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Comments: Challenging the Challenge: Twelve Years after Batson, Courts Are Still Struggling to Fill in the Gaps Left by the Supreme Court

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CHALLENGING THE CHALLENGE: TWELVE YEARS AFTER *BATSON*, COURTS ARE STILL STRUGGLING TO FILL IN THE GAPS LEFT BY THE SUPREME COURT

I. INTRODUCTION

The client is an Arabian terrorist, and his attorney wants to strike all Jews from the jury. The client is an accused rapist, and his attorney intends to eliminate all women from the jury. The client is O.J. Simpson, and his attorneys hope to seat as many African-American jurors as possible.

Every attorney seeks to select a jury that will favor the client.[1] Many attorneys believe that a case can be won or lost during the jury selection stage of the trial.[2] Therefore, considerable amounts of time and money may be spent on efforts to shape the jury.[3] Both sides will use every weapon available.

The peremptory challenge—the elimination of a potential jury member without cause[4]—is one of the most powerful weapons an

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1. *See* Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041, 1088-89 n.188 (1995) (noting that, although the purpose of voir dire is to seat an impartial jury, "in practice" each side is looking for a sympathetic decision-maker).
2. *See* Robert B. Hirshorn & Heather R. Epstein, *How to Conduct a Meaningful & Effective Voir Dire in Criminal Cases*, 46 SMU L. REV. 659, 680-81 (1992) (explaining that a good trial attorney puts "as much energy into the selection of a jury as he or she does in the presentation of the case, because he or she realizes that he or she can put on the best play in the world, but without an audience that is receptive to the play, it will be misunderstood and not comprehended").
3. *See* Jim Goodwin, *Articulating the Inarticulable: Relying on Nonverbal Behavioral Cues to Deception to Strike Jurors During Voir Dire*, 38 ARIZ. L. REV. 739, 739-40 (1996) (indicating that an entire industry, composed of "sociologists, market researchers, and communications experts," exists to help the attorney select a jury); Debra Sahler, *Scientifically Selecting Jurors While Maintaining Professional Responsibility: A Proposed Model Rule*, 6 ALB. L.J. SCI. & TECH. 383, 386 (1996) (observing that the use of trial consultants is no longer limited to multi-million dollar cases).
4. *See* BLACK'S LAW DICTIONARY 1136 (6th ed. 1990) (defining peremptory challenge as "the right to challenge a juror without assigning, or being required to assign, a reason for the challenge"). *But see, e.g.*, ROGER HAYDOCK & JOHN SONSTENG, ADVOCACY: JURY TRIALS § 1.61, at 57 (1994) (maintaining that, although no reason need be given, an attorney may not strike a juror based on race or some other protected class).

attorney can use during the jury selection process.[5] The primary goal of the peremptory challenge is to eliminate all prospective jurors who appear partial to the other side.[6] The peremptory challenge allows an attorney to dismiss those venirepersons without providing a reason.[7] However, the unrestrained use of peremptory challenges was curtailed by the Supreme Court in *Batson v. Kentucky*.[8]

This Comment discusses the struggle to fill the gaps left by the *Batson* decision. Part II provides background information regarding the jury selection process,[9] peremptory challenges,[10] and the Equal Protection Clause.[11] Part III provides an overview of the decisions leading up to *Batson*,[12] followed by a discussion of *Batson* and its progeny.[13] The procedures and remedies formulated in *Batson* are analyzed generally in Part IV.[14] Part V reviews the *Batson* procedures and remedies as Maryland courts apply them.[15] Part VI discusses the present standing of peremptory challenges and makes recommendations for their future use in the jury selection process.[16] This Comment concludes that despite a lack of direction, the *Batson* challenge is a necessary tool to eliminate discrimination in the jury selection process.[17]

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5. *See* JEFFREY ABRAMSON, WE THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 131 (1994) (explaining that peremptory challenges allow attorneys on both sides to rid a jury of biased or prejudiced people).
6. *See* HALE STARR & MARK MCCORMICK, JURY SELECTION § 11.4.3, at 457-58 (2d ed. 1993).
7. *See* VALERIE O. HANS & NEIL VIDMAR, JUDGING THE JURY 67 (1986) (noting that attorneys who believe jurors will view their side disfavorably use their preemptory strikes to eliminate such jurors when they are not dismissed for cause).
8. 476 U.S. 79, 79 (1986) (holding that the Equal Protection Clause is violated when a prospective juror is excluded because of race). Prior to *Batson*, prosecutors were able to exclude jurors who shared the defendant's race without any constitutional limitations. *See* Cynthia Richers-Rowland, Batson v. Kentucky*: The New and Improved Peremptory Challenge*, 38 HASTINGS L.J. 1195, 1195 (1987).
9. *See infra* notes 18-41 and accompanying text.
10. *See infra* notes 42-57 and accompanying text.
11. *See infra* notes 58-73 and accompanying text.
12. *See infra* notes 74-100 and accompanying text.
13. *See infra* notes 101-82 and accompanying text.
14. *See infra* notes 183-264 and accompanying text.
15. *See infra* notes 265-342 and accompanying text.
16. *See infra* notes 343-58 and accompanying text.
17. *See infra* notes 359-73 and accompanying text.

II. BACKGROUND

A. *The Jury Selection Process*

The selection of a jury is a multi-step process intended to comport with the requirements of the Constitution and the American judicial system.[18] It involves the creation of a source list from which prospective jurors will be drawn, the voir dire questioning of prospective jurors,[19] the elimination of biased jurors through challenges for cause,[20] and the elimination of other objectionable jurors through peremptory challenges.[21] The first step is the selection of a pool of prospective jurors from a source list.[22] At the federal district court level, prospective jurors may be selected from voter registration lists or from lists of actual voters within the district or division.[23] In addition to voter lists, other sources of names may be used[24] to ensure a random selection from "a fair cross section of

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18. *See, e.g.*, Juli Vyverberg, Note, *The Peremptory Challenge: Substance Worth Preserving?*, 43 DRAKE L. REV. 435, 437-38 (1994) (" 'It is part of the established tradition in the use of juries as instruments of public justice that the jury be truly representative of the community.' " (quoting Smith v. Texas, 311 U.S. 128, 130 (1940))). Although the Constitution does not require that the jury be perfectly representative of the surrounding community, it does forbid the systematic exclusion of " 'distinctive groups in the community.' " *Id.* (quoting Taylor v. Louisiana, 419 U.S. 522, 538 (1975)). According to at least one commentator, a jury comprised of a representative cross section of the community "is an essential component of the Sixth Amendment." *Id.* at 437 (citing *Taylor*, 419 U.S. at 528); *see also* U.S. CONST. amend. VI (guaranteeing all criminal defendants the right to an "impartial jury"). It is through the Due Process Clause of the Fourteenth Amendment that the Sixth Amendment applies to the States. *See* Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (extending the protections of the Sixth Amendment).

19. *See infra* notes 32-36 and accompanying text.

20. *See infra* notes 39-40 and accompanying text.

21. For a comprehensive discussion of peremptory challenges, see *infra* notes 41-57 and accompanying text.

22. *See* 28 U.S.C. § 1866(a)-(b) (1994) (providing that the clerk shall maintain a jury wheel and from time to time as required, publicly draw names of persons to be assigned to jury panels).

23. *See id.* § 1863(a),(b)(2) (providing that each federal district court shall devise a plan for random jury selection that shall, among other things, specify whether the names of jurors shall be selected from voter registration lists).

24. *See id.* § 1863(b)(2) (providing that if necessary to foster the policy and protect the rights prescribed by 28 U.S.C. §§ 1861 and 1862, other sources may be used, including the city directory in the District of Columbia and the resident list in the district of Massachusetts).

the community,"[25] and to prevent exclusion on the basis of "race, color, religion, sex, national origin, or economic status."[26]

The majority of states follow the federal approach and use state voter lists as a source for pooling prospective jurors.[27] Other states use alternative sources in addition to or in lieu of voter lists.[28] These alternative sources include "a local census, the tax rolls, city directories, telephone books, and drivers' license lists."[29] A minority of states follow the key-man system.[30] The key-man system authorizes political and civic leaders to suggest prospective jurors.[31]

The next step in the jury selection process is the voir dire questioning of prospective jurors. During voir dire, the prospective jurors are questioned to determine their biases.[32] The federal system provides two methods for questioning jurors.[33] Thus, on the federal level, the court will either conduct the voir dire itself or will allow the parties or attorneys to question the jurors.[34] The manner in

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25. *Id.* § 1861 (setting forth the policy of the United States that all litigants shall have the right to a jury selected at random).
26. *Id.* § 1862 ("No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States . . . on account of race, color, religion, sex, national origin, or economic status.").
27. *See* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 963 (2d ed. 1992) (noting that lists of voters are the most commonly used method). Maryland adheres to the federal approach. *See* MD. CODE ANN., CTS. & JUD. PROC. § 8-202(2) (1998) (providing that the jury selection plan shall specify procedures for the jury commissioner to select names from "voter registration lists or from other sources as are necessary").
28. *See* LAFAVE & ISRAEL, *supra* note 27, at 963.
29. *Id.*
30. *See id.* (approximating that one-third of the states, all of which are located in New England and the South, use the key-man system).
31. *See id.* Some commentators have argued the key-man system should be invalidated because its subjectivity "invites abuse" and "invidious manipulation." *See* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 184 (1997) (concluding that the Supreme Court should invalidate the key-man system due to its subjectivity and expense).
32. *See* STARR & MCCORMICK, *supra* note 6, § 2.10, at 48 (explaining that under the voir dire process, jurors are challenged to establish a fair and impartial jury).
33. *See id.*; *see also* FED. R. CRIM. P. 24(a) (discussing voir dire rules in criminal cases); FED. R. CIV. P. 47(a) (discussing voir dire rules in civil cases).
34. *See* STARR & MCCORMICK, *supra* note 6, § 2.10, at 48 (noting that when the court does the questioning, the court must permit attorneys to supplement the inquiry by such additional questions "as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper") (quoting FED. R. CRIM. P. 24(a); FED. R. CIV. P. 47(a)).

which voir dire is conducted in state courts varies from state to state.[35] The attorneys rely on voir dire responses to determine whether or not to strike the juror.[36]

The last two steps in the jury selection process involve the elimination of jurors through challenges.[37] There are two primary types of challenges—a challenge for cause and a peremptory challenge.[38] A challenge for cause is directed at a prospective juror who is objectionable for a particular reason.[39] To establish a challenge for cause, the attorney must show that the juror's sympathies or prejudices are such that it would be impossible for that juror to be impartial.[40] When the attorney wishes to remove a juror, but is unable to establish a challenge for cause, the peremptory challenge is often used.[41]

B. The Use and Importance of Peremptory Challenges

The peremptory challenge is the direct opposite of a challenge for cause.[42] The peremptory challenge allows each party to eliminate prospective jurors from the jury panel without establishing

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35. *See id.* The authors note that (1) in approximately 13 states, the examination is done by the judge only, (2) it is done primarily by attorneys in 18 states, and (3) the responsibility is shared by judge and attorney in the remainder. *See id.* Maryland follows the federal approach permitting either the parties or their attorneys to conduct the questioning, or permitting the court to question the jurors itself. *See* MD. R. CIV. P. 2-512(d) ("[T]he court may permit the parties to conduct an examination of jurors or may itself conduct the examination after considering questions proposed by the parties."); MD. R. CRIM. P. 4-312(d).

36. *See* STARR & MCCORMICK, *supra* note 6, § 2.10, at 51 (providing that after jurors have been examined, the parties can exercise peremptory and for cause challenges).

37. *See id.*

38. *See id.* § 2.11, at 51. A third type of challenge, a challenge to the array, is used when a party alleges that there was an irregularity in summoning or selecting the jury. *See id.* In Maryland, a challenge to the array is expressly recognized. *See* MD. R. CIV. P. 2-512(a); MD. R. CRIM. P. 4-312(a).

39. *See* HAYDOCK & SONSTENG, *supra* note 4, § 1.53, at 48. A challenge for cause may be based on actual bias, which is present when the prospective juror formulates an opinion regarding the case, the parties, or the witnesses at voir dire. *See id.* at 48-49. A challenge for cause may also be based on implied bias, which is present when the juror has an existing relationship with any of the attorneys, parties, or witnesses. *See id.* at 49.

40. *See id.* § 1.54, at 49 (explaining that a mere statement by a juror that he or she is biased or prejudiced is not enough to establish cause to strike, but that the jurors' answers must indicate an inability to be impartial).

41. *See* Richers-Rowland, *supra* note 8, at 1197.

42. *See* HAYDOCK & SONSTENG, *supra* note 4, § 1.53, at 48, § 1.61, at 57.

cause.[43] Unlike a challenge for cause, the peremptory challenge does not require the court's approval.[44] Exercise of the peremptory challenge is solely the prerogative of the attorney[45]—no reason or explanation for striking the prospective juror is required.[46] The strike can be based solely on the attorney's hunch or intuitive belief that the prospective juror is unlikely to render a favorable verdict.[47]

The peremptory challenge performs the valuable function of increasing the parties' power to choose who will sit in judgment over them.[48] Some believe that skillful exercise of the peremptory challenge will help the attorney select a more impartial jury.[49] Others view it as a tool to manipulate the outcome of a trial.[50] A challenge for cause involves the difficult tasks of identifying juror bias and proving that bias to the judge.[51] These difficulties are eased by the peremptory challenge because the attorney is allowed to remove a potentially biased juror without establishing cause.[52]

Much of the potential for abuse is explained by the very limited information upon which attorneys exercise their strikes.[53] An at-

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43. *See* ABRAMSON, *supra* note 5, at 131.
44. *See* JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 145 (1977).
45. *See* HANS & VIDMAR, *supra* note 7, at 67.
46. *See* HAYDOCK & SONSTENG, *supra* note 4, § 1.61, at 57; *see also* Kirk Pittard, *Withstanding* Batson *Muster: What Constitutes a Neutral Explanation?*, 50 BAYLOR L. REV. 985, 985 (1998) ("The peremptory practice allows litigants to strike potential jurors for reasons based purely on instinct and intuition, reasons which may not be amenable to articulation." (citing Hill v. State, 827 S.W.2d 860, 867 (Tex. Crim. App. 1992))).
47. *See* HANS & VIDMAR, *supra* note 7, at 76 (questioning the effectiveness of attorneys in their attempts to create a favorable jury).
48. *See id.* at 72 (noting that the defendant's ability to strike jurors that appear biased may help the defendant accept the verdict as reasonable).
49. *See* ABRAMSON, *supra* note 5, at 131 ("In theory, peremptories are justified as tools for fashioning impartial juries, used by both sides to eliminate 'extremes of impartiality.' ").
50. *See* HANS & VIDMAR, *supra* note 7, at 73 (noting that several manuals advise lawyers to "[l]ook for jurors whose minds can be molded, who will not resist your arguments, and who are not expert in the matters of the current case").
51. *See id.*
52. *See id.*
53. *See id.* This information is typically limited to the juror's name, occupation, and physical characteristics. *See id.* An informal telephone survey of jury commissioner offices in Baltimore City, Baltimore County, and Anne Arundel County indicates that the information given to Maryland attorneys includes the juror's name, occupation, spouse's occupation, and level of education. *See* MD. R. Civ. P. 2-512(c); MD. R. CRIM. P. 4-312(c).

torney's decision to peremptorily challenge a prospective juror may rest on a remark made during voir dire, a questionable glance, or the juror's clothing.[54] Likewise, some have noted patterns by prosecutors to strike prospective jurors who share the same genetic, socio-economic, religious, or national background as the defendant.[55] Trial experts have gone so far as to advise young lawyers to base their selections on stereotypes.[56] This advice is grounded on implied assumptions that jurors are "incapable of doing justice across group lines, that jurors always favor their own kind."[57]

C. *Equal Protection and the Jury Selection Process*

The Supreme Court has increasingly relied on the Equal Protection Clause[58] to ensure that all individuals are treated fairly in the exercise of their rights.[59] The Equal Protection Clause applies to government actions that classify individuals for different treatment under the law.[60] An equal protection analysis examines whether the

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54. *See* ABRAMSON, *supra* note 5, at 131-32.

55. *See id.* at 132 (noting that the success of this tactic relies on the presumption that jurors will favor parties that resemble them). Many also believe that a juror's demographic and socio-economic characteristics will influence that juror's verdict in a particular case. *See id.* at 143.

56. *See* HANS & VIDMAR, *supra* note 7, at 73 (discussing the types of jurors favored and disfavored by trial tactic manuals).

57. ABRAMSON, *supra* note 5, at 131-32. *But see* Batson v. Kentucky, 476 U.S. 79, 98 (1984) (concluding that if prosecutors are allowed to exercise peremptory challenges based on the assumption that African-American jurors would automatically favor defendants of their race, the Equal Protection Clause " 'would be but a vain and illusory requirement' ") (quoting Norris v. Alabama, 294 U.S. 587, 598 (1935)); Thiel v. Southern Pacific Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting) (commenting that a person's race "is unrelated to his fitness as a juror").

58. The Equal Protection Clause provides: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, § 1.

59. *See* 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.1, at 5 (2d ed. 1992). The right to fair or equal treatment requires that the government "treat each individual with equal regard as a person." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-1, at 1438 (2d ed. 1988).

60. *See* 3 ROTUNDA & NOWAK, *supra* note 59, § 18.1, at 4 ("The equal protection guarantee . . . governs all governmental actions which classify individuals for different benefits or burdens under the law."). Equal treatment may be denied when a government classification distinguishes between persons who

government classification is based on impermissible criteria or places an arbitrary burden on a particular group.[61] In some instances, the express requirements of the law will establish a questionable government classification.[62] In other instances, the law will not establish a questionable classification by its own terms, but it will be applied in an impermissible manner.[63]

When the guarantees of the Equal Protection Clause are at issue, the Supreme Court examines the constitutionality of government classifications using three standards of review.[64] The first standard of review for an equal protection analysis is the rational relationship test.[65] Under the rational relationship test, the Supreme Court limits its analysis to whether the government classification has a rational relationship to a legitimate government interest.[66] The Su-

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should be viewed as "similarly situated." TRIBE, *supra* note 59, § 18.1, at 1438. Equal treatment may also be denied when the government fails to establish a classification for persons who should be viewed as "differently situated." *Id.*

61. *See* 3 ROTUNDA & NOWAK, *supra* note 59, § 18.2, at 7; *see also* Joseph S. Jackson, *Persons of Equal Worth:* Romer v. Evans *and the Politics of Equal Protection,* 24 WM. MITCHELL L. REV. 407, 456 (1997) (explaining that the legislature cannot draw classifications to disadvantage or burden a group); James J. Sing, *Integration As a Two-Way Street,* 108 YALE L.J. 479, 480-81 (1998) (discussing the impermissibility of a government standard that "burdens or grants preferential treatment" to certain groups).

62. *See* 3 ROTUNDA & NOWAK, *supra* note 59, § 18.2, at 8; *see also* Therese M. Goldsmith, Note, Hopwood v. Texas*: The Fifth Circuit Further Limits Affirmative Action Educational Opportunities,* 56 MD. L. REV. 273, 281-82 (1997) (providing that overt race-based classifications "must be viewed with skepticism") (citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226-27 (1995)); Lisa White Shirley, *Reassessing the Right of Equal Access to the Political Process: The* Hunter *Doctrine, Affirmative Action, and Proposition 209,* 73 TUL. L. REV. 1415, 1422 (1999) (describing racial classifications as an overt distinction based on race).

63. *See* 3 ROTUNDA & NOWAK, *supra* note 59, § 18.2, at 8 ("[A] law may have no impermissible classification by its own terms but it may be applied in such a way as to create a classification."); *see also* Alan E. Brownstein, *Interpreting the Religion Clauses in Terms of Liberty, Equality, and Free Speech Values–A Critical Analysis of "Neutral Theory" and Charitable Choice,* 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 243, 284 n.46 (1999) (pointing out that the legislature may pass a law without intending to discriminate or may not realize that a statute will burden a particular group); Shirley, *supra* note 62, at 1422 (discussing that a facially neutral law may nonetheless have a disproportionate impact on minority groups).

64. *See* 3 ROTUNDA & NOWAK, *supra* note 59, § 18.3, at 14.

65. *See id.*

66. *See id.*; *see also* Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985) ("The general rule is that legislation is presumed valid and will be sustained if

preme Court has applied the rational relationship test to government classifications that stem from social and economic legislation.[67]

The second standard of review is the strict scrutiny test. Under the strict scrutiny test, the Supreme Court raises the level of its review and independently determines whether the government classification is narrowly tailored to further a compelling government interest.[68] The Supreme Court has applied the strict scrutiny test to two types of classifications: (1) classifications that affect a person's ability to exercise a fundamental constitutional right[69] and (2) classi-

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the classification drawn by the statute is rationally related to a legitimate state interest."); *see also* Kathleen A. Graves, Comment, *Affirmative Action in Law School Admissions: An Analysis of Why Affirmative Action is No Longer the Answer . . . Or is It?*, 23 S. ILL. U. L.J. 149, 166 (1998); Julie M. Riewe, Note, *The Least Among Us: Unconstitutional Changes in Prisoner Litigation Under the Prison Litigation Reform Act of 1995*, 47 DUKE L.J. 117, 127 (1997) (pointing out that a law will be upheld if it passes the rational relationship test and if it does not burden a fundamental right or target a suspect class); Jerald W. Rogers, Note, Romer v. Evans*: Heightened Scrutiny Has Found a Rational Basis—Is the Court Tacitly Recognizing Quasi-Supsect Status for Gays, Lesbians, and Bisexuals?*, 45 U. KAN. L. REV. 953, 957-58 (1997).

67. *See Cleburne*, 473 U.S. at 440 (observing that the Equal Protection Clause allows states wide latitude on social and economic legislation); *see also* Graves, *supra* note 66, at 574 (arguing that a rational basis review gives legislatures deference in instituting social policy); Helen Herschkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1153 (1999) (discussing the rational relation test in the context of welfare legislation); Peter J. Longo, *The Human Genome Project's Threat to the Human Constitution: Protections From Nebraska Constitutionalism*, 33 CREIGHTON L. REV. 3, 9 (1999) ("[I]f a statute involves economic or social legislation not implicating a fundamental right or suspect class, courts will only ask whether [there is] a rational relationship [to a legitimate government interest].").

68. *See* 3 ROTUNDA & NOWAK, *supra* note 59, § 18.3, at 15; *see also* Kevin F. Clarkson et al., *The Alaska Marriage Amendment: The People's Choice on the Last Frontier*, 16 ALASKA L. REV. 213, 249 (1999) (discussing the types of cases to which the strict scrutiny test applies); Seymour Moskowitz & Michael J. DeBoer, *When Silence Resounds: Clergy and the Requirement to Report Elder Abuse and Neglect*, 49 DEPAUL L. REV. 1, 73 (1999) (discussing the application of the strict scrutiny test to religious freedom cases); Linda N. Deitch, Comment, *Breaking News: Proposing a Pooling Requirement For Media Coverage of Live Hostage Students*, 47 UCLA L. REV. 243, 298 (1999) (arguing that a content-based ban on speech would have to pass a strict scrutiny test).

69. *See* Susan R. Klein & Katherine P. Chiarello, *Successive Prosecutions and Compound Criminal Statutes: A Functional Test*, 77 TEX. L. REV. 333, 386 (1998); Gretchen Witte, Comment, *Internet Indecency and Impressionable Minds*, 44 VILL. L. REV. 745, 777 (1999) (arguing that a restriction on children's Internet access involves two fundamental rights—parental child rearing authority and free-

fications that make distinctions using a "suspect" basis.[70]

The third standard of review is the intermediate test, which is a middle ground between the strict scrutiny test and the rational relationship test.[71] Under the intermediate test, or heightened scrutiny standard of review, the government classification must have a substantial relationship to an important government interest.[72] The Supreme Court has used the intermediate test for classifications involving gender and illegitimacy.[73]

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dom of speech—and must therefore withstand strict scrutiny).

70. *See* 3 ROTUNDA & NOWAK, *supra* note 59, § 18.3, at 15. According to the Court, "[t]he general rule gives way" when the government uses suspect classifications such as "race, alienage, or national origin." *Cleburne*, 473 U.S. at 440. For a description of the general rule, see *supra* note 66. *See also* Darlene C. Goring, *Affirmative Action and the First Amendment: The Attainment of a Diverse Student Body is a Permissible Exercise of Institutional Autonomy*, 47 U. KAN. L. REV. 591, 596 (1999) (noting that classifications that are considered suspect are usually race based); Brian Privor, *Dusk 'Til Dawn: Children's Rights and the Effectiveness of Juvenile Curfew Ordinances*, 79 B.U. L. REV. 451, 492 (1999) (arguing age is not a suspect class) (citing Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313-14 (1976)); Lynn A. Stout, *Strict Scrutiny and Social Choice: An Economic Inquiry Into Fundamental Rights and Suspect Classifications*, 80 GEO. L.J. 1787, 1814-21 (1992) (discussing suspect classes).

71. *See* 3 ROTUNDA & NOWAK, *supra* note 59, § 18.3, at 17 ("The Supreme Court has adopted an intermediate standard of review that is not as difficult for the government to meet as the compelling interest test, but which involves far less deference to the legislature than does the rationality test.").

72. *See id.*; *see also* John P. Cronan, *Subjecting the Fourth Amendment to Intermediate Scrutiny: The Reasonableness of Media Ride-Alongs*, 17 YALE L. & POL'Y REV. 949, 959 (1999) (arguing that intermediate scrutiny would be the appropriate test in addressing Fourth Amendment issues surrounding media "ride-alongs" with law enforcement agents); Stacy Sulman Kahana, *Crossing the Border of Plenary Power: The Viability of an Equal Protection Challenge to Title VI of the Welfare Law*, 48 DUKE L.J. 305, 339 (1997) (predicting the outcome of a welfare law challenge under each Equal Protection test); Yanet Perez, Note, *Women Win the War at VMI*, 28 SETON HALL L. REV. 233, 234 (1997) (discussing the application of the strict scrutiny test to gender-based classifications).

73. *See* 3 ROTUNDA & NOWAK, *supra* note 59, § 18.3, at 17. In *Cleburne*, the Supreme Court determined that mental retardation was not a classification that required more than the rationally related standard of review. *See Cleburne*, 473 U.S. at 440-42. *But see* Mary A. Lynch, *The Application of Equal Protection to Prospective Jurors with Disabilities: Will* Batson *Cover Disability-Based Strikes?*, 57 ALB. L. REV. 289, 342-43 (1993) (arguing that *Batson* should be extended to include classifications based on physical disabilities).

III. HISTORICAL ANALYSIS

A. *Pre*-Batson *Cases*

Generally, courts do not subject a law to any level of equal protection analysis unless a party demonstrates that the law classifies persons in some manner, including on the basis of race, alienage, national origin, gender, or illegitimacy.[74] Historically, discrimination on the basis of race and gender has permeated the jury selection process.[75] The promise of a non-discriminatory process began over 100 years ago.[76] In 1879, the Supreme Court examined discrimination in the jury selection process in *Strauder v. West Virginia.*[77] The *Strauder* Court invalidated a state statute that solely permitted "white male persons who are twenty-one years of age" to serve as jurors.[78] Addressing the issue of whether a "colored man" could be fairly tried by a jury assembled with a discriminatory selection process,[79] the Court held that jury selection criteria discriminating against a group because of its color or race violated the Equal Protection Clause of the Fourteenth Amendment.[80]

According to the *Strauder* Court, the purpose of the Equal Protection Clause was to "assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white per-

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74. *See* 3 ROTUNDA & NOWAK, *supra* note 59, § 18.4, at 41.

75. *See* Benno C. Schmidt, Jr., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of* Strauder v. West Virginia, 61 TEX. L. REV. 1401, 1406-07 (1983) (discussing the history of racial discrimination in the jury selection process); ABRAMSON, *supra* note 5, at 112-13 (discussing the historical discrimination against women as potential jurors).

76. *See* Schmidt, *supra* note 75, at 1414 (referring to *Strauder* as a "lost promise" and providing a detailed discussion of its "strength and impotence").

77. 100 U.S. 303 (1879).

78. *See id.* at 305.

79. *See id.* at 305-06. Here, an African-American man was indicted and convicted of murder by a jury solely comprised of white men. *See id.* at 305. The Court carefully defined the issue it was to address:

> It is to be observed that the first of these questions is not whether a colored man, when an indictment has been preferred 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, but it is whether, in the composition or selection of jurors by whom he is to be indicted or tried, all persons of his race or color may be excluded by law, solely because of their race or color, so that by no possibility can any colored man sit upon the jury.

Id.

80. *See id.* at 310.

sons."[81] The West Virginia statute effectively impeded the parity that the Equal Protection Clause sought to secure by denying a race the right to participate in the administration of justice.[82]

A general proposition in Equal Protection jurisprudence is that a violation is established only upon a "showing of intentional or deliberate discrimination."[83] It is easy to find intentional discrimination that violates the Equal Protection Clause when the state announces its racial exclusion, as the West Virginia legislature did in *Strauder*.[84] However, proving intentional discrimination is more difficult when there is no express policy either on the statute's face or in the government's application.[85] In the years following *Strauder*, the Supreme Court struggled with this problem.[86] Unfortunately, the Supreme Court tended to defer to the judgment of state courts and rarely overturned convictions of defendants making jury dis-

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81. *Id.* at 306.

82. *See id.* at 308. The Court observed:

> It is not easy to comprehend how it can be said that while every white man is entitled to a trial by a jury selected from persons of his own race or color, or, rather, selected without discrimination against his color, and a negro is not, the latter is equally protected by the law with the former.

Id. at 309.

83. LAFAVE & ISRAEL, *supra* note 27, § 22.2(c), at 964. As declared by the Court:

> The mere fact of inequality in the number selected does not in itself show discrimination. A purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurymen of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination.

Akins v. Texas, 325 U.S. 398, 403-04 (1945).

84. *See* KENNEDY, *supra* note 31, at 171.

85. *See id.* (noting the "huge volume of litigation" generated to determine the existence of purposeful discrimination where the government policy does not expressly discriminate). *See also* JOHN G. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.4, at 621 (5th ed. 1995). A discriminatory classification for equal protection purposes can be established in one of three ways. First, the law may establish a classification "on its face," meaning that "the law by its own terms classifies persons for different treatment." *Id.* Second, a law may be challenged in its "application"—while imposing no classification explicitly on its face, the law may be administered in "different degrees of severity to different groups of persons who are described by some suspect trait." *Id.* Finally, while containing no classification and being applied evenhandedly, a "law may be challenged as in reality constituting a device designed to impose different burdens on different classes of persons." *Id.*

86. *See* KENNEDY, *supra* note 31, at 175-76.

crimination claims.[87]

Although *Strauder* involved a discriminatory statute rather than a discriminatory practice,[88] it constituted the Supreme Court's foundation for eliminating discrimination in the jury selection process.[89] In 1965, the Supreme Court first addressed the discriminatory use of peremptory challenges in *Swain v. Alabama*.[90] However, the *Swain* Court failed to adopt a viable means of protecting the defendant's right to a fair and impartial jury, free from unscrupulous manipulation by state prosecutors.[91]

Swain involved an African-American's conviction and sentence to death by an all-white jury.[92] The defendant, Robert Swain, objected to the prosecutor's use of peremptory challenges to eliminate African-Americans from the jury.[93] The Supreme Court held that

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87. *See id.* at 175 (characterizing the Supreme Court's deference as "unwarranted"). For a discussion of the Supreme Court's 1880 through 1909 decisions in which defendants failed to establish the requisite discriminatory intent, see ABRAMSON, *supra* note 5, at 108-09. For a typical example of the Supreme Court's deference to state court fact-finding during this period, see Thomas v. Texas, 212 U.S. 278, 281 (1909). The *Thomas* Court explained: "[W]hether such discrimination was practiced in this case was a question of fact, and the determination of that question adversely to plaintiff in error by the trial court and by the [Texas] Court of Criminal Appeals was decisive." *Id.* at 282; *see also* Vyverberg, *supra* note 18, at 443 ("A particular problem with a trial court's acceptance of subjective demeanor is that it often insulates discriminatory challenges from appellate review. Reviewing courts cannot observe the idiosyncratic behavior and body language of venirepersons, and thus, may often unintentionally ignore illegitimate justifications given by prosecutors.").

88. *See supra* notes 78-80 and accompanying text.

89. *See* Batson v. Kentucky, 476 U.S. 79, 85 (1986).

90. 380 U.S. 202, 209 (1965).

91. *See id.* at 222-23. In fact, the Court adopted a presumption that a prosecutor's use of peremptory challenges secured a fair and impartial jury. *See id.* at 222. Further, a showing that "all Negroes were removed from the jury or that they were removed because they were Negroes" did not overcome this presumption. *Id.*

92. *See id.* at 203. Robert Swain, a 19 year-old African-American, was convicted of raping a 17 year-old white girl. *See id.* at 231 (Goldberg, J., dissenting). Only Justice Goldberg's dissent elucidated these facts. *See id.* (Goldberg, J., dissenting).

93. *See id.* at 209-10 (noting that all six African-Americans were struck from the jury pool). In the county of the trial, three jury commissioners placed "all male citizens in the community over 21 who are reputed to be honest, intelligent men and are esteemed for their integrity, good character and sound judgment" on the jury roll. *Id.* at 206 (citation omitted). The identities of these individuals were attained from sources including "city directories, registration lists, club and church lists, conversations with other persons in the

the defendant must demonstrate that the prosecutor systematically used peremptory challenges to discriminate over a period of time.[94] Without a clear showing of when, how often, and the relative circumstances of the prosecutor's discriminatory conduct, the defendant would be unable to attack the prosecutor's use of peremptory strikes.[95] Otherwise, the Court concluded, the long-lasting system of peremptory challenges would be undermined.[96]

Legal scholars have criticized *Swain* for establishing an insurmountable evidentiary standard.[97] Writing for the Supreme Court years later in *Batson*, Justice Powell recognized that a number of lower courts had interpreted the *Swain* standard to mean that the defendant must provide proof of the repeated exclusion of a minority group over several trials.[98] Unfortunately, in the years following the *Swain* decision, few defendants were able to uncover sufficient details regarding a prosecutor's past jury panels and strikes to establish systematic discrimination.[99] Therefore, it was virtually impossible

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community, both white and colored, and personal and business acquaintances." *Id.* (footnote omitted). Although the Court recognized that the jury selection process was haphazard and made little effort to include the African-American community, it concluded that "an imperfect system is not equivalent to purposeful discrimination based on race." *Id.* at 209 (footnote omitted).

94. *See id.* at 227-28 (emphasizing that both prosecutors and defense counsel exercise peremptory strikes). According to the Court, "[t]he ordinary exercise of challenges by defense counsel does not . . . imply purposeful discrimination by state officials." *Id.* at 227. Therefore, unless the defendant sufficiently established the prosecutor's participation, the mere absence of African-Americans serving as jurors over a particular period of time would not "give rise to the inference of systematic discrimination on the part of the State." *Id.* The Court eventually discarded the notion that discriminatory peremptory strikes by a criminal defendant would not constitute state action. *See* Georgia v. McCollum, 505 U.S. 42, 51-55 (1992). For a discussion of *McCollum*, see *infra* notes 158-72 and accompanying text.

95. *See Swain*, 380 U.S. at 224 (finding no evidence of prolonged use of race-based peremptory strikes on the record). However, it should be noted that African-Americans constituted 26% of Talladega County, yet typically accounted for no more than 15% of the venire. *See id.* at 205. Additionally, no African-American had served on a jury for fifteen years, even though an average of six or seven African-Americans were on individual petit jury venires in criminal cases during this time. *See id.*

96. *See id.* at 221.

97. *See* ABRAMSON, *supra* note 5, at 134; KENNEDY, *supra* note 31, at 196.

98. *See* Batson v. Kentucky, 476 U.S. 79, 92 (1986). Justice Powell referred to the *Swain* evidentiary standard as "a crippling burden of proof." *Id.*

99. *See* LAFAVE & ISRAEL, *supra* note 27, § 22.3(d), at 979. Most courts did not keep

for a defendant to successfully attack discriminatory peremptory challenges.[100]

B. The Batson *Decision*

Two decades after *Swain*, the Supreme Court lowered the evidentiary standard established by the *Swain* Court in the landmark decision of *Batson v. Kentucky*.[101] James Kirkland Batson, an African-American defendant, was convicted of second-degree burglary and receipt of stolen goods by an all-white jury.[102] During the jury selection process, the prosecutor used his peremptory challenges to eliminate all four African-Americans from the pool.[103] Before the jury was sworn, the defense attorney moved to discharge the jury, contending that the prosecutor had improperly removed African-American venirepersons.[104] Observing "that the parties were entitled to use their peremptory challenges to 'strike anybody they want to,' " the trial court denied the motion.[105]

The *Batson* prosecutor's peremptory challenges of potential jurors reflected the perception that African-Americans were incapable of impartiality in an action against a defendant of the same race.[106] The Supreme Court declared that the Equal Protection Clause prohibited peremptory challenges exercised on this assumption.[107] Therefore, the Supreme Court remanded the case for further pro-

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records reflecting the race of the prospective jurors, which party challenged a particular juror, or whether the challenge was made for cause or peremptorily. *See* Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Use of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099, 1102 (1994).

100. *See* ABRAMSON, *supra* note 5, at 134 (observing that no federal court made a finding of discriminatory use of peremptory challenges during the two decades following *Swain*).

101. 476 U.S. 79 (1986).

102. *See id.* at 82-83.

103. *See id.* at 83. Under Kentucky law, the prosecutor had six peremptory challenges in total. *See id.* at 83 n.2.

104. *See id.* The defense attorney argued that the prosecutor's unexplained removal of African-American jurors violated the defendant's Sixth and Fourteenth Amendment rights. *See id.*

105. *Id.*

106. This is the assumption courts make regarding the attorney's motives when a peremptory challenge raises the inference of discriminatory intent. *See id.* at 101 (White, J., concurring).

107. *See id.* at 97 ("The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of [the assumption that African-Americans would be biased toward other African-Americans, which arises] solely from race.").

ceedings to determine whether the facts established purposeful discrimination.[108] The Supreme Court further stated that in the absence of a neutral explanation for the peremptory challenges, the defendant's conviction must be reversed.[109] Although the Court did not expressly rely on any of the three standards used in an equal protection analysis,[110] the logical conclusion is that the constitutional protection of suspect classifications, which are subject to strict scrutiny, will supersede the right to exercise peremptory challenges.[111]

The Court's holding in *Batson* allows a defendant to establish a prima facie case of purposeful discrimination solely on the basis of peremptory challenges exercised in the defendant's trial, rather than requiring a demonstration of systematic exclusion over several trials.[112] After *Batson*, a prosecutor's actions and statements during voir dire and in the exercise of peremptory challenges could be used to infer a discriminatory purpose.[113] Once the attorney opposing the challenge makes a prima facie showing of purposeful discrimination, the attorney making the challenge would have to provide a neutral explanation for striking the juror.[114]

Rather than concentrating exclusively on the rights of the defendant, the *Batson* Court also discussed the impact of discriminatory peremptory challenges on the surrounding community as a whole.[115] As noted by the *Batson* Court, "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community."[116] Aside from the threats to the defendant's Equal Protection rights, the Court recognized the considerable threat that discriminatory peremptory strikes pose to the public's confidence in the justice system.[117]

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108. *See id.*
109. *See id.*
110. For a discussion of equal protection, see *supra* notes 58-73 and accompanying text.
111. *See* Lynch, *supra* note 73, at 322-23.
112. *See Batson*, 476 U.S. at 95.
113. *See id.*
114. *See id.* at 98.
115. *See id.* at 87.
116. *Id.*
117. *See id.*

C. *Post*-Batson *Cases*

The Supreme Court's decision in *Batson* has substantially impacted the exercise of peremptory challenges. The peremptory challenge is no longer a true challenge without cause. When an attorney believes that opposing counsel has stricken a prospective juror in violation of the Equal Protection Clause, the attorney may make a *Batson* challenge—a motion challenging the removal of the juror.[118] Moreover, the Supreme Court has extended the reach of the *Batson* challenge in subsequent cases.[119] Decisions have been made regarding the use of the *Batson* challenge by white defendants,[120] civil litigants,[121] and prosecutors.[122] Peremptory challenges on the basis of gender have also undergone examination by the Court.[123]

1. The Evolution of *Batson* Challenges

a. Use by White Defendants

In 1991, the Supreme Court addressed the issue of whether a white defendant had standing to object to the prosecutor's peremptory strikes of African-American jurors in *Powers v. Ohio*.[124] A white defendant, Larry Joe Powers, was convicted of murder and attempted murder.[125] During voir dire, Powers objected to the prosecutor's use of peremptory challenges to remove seven African-American venirepersons.[126] However, there was no indication that race was a factor in the crime or the trial.[127] The trial court rejected each of the defendant's challenges without requiring the prosecutor

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118. *See* HAYDOCK & SONSTENG, *supra* note 4, § 1.62, at 59 (explaining that a party may challenge a peremptory strike exercised by an opposing party if the juror was struck on an unconstitutional basis).

119. *See* Ogletree, *supra* note 99, at 1103 (observing that the Court has allowed the use of the *Batson* challenge when the defendant and juror are not of the same race, during jury selection in civil actions, and where the objection is made by the government).

120. *See infra* notes 124-46 and accompanying text.

121. *See infra* notes 142-57 and accompanying text.

122. *See infra* notes 158-72 and accompanying text.

123. *See infra* notes 173-82 and accompanying text.

124. 499 U.S. 400 (1991).

125. *See id.* at 403. He received a sentence of 53 years to life imprisonment. *See id.*

126. *See id.* (commenting that each time the State used a peremptory strike to remove an African-American juror, the defendant would make a *Batson* challenge). In all, the prosecutor exercised 10 peremptory strikes. *See id.*

127. *See id.* (recognizing that the record did not reveal whether race was in some way implicated in the crime or trial).

to provide a neutral explanation.[128]

Again discussing the importance of the jury process to the community at large, much like in *Batson*,[129] the Supreme Court concluded that the defendant did not have to be the same race as the excluded juror to make a *Batson* challenge.[130] The Court emphasized the contribution of jury service to community acceptance of legal institutions and the law, declaring that "with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process."[131] Although conceding that no individual juror has the right to sit on a particular jury, the Court emphasized that all citizens have the right to not be excluded solely on the basis of race.[132]

The Court further explained that the defendant had standing to raise a claim under the Equal Protection Clause.[133] Although the use of race-based peremptory strikes violates the rights of prospective jurors, the Court held that defendants—even though they are third parties—may challenge these discriminatory practices.[134] The Court noted that the similarity in interests between the defendant and the stricken juror, as well as the potential impact on the administration of justice during the trial, supports the defendant's right to enforce the rights of jurors.[135] The Court also relied on the practical roadblocks to equal protection challenges by venirepersons,[136] compounded by "little incentive to set in motion the arduous process needed to vindicate [their] own rights."[137]

Thus, *Powers* allows the defendant to enforce the equal protection rights of the excluded juror.[138] The Court also concluded that

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128. *See id.*

129. *See supra* notes 101-17 and accompanying text.

130. *See* Powers v. Ohio, 499 U.S. 400, 402 (1991).

131. *Id.* at 407.

132. *See id.* at 409 ("Race cannot be a proxy for determining juror bias or competence."). The Court also rejected the State's argument that race-based peremptory challenges survived equal protection analysis because they equally affected all races, including whites. *See id.* at 410. The Court concluded that this approach "has no place in our modern equal protection jurisprudence." *Id.*

133. *See id.* at 415.

134. *See id.* at 413.

135. *See id.* at 413-15.

136. *See id.* at 415 ("There exists considerable practical barriers to suit by the excluded juror because of the small financial stake involved and the economic burdens of litigation.").

137. *Id.* at 415 (citing Barrows v. Jackson, 346 U.S. 249, 257 (1953)).

138. *See id.*

race was irrelevant to the defendant's standing.[139] According to the *Powers* Court: "To bar [Powers's] claim because his race differs from that of the excluded jurors would be to condone the arbitrary exclusion of citizens from the duty, honor, and privilege of jury service."[140] This signified an expansion of the *Batson* decision, which had previously appeared to require that the defendant share the same race as the excluded juror.[141]

b. Use by Civil Litigants

To further preserve the integrity of the courtroom, the Supreme Court extended *Batson* challenges to civil litigants in *Edmonson v. Leesville Concrete Co.*[142] Here, Edmonson filed a negligence suit against his employer for injuries sustained in a work-related accident.[143] When Leesville used peremptory challenges to remove two African-American jurors, Edmonson requested a race-neutral explanation for the challenges.[144] The trial court denied the request, indicating that *Batson* only applied to criminal cases.[145]

Prior to *Edmonson*, most charges of discrimination in the jury selection process involved the actions of prosecutors and other state officials in criminal cases.[146] This was mainly because of Batson's reliance on the Equal Protection Clause, which is limited to challenging state action.[147] In *Edmonson*, however, not only did the Court consider whether civil litigants could exercise racially motivated peremptory challenges,[148] but the court also confronted the question of whether a civil litigant could be considered a government actor so as to satisfy the state action requirement of the Fourteenth Amendment.[149]

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139. *See id.*
140. *Id.*
141. *See id.* at 420 (Scalia, J., dissenting).
142. 500 U.S. 614 (1991).
143. *See id.* at 616.
144. *See id.* at 616-17. The plaintiff was also an African-American. *See id.*
145. *See id.* at 617.
146. *See id.* at 618. The Court rejected the notion that it would allow discrimination in civil cases. *See id.*
147. *See id.* at 619.
148. *See id.* ("[D]iscrimination on the basis of race in selecting a jury in a civil proceeding harms the excluded juror no less than discrimination in a criminal trial.").
149. *See id.* State action refers to an activity that is dominated by governmental authority to the extent that it becomes subject to constitutional constraints. *See id.* at 620-22. The state action analysis is used to determine whether the constitutional violation results from a state authorized right and whether the party

The Court determined that the mere availability of peremptory challenges constituted sufficient state action to invoke the Equal Protection Clause.[150] For this determination, the Court noted that peremptory challenges were only permitted when authorized by the government.[151] Without this governmental approval, the private litigant would be unable to strike a juror on a discriminatory or any other basis.[152] The Court further reasoned that the jury selection process, which includes the peremptory challenge system, is administered by the government.[153] When civil litigants participate in the jury selection process, they assist the government in the important function of determining who will be the trier of fact.[154] The Court also commented on the insidious nature of racially motivated peremptory strikes, concluding that the stigmatization and alienation decided in *Powers*[155] applied in equal force to the selection of jurors for civil trials.[156] Therefore, the Court held that discriminatory peremptory challenges were prohibited in civil, as well as criminal, cases.[157]

c. Use by Prosecutors

In *Georgia v. McCollum*,[158] the Supreme Court extended *Batson* challenges even further by permitting prosecutors to demand race-neutral explanations for a criminal defendant's use of peremptory strikes.[159] In this case, three white defendants were charged with ag-

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charged with the violation can be described as a state actor. *See id.* at 620 (citing Lugar v. Edmondson Oil Co., 457 U.S. 922, 939-42 (1982)).

150. *See id.* at 627.

151. *See id.* at 620. The peremptory challenge exercised in *Edmonson* was authorized by a federal statute. *See id.* at 621 (citing 28 U.S.C. § 1870 (1994)).

152. *See id.*

153. *See id.* at 622-24. The Court further noted: "[A] private party could not exercise its peremptory challenges absent the overt, significant assistance of the court. The government summons jurors, constrains their freedom of movement, and subjects them to public scrutiny and examination." *Id.* at 624.

154. *See id.* at 624-28. As the principal fact-finder, the jury weighs the evidence, judges the credibility of witnesses, and renders a verdict. *See id.* at 625. Ultimately, the Court reasoned that the jury embodies the power of the court and the government.

155. *See supra* notes 124-141 and accompanying text.

156. *See Edmonson*, 500 U.S. at 630.

157. *See id.* ("Racial discrimination has no place in the courtroom, whether the proceeding is civil or criminal.").

158. 505 U.S. 42 (1992).

159. *See id.* at 59.

gravated assault and simple battery against two African-Americans.[160] Before the jury selection phase of the trial began, the prosecution moved to restrain the defendants from using their peremptory challenges to discriminate against prospective African-American jurors.[161] The trial court denied the prosecutor's motion.[162]

The Supreme Court reversed, holding that a criminal defendant could not use peremptory challenges in a discriminatory manner.[163] The Court observed that the defendant's use of peremptory challenges in a discriminatory manner harmed the excluded juror as well as the community at large.[164] Reiterating the law's need to instill public confidence in the courts, the Court reasoned that criminal defendants should no more be permitted to exercise discriminatory peremptory strikes than civil litigants or prosecutors.[165] Moreover, the Court concluded that racially motivated strikes by a criminal defendant could be subjected to a *Batson* challenge.[166] Al-

160. *See id.* at 44.

161. *See id.* at 44-45. The prosecutor argued that defense counsel had "indicated a clear intention to use peremptory strikes in a racially discriminating manner." *Id.* at 45. Given the statistical composition of the area and the likely size of the venire, the prosecutor argued that counsel could strike all of the potential African-American jurors with the 20 peremptory strikes available to the defense. *See id.*

162. *See id.* The trial court held that the law does not prohibit a criminal defendant's use of racially discriminatory peremptory challenges. *See id.*

163. *See id.* at 59 ("[T]he Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges."). In deciding whether the Constitution was violated, the Court addressed whether: (1) a criminal defendant's racially motivated strikes causes the harms *Batson* was designed to protect; (2) a criminal defendant's peremptory strikes constitutes state action; (3) a prosecutor has standing to invoke a *Batson* challenge; and (4) a criminal defendant's constitutional rights preclude the extension of *Batson* to the defendant's strikes. *See id.* at 48.

164. *See id.* at 48-50 (addressing the harms protected by *Batson*). The Court concluded that when a juror is subjected to the public indignity of racial discrimination, the juror is harmed, regardless of who exercises the peremptory challenge. *See id.* at 49-50. According to the Court, the community is harmed by the inevitable undermining of the integrity of the criminal justice system whenever the jury selection process permits attorneys to exclude potential jurors on the basis of race. *See id.*

165. *See id.* at 49-50.

166. *See id.* at 48-59. Relying on *Edmonson*, the Court also determined that the exercise of a peremptory challenge by a criminal defendant was a result of state action. *See id.* at 51-55 (discussing Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991)). For a discussion of *Edmonson*, see *supra* notes 142-57 and accompanying text. Relying on *Powers* and *Edmonson*, the Court also determined

though the Court recognized that criminal defendants have a right to an impartial jury, it found that this requirement did not mandate the availability of discriminatory peremptory strikes.[167]

However, the Court did observe that there was a distinction between peremptory challenges exercised to remove jurors who harbor racial prejudice and peremptory challenges exercised to remove jurors because of their race.[168] The Court recognized that given the Sixth Amendment right to an impartial jury,[169] a defendant has the right to remove jurors who "would be incapable of confronting and suppressing their racism."[170] However, the Court concluded that peremptory challenges exercised simply because the venireperson is a particular race do not qualify under this right.[171] Indicating that the defendant must articulate a racially neutral explanation for the challenges if the State established a prima facie showing of a discriminatory strike, the Court remanded the case for further proceedings.[172]

2. The Court Extends *Batson* to Include Gender-Based Peremptory Strikes

In 1994, the Supreme Court increased the classes of individuals[173] protected from discriminatory peremptory strikes by holding

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that prosecutors have standing to object to the violation of the excluded juror's constitutional rights. *See id.* at 55-56. For a discussion of *Powers*, see *supra* notes 124-41.

167. *See McCollum*, 505 U.S. at 57-58 (rejecting the defendants' argument that limitations on peremptory strikes violated the attorney-client privilege, Sixth Amendment guarantee of effective assistance of counsel, and Sixth Amendment right to an impartial jury). The Court noted that peremptory challenges are not a constitutionally-protected right. *See id.* at 57. The peremptory challenge is "but one state-created means to the constitutional end of an impartial jury and a fair trial." *Id.* This "state-created means" may be withheld without violating the Constitution. *See id.*

168. *See id.* at 59. The Court recognized that a defendant may sometimes need protection from jurors who cannot overcome their racism. *See id.* at 58. However, the Court rejected the belief that "assumptions of partiality based on race provide a legitimate basis for disqualifying a person as an impartial juror." *Id.* at 59.

169. For the relevant portions of this Amendment, see *supra* note 167.

170. *McCollum*, 505 U.S. at 58 (citations omitted).

171. *See id.* at 59.

172. *See id.*

173. It should be noted that the Supreme Court has not extended the grounds upon which *Batson* challenges may be made to all classifications requiring a strict scrutiny analysis. *But see* Batson v. Kentucky, 476 U.S. 79, 124 (1986) (Burger, J., dissenting) ("[I]f conventional equal protection principles apply,

that gender-based peremptory strikes also violate the Equal Protection Clause.[174] The case, *J.E.B. v. Alabama ex rel. T.B.*,[175] involved a complaint against a male defendant for paternity and child support.[176] The State used its peremptory strikes to remove all male jurors.[177] The Supreme Court concluded that gender was an unconstitutional basis for determining a juror's ability to render a fair and impartial decision,[178] holding that "gender, like race, is an unconstitutional proxy for jury competence and impartiality."[179] The Court noted that by allowing discriminatory peremptory strikes, the courts impermissibly sent a signal to society that "certain individuals, for no reason other than gender, are presumed unqualified by state actors to decide important questions upon which reasonable persons could disagree."[180] Comparing the historical treatment of African-

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then presumably defendants could object to exclusions on the basis of not only race, but also . . . age, . . . religious or political affiliation, . . . mental capacity, . . . number of children, . . . living arrangements, . . . and employment in a particular industry, . . . or profession." (citations omitted)). For example, in *Minnesota v. Davis*, 504 N.W.2d 767, 768 (Minn. 1993), *cert. denied*, 511 U.S. 1115 (1994), the Supreme Court of Minnesota affirmed the aggravated robbery conviction of a defendant who had challenged the State's sole peremptory strike. *See Davis*, 504 N.W.2d. at 768. Using the peremptory strike against an African-American, the prosecutor explained that the removal was due to the potential juror's beliefs as a Jehovah's Witness, not because of his race. *See id.* The prosecutor argued that Jehovah's Witnesses are "reluctant to exercise authority over their fellow human beings" as members of a jury. *Id.* Refusing to overturn the defendant's conviction, the court commented that discrimination based on religion was not as "common and flagrant" as that based on race. *See id.* at 771. The *Davis* court also struggled to differentiate between a peremptory challenge based on a venireperson's religious beliefs and a challenge for cause based on a juror's reluctance to impose a criminal sanction. *See id.* Furthermore, it is questionable whether *Batson* challenges would be available on the basis of "age, occupation, education, or wealth because these are not classified as protected groups." Vyverberg, *supra* note 18, at 448 (citing Barber v. Ponte, 772 F.2d 982, 999 (1st Cir. 1985)).

174. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994).

175. 511 U.S. 127 (1994).

176. *See id.* at 129.

177. *See id.* The trial court rejected petitioner's theory that *Batson* applied to gender discrimination. *See id.* An all-female jury ordered him to pay child support. *See id.* The petitioner lost on appeal to the Alabama Court of Civil Appeals, and the Supreme Court granted certiorari to resolve the issue of gender discrimination. *See id.* at 129-30.

178. *See id.* at 146.

179. *Id.* at 129.

180. *Id.* at 142. Ironically, the *J.E.B.* Court noted that in *Strauder*—the groundwork for equal protection guarantees in the courtroom—the Supreme Court "ex-

Americans and women, the Court found no governmental interest served by perpetuating a judicial system that permits discriminatory peremptory challenges.[181] Thereafter, a *Batson* challenge could be made on the exercise of a gender-based peremptory strike.[182]

IV. *BATSON* PROCEDURALLY

A. A Prima Facie Case

Understanding the grounds on which a *Batson* challenge can be made is only one dimension to raising a challenge at trial. In order to properly raise a challenge, it is important for attorneys to understand how to conduct a *Batson* challenge procedurally. An attorney should be aware of when to make a *Batson* challenge and how to defend peremptory strikes against a possible objection under *Batson.* Unfortunately, the *Batson* Court declined to adopt specific guidelines that would instruct attorneys and the lower courts as to how to implement its decision.[183] Due to the variety of jury selection practices followed in state and federal courts, the Court decided not to attempt to instruct those courts as to how to implement *Batson's* holding.[184]

However, the Supreme Court did announce a three-prong test for establishing a prima facie case of discrimination.[185] First, the defendant must be a member of a cognizable group.[186] Second, the defendant must demonstrate that the prosecutor used peremptory challenges to remove members of that group from the venire.[187]

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pressed no doubt that a State 'may confine the selection [of jurors] to males.'" *Id.* at 131 (quoting Strauder v. West Virginia, 100 U.S. 303, 310 (1879)). For a discussion of *Strauder,* see *supra* notes 77-87 and accompanying text.

181. *See J.E.B.*, 511 U.S. at 135-39. Interestingly, however, the Court would permit peremptory challenges that have a disproportionate impact on one gender, absent a showing of pretext. *See id.* at 143 & n.16 (approving hypothetical peremptory strikes against individuals with military service and individuals employed as nurses) (citing Hernandez v. New York, 500 U.S. 352 (1991)).

182. *See id.* Maryland had rejected the use of gender-based peremptory challenges two years earlier. *See* Tyler v. State, 330 Md. 261, 623 A.2d 648 (1992). The court of appeals concluded that gender-based peremptory challenges were prohibited under the *Maryland Declaration of Rights. See id.* at 270, 673 A.2d at 653.

183. *See* Batson v. Kentucky, 476 U.S. 79, 99 (1986) (deferring to the trial courts' ability to ensure that peremptory strikes are non-discriminatory).

184. *See id.* at 99-100 n.24.

185. *See id.* at 96.

186. *See id.* (citing Castenada v. Partida, 430 U.S. 482, 494 (1977)).

187. *See id.*

Third, the defendant must show that the facts and circumstances of the case raise an inference that the peremptory challenges were used to exclude that group.[188] Once the defendant satisfies these three requirements, the burden of production shifts to the proponent of the peremptory strike.[189] The *Batson* Court's three-prong test contemplates an attack by a criminal defendant. Nevertheless, in light of the subsequent expansion of *Batson* to encompass attacks by civil litigants and prosecutors, the test is no longer limited to criminal defendants.[190]

The first two requirements for a showing of discrimination are relatively self-evident.[191] Generally, membership within a cognizable group and the exclusion of the group's members via peremptory challenges are easily discernible.[192] As a result, the first two requirements are not subject to wide degrees of interpretation.[193] However, it is much more difficult to discern an inference of discrimination from the facts and circumstances of a case. Therefore, the third requirement has been subjected to a number of interpretations.[194]

An inference of discriminatory intent has been drawn from various circumstances.[195] For example, courts have considered whether the challenged juror shares membership in a cognizable group with a defendant, victim, witness, or attorney involved in the case.[196] Courts have also considered the type and level of voir dire questioning and the juror's responses.[197] Challenges that remove all mem-

188. *See id.*

189. *See id.*

190. *See supra* notes 142-72 and accompanying text; *see generally* Christopher J. Scanlon, Casarez v. State*: Texas Draws a Line in the Sand and Refuses to Extend* Batson *to Religion-Based Peremptory Challenges*, 49 BAYLOR L. REV. 233 (1997) (discussing the evolution of *Batson*).

191. *See* Ogletree, *supra* note 99, at 1105-06.

192. *See id.* at 1106. Courts have generally recognized that *Batson* applies to particular groups. *See, e.g.*, United States v. Biaggi, 909 F.2d 662, 679 (2d Cir. 1990) (noting that Hispanic persons are a cognizable group); United States v. Iron Moccasin, 878 F.2d 226, 229 (8th Cir. 1989) (identifying Native-Americans as a cognizable group) (citing United States v. Chalan, 812 F.2d 1302, 1314 (10th Cir. 1987)); United States v. Biaggi, 853 F.2d 89, 95-97 (2d Cir. 1988) (concluding that Italian-Americans are a cognizable group).

193. *See* Ogletree, *supra* note 99, at 1105-06.

194. *See id.* at 1106.

195. *See* STARR & MCCORMICK, *supra* note 6, § 2.13.4, at 13-15 (listing several kinds of evidence that demonstrate discriminatory intent).

196. *See id.* at 14 (citing United States v. Grandison, 885 F.2d 143, 148 (4th Cir. 1989) (considering the race of the victim and witnesses)).

197. *See id.* at 13-14.

bers of a cognizable group have been deemed improper.[198] In addition, a prima facie showing of discrimination may even be found where some members of a cognizable group are challenged for cause.[199]

B. The Requirement of a Neutral Basis for Challenge

1. The *Batson* Standard

Once an attorney establishes a prima facie case of a discriminatory peremptory challenge, the proponent of the challenge must provide a neutral basis for the strike.[200] Unfortunately, the *Batson* Court failed to differentiate between the justifications that can overcome the prima facie case and what justifications are merely pretextual.[201] Facially neutral reasons for the peremptory challenge can easily be fabricated after a *Batson* challenge is made.[202] In the absence of clear standards, the trial court is likely to accept almost any explanation.[203] Reasons that courts have accepted include failing to make eye contact,[204] looking flirtatiously at the defendant,[205] appearing too eager to serve on a jury,[206] and glancing favorably at the other side.[207] The trial court's findings become problematic because the appellate courts defer to their determinations and only reverse if those determinations are "clearly erroneous."[208]

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198. *See id.* at 13 (citing United States v. Chinchilla, 874 F.2d 695 (9th Cir. 1989) (noting that all Hispanic jurors had been challenged)).

199. *See id.*; *see also* United States v. Chalan, 812 F.2d 1302, 1312 (10th Cir. 1987) (holding that *Batson* was applicable to the peremptory challenge of the last Native-American juror, even though the other challenges of Native-American jurors had been for cause).

200. *See* Ogletree, *supra* note 99, at 1107.

201. *See id.*

202. *See id.* (arguing that many courts accept explanations that are "after-the-fact rationalizations" made on "subconsciously racial grounds").

203. *See id.* (noting that trial court determinations are largely unreviewable because of the history of deference to state court findings and the heightened standard for reversal).

204. *See* United States v. Fields, 72 F.3d 1200, 1206 (5th Cir. 1996) (upholding the use of four peremptory strikes against minorities in the jury pool).

205. *See id.*

206. *See* Kelly v. Winthrow, 25 F.3d 363, 366-67 (6th Cir. 1994) (involving the peremptory strikes of seven African-American jurors, two of which were stricken because they seemed too eager to serve).

207. *See* Cooper v. State, 469 S.E.2d 790, 791-92 (Ga. Ct. App. 1996) (involving an African-American defendant's use of 10 peremptory strikes to remove white jurors).

208. *See* Ogletree, *supra* note 99, at 1107; *see also* Chew v. State, 71 Md. App. 681,

Some courts have accepted seemingly fabricated, "after-the-fact" explanations that are potentially driven by a discriminatory purpose.[209] For example, a prosecutor's assertion that the prospective juror had a bad attitude was deemed facially neutral, despite the fact that the prosecutor had used seven of his fifteen peremptory challenges to strike African-Americans.[210]

Other courts have accepted explanations based on reasons that correlate to race.[211] However, as announced by the Supreme Court in *Hernandez v. New York*,[212] a party's peremptory strikes do not violate the Equal Protection Clause simply because the proffered justifications have a disproportionate impact on a protected class.[213] During voir dire in an attempted murder trial involving a Latino defendant, a prosecutor struck all venirepersons with Latino surnames.[214] In response to a *Batson* challenge, the prosecutor argued that the two bilingual venirepersons would not follow the interpreter's translation of testimony by Spanish-speaking witnesses.[215] Although the Court noted that "disparate impact should be given appropriate weight in determining whether the prosecutor acted with a forbidden intent, . . . it will not be conclusive in the preliminary race-neutrality step of the *Batson* inquiry."[216] In regard to the prosecutor's race-neutral explanation, the Court declared: "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race-neutral."[217] The *Hernandez* Court

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701, 527 A.2d 332, 342 (1987) (explaining that a "reviewing court must pay great deference to" the trial court determinations).

209. Ogletree, *supra* note 99, at 1107-08. Arguably, judges are reluctant to implicitly label an attorney a liar by rejecting that attorney's explanation. *See* Jose Felipe Anderson, *Catch Me If You Can! Resolving the Ethical Tradgedies in the Brave New World of Jury Selection*, 32 NEW ENG. L. REV. 343, 376 (1998) (discussing the ethical concerns raised by a procedure that requires a race-neutral explanation for the exclusion of a particular juror).

210. *See* Zumbado v. State, 615 So. 2d 1223, 1232 (Ala. Crim. App. 1993) (explaining that the prosecutor believed that the prospective juror may have had a "chip on her shoulder" regarding the judicial system).

211. *See* Ogletree, *supra* note 99, at 1108 (listing reasons such as unemployment, living in high crime areas, lower education, and failure to speak the English language).

212. 500 U.S. 352 (1991).

213. *See id.* at 361.

214. *See id.* at 355-56.

215. *See id.* at 356.

216. *Id.* at 362.

217. *Id.* at 360. Justice Stevens, joined by Justice Marshall, rejected this conclusion and asserted that "[a]n avowed justification that has a significant dispropor-

accorded a great deal of deference to the trial court and affirmed the defendant's convictions.[218]

The weight accorded to justifications that have a disproportionate impact is no greater for peremptory strikes of African-American jurors. For example, the peremptory strike of a female African-American juror on the basis of her unemployment and lack of education was found to be facially neutral.[219] Yet, there is a higher incidence of unemployment and lower education in minority communities.[220] As a result, this "facially neutral" reason has a disproportionate impact on minority representation in juries.[221]

2. The *Purkett* Standard

Perhaps the most disturbing procedural development occurred in 1995, when the Supreme Court decided *Purkett v. Elem.*[222] The *Purkett* decision appears to retreat from the evidentiary requirements of *Batson.*[223] To rebut a prima facie showing of discrimination, the *Batson* Court required a "neutral explanation related to the particular case to be tried."[224] However, the *Purkett* Court indicated that

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tionate impact will rarely qualify as a legitimate, race-neutral reason sufficient to rebut the prima facie case because disparate impact is itself evidence of discriminatory purpose." *Id.* at 376 (Stevens, J., dissenting).

218. *See id.* at 364, 372.

219. *See* United States v. Ross, 872 F.2d 249, 250 (8th Cir. 1989) (holding that the government's theory that these factors indicated a "general lack of experience on the street, instability in life, and a smaller stake in the community" were sufficiently neutral).

220. *See* U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 398 (117th ed. 1997). In 1996, 4.7% of the white labor force was unemployed. *See id.* The 1996 unemployment rates for Hispanics (8.9%) and African Americans (10.5%) were significantly higher. *See id.* The 1996 data also shows minorities trailing in educational attainment levels. *See id.* at 160. For persons over age 25, 17.2% of whites, 25.7% of African-Americans, and 46.9% of Hispanics lack a high school diploma. *See id.*

221. *See* Ogletree, *supra* note 99, at 1108; *see also* Pittard, *supra* note 46, at 999 (discussing the constitutionality of partially race-based peremptory strikes in a hypothetical medical malpractice case in which a doctor misdiagnosed a case of sickle-cell anemia).

222. 514 U.S. 765 (1995) (per curiam).

223. *See id.* at 770 (Stevens, J., dissenting) (arguing that the second step of the three-step process articulated in *Batson* has been lessened from a specific, neutral explanation to use of an incredible explanation or a mere denial of an improper motive).

224. Batson v. Kentucky, 476 U.S. 79, 98 (1986). The *Purkett* Court argued that this passage did nothing more than prevent the challenged attorney from "satisfy[ing] his burden of production by merely denying that he had a discrimi-

this "neutral explanation" did not have to be persuasive or plausible.[225]

The facts of *Purkett* illustrate the danger inherent in this lowered standard. In this case, the defendant was on trial for second-degree robbery.[226] The prosecutor argued that an African-American juror's long hair and facial hair rendered him an unfit juror.[227] Rather than asking whether the given justification was *plausible*, the Court emphasized that the trial court must first concentrate on whether the justification was facially *race-neutral*.[228] Therefore, the prosecutor's strike was upheld because a member of any race may grow long hair, a beard, or a mustache.[229] Such reasoning could render future *Batson* challenges useless.[230] However, the ultimate impact of *Purkett* will depend upon whether state courts choose to follow its standard.

For example, in *People v. Jamison*,[231] the California Court of Appeals refused to follow *Purkett*, invoking the protections of the state constitution.[232] In *Jamison*, the defendants were African-Americans, and the prosecutor excluded the only African-American juror with a peremptory challenge.[233] The only explanation offered by the State was the juror's purported avoidance of eye contact with the prosecutor.[234] The *Jamison* court declared that without more, the trial court

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natory intent or merely by affirming his good faith." *Purkett*, 514 U.S. at 769.

225. *See Purkett*, 514 U.S. at 768. The *Purkett* Court indicates that a neutral reason that is "silly or superstitious" does not end a *Batson* inquiry. *See id.* If the proponent of the challenge gives any neutral reason for the challenge, the judge must proceed to the next step in the *Batson* inquiry, which is to determine whether or not there has been purposeful discrimination. *See id.* at 767. At that point, but not before, the persuasiveness of the reason becomes relevant. *See id.* at 768.

226. *See id.* at 766.

227. *See id.*

228. *See id.* at 769.

229. *See id.*

230. *See id.* at 777 (Stevens, J., dissenting) (arguing that without further evidence, "some implausible, fantastic, and silly explanations" could overcome *Batson* challenges).

231. 50 Cal. Rptr. 2d 679 (Cal. Ct. App. 1996).

232. *See id.* at 686.

233. *See id.* at 682.

234. *See id.* The prosecutor believed that the juror's behavior indicated an unwillingness to serve on the jury and that she was disinterested in the events in the courtroom. *See id.* The State also attempted to argue that she exercised her peremptory strike because the venireperson had no prior jury experience. *See id.* at 683. The trial court rejected this justification, commenting that other

could not uphold the prosecutor's use of the peremptory strike.[235] The court referred to *Purkett* as a "digression from prior federal law prohibiting" discriminatory peremptory challenges.[236] The court concluded that California's constitution and prior case law required its trial courts to demand a "race neutral, reasonably specific, and trial related" explanation.[237]

When the proponent of a *Batson* challenge must rely upon the Supreme Court's interpretation of the United States Constitution, state courts may likewise chip away at *Batson.* For example, the Nevada Supreme Court accepted *Purkett*'s lead in *Washington v. State.*[238] At trial, the court denied a *Batson* challenge to the prosecutor's use of a peremptory strike to remove the only African-American male in the venire.[239] Adhering to *Purkett,* the *Washington* court indicated that a court did not have to require a persuasive or plausible explanation.[240] The court concluded that there was no discriminatory intent in the prosecutor's strike on the basis of the prospective juror's job, education, or lack of children.[241] Therefore, the court affirmed the trial judge's ruling.[242]

C. Remedies for a Batson Violation

Once identifying a *Batson* violation, the trial court must then implement an appropriate remedy. The Supreme Court mentioned two possible remedies for a *Batson* violation established before the trial begins.[243] However, while the trial court must carefully apply either solution, each has its individual benefits and pitfalls.

As suggested by the *Batson* Court, one remedy is to call for a new jury venire.[244] Once a party removes a venireperson for discriminatory reasons, the representative panel is destroyed.[245] To this end,

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members of the venire also likely lacked experience as jurors. *See id.*

235. *See id.* at 686.

236. *See id.*

237. *Id.* (refusing to follow the *Purkett* majority because California law, not federal law, controlled the disposition of the case).

238. 922 P.2d 547 (Nev. 1996).

239. *See id.* at 549.

240. *See id.* (citing Purkett v. Elem, 514 U.S. 765, 768-69 (1995)).

241. *See id.*

242. *See id.* (finding the trial court did not abuse its discretion in overruling the objection to the peremptory challenge).

243. Batson v. Kentucky, 476 U.S. 79, 99-100 n.24 (1986).

244. *See id.* at 99-100 n.24.

245. *See* Richers-Rowland, *supra* note 8, at 1220 ("[T]he venire is no longer representative of the community after minority jurors have been stricken.").

some view calling for a new venire as a necessary remedy.[246] A number of jurisdictions require this solution.[247] Jurisdictions that require this remedy usually focus on the impartial jury and fair cross-section principles rather than the rights of the excluded juror.[248]

Unfortunately, rather than dissuading parties from using peremptory challenges in a discriminatory manner, the possibility of a new jury venire may act as an incentive for using peremptory challenges in a discriminatory manner. Sometimes the attorney does not like the venire as a whole and may prefer a new jury venire.[249] Therefore, with a few improper strikes, the attorney could effectively get rid of the entire venire.[250]

A second remedy suggested by the *Batson* Court is to reinstate improperly excluded jurors.[251] This remedy has also been adopted by several states.[252] Under an equal protection analysis, the discriminatory use of peremptory challenges violates both the defendant's and excluded juror's constitutional rights.[253] The defendant's equal protection rights are violated by the exclusion of potential jurors who are members of the same cognizable group as the defendant.[254]

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246. *See id.*

247. *See, e.g.*, People v. Wheeler, 583 P.2d 748, 765 (Cal. 1978) (holding that the venire must be dismissed after a *Batson* violation and the jury selection process will begin over again with a different venire); Minniefield v. State, 539 N.E.2d 464, 466 (Ind. 1989) (finding error where the trial court failed to grant a mistrial after the prosecutor failed to give a racially neutral explanation for striking potential jurors); State v. McCollum, 433 S.E.2d 144, 159 (N.C. 1993) (concluding that the selection of a new jury is the remedy for a *Batson* violation).

248. *See* Richers-Rowland, *supra* note 8, at 1220-21.

249. *See* Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 178 (1989).

250. *See id.* (opining that a prosecutor in violation of *Batson* would gain a victory for his unlawful jury selection tactics).

251. *See* Batson v. Kentucky, 476 U.S. 79, 99-100 n.24 (1986) (citing United States v. Robinson, 421 F. Supp. 467, 474 (Conn. 1976)).

252. *See, e.g.*, Ellerbee v. State, 450 S.E.2d 443, 448 (Ga. 1994) (holding that a trial court has the power to seat a juror determined to have been challenged in violation of *Batson*); Conerly v. State, 544 So. 2d 1370, 1372 (Miss. 1989) (concluding that where there is no racially neutral reason for a strike, the trial court must seat the juror); State v. Grim, 854 S.W.2d 403, 416 (Mo. 1993) ("[T]he proper remedy for discriminatory use of peremptory strikes is to quash the strikes and permit those members of the venire stricken for discriminatory reasons to sit on the jury if they otherwise would.").

253. *See Batson*, 476 U.S. at 85-87 (discussing Strauder v. West Virginia, 100 U.S. 303 (1880)).

254. *See id.* at 86.

The equal protection rights of the excluded juror are violated because each juror has the right to participate in jury service, regardless of race or other group membership.[255] Reinstatement of the excluded juror corrects the violation of the defendant's and excluded juror's equal protection rights by reversing the peremptory challenge. Therefore, reinstatement of the excluded juror appears to be the required remedy under an equal protection analysis.[256]

Furthermore, the potential reinstatement of an excluded juror is a strong incentive for avoiding discriminatory challenges because the jury may no longer be impartial once an excluded juror has been reseated. Therefore, an attorney who knows that an improperly challenged juror may be reseated will pay more attention to his or her peremptory challenges.[257] Reinstatement would encourage attorneys to examine their conscious and unconscious motives for discrimination before making a peremptory challenge against a member of a cognizable group.[258]

Notwithstanding the potential benefits, there is a disadvantage to the reinstatement of an excluded juror. The reseated juror may suspect that the challenge was discriminatory and harbor hostility against both the attorney who made the challenge and that attorney's client.[259] The potential for destroying the impartiality of the jury as a whole limits the effectiveness of this remedy.

Weighing both the positive and the negative aspects of each remedy, the trial court is ultimately in the best position to determine which remedy is most appropriate to the case at hand.[260] One commentator suggests that no matter what remedy the trial court chooses for a *Batson* violation, its solution should further two goals.[261] First, the remedy should persuade attorneys not to make discriminatory challenges.[262] Second, the remedy should punish the attorney who chooses to make an improper challenge.[263] No matter

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255. *See id.* at 87 ("A person's race simply 'is unrelated to his fitness as a juror.' " (quoting Thiel v. Southern Pacific Co., 328 U.S. 217, 223-24 (1946)(Frankfurter, J., dissenting))).

256. *See* Richers-Rowland, *supra* note 8, at 1221.

257. *See id.*

258. *See id.*

259. *See id.*

260. *See supra* note 208 and accompanying text.

261. *See* Ogletree, *supra* note 99, at 1116-17, 1122-23 (discussing a number of proposed remedies for *Batson* violations).

262. *See id.* at 1116-17.

263. *See id.* at 1113-23.

which solution is pursued, appellate courts will afford trial courts great deference.[264]

V. *BATSON* IN MARYLAND

A. *System for Exercising Peremptory Challenges*

As in most jurisdictions, the system for exercising peremptory challenges in Maryland is governed by rule and statute.[265] After voir dire, the court identifies potential jurors who have qualified to be seated on the jury. The attorneys for each side are then allowed to exercise a statutorily defined number of peremptory challenges.[266]

The number of available peremptory strikes varies from jurisdiction to jurisdiction. Most state courts provide parties with six peremptory strikes in both civil and criminal cases.[267] Federal courts allow three peremptory challenges.[268] In Maryland, each civil party may exercise four peremptory challenges, plus one additional challenge for each group of three or less alternate venirepersons.[269] For purposes of determining the maximum number of peremptory strikes, multiple plaintiffs or defendants will be viewed as a single party, unless otherwise directed by the court.[270]

The peremptory challenges permitted in Maryland criminal cases vary with the severity of the possible sentence.[271] For example, the defendant who may be subject to the death penalty may exercise twenty peremptory challenges, whereas the State is granted a total of ten.[272] In cases where a defendant faces a sentence of twenty years of imprisonment or greater, there are ten peremptory challenges at the disposal of defense counsel and five strikes available to the State.[273] For sentences of less than twenty years, the defendant and the State are each permitted a maximum of four peremptory challenges.[274]

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264. *See supra* note 208 and accompanying text.

265. *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 621 (1991) ("Today in most jurisdictions, statutes or rules make a limited number of peremptory challenges available to parties in both civil and criminal proceedings.").

266. *See* MD. R. CIV. P. 2-512(h); *see also* MD. R. CRIM. P. 4-313.

267. *See* HANS & VIDMAR, *supra* note 7, at 67.

268. *See* 28 U.S.C. § 1870 (1998).

269. *See* MD. R. CIV. P. 2-512(h).

270. *See id.*

271. *See* MD. CODE ANN., CTS. & JUD. PROC. § 8-301 (1998).

272. *See id.* § 8-301(a).

273. *See id.* § 8-301(b). However, this provision does not apply to common law offenses for which no specific remedy is statutorily provided. *See id.*

274. *See id.* § 8-301(c).

B. The Prima Facie Case

Like other jurisdictions, Maryland has grappled with the problem of implementing the mandate of the *Batson* Court.[275] Thus, Maryland courts rendered several important decisions that helped to establish guidelines for exercising and responding to *Batson* challenges.[276] Essentially, the issues of establishing that a party is a member of a cognizable group and whether that group has been the focus of peremptory challenges seem to be relatively straightforward concepts.[277] Yet, like other jurisdictions, Maryland courts have repeatedly revisited the issue of what constitutes a cognizable group.

In *Mejia v. State*,[278] a criminal defendant on trial for the rape of a white woman alleged that the State struck the only potential juror identified as Hispanic in violation of *Batson*.[279] Concluding that the defendant had established a prima facie case,[280] the Court of Appeals of Maryland set forth the criteria for determining when a person is a member of a cognizable group.[281] The court noted that visual observations are ordinarily acceptable as a basis for determining that a person is a member of a cognizable group.[282] However, group

275. *See, e.g.*, Cooper v. State, 469 S.E.2d 790 (Ga. Ct. App. 1996); Brashear v. State, 90 Md. 709, 715, 603 A.2d 901, 903 (1992); Cudjoe v. Commonwealth, 475 S.E.2d 821 (Va. Ct. App. 1996).

276. *See* Mejia v. State, 328 Md. 522, 616 A.2d 356 (1992) (holding that a prima facie case showing of fact for *Batson* purposes was established by the defendant's proffer that the stricken venireperson was the only Hispanic in the venire); Stanley v. State, 313 Md. 50, 542 A.2d 1267 (1988) (concluding that a prima facie case for discrimination had been established by the fact that the prosecutor had stricken the sole African-American from the jury venire).

277. *See supra* notes 191-93 and accompanying text.

278. 328 Md. 522, 616 A.2d 356 (1992).

279. *See id.* at 527-28, 616 A.2d at 358-59.

280. *See id.* at 539, 616 A.2d at 358.

281. *See id.* at 535 n.8, 616 A.2d at 363 n.8 (explaining that the basis for concluding whether a person is a member of a particular ethnic or racial group should be established in detail in the record). The court did not address the question of whether Hispanics constituted a cognizable group because of the Supreme Court's recognition of this class in *Hernandez v. New York*. For a discussion of *Hernandez*, see *supra* notes 212-18 and accompanying text.

282. *See Mejia*, 328 Md. at 535, 616 A.2d at 362. The court noted that once a party suggests that a venireperson is a member of a cognizable group, it is the responsibility of the other party to object if this assertion is incorrect. *See id.* at 537, 616 A.2d at 363 (likening silence to a tacit admission). The court of special appeals had concluded that affirmative evidence, not an unchallenged statement, was required to establish each element of a prima facie case. *See id.* at 532, 616 A.2d at 361.

membership could also be based on non-visual observations, such as surnames and language.[283] The excluded juror in *Mejia* had a Spanish surname and spoke Spanish.[284] Therefore, according to the court of appeals, the defendant had established that the excluded juror was a member of a cognizable group.[285] Moreover, the court determined that the effect of the exclusion of that juror was the elimination of all Hispanics from the jury.[286] Therefore, the court of appeals concluded that the case should be remanded to give the prosecutor an opportunity to provide a facially neutral explanation for the strike.[287]

The party making a *Batson* challenge has the burden of convincing the trial court that intentional discrimination has occurred.[288] In *Stanley v. State*,[289] the Court of Appeals of Maryland examined the facts and circumstances that would generate a prima facie showing of discrimination.[290] The *Stanley* court considered two cases involving African-American criminal defendants—Clarence Trice and Michael Stanley.[291] Each defendant had been convicted by a jury that was substantially or totally composed of white jurors.[292] In both cases, prosecutors used peremptory challenges to exclude most or all African-Americans from the pool of prospective jurors.[293]

In the trial of Trice, the jury convicted the defendant of burglary, malicious destruction of property, and theft.[294] There was only one African-American in the array of prospective jurors.[295] The State used one of its peremptory challenges to eliminate that potential ju-

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283. *See id.* at 535, 616 A.2d at 362.
284. *See id.* at 526-27, 616 A.2d at 358.
285. *See id.* at 539, 616 A.2d at 364 (observing that there was no expressed disagreement with the proffer that the stricken venireperson was the only Hispanic in the jury venire).
286. *See id.*
287. *See id.* at 540-41, 616 A.2d at 365. At trial, the judge denied the defendant's *Batson* motion without asking for a neutral basis for the challenge from the State. *See id.*
288. *See* Stanley v. State, 313 Md. 50, 61, 542 A.2d 1267, 1272 (1988) ("[E]xamination of *Batson* and the Title VII cases has convinced us that the defendant has the ultimate burden of persuading the court there has been intentional racial discrimination.").
289. 313 Md. 50, 542 A.2d 1267 (1988).
290. *See id.* at 71-72, 542 A.2d at 1277.
291. *See id.* at 54, 542 A.2d at 1278.
292. *See id.*
293. *See id.* at 72, 81-82, 542 A.2d at 1278, 1282.
294. *See id.* at 81, 542 A.2d at 1282.
295. *See id.*

ror.[296] The court of appeals held that when the State uses a peremptory strike in a manner which insures that no African-American jurors will serve in a case involving an African-American defendant, a prima facie case has been made under *Batson*.[297]

In the trial of Stanley, the jury convicted the defendant of several offenses, including murder, and sentenced him to a period of incarceration.[298] The State used eighty percent of its peremptory challenges to remove African-Americans from the pool of prospective jurors,[299] even though African-Americans constituted less than twenty-five percent of the venire.[300] The court of appeals held that there was a "legally mandatory rebuttable presumption" of discrimination in Stanley's case because the circumstances indicated that the State had disproportionately used peremptory challenges against a specific group. [301] The case involved an African-American defendant, victim, and key State witnesses.[302] In addition, none of the voir dire responses made the excluded African-American jurors ripe for a prosecutorial challenge.[303] It appears that unless circumstances in-

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296. *See id.* at 82-83, 542 A.2d at 1282.

297. *See id.* at 87, 542 A.2d at 1285.

298. *See id.* at 64, 542 A.2d at 1273. Throughout the trial, the State pursued a death sentence for the defendant. *See id.* at 64, 542 A.2d at 1273-74.

299. *See id.* at 72, 542 A.2d at 1278.

300. *See id.* at 73, 542 A.2d at 1278. The jury that convicted the defendant included three African-Americans, or 25% of the jury. *See id.* at 66-67, 542 A.2d at 1275.

301. *Id.* at 73, 542 A.2d at 1278. At trial, the prosecutor also argued that the defendant had not timely objected to the peremptory strikes by waiting to raise his *Batson* challenge until after the jury had been selected, but before it had been sworn. *See id.* at 68, 542 A.2d at 1276. Although the State conceded that the defendant had preserved the issue for appeal by objecting in a timely manner, the court nonetheless discussed the appropriate timing for a *Batson* challenge. *See id.* at 69-70, 542 A.2d at 1276. The court explained:

> A *Batson* objection is timely if the defendant makes it no later than when the last juror has been seated and before the jury has been sworn. By waiting, rather than objecting to the first and every subsequent strike of a black juror, a clearer picture of what the State is doing may be seen; a pattern may form.

Id. at 69, 542 A.2d at 1276. However, the court did note that if there is a question as to the stricken venire person's membership in a cognizable group or if there is a possibility that stricken venire persons will not be available once dismissed, the better practice may be to bring the matter to the court's attention at an earlier time. *See id.* at 69 n.10, 542 A.2d at 1276 n.10.

302. *See id.* at 73, 542 A.2d at 1278. The police officers and the other witnesses involved were all white. *See id.*

303. *See id.* Only two of the African-American venire persons against which the State exercised peremptory challenges indicated any response to the court's

dicate otherwise, the use of a highly skewed number of peremptory challenges against a cognizable group creates a presumption of discriminatory intent.[304] Therefore, the proponent of the challenges will have to rebut this presumption with a neutral explanation.[305]

C. Neutral Basis for Challenge

Once the *Stanley* court determined that the defendants had established a prima facie case, it remanded the cases and ordered the trial courts to conduct a hearing at which the State would be given an opportunity to explain its peremptory challenges.[306] As mandated by *Batson*, once a prima facie case is made, the opposing counsel must provide a neutral explanation for the strikes.[307] Although the explanation does not have to be equal to a challenge for cause, it must be more than a good faith denial of discrimination[308] or an assertion that the excluded juror would have been biased.[309] The court had explicitly provided that the defendants be given an opportunity to "rebut" these justifications, so as to expose any pretextual explanations.[310]

During the hearing for the defendant Stanley, the trial court ruled that there was a race-neutral basis for the State's peremptory strikes;[311] the court of special appeals heard the appeal from this ruling.[312] The appeal is significant because the court of special appeals discusses the types of evidence that may be used to rebut a presumption of discrimination.[313]

According to the court of special appeals, rebutting a presumption of discrimination requires proof of acceptable criteria for making the challenge.[314] The court recognized that age, occupation, and

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preliminary questions. *See id.* In contrast, the State used peremptory challenges against two white venire persons that had expressed reservations about imposing a death sentence during the court's questioning. *See id.*

304. *See id.*

305. *See id.* at 75, 542 A.2d at 1279.

306. *See* Stanley v. State, 85 Md. App. 92, 96-97, 582 A.2d 532, 534 (1990).

307. *See* Batson v. Kentucky, 476 U.S. 79, 97 (1986).

308. *See id.* at 97-98.

309. *See id.* ("[T]he prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption . . . that they would be partial to the defendant because of their shared race.").

310. *See Stanley*, 313 Md. at 80 n.16, 88, 542 A.2d at 1281 n.16, 1286.

311. *See* Stanley v. State, 85 Md. App. 92, 95, 582 A.2d 532, 533 (1990).

312. *See id.*

313. *See id.* at 105, 582 A.2d at 538; *see also supra* notes 200-205.

314. *See Stanley*, 85 Md. App. at 101, 105, 582 A.2d at 536, 538.

demeanor were acceptable criteria.[315] Such criteria must be established by evidence from the jury selection process.[316] Therefore, the attorney facing a *Batson* challenge must be able to reconstruct the circumstances of the jury selection process.[317]

The ability to reconstruct the circumstances of the jury selection process becomes critical, and challenging, when the *Batson* inquiry is made after a lengthy trial, on appeal, or both. Memories fade with the passage of time, making it more difficult to accurately recall the events of jury selection.[318] Therefore, the trial court should ordinarily conduct a *Batson* inquiry at the time the *Batson* challenge is made.[319] However, the Court of Special Appeals of Maryland has held that a *Batson* inquiry is not per se unreliable merely because it is conducted after the trial is over.[320] As long as parties have the ability to reconstruct the circumstances of jury selection to the satisfaction of the trial court, a post-trial *Batson* inquiry will not be automatic grounds for reversal.[321]

There are a number of steps that an attorney can take to successfully reconstruct the basis for a peremptory challenge. For example, attorneys should take notes on the lists of potential jurors provided by the court during voir dire.[322] Attorneys should also create their own lists and make additional notes regarding the jurors they intend to strike.[323] These lists and notations will enable attorneys to prove that their peremptory challenges were based on neutral reasons.[324]

D. Remedy after Showing a Batson *Violation*

Maryland examined the appropriate remedies for *Batson* viola-

315. *See id.* at 101-06, 582 A.2d at 536-38.
316. *See id.* at 100, 582 A.2d at 535.
317. *See id.* at 97-100, 582 A.2d at 534-35.
318. *See* Batson v. Kentucky, 476 U.S. 79, 133 n.12 (1986) (Burger, J., dissenting) ("[I]t would be virtually impossible for the prosecutor in this case to recall why he used his peremptory challenges in the fashion he did."); *see also* Ford Motor Co. v. Wood, 119 Md. App. 1, 28, 703 A.2d 1315, 1328 (1998) (involving a defendant who argued that after a four-week trial, "memories were not as fresh").
319. *See Ford Motor Co.*, 119 Md. App. at 28, 703 A.2d at 1328.
320. *See id.* at 29, 703 A.2d at 1328. This holding is grounded in the fact that Maryland courts have "remanded cases to trial courts for *Batson* hearings long after the jury selections and trials in such cases." *Id.*
321. *See id.*
322. *See Stanley*, 85 Md. App. at 99-100, 582 A.2d at 535.
323. *See id.*
324. *See id.*

tions in *Jones v. State*.[325] Here, the court of appeals expressly recognized that the remedy for *Batson* violations was an issue that the *Batson* Court had left unresolved.[326] Agreeing with the court of special appeals, the *Jones* court held that the determination of the appropriate remedy for a *Batson* violation lies with the trial court.[327] According to *Jones*, the trial court has discretion to fashion a remedy that addresses and resolves the specific harm.[328]

In *Jones*, the trial court found that the defense attorney's peremptory challenges of five white venirepersons were discriminatory.[329] Upon inquiry, the court concluded that the defense counsel's explanations were "pure, simple subterfuge."[330] To remedy the violation, the trial court reseated the seven stricken jurors.[331] On appeal, the defendant argued that instead of reseating the stricken jurors, the trial court should have dismissed the entire panel and started the selection process over again with a new venire.[332] In response, the State argued that reseating improperly stricken jurors should be the sole remedy for *Batson* violations.[333] Adopting the method used by the majority of state courts, the Court of Appeals of Maryland delegated the determination of the appropriate remedy to the trial court.[334]

In its analysis, the court indicated that after a *Batson* violation is established, the goal of the trial court should be to effectuate a remedy that will balance the equal protection rights of the litigants and the challenged juror.[335] The court stated that although there is no specific remedy, the facts and circumstances of each particular

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325. 343 Md. 584, 683 A.2d 520 (1996).

326. *See id.* at 586, 683 A.2d at 521.

327. *See id.* at 602-03, 683 A.2d at 529. The court of appeals observed that a *Batson* violation may be "remedied by the discharge of the entire *venire* and beginning jury selection anew with a new *venire* or by the reseating of the improperly stricken juror." *Id.* at 594, 683 A.2d at 525.

328. *See id.* at 602-03, 683 A.2d at 529.

329. *See id.* at 588-89, 683 A.2d at 522.

330. *Id.* at 588, 683 A.2d at 522.

331. *See id.* at 589, 683 A.2d at 522. The trial court recalled not only the five white jurors who had been improperly stricken, but two jurors who had been properly stricken by the prosecution. *See id.*

332. *See id.* at 591, 683 A.2d at 523 (noting that the petitioner argued that reseated jurors were "biased against him for having attempted to remove them from the venire, [and that] reseating the jurors significantly prejudiced him, in violation of his [Fifth] Amendment right to a trial by a fair and impartial jury").

333. *See id.* at 591-92, 683 A.2d at 524.

334. *See id.* at 602-03, 683 A.2d at 529.

335. *See id.* at 599, 683 A.2d at 527.

case are important considerations in fashioning a remedy.[336] Therefore, the trial court is in the best position to evaluate these considerations and choose a remedy that balances the rights of all parties concerned.[337] Although the court of appeals limited its discussion to the remedies of reseating the excluded juror or impaneling a new venire,[338] *Jones* does not appear to limit a trial court's ability to formulate a creative remedy.[339]

The court of appeals concluded that the trial court in *Jones* made the appropriate decision because the *Batson* inquiry was not conducted in the presence of the jury.[340] However, where the circumstances show that the reseated juror will harbor prejudice against the side that impermissibly exercised the peremptory strike, the court held that the only "viable effective remedy" is the dismissal of the entire venire.[341] To do otherwise would be an abuse of the trial court's discretion.[342]

VI. ANALYSIS

Practically speaking, an attorney must always be prepared to challenge the discriminatory use of peremptory challenges by opposing counsel. In addition, attorneys must also be prepared to defend their peremptory challenges in the face of charges that they were exercised in a discriminatory manner. To be effective, an attorney should be prepared to present the court with all of the circumstances surrounding the acceptance or rejection of each individual juror.

Consequently, the attorney should take meticulous notes during the jury selection process. These notes should include information regarding the characteristics of the jury pool by identifying males, females, and minorities. The attorney's notes should also re-

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336. *See id.* at 602, 683 A.2d at 529. Factors to be considered include a defendant's constitutional right to a non-discriminatory jury and a juror's right not to be excluded because of race. *See id.*

337. *See id.*

338. *See id.* at 601, 683 A.2d at 528.

339. *See id.* at 602, 683 A.2d at 529 (finding that conflicting constitutional rights between the defendant and the excluded juror "militates in favor of permitting the trial court to tailor the remedy so as to protect the rights of all parties concerned").

340. *See id.* at 603, 683 A.2d at 529 (noting that there was nothing in the record to suggest that the jurors were aware of the basis of their exclusion, or that it was unconstitutional).

341. *Id.* at 604-05, 683 A.2d at 530.

342. *See id.*

flect each juror's response to the voir dire questions. The attorney should also maintain a record of each juror stricken, the factors relating to the strike, and a record for each juror remaining in the pool.

Theoretically, an attorney familiar with the various cases interpreting *Batson* will be prepared to take the appropriate action when challenging or defending a peremptory strike. However, twelve years after the *Batson* decision, attorneys and courts are still struggling to understand when and how a *Batson* challenge should be made. No clear-cut or bright-line rules have evolved from *Batson* or its progeny. To determine whether a prima facie case of discrimination has been established and whether a facially neutral reason for the challenge has been provided, courts must weigh the particular circumstances of each case.[343] However, circumstances and individual judges can vary widely from one case to another. Thus, it is virtually impossible to determine the outcome of any given *Batson* challenge.

Despite the confusion, many commentators recognize the need to prohibit the discriminatory use of peremptory challenges.[344] However, views as to how to resolve the confusion vary. One proposal involves the use of affirmative peremptory choices as opposed to peremptory strikes.[345] Rather than excluding jurors, affirmative peremptory choices would be used to include particular jurors.[346] Such choices could be race-based.[347] However, this proposal seems counterproductive if the goal is to eliminate race and gender criteria from the jury selection process. Others advocate the total elimination of peremptory challenges.[348] In the absence of peremptory

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343. *See supra* notes 181-97 and accompanying text.

344. *See supra* notes 260-64 and accompanying text.

345. *See* Ogletree, *supra* note 99, at 1114 (describing a proposal by Professor Deborah Ramirez to use affirmative peremptory choices to increase the odds of securing minority representation on a jury); *see also* Anderson, *supra* note 209, at 392 (proposing an "affirmative selection" procedure in which defendants trade some of their peremptory challenges for jurors that they believe will be favorable).

346. *See* Ogletree, *supra* note 99, at 1114. The affirmative choices would be made after all challenges for cause had been exercised. *See id.*

347. *See id.*

348. *See* Batson v. Kentucky, 476 U.S. 79, 102-08 (1986) (Marshall, J., concurring). As noted by Justice Marshall: "The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely." *Id.* at 102-03 (Marshall, J., concurring).

challenges, the trial court would have to validate every challenge.[349] Arguably, this would allow a judge to seat a juror that is objectionable to both parties.[350] However, if an expanded challenge for cause system is adopted[351] and properly administered, the parties could exclude any juror where there is good reason for the exclusion.[352]

Other proposals offered by legal scholars address the need for deterrents against discriminatory peremptory challenges.[353] These proposals include application of an exclusionary rule when the prosecutor uses a peremptory challenge in a discriminatory manner[354] and implementation of ethical rules to sanction practitioners using peremptories discriminatorily.[355] While the need to deter discrimination is valid, sanctions are worthless if discrimination cannot be proven to the satisfaction of the judge. In *Batson*, Justice Marshall expressed his concern regarding the difficulties associated with establishing a prima facie case and determining prosecutorial motives.[356] These difficulties remain despite the countless attempts by state and federal courts to interpret and apply *Batson* standards.

However, courts could adopt rules that describe the specific types of nondiscriminatory reasons that will survive a *Batson* challenge.[357] Statutory limitations on acceptable explanations could also

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349. *See* Ogletree, *supra* note 99, at 1134 (indicating that a judge's "willingness to give defense lawyers greater latitude in using for-cause strikes" would be crucial to protecting a defendant's right to a fair trial). If there were no peremptory challenges, the means to eliminate undesirable jurors would be primarily limited to challenges for cause. *See supra* note 39 and accompanying text.

350. *See* Ogletree, *supra* note 99, at 1140.

351. *See id.* at 1134 (suggesting the adoption of an "expanded for cause" system in which the trial judge could accept challenges on any basis that would lead a reasonable attorney to believe that the potential juror could not be impartial).

352. *See id.* at 1140.

353. *See id.* at 1116-23 (discussing proposed disincentives and penalties for discrimination in the jury selection process).

354. *See id.* at 1117 (proposing that criminal proceedings be dismissed with prejudice if a prosecutor uses peremptory challenges in a discriminatory fashion).

355. *See id.* at 1116-17.

356. *See* Batson v. Kentucky, 476 U.S. 79, 105-06 (1986) (acknowledging that the use of discriminatory challenges must be "flagrant" to establish a prima facie case, and explaining that a prosecutor's motives may be hidden behind facially neutral reasons and unconscious racism).

357. *See* Ogletree, *supra* note 99, at 1124. Several court-imposed rules have been proposed. According to one commentator, courts should reject reasons like demeanor and intuitive impressions, require that all explanations be based on

be adopted.[358] Arguably, the wide variety of potential circumstances suggests an almost infinite set of rules or limitations. Unless the rules or limitations address every conceivable explanation, some valid explanations could be rejected. Yet, it is possible to develop standards that would balance the types of acceptable reasons with guidelines for determining purely pretextual rationalizations. Thus, the appropriate standards must provide the trial judge with the necessary tools for evaluating *Batson* challenges without totally eliminating the trial judge's discretion.

VII. CONCLUSION

Many would hail *Batson* as a pivotal decision that helped to eradicate discrimination from the jury selection process.[359] After *Batson*, an attorney could no longer exclude jurors of identifiable classes or groups without challenge.[360] However, with the evolution of *Batson*, the peremptory challenge has become less discretionary. Some bemoan this weakening of the peremptory challenge, arguing that there is insufficient time and freedom for attorneys to question potential jurors or transcend superficial groupings and classifications.[361] Even when an attorney is allowed to conduct extensive voir dire, the resulting information is often insufficient for the attorney to make more than an intuitive decision.[362]

Unfortunately, these intuitive decisions have often resulted in discriminatory practices.[363] There is a tendency to rely on negative stereotypes unless they are dispelled by body language or a verbal exchange.[364] The cost of relying on negative stereotypes is discrimi-

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the juror's voir dire statements or responses to a questionnaire, and require attorneys to strike all jurors that share some undesirable characteristic. *See id.*

358. *See id.*

359. *See* Ogletree, *supra* note 99, at 1101 (maintaining that *Batson* reduced the burden of proof that a defendant needed to establish a discriminatory use of a peremptory challenge); Richers-Rowland, *supra* note 8, at 1195 (noting that prior to *Batson*, a defendant had to demonstrate a systematic pattern of excluding jurors because of race).

360. *See* HAYDOCK & SONSTENG, *supra* note 4, § 1.35, at 24-25.

361. *See* Bill K. Felty, *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 Co., 27 TULSA L.J. 203, 221 (1991) (concluding that if more time were allowed for attorneys to question potential jurors up front, the likelihood of error and appeal would ultimately be reduced).

362. *See id.* at 222-23 (noting that even with intensive questioning, a negative stereotype may nonetheless be the basis for a peremptory challenge).

363. *See id.*; *see also supra* notes 249-50 and accompanying text.

364. *See* Felty, *supra* note 361, at 223; *see also supra* notes 54-55 and accompanying

nation in the use of peremptory challenges.[365]

The Supreme Court has determined that this cost is too high.[366] The courtroom is not the appropriate place for stereotypes and discrimination. When a jury is chosen by discriminatory means, criminal defendants and civil litigants will find it difficult to accept its verdict because they lose confidence in the system's ability to render "color-blind" justice.[367]

Batson may also be viewed as a single step toward the total elimination of peremptory challenges.[368] In *Batson*, the Supreme Court gave us the goal of eliminating peremptory challenges based on stereotypes associated with cognizable groups.[369] However, the Supreme Court did not tell us how to achieve that goal.[370] Subsequent decisions rendered by state and federal courts[371] have added structure to the foundation laid by *Strauder*[372] and *Batson*.[373] Unfortunately, these decisions have yet to create a stable structure upon which an attorney can formulate or defend against a *Batson* challenge.[374]

The ultimate goal is to establish a fair and impartial judicial system. A clear mandate against discrimination in the courtroom must be a fundamental part of that system. Skin color and gender cannot be determinants in the jury selection process. Attorneys must find other means to ensure jury impartiality.[375] Therefore, we will continue to struggle with *Batson* until our goal is reached.

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text.

365. *See* Felty, *supra* note 361, at 223 (explaining that if voir dire works as it should, venirepersons' answers to questioning should uncover potential bias).

366. *See* Powers v. Ohio, 499 U.S. 400, 411 (1991) (finding that racial discrimination casts a shadow on the entire judicial process).

367. *See id.* at 412.

368. *See supra* notes 119-23 and accompanying text.

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

370. *See supra* notes 183-84 and accompanying text.

371. *See supra* notes 202-16, 222-42 and accompanying text.

372. *See supra* notes 77-87 and accompanying text.

373. *See supra* notes 101-17 and accompanying text.

374. *See supra* notes 183-84 and accompanying text.

375. *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 630 (1991) (maintaining that a prospective juror's bias should be explored not on the basis of ancestry or skin color, but rather through questions that attempt to uncover the bias at issue).