This would protect the litigant and the attorney from seating jurors with perceived non-racial bias. Additionally, any issues of race which were case-related would have been addressed during the voir dire and challenged for cause, and dealt with at that stage of the inquiry. This would allow the litigant to avoid any implications of race-based challenges.

The litigant's right to formulate a jury of his or her peers cannot be overlooked. If a juror has articulated opinions which do not rise to the level of cause challenges, but still indicate some bias, the peremptory should remain a viable option. The cause challenge would eliminate racially discriminatory removals, and the few peremptories available

105. *See generally* Bill K. Felty, Note, *Resting in Mid-Air, the Supreme Court Strikes the Traditional Peremptory Challenge and Creates a New Creature, the Challenge for Semi-Cause*: Edmonson v. Leesville Concrete Company, 27 TULSA L.J. 203 (1991) (arguing that the Court has created a semi-cause challenge).

106. *Id.* at 203.

could eliminate any jurors who were still felt to be undesirable. The optimum result is that jurors would not feel stricken for racial reasons, and those who vocalized potential bias or disfavor with a litigant would be removed peremptorily. The juror, litigant, and court would be served well by such a system.

Alternatively, courts may prefer to set up a mini-trial when a juror is stricken for perceived racial reasons. This could be pursued as a mini-cause challenge, wherein the juror would have some rights in fighting to stay on a jury panel. Perhaps if the juror felt racial discrimination was at play, the juror could expound to the court the reasons why he or she would not be affected by race. If one leaves this option in the hands of the juror, and not as an automatic judicial inquiry, the ends of justice would be better served. Attorneys could then pursue peremptory challenges in their true form, as arbitrary tools to protect litigants. Only when challenged by a juror as to race-based discrimination would the *Batson*-type inquiry be triggered.

Even at that point, the court could transform such a colloquy with the potential juror as a "quasi-cause" inquiry, since the juror would essentially be arguing the merits of how he or she is not racially biased. Since the peremptory, in its definitional form, is a capricious and arbitrary tool, its original integrity could be preserved. Once again, the juror in this method would have elevated rights, and the litigants and the court could still maintain the unfettered yet limited use of peremptory challenges.

Proponents of either plan must take into account the fact that certain questions concerning the juror's background factor into their decisionmaking status.[107] By limiting the number of challenges, opponents of the peremptory challenge would also be protected. The judicial system as a whole would benefit from using the peremptory challenge in conformity with the reasons for its use—juror, litigant, and judicial protection.

The peremptory challenge is a hybrid. Essentially, viewing the questioning of a potential juror as one for "quasi-cause" would allow for the vital questions concerning race to be asked, without affecting the juror's individual liberties. If the search for juries is to find "fair" panels, and courts are no longer willing to accept peremptories for any old "hunch," then a limited number of "semi-cause" challenges appears to be a fairly reasonable alternative to the current methods being employed.

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107. Bader notes that under this view, the fact that a juror does not have a completely neutral background would undermine the fairness of a verdict in which he or she participates. *See* Bader, *supra* note 10, at 586.

### D. *Other Methods to Ensure Race-Neutrality While Protecting Juror and Litigant Rights*

The Supreme Court has obviously vacillated on the issue of whether racial discrimination is to be accorded serious investigation.[108] Assuming, though, that the Court's focus is truly based upon the protection against discrimination, there must be a great number of alternatives to the current use of peremptories which would still ensure race-neutrality. Some scholars have argued for affirmative peremptory juror selection.[109] Yet others have insisted that racially diverse juries are naturally more "impartial,"[110] and hence should be idealized.

There are a host of other methods to eliminate discrimination while maintaining judicial integrity. Scholars have argued for the elimination of peremptories for the prosecution only; for providing counsel to those challenged as to their ability to serve; and even for instituting monetary fines for the improper use of peremptory challenges.[111] Although any number of methods would require their own implementation, the guidelines would have to surpass the currently confused state of peremptory challenges following *Purkett*.[112]

## VII. CONCLUSION

The use of the peremptory challenge has its basis in the rich Supreme Court doctrine on the subject. However, as is evident from *Swain* to *Batson* to *Purkett*, the Court has struggled with exactly how to use peremptories while not impinging upon the rights of the individual juror or litigant, and also the public as a whole. As a consequence, Supreme Court doctrine has focused on the "form" of the challenge and its particular steps to ensure race-neutrality.

Furthermore, especially after *Purkett*, the Court has advanced the

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108. *See* Muller, *supra* note 33, at 96, and accompanying text.

109. *See generally* Hans Zeisel, Comment, *Affirmative Peremptory Juror Selection*, 39 STAN. L. REV. 1165 (1987) (detailing an experiment as to whether lawyers indeed challenge the "right" jurors, those which would have voted in opposition to their interests).

110. Therefore, one should strive to achieve a racially diverse panel almost as a measure of affirmative action. Color-conscious juries would not stigmatize one group or enforce stereotypes; would not imply that unqualified people had been given special treatment; nor injure the public. In essence, the color-conscious jury is more representative of the public interest. *See* Albert W. Alschuler, *Equal Justice: Would Color-Conscious Jury Selection Help? Yes: A Racially Diverse Jury Is More Likely to Do Justice*, A.B.A. J., Dec. 1995, at 36, 36.

111. *See* Hochman, *supra* note 59, at 1402.

112. In fact, the Second District Court in California rejected *Purkett*'s acceptance of "silly" or "implausible" reasons to be acceptable at the second step of a *Batson* hearing. The court held that "body language" alone could not suffice as a race-neutral reason to support a peremptory challenge. *See* Stephanie Stone, *California Appeal Court Says Juror's "Lack of Eye Contact" Insufficient Explanation for Peremptory Challenge*, WEST'S LEGAL NEWS, Mar. 19, 1996, at 1413 (discussing *People v. Jamison*).

peremptory challenge to the point where it is nearly impossible to prove racial discrimination, contrary to its intent. Now state and federal courts, both civil and criminal, are faced with the dilemma of how to use peremptories, if at all. States are adding protections to ensure that peremptories are exercised without regard to race.

Nevertheless, the ability of the litigant to control the makeup of the jury cannot be lightly discarded. As the right to a jury trial by one's peers is constitutionally mandated, the use of peremptory challenges may indeed serve as a facet of those broad rights. Hence, courts should attempt to find other means to combat the current transformation of the peremptory challenge.

Since the peremptory challenge cannot pass judicial muster unless it is race-neutral, why not create quasi-cause challenges which are case-related and tied to the underlying facts of the case? This way, litigators can explore the views of particular jurors in a non-racial fashion.

In any event, the current state of the peremptory challenge is in serious jeopardy following *Purkett*. That case has unwittingly returned the judicial system to its pre-*Batson* roots, where mere "hunches" are allowed to remove potential jurors. Paradoxically, though, race-conscious decisions to strike are not allowed by *Purkett*. Justice Stevens eloquently noted in *Purkett* that the hunches and racial reasons are often intertwined or even the same. Since the Court has evinced a clear intent to revive the peremptory challenge, while still maintaining race-neutrality, the Court should adduce a better method of so doing. Otherwise, the savvy attorney at step two of *Purkett* will always find a race-neutral reason to survive an attack of purposeful discrimination, and will enjoy the unfettered use of peremptories. This result neither furthers the Court's intent, nor protects the intended beneficiaries of the peremptory challenge—the juror, the litigant, and the public. The time has come for a change.

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