Note

Challenging Peremptories: Suggested Reforms to the Jury Selection Process Using Minnesota as a Case Study

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The right to have a case decided by a fair and impartial group of one's peers receives great reverence in the American judicial system.[1] When a criminal case goes to trial, one of the first steps of the judicial process is selection of the jury.[2] The makeup of the jury can have a large effect (or at least a large perceived effect) on the verdict because of the decisional power juries enjoy.[3] Thus, attorneys have an incentive to manipulate the jury to include members who will likely return a favorable verdict for their client.[4] In an adversarial system, when both sides engage in this process, they theoretically produce a balanced jury.[5]

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1. *See, e.g.*, Eva Kerr, *Prejudice, Procedure, and a Proper Presumption: Restoring the* Remmer *Presumption of Prejudice in Order to Protect Criminal Defendants' Sixth Amendment Rights*, 93 IOWA L. REV. 1451, 1453 (2008) (discussing the status of the jury as a "fundamental component of American jurisprudence").

2. *See* FED. R. CRIM. P. 23.

3. *Cf.* Smith v. Texas, 311 U.S. 128, 130 (1940) (rationalizing that juries serve as "instruments of public justice" when they are "truly representative of the community").

4. *See* Robert L. Jones, *Finishing a Friendly Argument: The Jury and the Historical Origins of Diversity Jurisdiction*, 82 N.Y.U. L. REV. 997, 1029–30 (2007) (discussing the historical practice of jury manipulation to control the outcomes of jury trials).

5. *See* 9B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2483, at 54 (3d ed. 2008) ("The use of peremptory challenges is of ancient origin and is given to aid each party's interest in a fair and impartial jury."); Christopher E. Smith, *Imagery, Politics, and Jury Reform*, 28 AKRON L. REV. 77, 92–93 (1994) (noting that supporters usually justify the per-

During jury selection, the judge and attorneys representing both sides question potential jurors to determine whether a juror has any particular characteristics or experiences that might prevent him or her from rendering a verdict in a fair manner.[6] To remove potentially biased jurors from the juror pool, attorneys may use either a challenge for cause or a peremptory challenge.[7] Challenges for cause involve elimination of jurors who possess one or more characteristics that courts have predetermined may make them unable to render unbiased decisions.[8] Examples of such characteristics include a relationship with one of the parties or another jury experience involving the same type of crime.[9] A peremptory challenge, in contrast, allows an attorney to remove a potential juror for no particular reason at all.[10]

Since the peremptory challenge requires no justification for its use, many critics fear attorneys use it for discriminatory purposes.[11] The Supreme Court first addressed the discriminatory use of the peremptory challenge in *Batson v. Kentucky*, where it held potential jurors could not be removed simply because of their race.[12] Recently, many state courts have considered expanding *Batson*'s protection to the removal of jurors based on other characteristics such as gender,[13] religious affili-

emptory challenge by claiming its use leads to "selection of a more impartial jury").

6. *See* FED. R. CRIM. P. 24(a); Christian Breheney et al., *Gender Matters in the Insanity Defense*, 31 LAW & PSYCHOL. REV. 93, 99 (2007) ("Jury selection is premised on fairness, with the goal of identifying jurors who can apply the law without undue bias.").

7. *See* FED. R. CRIM. P. 24(b); Carol A. Chase & Colleen P. Graffy, *A Challenge for Cause Against Peremptory Challenges in Criminal Proceedings*, 19 LOY. L.A. INT'L & COMP. L. REV. 507, 507–08 (1997) (discussing the different purposes of each challenge).

8. *See* THOMAS A. MAUET, TRIAL TECHNIQUES 38 (7th ed. 2007).

9. *See, e.g.*, MINN. R. CRIM. P. 26.02 subdiv. 5.

10. *See* BLACK'S LAW DICTIONARY 189 (8th ed. 2004); *see also* Swain v. Alabama, 380 U.S. 202, 220 (1965) ("The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control.").

11. *See, e.g.*, Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369, 420 (1992) ("[T]he peremptory challenge ha[s] been, and will continue to be, used to discriminate in our citadels of justice—our court rooms.").

12. Batson v. Kentucky, 476 U.S. 79, 89 (1986).

13. *See, e.g.*, J.E.B. v. Alabama *ex rel.* T.B., 606 So. 2d 156, 157 (Ala. Civ. App. 1992) (declining to extend *Batson* to gender-based strikes), *rev'd sub nom.* J.E.B. v. Alabama, 511 U.S. 127, 146 (1994) ("[T]he Equal Protection Clause prohibits discrimination in jury selection on the basis of gender . . . .").

ation,[14] or sexual orientation.[15] States have also reconsidered other elements surrounding the use of peremptory challenges, such as how many each side may use and the propriety of using the challenge at all.[16] Minnesota recently considered both the expansion of *Batson* to other suspect categories and a reformulation of the method of using peremptory challenges.[17] As such, it provides a timely example of reform to the jury selection process nationwide.

This Note discusses the future of peremptory challenges in this country, using Minnesota, which recently considered reforms to its jury selection system, as a case study. Part I details the underlying jurisprudence, statutes, and rules that govern the use of peremptory challenges and describes the current procedure for impaneling a jury in Minnesota. It also discusses proposed reforms to the system, such as a prohibition on using peremptory challenges to discriminate against jurors with an expanded set of characteristics, and a change in the number of peremptories given to each party. Part II analyzes the efficacy of the reform proposals. Lastly, Part III suggests a preferred reform of the jury selection process. This Note demonstrates that reform should include the elimination of the peremptory challenge in most cases, since the for-cause challenge provides an adequate avenue for party participation in jury selection. Such reform is necessary to fulfill the Court's mandate in *Batson* that the justice system proceed free from discrimination.

I. USE OF THE PEREMPTORY CHALLENGE IN JURY SELECTION AND PROPOSED REFORMS TO THE SYSTEM

Many attorneys believe they have an advantage when arguing a case before a jury that can empathize with their

14. *See, e.g.*, State v. Purcell, 18 P.3d 113, 120 (Ariz. Ct. App. 2001) (extending *Batson* to encompass peremptory strikes based on religion); State v. Davis, 504 N.W.2d 767, 771 (Minn. 1993) (declining to extend *Batson* to religious affiliation).

15. *See, e.g.*, Commonwealth v. Smith, 879 N.E.2d 87, 96 (Mass. 2008) (commenting on, though not ruling on, whether a peremptory challenge based on sexual orientation is unconstitutional).

16. *See, e.g.*, PAULA L. HANNAFORD-AGOR & NICOLE L. WATERS, NAT'L CTR. FOR STATE COURTS, EXAMINING VOIR DIRE IN CALIFORNIA 2–3 (2004) (discussing the efficacy of peremptory challenges and considering a reduction in the number of peremptory strikes).

17. *See* Michelle Lore, *Proposal Would Expand Restrictions On Use of Peremptories*, MINN. LAW., Mar. 2, 2009, at 1.

client.[18] Lawyers often favor jurors who share characteristics such as race or gender with their client because this may increase empathy, making jurors more likely to return a favorable verdict.[19] Since peremptory challenges allow attorneys to eliminate potential jurors for no reason at all, they provide a tool for attorneys to create a jury of a particular racial and gender makeup.[20]

Over the past half-century, with the spread of the civil rights movement, courts came to view discriminatory use of such challenges critically.[21] Jurisprudence surrounding the Equal Protection Clause of the Fourteenth Amendment expanded into many areas of the law including the use of peremptory challenges in jury selection.[22] The landmark decision *Batson v. Kentucky* held that the use of a peremptory challenge to remove a potential juror due to his race violated the Equal Protection Clause of the U.S. Constitution.[23] *Batson* signaled the Supreme Court's desire to prevent discriminatory use of the peremptory challenge.[24]

Since *Batson*, reform of the jury selection process continues to be a preeminent issue nationwide, with many states enter-

18. *See* Brandon Righi, *A Covert Expression?: Voir Dire and the Impartial American Jury*, 3 NEOAMERICANIST 1, 3 (2008), http://neoamericanist.org/sites/default/files/pdfs/righi.pdf ("While it is debatable whether or not voir dire is used to facilitate racial discrimination, its use to eliminate jurors who hold certain ideological principles is undeniable.").

19. *See* Douglas O. Linder, *Juror Empathy and Race*, 63 TENN. L. REV. 887, 897 (1996) ("Similarities between jurors and other trial participants increase the likelihood of empathetic reactions that could determine trial outcomes.").

20. But peremptory challenges are not without limitation. *See, e.g.*, Illinois v. Rivera, 852 N.E.2d 771, 791 (Ill. 1996) (holding that a trial court may refuse a transparently discriminatory peremptory challenge).

21. *See* John J. Francis, *Peremptory Challenges,* Grutter*, and Critical Mass: A Means of Reclaiming the Promise of* Batson, 29 VT. L. REV. 297, 312–20 (2005) (discussing at length the expansion of *Batson* in response to increasing protections under the Equal Protection Clause).

22. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 89 (1986).

23. *See id.* at 89 ("[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race . . . .").

24. *See* Russell D. Covey, *The Unbearable Lightness of* Batson*: Mixed Motives and Discrimination in Jury Selection*, 66 MD. L. REV. 279, 317 (2007) ("*Batson* signaled that the traditionally unfettered common law/statutory right to peremptory challenges is subordinate to equal protection's constitutional command." (citation omitted)); John P. Marks, Note, Bader v. State*: The Arkansas Supreme Court Restricts the Role Religion May Play in Jury Selection*, 55 ARK. L. REV. 613, 625–32 (2002) (recounting the subsequent expansion of *Batson* protection to non-race-based discriminatory use).

taining improvements to the process.[25] Each state's courts promulgate rules governing the specific jury selection process in that state.[26] Thus, examining the process in one state proves helpful. Since Minnesota's bar association recently proposed reforms to the state's jury selection process,[27] it provides a nice case study through which to analyze the merit of such reforms. Jury selection in Minnesota is governed by United States and Minnesota Supreme Court precedent, statutes, and rules of procedure. This Part discusses each of these, offers a description of the jury impaneling process in Minnesota as an example of state procedure, and then summarizes proposed reforms of the system.

A. UNITED STATES SUPREME COURT PRECEDENT

Throughout the twentieth century, civil rights activists worked to curb discriminatory thinking and enlarge equal protection jurisprudence.[28] Since discriminatory use of the peremptory challenge often involved prejudice based on race or gender, Supreme Court limitations on its use naturally followed limitations on other types of discriminatory behavior.[29] However, the Supreme Court has also expanded the discretion given to trial judges once they use the proper method for identifying discrimination in jury selection. This section details the case law giving rise to those principles.

1. Early Cases

As early as 1879, the U.S. Supreme Court prohibited racially motivated jury selection.[30] In striking down a statute that excluded black males from jury service in *Strauder v. West Virginia*, the Court found that excluding black males from the de-

25. *See, e.g.*, HANNAFORD-AGOR & WATERS, *supra* note 16, at 6–7 (discussing the reforms of the voir dire system in California).

26. *See id.* at 4.

27. *See* Lore, *supra* note 17, at 1.

28. *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, 167 (1989).

29. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 93 (1986) (analogizing discrimination of a venireperson to the "invidious quality" of racial discrimination in other contexts).

30. *See* Strauder v. West Virginia, 100 U.S. 303, 310 (1879) ("[T]he statute of West Virginia, discriminating in the selection of jurors, as it does, against negroes because of their color, amounts to a denial of the equal protection of the laws . . . .").

fendant's jury deprived him of equal protection of the law in violation of the Fourteenth Amendment.[31] Congress reaffirmed this principle when it outlawed disqualification for service on a jury "on account of race, color, or previous condition of servitude."[32] Additionally, the Court stated in *Smith v. Texas* that states should design the jury selection process to create a jury that represented the community.[33] Although these cases eliminated the use of explicitly discriminatory statutes and practices in jury selection processes, discriminatory use of the peremptory challenge continued unopposed until the Court decided *Swain v. Alabama* in 1965.[34]

In *Swain*, the Court recognized that counsel for both sides often exercised peremptory challenges "upon the 'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another,'" and considered factors "normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty."[35] The Court suggested that such a pattern of discrimination on the basis of race might violate the Equal Protection Clause.[36] It placed the burden on the defendant, however, to show that the prosecutor systematically excluded otherwise qualified jurors of a particular race over a period of time.[37] Since the defendant could not show intent by the prosecutor, but could only offer evidence that no black person had sat on a jury in that particular county in roughly fifteen years, the Court found no constitutional violation.[38] *Swain* remained the governing precedent for nearly twenty years.

31. *Id.*

32. 18 U.S.C. § 243 (2006).

33. *See* Smith v. Texas, 311 U.S. 128, 130 (1940) ("It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.").

34. Swain v. Alabama, 380 U.S. 202 (1965).

35. *Id.* at 220.

36. *See id.* at 223 (stating that an equal protection claim has particular significance when a prosecutor in a certain county, "whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries").

37. *See id.* at 227.

38. *See id.* at 224 ("The difficulty with the record before us . . . is that it does not with any acceptable degree of clarity, show when, how often, and under what circumstances the prosecutor alone has been responsible for striking

2. The Landmark *Batson v. Kentucky*

The Court reformulated *Swain*'s holding that the burden of proof lay entirely with the defendant in *Batson v. Kentucky*.[39] In *Batson*, the prosecutor used his peremptory challenges to remove all four of the black men on the jury panel, which later convicted Batson, a black man.[40] The Court began by acknowledging that *Swain* placed a "crippling burden" on the defendant by requiring him to show a pattern of discriminatory use of peremptory challenges over a number of cases.[41] Next, the Court detailed its jurisprudence regarding Title VII of the Civil Rights Act since *Swain*.[42] These cases required the party alleging discrimination to bear the ultimate burden of showing the other party's discriminatory purpose, but allowed the alleging party to do so using the "totality of the relevant facts . . . *in his case*," rather than requiring a showing that the offending party had a pattern of discriminatory behavior.[43]

By analogy to its Title VII cases, the Court adopted a three-part burden-shifting test to determine whether the State exercised a peremptory challenge in a discriminatory manner.[44] The first step requires the defendant to produce evidence sufficient to make a prima facie showing of purposeful exclusion of jurors of a particular race.[45] Next, the State can rebut this showing by articulating a race-neutral explanation for the exclusion.[46] Lastly, the trial court determines whether the defendant established purposeful discrimination.[47] This case ulti-

[black jury members for reasons wholly unrelated to the outcome of the particular cases he was trying].").

39. 476 U.S. 79, 97–98 (1986) (shifting the burden of proof to the state after the defendant made a prima facie showing of discrimination against black jurors); *see also* Mary A. Lynch, *The Application of Equal Protection to Prospective Jurors with Disabilities: Will* Batson *Cover Disability-Based Strikes?*, 57 ALB. L. REV. 289, 310 (1993).

40. *See Batson*, 476 U.S. at 82–83.

41. *Id.* at 92–93.

42. *See id.* at 93–94.

43. *Id.* at 94–95.

44. *See id.* at 93–94; Oluseyi Olubadewo, Casebrief, *Racial Profiling in Jury Selection: The Third Circuit Revisits the* Batson *Inquiry in* Riley v. Taylor, 47 VILL. L. REV. 1195, 1196–97 (2002) (delineating the three-part *Batson* test).

45. *See Batson*, 476 U.S. at 93.

46. *See id.* at 94 (requiring the state to show that "permissible racially neutral selection criteria and procedures have produced the monochromatic result" (quoting Alexander v. Louisiana, 405 U.S. 625, 632 (1972))).

47. *See id.*

mately changed the nature of peremptory strikes, since requiring the prosecutor to give a race-neutral explanation suggests that strikes may no longer be used to eliminate jurors based on "unaccountable prejudices."[48]

The Court also enunciated three purposes served by the *Batson* test[49]: first, vindication of the defendant's right to be tried in a system free from racial discrimination;[50] second, protection of the juror's right to participate in a system free from racial discrimination;[51] and lastly, cultivation of public confidence in the fairness of the justice system.[52] As discussed next, these three principles continue to justify the expansions of the *Batson* holding in the cases that followed.

3. *Batson*'s Progeny Expanded its Protection

A number of post-*Batson* cases extended its holding to other situations.[53] In *Edmonson v. Leesville Concrete Co.*, the Court held that *Batson*'s prohibition of the discriminatory use of peremptory challenges also applied in civil cases.[54] The Court in *Powers v. Ohio* ruled that a white defendant could bring a *Batson* challenge when the State excluded black venirepersons.[55] Furthermore, *Georgia v. McCollum* held that the State

48. *Id.* at 123 (Burger, C.J., dissenting) (quoting Lewis v. United States, 146 U.S. 370, 376 (1892)); *see also id.* at 89 (majority opinion) (requiring that prosecutors' strikes both relate to the outcome of the case and refrain from "challeng[ing] potential jurors solely on account of their race"); Michelle Mahony, *The Future Viability of* Batson v. Kentucky *and the Practical Implications of* Purkett v. Elem, 16 REV. LITIG. 137, 147 (1997) (stating that *Batson* reduced the opportunity for prosecutors to eliminate jurors on the basis of perceived group bias).

49. *See Batson*, 476 U.S. at 87.

50. *Id.* at 86.

51. *Id.* at 87.

52. *See id.* (opining that discriminatory practices undermine the public's confidence in the fairness of the judicial system, stimulate racial prejudice, and impede equal justice for people of color).

53. *See* Steven C. Serio, *A Process Right Due? Examining Whether a Capital Defendant Has a Due Process Right to a Jury Selection Expert*, 53 AM. U. L. REV. 1143, 1163–64 (2004) (describing the extension of the Court's holding in *Batson*).

54. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 616 (1991).

55. Powers v. Ohio, 499 U.S. 400, 406 (1991). Even though the Court found no violation of the defendant's equal protection rights, it ruled the defendant had third-party standing to bring a claim on behalf of the excluded jury person. *See id.* at 411. The Court found the exclusion of a juror because of race "places the fairness of a criminal proceeding in doubt." *Id.* The Court also held that while a venireperson does not have a right to sit on a jury, he or she

could also bring a *Batson* challenge against defendants who used peremptory challenges to exclude jurors on the basis of race.[56]

In *J.E.B. v. Alabama*, the Court extended *Batson* protection to jurors excluded through peremptory challenges on the basis of sex.[57] After noting that sex-based classifications generally receive heightened scrutiny in equal protection claims,[58] the Court acknowledged the comparable history of total exclusion from jury service shared by women and racial minorities, and held that the use of peremptory strikes to exclude women from juries should be subject to the same *Batson* test as exclusions on the basis of race.[59] The Court went on to state, "[p]arties may also exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to 'rational basis' review," firmly anchoring the peremptory challenge inquiry in equal protection jurisprudence.[60] The Court relied on the suspect class methodology even in the absence of a fundamental right to exercise a peremptory challenge.[61] It weighed the harm of using a sex-based peremptory challenge against the legitimate state interest in securing a fair and impartial jury.[62] The Court's finding that the harm outweighed the State's interest continued to expand the protection afforded potential jurors who were struck on discriminatory grounds.

The Court addressed the second prong of the *Batson* test in *Purkett v. Elem*, in which the Court restricted the availability of the *Batson* challenge.[63] The Court held that the prosecutor successfully rebutted a prima facie showing of discrimination by explaining that he struck two black men from the jury because "[t]hose are the only two people on the jury . . . with the

does have a right not to be excluded from one on the basis of race. *See id.* at 409.

56. Georgia v. McCollum, 505 U.S. 42, 56 (1992) (finding the state had standing because the defendant's use of the peremptory challenge constituted state action).

57. J.E.B. v. Alabama, 511 U.S. 127, 129 (1994).

58. *Id.* at 135; *see also, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976) ("To withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

59. *See J.E.B.*, 511 U.S. at 136, 146.

60. *Id.* at 143.

61. *Id.* at 136–37.

62. *Id.*

63. Purkett v. Elem, 514 U.S. 765, 769 (1995).

facial hair . . . . And I don't like the way they looked, with the way the hair is cut."[64] The Court held that at the second step of the *Batson* inquiry, the trial court should only require the prosecutor to give a facially valid explanation, which need not be persuasive, or even plausible.[65] Thus, after *Purkett* the Court appeared to move in the direction of pre-*Batson* jurisprudence by placing no appreciable burden of proof on the state.

Recently, however, the Court seemed to shift back towards its previous precedent in *Snyder v. Louisiana*, in which it examined the third prong of the *Batson* test.[66] In *Snyder*, the Court enunciated a very deferential standard of review for the trial court's findings regarding the credibility of the potential juror.[67] Yet the Court went on to require a specific finding on the record as to whether the defendant had shown purposeful discrimination.[68] In the absence of a specific finding, the reviewing court had no way to determine whether the trial court actually followed the third step of the *Batson* test.[69] Consequently, the Supreme Court would not uphold a peremptory strike without specific evidence that the trial court found the potential juror not credible.[70]

However, in its newest peremptory challenge case, *Rivera v. Illinois*, the Court held that a trial court's erroneous denial of a peremptory challenge need only receive harmless error review instead of an automatic reversal.[71] The Court held that peremptory challenges are creatures of state law rather than federal rights; hence, their denial does not violate due process.[72] As a result of this ruling, all such denials of peremptory challenges will likely be affirmed: to reverse, a court would have to find the seated jury's decisionmaking process inconsis-

64. *Id.* at 766.

65. *Id.* at 768.

66. Snyder v. Louisiana, 552 U.S. 472, 476–77 (2008).

67. *See id.* at 477.

68. *Id.* at 477–79 (holding that without a specific finding by the trial judge, the record lacked evidence sufficient to prove the trial judge actually made a determination regarding the excluded juror's behavior).

69. *See id.* at 484–86.

70. *See id.*

71. Rivera v. Illinois, 129 S. Ct. 1446, 1454 (2009) (finding that denial is a structural error requiring reversal only when it necessarily renders unreliable a determination of guilt).

72. *See id.* at 1456.

tent with a hypothetical rational jury.[73] Appellate courts will have difficulty making such speculative determinations.[74]

These cases form the foundation upon which state jury selection procedure rests. United States Supreme Court precedent also provides the basis for any changes to the scope of peremptory challenges. The next two sections detail Minnesota's jury selection procedure as an example of state processes and discuss potential expansions to *Batson* protections in Minnesota and other states.

B. THE PEREMPTORY CHALLENGE AS A CREATURE OF STATE LAW: MINNESOTA PROCEDURE

In Minnesota, parties have a statutory entitlement to peremptory challenges.[75] In criminal cases, the defendant receives five and the State receives three challenges, unless the potential penalty is life imprisonment, in which case the defendant gets fifteen and the State nine.[76] In civil cases, each party receives two such challenges.[77]

The general procedure for selecting a jury begins with the creation of a list of prospective jurors using voter registration and driver's license lists.[78] This list must represent a fair cross-section of the community.[79] Minnesota prohibits excluding citizens from the jury service list on the basis of "race, color, creed, religion, sex, national origin, marital status, status with regard to public assistance, disability, age, occupation, physical or sensory disability, or economic status."[80] Felony criminal trials use twelve-person juries, while misdemeanor criminal and civil trials use six-person juries.[81] The court engages in voir dire ex-

73. *The Supreme Court, 2008 Term—Leading Cases*, 123 HARV. L. REV. 153, 218 (2009).

74. *See id.*

75. *See, e.g.*, MINN. STAT. § 546.10 (2008); MINN. R. CRIM. P. 26.02 subdiv. 6.

76. MINN. R. CRIM. P. 26.02 subdiv. 6.

77. MINN. STAT. § 546.10.

78. MINN. R. CRIM. P. 26.02 subdiv. 2(1); MINN. GEN. R. PRAC. 806.

79. MINN. R. CRIM. P. 26.02 subdiv. 1.

80. MINN. GEN. R. PRAC. 809; *see also* MINN. STAT. § 593.32 subdiv. 1 (2008). Other jurisdictions have similar restrictions. *E.g.*, CAL. CIV. PROC. CODE § 231.5 (West 2006). *See generally* AM. BAR ASS'N, PRINCIPLES FOR JURIES AND JURY TRIALS 67–68, 80–82 (2005) (discussing jurisprudential roots of the prohibition on discrimination against prospective jurors).

81. MINN. CONST. art. 1, §§ 4, 6.

amination to narrow the jury service list to the appropriate size jury.[82]

Voir dire examination proceeds by calling from the list a panel of jurors equal to the number of jurors that will be seated, plus the number of peremptory challenges each side receives.[83] Prospective jurors answer questions first from the judge, then from the defendant, and finally from the State.[84] At any time, the parties can challenge a prospective juror for cause according to a list of specified reasons, including a principle-agent relationship with one of the parties, prior jury service on a similar case, or the "existence of a state of mind on the part of the juror, in reference to the case or to either party, which satisfies the court that the juror cannot try the case impartially and without prejudice to the substantial rights of the party challenging."[85] The judge must rule on challenges for cause,[86] and if she agrees to allow the strike for cause, a new juror from the panel replaces the excluded juror.[87] After each party makes its challenges for cause, parties alternately exercise peremptory challenges, starting with the defendant, until the proper number of jurors remains.[88] Thus, the process requires each party to use all of their peremptory challenges.

Minnesota's procedure provides a nice example of a common state method for selecting juries.[89] While state processes vary widely, all states give attorneys the chance to craft a jury to their liking, and trial judges receive great discretion with re-

82. *See* MINN. R. CRIM. P. 26.02 subdiv. 4.

83. *Id.* In some criminal cases, this step may be preceded by a jury questionnaire. *Id.* subdiv. 2(3).

84. *Id*. subdiv. 4(3)(a).

85. *Id.* subdiv. 5(1); *see also* State v. Roan, 532 N.W.2d 563, 568 (Minn. 1995) (holding that the criteria listed in subdivision 5(1) were the factors for which a juror could be excused for cause).

86. To overturn a judge's ruling on a challenge for cause, an appellant must show not only that the potential juror belonged in one of the above categories, but also that actual prejudice resulted. State v. Stufflebean, 329 N.W.2d 314, 317 (Minn. 1983).

87. MINN. R. CRIM. P. 26.02 subdiv. 4(3)(a).

88. *Id.* In first degree murder cases, jury selection proceeds in a different manner. Jurors are examined one at a time, first by the court and then by the defendant, at which time the defendant may exercise a challenge. *Id.* subdiv. 4(3)(c). If the defendant chooses to keep the prospective juror, the state may question the juror and then exercise a for-cause or peremptory challenge. *Id.* This process continues until the jury is filled. *Id.* The court may also decide to use this process for any other case. *Id.* subdiv. 4(3)(b).

89. This is also the method suggested by the ABA. *See* AM. BAR ASS'N, *supra* note 80, at 78.

spect to their rulings on challenges.[90] Clear rules are needed to ensure uniform and nondiscriminatory jury selection processes.

C. STATE PROPOSALS FOR REFORM OF THE PEREMPTORY CHALLENGE

To address some of the discrimination problems associated with peremptory challenges,[91] various groups in Minnesota have proposed changes to the jury selection system. Several other states are also considering changes to the peremptory system.[92] This section first reviews Minnesota's proposals and case law as examples of current jury selection reform and then details other states' efforts.

1. Expansion of *Batson* Protection to Other Categories

The Minnesota State Bar Association's Diversity Committee, with the support of several other organizations, proposed an amendment to prohibit discrimination on the basis of membership in an expanded list of classes in the jury selection process.[93] The proposed amendment would combine the rule prohibiting the use of peremptory challenges to eliminate jurors on the basis of race or gender with Minnesota Rule of Criminal Procedure 1.02, which dictates proceedings should be conducted "without the purpose or effect of discrimination based upon race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability, handicap in communication, sexual orientation, or age."[94] By preventing the use of a peremptory challenge to remove potential jurors on the basis of membership in any of these categories, the

90. *See* HANNAFORD-AGOR & WATERS, *supra* note 16, at 3.

91. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 93–95 (1986) (discussing race-based discrimination).

92. For example, California set up a task force that has researched various aspects of voir dire for the past fifteen years. ADMIN. OFFICE OF THE COURTS, FACT SHEET: JURY IMPROVEMENT PROGRAM 1–2, 4–5 (Mar. 2009), http://www.courtinfo.ca.gov/reference/documents/factsheets/jurysys.pdf. Massachusetts recently created a task force to examine the history of the use of peremptory challenges. Mass. Bar Ass'n, *MBA Task Force of Prominent Judges and Attorneys to Tackle Jury Selection Issues*, LAWS. E-JOURNAL, Sept. 10, 2009, http://www.massbar.org/for-attorneys/publications/e-journal/2009/september/09-10.

93. Lore, *supra* note 17, at 1, 5. Supporting organizations include the Minnesota State Bar Association's Human Rights, Legal Assistance to the Disadvantaged, and Life and the Law Committees; and the Minnesota Lavender Bar. *Id.* at 5.

94. MINN. R. CRIM. P. 1.02.

amendment would effectively expand the Court's holding in *Batson*.[95]

The Minnesota Supreme Court has heard two cases in which it considered and rejected expansions to the protections afforded by *Batson*. First, *State v. Everett* declined to extend *Batson* protection to prospective jurors eliminated because of their age.[96] Since the U.S. Supreme Court's equal protection jurisprudence does not afford age-based classifications heightened or strict scrutiny,[97] the court found no support for *Batson* protection.[98]

In *State v. Davis*, the defendant challenged the exclusion of a black juror on the basis of religion.[99] As a race-neutral reason for the peremptory strike, the prosecutor explained that the potential juror was a Jehovah's Witness, which the prosecutor believed would make the juror hesitant to exercise authority over others.[100] The court denied protection to jurors excluded on the basis of religion in part because such discrimination did not permeate the system in the same manner as racial discrimination, and in part because religious affiliation is not a self-evident characteristic like race and gender.[101] The defendant appealed this decision to the U.S. Supreme Court, which denied

95. Some also advocate for a quota system that would increase the representativeness of the jury. Hennepin County, Minnesota has a groundbreaking quota system for impaneling grand juries. It requires that the jury contain a number of minorities equivalent to the percentage of minorities in the county—about nine percent in 1992. HENNEPIN COUNTY ATTY'S TASK FORCE ON RACIAL COMPOSITION OF THE GRAND JURY, FINAL REPORT 45 (1992). Hence, if the first twenty-one of twenty-three jurors have been selected and none has self-identified as a minority, the next two jurors selected must be the next two minorities on the list. *Id.* Some scholars have predicted that a similar plan for petit juries would be constitutional. *See, e.g.*, Albert W. Alschuler, *Racial Quotas and the Jury*, 44 DUKE L.J. 704, 710 (1995). Given the most recent U.S. Supreme Court jurisprudence on affirmative action, however, it now appears more likely that the Court would find such a plan unconstitutional. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 729–31 (2007) (holding that racial balancing was not, in itself, a compelling state interest); Grutter v. Bollinger, 539 U.S. 306, 334 (2003) (stating that the Equal Protection Clause would not permit the use of a quota system to give preference to minorities on the basis of race).

96. State v. Everett, 472 N.W.2d 864, 869 (Minn. 1991).

97. Gregory v. Ashcroft, 501 U.S. 452, 470 (1991).

98. *See Everett*, 472 N.W.2d at 869.

99. State v. Davis, 504 N.W.2d 767, 768 (Minn. 1993), *cert. denied*, 511 U.S. 1115 (1994).

100. *Id.*

101. *See id.* at 771.

certiorari.[102] In a dissent from the denial of certiorari, however, Justices Thomas and Scalia concluded that *J.E.B.* suggested that *Batson* could be extended beyond race and that any classification afforded heightened scrutiny under the Equal Protection Clause should receive *Batson* protection.[103]

Other states have also considered, with no consensus, expanding protection to jurors eliminated on the basis of religious affiliation.[104] One federal district court and a few state courts have held that *Batson*'s protections should expand to include peremptory strikes based on religious affiliation.[105] Some state courts have extended *Batson*'s protection to religious affiliation on state constitutional grounds;[106] others have drawn a distinction between religious affiliation and religious beliefs, allowing a peremptory strike on the basis of the latter but not the former.[107] And some states have declined to extend *Batson* to religious affiliation at all.[108]

102. Davis v. Minnesota, 511 U.S. 1115, 1115 (1994).

103. *Id.* at 1117 (Thomas, J., dissenting). Religion is one such classification. Larson v. Valente, 456 U.S. 228, 246 (1982).

104. *See* Robert W. Gurry, *The Jury Is Out: The Urgent Need for a New Approach in Deciding When Religion-Based Peremptory Strikes Violate the First and Fourteenth Amendments*, 18 REGENT U. L. REV. 91, 104–05 (2005).

105. *See* United States v. Somerstein, 959 F. Supp. 592, 594–95 (E.D.N.Y. 1997) (relying in part on Justice Thomas's dissent from the denial of certiorari in *Davis v. Minnesota*); State v. Purcell, 18 P.3d 113, 120 (Ariz. Ct. App. 2001) ("We agree [that *Batson* should be] extended to encompass peremptory strikes based upon religious membership or affiliation."); Bader v. State, 40 S.W.3d 738, 742 (Ark. 2001) (holding that a trial court could prohibit voir dire questions about venirepersons' religious affiliation and practices in part because of the constitutional prohibition on religious discrimination found in the United States Constitution: "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States" (citing U.S. CONST. art. VI, cl. 3)).

106. *See* Thorson v. State, 721 So. 2d 590, 594–95 (Miss. 1998) (holding that state constitutional and statutory provisions prohibit peremptory challenges based solely on a person's religion); State v. Fuller, 812 A.2d 389, 396–97 (N.J. Super. Ct. App. Div. 2002) (noting that exclusion of jurors based on religious affiliation would violate state constitutional and statutory provisions), *rev'd on other grounds*, 862 A.2d 1130 (N.J. 2004).

107. *See* United States v. Stafford, 136 F.3d 1109, 1114 (7th Cir. 1998); State v. Hodge, 726 A.2d 531, 553 (Conn. 1999); State v. Eason, 445 S.E.2d 917, 921 (N.C. 1994).

108. *See, e.g.*, State v. Davis, 504 N.W.2d 767, 771 (Minn. 1993), *cert. denied*, 511 U.S. 1115 (1994); Casarez v. State, 913 S.W.2d 468, 495–96 (Tex. Crim. App. 1995) (en banc) (holding that *Batson* only applied to race-based peremptories).

Similarly, other courts have considered expanding *Batson* to include strikes based on sexual orientation.[109] At least one state legislature has decided that sexual orientation should be a cognizable class eligible for protection,[110] but no court has expanded *Batson*'s protections to include homosexuality.[111] The Eighth Circuit has expressed doubt that *Batson* extends protection to venirepersons on the basis of sexual orientation, but has never directly considered the issue.[112]

The American Bar Association's (ABA) American Jury Project has also set out several proposals relating to juries, including the use of peremptory challenges.[113] It recommends that peremptory challenges not be allowed for "constitutionally impermissible reasons," without elaborating on what such reasons may be.[114] Similar to Rule 1.02 of the Minnesota Rules of Criminal Procedure, the ABA requires that eligibility for jury service not be denied or limited on the basis of "race, national origin, gender, age, religious belief, income, occupation, disability, sexual orientation, or any other factor that discriminates against a cognizable group."[115] Although the ABA believes jury panel construction should not consider these characteristics, it has made no effort to extend this rule to peremptory strikes.[116]

109. *See, e.g.*, United States v. Blaylock, 421 F.3d 758, 769 (8th Cir. 2005) (observing that the Ninth Circuit has assumed, without deciding, that sexual orientation qualifies as a protected characteristic, but "doubt[ing] the validity of this conclusion"); People v. Bell, 151 P.3d 292, 304 (Cal. 2007) ("Like the trial court, we assume lesbians are a cognizable group for *Wheeler-Batson* purposes.").

110. CAL. CIV. PROC. CODE § 231.5 (West 2006) ("A party may not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of his or her race, color, religion, sex, national origin, sexual orientation, or similar grounds.").

111. *See, e.g.*, Johnson v. Campbell, 92 F.3d 951, 953 (9th Cir. 1996) ("Even when we assume, without deciding, that sexual orientation qualifies as a *Batson* classification, [plaintiff]'s appeal fails."); *Bell*, 151 P.3d at 304 (finding no prima facie case of discrimination).

112. *See Blaylock*, 421 F.3d at 769; United States v. Ehrmann, 421 F.3d 774, 782 (8th Cir. 2005).

113. AM. BAR ASS'N, *supra* note 80, at 66–69.

114. *Id.* at 67.

115. *Id.* at 7.

116. *See id.* at 66–68 (discussing guidelines for using peremptory challenges without mentioning unconstitutionally discriminatory classes, and stating "[i]t should be presumed that each party is utilizing peremptory challenges validly").

2. The Number of Challenges

Some Minnesota lawyers have also proposed changing the number of peremptory challenges available for each side or doing away with the challenge altogether.[117] The ABA suggests each side should have a uniform number of challenges.[118] Historically, criminal defendants received a greater number of peremptory challenges than the State because the defendant's interest in a trial free from bias outweighed the State's interest in procuring a conviction.[119] Minnesota still adheres to this principle.[120] Nine other states continue to allow the defendant more challenges than the State.[121] The Federal Rules of Criminal Procedure give each party twenty challenges in capital cases, while in other felony cases the defendant has ten challenges and the government receives six.[122] Minnesota's rules thus give protection for defendants similar to other state and federal rules in most cases.[123]

3. Elimination of the Peremptory Challenge

At the most extreme end, some commentators have called for the elimination of peremptory challenge entirely.[124] Various

117. Lore, *supra* note 17, at 5.

118. AM. BAR ASS'N, *supra* note 80, at 14. California's task force has also recommended equalization of the number of challenges. J. CLARK KELSO ET AL., FINAL REPORT OF THE BLUE RIBBON COMMISSION ON JURY SYSTEM IMPROVEMENT 7 (1996).

119. *See* BUREAU OF INT'L INFO. PROGRAMS, U.S. DEP'T OF STATE, OUTLINE OF THE U.S. LEGAL SYSTEM 105–07, 112 (2004) (discussing a defendant's interest in an impartial jury, the customary additional peremptories afforded to the defense, and the heavy burden the state bears to overcome the presumption of innocence); *cf.* Swain v. Alabama, 380 U.S. 202, 220 (1965) (noting that traditionally, the prosecutor's use of peremptories differed from that of the defense).

120. *See* MINN. R. CRIM. P. 26.02 subdiv. 6.

121. DAVID B. ROTTMAN & SHAUNA M. STRICKLAND, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, STATE COURT ORGANIZATION 2004, at 228–31 tbl.41 (2004), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/sco04.pdf (comparing state allocation of peremptory challenges for trial juries).

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

123. *See generally* MINN. R. CRIM. P. 26 (discussing Minnesota trial procedure rules).

124. *See, e.g.*, State v. Buggs, 581 N.W.2d 329, 347 (Minn. 1998) (Page, J., dissenting) (citing Batson v. Kentucky, 476 U.S. 79, 102–03 (1986) (Marshall, J., concurring)) (favoring elimination of peremptory challenges); John Paul Stevens, *Foreword*, 78 CHI.-KENT L. REV. 907, 907–08 (2003) ("A citizen should not be denied the opportunity to serve as a juror unless an impartial judge can state an acceptable reason for the denial. A challenge for cause provides such a reason; a peremptory challenge does not."); *see also* Nancy S.

Batson challenges in Minnesota have led one Minnesota Supreme Court Justice to question the continuing utility of peremptory challenges in the jury selection process.[125] Minnesota's Supreme Court considered the first prong of the *Batson* test in *State v. Buggs*, where it held that exclusion of a white juror who had an interracial family violated neither the defendant's nor the juror's equal protection rights.[126] In a dissent, Justice Page noted that race remained at issue in *Buggs* and suggested the proper inquiry would ask whether race played an impermissible role in the exclusion decision.[127] Such an inquiry would lead to the conclusion that the State did exclude the potential juror on impermissible grounds since the juror's familial association with minorities could have formed the basis for her exclusion.[128] Further, the holding in *State v. McRae* made clear that the State could not strike a black person who expressed the same type of skepticism about the fairness of the system with respect to minorities.[129] *Buggs* therefore conflicted with this aspect of *McRae*'s holding.

Marder, *Justice Stevens, the Peremptory Challenge, and the Jury*, 74 FORDHAM L. REV. 1683, 1713 (2006) ("The chorus of judges calling for the elimination of the peremptory, while still small, is nonetheless growing.").

125. *See Buggs*, 581 N.W.2d at 347 (Page, J., dissenting) (citing *Batson*, 476 U.S. at 102–03 (Marshall, J., concurring)) ("At a minimum, we should refer the issue of the continued use of the peremptory challenge to the Criminal Rules Committee for review, debate, and recommendation.").

126. *See id.* at 339 (majority opinion) ("The trial court correctly determined that the defendant did not make a prima facie case that the challenge was exercised on the basis of race."). Although no U.S. Supreme Court precedent addresses this issue, some lower courts have extended *Batson* to the exclusion of white jurors. *See, e.g.*, Gov't of the V.I. v. Forte, 865 F.2d 59, 64 (3d Cir. 1989) (noting that, although the usual case of discrimination in peremptory challenges "involves the excusing of black jurors," the court would not distinguish between "white and black"); State v. Knox, 609 So. 2d 803, 806 (La. 1992) (holding that the state may object to a black defendant's racially discriminatory peremptory challenge).

127. *See Buggs*, 581 N.W.2d at 345 (Page, J., dissenting) (noting that the inquiry is "whether race played an impermissible role" in the exclusion of the juror).

128. *See id.* ("Thus, although juror 32 is caucasian, her association with people of color may form the basis for the conclusion that her exclusion was impermissibly race based and is, at a minimum, sufficient to make out a *prima facie* case under *Batson*.").

129. State v. McRae, 494 N.W.2d 252, 257 (Minn. 1992) (explaining that an attorney may not strike any "fair-minded, reasonable black person from the jury panel who expressed any doubt the 'the system' is perfect"); *see also Buggs*, 581 N.W.2d at 346 (Page, J., dissenting) (citing *McRae*, 494 N.W.2d at 257).

Justice Page expressed further concern over the application of the *Batson* process in cases involving white parties in his sharp dissent in *State v. Reiners*.[130] *Reiners* represented the first case in which the court reversed the strike of a juror under the deferential standard given to trial court findings, and was also coincidentally the first case with a white defendant.[131] This result suggested to Justice Page a pattern of discrimination in the court system.[132] Ultimately, he concluded that the Rules Committee should reconsider continued use of the peremptory challenge.[133] The viability of these proposals must be evaluated against the backdrop of U.S. Supreme Court jurisprudence, state court rulings, and statutes. A careful examination shows a decline in support for continued use of peremptory challenges.

II. THE CONTINUED USE OF PEREMPTORY CHALLENGES IN JURY SELECTION IS LOSING VALIDITY

The foremost concern with use of the peremptory challenge lies in the enormous potential for abuse.[134] Since the challenge historically allowed removal of a juror for any or no reason, it often meant the challenging attorney could express his prejudices against members of distinct groups.[135] Such prejudicial conduct had the invidious effect of infringing on the right of the defendant to a procedurally fair trial and the right of the poten-

130. 664 N.W.2d 826, 835–41 (Minn. 2003) (Page, J., dissenting).

131. *See id.* at 841 (noting the irony that "[i]n each case except this one, we deferred to the trial court").

132. *See id.* at 838 (finding "an extremely troublesome trend emerging" in the decisions that "evinces a hostility toward jurors of color").

133. *See Buggs*, 581 N.W.2d at 347 (Page, J., dissenting). Justice Page is not the only jurist to advocate for elimination of the peremptory challenge. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 102–03 (1986) (Marshall, J., concurring) ("The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely.").

134. *See, e.g.*, Miller-El v. Dretke, 545 U.S. 231, 269 (2005) (Breyer, J., concurring) ("[T]he use of race- and gender-based stereotypes in the jury-selection process seems better organized and more systematized than ever before."); *Batson*, 476 U.S. at 106 (Marshall, J., concurring) (pointing out that "[a]ny prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons," and that unconscious racism could lead to the biased construction of a jury).

135. *See* Swain v. Alabama, 380 U.S. 202, 220 (1965) ("[T]he peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable."); BLACK'S LAW DICTIONARY 189 (8th ed. 2004) ("At one time, a peremptory challenge could not be attacked and did not have to be explained.").

tial juror not to suffer discrimination in a state institution.[136] Furthermore, imputing prejudicial decisionmaking to entire groups of people based on a common factor furthered stereotypes and misunderstandings.[137]

Commentators suggest three distinct but related proposals to prevent such abuse. The first would limit use of the peremptory challenge by expanding the number of groups that receive *Batson* protection. The second would equalize the number of challenges each side receives, and the third would eliminate use of the preemptory challenge altogether. This Part discusses the prospects of success for each of these solutions.

A. SUPREME COURT PRECEDENT SUPPORTS EXPANSION OF *BATSON* PROTECTION TO OTHER CATEGORIES

The most common argument against expansion of *Batson* protection to other categories focuses on the difficulty of administration.[138] In practice, if the characteristic is not visible like race and gender, the party bringing the *Batson* challenge would have a difficult time proving purposeful discrimination because he or she would have to show the opposing attorney actually knew of the juror's protected characteristic.[139] Critics have suggested that to ensure impermissible discrimination has not occurred, jurors would have to disclose their status with regard to the protected classifications.[140] Such disclosure may increase the potential for discrimination, since the characteristic would then become known and salient.[141] In the current system, however, inquiry into such topics is considered inappropriate and is

136. *See Batson*, 476 U.S. at 87 ("The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community.").

137. *See* Norris v. Alabama, 294 U.S. 587, 599 (1935) (disapproving of the presumption that judicial officers disqualified African Americans for lack of intelligence and other characteristics).

138. *See, e.g.*, Johnson v. Campbell, 92 F.3d 951, 952 (9th Cir. 1996) (explaining that the characteristics that led the attorney to believe the potential juror was gay—such as mannerisms, marital status, and occupation—are difficult to accurately observe and even more difficult to prove).

139. *Cf. Batson*, 476 U.S. at 94 (requiring a showing of *purposeful* discrimination by the opposing attorney).

140. *See* Lore, *supra* note 17, at 1 (considering whether jurors would have to disclose sexual orientation to the court in order to determine whether any discrimination took place).

141. *See id.* (noting that identification of protected categories may lead to the exclusion of jurors based on those factors).

unlikely to occur.[142] Hence, the fear of forced disclosure of protected characteristics probably lacks foundation. In the absence of inquiries into protected class status, reviewing courts give trial judges such great deference in *Batson* decisions that without evidence of membership in a protected class on the record, challengers would likely lose on appeal.[143]

Opponents also argue that the proposed amendment would effectively eliminate the peremptory challenge, because if attorneys have to justify the reason for using a peremptory strike, then it is no longer truly peremptory.[144] However, the same argument would apply to *Batson* challenges on the basis of race and gender, for which the Supreme Court has decided the prevention of discrimination outweighs the attorney's interest in the availability of unexplained peremptory strikes.[145]

In addition, by prohibiting peremptory challenges on the basis of gender in *J.E.B.*, the Court suggested that other categories that receive heightened scrutiny under the Equal Protection Clause should also receive protection under *Batson*.[146] Such categories may include religion,[147] alienage,[148] and potentially homosexuality.[149] Justice Thomas reinforced this view in his dissent from the denial of certiorari in *Davis v. Minnesota*: "[G]iven the Court's rationale in *J.E.B.*, no principled reason

142. *Cf. id.* (explaining that, in practice, there is no discrimination based upon these "other" factors).

143. *See* Miller-El v. Cockrell, 537 U.S. 322, 340 (2003) ("In the context of direct review, therefore, we have noted that 'the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal' and will not be overturned unless clearly erroneous." (citation omitted)); *see also* E-mail from Roy Spurbeck, Assistant Pub. Defender, Appellate Div., State of Minn. Bd. of Pub. Def., to author (Apr. 21, 2009, 09:19 CST) (on file with author) (noting that trial judges receive great deference on review).

144. *See* Lore, *supra* note 17, at 1.

145. *See* Batson v. Kentucky, 476 U.S. 79, 98–99 (1986) (discussing the use of peremptory challenges as subject to the requirements of equal protection).

146. *See* J.E.B. v. Alabama, 511 U.S. 127, 143 (1994) (stating that parties may use peremptory challenges to remove jurors belonging to categories that receive rational basis review, which suggests peremptories may not be used to remove jurors who belong to categories that receive heightened scrutiny).

147. *See* Larson v. Valente, 456 U.S. 228, 246 (1982) (holding that religious affiliation is a suspect class and applying strict scrutiny to religion-based classifications).

148. *See* Bernal v. Fainter, 467 U.S. 219, 220 (1984) (subjecting discrimination based on alienage to strict scrutiny).

149. *See, e.g.*, Barry P. McDonald, *If Obscenity Were to Discriminate*, 103 NW. U. L. REV. 475, 485 (2009) (discussing constitutional protections afforded to classifications based on sexual orientation).

immediately appears for declining to apply *Batson* to any strike based on a classification that is accorded heightened scrutiny under the Equal Protection Clause. . . . because such strikes 'are not substantially related to an important government objective.'"[150] Thus, he felt other categories receiving special protection under the Equal Protection Clause should receive *Batson* protection.[151]

Furthermore, the Minnesota Supreme Court Rules Committee noted in the comments to the rule governing the exercise of peremptory challenges that "counsel and the court should be aware of the possibility that the *Batson* protections and procedures could be extended by caselaw to other protected classes, especially where that class is subject to heightened or strict scrutiny, such as for religion."[152] Thus, the Rules Committee has acknowledged the possibility of expansion of *Batson* protections. Any practical concerns are likely overstated and should not outweigh the constitutional ones anyway. In sum, Minnesota's proposed amendment appears theoretically well-grounded in precedent. Minnesota and other states should continue to explore reforming their court rules to disallow discrimination in the jury selection process.

B. EQUALIZATION OF THE NUMBER OF CHALLENGES DOES NOT PROVIDE AN ADEQUATE SOLUTION

The ABA suggests each side receive a uniform number of peremptory challenges.[153] That suggestion derives support from the U.S. Supreme Court's recognition that both the defendant and the State have the historical right to use peremptory challenges.[154] However, opponents argue the defendant deserves more challenges than the State because the defendant "has more at stake individually than the State does in the outcome of the trial."[155]

150. Davis v. Minnesota, 511 U.S. 1115, 1117 (1994), *denying cert. to* 504 N.W.2d 767 (Minn. 1993) (Thomas, J., dissenting) (quoting *J.E.B.*, 511 U.S. at 137 n.6).

151. *See id.*

152. *See* MINN. R. CRIM. P. 26.02 subdiv. 6a cmt. (citing *Davis*, 504 N.W.2d 767, *cert. denied*, 511 U.S. 1115).

153. AM. BAR ASS'N, *supra* note 80, at 66.

154. *Cf.* Swain v. Alabama, 380 U.S. 202, 218–19 (1965) (noting the historical use of peremptories, and arguing that the persistence of their use suggests that the challenge is widely accepted as a necessary part of trial by jury).

155. *See* E-mail from Roy Spurbeck, *supra* note 143.

In the end, changing the number of peremptory challenges each side receives may not have much effect on the outcome of the case because peremptory challenges do not remove jurors with demonstrated biases likely to affect the case.[156] Rather, equalization would just change the size of the jury panel during voir dire.[157] Additionally, each side would still have unlimited challenges for cause, so attorneys could still eliminate demonstrably biased or conflicted jurors.[158] Hence, equalizing the number of peremptory challenges each side receives would not effectively address the problem of discriminatory use of the peremptory strike.

C. ELIMINATION OF PEREMPTORY CHALLENGES WOULD PROMOTE *BATSON*'S AIMS

The peremptory challenge, although not constitutionally required, remains one of the most venerated institutions of the jury trial.[159] Proponents argue that the challenge enhances the perceived legitimacy of the system by allowing defendants to help construct the tribunal that will judge them.[160] Since prospective jurors rarely believe or admit that they will allow prejudice to affect their judgment, the parties must have a tool to remove latent bias from the jury pool.[161] Indeed, the U.S. Supreme Court has historically justified the peremptory challenge with the explanation that it helps both parties obtain a fair and

156. *See* Cathy Johnson & Craig Haney, *Felony Voir Dire: An Exploratory Study of Its Content and Effect*, 18 LAW & HUM. BEHAV. 487, 498 (1994) (finding that jury composition varied only slightly between a carefully selected jury and a randomly selected jury); Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491, 507 (1978) (finding no appreciable effect from the use of peremptory challenges on the outcomes in a majority of cases).

157. *See, e.g.*, MINN. R. CRIM. P. 26.02 subdiv. 4(3) (discussing the drawing, examining, and challenging of jurors).

158. *Cf. id.* ("A challenge for cause may be made at any time during voir dire by any party. At the close, . . . any additional challenges for cause shall be made, first by the defense and then by the prosecution.").

159. *See Swain*, 380 U.S. at 219–20.

160. *See* John H. Mansfield, *Peremptory Challenges to Jurors Based Upon or Affecting Religion*, 34 SETON HALL L. REV. 435, 447–51 (2004) (discussing the use of peremptories and how their use could make verdicts more publicly acceptable).

161. *See* Paula L. Hannaford, *Safeguarding Juror Privacy: A New Framework for Court Policies and Procedures*, 85 JUDICATURE 18, 23–25 (2001) (discussing the nature of information revealed during jury selection and the various techniques used during the process to encourage "greater candor by prospective jurors concerning sensitive or private matters").

impartial jury.[162] Any outright elimination of the peremptory would be a major departure from current practice in this country.[163]

With regard to the use of challenges, the Minnesota Supreme Court has commented that "[p]eremptory challenges are designed to be used to excuse prospective jurors who can be fair but are otherwise unsatisfactory to the challenging party. A prospective juror who could not be fair would be subject to removal for cause."[164] This statement begs the question why a prospective juror who could be fair would be unsatisfactory to the challenging party, except for a discriminatory reason. The U.S. Supreme Court has ruled that trial courts must consider the right of both the defendant and the excluded juror to a judicial process free from discrimination.[165] If a challenging party could only find a prospective juror unsatisfactory for a discriminatory reason, and the defendant and the juror have a right to a process free from discrimination, it logically follows that the judicial process should not allow peremptory challenges.[166]

162. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 119–20 (1986) (Burger, C.J., dissenting) (noting various rationales for the traditional use of peremptories); *cf.* KELSO ET AL., *supra* note 118, at 57 (acknowledging that many scholars have called for the elimination of the peremptory challenge, but ultimately deciding that peremptories help create fair and impartial juries); Shari Seidman Diamond et al., *Realistic Responses to the Limitations of* Batson v. Kentucky, 7 CORNELL J.L. & PUB. POL'Y 77, 79 (1997) (noting that peremptory challenges in the juror selection process "have been a part of the justice system in the United States since 1790").

163. It is interesting to note that Great Britain, from which the United States inherited its jury selection system, has eliminated its use of the peremptory challenge. *See* STEPHEN J. ADLER, THE JURY: DISORDER IN THE COURT 223 (1994) (explaining that, though peremptories were once popular in British legal culture, Parliament "did the deed" and eliminated peremptories altogether in 1988). Some commentators believe this may be due to the greater homogeneity of the population in England. *See* Alschuler, *supra* note 28, at 166.

164. State v. Reiners, 664 N.W.2d 826, 833 (Minn. 2003).

165. *See, e.g.*, *Batson*, 476 U.S. at 87.

166. This viewpoint enjoys support by several notable jurists and academics. *See, e.g.*, *id.* at 102–03 (Marshall, J., concurring) (advocating for the elimination of peremptory challenges); State v. Buggs, 581 N.W.2d 329, 347 (Minn. 1998) (Page, J., dissenting) ("Sitting here some 12 years after *Batson*, it cannot be said that its promise to eradicate racial bias from the jury selection process has been accomplished."); Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 871 (1997) ("[E]ven assuming the peremptory challenge ever worked in this country as anything other than a tool for racial purity, and even assuming it is working today in its post-*Batson* configuration to eliminate hidden juror biases without being either unconstitutionally discriminating or unconstitutionally irrational,

Indeed, it remains unclear why the system would allow an attorney to exclude a juror after a mere brief questioning based on the belief that that juror would serve with bias, even though the attorney cannot articulate any justifiable reason. The practice is particularly disturbing given the historical use of the peremptory challenge as a pretext for discrimination.[167] Such a system effectively sanctions the exact same exercise of prejudice by the attorney that the peremptory strike attempts to eliminate from the jury.[168] Allowing the attorney's discriminatory acts is unprincipled in a justice system anchored in procedural fairness.[169] Discriminatory dismissal from jury service will likely taint the perspective juror's view of the justice system.[170] Once the U.S. Supreme Court acknowledged it valued a justice system free from discrimination over attorneys' traditional use of the peremptory challenge,[171] it took the first step down the path towards elimination of the challenge. The U.S. and state supreme courts should continue down that path.

III. STATES SHOULD ELIMINATE REGULAR USE OF THE PEREMPTORY CHALLENGE

The jury impaneling method in Minnesota and many other states conflicts with the tripartite aims of *Batson*: vindicating the rights of the defendant and the jurors and fostering public confidence in the fairness of the system.[172] As such, these impaneling methods need reform. By replacing each juror successfully removed for cause with a new venireperson, as in the cur-

I submit that its institutional costs outweigh any of its most highly-touted benefits.").

167. *See* Norris v. Alabama, 294 U.S. 587, 597–99 (1935) (discussing the historically discriminatory use of the peremptory challenge to exclude African Americans from juries); Hoffman, *supra* note 166, at 829 ("[T]he peremptory challenge was an incredibly efficient final racial filter.").

168. *See* Hoffman, *supra* note 166, at 830 ("[T]he preemptory challenge once was, and now may again be, a tool to prevent impartial juries rather than to ensure them.").

169. *Cf. id.* at 853–70 (arguing that use of the peremptory challenge is inconsistent with the basic concepts associated with an impartial jury).

170. *See* KELSO ET AL., *supra* note 118, at 55–56 (citing exit interviews with jurors in Los Angeles that found ninety-five percent of jurors dismissed by a peremptory challenge had a negative view of the jury system, while those who served on the jury had a positive view).

171. *See Batson*, 476 U.S. at 98–99 (recognizing the traditional importance of the peremptory challenge to trial procedures, but nonetheless holding that equal protection concerns outweighed that importance).

172. *Cf.* Hoffman, *supra* note 166, at 830–44 (discussing *Batson* and the developments leading up to, and following, the holdings of the case).

rent impaneling method, the size of the panel does not diminish with for-cause challenges.[173] Attorneys must use all of their peremptory challenges to reduce the panel to the appropriate size.[174] Peremptory challenges provide ample opportunity for discriminatory conduct by the attorneys.[175] Consequently, forced use of peremptories leads to a greater risk of infringement of the prospective juror's rights and diminished public confidence in the fairness of the system, without offering any more protection to the defendant. The judicial system would achieve greater fairness by eliminating the requirement that parties use all of their peremptory challenges.

To this end, states should adopt a method for impaneling juries whereby the panel is composed of a number of venirepersons equal to the number of jurors that will ultimately sit on the jury, plus the statistically projected number of jurors eliminated for cause. During questioning of the panel, attorneys should make challenges for cause. If, after the court removes jurors for cause, not enough jurors remain to form an entire jury, the next people on the list should be added to the panel. If too many venirepersons remain after challenges for cause, jurors would be called and seated in the order in which they appear on the list.[176] Parties would only be allowed to use peremptory challenges in rare cases where the trial judge decides peremptory challenges advance the interests of justice.[177]

173. *See* MINN. R. CRIM. P. 26.02 subdiv. 4.

174. *See id.* Another oddity of Minnesota's system lies in the allocation of peremptories for trials of crimes of different severities. *Id.* subdiv. 6. Although misdemeanor trials only use six jurors, the defendant and state still receive five and three peremptory challenges, respectively. *See id.* (for offenses not punishable with life imprisonment, "the defendant shall be entitled to 5 and the state to 3 peremptory challenges" regarding juror selection). This means more jurors are eliminated through peremptory strikes than are left sitting on the jury. Most states generally do, however, offer fewer peremptory challenges for less severe crimes. *See* ROTTMAN & STRICKLAND, *supra* note 121, at 228–31 tbl. 41.

175. *See* Broderick, *supra* note 11, at 420.

176. This would be similar to the current procedure, only eliminating the exercise of peremptories. *See* MINN. R. CRIM. P. 26.02 subdiv. 4 ("[T]he jury shall be selected from the remaining prospective jurors in the order in which they were called until the number selected equals the number of which the jury shall be composed for the trial of the case . . . .").

177. *See, e.g.*, CAL. CIV. PROC. CODE § 231(c) (West 2006) (allowing additional peremptories in civil cases when "the interests of justice . . . require"). This is the standard often used to grant additional peremptory challenges. *Cf. id.* Such situations may include cases tried in a location where bias might be a particular problem, or cases that have received more publicity than average, leading to a reasonable fear of juror bias.

Opponents of this system might claim that it would increase the number of for-cause challenges judges must rule on, thus increasing the length and cost of voir dire.[178] However, this system would also largely eliminate the need for judges to rule on *Batson* challenges and the resulting appellate litigation, potentially producing an overall cost savings.

In addition, some may object that the proposed system would result in a judicially created jury.[179] The proposed system would effectively require judges to rule on every strike. Nonetheless, the expansion of the *Batson* doctrine and the corresponding increase in objections to the use of peremptory challenges means judges already have to rule on many challenges. Under the proposed reform, judges' rulings on *Batson* challenges would likely just become rulings on challenges for-cause.[180]

Given the long history in the American judicial system and the strength of attachment of attorneys on both sides to the peremptory challenge, overcoming negative sentiment among judicial actors might present the biggest hurdle to implementation of this proposed reform. However, the current rules in many states allow for-cause challenges if the attorney identifies in the potential juror a state of mind, with reference to the case or either party, which indicates he would not be able to try the case without prejudice to the rights of the challenging party.[181] Thus, parties would still have an avenue through which to exercise their own judgment in the creation of their jury. This proposed reform best vindicates the nondiscrimination ideal embodied by the rule for creating jury service lists.[182] Although

178. *See* Marder, *supra* note 124, at 1715 ("Eliminating the peremptory might require a slightly expanded for-cause challenge, but this should not be reason for concern."). *But see* E-mail from Roy Spurbeck, *supra* note 143 (stating that jury selection in Minnesota tends to be nonconfrontational and quick).

179. *See, e.g.*, Jon Van Dyke, *Voir Dire: How Should It Be Conducted to Ensure That Our Juries Are Representative and Impartial?*, 3 HASTINGS CONST. L.Q. 65, 74–75 (1976) (stating a preference for attorney participation in voir dire); *cf.* Leonard B. Sand & Steven Alan Reiss, *A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit*, 60 N.Y.U. L. REV. 423, 432–33 (1985) (finding even minimal attorney participation enhances voir dire).

180. *Cf.* Marder, *supra* note 124, at 1716 (noting that peremptories may be replaced by for-cause challenges, and thus for-cause challenges would have to be expanded).

181. *See, e.g.*, MINN. R. CRIM. P. 26.02 subdiv. 5(1)(1).

182. *Cf.* MINN. STAT. § 593.32 subdiv. 1 (2008) (discussing the general prohibition on the exclusion of jurors for discriminatory purposes); MINN. GEN. R. PRAC. 806 (governing jury source list creation).

elimination of the peremptory strike may appear drastic,[183] it is the most effective way to protect the defendant's and juror's rights to a judicial system free from discrimination, and foster public confidence in the fairness of the system.

CONCLUSION

The peremptory challenge enjoys a long history in the American judicial process. However, over the past four decades the U.S. Supreme Court, beginning with its *Batson* opinion and moving to the recent *Rivera v. Illinois*, has eroded the right to use a peremptory strike, finding its benefit outweighed by the harm caused by discriminatory use. This move reflects a growing interest among the American public in judicial systems free from discrimination.

Groups in several states have proposed reforms designed to further reduce discrimination in the judicial process. Minnesota provides an apt case study for the viability of proposed reforms because it is currently considering multiple options for reform. Like Minnesota, states that use a jury impaneling system that forces attorneys to use peremptory strikes particularly need such reforms. The detrimental effects of forced exercise of the peremptory challenge, and the lack of theoretical basis for its continued use, suggest the best reform is eliminating peremptory strikes in almost all cases. Elimination will best serve the purposes of *Batson* and the antidiscrimination sentiment underlying *Batson*'s purposes. Furthermore, the for-cause challenge preserves the ability of parties to help construct the tribunal that will judge them. Eliminating peremptory challenges best balances the interests of contemporary society and should receive serious consideration.

183. A less drastic proposal might involve adopting the jury impaneling method used for first degree murders for all cases. *Cf.* MINN. R. CRIM. P. 26.02 subdiv. 4(3)(c) (outlining the jury impaneling procedure for first degree murder trials). This system has the advantage of not forcing attorneys to use peremptory challenges. *Cf. id.* (directing that the potential juror "may be challenged . . . peremptorily" but noting that the process of selection continues until the number of persons needed to serve in the jury is selected from the jury panel). However, it has the disadvantage of not allowing attorneys to consider the entire panel before using a peremptory strike. *Cf. id.* ("The court shall direct that one prospective juror at a time be drawn from the jury panel for examination."). This could lead to strategic behavior such as saving one strike for the end, which attorneys may find unfair. *See generally* AM. BAR ASS'N, *supra* note 80, at 66–67 (discussing the use of peremptories and challenges for-cause).