March 1998

The Current State of the Peremptory Challenge

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NOTES

THE CURRENT STATE OF THE PEREMPTORY CHALLENGE

The peremptory challenge, once defined by the U.S. Supreme Court as a challenge "exercised without a reason stated, without inquiry and without being subject to the court's control," no longer exists in the American judicial system. In *Batson v. Kentucky* and its progeny, the Supreme Court ignored common sense and bastardized the English language by redefining the peremptory challenge to represent its antithesis. This jurisprudence, which retains the peremptory challenge in name only, has forced trial court judges to traverse a difficult path through the complexities of equal protection claims, the uniqueness of third party standing, the dilemma of whose rights to protect, and the opaque pretext behind parties' alleged neutral use of the peremptory challenge.

1. The peremptory challenge is a challenge instituted by a party, in either a civil or criminal case, to strike a potential juror. The challenge is "peremptory" because it requires no explanation for its use. See Valerie P. Hans & Neil Vidmar, Judging the Jury 67 (1986); see also infra note 20 and accompanying text (describing the institution of the venire and the voir dire process).


3. That is, the peremptory challenge no longer exists as defined by the Supreme Court in 1965. The peremptory does continue to exist, at least in name, in every American jurisdiction. See Barbara D. Underwood, Ending Race Discrimination in Jury Selection: Whose Right is it, Anyway?, 92 COLUM. L. REV. 725, 726 n.3 (1992).


6. One scholar wrote of the *Batson* decision:

   *Batson* represents a well-intentioned effort to eliminate the pernicious effects of discrimination in the petit jury system. The solution proffered by the Court, however, has resulted in a quagmire. What *Batson* wrought was an "enforcement nightmare." By narrowly limiting the peremptory challenge, the majority created more problems than it solved.


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These knotty concerns most recently surfaced in a split between the Fifth and Seventh Circuits. The split resulted from the unconstitutional use of peremptory challenges in United States v. Boyd and United States v. Huey. The defendants in both cases used their peremptory challenges to strike prospective jurors solely because of the prospective jurors' race. The courts differed, however, as to whether the defendants should be granted new trials due to their unconstitutional employment of the peremptory challenges. This circuit split stands as a testament to the Supreme Court's misguided jurisprudence that made the long-standing peremptory challenge irrational and functionally obsolete.

This Note will address the Supreme Court's whittling away of the peremptory challenge and the confusion that has resulted from its opinions. The first portion of the Note will detail the history of the peremptory challenge, devoting particular attention to the Court's treatment of the peremptory, from its opinion in Swain v. Alabama, to its most recent cases decided in the wake of J.E.B. v. Alabama ex rel. T.B. The second part of this Note will explain the facts and holdings in United States v. Huey and United States v. Boyd and detail to what extent the cases may be factually distinguishable. The Fifth and Seventh Circuits' holdings will be held as indicia of a greater confusion stemming from Supreme Court jurisprudence. This Note will then predict the probable outcome should the Supreme Court decide to resolve the issue raised by the circuit split.

7. See John Flynn Rooney, 7th Circuit Rejects Batson Claim Pitting Defendant Against His Own Attorney, CHI. DAILY L. BULL., June 17, 1996, at 1.
8. 86 F.3d 719 (7th Cir. 1996), cert. denied, 117 S. Ct. 1825 (1997).
9. 76 F.3d 638 (5th Cir. 1996).
10. See Boyd, 86 F.3d at 721; Huey, 76 F.3d at 639-40.
11. See Boyd, 86 F.3d at 724 (“Our conclusion that the exercise of a peremptory challenge by the defense, in violation of Batson and McCollum, does not entitle the defendant to a new trial . . . places us in respectful disagreement with United States v. Huey.”).
12. See infra notes 36-38 and accompanying text.
13. See infra notes 20-73 and accompanying text.
16. See infra notes 74-110 and accompanying text.
17. See infra notes 111-39 and accompanying text. The Supreme Court denied cer-
third part of this Note will analyze the options available to the Supreme Court in resolving the problems many critics see in the Court’s current treatment of the peremptory challenge. Finally, this Note will conclude by presenting the most logical, though admittedly unlikely, course for the future of the peremptory challenge.

HISTORY OF THE PEREMPTORY CHALLENGE

The Peremptory Challenge v. the “For Cause” Challenge

To understand the history of the peremptory challenge, it must first be distinguished from its counterpart, the “for cause” challenge. Traditionally, the peremptory challenge permitted a party to strike a member of the venire without needing to explain to the court the reasoning for the strike. In contrast, the for cause challenge demands that a party give a “narrowly specified, provable and legally cognizable basis of partiality” for the
strike. Litigants often ground for cause challenges on a prospective juror's familial or social relationship to one of the parties, failure to meet statutory qualifications for jury duty, or other specific evidence of bias.

The peremptory and for cause challenges also differ in the number allowed by the courts. A party may exercise an unlimited number of for cause challenges. Peremptory challenges, however, are limited to the number specified by statute in the jurisdiction. The federal courts limit a litigant to three peremptory challenges in civil cases, while allowing the government six peremptory challenges and the defendant ten peremptory challenges in felony cases. In misdemeanor cases, each side receives three peremptory challenges. Most states have similar statutory grants of peremptory challenges.

Although judges, scholars, and litigants often disagree over whether the peremptory challenge serves a worthwhile purpose in the American judicial system, all seem to admit that no constitutional basis exists for the peremptory challenge. Indeed, the Court in Stilson v. Lewis wrote that "there is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges." Unlike peremptory challenges, a trial judge cannot revoke for cause challenges because they are grounded in the Sixth Amendment's right to an impartial jury. The peremptory challenge, therefore, when

23. See Jack H. Friedenthal et al., Civil Procedure 526 (2d ed. 1993); LaFave & Israel, supra note 20, § 22.3, at 973.
25. See id.
27. See Fed. R. Crim. P. 24(b). Both the government and the defendant may use 20 peremptory challenges in criminal cases if the charge is a capital offense. See id.
28. See id.
29. See LaFave & Israel, supra note 20, § 22.3, at 978.
30. Disagreements exist even between Supreme Court Justices regarding the legitimacy of the peremptory challenge. The Court did not announce its landmark decision in Batson v. Kentucky with a unified voice; there were seven different opinions written. See 476 U.S. 79 (1986). Justice Marshall's concurring opinion went so far as to argue for the abolishment of the peremptory challenge. See id. at 102-03 (Marshall, J., concurring).
32. Id. at 586.
33. See U.S. Const. amend. VI (stating that the accused in criminal cases shall
isolated from all of its adopted uses, is simply a tool to create an impartial jury. It is for this reason that the Court has allowed trial judges to strip the parties of their peremptory challenges when the creation of an impartial jury has already been assured. The peremptory challenge thus stands along side the for cause challenge to defend litigants from juror bias.

The Evolution of the Peremptory Challenge

To understand the current state of the peremptory challenge, it is necessary to unfold its long history. Few institutions of the trial court have as distinguished and time-tested a history as the peremptory challenge. Scholars believe that the peremptory was born over 700 years ago. The peremptory traveled with the colonists to America where it soon grew beyond its English heritage. From the inception of the United States, few questioned the use of the peremptory challenge until 1965 when the Court decided Swain v. Alabama.
In a six to three decision, the Court in *Swain* held that Alabama did not violate the defendant's equal protection rights when it employed its peremptory challenges to strike black jurors. The Court arrived at this conclusion by stating:

In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause. To subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge. The challenge, *pro tanto*, would no longer be peremptory, each and every challenge being open to examination, either at the time of the challenge or at a hearing afterwards.

The Court held that a defendant could successfully challenge a state's use of the peremptory challenge only by showing that the state discriminatorily excluded blacks from petit juries over a period of time. A defendant's showing of such a discriminatory use of the peremptory constitutes a "prima facie case under the Fourteenth Amendment[^s]"[^Equal Protection Clause] equal protection clause. By

[^remptory challenges was well accepted from the start. See id. at 148. The prosecution's practice of "standing jurors aside" initially received more skepticism. See id. A forerunner of the modern peremptory challenge exercised by the prosecution was "standing aside," a practice that originated in England and that entailed the prosecution "standing aside" jurors whom it considered objectionable. See id. at 148-49. If 12 jurors could be assembled, then the prosecution would never need to show cause for those jurors who were asked to stand aside. See id. at 148. In 1827, Justice Story gave the U.S. Supreme Court's approval for the practice of standing aside. See id. at 149 (explaining the dicta in United States v. Marchant, 25 U.S. (12 Wheat.) 480, 483 (1827)). The peremptory challenge, or its functional equivalent of standing aside, thus quickly established itself in the American legal system.

By the mid-nineteenth century, most states had adopted laws allowing for peremptory challenges to be used by the prosecution; this effectively ended the need for standing aside. See id. at 150. "By the beginning of the twentieth century, the government's right to exercise peremptory challenges was firmly established." *Id.*


[^41. Id.]

[^42. See id. at 223-24.]

[^43. Id. at 224.]

[^44. The Fourteenth Amendment's Equal Protection Clause states that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.]
placing this weighty burden of proof upon the defendant, the Court effectively rid itself of equal protection claims based upon the state's behavior in any one trial.

It was not until twenty years later that the Supreme Court revisited the peremptory challenge issue in its tide-turning *Batson v. Kentucky*\(^4^5\) decision. The defendant in *Batson* claimed the prosecutor violated his rights under the Sixth and Fourteenth Amendments by using his peremptory challenges to strike all four black members of the venire.\(^4^6\) The remaining all-white jury found the black defendant guilty.\(^4^7\) The Court focused its attentions upon the defendant's equal protection claim.\(^4^8\) In overruling *Swain*,\(^4^9\) the Court found that it was not only the defendant who suffered when a court allowed race-based challenges; the excluded jurors and the community at large also felt the sting of discrimination.\(^5^0\)

To detect future race-based, unconstitutional uses of the peremptory challenge, the Supreme Court created a three-part test that courts continue to use today.\(^5^1\) First, the defendant must show that the circumstances surrounding a particular challenge create a prima facie case that the prosecutor challenged the

\(^{45}\) 476 U.S. 79 (1986).

\(^{46}\) See id. at 83.

\(^{47}\) See id.

\(^{48}\) In fact, the Court did not address the defendant's Sixth Amendment claim to the right to a jury drawn from a cross-section of the community other than to state in a footnote that "we have never held that the Sixth Amendment requires that 'petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population." Id. at 85-86 n.6 (quoting Taylor v. Louisiana, 419 U.S. 522, 538 (1975)).

\(^{49}\) The Court overruled *Swain* to the extent that *Swain* allowed a defendant to show discriminatory jury selection only through the strike process by showing a history of such discrimination in that locality. The Court in *Batson* allowed the defendant to prove discrimination without removing the analysis from the confines of the trial at hand. See id. at 90-93.

\(^{50}\) See id. at 87. In his opinion for the Court, Justice Powell wrote that the Court first recognized the equal protection rights of excluded jurors in *Strauder v. West Virginia*, 100 U.S. 303 (1879). See *Batson*, 476 U.S. at 87. Powell also claimed that discriminatory jury selection processes "undermine public confidence in the fairness of our system of justice." Id.

\(^{51}\) See *Batson*, 476 U.S. at 96; United States v. Huey, 76 F.3d 638, 640-41 (5th Cir. 1996) (applying *Batson's* three-part test). The Court rejected *Swain's* "crippling burden of proof" necessary to prove a prima facie case of racial discrimination in the use of peremptory challenges. See *Batson*, 476 U.S. at 92-93.
potential juror on the basis of race. Once the defendant establishes this prima facie case of discrimination, the burden shifts to the proponent of the peremptory challenge to provide a race-neutral reason for exercising the challenge. Finally, the trial court must then determine whether the opponent of the strike has proved purposeful discrimination.

In his dissent, Chief Justice Burger emphasized the deep and firmly rooted foundations of the peremptory. Chief Justice Burger took pains to differentiate the case at bar from cases involving wholesale juror exclusion. Using a peremptory challenge to exclude individual jurors based on the facts in a particular case is vastly different from excluding an entire class of people from being eligible to be in the initial venire. Justice Rehnquist echoed Chief Justice Burger's complaints, emphasizing that "there is simply nothing 'unequal' about the State's using its peremptory challenges to strike blacks" because all other races and ethnic groups are subject to the same treatment.

The cases following in Batson's aftermath only served to widen Batson's scope. In the 1991 case of Powers v. Ohio, the Court held that Ohio violated a white defendant's rights when it exercised its peremptory challenges to exclude seven black jurors. Unlike in Batson, however, the Court spent the vast majority of its opinion justifying the holding based on the wrongs

52. See Batson, 476 U.S. at 95-96. A defendant may establish the prima facie case by proving that he is a member of a "cognizable racial group" whose members the prosecutor attempted to exclude. Id. at 96. Finally, the defendant must convince the court that the prosecutor's actions raise an inference that the peremptory challenges were based on race. See id. In later years, the Court extended this test by holding that the opponent of the strike need not be of the same race as the excluded jurors. See Powers v. Ohio, 499 U.S. 400 (1991).

53. See Batson, 476 U.S. at 97.
54. See id. at 98.
55. See id. at 119 (Burger, C.J., dissenting).
56. See id. at 122-23 (Burger, C.J., dissenting).
57. See id. (Burger, C.J., dissenting)
58. Id. at 137 (Rehnquist, J., dissenting).
60. See id. at 403-04. The decision echoed the Court's concerns expressed in Batson for the rights of the defendant and the excluded jurors, as well as public confidence in the judicial system. See id. at 406 ("Batson recognized that a prosecutor's discriminatory use of peremptory challenges harms the excluded jurors and the community at large.").
suffered by the excluded jurors and not upon the rights of the criminal defendant.\textsuperscript{61} That same year, the Court held in \textit{Edmonson v. Leesville Concrete Co.}\textsuperscript{62} that the prohibition against using race-based peremptory strikes should also apply in civil cases.\textsuperscript{63} The following year in \textit{Georgia v. McCollum},\textsuperscript{64} the Court extended \textit{Batson} to encompass race-based peremptory challenges exercised by defendants in criminal trials.\textsuperscript{65} The most recent extension of \textit{Batson} occurred in \textit{J.E.B. v. Alabama ex rel. T.B.}\textsuperscript{66} The Court in \textit{J.E.B.} held that gender, like race, is an impermissible basis for peremptory challenges.\textsuperscript{67}

Despite many observers' expectations that the Court will extend \textit{Batson} beyond race and gender discrimination,\textsuperscript{68} the Court

\begin{itemize}
  \item \textsuperscript{61} See id. at 406-10.
  \item \textsuperscript{62} 500 U.S. 614 (1991).
  \item \textsuperscript{63} See id. at 619. In reaching this conclusion, the Court necessarily had to find that the use of race-based peremptory challenges by private litigants is somehow equivalent to the use of such challenges by a government actor. See id. at 618-19. The need for this finding stemmed from the fact that "[t]he Constitution's protections of individual liberty and equal protection apply in general only to action by the government." Id. at 619. In reasoning that the private litigant's peremptory strikes were unconstitutional under \textit{Batson}, the Court noted that the government supplies the forum, the judge, and the jury to make the use of the unconstitutional challenges possible. See id. at 622. Despite the absence of the government at the defendant's or plaintiff's tables, the government takes an active role in the civil trial process. See id. at 622-24.
  \item \textsuperscript{64} 505 U.S. 42 (1992).
  \item \textsuperscript{65} See id. at 59. This decision gave the \textit{Batson} prohibition on race-based challenges a clean sweep: After \textit{McCollum}, all parties in both civil and criminal cases may not strike prospective jurors on account of race. In arriving at this decision, the Supreme Court had to trudge through the quagmires first traversed in its earlier decisions of \textit{Batson}, \textit{Powers}, and \textit{Edmonson}. The Court noted that:

  The majority in \textit{Powers} recognized that "\textit{Batson} was designed to “serve multiple ends,” only one of which was to protect individual defendants from discrimination in the selection of jurors.” As in \textit{Powers} and \textit{Edmonson}, the extension of \textit{Batson} in this context is designed to remedy the harm done to the “dignity of persons” and to the “integrity of the courts.”

  \textit{Id.} at 48 (citations omitted) (quoting \textit{Powers v. Ohio}, 499 U.S. 400, 402, 406 (1991)). The Court justified its conclusion that a defendant's use of discriminatory peremptory challenges constitutes state action for purposes of equal protection analysis by adopting the rationale from \textit{Edmonson}. See id. at 50-55; see also supra note 63 (discussing \textit{Edmonson}'s rationale for this conclusion).
  \item \textsuperscript{66} 511 U.S. 127 (1994).
  \item \textsuperscript{67} See id. at 146.
  \item \textsuperscript{68} See Benjamin Hoorn Barton, Note, \textit{Religion-Based Peremptory Challenges After
has not yet chosen to do so. In *Hernandez v. New York*, the Court refused to find fault with a prosecutor’s use of peremptory strikes to exclude two bilingual jurors whom the prosecutor feared would not be able to listen to an interpreter while blocking out what was said by Spanish-speaking witnesses. In his opinion for the Court, Justice Kennedy held that the peremptory challenges were race-neutral, despite the defendant’s assertion that the prosecutor unfairly excluded Latinos. In another case, *Davis v. Minnesota*, the Court denied certiorari to a case involving a prosecutor’s use of a peremptory to exclude a Jehovah’s Witness.

The Court’s recent refusals to extend the *Batson* holding to other historically protected classifications leaves an unanswered question as to the scope and process of jury selection. By failing to extend the reasoning of *Batson* to these classes, questions remain as to whom specifically *Batson* protects. The conflicting opinions in *United States v. Huey* and *United States v. Boyd* present an equally puzzling question: Specifically, what are the remedies for defendants’ illicit use of race-based challenges?

**HUEY AND BOYD**

The ever-expanding holding in *Batson* forces the lower courts to stand upon a shifting foundation while parties further try to push the limits of the Supreme Court’s prior holdings. One of the most recent examples of litigants’ efforts to profit from the *Batson* analysis met with mixed results in *Boyd* and *Huey*.

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70. See id. at 356-57, 372.
71. See id. at 360-61. Justice Kennedy stated that the Court did not need to consider the “high correlation between Spanish-language ability and ethnicity” because the two excluded jurors’ attitudes and responses to the prosecutor’s questions served as legitimate grounds for the prosecutor’s challenges. *Id.* at 360.
72. 511 U.S. 1115 (1994), denying cert. to 504 N.W.2d 767 (Minn. 1993).
73. See *Davis*, 511 U.S. at 1115; *infra* notes 155-56 and accompanying text.
74. The defendant in *Boyd* did not enjoy the same benefit from his appeal of his


In United States v. Huey, Antonio Garcia, a Hispanic American, and Arthur Huey, a Caucasian, both pled not guilty to a three-count indictment for drug and weapons charges. At the close of voir dire and prior to the exercise of peremptory strikes, Huey's counsel moved to strike six potential jurors who were either black or had Hispanic surnames. Knowing that the government intended to introduce audio tapes that not only linked the defendants to the crimes but also captured the defendants issuing threats laced with "harsh and offensive racial epithets," counsel for Huey argued that black and Hispanic jurors would be unable to reach an unbiased verdict. The court denied the motion to exclude the jurors.

Determined to protect his client from the perceived inevitable bias of the prospective minority jurors, Huey's counsel used the five peremptory strikes allotted to Huey to strike five of the black jurors. Garcia, Huey's codefendant, objected to Huey's peremptory strikes. Although, the trial judge granted Huey's unconstitutional use of the peremptory challenge as did the two defendants in Huey. The Seventh Circuit denied defendant Boyd a new trial, see United States v. Boyd, 86 F.3d 719, 724-25 (7th Cir. 1996), cert. denied, 117 S. Ct. 1825 (1997), but the Fifth Circuit was much more generous to defendants Huey and Garcia as it granted them both a new trial due to Huey's illicit use of his peremptory challenges. See United States v. Huey, 76 F.3d 638, 641 (5th Cir. 1996).

75. See Huey, 76 F.3d at 639.
76. See id.
77. Id. Prior to trial, the court denied a motion in limine filed by Huey's counsel. The motion asked for the exclusion of the inflammatory audio tapes, but the court ruled that the jury should hear the tapes. See id. at 639 n.2.
78. See id. at 639. Despite the court's refusal to grant the motion, the court did proceed to inform the venire that tapes would be introduced into evidence that contained racial slurs. See id. The judge asked whether any of the prospective jurors would not be able to make an unbiased decision because of the slurs; none of the jurors responded that the tapes would affect their decisions of guilt or innocence. See id.
79. Under the Federal Rules of Criminal Procedure, the defense in a felony case receives 10 peremptory challenges. See FED. R. CRIM. P. 24(b); supra note 27 and accompanying text.
80. See Huey, 76 F.3d at 639-40.
81. See id. at 639-40. Over both Garcia's and the government's objections, counsel for Huey used three of the five peremptory challenges at his first opportunity. See id. at 639. During the second round of strikes, Huey's counsel struck two more black jurors, but only Garcia's counsel objected. See id. at 640.
counsel an opportunity to state a race-neutral reason for striking five black venire members, the court did not demand a reason to be stated. The court allowed the strikes, proceeded with the trial, and eventually convicted the two defendants.

Both defendants appealed their convictions to the Fifth Circuit Court of Appeals. Garcia and Huey challenged their convictions on the grounds that the district court erred because it did not defend the equal protection rights of the five excluded black jurors. The appeals court found that when counsel for Garcia objected to the peremptory strikes, it had satisfied the first inquiry of the Batson three-part test by showing a prima facie case of racial discrimination. By not demanding a race-neutral reason for the strikes or not disallowing the strikes, the district court failed to protect the rights of the excluded jurors. Ruling that the district court committed reversible error, the appellate court granted both defendants a new trial.

The Fifth Circuit did not fail to foresee how some critics might view the act of granting a new trial to a defendant who had been convicted despite his own deliberate error. The court noted:

We are not unaware that there is some irony in reversing Huey's conviction given that it was his counsel who made the discriminatory strikes. We are convinced, however, that this result is consistent with the teachings of Batson and its progeny. In addition to harming individual defendants

82. See id. at 641.
83. See id. at 640.
84. See id. at 639.
85. See id. at 640. Huey joined Garcia in the appeal of the lower court's ruling. See id.
86. See id. at 641.
87. See id. The appeals court held that Garcia had standing to bring a claim on behalf of the excluded jurors due to his codefendant's unconstitutional use of peremptory challenges. See id. at 640.
88. See id. at 641. In a later decision, the Fifth Circuit explained that it granted Huey a new trial only after determining that Garcia deserved a new trial. See Mata v. Johnson, 99 F.3d 1261, 1271 (5th Cir. 1996), vacated in part on reh'g by 105 F.3d 209 (5th Cir. 1997). The court reasoned that the "financial and emotional burden on the community" would not be increased significantly by retrying Huey along with Garcia. Id.
and prospective jurors, racial discrimination in the selection of jurors impugns the integrity of the judicial system and the community at large.\textsuperscript{89}

The court discounted concerns that future defendants might purposely exclude certain jurors knowing that they would be granted a new trial even if the strategy resulted in a conviction.\textsuperscript{90} The court stated that "such mischief" could be avoided by trial courts if the judges practiced "diligent oversight and sound judgment" by means of applying "the well-known three-step inquiry for ensuring race-neutral use of peremptory challenges."\textsuperscript{91}

\textit{United States v. Boyd}

The Seventh Circuit Court of Appeals applied a vastly differ-

\textsuperscript{89} Huey, 76 F.3d at 641. It was not until the Fifth Circuit's later opinion in \textit{Mata v. Johnson} that it became clear how the court decides whether to grant a new trial to a defendant who wrongfully excludes prospective jurors. See \textit{Mata}, 99 F.3d at 1270-71. In \textit{Mata}, the prosecutor and defense, with the court's direct or implied consent, agreed to exclude all eight black veniremen from the jury. See \textit{id}. at 1268-69. The exclusion of the jurors was not accomplished by use of peremptory challenges; the court, therefore, could not apply a traditional \textit{Batson} analysis. See \textit{id}. at 1270. The court recognized that because the defendant agreed with the prosecution to exclude the black veniremen, the defendant had committed his own constitutional violation. See \textit{id}.

The Fifth Circuit stated that if the agreement to exclude jurors violated the defendant's rights, it was not actionable because those rights had been waived by his collusive actions. See \textit{id}. The court also found the harm to the excluded jurors not to be actionable because the trial had occurred over 10 years previously. See \textit{id}. The court focused its attention on the integrity of the judicial system while admitting that harm would be done regardless of whether it granted the defendant a new trial. See \textit{id}. In the end, the court applied a balancing test and decided not to grant a new trial. See \textit{id}. at 1270-71. The court believed the harm done to the integrity of the judicial system by granting a convicted murderer a new trial based on his own unconstitutional actions would be worse than the harm done to the judicial system by allowing this unconstitutional exclusion of jurors to pass without punishment or remedy. See \textit{id}.

\textsuperscript{90} See \textit{Huey}, 76 F.3d at 642.

\textsuperscript{91} Id. Two of the judges on the three-judge panel filed a concurring opinion concerning what they believed was "an indisputable abuse of the \textit{Batson v. Kentucky} rule by the defendant." See \textit{id}. (Jolly, J., concurring). The concurrence affirmed the belief that abuses such as those present in \textit{Huey} must be avoided in the future through "the diligence of trial judges." \textit{Id}. (Jolly, J., concurring). The concurrence further noted that this decision would harm the "public trust" because, through its holding, the court permitted a convicted criminal to receive "a new trial based on his own abuse of the judicial system." \textit{Id}. (Jolly, J., concurring).
ent treatment to an appeal similar to that in *Huey*. In *United States v. Boyd*, the defendant appealed from a bank robbery conviction. 92 During jury selection in the trial court, counsel for Boyd used a peremptory challenge to strike the only black person in the venire. 93 The defendant did not protest, and the government did not object to the peremptory strike. 94 It was not until the sentencing process that it became clear that the peremptory challenge had been race-based. 95 Like the defendants in *Huey*, Boyd claimed that his counsel's use of race-based peremptory strikes entitled him to a new trial. 96

Judge Easterbrook, writing the opinion for the court, quickly disposed of Boyd's contention that he should be granted a new trial due to the unconstitutional challenge exercised by his counsel. Easterbrook wrote:

> How can Boyd protest his agent's—which is to say, his own—tactical decision? Many a defendant would like to plant an error and grow a risk-free trial: an acquittal is irrevocable under the double jeopardy clause, and a conviction can be set aside. But steps the court takes at the defendant’s behest are not reversible, because they are not error; even the “plain error” doctrine does not ride to the rescue when the choice has been made deliberately, and the right in question has been waived rather than forfeited. 97

The court explained that a peremptory challenge is not a fundamental or personal right of the accused; 98 it is a tactical

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93. See id.
94. See id.
95. See id. During sentencing, counsel for Boyd told the court that he excluded the one black member of the venire because he thought that all of the white jurors would naturally defer to the reasoning and decision of the one black juror. See id. Counsel confided that he did not want the entire case hinging upon the decision of one juror. See id. Defendant Boyd, on appeal, claimed that his counsel told him that the black juror should be struck because a middle-class black person would be more likely to convict a lower-class black person. See id. The court stated that the reason for which Boyd's counsel exercised the peremptory strike was of no matter, as both "are forbidden grounds for removing jurors." Id.
96. See id.
97. Id. at 721-22 (citing United States v. Olano, 507 U.S. 725, 732-34 (1993)).
98. See id. at 722-24. The court differentiated the peremptory challenge from a
weapon to be used by counsel. supra. "Decisions on selection of a jury are among the many entrusted to counsel rather than to defendants personally." It is precisely because peremptory challenges are not fundamental or personal rights that the Federal Rules of Criminal Procedure allow a judge to divide up the number of peremptory challenges available if there is more than one defendant.

The court admitted that its holding would place it in direct disagreement with the Fifth Circuit Court of Appeals; however, Judge Easterbrook claimed that the Fifth Circuit's holding was a "non-sequitur" to the extent that it granted a new trial to a convicted criminal based on an attack of his own course of action. Stating that "[g]iving a defendant a new trial because of his own violation of the Constitution would make a laughingstock of the judicial process," the court affirmed Boyd's conviction.

truly personal right such as the right to remain silent. See id. at 722-23.

99. See id. at 723.
100. Id.
101. See id. ("Peremptory challenges under Fed. R.Crim.P. 24(b) belong to a 'side,' not to a person. When there is more than one defendant, the court may require the defendants to exercise their challenges collectively, which is incompatible with the idea that challenges are personal, non-delegable choices."). By its act of dividing the allotted peremptory challenges between the two defendants, the court in Huey implicitly recognized the tactical, not fundamental, nature of peremptory challenges. See United States v. Huey, 76 F.3d 638, 639 (5th Cir. 1996).

102. See Boyd, 86 F.3d at 724.
103. Id.

In reaching its decision, the Seventh Circuit introduced what it considered to be "parallel situations" to the case at bar in which the defendant committed his own error. See id. The court noted that a defendant who commits perjury, in a mistaken belief that his lie will work towards his acquittal, cannot receive a new trial based upon the error. See id. Even though the prevention of perjury is in the interest of the judicial system, a new trial, while erasing the effects of the perjury, would grant the accused another chance at acquittal. The court also stated that when multiple defendants in a single case waive their right to have separate counsel and their claims to a possible conflict of interest, they may not subsequently demand a new trial based on the judicial system's interest in preventing joint representation. See id.

A few months after the Seventh Circuit issued its opinion in Boyd, the Louisiana Supreme Court likewise refused to follow the Fifth Circuit's reasoning in Huey. See State v. Strickland, 683 So. 2d 218 (La. 1996). In Strickland, the Louisiana Supreme Court rejected an appeal on Batson grounds from a defendant found guilty of first-degree murder. See id. at 230. The defendant claimed there was a Batson violation when his trial counsel struck seven men with the eight peremptory challenges
Differences Between Huey and Boyd

Before contrasting the disparate treatments of the two cases by the Fifth and Seventh Circuits, it is important to clarify the ways in which the cases may be distinguishable. First, and most obviously, the cases differ in that there were two defendants in Huey while only one in Boyd. Whereas defendant Boyd appealed his case based on his own error, defendants Huey and Garcia appealed due to the peremptory challenges exercised exclusively by Huey. To the extent that a court divides peremptory challenges among codefendants and the codefendants exercise the peremptory challenges as one actor, the Fifth Circuit's grant of a new trial seems to run directly against the Seventh Circuit's holding in Boyd. If, however, the court treats the codefendants as independently exercising their challenges, then the holding in Huey seems distinguishable from Boyd only to the extent that the court granted defendant Huey a new trial.

A second difference between Boyd and Huey lies in the fact that there was no objection to the unconstitutional peremptory challenge in Boyd. Without a challenge to the peremptory, he exercised. See id. The Louisiana Supreme Court stated:

Huey fails entirely to persuade, standing as it does for the proposition that a defendant can both violate the constitutional rights of veniremen and the state’s right to a fair trial, and subsequently, if acquittal has not put him safely out of reach on double jeopardy grounds, claim error and receive a new trial.

Id. In criticizing the Fifth Circuit's holding in Huey, the Louisiana Supreme Court explicitly embraced the Seventh Circuit's decision in Boyd. See id.

105. See id. at 721; Huey, 76 F.3d at 639.
106. See Boyd, 86 F.3d at 721; Huey, 76 F.3d at 639-40.
107. If Huey and Garcia exercised their peremptory challenges not as one party, but rather, as two individual defendants, then it might easily be argued that Garcia should receive a new trial while Huey should not. Huey unconstitutionally exercised the five peremptory challenges allotted to him, see Huey, 76 F.3d at 641, whereas Garcia objected to all five of Huey's race-based peremptory challenges. See id. at 639-40. In Mata v. Johnson, the Fifth Circuit further explained its holding in Huey. See Mata v. Johnson, 99 F.3d 1261, 1271 (5th Cir. 1996), vacated in part on reh'g by 105 F.3d 209 (5th Cir. 1997). The court acknowledged that "there was no question but that the case had to be retried with respect to [Garcia]." Id. at 1271. The only true question was whether Huey should receive a trial.
108. See Boyd, 86 F.3d at 721. Neither the Government, nor Boyd, objected when Boyd's counsel peremptorily struck the one black member of the venire. See id. It was not until the sentencing process that it became apparent that Boyd's counsel
the district court in *Boyd* never had to employ the three-part *Batson* test, and the defendant never had to offer a race-neutral reason for the strike. Contrarily, there was an immediate objection to Huey's use of race-based peremptory challenges. The significance of this distinction serves only to highlight a trial court's duty to either refuse to exclude the challenged juror or to demand a race-neutral reason for the peremptory from the proponent. The district court in *Boyd* had no affirmative duty to request Boyd to explain his peremptory challenge. The district court in *Huey*, however, did have such a duty because a party objected to the challenge.

Regardless of the weight accorded to the factual dissimilarities between the two cases, the conflict between the Fifth and Seventh Circuits persists. No matter how one views the cases, the Fifth Circuit's grant of a new trial to Huey cannot be reconciled with the Seventh Circuit's rejection of Boyd's appeal for a new trial.

**Possible Resolutions of the Conflicting Opinions**

After the Seventh Circuit denied his request for a new trial, Boyd applied for certiorari from the Supreme Court only to be denied. If and when the Court decides to resolve the issue of
Whether a defendant may be granted a new trial based upon his deliberate exercise of race-based peremptory challenges, prior precedent suggests the Court will probably side with the Seventh Circuit's reasoning in *Boyd*. Specifically, the Court will likely hold that a defendant may not profit from his own deliberate errors despite the uncompensated harm suffered by the excluded jurors and the judicial system.

Since its decision in *Batson* eleven years ago, the Court has altered its primary reasoning behind why race-based peremptory challenges offend the Constitution. In *Batson*, the Court gave three reasons why the state's use of race-based challenges is unconstitutional. First, race-based challenges infringe upon "a defendant's right to equal protection because [they] den[y] him the protection that a trial by jury is intended to secure." Second, race-based peremptory challenges violate the equal protection rights of the excluded jurors. Third and finally, race-based challenges "touch the entire community" because they "undermine public confidence in the fairness of our system of justice." Despite the Court's acknowledgment that race-based strikes harm the excluded jurors and society as a whole, the emphasis of the Court's opinion was on the equal protection rights of the black defendant.

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shown an interest in since the *Batson* case." See Rooney, supra note 7, at 1.
113. *Id*.
114. *See id* at 87 (noting that "by denying a person participation in jury service on account of his race, the State unconstitutionally discriminate[s] against the excluded juror").
115. *Id*.
116. *See generally id* at 86-87 (discussing the equal protection violation). Justice Powell, writing for the Court, spent only two paragraphs on the effects of race-based challenges on the excluded jurors, the judicial system, and society as a whole. See *id* at 87-88. He did not explain how a defendant might have standing to bring a claim on behalf of the excluded jurors, nor did he hypothesize about what would happen if the defendant were white and complained of race-based peremptory strikes that excluded black jurors. In such an example, the defendant would not be able to ground his objection on the fact that his own equal protection rights were violated; the defendant would have to rely upon the arguments that the excluded jurors and the judicial system were harmed. Extending Powell's reasoning to that situation, it would seem that the white defendant should have a valid objection, yet Powell did not explain how the mechanics of such an objection or appeal might work. Powell also avoided the thorny issue of third-party standing. It is fair to say that Powell
In the peremptory challenge cases following *Batson*, the Court shifted its emphasis from the equal protection rights of the defendant\footnote{117} to the equal protection rights of the excluded jurors\footnote{118} and to a concern for the judiciary's integrity.\footnote{119} In *Powers v. Ohio*, the Court found itself confronted with a case in which it could not use the defendant’s rights rationale to legitimate its holding.\footnote{120} In declaring that the prosecutor’s use of race-based peremptory challenges unconstitutionally denied the excluded jurors “a significant opportunity to participate in civic life,”\footnote{121} the Court spent considerable energy explaining the defendant’s third-party standing to bring an action based on the interests of excluded jurors.\footnote{122} Although the facts of the case

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\footnote{117}{The idea that peremptory challenges infringe upon the equal protection rights of the criminal defendant “is the oldest and most frequently invoked foundation for a ban on jury discrimination.” *Underwood*, *supra* note 3, at 728.}

\footnote{118}{*See generally* *Powers*, 499 U.S. at 406-09 (discussing the benefits provided to individuals by jury service and how racial discrimination in choosing jurors unfairly deprives the excluded individual of those benefits).}

\footnote{119}{*See generally id.* at 411-12 (noting the “cynicism” respecting juries that would result from permitting race-based challenges).}

\footnote{120}{The Court could not justify its holding based on protecting the defendant’s equal protection rights because the defendant was white and the excluded jurors were black. *See id.* at 402-03. As a result, the Court noted that its *Batson* decision served more than one purpose. *See id.* at 406. Not only did *Batson* serve “to protect individual defendants from discrimination in the selection of jurors,” but also, the decision “recognized that a prosecutor’s discriminatory use of peremptory challenges harms the excluded jurors and the community at large.” *Id.*}

\footnote{121}{*Id.* at 409.}

\footnote{122}{Justice Kennedy committed a significant portion of the Court’s opinion to the subject of third-party standing. *Id.* at 410-15. In a typical action, a litigant must claim a violation of his own rights or interests and may not assert those of a third party. *See id.* at 410. In certain instances, however, a party may bring a claim on another’s behalf. *See id.* To be able to bring an action based on the interests of a nonlitigant, three criteria must be met: (1) “[t]he litigant must have suffered an ‘injury in fact’”; (2) “the litigant must have a close relation to the third party”; and (3) “there must exist some hindrance to the third party’s ability to protect his or her own interests.” *Id.* at 411. In *Powers*, the Court held that the criminal defendant suffered an “injury in fact,” not because the excluded black members were more likely to vote for acquittal, but because the race-based peremptory challenges robbed the defendant of a “vital check against the wrongful exercise of power by the State and its prosecutors.” *Id.* In short, illicit peremptory challenges injure the defendant by...}
may not have allowed the Court to return to its emphasis on the defendant's rights, the Court seemed entirely willing and comfortable in placing the excluded jurors and society's interests upon center stage.

This evolution of reasoning continued through *Edmonson v. Lee*, *Georgia v. McCollum*, and *J.E.B.* as the Court placed increased emphasis on the rights of the excluded jurors and the importance of protecting the judiciary. *Edmonson* had its foundations in the rights of the excluded jurors and did not mention the rights of the litigant. *McCollum*, which held unconstitutional a defendant's use of race-based peremptory challenges, could not have been based on the rights of the defendant. Finally, in *J.E.B.*, the Supreme Court had the perfect opportunity to return to its earlier rationale announced in leading him to question the fairness and integrity of the judicial system. See *id.* at 411 ([R]acial discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process' and places the fairness of a criminal proceeding in doubt." (quoting *Rose v. Mitchell*, 443 U.S. 545, 546 (1979) (citation omitted)); see also *id.* at 411-14 (discussing the importance of fostering the perception of fairness in court in order to validate the verdict in the eyes of the defendant, the jurors, and their community).

Justice Scalia subsequently chastised the Court in *J.E.B. v. Alabama ex rel. T.B.* for "applying the uniquely expansive third-party standing analysis of *Powers v. Ohio*." 511 U.S. 127, 159 (1994) (Scalia, J., dissenting). Justice Scalia compared allowing the defendant to bring a claim on the excluded jurors' behalf to "making restitution to Paul when it is Peter who has been robbed." *Id.*

123. 500 U.S. 614, 628 (1991) ("To permit racial exclusion in [the courthouse] compounds the racial insult inherent in judging a [prospective juror] by the color of his or her skin.").

124. 505 U.S. 42, 56 (1992) (recognizing the injury suffered by the State "when the fairness and integrity of its own judicial process is undermined").

125. 511 U.S. at 140 (arguing that "the perpetuation of invidious group stereotypes" by the use of discriminatory challenges results in "the inevitable loss of confidence in our judicial system" and "may create the impression that . . . the 'deck has been stacked' in favor of one side").

126. See *Edmonson*, 500 U.S. at 619 (recognizing that "discrimination 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. In either case, race is the sole reason for denying the excluded venire-person the honor and privilege of participating in our system of justice") (citation omitted).

127. It was the defendant in *McCollum* who employed the race-based challenges. See *McCollum*, 505 U.S. at 44-45. Determined to find the defendant's challenges unconstitutional, the Court had no choice but to base its holding on the rights of the excluded jurors and the integrity of the judicial system. See *id.* at 48-50.
Batson—the defendant's equal protection rights. Both cases involved peremptory challenges used to exclude jurors sharing a similar trait with the defendants. Instead, the Court chose to embrace its more recent holdings. In making only a passing acknowledgment of the violation to the defendant's equal protection rights, the Court in J.E.B. quickly proceeded to its now familiar concern with the rights of the excluded jurors. The Court itself acknowledged that in recent peremptory challenge cases, it had shifted its focus.

This change of focus to the rights of the excluded jurors and the integrity of the judicial system, will impact the Court if it takes the opportunity to resolve the issue presented by the split between the Fifth and Seventh Circuits. The Fifth Circuit in Huey seemed to pick up where the Supreme Court left off in J.E.B. When the Fifth Circuit granted Huey a new trial, it held that critics might see "some irony" in such a decision, but the court was compelled to undertake its course of action in order not to "undermine the very foundation of our system of justice." The Fifth Circuit, like the Supreme Court in J.E.B., arrived at its decision by considering the welfare of the system as a whole. The holding, while creating an absurd result in regard to Huey, arguably produced a desirable result for the judicial system.

128. See J.E.B., 511 U.S. at 129; Batson v. Kentucky, 476 U.S. 79, 82-83 (1986). Whereas Batson entailed the state striking black veniremen to the detriment of a black defendant, see Batson, 476 U.S. at 82-83, J.E.B. had the state striking male veniremen to the alleged disadvantage of the male defendant, see J.E.B., 511 U.S. at 129.

129. See J.E.B., 511 U.S. at 140 ("The litigants are harmed by the risk that the prejudice that motivated the discriminatory selection of the jury will infect the entire proceedings.").

130. See id. at 140-42.

131. See id. at 140-41 ("In recent cases we have emphasized that individual jurors themselves have a right to nondiscriminatory jury selection procedures.").

132. See supra text accompanying notes 7-12.


134. Compare Huey, 76 F.3d at 641 (noting the Court's concern that discriminatory jury selection "impigns the integrity of the judicial system and the community at large") with J.E.B., 511 U.S. at 140 ("The community is harmed by the . . . inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders.").
The Fifth Circuit, perhaps "sacrificing" the conviction in order to promote the overall integrity of the judicial system, acted in accordance with one of the basic tenets of criminal procedure—detering future constitutional violations by setting an example.\textsuperscript{135} Desiring to prevent such race-based challenges in the future, the court set an example by granting Huey a new trial and by admonishing trial judges to be on their toes for unconstitutional \textit{Batson} challenges.\textsuperscript{136} "[W]e believe... such mischief can be avoided with relative ease by the exercise of diligent oversight and sound judgment on the part of trial judges, and through their proper application of the well-known three-step inquiry for ensuring race-neutral use of peremptory challenges."\textsuperscript{137}

The Fifth Circuit was undoubtedly correct in stating that the excluded black jurors suffered a harm. In its attempt to prevent similar harms to prospective future veniremen, however, the court chose to ignore a fundamental aspect of trial procedure: A party cannot cry foul based upon its own deliberate error.\textsuperscript{138} As

\textsuperscript{135} Criminal procedure is replete with examples of foregoing the conviction of a particular defendant for the loftier goal of deterring future violations of people's constitutional rights. For example, the exclusionary rule of the Fourth Amendment disallows the use of any evidence seized by the government in violation of a defendant's Fourth Amendment right to be free from illegal searches and seizures. \textit{See Weeks v. United States}, 232 U.S. 383 (1914). The purpose of the exclusionary rule "is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." \textit{Elkins v. United States}, 364 U.S. 206, 217 (1960). Through another rule of exclusion, the Supreme Court protects a different cornerstone of criminal procedure: the right of a defendant to be free from compelled self-incrimination. The Court in \textit{Miranda v. Arizona}, 384 U.S. 436 (1966), held that a prosecutor may not use statements made by a defendant during custodial interrogation unless the defendant has been apprised of his rights. \textit{See id.} at 444. The \textit{Miranda} decision protects a defendant's Fifth Amendment right while also deterring police officers from pursuing confessions through trickery, threats, or a defendant's ignorance of his rights. \textit{See id.} at 476.

\textsuperscript{136} \textit{See Huey}, 76 F.3d at 641-42.

\textsuperscript{137} \textit{Id.} at 642. In the event that no litigant objects to a possibly discriminatory peremptory challenge, a subsequent appeal based on the alleged \textit{Batson} violation will fail. \textit{See Dias v. Sky Chefs, Inc.}, 948 F.2d 532, 535 (9th Cir. 1991). A \textit{Batson} objection must be timely. \textit{See United States v. Thompson}, 827 F.2d 1254, 1257 (9th Cir. 1987). The opponent of the peremptory should object "as soon as possible, preferably before the jury is sworn."\textit{ Dias}, 948 F.2d at 534.

\textsuperscript{138} \textit{See generally United States v. Boyd}, 86 F.3d 719, 725 (7th Cir. 1996), \textit{cert. denied}, 117 S. Ct. 1825 (1997) ("[T]he principle that no one is entitled to profit from his own wrong governs the content of trials as well as the imposition of criminal sanctions."). The Seventh Circuit found this point to be one that could not be log-
much as a court may wish to curtail future *Batson* violations, it may not take a prophylactic measure such as granting a defendant a new trial if by doing so, the court abandons a basic procedural foundation. Recognizing the Fifth Circuit's desire to prevent later *Batson* abuses, the Seventh Circuit noted the impossibility of such a goal under current trial principles:

If a decision of the Supreme Court gave the accused the right to bootstrap his own violation of *Batson* into a new trial, we would be obliged to enforce that holding. But there is no such decision, and the principle that no one is entitled to profit from his own wrong governs the conduct of trials as well as the imposition of criminal sanctions.\(^9\)

If other cases presenting the same issue find their way to the Supreme Court, the Court will undoubtedly side with the Seventh Circuit's position. Despite the Court's increasing willingness to decide peremptory challenge cases based upon the excluded jurors' rights and the integrity of the judicial system, the Court will not be able to overcome the unavoidable obstacle presented by a defendant who seeks to profit from his own error. This one principle of error blocks the evolving nature of the peremptory, and the Court may thus find one direction in which it will be prevented from expanding the reach of the peremptory.

*The Continuing Confusion Underlying the Circuit Split*

Regardless of any future resolution of the narrow issue identified in *Huey* and *Boyd*, the ongoing confusion created by the shifting foundation of the peremptory challenge is sure to cause similar conflicts among other courts in the coming years. Not only must courts interpret the recent trend of the Supreme Court to focus more on the harms felt by excluded jurors and the judicial system than on the rights of the defendant,\(^140\) but also, courts must wade through case law containing "judicial interpret-

\(^{9}\) If a decision of the Supreme Court gave the accused the right to bootstrap his own violation of *Batson* into a new trial, we would be obliged to enforce that holding. But there is no such decision, and the principle that no one is entitled to profit from his own wrong governs the conduct of trials as well as the imposition of criminal sanctions.

tations of Batson [that] are all over the map.”

The confusion surrounding the peremptory challenge also requires judges to continuously ponder whether the basis of the challenge should or will be extended to prohibit challenges based on considerations typically afforded heightened scrutiny. Furthermore, trial courts must practice “diligent oversight and sound judgment” to prevent litigants from employing the peremptory challenge to create “mischief” as witnessed in Huey. Trial courts must also listen to litigants’ proffered race- and gender-neutral reasons for their peremptory challenges and then separate the valid reasons from the purely pretextual. Finally, the courts must keep some record of the race, gender, and other characteristics of excluded jurors who might later be the subject of a Batson hearing.

The burden and confusion created by Batson and its offspring have caused a judicial nightmare. The Supreme Court once again needs to enter the fray and finally give direction to the shifting peremptory challenge.

POSSIBLE DIRECTIONS FOR THE EVOLVING PEREMPTORY CHALLENGE

The peremptory challenge has eroded significantly—from an unassailable defense against biased jurors to one subject to numerous equal-protection attacks. The turmoil, litigation, and confusion created by Batson challenges makes predicting the future of this litigant’s tool difficult. It is, however, possible

143. United States v. Huey, 76 F.3d 638, 642 (5th Cir. 1996).
144. See supra text accompanying notes 1-6. The Batson decision in 1986 marked the beginning of tremendous change for the peremptory challenge as it “substantially limited an attorney’s use of the peremptory challenge for the first time.” See Collins, supra note 68, at 947.
145. See GARCIA, supra note 6, at 200 (recognizing that “the Court’s jurisprudence
to outline four possible directions for the peremptory. First, the court may find comfort in the status quo and continue to rule that race- and gender-based peremptory challenges are unconstitutional. Under this approach, the Court eventually might extend its *Batson* holding to include not only race and gender, but also religion, age, disability, and other discriminatorily excluded groups. Second, the Court might abolish the peremptory challenge altogether. Third, the Court might choose to maintain the current system while relaxing the requirement on lower courts to screen thoroughly peremptory challenges. The Court could favor form over substance and claim to strike down all race- and gender-based challenges when, in fact, it would be allowing litigants to camouflage illegitimate challenges in pretext. Finally, the Court could turn back the clock eleven years and reinstate peremptory challenges that cannot be questioned and do not need to be explained.

*Maintaining the Status Quo*

The first and most likely course for the Court to pursue is to continue to enforce its *Batson* decision to the extent that it applies to race and gender, prosecutor and criminal defendant, and plaintiff and civil defendant. To continue on its current path, the Court would emphasize its belief that race- and gender-based challenges hurt more than just the opposing party. The Court now recognizes that appearances are often as important as substance; how litigants, bystanders, and jurors view the judicial system is of the utmost concern.

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146. *See infra* text accompanying notes 150-70.
147. *See infra* text accompanying notes 171-205.
149. *See infra* text accompanying notes 216-32.
154. *See Underwood*, *supra* note 3, at 727. Professor Underwood, in noting how important the jury system is in the United States, compared the injuries suffered by excluded jurors to the harm done to our democratic ideals when groups of voters are disenfranchised. *See id.* Even though the outcome of an election or a verdict may
The trend of the Court to focus less on the individual litigants' rights and more on the excluded jurors' rights, and on the judicial system's projection of fairness, leads some scholars to believe that the Court should extend *Batson* to protect other discriminated groups. It would seem that the Court could extend *Batson* to protect any discriminatorily excluded jurors who belong to groups previously afforded heightened scrutiny by the Court. By preventing peremptory strikes that discriminate against certain other groups, the Court would create a better cross-section of the community on jury panels. Defendants judged by juries composed of a greater percentage of their peers would have more confidence in the integrity and fairness of the system.

not necessarily differ when certain citizens are not allowed to participate, the mere act of excluding those people "impairs public confidence." *Id.* Professor Underwood believes that it is the "derivative harms" that arise from unconstitutional challenges that "reinforce our shared commitment to eradicate such discrimination." *Id.*

155. *See, e.g.*, Cheryl G. Bader, *Batson Meets the First Amendment: Prohibiting Peremptory Challenges that Violate a Prospective Juror's Speech and Association Rights*, 24 HOFSTRA L. REV. 567, 602-03 (1996) (stating the need to expand *Batson* to protect veniremen from being peremptorily challenged based on their associations with certain groups and causes and their practice of free speech); Frederick L. Brown et al., *The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse*, 14 NEW ENG. L. REV. 192, 234 (1978) (citing the advantages of protecting jurors excluded because of race, age, sex, and ethnicity); Andrew Weis, *Peremptory Challenges: The Last Barrier to Jury Service for People with Disabilities*, 33 WILLAMETTE L. REV. 1, 64-66 (1997) (predicting that religious affiliation and illegitimacy will be the next grounds upon which the Court extends *Batson*).

In dissenting to the Court's decision in *J.E.B.*, Justice Scalia predicted that the Court would not stop with declaring race- and gender-based challenges to be unconstitutional. *See J.E.B.*, 511 U.S. at 160-62 (Scalia, J., dissenting). The Court had the opportunity to review a case that extended *Batson* to include strikes based upon religious affiliation, but it declined to do so. *See State v. Davis*, 504 N.W.2d 767 (Minn. 1993), cert. denied, 511 U.S. 1115 (1994).

156. *See Collins*, *supra* note 68, at 974. In his dissent from the Court's denial of certiorari in *Davis*, Justice Thomas commented that "given the Court's rationale in *J.E.B.*, no principled reason immediately appears for declining to apply *Batson* to any strike based on a classification that is accorded heightened scrutiny under the Equal Protection Clause." *Davis*, 511 U.S. at 1117 (Thomas, J., dissenting), denying cert. to 504 N.W.2d 767 (Minn. 1993) (involving peremptory strikes based upon religious-affiliation).


158. In *J.E.B.*, Justice Scalia commented on the importance of the appearance or
But extension of the *Batson* holding will only exacerbate problems already present with peremptory challenges. It may be that any further extension of *Batson* comes at a time when the peremptory challenge is already dead.\footnote{159} By carving away at the peremptory challenge until opposing counsel may at any time elect to question its use, the Court has molded the challenge into something more resembling the for cause challenge.\footnote{160}

Other problems accompanying the extension of *Batson* to include religion-based\footnote{161} or other attacks include longer trials, more confusing and unwieldy *Batson* appeals, and an increased inability of litigants to act on hunches concerning a venireman's bias.\footnote{162} Trials would be longer because voir dire would have to be extended for the parties to better inform themselves about the members of the venire in case of a later *Batson* challenge requiring an explanation.\footnote{163} *Batson* "mini-hearings"\footnote{164} are already too common\footnote{165} and time consuming, and any extension of the restrictions on the peremptory challenge will "increase[] the projection of fairness in the judicial system. See *J.E.B.*, 511 U.S. at 161 n.3 (Scalia, J., dissenting). Justice Scalia wrote that "[w]ise observers have long understood that the appearance of justice is as important as its reality. If the system of peremptory strikes affects the actual impartiality of the jury not a bit, but gives litigants a greater belief in that impartiality, it serves a most important function." Id. (Scalia, J., dissenting); see also, Gerard N. Magliocca, Case Note, *Arbitrary Rationality*, 106 YALE L.J. 1959, 1964 (1997) (emphasizing the importance of litigants' perceptions of the composition of the jury).}

projection of fairness in the judicial system. See *J.E.B.*, 511 U.S. at 161 n.3 (Scalia, J., dissenting). Justice Scalia wrote that "[w]ise observers have long understood that the appearance of justice is as important as its reality. If the system of peremptory strikes affects the actual impartiality of the jury not a bit, but gives litigants a greater belief in that impartiality, it serves a most important function." Id. (Scalia, J., dissenting); see also, Gerard N. Magliocca, Case Note, *Arbitrary Rationality*, 106 YALE L.J. 1959, 1964 (1997) (emphasizing the importance of litigants' perceptions of the composition of the jury).

\footnote{159} See Ferdico, *supra* note 37, at 1202, 1207.

\footnote{160} See *J.E.B.*, 511 U.S. at 148 (O'Connor, J., concurring) (noting that in extending *Batson* to gender-based challenges, the Court will "make the peremptory challenge less discretionary and more like a challenge for cause").

\footnote{161} For a discussion concerning religion-based *Batson* challenges, see Barton, *supra* note 68 (arguing in favor of the extension of *Batson* to include religion-based challenges).

\footnote{162} See *J.E.B.*, 511 U.S. at 156 (Rehnquist, C.J., dissenting).

\footnote{163} See generally JEFFREY T. FREDERICK, *MASTERING VOIR DIRE AND JURY SELECTION: GAINING AN EDGE IN QUESTIONING AND SELECTING A JURY* 176 (1995) (stating that "it is important to maximize the information gained through voir dire" and suggesting ways to elicit the most information from perspective jurors).

\footnote{164} *J.E.B.*, 511 U.S. at 147 (O'Connor, J., concurring).

\footnote{165} See id. at 175-76 (Scalia, J., dissenting) (describing the confusion existing in the lower courts as a result of the lack of clarity in the standards for exercising peremptory challenges following *Batson* and *J.E.B.*). See generally FREDERICK, *supra* note 163, at 173 ("Peremptory challenges have been under increased scrutiny since *Batson v. Kentucky*.").
number of cases in which jury selection—once a sideshow—will become part of the main event."\textsuperscript{166}

Under the current jury selection system, the trial judge carries a significant burden because he must separate legitimate peremptory challenges from objectionable discriminatory ones.\textsuperscript{167} Sorting pretext from true showings of bias on an ad hoc basis leaves the trial judge with much discretion;\textsuperscript{168} it also forces the judge to be constantly aware of discriminatory uses of the peremptory. Chief Justice Burger wrote in his dissent in \textit{Batson} that the \textit{Batson} inquiry "is sure to tax even the most capable of counsel and judges since determining whether a prima facie case has been established will 'require a continued monitoring and recording of the... composition of the panel present and prospective.'\textsuperscript{169}

\begin{footnotesize}
\begin{enumerate}
\item J.E.B., 511 U.S. at 147 (O'Connor, J., concurring).
\item See Christopher E. Smith & Roxanne Ochoa, \textit{The Peremptory Challenge in the Eyes of the Trial Judge}, 79 JUDICATURE 185, 185 (1996) (recognizing the "significant difficulties" a trial judge faces when separating pretext from actual race- and gender-based challenges).
\item A trial judge's decision in the third step of the \textit{Batson} inquiry "is accorded great deference, and is reviewed under a 'clearly erroneous' standard." United States v. Seals, 987 F.2d 1102, 1109 (5th Cir. 1993).
\item Batson v. Kentucky, 476 U.S. 79, 130 (1986) (Burger, C.J., dissenting) (quoting People v. Wheeler, 22 Cal. 3d 258, 294 (1978)). Justice Marshall also predicted the terrible burden that trial judges would be forced to carry in assessing the explanations given by the striking party. See \textit{id.} at 106 (Marshall, J., concurring). The difficulty faced by the trial judge is only matched by the ease with which counsel can offer neutral explanations as to why he challenged a particular juror. See Michael J. Raphael & Edward J. Ungvarsky, \textit{Excuses, Excuses: Neutral Explanations Under Batson v. Kentucky}, 27 U. Mich. J.L. Reform 229, 236-37 (1993). Raphael and Ungvarsky wrote of their research results and described the possible scenarios involving a hypothetical black juror named "Pat":

In virtually any situation, an intelligent prosecutor can produce a plausible neutral explanation for striking Pat despite the prosecutor's having acted on racial bias. The prosecutor can show either that Pat has served on a jury before, or that Pat has never served on a jury before. The prosecutor can explain that Pat is young or that Pat is old. He can say that he does not want a juror with Pat's occupation for this case, or that Pat is unemployed .... The prosecutor can even focus on a random aspect of the juror's character or past dealings, even if it only remotely relates to some aspect of the case or to the legal process in general .... Consequently, given the current case law, a prosecutor who wishes to offer a pretext for a race-based strike is unlikely to encounter difficulty in crafting a neutral explanation.

\textit{Id.} at 237.
\end{enumerate}
\end{footnotesize}
Despite the obvious difficulties inherent in the current peremptory challenge system, the Supreme Court will, in all probability, continue to enforce its *Batson* decision. The Court is also likely to broaden the scope of *Batson* to include categories protected in other circumstances by heightened scrutiny. The Court’s jurisprudence is sure to cause nightmares for attorneys, judges, and parties as they demand explanations for those challenges that, by definition, are beyond explanation.\textsuperscript{170}

**Abolishing the Peremptory Challenge**

A second direction in which the Court could travel would be to abolish the peremptory challenge. At least three distinct arguments exist for this seemingly drastic action.\textsuperscript{171} First, many believe the peremptory challenge currently exists in name only.\textsuperscript{172} Second, some commentators contend that the peremptory challenge, although once a necessary institution, no longer serves a useful purpose.\textsuperscript{173} Third and finally, some believe that the peremptory, by its very nature, is an undemocratic and purposefully discriminatory tool that serves only the objectionable goal of excluding citizens from exercising their fundamental

\textsuperscript{170} See Van Dyke, *supra* note 24, at 145. Justice O'Connor recognized that demanding race- and gender-neutral explanations for peremptory challenges flies in the face of the original use and understanding of the peremptory challenges. She has argued that as the Court piles "layer by layer, additional constitutional restraints on the use of the peremptory, [the Court] force[s] lawyers to articulate what [it] know[s] is often inarticulable." *J.E.B.*, 511 U.S. at 148 (O'Connor, J., concurring).

\textsuperscript{171} A fourth, less contentious, objection to the peremptory challenge is that it is simply ineffective. Several studies show that lawyers exercising their peremptory challenges often are poor judges of how the individual jurors will vote. See, e.g., Norbert L. Kerr et al., *On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity: An Empirical Study*, 40 AM. U. L. REV. 665, 726 (1991); 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, 528-30 (1978). The reasons why attorneys are so ineffective in predicting jurors' voting patterns may be that voir dire is too brief to gather necessary information and the attorneys never receive any feedback as to how their predictions panned out. See Hans & Vidmar, *supra* note 1, at 76.


right of jury duty.\textsuperscript{174}

The definition of a peremptory challenge is "[t]he right to challenge a juror without assigning, or being required to assign, a reason for the challenge."\textsuperscript{175} As currently limited by \textit{Batson}, the peremptory challenge no longer exists. Of course, the vast majority of peremptory challenges that parties exercise do not require an explanation because the other party does not object or, if it does object, it fails to make a prima facie case of discrimination. Nonetheless, the possibility always remains that an objection to the peremptory challenge will require an explanation when, by definition, none can be required.\textsuperscript{176}

The second argument supporting the retirement of the peremptory challenge draws support from the highly evolved nature of the for cause challenge and from the perceived harms and confusion caused by the current form of the peremptory challenge.\textsuperscript{177} Proponents of this argument cite all of the evils recognized by other detractors of the peremptory challenge.\textsuperscript{178}

\textsuperscript{174} The Court long ago noted that the peremptory challenge holds a power of exclusion and not of inclusion. The peremptory "is not of itself a right to select, but a right to reject jurors." United States v. Marchant, 25 U.S. (12 Wheat.) 480, 482 (1827).

\textsuperscript{175} \textit{BLACK'S LAW DICTIONARY} 1136 (6th ed. 1990).


\begin{quote}
Our system permits two types of challenges: challenges for cause and peremptory challenges. Challenges for cause obviously have to be explained; by definition, peremptory challenges do not. "It is called a peremptory challenge because the prisoner may challenge peremptorily, on his own dislike without showing any cause." Analytically, there is no middle ground: A challenge either has to be explained or it does not. It is readily apparent, then, that to permit inquiry into the basis for a peremptory challenge would force "the peremptory challenge [to] collapse into the challenge for cause."
\end{quote}

\textit{Id.} (Burger, C.J., dissenting) (citations omitted).

\textsuperscript{177} See generally \textit{Melilli}, supra note 173, at 501 ("The costs in terms of the rights of potential jurors and the loss of representative juries is significant. . . . Any 'gain' in terms of the litigants' private interests in gaining more favorable factfinders simply deserves no consideration.").

\textsuperscript{178} See \textit{id.}

\begin{quote}
[T]he exclusion from jury service because of group stereotyping brands the excluded group members as inferior, insults individuals by reducing their worth as jurors to a cosmetic or trivial characteristic, makes underrepresented groups less accepting of the court system and its results, and injures society as a whole by frustrating the ideal of equal
With the modern requirement that jury pools represent a fair cross-section of society and the ability of litigants to employ for cause challenges to remove veniremen who appear biased during voir dire, the once indispensable peremptory challenge might be an outdated relic.\textsuperscript{179}

Finally, many argue against the peremptory challenge because it allows counsel to exclude qualified jurors for illegitimate reasons. In his concurring opinion in \textit{Batson}, Justice Marshall stated that "[t]he inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal justice system."\textsuperscript{180} Justice Marshall found the three-part \textit{Batson} test to be inadequate protection against race-based peremptory challenges.\textsuperscript{181} According to critics such as Justice Marshall, it is too easy for a party to camouflage a discriminatory basis for a peremptory strike in pretextual explanations.\textsuperscript{182}

Critics state that the peremptory challenge is the "most undemocratic feature of our democratic trial system."\textsuperscript{183} The pe-

\begin{itemize}
  \item \textit{Id.}
  \item \textsuperscript{180} \textit{Batson}, 476 U.S. at 107 (Marshall, J., concurring).
  \item \textsuperscript{181} Justice Marshall noted two distinct reasons why the \textit{Batson} test would not be sufficient. First, defendants often cannot satisfy the first step of the inquiry, showing a prima facie case of discrimination, unless the race-based challenges are glaringly obvious. See \textit{id.} at 105 (Marshall, J., concurring). If, for instance, a few black men remained on the jury, but many others had been struck through allegedly discriminatory peremptory challenges, the defendant might not be able to show a prima facie case of discrimination as to the excluded jurors. Second, even if the defendant manages to show a prima facie case of discrimination, the trial judge may have tremendous difficulty sorting the illegitimate motives from the legitimate ones. See \textit{id.} at 105-06 (Marshall, J., concurring). Justice Marshall later seemed to modify his stance on peremptory challenges in \textit{Holland v. United States}, 493 U.S. 474 (1990), by asserting that prohibiting peremptory challenges that "exclude members of distinctive groups on the basis of their 'distinctive' attribute would leave the peremptory challenge system almost entirely untouched." \textit{Id.} at 502 (Marshall, J., dissenting).
  \item \textsuperscript{182} See \textit{Batson}, 476 U.S. at 105-06 (Marshall, J., concurring); GARCIA, supra note 6, at 195.
\end{itemize}
remptive challenge permits parties to strike qualified potential jurors who have shown no evidence of being impartial or biased towards one of the parties.\textsuperscript{184} By allowing counsel to strike perfectly able jurors, the peremptory challenge harms excluded jurors and lowers their respect and confidence in the judicial system.\textsuperscript{185} The fact that the peremptory challenge occurs in the courtroom and under the approving eye of the trial judge is ironic.\textsuperscript{186} It is all the more ironic when one considers that the allegedly undemocratic peremptory challenge is a tool used to help form a trial jury, which "is universally understood as an important institution of democratic government."\textsuperscript{187}

A federal district court recently issued a strongly worded opinion calling for a complete ban on the use of peremptory challenges.\textsuperscript{188} The court stated that "peremptory challenges \textit{per se} violate equal protection."\textsuperscript{189} While presiding over an employment discrimination case in which both the plaintiff and defendant alleged \textit{Batson} violations by the other party, the exasperated trial judge noted that having for cause challenges should be sufficient and peremptory challenges should be abolished.\textsuperscript{190}

\textsuperscript{184} See GARCIA, supra note 6, at 192; HANS \& VIDMAR, supra note 1, at 72.
\textsuperscript{185} See generally J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 140 (noting the "inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders").
\textsuperscript{186} In its discussion of how a private litigant's use of a race-based peremptory challenge offends the Constitution, the Court in \textit{Edmonson v. Leesville Concrete Co.} took considerable pains to describe the sanctity of the courtroom. "Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds. Within the courtroom, the government invokes its laws to determine the rights of those who stand before it." \textit{Edmonson v. Leesville Concrete Co.}, 500 U.S. 614, 628 (1991). If one agrees that peremptory challenges are, \textit{per se}, undemocratic and discriminatory, then the fact that litigants exercise the strikes with the blessing of the trial courts should offend all sensibilities.
\textsuperscript{188} See Minetos v. City Univ. of New York, 925 F. Supp. 177, 183 (S.D.N.Y. 1996).
\textsuperscript{189} Id. at 185.
\textsuperscript{190} See id. at 182.
The mechanics of abandoning the peremptory challenge do not pose much of an obstacle. Despite the long history and continued use of the peremptory challenge, it has no constitutional basis.\footnote{191} A litigant has no absolute right to exercise peremptory challenges.\footnote{192} Not only do critics of the peremptory point to its lack of constitutional authority, but also, they claim that, despite its widespread use, the peremptory challenge has little practical use as it fails to accomplish its stated goal of selecting an impartial jury.\footnote{193} Despite the noble underlying rationale of selecting an impartial jury, in reality, litigants “do not desire impartiality but rather favorability.”\footnote{194} Counsel for the parties expend considerable energy and resources trying to “pick” the members of the venire who will be the most favorable to their cause.\footnote{195} The exercise of peremptory challenges thus involves manipulative and deceptive tactics by attorneys under the guise of impartiality.\footnote{196}

Proponents of the peremptory challenge admit that such abuses exist; however, they also point out that the peremptory challenge still serves a legitimate role.\footnote{197} No matter what abuses occur, the challenge, like the challenge for cause, acts as a safe-

\begin{footnotes}
\item[191] See Stilson v. United States, 250 U.S. 583, 586 (1991) (“There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges to defendants in criminal cases . . . .”).
\item[192] See United States v. Boyd, 86 F.3d 719, 723 (7th Cir. 1996), cert. denied, 117 S. Ct. 1825 (1997). Nowhere in the Constitution does it state that a litigant or, more specifically, a criminal defendant has a right to peremptorily challenge prospective jurors. Peremptory challenges are provided for by statute. See FREDERICK, supra note 163, at 173; GARCIA, supra note 6, at 196.
\item[193] It is widely accepted that the primary reason for the peremptory challenge is to seat an impartial jury. See J.E.B., 511 U.S. at 137 n.8 (“[T]he only legitimate interest [that one] could possibly have in the exercise of [one’s] peremptory challenges is securing a fair and impartial jury.”); Kerr et al., supra note 171, at 681.
\item[194] HANS & VIDMAR, supra note 1, at 74.
\item[195] See Phoebe C. Ellsworth, Some Steps Between Attitudes and Verdicts, in INSIDE THE JUROR 42, 44 (Reid Hastie ed., 1993).
\item[196] See HANS & VIDMAR, supra note 1, at 74. Critics find that the peremptory’s tactical and strategic role in the litigant’s trial plan offends the reason for the peremptory’s existence. See generally Brown et al., supra note 155, at 223-28 (describing the reasons attorneys make peremptory challenges and the problems underlying the assumptions those attorneys make concerning jury preferences).
\item[197] See J.E.B., 511 U.S. at 147-48 (O’Connor, J., concurring; see also Barbara L. Horwitz, Comment, The Extinction of the Peremptory Challenge: What Will the Jury System Lose by Its Demise?, 61 U. CIN. L. REV. 1391, 1439-40 (1993) (“Yet, the peremptory is as important today as ever in achieving what it was designed to accomplish.”).
\end{footnotes}
guard to litigants, all of whom deserve a fair trial. Furthermore, even if the peremptory strikes overwhelmingly serve to strike unfavorable, as opposed to impartial, veniremen, they still present the appearance of impartiality and fairness, which may be just as important as actual impartiality. Attorneys, who are expected to be zealous advocates for their clients, have a duty to exclude jurors who they feel will not be favorably predisposed to their clients. The ultimate response to the abolitionists’ argument against the peremptory challenge is that the peremptory challenge is a tool of exclusion, not inclusion. The peremptory does not give the parties an opportunity to choose a jury of their liking; it only permits the parties to exclude possibly impartial jurors.

The abolition of the peremptory challenge is unlikely to occur as the Court, despite its narrowing of the challenge, continuously affirms its belief that the peremptory “occupies an important position in . . . trial procedures.” Only Justice Marshall has

198. Opponents may object to the fact that some attorneys use their peremptory challenges to select potentially favorable jurors. Besides the fact that peremptory challenges do not allow counsel to select jurors but only to reject jurors, the use of the peremptory to somehow create a favorable jury is not altogether misguided. It may be that a completely impartial jury does not exist. See United States v. Burr, 25 F. Cas. 49, 50-51 (C.C. Va. 1807) (No. 14, 692f) (“Were it possible to obtain a jury without any prepossessions whatever respecting the guilt or innocence of the accused, it would be extremely desirable to obtain such a jury; but this is perhaps impossible, and therefore will not be required.”). When faced with an impartial venire, surely a litigant cannot be faulted for striking those whom he views as unsympathetic in order to create a favorably disposed jury.

199. See supra note 158 (discussing the importance of public perception to the judicial process).

200. See HANS & VIDMAR, supra note 1, at 74.

201. See United States v. Marchant, 25 U.S. (12 Wheat.) 480, 482 (1827) (“The right, therefore, of challenge, does not necessarily draw after it the right of selection, but merely of exclusion.”).

202. Batson v. Kentucky, 476 U.S. 79, 98 (1986). Not only has the Supreme Court confessed its belief in the utility of the peremptory challenge, but also, trial judges continue to support the peremptory challenge. See Smith & Ochoa, supra note 167, at 185. A recent survey of federal district court judges concluded that “the prospects for reform of the peremptory challenge are dim.” Id. at 189. Only 15.4% of the responding judges called for the removal of all peremptory challenges. See id. at 188, tbl. 3. Nearly two-thirds of the judges replied that they would keep the current system if it were their decision. See id. Smith and Ochoa concluded that the survey’s results showed “strong levels of support for and acceptance of most aspects of current peremptory challenge practices in the federal trial courts.” Id. at 189.
openly called for the death of the peremptory challenge. In the Court's opinions narrowing the effective reach of the peremptory, the Court has taken great pains to note that its decisions will not cause the peremptory to fade into oblivion. It is clear that the Court is not ready to cast out the peremptory challenge; whether the Court emasculates the peremptory to the point of ineffectiveness is another issue.

Allowing Shallow Explanations

The third manner in which the Court could approach the peremptory challenge in the coming years consists of allowing litigants to use ostensibly race- and gender-based challenges as long as the challenges appear neutral. In fact, the Court recently gave life to this simple idea in *Purkett v. Elem.* In *Purkett*, the Court denied a black criminal defendant's *Batson* claim after the prosecution used two peremptory challenges to strike both black male jurors from the jury pool. The prosecutor explained his challenges by pointing to the two black jurors' long hair and goatees. The Court held that a litigant's explanation of his peremptory does not have to be "persuasive, or even plausible."

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204. In *Batson*, the Court commented, "[W]e do not agree that our decision today will undermine the contribution the challenge generally makes to the administration of justice." *Id.* at 98-99. The Court in *Powers v. Ohio* affirmed what it made clear in *Holland*, "the peremptory challenge procedure has acceptance in our legal tradition." 499 U.S. 400, 409 (1991) (citing *Holland v. United States*, 493 U.S. 474, 481 (1990)). Later, in *Georgia v. McCollum*, the Court echoed its statement in *Batson* as it declared, "We do not believe that this decision will undermine the contribution of the peremptory challenge to the administration of justice." 505 U.S. 42, 57 (1992). Most recently, the Court explained, "Our conclusion that litigants may not strike potential jurors solely on the basis of gender does not imply the elimination of all peremptory challenges." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143 (1994).
205. *See generally Collins*, *supra* note 68 (noting that the Supreme Court may continue to extend the situations in which peremptory challenges are prohibited); *Ferdico*, *supra* note 37 (acknowledging the Supreme Court's tendency to restrict the kinds of situations in which peremptory challenges can be used).
207. *See id.* at 766.
208. *See id.* The prosecutor told the trial court that he "[didn't] like the way they looked, with the way the hair is cut." *Id.*
209. *Id.* at 768. The Court stated that the "legitimate reason" required by the pro-
It is unclear as to what the significance of the *Purkett* decision will be.\textsuperscript{210} It is, however, possible that the decision represents an attempt by the Court to retreat from its post-*Batson* jurisprudence.\textsuperscript{211} Instead of taking the equal protection argument regarding peremptory challenges to its logical conclusion,\textsuperscript{212} the Court may settle for the less controversial and more discrete method of turning a blind eye towards certain illicit challenges. The Court may decide that the best way to handle the ever-expanding equal protection analysis for peremptory challenges is to allow litigants to explain their challenges based on superficial, even ridiculous, reasons.\textsuperscript{213} If the Court does allow shallow explanations for arguably discriminatory peremptory challenges, then "only a very stupid [litigant] will ever again lose a *Batson* claim."\textsuperscript{214}

\begin{footnotes}
\item[210] See Richard C. Reuben, *Excuses, Excuses: Any Old Facialy Neutral Reason May Be Enough to Defeat an Attack on a Peremptory Challenge*, A.B.A. J., Feb. 1996, at 20. Reuben spotlighted the widely divergent opinions of many practitioners as to the ultimate conclusion of *Purkett*. See id. Opinions concerning the decision vary from a belief that *Purkett* "rips the heart out of *Batson v. Kentucky*" to a belief that *Purkett* "only restates existing law." Id. Reuben concluded that legal scholars agree *Purkett* will, at a minimum, alter the way in which attorneys approach *Batson* hearings. Because they know appellate courts will not second-guess trial judges' *Batson* decisions, attorneys will now be forced to focus all of their efforts on the trial court level. See id. The court in *Minetos v. City Univ. of New York*, 925 F. Supp. 177 (S.D.N.Y. 1996), predicted *Purkett* would "add more years of vexatious litigation." Id. at 183.


\item[212] The logical conclusion for the Court to reach in the wake of *Batson* would be to apply equal protection scrutiny to all peremptory challenges leveled against groups deserving heightened scrutiny. See *Davis v. Minnesota*, 511 U.S. 1115, 1116-17 (1994) (Thomas, J., dissenting), denying cert. to 504 N.W.2d 767 (Minn. 1993). The Court in *Davis* refused to review a case in which a prosecutor peremptorily excluded a Jehovah's Witness under the belief that such a juror would be loath to convict criminal defendants. See *Davis*, 504 N.W.2d at 768. Justice Thomas, joined by Justice Scalia, wrote in dissent that "given the Court's rationale in *J.E.B.*, no principled reason immediately appears for declining to apply *Batson* to any strike based on a classification that is accorded heightened scrutiny under the Equal Protection Clause." *Davis*, 511 U.S. at 1117 (Thomas, J., dissenting).

\item[213] Justice Stevens, dissenting in *Purkett*, noted that the prosecutor's explanation "may well be pretextual as a matter of law." *Purkett*, 514 U.S. at 777 (Stevens, J., dissenting).

\item[214] Donald A. Dripps, *'I Didn't Like the Way He Looked'*: TRIAL, July 1995, at 94, 96; see also Greg B. Enos, *Discriminatory Peremptory Jury Strikes in Civil Trials*, 58
Despite the Court's recent holding in *Purkett*, it seems unlikely that the Court will continue to favor form over substance by allowing pretextual explanations to *Batson* challenges. Allowing such explanations is incompatible with the Court's prior holdings. Because *Batson* and *J.E.B.* specifically disallow race- and gender-based challenges, allowing such challenges when explained by pretext would certainly offend the principles laid down in these prior cases.

**Restoring the Pre-Batson Approach**

The fourth and final approach the Court may choose to take when confronted with the problematic peremptory challenge entails returning the challenge to its pre-*Batson* form. By revisiting its jurisprudence prior to 1986, the Court would restore the logic and usefulness to the challenge while relieving judges and litigants of the burden of trying to interpret, practice, and enforce the "ambiguous, confused jurisprudence [of] the Supreme Court."

**THE ORIGINAL AND BEST APPROACH TO PEREMPTORY CHALLENGES**

The first reason for returning the peremptory to its pre-*Batson* state is merely an issue of semantics and logic. It is incorrect and misleading to call the challenge that currently exists a "peremptory challenge." A challenge subject to questioning

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215. *See* generally *Imbriani*, supra note 211, at 916 (noting that the standard set by the Court in *Purkett* "has the potential to foster unjust practices and results in the selection of jurors").

216. Once again, the peremptory could be a challenge "without a reason stated, without inquiry and without being subject to the court's control." *Swain v. Alabama*, 380 U.S. 202, 220 (1965).

217. *GARCIA*, supra note 6, at 200.

218. *See* *Dripps*, supra note 214, at 94 (noting that constitutionally challenging the
and explanation is, by definition, not peremptory.\textsuperscript{219}

The second reason for returning the peremptory challenge to its prior form lies in the usefulness of the challenge as a safeguard when a challenge for cause does not succeed. A party who attempts to excuse a juror for cause but fails for lack of proof should be able to exclude the juror peremptorily; otherwise, that juror might be biased due to the party's unsuccessful strike.\textsuperscript{220} This may be especially true in those jurisdictions that force the parties to exercise their for cause strikes in the company of the venire.\textsuperscript{221}

A third reason supporting the return of the peremptory challenge to its pre-\textit{Batson} form is the role the peremptory challenge has in boosting the litigants' and the public's confidence in the jury system. Blackstone understood that by permitting a defendant to act upon his inexplicable gut instinct in excluding seemingly biased veniremen, the defendant would be more likely to accept the verdict.\textsuperscript{222} The peremptory challenge gives the parties some sense of control over who will judge them.\textsuperscript{223}

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\textsuperscript{220} Blackstone long ago offered this reason for why the peremptory challenge is necessary: "[U]pon challenges for cause shown, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment; to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases, peremptorily to set him aside." Lewis v. United States, 146 U.S. 370, 376 (1892) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *353).
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\textsuperscript{221} See generally Frederick, supra note 163, at 173 (noting the danger of alienating "a potential juror whom you cannot remove with a peremptory challenge if the court rejects the motion for a challenge for cause").
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\textsuperscript{222} Blackstone noted:

As every one must be sensible, what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another; and how necessary it is that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom he has conceived a prejudice even without being able to assign a reason for such his dislike.

\textit{Lewis}, 146 U.S. at 376 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *353).
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\textsuperscript{223} See HANS & VIDMAR, supra note 1, at 72; see also Comment, \textit{The Right of Peremptory Challenge}, 24 U. CHI. L. REV. 751, 762 (1957) (noting that peremptory challenges prevent litigants from feeling that the composition of the jury is complete-
Court's concern over the possibility that excluded jurors will feel alienated and lose confidence in the judiciary pales beside the need to have litigants, particularly criminal defendants, feel as though they have been judged fairly.\textsuperscript{224}

A fourth rationale behind purging the peremptory challenge of all of its current restrictions lies in the fact that all prospective jurors, regardless of race, gender, or ethnicity, are equally subject to be excluded by a peremptory challenge.\textsuperscript{225} This type of discrimination is different from the type that excludes jurors from being accepted as a part of the venire.\textsuperscript{226} Whereas wholesale discrimination against any group offends the Equal Protection Clause, individualized peremptory strikes exercised by litigants do not rise to the level of implying that a particular group or race is unfit for jury duty.\textsuperscript{227} Protecting certain groups of people from being excluded by a peremptory when every other group is exposed to the possibility of exclusion is discriminatory in itself.\textsuperscript{228}

By returning the peremptory challenge to its natural and logical state, the Court will be able to avoid wandering through the

\textsuperscript{224} Justice Thomas warned about the implications of restricting a criminal defendant's peremptory challenge. By placing the excluded jurors' rights in front of the defendant's rights, the Court "produces a serious misordering of [its] priorities." Georgia v. McCollum, 505 U.S. 41, 61 (1992) (Thomas, J., concurring). Justice Thomas claimed that the handicapped peremptory would leave the defendant with less protection than before. See id. (Thomas, J., concurring).

\textsuperscript{225} See Batson v. Kentucky, 476 U.S. 79, 137 (1986) (Rehnquist, J., dissenting) ("[T]here is simply nothing 'unequal' about the State's using its peremptory challenges to strike blacks from the jury in cases involving black defendants, so long as such challenges are also used to exclude whites in cases involving white defendants . . . .").

\textsuperscript{226} See id. at 122-23 (Burger, C.J., dissenting).

\textsuperscript{227} See id. (Burger, C.J., dissenting). Taking this argument one step further, one might ask why it is incorrect to surmise that jurors of different ages, sexes, races, religions, or financial status might think or react differently when confronted by identical facts. See George P. Fletcher, \textit{Political Correctness in Jury Selection}, 29 SUFFOLK U. L. REV. 1, 16 (1995). Professor Fletcher argued that we cannot ignore the cultural differences that may affect potential jurors' insights and judgments. See id. Instead of turning a blind eye towards these cultural differences, Professor Fletcher encourages the acknowledgement of these differences by permitting litigants to strike whomever they desire and allowing the litigants' views to offset one another. See id.

labyrinthine complexities of third-party standing. Ridding the peremptory of its current restrictions would also alleviate the problems trial judges face in sorting pretext from gender- and race-neutral explanations for challenged strikes. There would be fewer appeals based upon discriminatory strikes because the litigant would have to demonstrate the discriminatory nature of the strike using a provable history of discrimination.

Despite the stability that would accompany the return of the pre-

Batson peremptory challenge, the Court is unlikely to proceed in such a direction. Unshackling the peremptory challenge from its current restrictions would require the Court to overturn Batson and its offspring.

CONCLUSION

In narrowing the scope of the peremptory challenge, the Supreme Court all but destroyed "an important litigator's tool and a fundamental part of the process of selecting impartial juries." Through a series of cases beginning with Batson, the Court chipped away at the peremptory challenge to sculpt it into its present state—a grotesque and emaciated form of the original. Through this jurisprudence, the Court created many problems where few previously existed. The terrible toll taken by Batson and its progeny is evident in cases such as Boyd and Huey, which produced a circuit split over a trial procedure firmly established since the beginning of our nation.

The Court should have the courage to disassociate itself with its recent precedents and to cast its lot with the centuries of cases upholding the unrestricted use of the peremptory challenge. By returning the peremptory challenge to its former incarnation,
the Court would, in one bold move, replace confusion with clarity while sacrificing none of the protection deserved by defendants, potential jurors, or the judicial system.

*Coburn R. Beck*