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# DO NON-DISCRIMINATORY PEREMPTORY STRIKES REALLY EXIST, OR IS A JUROR'S RIGHT TO SIT ON A JURY DENIED WHEN THE COURT ALLOWS THE USE OF PEREMPTORY STRIKES?

*By Jeanette E. Walston**



## I. INTRODUCTION

The United States Constitution affords equal protection of the laws to all citizens under the Equal Protection Clause of the Fourteenth Amendment.[1] The Fourteenth Amendment also contains a Due Process Clause, stating that no State shall "deprive any person of life, liberty, or property, without due process of law."[2] Under the justice system in the United States we place great weight on a defendant's right to a fair and impartial trial. The Sixth Amendment guarantees an impartial jury trial to defendants in criminal prosecutions,[3] which has been made applicable to the States through the Fourteenth Amendment.[4] States, however, do not have a constitutional obliga-

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1. U.S. CONST. amend. XIV, § 1.
2. *Id.*
3. U.S. CONST. amend. VI.
4. Duncan v. Louisiana, 391 U.S. 145, 149 (1968).



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tion to provide a jury trial in civil lawsuits;[5] although in Texas, trial by jury is freely given if timely requested and the fee is paid.[6]

This Comment explores the right of citizens to be part of the justice system by exercising their right to sit on a jury. A citizen's right to be empanelled, however, could directly affect a party's right to a fair and impartial trial. Thus, some safeguards, such as challenges for cause, must be kept in place. However, the use of peremptory strikes may be interfering far more with a citizen's right to sit on a jury than with a party's right to a fair and impartial trial.

In *Rivera v. Illinois*, the Supreme Court reiterated that it is up to the states to determine the existence and exercise of peremptory challenges, although peremptory challenges themselves are not a constitutional guarantee with regards to an impartial jury and a fair trial.[7] Although the Supreme Court has left this task to the states, the Court has held that a juror may not be stricken based on race,[8] ethnicity,[9] or gender.[10] This Comment evaluates which states have extended the restriction to other categories such as religion and age and discusses the extent to which other categories should be included. Thus, as state law continues to broaden the equal protection of jurors under the Equal Protection Clause, the question must be asked: When is the exercise of a peremptory strike not purposeful discrimination against a potential juror?

## II. HISTORY OF THE CHALLENGE FOR CAUSE

The Sixth Amendment to the United States Constitution provides: "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."[11] An impartial jury can be defined as "a jury not impeded or influenced by improper instructions on the law applicable to the particular factual issue they must decide; and not being even possibly influenced by improper questions intentionally put to witnesses who appear before it."[12] Thus, to ensure that a defendant receives a fair and impartial trial, parties are entitled to an unlimited number of challenges for cause.[13] "Challenges for cause are the means by which partial or biased jurors should be eliminated."[14]

5. Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211, 216 (1916).
6. TEX. R. CIV. P. 216.
7. *See* Rivera v. Illinois, 129 S. Ct. 1446 (2009).
8. *See* Batson v. Kentucky, 476 U.S. 79, 79 (1986).
9. *See* Hernandez v. New York, 500 U.S. 352, 355 (1991).
10. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 129 (1994).
11. U.S. CONST. amend. VI.
12. County of Maricopa v. Maberry, 555 F.2d 207, 224 (9th Cir. 1977).
13. Gray v. Mississippi, 481 U.S. 648, 653 n.3 (1987).
14. United States v. Gonzalez, 214 F.3d 1109, 1111 (9th Cir. 2000).

Parties are not only entitled to challenges for cause in criminal cases under the Sixth Amendment, but in civil suits as well. In federal court, "the court may exclude a juror for good cause."[15] In Texas, a challenge for cause is defined as "an objection made to a juror, alleging some fact which by law disqualifies him to serve as a juror in the case or in any case, or which in the opinion of the court, renders him an unfit person to sit on the jury."[16]

To disqualify a juror for cause, the party must show either an actual bias (bias in fact) or an implied bias (bias conclusively presumed as a matter of law).[17] "Bias can be revealed by a juror's express admission of that fact, but, more frequently, jurors are reluctant to admit actual bias, and the reality of their biased attitudes must be revealed by circumstantial evidence."[18] "A juror is considered to be impartial 'only if he can lay aside his opinion and render a verdict based on the evidence presented in court . . . .'"[19] "When a juror is unable to state that she will serve fairly and impartially despite being asked repeatedly for such assurances, [there] can [be] no confidence that the juror will 'lay aside' her biases or her prejudicial personal experiences and render a fair and impartial verdict."[20]

Thus, a challenge for cause is the main tool that a litigant can use to ensure that he or she receives a fair and impartial trial by jury.

## III. HISTORY OF THE PEREMPTORY STRIKE

Chief Justice White stated the history and importance of the peremptory strike best in *Swain v. Alabama*.[21] According to Justice White, English law provided for a number of strikes on both sides, and was "settled law . . . until after the separation of the Colonies."[22] Although peremptory strikes did not continue to be widely used in England, the idea transferred to the States where Congress, early on, began setting the number of strikes permitted in criminal cases.[23] The States promptly followed suit by conferring peremptory challenges by statute for "both sides in both criminal and civil cases."[24] Chief Justice Burger also discussed the history and importance of the peremptory strike in his dissent in *Batson v. Kentucky*,[25] the landmark case

15. FED. R. CIV. P. 47(c).
16. TEX. R. CIV. P. 228.
17. *Gonzalez*, 214 F.3d at 1111.
18. United States v. Allsup, 566 F.2d 68, 71 (9th Cir. 1977).
19. *Gonzalez*, 214 F.3d at 1114 (quoting Patton v. Yount, 467 U.S. 1025, 1037 n.12 (1984)).
20. *Id.*
21. Swain v. Alabama, 380 U.S. 202, 212–13 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986).
22. *Id.*
23. *Id.* at 214–15.
24. *Id.* at 215–17.
25. *Batson*, 476 U.S. at 118–20 (1986) (Burger, J., dissenting).

that changed the use of peremptory strikes in the United States and is still causing great debate today. His analysis begins with the use of the strikes in criminal trials by the Romans, where each side was permitted fifty strikes, then moves to the history under English and American law reiterating Justice White's analysis from *Swain*.[26]

In addition to the history, the importance of the peremptory strike is discussed: "The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise."[27] A peremptory strike is different than a strike for cause in that "[t]he essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control."[28] The Texas Rules of Civil Procedure state virtually the same principle: "[a] peremptory challenge is made to a juror without assigning any reason therefor."[29] Although under current law the underlying nature of the peremptory challenge remains the same, the use of the peremptory challenge has been somewhat restricted and could continue to be further restricted, as this Comment will explore.

The number of peremptory strikes a party may exercise has varied depending on the nature of the case and its jurisdiction. Currently, each party to a civil action in federal court is allowed three peremptory strikes.[30] For a criminal action in federal court, it varies by what charge is sought: twenty for each side when the government is seeking the death penalty;[31] six for the government and ten for the defendant when seeking imprisonment of more than a year;[32] and when seeking only a fine or imprisonment for less than a year, both sides are allowed three.[33] The Texas Rules of Civil Procedure require twenty-four prospective jurors, or twelve in county court, to remain on the panel after strikes for cause have been determined in order for the parties to proceed in exercising peremptory strikes.[34] "[E]ach party to a civil action is entitled to six peremptory challenges in a case tried in the district court, and to three in the county court."[35] In criminal cases in Texas, it again varies with the type of case: fifteen for capital

26. *Id.* at 119.
27. *Swain*, 380 U.S. at 219.
28. *Id.* at 220.
29. TEX. R. CIV. P. 232.
30. 28 U.S.C. § 1870 (2006).
31. FED. R. CRIM. P. 24(b)(1).
32. FED. R. CRIM. P. 24(b)(2).
33. FED. R. CRIM. P. 24(b)(3).
34. TEX. R. CIV. P. 232.
35. TEX. R. CIV. P. 233.

cases,[36] ten for non-capital cases,[37] and five for each side in misdemeanor cases.[38]

## IV. THE *BATSON* CHALLENGE

### A. *History of* Batson

In 1880 the Supreme Court started laying the groundwork for what is now known as a *Batson* challenge, which began the process of limiting the use of peremptory strikes. The Court, in holding that a West Virginia statute was unconstitutional under the Fourteenth Amendment, stated that the statute "singled out and expressly denied" the right of colored people "to participate in the administration of the law, as jurors."[39] In addition, the Court stated that "[t]he very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds."[40] Therefore, a state denies a colored defendant equal protection of the laws when colored persons have been statutorily excluded from the jury.[41]

More than a century later the Supreme Court held, in its landmark decision of *Batson v. Kentucky*, that the Equal Protection Clause of the Fourteenth Amendment prohibited a prosecutor from using peremptory strikes to exclude jurors solely on the basis that their race was the same as the defendant's race.[42] Initially, under *Swain v. Alabama*, in order to establish a violation of the Equal Protection Clause, a defendant had to prove that the State systematically exercised peremptory challenges to exclude blacks from the jury based on race.[43] However, the *Batson* court overruled *Swain* and instead recognized that a defendant could make a prima facie showing of purposeful racial discrimination by relying solely on the facts of the defendant's case.[44]

*Batson* states that "the defendant initially must show that he is a member of a racial group capable of being singled out for differential treatment."[45] In determining "whether the defendant has made the requisite showing, the trial court should consider all relevant circum-

36. TEX. CODE CRIM. PROC. ANN. art. 35.15(a) (West 2006).
37. *Id.* art. 35.15(b).
38. *Id.* art. 35.15(c).
39. Strauder v. West Virginia, 100 U.S. 303, 308, 310 (1879), *abrogated by* Taylor v. Louisiana, 419 U.S. 522 (1975).
40. *Id.* at 308.
41. *See id.*
42. Batson v. Kentucky, 476 U.S. 79, 84 (1986).
43. *See* Swain v. Alabama, 380 U.S. 202, 227 (1965), *overruled by Batson*, 476 U.S. at 79.
44. *See Batson*, 476 U.S. at 95.
45. *Id.* at 94.

stances."[46] Once the defendant has established a prima facie case, "the burden shifts to the State to explain adequately the racial exclusion."[47] At this point, the State must come forward with a neutral explanation related to the case of why it exercised the peremptory strike.[48] Once the State has come forward with its neutral explanation, the trial court has the duty to decide whether the defendant established purposeful discrimination.[49] "In evaluating the race neutrality of an attorney's explanation, a court must determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the Equal Protection Clause as a matter of law."[50]

On appeal, the trial court's decision on whether the State came forward with a neutral explanation will stand, unless the reviewing court finds that it was "clearly erroneous."[51] However, the Supreme Court has not been very consistent on what constitutes a neutral explanation. In *Hernandez v. New York*, the Court sustained the prosecutor's explanation that he was doubtful that two venirepersons would be able to defer to the official translation of Spanish-language testimony by the court-approved interpreter, as a neutral explanation of striking two bilingual Latino venirepersons.[52] The Court went on to state that even if the use of peremptory strikes causes disparate impact, "[u]nless the government actor adopted a criterion with the intent of causing the impact asserted, that impact itself does not violate the principle of race neutrality."[53] But in *Snyder v. Louisiana*, the Supreme Court reversed the lower court's decision that a prosecutor's explanation that a prospective a juror's nervous behavior and concern for missing student-teaching requirements was enough to satisfy the neutral explanation requirement.[54] The Court held the prosecution's use of the peremptory strike was "motivated in substantial part by discriminatory intent."[55]

The Court also reversed a finding of a race-neutral explanation in *Miller-El v. Dretke*, holding that "the state court's conclusion was unreasonable as well as erroneous."[56] However, in this case, the prosecutor used peremptory strikes on two African-Americans based on their views of the death penalty, while not pursuing the use of peremptory strikes among other potential jurors who were white and

46. *Id.* at 96.
47. *Id.* at 94.
48. *Id.* at 97–98.
49. *Id.* at 98.
50. Hernandez v. New York, 500 U.S. 352, 359 (1991).
51. *Id.* at 369.
52. *Id.* at 363–72.
53. *Id.* at 362.
54. *See* Snyder v. Louisiana, 552 U.S. 472, 477–79 (2008).
55. *Id.* at 485.
56. Miller-El v. Dretke, 545 U.S. 231, 266 (2005).

made similar comments regarding a death penalty sentence for the defendant.[57] In fact, the prosecutor's proffered explanation to one of those strikes was a mischaracterization of the venireman's response during voir dire.[58] In addition, the Court stated "the appearance of discrimination is confirmed by widely known evidence of the general policy of the Dallas County District Attorney's Office to exclude black venire members from juries at the time Miller-El's jury was selected."[59]

In studying these three cases one can see the broad holdings by the Supreme Court of what constitutes a neutral explanation and when a trial court's decision will be found to be clearly erroneous. These inconsistencies should be taken into consideration when states are looking to extend *Batson* challenges or prohibit peremptory strikes all together.

### B. Batson *Extended*

*Batson* originally applied only to criminal cases in which the prosecutor executed a peremptory strike against a juror of the same race as the defendant.[60] However, five years later the Supreme Court extended *Batson*'s application of the Equal Protection Clause to civil trials.[61] The Court, in *Edmonson v. Leesville Concrete*, reasoned that the process of exercising a peremptory strike, whether exercised by a prosecutor or a civil attorney, was State action because the strike was permitted by statute and exercised in a court of law, and thus authorized by Congress.[62] This theory again surfaced when the Court held that the State could raise a *Batson* challenge against a criminal defendant's use of peremptory strikes.[63] The Court stated, "[r]egardless of who invokes the discriminatory challenge, there can be no doubt that the harm is the same-in all cases, the juror is subjected to open and public racial discrimination."[64]

Three years after the Supreme Court extended *Batson* challenges to the civil arena, the Court extended the application of *Batson* challenges to gender.[65] In doing so, the Court discussed the similarities between gender discrimination and racial discrimination throughout our country's history.[66] Specifically with regards to jury service, the Court noted that African-Americans and women share a history of

57. *Id.* at 244–52.
58. *Id.* at 244–45.
59. *Id.* at 253.
60. *See* Batson v. Kentucky, 476 U.S. 79, 82–83 (1986).
61. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 629–30 (1991).
62. *See id.* at 620–22.
63. Georgia v. McCollum, 505 U.S. 42, 59 (1992).
64. *Id.* at 49.
65. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 129 (1994).
66. *Id.* at 135–38.

total exclusion from the right to serve as a juror.[67] To hold that discrimination on the basis of gender was unconstitutional in jury selection, the Court first had to find that peremptory challenges based on gender stereotypes did not further "the State's legitimate interest in achieving a fair and impartial trial"[68] or "provide substantial aid to a litigant's effort to secure a fair and impartial jury."[69] Finding no legitimate government interest, the Court reached the conclusion that gender, like race, could not be used as a basis for striking potential jurors.[70] The U.S. Supreme Court has further extended the *Batson* application by holding that a *Batson* challenge does not require that the veniremember be of the same race as the defendant because the Equal Protection Clause prohibits racially discriminatory classifications and thus the defendant's race is irrelevant.[71]

The *Hernandez* case, discussed above, evaluated the prosecutor's race-neutral explanation, but referred both to race and ethnicity throughout the opinion, as the prospective jurors that were initially struck were of Latino descent.[72] The Court does not directly hold that a peremptory strike cannot be based solely upon one's ethnicity. However, it can be inferred that because the Court evaluated the issue under *Batson*, and held that the prosecutor did give a race-neutral reason for striking two venirepersons of Latino descent, that *Batson* also extends to ethnicity.[73]

### C. Batson *Procedure in Texas*

The Supreme Court of Texas has laid out a three-step process in resolving a *Batson-Edmonson* challenge that mirrors the procedure laid out in *Batson*.[74] The first step of the process requires the opponent of the peremptory challenge to establish a prima facie case of racial discrimination.[75] "During the second step of the process the burden shifts to the party who has exercised the strike to come forward with a race-neutral explanation."[76] The court in *Goode v. Shoukfeh* stated that a neutral explanation is an explanation that showed "the challenge was based on something other than the juror's race."[77] At this step the appellate court does not consider "whether the explanation is persuasive or even plausible."[78] Instead, "[t]he is-

67. *Id.* at 136.
68. *Id.* at 136–37.
69. *Id.* at 137.
70. *Id.* at 137–40.
71. Powers v. Ohio, 499 U.S. 400, 409 (1991).
72. *See* Hernandez v. New York, 500 U.S. 352 (1991).
73. *Id.* at 370.
74. Goode v. Shoukfeh, 943 S.W.2d 441, 445–46 (Tex. 1997).
75. *Id.* at 445.
76. *Id.*
77. *Id.*
78. *Id.*

sue for the trial court and the appellate court at this juncture is the facial validity of the explanation."[79] "In evaluating whether the explanation offered is race-neutral, a court must determine whether the peremptory challenge violates the Equal Protection Clause as a matter of law, assuming the reasons for the peremptory challenge are true."[80]

The third step requires the trial court to determine "if the party challenging the strike has proven purposeful racial discrimination, and the trial court may believe or not believe the explanation offered by the party who exercised the peremptory challenge."[81] Once the analysis has reached the third step, the question is no longer a matter of law, but instead "[t]he issue of whether the race-neutral explanation should be believed is purely a question of fact for the trial court" to determine.[82] In making its determination, the trial court should allow the party challenging the peremptory strike to rebut the race-neutral explanation offered by the party exercising the strike.[83] In order to determine whether the strike was racially motivated, the trial court should look at "all relevant circumstances."[84]

The Texas Court of Criminal Appeals "has held that the production of a prosecutor's juror information notes is both 'necessary and proper' when the prosecutor refreshes his or her memory regarding the exercise of peremptory challenges by reviewing those notes before the Batson hearing."[85] Under the Texas Rules of Evidence "if a witness uses the writing while testifying the adverse party must be given access to it, but if the writing is used before the witness testifies, the court has the discretion to order the writing disclosed to the adverse party."[86] *Goode* holds "that an Edmonson movant has the right to examine the voir dire notes of the opponent's attorney when the attorney relies upon these notes while giving sworn or unsworn testimony in the Edmonson hearing."[87] "Absent such reliance, the voir dire notes are privileged work product, and the movant may not examine them."[88]

Although *Batson* challenges and the procedure following a *Batson* challenge are made outside of the presence of the jury, just as challenges for cause are made outside of the presence of the jury, "the proceedings should be held in open court," and the rules of evidence

79. *Id.*
80. *Id.*
81. *Id.* at 445–46.
82. *Id.* at 446 (emphasis removed).
83. *Id.* at 452.
84. Davis v. Fisk Electric Co., 268 S.W.3d 508, 516 (Tex. 2008).
85. *Goode*, 943 S.W.2d at 448.
86. *Id.* at 449 (citing Tex. R. Evid. 612).
87. *Id.*
88. *Id.*

and procedure apply.[89] However, "unsworn statements of counsel may be offered to explain why the peremptory challenges were exercised."[90] In addition, juror information cards may be treated as exhibits and offered into the record as evidence, or the information from the juror card can simply be read into the record so that it appears in the written transcript of the proceedings.[91]

In order for the party in opposition of the peremptory strike to preserve a *Batson* challenge, the party must object to the peremptory strike and raise a *Batson* challenge before the jury is sworn.[92] On appeal, the standard of review for a *Batson-Edmonson* challenge in Texas is "abuse of discretion," which differs from the federal ("clearly erroneous") standard of review.[93] When "a party offers a facially race-neutral explanation, a reviewing court cannot reweigh the evidence and reach a conclusion different from that of the trial court unless . . . the explanation offered is too incredible to be believed."[94]

Given the inconsistencies by the Supreme Court in deciding what constitutes a race-neutral explanation under a clearly-erroneous standard of review, one could assume that under an abuse-of-discretion review the results are just as inconsistent. As previously discussed, states should consider these inconsistencies when determining the proper method or circumstance in which a party may exercise a peremptory strike.

## V. STATE COMPARISON OF THE USE OF PEREMPTORY STRIKES AND *BATSON* CHALLENGES

Recently the Supreme Court of the United States reiterated that it is up to the states to determine whether peremptory strikes will be allowed and to what extent a party in litigation may exercise a peremptory strike.[95] The Court also reiterated that it has long been recognized that peremptory challenges or peremptory strikes are not constitutionally guaranteed to any party in litigation and that states could abolish the use of peremptory strikes entirely without disturbing the constitutional guarantee of a fair and impartial trial by jury.[96] So where do the individual states stand with regard to the use of peremptory strikes and the limitation on the use of peremptory strikes that *Batson* set in motion?

89. *Id.* at 451.
90. *Id.*
91. *Id.*
92. *In re* K.M.B., 91 S.W.3d 18, 27 (Tex. App.—Fort Worth 2002, no pet.).
93. *Id.*
94. *Goode*, 943 S.W.2d at 448.
95. *See* Rivera v. Illinois, 129 S. Ct. 1446 (2009).
96. *Id.* at 1450.

### A. Batson *and Religion*

In Texas, *Batson* challenges have only been held to apply to race, gender, and ethnicity; following the post-*Batson* holdings of the Supreme Court of the United States.[97] The Texas Court of Criminal Appeals did, however, evaluate whether *Batson* challenges should be applied to discrimination on the basis of a potential juror's religion.[98] In the initial hearing, the court in *Casarez v. State* held that "the Equal Protection Clause of the Fourteenth Amendment prohibits the use of a peremptory challenge on the basis of religion absent a compelling governmental interest."[99] But, on rehearing, the court changed its opinion and stated that peremptory strikes could be exercised in discrimination against a person's beliefs.[100]

Like Texas, Minnesota has also directly addressed whether *Batson* applies to peremptory challenges based on religious affiliation, and decided that it did not apply, even when the prosecutor stated she struck the prospective juror because he was a Jehovah's Witness and she always challenged Jehovah's Witnesses when possible.[101]

In Missouri, a defendant claimed that the state's method of selecting potential jurors from lists of persons with driver's licenses systematically excluded all people of Amish faith because "driving an automobile is contrary to the Amish faith."[102] Thus, the defendant argued that the jury selection process systematically excluded a distinctive group of persons.[103] The court held that the defendant failed to meet his burden of proof on the issue.[104] However, if a defendant could show evidence that the jury selection process systematically excluded a distinctive group of persons, the structure of the jury would be unconstitutional.[105] The court did not hold that strikes based solely on religion were unconstitutional in themselves.[106]

However, several states have reviewed the issue of whether *Batson* should apply to peremptory strikes based on religion and found that it should. The first state to extend *Batson* challenges to religion appears to be New Jersey.[107] In deciding whether to extend *Batson*, the New Jersey Supreme Court looked to its constitution and other state statutes for guidance,[108] particularly relying on a statute that provided: "no citizen otherwise qualified to serve as a grand or petit juror shall

97. *See Goode*, 943 S.W.2d at 444–45.
98. Casarez v. State, 913 S.W.2d 468, 475 (Tex. Crim. App. 1994) (en banc).
99. *Id.* at 478–79 (initial hearing op.).
100. *Id.* at 495–96 (rehearing op.).
101. *See* State v. Davis, 504 N.W.2d 767, 767–68 (Minn. 1993) (en banc).
102. State v. Rogers, 825 S.W.2d 49, 51 (Mo. Ct. App. 1992).
103. *Id.*
104. *Id.*
105. *Id.*
106. *See id.*
107. *See* State v. Gilmore, 511 A.2d 1150 (N.J. 1986).
108. *Id.* at 1158–61.

be disqualified based on race, color, creed, ancestry, national origin, marital status or sex."[109] Although the case was not subsequently overturned, nine years later that statute was repealed and not replaced by any similar language.[110]

California also extended *Batson* to religion-based strikes, although the court did not directly evaluate the issue head on, but was instead evaluating a strike based on gender.[111] In its discussion of a fair trial, the court stated, "[e]very criminal defendant has a constitutional right to a trial by jury drawn from a representative cross-section of the community."[112] This court, like the New Jersey Supreme Court looked to its state constitution for guidance.[113] Under the California Constitution, the right to a jury composed of a representative cross-section of the community "is violated when the prosecution exercises its peremptory challenges to remove prospective jurors on the sole ground of group bias."[114] The court stated, "[g]roup bias exists when a party presumes certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds." However, the court later held that although exercising a peremptory strike solely on the basis of religion is unconstitutional, "exclusion of a juror on the basis of the juror's beliefs is a legitimate use of the peremptory challenge."[115] The court stated, "[w]e are persuaded that the peremptory challenge of a juror on the basis of the juror's relevant personal values is not improper even though those views may be founded in the juror's religious beliefs."[116]

Another state to extend *Batson* challenges to religion without facing the issue under a religion-based challenge, was Colorado.[117] The court was ultimately deciding the issue of whether jurors with Spanish surnames constituted a cognizable group that could not be discriminated against, and in its analysis stated:

> In order to avoid an open-ended definition of cognizable groups that could require extensive hearings each time defense counsel could discern a pattern in the prosecutor's exercise of peremptory challenges, we believe that a group is legally cognizable if it is defined on the basis of race, national origin, religion or sex.[118]

Florida also relied on its constitution in ruling that people of Jewish faith are a cognizable group and the purposeful exclusion of Jewish venirepersons based on their religion violates the state constitution

109. N.J. STAT. ANN. § 2A:72-7 (West 1974) (repealed 1995).
110. 1995 N.J. Sess. Law. Serv. 44 (West).
111. People v. Cervantes, 284 Cal. Rptr. 410, 414 (Ct. App. 1991).
112. *Id.*
113. *See id.*
114. *Id.*
115. People v. Martin, 75 Cal. Rptr. 2d 147, 151 (Ct. App. 1998).
116. *Id.*
117. *See* Fields v. People, 732 P.2d 1145, 1153 n.15 (Colo. 1987) (en banc).
118. *Id.*

and state law.[119] The court carefully pointed out however that the decision was not made under *Batson*, but under its own constitution and state law.[120]

The Supreme Court of Hawaii held that "the right to serve on a jury is a privilege of citizenship" and cannot be taken away because of "race, religion, sex, or ancestry."[121] In deciding the case the court looked at one of its state statutes for support, which provides: "[a] citizen shall not be excluded from jury service in this State on account of race, color, religion, sex, national origin, economic status, or physical disability . . . ," interestingly omitting the last two provisions of "economic status" and "physical disability" from the holding.[122]

Mississippi ruled along the same lines as California in holding that it is permissible to strike a potential juror for their actual beliefs, even when those beliefs are founded in religion, but that challenges based solely on a prospective juror's religion were unconstitutional.[123]

In accordance with its state constitution, New York found that excluding a prospective juror because he was Islamic violated the juror's right to serve on the jury, and held that the prosecutor cannot use peremptory challenges on the basis of religion unless the prosecutor has a sufficient neutral reason for the strike.[124]

A court in Arizona also agreed that *Batson* "encompass[es] peremptory strikes based upon religious membership or affiliation."[125]

It appears that the states that have extended the *Batson* principle, even if not under the federal law of *Batson* itself, looked closely to their constitutions and state statutes regarding procedures for jury service and the juror's right to serve on a jury.

### B. Batson *and Age*

In every federal appeals court that has addressed the issue of whether *Batson* extends to age, the decision has been unanimous that using a strike solely because of one's age does not violate equal protection.[126] The First Circuit held that a challenge to jurors between the ages of eighteen and thirty-four did not violate equal protection,[127] while the Eighth Circuit declined to extend *Batson* to peremptory strikes regarding jurors over the age of fifty.[128] Several circuits have held that age is a race-neutral factor under *Batson*, not an exten-

119. Joseph v. State, 636 So. 2d 777, 780 (Fla. Dist. Ct. App. 1994).
120. *Id.* at 781.
121. State v. Levinson, 795 P.2d 845, 849 (Haw. 1990).
122. HAW. REV. STAT. § 612-2 (2007).
123. *See* Thorson v. State, 96-DP-00144-SCT, 90-DP-00015-SCT (¶ 11), 721 So. 2d 590, 595 (Miss. 1998) (en banc).
124. *See* State v. Langston, 641 N.Y.S.2d 513, 513 (Sup. Ct. 1996).
125. State v. Purcell, 18 P.3d 113, 120 (Ariz. Ct. App. 2001).
126. United States v. Helmstetter, 479 F.3d 750, 753–54 (10th Cir. 2007).
127. United States v. Cresta, 825 F.2d 538, 544–45 (1st Cir. 1987).
128. Weber v. Strippit, Inc., 186 F.3d 907, 911 (8th Cir. 1999).

sion to which *Batson* should be applied.[129] The Third Circuit discussed that age-based peremptory strikes were subject to rational-basis analysis and it would likely determine that such strikes are rationally related to the legitimate objective of seating an impartial jury.[130]

Although it does not appear that any court, federal or state, has extended *Batson* challenges to peremptory strikes based on age, a court in Ohio held that excluding eighteen-, nineteen-, and twenty-year-olds from the list of people to select for jury service violated the defendant's right to a fair and impartial jury.[131] The court's reasoning was based similarly to those states that have extended *Batson* to religion, in theory that the jury was not made up of a fair cross-section of the community.[132] The court stated that "[a] fundamental objective of a fair jury system is that no person or class of persons be denied the right to serve on a jury because of status of race, religion, sex or age so long as they are competent."[133]

## VI. Are Strikes for Cause Sufficient in Eliminating Bias?

As discussed above, strikes for cause eliminate bias and ensure that a party gets a fair and impartial trial–a constitutional guarantee.[134] However, strikes for cause do not just eliminate bias or prejudice; they are statutorily created and can eliminate prospective jurors based on a number of other factors that by law disqualifies them from sitting on the jury. For example, in Texas, a panelist is disqualified from serving on a particular case, by law, not only when he or she has a bias or prejudice in favor or against a party in the case, but also when the prospective juror is a witness in the case, has a direct or indirect interest in the case, is related by consanguinity or affinity within the third degree to a party, or has already served as a juror in an earlier trial of the same case.[135] But, is that sufficient to eliminate all bias?

One argument of course, at least from the trial lawyer's perspective, is that peremptory strikes allow parties to strike those jurors who did not quite meet the requirements to be challenged for cause, but that the attorney can just "feel" are biased against his side of the case. The other side of that argument is that every potential juror walks into the courtroom with some amount of experience or knowledge outside of the evidence that will be presented, and thus eliminating a potential

129. United States v. Bryce, 208 F.3d 346, 350 n.3 (2d Cir. 1999); Howard v. Moore, 131 F.3d 399, 408 (4th Cir. 1997); United States v. Jimenez, 77 F.3d 95, 100 (5th Cir. 1996).

130. Pemberthy v. Beyer, 19 F.3d 857, 871 n.18 (3d Cir. 1994).

131. Ohio v. Willis, 293 N.E.2d 895, 896 (Akron Mun. Ct. 1972).

132. *Id.*

133. *Id.*

134. *See* United States v. Gonzalez, 214 F.3d 1109, 1111 (9th Cir. 2000).

135. Tex. Gov't Code Ann. § 62.105 (West 2005).

juror's bias, even if it is minimal, toward an issue is nearly impossible. In essence, using peremptory strikes makes the jury selection process not about selecting the best jurors for the case, but deselecting the worst.

The Supreme Court, in *Rivera*, reiterated that the use of peremptory strikes are not constitutionally guaranteed and that states are free to abolish them if they so choose.[136] In maintaining that the states are free to abolish peremptory strikes, the Court seems to be moving toward an era where strikes for cause may have to be sufficient in eliminating bias. If a state does abolish peremptory strikes, or begins to condemn their use in other categories, such as religion, the result may be an overwhelming flood of challenges for cause during voir dire. Such an increase would likely force courts to revisit the rules and procedures for excluding jurors for cause.

However, the rules' need for revision does not automatically mean a sole reliance on challenges for cause is a bad idea. First, constitutional guarantees for a fair and impartial trial would remain in place, because one way to eliminate bias in jury selection is to make a motion to strike a potential juror for cause. Second, the juror's right to serve on the jury would be upheld because the prospective juror is no longer being discriminated against for her age, occupation, or other characteristics. In the alternative though, a criminal defendant could argue that the extended time required to rule on for-cause challenges violates his Sixth Amendment "speedy"[137] trial right, if in fact those challenges were to increase in number.

Justice Marshall's concurring opinion in *Batson* states that the *Batson* decision "[would] not end the racial discrimination that peremptories inject into the jury-selection process."[138] The only way to accomplish that goal, he stated, was by "eliminating peremptory challenges entirely."[139] Although Justice Marshall was concerned specifically about the misuse of peremptory strikes in order to exclude blacks from juries,[140] his statement could very well be the foundation for eliminating peremptory challenges on the basis of all types of discrimination against potential jurors.

## VII. AN INDIVIDUAL'S RIGHT TO SERVE ON A JURY

Although "[a]n individual juror does not have a right to sit on any particular petit jury,"[141] individuals do have the right to serve on juries if they meet the statutory requirements. In addition, "individual jurors themselves have a right to nondiscriminatory jury selection proce-

136. Rivera v. Illinois, 129 S. Ct. 1446, 1450 (2009).
137. U.S. CONST. amend. VI.
138. Batson v. Kentucky, 476 U.S. 79, 102–03 (1986) (Marshall, J., concurring).
139. *Id.* at 103.
140. *See id.*
141. Powers v. Ohio, 499 U.S. 400, 409 (1991).

dures."[142] "The opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system."[143] However, the balance between a litigant's right to a fair trial and an individual's right to serve on a jury seems to complicate the matter.

"Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial."[144] It could be argued that an assessment of an individual's qualifications requires attorneys to discriminate against potential jurors based on their looks, education level, type of employment, whether the person has been involved in the litigation process before, or many other characteristics. But when two constitutional rights are in limbo—the right to a fair trial and the right to serve on a jury—the right of an attorney to pick a jury that will best decide the case seems quite inferior. Again, the constitution does not guarantee a perfect trial, but simply a fair and impartial trial. And, "[a] fundamental objective of a fair jury system is that no person or class of persons be denied the right to serve on a jury because of status of race, religion, sex or age so long as they are competent."[145]

In deciding to extend *Batson* to gender, the Court stated, "the Equal Protection Clause prohibits discrimination in jury selection on the basis of gender, or on the assumption that an individual will be biased in a particular case for no reason other than the fact that the person happens to be a woman or a man."[146] Following this reasoning, it seems that any peremptory strike should be prohibited by the Equal Protection Clause because when the strike is exercised, it is being exercised under the assumption that that particular individual will be biased in a particular case for no reason other than the fact he or she looks a certain way, has multiple tattoos, is wearing black finger nail polish, looks at the people conducting voir dire in an unusual manner, or any other characteristic or personality trait.

The Court has also stated, "[u]ndoubtedly, the overriding interest in eradicating discrimination from our civic institutions suffers whenever an individual is excluded from making a significant contribution to governance on account of his race."[147] More generally, the Court stated, "[r]estricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial."[148] Under the same reasoning, would this not extend to modern day discrimination

142. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 140–41 (1994).
143. *Powers*, 499 U.S. at 406.
144. *Batson*, 476 U.S. at 87.
145. Ohio v. Willis, 293 N.E.2d 895, 896 (Akron Mun. Ct. 1972).
146. *J.E.B.*, 511 U.S. at 146.
147. Johnson v. California, 545 U.S. 162, 172 (2005).
148. Taylor v. Louisiana, 419 U.S. 522, 530 (1975).

based on religion, political affiliation, sexual orientation, or a number of other categories in which citizens judge one another? In *Edmonson*, the Court stated, "by enforcing a discriminatory peremptory challenge, the Court has elected to place its power, property, and prestige behind the alleged discrimination."[149] If, indeed, strikes for cause eliminate bias and ensure a fair trial when correctly raised and decided, then any peremptory challenge would be discriminatory in nature against the potential juror. In addition, it would seem that by refraining from discriminating on any grounds, the court would maintain a more diverse and representative cross-section of the community, and thus impartiality would be guaranteed.

However, strikes made solely on the account of race were prohibited under *Batson* after the Court applied a heightened scrutiny analysis.[150] Similarly, peremptory strikes made on the basis of one's gender were also prohibited only after the Court applied a heightened scrutiny test to analyze whether there was in fact a legitimate governmental interest in exercising gender-motivated strikes, and found that the strikes did not further the interests of the state in achieving a fair and impartial trial.[151] For a juror to challenge a peremptory strike against him or her on the account of any other type of discrimination, the juror would have to survive a rational basis analysis.[152] To survive a rational basis analysis is virtually impossible, as the party raising the discrimination claim has the burden of proof, whereas in strict or intermediate scrutiny analysis the burden is on the State.[153] In addition, the State can defend upon a claim of discrimination under a rational basis test by coming up with any plausible reason for the discrimination.[154] Thus the State, or in this specific situation anyone exercising a peremptory strike against a category analyzed by rational basis, does not have to offer the exact reason the strike was based upon during voir dire, but any plausible reason it could have been based upon.[155]

For example, in *U.S. v. Watson* the defendant contended that the prosecutor's strikes of two blind venirepersons could be challenged under the same line of reasoning used in deciding *Batson*.[156] Watson based his contention on the right to serve on a jury as a fundamental right and the history of discrimination of disabled persons.[157] However, the D.C. Circuit stated, "in light of Supreme Court precedent holding that disabled persons are not a suspect class to which a height-

149. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 624 (1991).
150. *See* Batson v. Kentucky, 476 U.S. 79 (1986).
151. *See J.E.B.*, 511 U.S. at 145.
152. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).
153. *Id.*
154. *Id.*
155. *Id.*
156. United States v. Watson, 483 F.3d 828, 829 (D.C. Cir. 2007).
157. *Id.*

ened degree of scrutiny attaches, . . . this contention must fail."[158] The court went on to analyze the prosecutor's strikes of the two blind venirepersons under the rational basis test, and held that the government's reasons for the strikes were in fact "rationally related to ensuring a fair trial to Watson."[159] Here, the government stated that it exercised the strikes on the two blind venirepersons because a good portion of the State's evidence would be presented in visual form, such as photographs and videotapes.[160]

Thus, it seems near impossible for a prospective juror to succeed under the rational basis test in proving purposeful discrimination. This impossibility seems to stem from the balancing of the two rights—the litigant's right to a fair trial and an individual's right to sit on a jury. Because a litigant has the right to a fair trial, exercising peremptory strikes will most likely always be found to be rationally related to that right. Surely, it would be quite a different situation if certain people were banned from voting, even though both are civic duties for all Americans.

Rational basis is not the only obstacle a juror would have to overcome to show purposeful discrimination. "[T]he *Towers* Court recognized that, although individuals excluded from jury service on the basis of race have a right to bring suit on their own behalf, the 'barriers to a suit by an excluded juror are daunting.'"[161] Initially, some jurors have no desire to serve on a jury at all. Either the juror does not want to miss work because his or her pay would be greatly reduced, or the juror does not want to sit in a court and listen to two or more parties iron out their differences when he or she has his own "ironing" to do. If indeed the juror did want to serve on a jury, the juror would most likely be unaware of the intricacies of trial practice. It is doubtful that the juror would know what a "strike zone" was, or the difference between a challenge for cause and a peremptory challenge. And even if the juror were to know the differences, it would be very unlikely that the juror would be able to determine during the voir dire process how exactly he or she was not selected to serve on the jury. With none of those facts at the juror's fingertips, it would be very difficult for a juror to raise a claim of discrimination at all, because yes, the "barriers would be great."

However, the evaluation of standing under *Powers* and *McCollum* sheds light that a juror would be able to bring his or her own suit against the court for excluding him from serving on the jury.[162] Al-

158. *Id.*

159. *Id.* at 835.

160. *Id.* at 834.

161. Georgia v. McCollum, 505 U.S. 42, 56 (1992) (quoting Powers v. Ohio, 499 U.S. 400, 414 (1991)).

162. *See id.*; *Powers*, 499 U.S. at 414.

though in both decisions the context is race,[163] it could be reasonably assumed that the jurors right to initiate suit would be at least as broad as the particular state's extension of *Batson* beyond race, ethnicity, and gender. Yet Justice Thomas notes in his concurring opinion in *McCollum* that "[i]n effect, we have exalted the right of citizens to sit on juries over the rights of the criminal defendant, even though it is the defendant, not the jurors, who faces imprisonment or even death."[164] While the defendant is facing loss of liberty, and it most certainly cannot be argued that liberty is not one of the most fundamental rights in the United States, it is important to note again that the Court has recently stated that whether or not peremptory strikes are even allowed to be exercised within a particular state, has no bearing on the right to a fair and impartial trial.[165]

## VIII. CONCLUSION

Constitutional rights with regards to trials and other court proceedings should not be taken lightly. The rights of individuals to have a fair and impartial trial are firmly based in the Due Process Clause of the Fourteenth Amendment.[166] However, the right of an individual to serve on a jury is also fundamental. It can be compared to the right to access the courts, the right to vote, the right to serve the United States of America by joining the armed forces, the right to work or earn a livelihood, and many other rights that we deem as part of serving and contributing to our great nation.

Serving on juries however, is not just a right, but also a duty. The justice system of the United States would not function if jurors did not serve on juries and complete their civic duties. Thus, if the justice system requires individuals to serve on juries so that our system can continue to function under the notion that cases should be decided by peers of a representative cross-section of the community, then how is it that the same system can discriminate against the very people it requires to maintain its structure?

As *Powers* and *McCollum* discuss, a juror would face great difficulty in trying to prove that he or she was struck from the jury based on some discriminatory reason rather than for displaying bias or prejudice and being struck for cause.[167] However, both cases also state that the defendant can challenge the peremptory strike for that very reason, because of the fact that the defendant and the prospective juror are similarly situated.[168] Regardless of who is challenging the discrimination, the juror or a party involved in the litigation, it

163. *McCollum*, 505 U.S. at 48; *Powers*, 499 U.S. at 402.
164. *McCollum*, 505 U.S. at 62 (Thomas, J., concurring).
165. Rivera v. Illinois, 129 S. Ct. 1446, 1450 (2009).
166. U.S. CONST. amend. XIV, § 1.
167. *McCollum*, 505 U.S. at 56; *Powers*, 499 U.S. at 414–15.
168. *McCollum*, 505 U.S. at 56; *Powers*, 499 U.S. at 413–14.

seems that zero discrimination should exist in a country so rooted in its beliefs in freedom—freedom of choice in religion, lifestyle, and other private matters.

In conclusion, because a party's constitutional right to a fair and impartial trial is not violated by further restricting peremptory strikes or abolishing them all together, it seems that each state has a duty to take a second look at its constitution to determine where exactly a juror's right to serve on a jury comes into play. If indeed the state is relying on prospective jurors to sustain the justice system that it has created and maintained on behalf of its citizens, then those prospective jurors deserve an equal opportunity to sit on a jury and uphold their civic duty, as the state requires, regardless of whether eliminating peremptory strikes based on a certain classification falls under the *Batson* reasoning.