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Batson v. Kentucky and Federal Peremptory Challenge Law

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SUMMARY

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Batson v. Kentucky and Federal Peremptory Challenge Law

Parties in federal court—whether in civil or criminal trials—have two options to challenge potential jurors during jury selection: challenges for cause and peremptory challenges. Both types of challenges may be made during a process called *voir dire*, where the parties select a jury from the prospective jurors summoned by examining them for suitability. If *voir dire* reveals that a prospective juror is partial, biased, incompetent, or unqualified, then that prospective juror may be challenged for cause and removed, subject to court approval. Otherwise, a party must rely on peremptory challenges to remove a potential juror, which are challenges not based on cause and largely subject to the discretion of the party exercising them.

Parties using peremptory challenges face procedural and substantive hurdles. Procedurally, for federal civil trials, peremptory challenges are limited in number by statute and the Federal Rules of Civil Procedure; for federal criminal trials, the Federal Rules of Criminal Procedure govern peremptory challenges. Substantively, parties exercising peremptory challenges are limited by a line of Supreme Court precedent, starting with *Batson v. Kentucky*, which precludes the use of certain types of *discriminatory* peremptory challenges.

Modifying the peremptory challenge process would inherently involve rebalancing conflicting rights. On the one hand, *Batson* and its progeny clarified that parties and prospective jurors have a constitutional right to be free from peremptory challenges that discriminate based on race, ethnicity, or gender. On the other hand, the very discretion that makes peremptory challenges potential vehicles for discriminatory use also makes them valuable in excusing jurors who are unsuitable even if not to the degree of a challenge for cause. In that sense, the Supreme Court has described peremptory challenges as an important right of the accused, an "auxiliary" tool that helps to secure the right to an impartial jury guaranteed by the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment.

The Constitution does not guarantee a right to peremptory challenges, however, and the merits and drawbacks of peremptory challenges have long been a subject of debate. Some jurists and observers have questioned whether *Batson* goes far enough in prohibiting discriminatory peremptory challenges. Several states have either eliminated or restricted the use of peremptory challenges in their respective jurisdictions, and others are exploring such options. At the federal level, a high-profile effort to modify peremptory challenges in the 1970s was ultimately unsuccessful, and subsequent legislation to modify peremptory challenges has been scarce.

This report provides legal background on peremptory challenges at the federal level, with particular emphasis on how *Batson* and its progeny have limited such challenges. The report discusses the three-step *Batson* framework for evaluating whether a peremptory challenge is discriminatory and then examines the classifications *Batson* protects. The report concludes with an overview of selected legislative efforts to change peremptory challenges and related congressional considerations.

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Parties in federal court—whether in civil or criminal trials—have a powerful tool to strike potential jurors during jury selection: peremptory challenges. Peremptory challenges may be brought during *voir dire*, a process where the judge and the parties select a jury by examining the prospective jurors summoned.[1] If *voir dire* reveals that a prospective juror is partial or biased,[2] lacks sufficient qualifications,[3] or is otherwise incompetent,[4] that potential juror may be struck for cause and excused from serving on the jury.[5] A trial court may excuse a juror for cause on its own initiative or in response to a challenge for cause from one of the parties.[6] Challenges for cause are unlimited in *number* but require a judge to agree "that one of the bases for such a challenge is present."[7] If a party wishes to strike a potential juror whom he believes will be particularly hostile to his position but who nevertheless falls outside of the scope of a challenge for cause,[8] the party may raise a peremptory challenge—a second option for challenging potential jurors.[9]

At the federal level, statute and the rules of criminal and civil procedure set the number of peremptory challenges available,[10] and parties have considerable discretion in determining whether to exercise a peremptory challenge against a potential juror.[11] Traditionally, peremptory challenges could "be used to remove any potential juror for any reason—no questions asked."[12]

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[1] *Voir Dire*, BLACK'S LAW DICTIONARY (11th ed. 2019). *Voir dire* serves two purposes: "enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges." Mu'Min v. Virginia, 500 U.S. 415, 431 (1991). The exact *voir dire* procedures employed to attain those goals may vary. *See* Morgan v. Illinois, 504 U.S. 719, 729 (1992) ("The Constitution, after all, does not dictate a catechism for *voir dire*.... "); *accord* Skilling v. United States, 561 U.S. 358, 386 (2010) ("Jury selection, we have repeatedly emphasized, is 'particularly within the province of the trial judge.'" (*quoting* Ristaino v. Ross, 424 U.S. 589, 594-595 (1976)).

[2] *See, e.g.*, Adams v. Texas, 448 U.S. 38, 45 (1980) (explaining, in the context of death penalty objectors, that a juror may be challenged for cause if his "views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath"); United States v. Nelson, 277 F.3d 164, 202 (2d Cir. 2002) (concluding that the trial court abused its discretion in rejecting for-cause challenge of juror who "sufficiently revealed actual bias in his answers during *voir dire* to require his exclusion from the jury"); Wolfe v. Brigano, 232 F.3d 499, 502-3 (6th Cir. 2000) (similar).

[3] A federal statute specifies that an individual is unqualified to serve as federal jurors if he: lacks United States citizenship; is under the age of eighteen; has not resided for one year in the judicial district; is "unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form"; is "unable to speak the English language"; is "incapable, by reason of mental or physical infirmity, to render satisfactory jury service"; or has "a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored." 28 U.S.C. § 1865.

[4] *See, e.g.*, United States v. Hall, 989 F.2d 711, 714 (4th Cir. 1993) ("A defendant is constitutionally entitled to mentally competent jurors.").

[5] *See generally* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 22.3(c) (4th ed. 2021).

[6] United States v. Torres, 128 F.3d 38, 43 (2d Cir. 1997).

[7] *See* LAFAVE ET AL., *supra* note 5, § 22.3(c).

[8] Swain v. Alabama, 380 U.S. 202, 220 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986) ("While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable.").

[9] *Id.*; *see also* LAFAVE ET AL., *supra* note 5, § 22.3(d) (explaining that the peremptory challenge "serves functions that the challenge for cause could never fill" (quoting Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545, 552 (1975))).

[10] 28 U.S.C. § 1870; FED. R. CRIM. P. 24(b), (c)(4); FED. R. CIV. P. 47(b).

[11] Frazier v. United States, 335 U.S. 497, 505 (1948) ("The right of peremptory challenge is given, of course, to be exercised in the party's sole discretion.").

[12] Flowers v. Mississippi, 139 S. Ct. 2228, 2238 (2019); *see also Swain*, 380 U.S. at 220 ("[T]he essential nature of the

Today that discretion is limited by Supreme Court precedent, starting with *Batson v. Kentucky*,[13] which precludes the use of certain types of discriminatory peremptory challenges in both federal and state proceedings.[14] Although *Batson* involved race-based peremptory challenges, the Court has subsequently clarified that peremptory challenges that discriminate based on ethnicity and gender are similarly impermissible.[15]

Peremptory challenges have "very old credentials,"[16] are "one of the most important of the rights secured to the accused,"[17] and help secure the right to an impartial jury.[18] Some jurists and observers have criticized peremptory challenges, contending that they still allow for discrimination, despite *Batson*.[19] For example, critics pointed out that, in the 2021 Georgia state trial for the killing of Ahmaud Arbery, only one Black person remained on the jury after the defense attorneys used their peremptory challenges.[20] A number of states—including Arizona,[21] Washington,[22] and California[23]—have abolished or restricted the use of peremptory challenges in state courts.

This report provides legal background on peremptory challenges at the federal level, with particular emphasis on how *Batson* and its progeny have limited such challenges. The report examines the classifications protected by *Batson* and discusses the three-step *Batson* framework for evaluating whether a peremptory challenge is discriminatory. For each *Batson* step, the report summarizes the corresponding evidentiary burdens and standards along with a non-exhaustive

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peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control.").

[13] 476 U.S. 79 (1986).

[14] *Batson* involved the use of a peremptory challenge in a state proceeding, *id.* at 82, and subsequent Supreme Court cases have also applied *Batson* in federal proceedings. *E.g.*, United States v. Martinez-Salazar, 528 U.S. 304, 311-15 (2000) (federal proceeding).

[15] *See infra* § "Classifications Protected by Batson and Progeny."

[16] *Swain*, 380 U.S. at 212. Peremptory challenges date back to the 1700s in the United States and earlier in English common law. *Id.* at 212-14.

[17] *Id.* at 219 (quoting Pointer v. United States, 151 U.S. 396, 408 (1894)).

[18] U.S. CONST. amend. VI. For more information on the Sixth Amendment right to an impartial jury, and its applicability in state and federal proceedings, see generally Cong. Rsch. Serv., *Amdt6.6 Right to an Impartial Jury*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt6-6/ALDE_00000940/ (last visited Aug. 22, 2022).

[19] *See, e.g.*, *Batson*, 476 U.S. at 102-03 (Marshall J., concurring) (warning that "eliminating peremptory challenges entirely" is the only way to "end the racial discrimination that peremptories inject into the jury-selection process"), *and* Miller-El v. Dretke (*Miller-El II*), 545 U.S. 231, 267-73 (2005) (Breyer J., concurring) (surveying shortcomings with *Batson* test and peremptory challenges, and stating belief that it is "necessary to reconsider *Batson*'s test and the peremptory challenge system as a whole"). For additional discussion, including a summary of common critiques of peremptory challenges, see generally LAFAVE ET AL., *supra* note 5, § 22.3(d); CONNECTICUT JURY SELECTION TASK FORCE, REPORT OF THE JURY SELECTION TASK FORCE TO CHIEF JUSTICE RICHARD A. ROBINSON 18-23 (Dec. 2020), https://jud.ct.gov/Committees/jury_taskforce/ReportJurySelectionTaskForce.pdf#page=23 (hereinafter "Connecticut Task Force").

[20] *See, e.g.*, Silvia Foster-Frau and Hannah Knowles, *Nearly all-White jury in Arbery killing highlights long-standing fears of racial bias in jury selection*, WASH. POST (Nov. 4, 2021), https://www.washingtonpost.com/nation/2021/11/04/arbery-juries-race/ ("Using a standard court procedure called a peremptory strike, the attorneys eliminated all but one of the dozen Black people in the final jury pool this week, leaving a nearly all-White panel to weigh murder charges in a killing that many see as inseparable from race.").

[21] Order Amending Rules 18.4 and 18.5 of the Rules of Criminal Procedure, and Rule 47(e) of the Rules of Civil Procedure, (Ariz. Aug. 30, 2021).

[22] Wash. Gen. R. 37.

[23] Cal. Civ. Proc. Code § 231.7.

survey of evidentiary factors that courts may consider.[24] Finally, the report concludes with an overview of selected efforts to legislate on peremptory challenges and related congressional considerations.

Peremptory Challenges: Legal Background

The number and allocation of peremptory challenges depend, at the federal level, on a combination of statute and rules of judicial procedure.[25] Rule 24 of the Federal Rules of Criminal Procedure governs peremptory challenges in federal criminal proceedings, allowing different numbers of peremptory challenges for the prosecution and the defense depending on the penalties connected to the alleged violation.[26] For federal civil trials, each party is ordinarily entitled to three peremptory challenges pursuant to Rule 47(b) of the Federal Rules of Civil Procedure, which sets that number by reference to 28 U.S.C. § 1870.[27]

An underlying rationale for peremptory challenges is that they help create an impartial jury.[28] Although the right to an impartial jury trial "implicates Due Process as well as Sixth Amendment rights,"[29] the Constitution does not guarantee a right to peremptory challenges.[30] Nevertheless, the Supreme Court has deemed the peremptory challenge "one of the most important of the rights secured to the accused."[31]

Despite the wide latitude afforded parties in determining whether to exercise a peremptory challenge against a potential juror, there is an important limit.[32] In *Batson v. Kentucky*, the Supreme Court held that the Fourteenth Amendment's Equal Protection Clause[33] prohibits a prosecutor from challenging "potential jurors solely on account of their race."[34] According to the

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[24] *See Batson*, 476 U.S. at 97 (expressing confidence in trial courts' ability to determine whether the "use of peremptory challenges creates a prima facie case of discrimination against black jurors" based on relevant circumstances).

[25] *See* 28 U.S.C. § 1870; FED. R. CRIM. P. 24(b), (c)(4); FED. R. CIV. P. 47(b); *accord* Frazier v. United States, 335 U.S. 497, 506 n.11 (1948) ("The right [to peremptory challenges] is in the nature of a statutory privilege, variable in the number of challenges allowed, which may be withheld altogether without impairing the constitutional guaranties of 'an impartial jury' and a fair trial.").

[26] *See* FED. R. CRIM. P. 24(b), (c)(4). In general, Rule 24 provides the defendant and government 20 peremptory challenges each in capital cases, and 3 peremptory challenges each in misdemeanor cases. *Id.* For non-capital felonies, Rule 24 provides the government with 6 peremptory challenges and the defendant with 10. *Id.* The Rule also authorizes more peremptory challenges in instances where alternate jurors are impaneled. *Id.*

[27] 28 U.S.C. § 1870; FED. R. CIV. P. 47 ("The court must allow the number of peremptory challenges provided by 28 U.S.C. § 1870."). Although three peremptory challenges per party is the default in civil matters, "the court may allow additional peremptory challenges and permit them to be exercised separately or jointly." 28 U.S.C. § 1870.

[28] Swain v. Alabama, 380 U.S. 202, 219 (1965), *overruled by Batson*, 476 U.S. at 79 ("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."); *Frazier*, 335 U.S. at 505 (noting that peremptory challenges are "given in aid of the party's interest to secure a fair and impartial jury").

[29] United States v. Nelson, 277 F.3d 164, 201 (2d Cir. 2002).

[30] United States v. Martinez-Salazar, 528 U.S. 304, 311 (2000) ("[W]e have long recognized ... [that peremptory] challenges are auxiliary; unlike the right to an impartial jury guaranteed by the Sixth Amendment, peremptory challenges are not of federal constitutional dimension.").

[31] *Swain*, 380 U.S. at 219 (quoting Pointer v. United States, 151 U.S. 396, 408 (1894)).

[32] *See Batson*, 476 U.S. at 86-88.

[33] For a discussion of the Equal Protection clause and racial classifications, see generally, e.g., CONSTITUTION ANNOTATED, *Amdt14.S1.4.1.1 Race-Based Classifications: Overview*, CONSTITUTION.CONGRESS.GOV (last visited Aug. 22, 2022), https://constitution.congress.gov/browse/essay/amdt14-S1-4-1-1/ALDE_00000816/.

[34] *Batson*, 476 U.S. at 89. Although *Batson* focused specifically on race as a prohibited discriminatory purpose for

Court in *Batson*, "[p]urposeful racial discrimination in [jury] selection ... violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure."[35] In *Batson* and its progeny, the Court clarified that discriminatory peremptory challenges violate not only a defendant's equal protection rights but also those of the excluded potential juror and the community at large.[36]

The Court has expanded the reach of *Batson* in at least four other ways. First, the Court has clarified that "a defendant may raise a *Batson* claim even if the defendant and the excluded juror are of different races."[37] Second, it has expanded *Batson* to encompass peremptory challenges that discriminate based on ethnicity and gender in addition to race.[38] Third, it has applied *Batson* to civil as well as criminal proceedings.[39] And fourth, it has applied the doctrine to criminal defendants' challenges.

In extending *Batson* beyond prosecutors' challenges, the Court had to resolve the matter of state action. Racial discrimination amounts to an equal protection violation only where state action is involved,[40] and civil lawsuits often involve disputes between private litigants.[41] The Court applied a two-part inquiry and held that a peremptory challenge made by a private litigant "was pursuant to a course of state action."[42] In one part of its inquiry, the Court analyzed "whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority."[43] According to the Court, peremptory challenges qualify because they are permitted only "by statute or decisional law."[44]

For the other part of its inquiry, the Court probed "whether the private party charged with the deprivation could be described in all fairness as a state actor."[45] The Court found several reasons

striking a juror, subsequent precedent has expanded *Batson* to preclude peremptory challenges justified on other discriminatory grounds. *See infra* § "Classifications Protected by Batson and Progeny." In some respects, *Batson* represents a continuation of a line of earlier Supreme Court cases disapproving of racial exclusion in other aspects of the jury system. *Batson*, 476 U.S. at 85 ("More than a century ago, the Court decided that the State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded.").

[35] *Batson*, 476 U.S. at 86.

[36] *See* Powers v. Ohio, 499 U.S. 400, 409 (1991) ("An individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race."); Georgia v. McCollum, 505 U.S. 42, 50 (1992) ("Just as public confidence in criminal justice is undermined by a conviction in a trial where racial discrimination has occurred in jury selection, so is public confidence undermined where a defendant, assisted by racially discriminatory peremptory strikes, obtains an acquittal."); *Batson*, 476 U.S. at 87 ("Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try.").

[37] Flowers v. Mississippi, 139 S. Ct. 2228, 2243 (2019); *accord McCollum*, 505 U.S. at 49 ("Regardless 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.").

[38] *See infra* § "Classifications Protected by Batson and Progeny."

[39] Edmonson v. Leesville Concrete Co., 500 U.S. 614, 631 (1991) (holding that the approach established in *Batson* to determine whether a prima facie case of racial discrimination has been established applies in the civil context and "leav[ing] it to the trial courts ... to develop evidentiary rules for implementing [the Court's] decision").

[40] *Edmonson*, 500 U.S.at 619; *see also* Cong. Rsch. Serv., *Amdt14.2 State Action Doctrine*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt14-2/ALDE_00000810/ (last visited Sept. 28, 2022).

[41] *E.g.*, *Edmonson*, 500 U.S. at 618.

[42] *Id.* at 622.

[43] *Id.* at 620.

[44] *Id.*

[45] *Id.*

for considering a private litigant as a state actor when making peremptory challenges. First, according to the Court, a litigant "relies on 'governmental assistance and benefits'" such as the underlying jury system; second, peremptory challenges perform the "traditional function of government" because they aid in "selecting an entity [a jury panel] that is a quintessential governmental body" and that "exercises the power of the court and of the government"; and third, the courtroom setting of peremptory challenges "compounds the racial insult inherent in judging a citizen by the color of his or her skin" and "raises serious questions as to the fairness of the proceedings conducted there."[46]

Then, applying similar state action analysis, the Supreme Court extended *Batson* to prohibit discriminatory peremptory challenges by *defendants* as well as prosecutors,[47] although many *Batson* claims involve alleged misuse of peremptory challenges by prosecutors.[48] In reaching that conclusion, the Court observed that some of the harms that result from discriminatory peremptory challenges are the same regardless of whether the challenge originates with the prosecution or the defendant—namely, that discriminatory challenges subject the juror to "open and public racial discrimination" and undermine public confidence in the verdict and the criminal justice system.[49]

Although the Equal Protection Clause expressly restricts only the states, the Court has said that it would be "unthinkable that the same Constitution would impose a lesser duty on the Federal Government" than on the states with respect to discrimination.[50] Thus, *Batson* forecloses discriminatory peremptory challenges made not only in state trials but also in federal trials.[51] In practice, however, most *Batson* challenges arise in state courts.[52]

Batson: Evidentiary Burdens, Standards, and Factors

Batson established a three-step framework for evaluating whether a given peremptory challenge is discriminatory and therefore violates equal protection rights.[53] The exact evidentiary burdens and standards shift with each step—although the "ultimate burden of persuasion" regarding discriminatory motivation "rests with, and never shifts from, the opponent of the strike."[54] Although the three steps are conceptually separate, courts sometimes combine them when

[46] 621-28.

[47] Georgia v. McCollum, 505 U.S. 42, 48-50 (1992).

[48] *See, e.g.*, *Flowers*, 139 S. Ct. at 2235; *accord* H.R. REP. NO. 95-195, at 48-49, 54 (1977) ("The testimony and statistics presented to the Subcommittee on Criminal Justice indicate that" it "is the prosecution that most often uses peremptories" to "exclude classes of people"); Alafair S. Burke, *Prosecutors and Peremptories*, 97 IOWA L. REV. 1467, 1471 (2012) ("A recent two-year study of eight southern states found that prosecutors routinely dismissed African-American venire members for pretextual reasons.").

[49] *McCollum*, 505 U.S. at 49.

[50] Bolling v. Sharpe, 347 U.S. 497, 500 (1955); *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 217 (1995) (describing Court precedent as "treat[ing] the equal protection obligations imposed by the Fifth and the Fourteenth Amendments as indistinguishable").

[51] *E.g.*, Alvarado v. United States, 497 U.S. 543, 545 (1990) (per curiam) (vacating judgment and remanding to federal court of appeals to conduct *Batson* analysis).

[52] *E.g.*, Flowers v. Mississippi, 139 S. Ct. 2228, 2235 (2019) (summarizing various *Batson* challenges made during state prosecution); *see also* Richard A. Primus, *Bolling Alone*, 104 COLUM. L. REV. 975, 1002-03 (2004) ("Since *Batson*, there has been only one reported instance of a federal prosecutor exercising a race-based peremptory challenge."). As of July 28, 2022 a search of the Westlaw database for cases citing *Batson* yielded 12,130 state law opinions and 6,245 federal opinions.

[53] Batson v. Kentucky, 476 U.S. 79, 96-98 (1986).

[54] Purkett v. Elem, 514 U.S. 765, 768 (1995) (per curiam).

analyzing peremptory challenges.[55] To the extent possible, this section separates the three steps of the *Batson* framework, describing the relevant evidentiary burdens, standards, and factors a court may consider.

Step 1: Prima Facie Case by Objecting Party

In the first *Batson* step, the party objecting to a peremptory challenge "must make a prima facie showing that a peremptory challenge has been exercised on the basis of race"[56] or on the basis of another prohibited reason.[57] The burden on the objecting party at the first step is not "onerous."[58] Rather, it requires a "showing that the totality of relevant facts gives rise to an inference of discriminatory purpose"[59]—a standard that courts have described as less demanding than either a preponderance of the evidence standard or a "more likely than not" standard.[60]

The relevant facts are circumstance-dependent and may vary.[61] It may include statistical evidence that a party made a disproportionate number of peremptory challenges against jurors of the same race or other protected classification.[62] A party's use of peremptory challenges to strike all potential jurors of a protected classification supports a prima facie case of discriminatory purpose,[63] even where the party strikes only a single juror.[64] The statements and questions of the party exercising the peremptory challenge may also be relevant.[65]

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[55] *See, e.g.*, *Flowers*, 139 S. Ct. at 2243 (listing relevant evidence for court to consider but not expressly stating at which step of the *Batson* framework a trial court should consider it).

[56] Miller-El v. Cockrell (*Miller-El I*), 537 U.S. 322, 328 (2003) (citing *Batson*, 476 U.S. at 96-97).

[57] *See supra* § "Classifications Protected by Batson and Progeny."

[58] Johnson v. California, 545 U.S. 162, 170 (2005).

[59] *Batson*, 476 U.S. at 94; *accord Johnson*, 545 U.S. at 170.

[60] *Johnson*, 545 U.S. at 168 (concluding that California's "more likely than not" standard was "an inappropriate yardstick by which to measure the sufficiency of a prima facie case").

[61] Jones v. West, 555 F.3d 90, 97 (2d Cir. 2009) ("In deciding whether the defendant has demonstrated a prima facie case of discrimination, the trial court should take into account 'all relevant circumstances.'" (quoting *Batson*, 476 U.S. at 94)).

[62] *Batson*, 476 U.S. at 97 ("For example, a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination."); United States v. Alvarado, 923 F.2d 253, 256 (2d Cir. 1991) ("We think a challenge rate nearly twice the likely minority percentage of the venire strongly supports a *prima facie* case under *Batson*."); *but see* LAFAVE ET AL., *supra* note 5, § 22.3(d) ("[T]here is not a per se rule that a certain number or percentage of the challenged jurors must be of within the challenged class in order for the court to conclude a prima facie case has been made out.").

[63] *See, e.g.*, United States v. Chinchilla, 874 F.2d 695, 698 n.4 (9th Cir. 1989) ("The fact that *all* the Hispanic jurors were challenged is significant though not required for a prima facie case to exist.").

[64] *See* United States v. Roan Eagle, 867 F.2d 436, 441 (8th Cir. 1989) (concluding that there was prima facie case of discriminatory purpose where "there was one potential American Indian juror and that juror was struck"); United States v. Esparsen, 930 F.2d 1461, 1466 (10th Cir. 1991) (explaining that "the striking of a single juror will not always constitute a prima facie case, but, when no members of defendant's race remain because of that strike, it does" (footnote omitted)); United States v. Chalan, 812 F.2d 1302, 1313-14 (10th Cir. 1987) (holding that defendant established prima facie case where three out of four potential Native American jurors were struck for cause, and a peremptory challenge was used to strike the fourth).

[65] *Batson*, 476 U.S. at 96-97.

Step 2: Neutral Justification by Party Supporting Peremptory Challenge

Once a prima facie case has been made at the first step, the second *Batson* step shifts the burden to the party making the peremptory challenge to offer nondiscriminatory reasons for the exclusion.[66] The issue at the second step is the truth of the given reason, and unless "a discriminatory intent is inherent in the ... explanation, the reason offered will be deemed race neutral."[67] The explanation provided need not be "minimally persuasive,"[68] let alone "rise to the level justifying exercise of a challenge for cause."[69] Rather, even a "silly or superstitious" reason may be sufficiently neutral to survive the second step.[70] But there are some standards the reason must satisfy. The explanation for the peremptory challenge must be "clear and reasonably specific,"[71] and the party explaining the peremptory strike must do more than "affirm[] his good faith" and "deny[] that he had a discriminatory motive."[72] Further, "[a] neutral explanation ... means an explanation based on something other than the race of the juror."[73] In practice, justifications vary widely, and "[v]alid reasons for exclusion [of jurors] may include 'intuitive assumptions' upon confronting" a potential juror such as "eye contact, demeanor, age, marital status, and length of residence in the community,"[74] family background,[75] and even the presence of facial hair.[76] Given the low standard at step two, even if the party "produces only a frivolous or utterly nonsensical justification for its strike, the case does not end—it merely proceeds to step three."[77]

Step 3: Trial Court Determination

If a party making the challenge gives a "neutral explanation" for the peremptory strike at step two, it triggers the third *Batson* step, which requires the trial court to decide whether the party objecting to the strike "has proved purposeful ... discrimination."[78] Although the ultimate burden rests with the opponent of the strike, the "critical question" at step three is the persuasiveness of the justification for the peremptory strike and whether the objecting party has persuaded the court

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[66] Johnson v. California, 545 U.S. 162, 168 (2005).

[67] Purkett v. Elem, 514 U.S. 765, 768 (1995) (per curiam) (quoting Hernandez v. New York, 500 U.S. 352, 360 (1991) (plurality opinion)).

[68] *Purkett*, 514 U.S. at 768.

[69] *Batson*, 476 U.S. at 97.

[70] *Purkett*, 514 U.S. at 768.

[71] *Miller-El II*, 545 U.S. 231, 239 (2005) (quoting *Batson*, 476 U.S. at 98 n.20).

[72] *Purkett*, 514 U.S. at 769.

[73] Hernandez v. New York, 500 U.S. 352, 360 (1991) (plurality opinion).

[74] United States v. De La Rosa, 911 F.2d 985, 991 (5th Cir. 1990) (quoting United States v. Terrazas-Carrasco, 861 F.2d 93, 94 (5th Cir. 1988)); *see also* United States v. Ruiz, 894 F.2d 501, 506-07 (2d Cir. 1990) (finding no error where trial court accepted facial expressions and body language as neutral justifications for peremptory challenges of Hispanic jurors).

[75] *See*, *e.g.*, United States v. Mathis, 96 F.3d 1577, 1582 (11th Cir. 1996) (finding no clear error in drug crimes case where potential juror "was removed because a close family member of hers had had a cocaine conviction").

[76] *See Purkett*, 514 U.S. at 769 ("The prosecutor's proffered explanation in this case–that he struck juror number 22 because he had long, unkempt hair, a mustache, and a beard–is race neutral and satisfies the prosecution's step two burden of articulating a nondiscriminatory reason for the strike.").

[77] Johnson v. California, 545 U.S. 162, 171 (2005).

[78] *Purkett*, 514 U.S. at 767; Batson v. Kentucky, 476 U.S. 79, 97 (1986).

that the peremptory challenge is attributable to a discriminatory purpose.[79] This is a question of credibility, and justifications accepted as neutral at step two may be rejected for lack of credibility at step three—"[a]t this stage, 'implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination.'"[80]

The *Batson* Court did not elaborate as to how a trial court should conduct an analysis under this final step.[81] At least three federal appellate courts have concluded that the *opponent* of the strike must satisfy this burden by a preponderance of the evidence.[82] Generally, preponderance of the evidence requires proof that something is more likely than not.[83]

At the third step, trial courts have considerable discretion[84] but must engage in "a sensitive inquiry" and consult "all of the circumstances that bear upon the issue of racial animosity."[85] Relevant evidence and factors will vary based on the circumstances but might include:

- The credibility of the party making the peremptory challenge, based on the party's demeanor, the reasonableness of his or her justifications, and whether the "proffered rationale" fits in to "accepted trial strategy";[86]
- Whether a party's given reasons for making the disputed challenge would apply equally to other jurors—not of the same protected classification—whom the party left on the jury;[87]
- Whether the party explained the peremptory challenge by mischaracterizing the potential juror's testimony;[88]

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[79] *Miller-El I*, 537 U.S. 322, 338-39 (2003); *see also Purkett*, 514 U.S. at 768 ("It is not until the third step that the persuasiveness of the justification becomes relevant-the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination.").

[80] *Miller-El I*, 537 U.S. at 339 (quoting *Purkett*, 514 U.S. at 768).

[81] *Batson*, 476 U.S. at 97.

[82] *See* Williams v. Beard, 637 F.3d 195, 213 (3d Cir. 2011) ("After the parties have satisfied their respective burdens of production in these first two steps, the defendant must prove purposeful discrimination by a preponderance of the evidence."); McKinney v. Artuz, 326 F.3d 87, 98 (2d Cir. 2003) ("Finally, the court must determine whether the moving party carried the burden of showing by a preponderance of the evidence that the peremptory challenge at issue was based on race."); United States v. Tucker, 90 F.3d 1135, 1142 (6th Cir. 1996) ("[B]ecause the district court here issued its ruling after considering the prosecution's explanation, the question in the instant case boils down to whether the appellants established by a preponderance of the evidence that the preemptory strikes were intentionally discriminatory"); *accord* LAFAVE ET AL., *supra* note 5, § 22.3(d) ("The burden at the third step is preponderance of the evidence, not clear and convincing."). In at least two opinions the Supreme Court has suggested that the evidentiary standard at step three is preponderance of the evidence, although it has not expressly said so. *See Johnson*, 545 U.S. at 170 (describing the third *Batson* step as requiring a trial court to decide "whether it was more likely than not that the challenge was improperly motivated"); Davis v. Ayala, 576 U.S. 257, 296 (2015) (describing, in passing, the standard a trial court uses to determine whether "peremptory strikes [were] racially motivated" as "preponderance of the evidence").

[83] *See Preponderance of the Evidence*, WEX LEGAL DICTIONARY, available at https://www.law.cornell.edu/wex/preponderance_of_the_evidence ("Under the preponderance standard, the burden of proof is met when the party with the burden convinces the fact finder that there is a greater than 50% chance that the claim is true.").

[84] *See, e.g.*, Flowers v. Mississippi, 139 S. Ct. 2228, 2244 (2019) ("We have recognized that these determinations of credibility and demeanor lie peculiarly within a trial judge's province." (quoting Snyder v. Louisiana, 552 U.S. 472, 477 (2008))).

[85] Foster v. Chatman, 578 U.S. 488, 501 (2016) (quoting *Snyder*, 552 U.S. at 478).

[86] *Miller-El I*, 537 U.S. 322, 339 (2003).

[87] *Miller-El II*, 545 U.S. 231, 241 (2005).

[88] *Id.* at 244; *accord Flowers*, 139 S. Ct. at 2243, (offering, as one relevant criterion, "a prosecutor's misrepresentations

- The party's failure to question the challenged juror about matters relating to the purported basis for the challenge;[89]
- The use of "contrasting *voir dire* questions posed respectively to black and nonblack panel members";[90]
- An official policy of excluding minorities from jury service;[91]
- "Statistical evidence about the prosecutor's use of peremptory strikes against" prospective jurors of one protected classification, "as compared to" potential jurors not of that classification;[92]
- "[S]ide-by-side comparisons" of potential jurors of a protected classification whom the party struck with those the party did not strike;[93]
- "Relevant history of the [prosecutor's] peremptory strikes in past cases";[94] or
- "[O]ther relevant circumstances that bear upon the issue of ... discrimination."[95]

Where a party's reason for a peremptory challenge "does not hold up" as genuine against the evidence at step three, a court should not "imagine a reason that might not have been shown up as false."[96] For example, in one case a prosecutor used a peremptory challenge to strike a black juror because he viewed the death penalty as "an easy way out" in some situations.[97] The Supreme Court concluded that initial justification was pretextual in light of other evidence of racial pretext, including similar statements made by other potential jurors—"most of them white" and "none of them struck" by the prosecutor.[98] The appellate court had re-characterized the peremptory challenge as based on a concern over the prospective juror's "general ambivalence about the penalty and his ability to impose it."[99] But the Supreme Court explained that the appellate court should not have supplanted the prosecutor's rationale with its own, because a party's peremptory challenge must "stand or fall on the plausibility of the reasons he gives," and the court's subsequent "substitution of a reason for eliminating [a prospective juror] does nothing to satisfy the [party's] burden of stating a racially neutral explanation for their own actions."[100]

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of the record when defending the strikes during the *Batson* hearing").

[89] *Miller-El II*, 545 U.S. at 246.

[90] *Id.* at 255; *accord Flowers*, 139 S. Ct. at 2243, (listing, as one relevant factor, "evidence of a prosecutor's disparate questioning and investigation of black and white prospective jurors in the case").

[91] For example, the Supreme Court seemingly gave weight to evidence that prosecutors had used a "20–year–old manual of tips on jury selection" that supported challenging minority potential-jurors. *Miller-El II*, 545 U.S. at 266.

[92] *Flowers*, 139 S. Ct. at 2243.

[93] *Id.*; *cf.* United States v. Terrazas-Carrasco, 861 F.2d 93, 95 (5th Cir. 1988) ("[T]he fact that the prosecutor exercised only six out of his seven challenges to exclude members of defendant's race, although several others remained in the venire, substantially supports the finding of no discrimination.").

[94] *Flowers*, 139 S. Ct. at 2243.

[95] *Id.* A party's use of state court jury-selection procedures may be relevant when they have the effect of removing members of a particular classification from a jury. *See, e.g.*, *Miller-El II*, 545 U.S. at 253-54 (describing suspicious use of a jury "shuffle" under Texas state law to "rearrang[e] the order in which members of a venire panel are seated and reached for questioning" when "black panel members ended up at the back").

[96] *Miller-El II*, 545 U.S. at 252.

[97] *Id.* at 248.

[98] *Id.*

[99] *Id.* at 250.

[100] *Id.* at 252.

Thus, at the third step in the process, a court reviews and ultimately determines (1) whether the objecting party has carried the burden of establishing a discriminatory intent and (2) whether the neutral explanation given for the peremptory challenge is credible and persuasive.[101] Lastly, the exact remedies for *Batson* violations may vary[102] but are available even where the discrimination impacts a single potential juror.[103]

Classifications Protected by *Batson* and Progeny

The Court in *Batson* considered discriminatory peremptory challenges made to strike Black jurors—and the decision applied only to race-based peremptory challenges.[104] Subsequently, the Court clarified that *Batson* bars not only peremptory challenges based on race[105] but also those based on ethnicity[106] and gender.[107] Although the Supreme Court has not expressly decided whether peremptory challenges based on national origin violate *Batson*,[108] a number of federal

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[101] *Miller-El I*, 537 U.S. 322, 338 (2003); *accord Miller-El II*, 545 US at 241.

[102] *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 99, n.24 (1986) (declining to specify remedy for *Batson* violation but suggesting as possibilities, discharging "the venire and select[ing] a new jury from a panel not previously associated with the case," and "disallow[ing] the discriminatory challenges and resum[ing] selection with the improperly challenged jurors reinstated on the venire"); United States v. Walker, 490 F.3d 1282, 1294 (11th Cir. 2007) ("In *Batson*, the 'Supreme Court made it clear that the fashioning of a remedy [for an unconstitutional strike] is a matter upon which [the lower] courts are to be accorded significant latitude.'"(quoting Koo v. McBride, 124 F.3d 869, 873 (7th Cir.1997)). For example, where a Court finds a *Batson* violation before trial, it may reject the peremptory challenge to the potential juror at issue and return that juror to the venire. *See, e.g.*, United States v. Ramirez-Martinez, 273 F.3d 903, 910 (9th Cir. 2001), *overruled on other grounds by* United States v. Lopez, 484 F.3d 1186 (9th Cir. 2007); (concluding that returning jurors to venire after district court found *Batson* violation was as an appropriate exercise of discretion). Alternatively, a Court may choose to "begin afresh with a new venire." *Walker*, 490 F.3d at 1295. At least two circuits have concluded that a *Batson* violation is a "structural error" generally requiring reversal and a new trial. Crittenden v. Chappell, 804 F.3d 998, 1003 (9th Cir. 2015); United States v. McFerron, 163 F.3d 952, 956 (6th Cir. 1998). For additional discussion of *Batson* remedies, including on appeal, see generally LAFAVE ET AL., *supra* note 5, § 22.3(d).

[103] Flowers v. Mississippi, 139 S. Ct. 2228, 2244 (2019) ("The Constitution forbids striking even a single prospective juror for a discriminatory purpose."); *see also* United States v. Vasquez-Lopez, 22 F.3d 900, 902 (9th Cir. 1994) ("To establish a prima facie case" a party does "not need to show that the prosecution had engaged in a pattern of discriminatory strikes against more than one prospective juror").

[104] *Batson*, 476 U.S. at 89.

[105] *See Flowers*, 139 S. Ct. at 2243 ("A defendant of any race may raise a *Batson* claim."); Federal courts have applied *Batson* to bar peremptory challenges against individuals from a variety of racial backgrounds. *See, e.g.*, United States v. Thompson, 528 F.3d 110, 118 (2d Cir. 2008), as amended (July 1, 2008) (concluding that *Batson* applies where "an African American defendant seeks to eliminate white jurors"); Kesser v. Cambra, 465 F.3d 351, 368 (9th Cir. 2006) (en banc)(finding *Batson* violation in peremptory challenge of Native American woman); United States v. Iron Moccasin, 878 F.2d 226, 229 (8th Cir. 1989) (concluding that *Batson* encompasses American Indians).

[106] *See* Rivera v. Illinois, 556 U.S. 148, 153 (2009) ("[P]arties are constitutionally prohibited from exercising peremptory challenges to exclude jurors on the basis of race, ethnicity, or sex."); Hernandez v. New York, 500 U.S. 352, 371 (1991) (plurality opinion) (analyzing case where peremptory challenges were used against Latinos and describing circumstances in which foreign language proficiency might be a proxy for ethnicity, and thus a prohibited justification for exercising a peremptory challenge).

[107] J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 129 (1994) ("We hold that gender, like race, is an unconstitutional proxy for juror competence and impartiality.").

[108] *See* Watson v. Ricks, No. 05 Civ. 7288 (S.D.N.Y. Jan. 24, 2007) (Report and Recommendation of Pauley III, J.). ("[T]he Court has never directly addressed the question of whether the use of peremptory challenges on the basis of national origin is prohibited under *Batson*."); Sorto v. Herbert, 364 F. Supp. 2d 240, 242 (E.D.N.Y. 2004), aff'd, 480 F.3d 609 (2d Cir. 2007), opinion amended and superseded, 497 F.3d 163 (2d Cir. 2007), and aff'd, 497 F.3d 163 (2d Cir. 2007) (same); *but see* Hernandez v. State of Tex., 347 U.S. 475, 479 (1954) (evaluating allegations of systematic exclusion of "persons of Mexican descent" from jury service and observing that the "exclusion of otherwise eligible

courts have suggested that they do.[109] However, "the line between ethnic and nation origin is not always clear."[110] For example, some federal courts have applied *Batson* to peremptory challenges that could have been based on national origin *or* ethnicity without expressly specifying which classification they deemed relevant.[111] In one unpublished opinion, the United States District Court for the Southern District of New York ordered a *Batson* hearing where "the prosecutor used peremptory challenges to exclude four prospective jurors from Jamaica and one from Trinidad from the jury."[112] Although the federal magistrate judge had construed the relevant classification as national origin and concluded that *Batson* applied in that context, the district court concluded that an "objection based on the exclusion of a *race* of people (i.e., blacks) from *multiple* countries (i.e., Jamaica and Trinidad) is more appropriately analyzed as based on ethnic origin."[113] Another federal court has extended *Batson* to bar peremptory challenges that discriminate against Italian Americans but appeared to characterize the discrimination as based not on national origin but rather on race and ethnicity.[114]

In other contexts—such as federal employment discrimination statutes—the Supreme Court has concluded that sex-based discrimination includes discrimination based on an "individual's homosexuality or transgender status,"[115] but the Court has not examined the issue in the *Batson* context.[116] In the absence of clear guidance, federal courts have disagreed on whether *Batson* prohibits peremptory challenges based on a potential juror's sexual orientation,[117] and federal

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persons from jury service solely because of their ancestry or national origin is discrimination prohibited by the Fourteenth Amendment.").

[109] *See* Pemberthy v. Beyer, 19 F.3d 857, 870 (3d Cir. 1994) ("We believe that *Batson* does not apply to peremptory challenges unless they are based on classifications, such as race or *national origin*, that are subject to 'strict' scrutiny under equal protection doctrine, or possibly those classifications, such as gender, that are subjected to 'heightened' scrutiny." (emphasis added)); Bronshtein v. Horn, No. CIV. A. 99-2186, 2001 WL 936702, at *3 (E.D. Pa. Aug. 16, 2001) ("There is no question that *Batson* applies to discrimination on the basis of national origin and ethnicity."); United States v. Bin Laden, 91 F. Supp. 2d 600, 625 (S.D.N.Y. 2000) ("Moreover, it is well settled that equal protection principles forbid discriminatory exclusions from jury service on the basis of factors such as race and national origin."); *but see Sorto*, 364 F. Supp. 2d at 242 (reviewing case law and denying petition for habeas relief where trial court rejected *Batson* claim based on national origin).

[110] Watson v. Ricks, No. 05 CIV 7288 WHP JCF, 2008 WL 490610, at *2 n.1 (S.D.N.Y. Feb. 22, 2008) (citing Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 614 (1987) (Brennan, J. concurring)).

[111] *See, e.g.*, United States v. Romero-Reyna, 867 F.2d 834, 836 (5th Cir. 1989) (remanding convictions for *Batson* analysis where the government used "six peremptory challenges to strike Mexican–Americans from the jury," but not specifying whether peremptory challenges were impermissibly based on ethnicity or national origin); *see also* United States v. Rudas, 905 F.2d 38, 41 (2d Cir. 1990) ("Hispanics are a cognizable group for purposes of the first step of the *Batson* inquiry.").

[112] *Watson*, 2008 WL 490610, at *1.

[113] *Id.* at *2, n. 1.

[114] *See* United States v. Biaggi, 673 F. Supp. 96, 102 (E.D.N.Y. 1987), aff'd, 853 F.2d 89 (2d Cir. 1988) ("It can therefore be confidently concluded that the Court in *Batson* meant 'cognizable racial groups' to include a variety of ethnic and ancestral groups subject to intentional discrimination, including Italian-Americans.").

[115] Bostock v. Clayton Cty., Georgia, 140 S. Ct. 1731, 1741 (2020).

[116] *See Id.* at 1753 (declining to consider implications of employment sex-discrimination jurisprudence in other contexts); Smith v. MacEachern, No. CV 09-10434-NMG, 2019 WL 2543504, at *13 (D. Mass. June 20, 2019) (noting that it "remains the status of the law today" that "no Supreme Court case law established that peremptory challenges based on either sexual orientation or transgender status were unconstitutional").

[117] *Compare* SmithKline Beecham Corp. v. Abbott Lab'ys, 740 F.3d 471, 475-76, 485 (9th Cir. 2014) (holding that "exclusion of the juror because of his sexual orientation violated *Batson*" because peremptory strikes "exercised on the basis of sexual orientation continue [the] deplorable tradition of treating gays and lesbians as undeserving of participation in our nation's most cherished rites and rituals"), *with* Sneed v. Fla. Dep't of Corr., 496 F. App'x 20, 27 (11th Cir. 2012) ("[T]he Supreme Court has never held that homosexuality is a protected class for purposes of analyzing

case law exploring the application of *Batson* to peremptory challenges involving gender identity is scarce.[118] Federal courts are also divided on the extent to which peremptory challenges based on a potential juror's religion violate *Batson*.[119] Lastly, federal courts have generally been reluctant to extend *Batson* in a variety of other contexts—declining to bar peremptory challenges based on political affiliation or beliefs,[120] age,[121] and disability.[122]

Amendments and Proposed Reforms

The merits and drawbacks of peremptory challenges have long been a subject of debate.[123] A number of legal scholars and observers have proposed various changes to peremptory

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discrimination in jury selection under *Batson*."), *and* United States v. Blaylock, 421 F.3d 758, 769 (8th Cir. 2005) ("[W]e doubt *Batson* and its progeny extend constitutional protection to the sexual orientations of venire persons."), *and* United States v. Ehrmann, 421 F.3d 774, 782 (8th Cir. 2005) (similar).

[118] *But see Smith*, 2019 WL 2543504, at *13 (surveying case law and other authorities and concluding in context of federal habeas petition that a peremptory challenge was not "clearly contrary" to Supreme Court precedent even if it had been exercised "on the basis of sexual orientation or gender identity").

[119] *Compare* United States v. Brown, 352 F.3d 654, 668-69 (2d Cir. 2003) (concluding that *Batson* prohibits peremptory challenges "based solely on a venire member's religious affiliation" but not necessarily those based on religious *activities*), *and* United States v. Stafford, 136 F.3d 1109, 1114 (7th Cir.), *modified*, 136 F.3d 1115 (7th Cir. 1998) (addressing—in dicta—application of *Batson* to peremptory challenges based on religion and speculating that "[i]t would be improper and perhaps unconstitutional to strike a juror on the basis of his being a Catholic, a Jew, a Muslim, etc. [but it] would be proper to strike him on the basis of a belief that would prevent him from basing his decision on the evidence and instructions, even if the belief had a religious backing"), *and* United States v. Somerstein, 959 F. Supp. 592, 595 (E.D.N.Y. 1997) ("[T]he Court holds that whether persons of the Jewish faith are considered a religion or a race or both, in the context of this case, the *Batson* rule does apply."), *with* United States v. Heron, 721 F.3d 896, 902 (7th Cir. 2013) (declining to extend *Batson* to peremptory challenges based on "religiosity" and casting doubt on constitutionality and feasibility of applying *Batson* to peremptory challenges based on religion because "[e]ven if the line between affiliation and religiosity were clear, it is unclear why someone's religious affiliation ought to be entitled to greater constitutional protection than that person's religious exercise"), *and* United States v. DeJesus, 347 F.3d 500, 510 (3d Cir. 2003) ("Even assuming that the exercise of a peremptory strike on the basis of religious affiliation is unconstitutional, the exercise of a strike based on religious beliefs is not.").

[120] *See* United States v. Prince, 647 F.3d 1257, 1261-64 (10th Cir. 2011) (declining to extend *Batson* to peremptory challenges based on political ideology or beliefs, such as support for legalization of marijuana); United States v. Villarreal, 963 F.2d 725, 729 (5th Cir. 1992) ("Political belief is not the overt and immutable characteristic that race is, and we decline to extend the *Batson* line of cases to this case."); LAFAVE ET AL., *supra* note 5, § 22.3(d) ("Attempts to extend *Batson* to bar challenges based on 'political affiliation' have so far been rejected.").

[121] *See, e.g.*, United States v. Helmstetter, 479 F.3d 750, 754 (10th Cir. 2007) (collecting cases, rejecting extension of *Batson* to peremptory challenges based on age, and observing that "every other circuit to address the issue has rejected the argument that jury-selection procedures discriminating on the basis of age violate equal protection"); *see also* United States v. Maxwell, 160 F.3d 1071, 1076 (6th Cir. 1998) (rejecting expansion of *Batson* to cover young adults); United States v. Cresta, 825 F.2d 538, 545 (1st Cir. 1987) (same).

[122] *See* United States v. Watson, 483 F.3d 828, 829 (D.C. Cir. 2007) (determining that *Batson* did not bar peremptory challenges of blind jurors); United States v. Harris, 197 F.3d 870, 876 (7th Cir. 1999) ("[T]he government's use of its peremptory challenge to strike [the potential juror] for reasons related to her disability did not violate the equal protection rights of either [the defendant] or [the potential juror].").

[123] *Compare* Batson v. Kentucky, 476 U.S. 79, 102-03 (1986) (Marshall J., concurring) (warning that "eliminating peremptory challenges entirely" is the only way to "end the racial discrimination that peremptories inject into the jury-selection process"), *and Miller-El II*, 545 U.S. 231, 273 (2005) (Breyer J., concurring) (surveying shortcomings with *Batson* test and peremptory challenges stating belief that it is "necessary to reconsider *Batson*'s test and the peremptory challenge system as a whole"), *with* Christopher E. Smith & Roxanne Ochoa, *The Peremptory Challenge in the Eyes of the Trial Judge*, 79 JUDICATURE 185, 189 (1996) (detailing survey of trial court judges and noting that "findings indicate strong levels of support for and acceptance of most aspects of current peremptory challenge practices in the federal trial courts"). For additional discussion, including a summary of common critiques, see generally LAFAVE ET AL., *supra* note 5, § 22.3(d). Connecticut Task Force, *supra* note 19.

challenges.[124] One common proposal is to abolish peremptory challenges entirely.[125] Another is to change the allocation of peremptory challenges to each party—often with the goal of affording additional peremptory challenges to criminal defendants.[126] Still others propose modifying the *Batson* framework[127] or disregarding it in certain contexts.[128] This section provides various examples at the state level to either abolish or modify peremptory challenges and *Batson* frameworks before concluding with an overview of federal peremptory reform amendment efforts and related congressional considerations.

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[124] *See, e.g.*, Adam M. Gershowitz, *The Race to the Top to Reduce Prosecutorial Misconduct*, 89 FORDHAM L. REV. 1179, 1180 (2021) ("Until prosecutors have completed satisfactory training on topics such as *Brady v. Maryland*, *Batson v. Kentucky*, and improper argument, judges should simply refuse to allow the prosecutors to handle cases in their courtrooms." (footnotes omitted)); Aliza Plener Cover, *Hybrid Jury Strikes*, 52 HARV. C.R.-C.L. L. REV. 357, 360 (2017) (proposing creation of a hybridized jury challenge that would "lie between successful cause challenges and traditional peremptory strikes"); Burke, *supra* note 48, at 1473 (collecting proposals to change peremptory challenges and calling on prosecutors to "voluntarily implement internal practices to avoid racialized jury selection"); Maureen A. Howard, *Taking the High Road: Why Prosecutors Should Voluntarily Waive Peremptory Challenges*, 23 GEO. J. LEGAL ETHICS 369, 370 (2010) (encouraging prosecutors to "consider a wholesale voluntary waiver of peremptory challenges"); Caren Myers Morrison, *Negotiating Peremptory Challenges*, 104 J. CRIM. L. & CRIMINOLOGY 1 (2014) ("I therefore propose that we jettison the inherently unstable framework of *Batson* and allow peremptory challenges only on consent of both parties with the challenges waived if no agreement is reached.").

[125] *See, e.g.*, *Batson*, 476 U.S. at 102-03 (Marshall J., concurring) (warning that "eliminating peremptory challenges entirely" is the only way to "end the racial discrimination that peremptories inject into the jury-selection process"); Wilkerson v. Texas, 493 U.S. 924, 928 (1989) (Marshall J., dissenting) (calling peremptory challenges "perhaps the greatest embarrassment in the administration of our criminal justice system" and stating that "until peremptory challenges are eliminated altogether, these challenges will inevitably be used to discriminate against racial minorities"); Judge Ulysses Gene Thibodeaux, *The Changing Face of Jury Selection:* Batson *and Its Practical Implications*, 56 LA. B.J. 408, 410 (2009) ("As long as peremptory challenges continue to be used," the objective of enhancing "representation of minorities and women on juries" will be "illusory because refined discriminators are adept at concealing their motives through the use of rhetorical sophistication"); Morris B. Hoffman, *Peremptory Challenges Should Be Abolished*, COLO. LAW. (Sept. 1998), at 51 ("After experiencing peremptory challenges firsthand for six years as a trial judge in a state court of general jurisdiction, I now add my small voice to the chorus calling for abolition."); Kenneth J. Melilli, Batson *in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 502 (1996) (advocating for abolition of the peremptory challenge, and arguing that it has "outlived its usefulness").

[126] *See, e.g.*, Anna Roberts, *Asymmetry As Fairness: Reversing A Peremptory Trend*, 92 WASH. U.L. REV. 1503, 1507 (2015) ("This Article ... recommends that asymmetry in the allocation of peremptory challenges—greater allocation of peremptory challenges to the defense than to the prosecution—be restored in those jurisdictions where it has been abandoned.").

[127] *See, e.g.*, People v. Rhoades, 8 Cal. 5th 393, 469 (2019) (Liu, J., dissenting), *reh'g denied* (Jan. 29, 2020), *cert. denied sub nom.* Rhoades v. California, 141 S. Ct. 659 (2020) (collecting cases and suggesting as an option, eliminating *Batson* step 1, so that "whenever a defendant raises a *Batson* challenge to the prosecutor's strike of a prospective juror from a legally cognizable group, [t]he trial court will then require the state to come forward with reasonably specific and clear race-neutral explanations for the strike" (internal quotation marks omitted)); Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 103 (2019) (advocating for "changing the meaning of discrimination" for *Batson* purposes "from racial bias to racist impact" to "stop the charade *Batson* generated in allowing prosecutors to continue to empanel all-white juries based on pretextual race-neutral explanations"); Jeffrey Bellin & Junichi P. Semitsu, *Widening* Batson's *Net to Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1078 (2011) ("This Article proposes a two-part fix to what ails *Batson*: (1) decouple *Batson* violations from any finding regarding the striking attorney's subjective intent and (2) foster a procedural mechanism that permits the immediate reseating of an improperly stricken juror without the juror ever knowing that she was the subject of a strike.")

[128] Abbe Smith, "*Nice Work If You Can Get It": "Ethical" Jury Selection in Criminal Defense*, 67 FORDHAM L. REV. 523, 531 (1998) (arguing "that it is unethical for a defense lawyer to disregard what is known about the influence of race and sex on juror attitudes in order to comply with *Batson v. Kentucky* and its progeny" (footnotes omitted)).

State Peremptory Challenge Amendments

Many states guarantee peremptory challenges in their courts,[129] and several have explored changing them.[130] For example, in August 2021, the Arizona Supreme Court issued an order abolishing peremptory challenges through the amendment of its state rules of judicial procedure.[131] Other state courts have eliminated or modified step one of *Batson*, effectively easing the initial burden on the party objecting to a peremptory challenge.[132] At least one state has focused on step two of *Batson*, requiring the party making the peremptory challenge to give a reason that is not only race neutral but relevant to the case at hand.[133]

Another example is the Washington Supreme Court, which enacted General Rule 37, modifying that state's approach to the first and third steps of *Batson*.[134] Under Washington's revised framework, at step one, a party—or the trial court—may object to a peremptory challenge by citing to Rule 37.[135] In other words, the party need not make out a prima facie case of discrimination.[136] Step two is generally similar to its federal analogue under *Batson* and requires the responding party to justify the peremptory challenge.[137] Rule 37 marks a significant departure from *Batson* at step three, where it requires the trial court to deny the peremptory challenge if an "objective observer could view race or ethnicity as a factor in the use of the peremptory challenge."[138] Rule 37 defines *objective observer* as someone who is "aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State."[139] In determining whether race or ethnicity is a factor at step three, Rule 37 authorizes courts to consider the "totality of the circumstances," including the "number and types of questions posed to the prospective juror," "whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party," and the disproportionate use of peremptory challenges

[129] *See, e.g.*, 234 Pa. Code Rule 634; Colo. Rev. Stat. Ann. § 16-10-104; R.I. Super. R. Crim. P. 24(b); Md. Code Ann., Cts. & Jud. Proc. § 8-420; Okla. Stat. Ann. tit. 22, § 655; N.C. Gen. Stat. Ann. § 15A-1217; 725 Ill. Comp. Stat. Ann. 5/115-4(e); Haw. Rev. Stat. Ann. § 635-30.

[130] This section presents select examples of state peremptory reform modifications for illustrative purposes. A comprehensive review of peremptory challenge law and changes exceeds the scope of this report.

[131] Order Amending Rules 18.4 and 18.5 of the Rules of Criminal Procedure, and Rule 47(e) of the Rules of Civil Procedure, (Ariz. Aug. 30, 2021).

[132] *See, e.g.*, Melbourne v. State, 679 So. 2d 759, 764 (Fla. 1996) ("A party objecting to the other side's use of a peremptory challenge on racial grounds must: a) make a timely objection on that basis, b) show that the venireperson is a member of a distinct racial group, and c) request that the court ask the striking party its reason for the strike." (footnotes omitted)); State v. Holloway, 209 Conn. 636, 646 (1989) ("[I]n all future cases in which the defendant asserts a *Batson* claim, we deem it appropriate for the state to provide the court with a prima facie case response consistent with the explanatory mandate of *Batson*."); State v. Parker, 836 S.W.2d 930, 939 (Mo. 1992) (en banc) ("First, the defendant must raise a *Batson* challenge with regard to one or more specific venirepersons struck by the state and identify the cognizable racial group to which the venireperson or persons belong."). Wash. Gen. R. 37(c)-(d) (requiring party objecting to peremptory challenge to merely cite rule of procedure, at which point onus switches to party exercising peremptory challenge to provide justification).

[133] *E.g.*, Ex parte Branch, 526 So. 2d 609, 623 (Ala. 1987) (explaining that at step 2 of *Batson*, "[t]he state then has the burden of articulating a clear, specific, and legitimate reason for the challenge which relates to *the particular case to be tried,* and which is nondiscriminatory").

[134] Wash. Gen. R. 37.

[135] *Id.* § 37(c).

[136] *Id.*

[137] *Id.* § 37(d).

[138] *Id.* § 37(e).

[139] *Id.* § 37(f).

against potential jurors of a particular race or ethnicity in "the present case or in past cases" by the party seeking to use its peremptory challenge.[140] Further, Rule 37 specifies that a number of justifications for peremptory challenges are "presumptively invalid," including that a potential juror:

- had "prior contact with law enforcement officers";
- expressed "distrust of law enforcement";
- has a "close relationship with people who have been stopped, arrested, or convicted of a crime";
- lives in "a high-crime neighborhood";
- had a "child outside of marriage";
- receives "state benefits"; and
- is not a "native English speaker."[141]

At least one other state, Connecticut, is exploring adopting a rule similar to Washington's Rule 37,[142] and in 2020 California enacted its own legislation governing the use of peremptory challenges under its state rules of judicial procedure.[143] Like Washington's General Rule 37, the California rule removes the requirement that the objecting party establish a prima facie case of discrimination and changes the ultimate analysis for the trial court.[144] Specifically, California's rule requires the trial court at step three to determine whether "there is a substantial likelihood that an objectively reasonable person would view race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, as a factor in the use of the peremptory challenge."[145] Discrimination need not be "purposeful" under the rule,[146] and it lists a number of non-exhaustive factors a trial court may consider and several presumptively invalid justifications for peremptory strikes.[147] Unlike Washington's General Rule 37, California's list of factors courts may consider includes several that would seemingly require the court to determine whether the potential juror, victim, objecting party, and witnesses are in the same "perceived cognizable group."[148] At least one of those factors, which permits a court to consider whether "the objecting party is a member of the same perceived cognizable group as the challenged juror,"[149] may potentially raise questions under

[140] *Id.* § 37(g).

[141] *Id.* § 37(h).

[142] *See, e.g.*, Connecticut Task Force, *supra* note 19, at 16-18.

[143] Press Release, Office of Governor Gavin Newsom, Governor Newsom Signs Landmark Legislation to Advance Racial Justice and California's Fight Against Systemic Racism & Bias in Our Legal System (Sept. 30, 2020), https://www.gov.ca.gov/2020/09/30/governor-newsom-signs-landmark-legislation-to-advance-racial-justice-and-californias-fight-against-systemic-racism-bias-in-our-legal-system/. Although enacted in 2020, California's rule was effective in state criminal trials starting in 2022, and will be effective in state civil trials starting in 2026. Cal. Civ. Proc. Code § 231.7(k); *see also* Jim Frederick and Kate M. Wittlake, *New Jury Selection Procedure in California: Is This the End of Peremptory Challenges? Is This the End of* Batson*?*, NAT'L L. REV. (Nov. 4, 2021), https://www.natlawreview.com/article/new-jury-selection-procedure-california-end-peremptory-challenges-end-batson.

[144] Cal. Civ. Proc. Code § 231.7.

[145] *Id.* § 231.7(d)(1).

[146] *Id.*

[147] *Id.* § 231.7(d)-(g).

[148] *Id.* § 231.7(d)(3)(A)(i)-(iii).

[149] *Id.* § 231.7(d)(3)(A)(i).

Supreme Court precedent holding that the party objecting to a peremptory challenge need not be of the same race as the prospective juror.[150]

Federal Peremptory Challenge Legislation and Congressional Considerations

At the federal level, there does not appear to be any recent proposed legislation to modify peremptory challenges.[151] One notable attempt to modify peremptory challenges occurred in 1977, when the Supreme Court proposed amending Rule 24 of the Federal Rules of Criminal Procedure to reduce the number of peremptory challenges for both prosecutors and defendants and to offer equal numbers of peremptory challenges to each side in non-capital felonies.[152] According to an accompanying report by the House Judiciary Committee, the proposed amendment drew "vigorous criticism."[153] In hearings before the House Judiciary Committee's Subcommittee on Criminal Justice, opponents of the amendment testified that, among other things, reducing and equalizing peremptory challenges would "not enable the defendant to achieve a jury free of bias against the accused,"[154] would "unnecessarily advantage the prosecution, which in most cases has more knowledge about the past behavior of jurors,"[155] and would diverge from the historical understanding that peremptory challenges were "for the accused, not the Government."[156] Congress rejected the proposed amendments to Rule 24.[157]

Congress retains significant authority over federal courts and peremptory challenges at the federal level.[158] Congress may amend the federal rules of procedure and related statutes to modify the

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[150] Flowers v. Mississippi, 139 S. Ct. 2228, 2243 (2019); *accord* Georgia v. McCollum, 505 U.S. 42, 49 (1992) ("Regardless 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.").

[151] *But see, e.g.*, Terrorist Death Penalty Act of 2007, H.R. 1914, 110th Cong. (2007) (proposing amendment to Rule 24 of the Federal Rules of Criminal Procedure to allow trial courts to impanel additional jurors and increase the number of peremptory challenges). For a discussion of peremptory amendment efforts in Congress in the 1970s and 1990s, see Savanna R. Leak, *Peremptory Challenges: Preserving an Unequal Allocation and the Potential Promise of Progressive Prosecution*, 111 J. CRIM. L. & CRIMINOLOGY 273, 287-88 (2020).

[152] H.R. REP. NO. 95-195, at 48-49, 54 (1977). For background on the roles of Congress and the Supreme Court in amending the Federal Rules of Criminal Procedure, see CRS In Focus IF11557, *Congress, the Judiciary, and Civil and Criminal Procedure*, by Joanna R. Lampe.

[153] H.R. REP. NO. 95-195, at 54 (1977); *but see Proposed Amendments to the Federal Rules of Criminal Procedure*: *Hearing Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 95th Cong. 57 (1977) (hereinafter "Hearing") (testimony of Richard J. Thornburgh, Acting Deputy Att'y Gen.) (testifying in favor of amendment to Rule 24 and stating that "[e]qualization of the number of peremptory challenges available as a matter of right to both sides in a criminal case is in accordance with the basic purpose of the peremptory challenge.")

[154] Hearing, *supra* note footnote 153, at 3 (Testimony of Jay Schulman, Coordinator, Nat. Jury Project).

[155] *Id.* at 114 (Testimony of David Epstein, Criminal Justice Section, Am. Bar Ass'n).

[156] *Id.* at 129 (Testimony of John Cleary, Exec. Dir., Fed. Defenders of San Diego, Inc.).

[157] *See* P.L. 95-78, 91 Stat 319 (1977) ("The amendment proposed by the Supreme Court to rule 24 of such Rules of Criminal Procedure is disapproved and shall not take effect.").

[158] *See, e.g.*, United States v. Martinez-Salazar, 528 U.S. 304, 311 (2000) (explaining that peremptory challenges are "not of federal constitutional dimension" and that "[t]here is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges." (*quoting* Stilson v. United States, 250 U.S. 583, 586 (1919)); Hanna v. Plumer, 380 U.S. 460, 472 (1965) ("For the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either."). Congressional attempts to change peremptory challenge laws at the state level would raise possible federalism concerns that exceed the scope of this report. *But see generally* CRS Report R45323, *Federalism-Based Limitations on Congressional Power: An Overview*,

numbers of, and parameters for, peremptory challenges.[159] For example, Congress could increase, reduce, reallocate, or abolish peremptory challenges in federal courts.[160] Alternatively, Congress could seek to codify a reworked *Batson* framework for federal proceedings so long as it did not reduce the equal protection rights *Batson* and subsequent cases announced.[161] Congress could also consider expanding the list of classifications that may not be used to make a peremptory challenge (for example, to expressly include sexual orientation, gender identity, or other characteristics where *Batson*'s reach is uncertain). Other options Congress could explore include eliminating the initial requirement that the objecting party make out a prima facie case of discrimination, changing the evidentiary burdens, or listing presumptively invalid justifications for peremptory challenges such as those in Washington's Rule 37.

Many of these changes would inherently involve trade-offs given the countervailing interests at stake. On the one hand, the Supreme Court has cited peremptory challenges as a valuable tool in securing the right to an impartial jury, which is of considerable benefit to the accused.[162] On the other hand, some have argued that, despite *Batson*, peremptory challenges impinge on the rights of the parties and potential jurors to be free from purposeful racial discrimination in jury selection.[163] Modifying the legal regime governing peremptory challenges would presumably change the balance between these rights.[164] For example, as discussed, one change adopted by some states in an effort to reduce discrimination in jury selection is to narrow the circumstances in which peremptory challenges are available.[165] This could take the form of protecting additional classifications of individuals from discriminatory challenges, prohibiting challenges based on implicit rather than purposeful discrimination, or listing presumptively invalid justifications, among other things.[166] Other similar efforts have involved making it easier to object to peremptory challenges or reducing the evidentiary burdens necessary to show discrimination.[167]

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coordinated by Andrew Nolan and Kevin M. Lewis.

[159] As discussed above, at the federal level, peremptory challenges are governed by 28 U.S.C. § 1870, FED. R. CRIM. P. 24(b), (c)(4), and FED. R. CIV. P. 47(b).

[160] For analysis of Congressional considerations relevant to amending federal rules of judicial procedure, see generally CRS In Focus IF11557, *Congress, the Judiciary, and Civil and Criminal Procedure*, by Joanna R. Lampe.

[161] Dickerson v. United States, 530 U.S. 428, 437 (2000) ("Congress may not legislatively supersede our decisions interpreting and applying the Constitution").

[162] *See supra* notes 28-31 and accompanying text.

[163] *See supra* notes 32-34, 123-127 and accompanying text.

[164] *See, e.g.*, *Miller-El II*, 545 U.S. 231, 273 (2005) (Breyer J., concurring) (acknowledging the historical value of peremptory challenges to the accused, but suggesting reconsideration of peremptory challenges in light of countervailing concerns about their potential discriminatory use).

[165] *See supra* "State Peremptory Challenge Amendments."

[166] *Id.*

[167] *Id.*

One potential consequence of such efforts might be to blur the distinction between challenges for cause and peremptory challenges. If parties exercising peremptory challenges have to provide justification to the court more often,[168] and fewer justifications suffice,[169] then peremptory challenges may function less like the traditional peremptory challenge available for "any reason—no questions asked"[170] and more like a challenge for cause, available only in limited circumstances when authorized by a court.[171] Relatedly, it is possible that changes to peremptory challenges that make them easier to oppose and harder to defend would curtail their overall use. The extent to which such outcomes occur would depend on the specifics of a given proposal, and proponents might argue that any downsides are necessary costs of reducing discrimination in jury selection.[172] Regardless, legislating to change peremptory challenges would likely require modifying the very feature that affords peremptory challenges value to the accused and other parties but simultaneously endows them with the potential for discriminatory abuses—discretion.[173]

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[168] For instance, both the Washington and California rules eliminate the requirement that a party make out an initial prima facie case of discrimination and require only an initial objection, which then shifts the burden of justification to the party seeking to exercise its peremptory challenge. *Id.*

[169] Arguably, rules like Washington's and California's restrict the range of permissible circumstances for exercising peremptory challenges by, among other things, expanding the classifications of individuals protected from discrimination, listing presumptively invalid justifications for peremptory challenges, reducing the burden on the party objecting to a challenge, changing the relevant determination from one of subjective bias to one of objective bias, and listing other factors for a court to consider as evidence of a prohibited discriminatory challenge. *See supra* "State Peremptory Challenge Amendments."

[170] Flowers v. Mississippi, 139 S. Ct. 2228, 2238 (2019); *see also* Swain v. Alabama, 380 U.S. 202, 220 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986) ("[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.").

[171] *See supra* notes 2-7 and accompanying text.

[172] *See supra* notes 123-127 and accompanying text; *see also Batson*, 476 U.S. at 108 (Marshall, J. concurring) ("The potential for racial prejudice, further, inheres in the defendant's challenge as well. If the prosecutor's peremptory challenge could be eliminated only at the cost of eliminating the defendant's challenge as well, I do not think that would be too great a price to pay.").

[173] *See Swain*, 380 U.S. at 220 ("While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable."); Frazier v. United States, 335 U.S. 497, 505 (1948) ("The right of peremptory challenge is given, of course, to be exercised in the party's sole discretion.").

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