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TOWARD A COLORBLIND JURY SELECTION PROCESS: APPLYING THE "BATSON FUNCTION" TO PEREMPTORY CHALLENGES IN CIVIL TRIALS

Lee Goldman*

I. INTRODUCTION

Jews are cheap. Afro-Americans are poor and ignorant. Catholics are authoritarian and unforgiving. These generalizations are acceptable only in All in the Family reruns and many civil trials in the United States.

In Batson v. Kentucky,1 the United States Supreme Court prohibited the discriminatory use of peremptory challenges in criminal trials. The Court, however, has never addressed whether its holding should extend to civil hearings. Lower courts that have faced the issue have reached differing conclusions.2 Commentators' views have been equally disparate.3

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* Visiting Associate Professor of Law, George Washington University National Law Center; B.A. 1976 Queens College; J.D. 1979 Stanford University.
The tensions between the historic peremptory challenge right and society's interest in eradicating discrimination have evoked strong emotions, but little analysis. Few alternative methods to combat a civil litigant's discriminatory peremptory challenges have been suggested, much less critiqued. This article attempts to fill that void.

This article does not suggest that any one proposal for reform is the "correct" response to discrimination in the peremptory challenge process. The "optimal" solution depends on too many unquantifiable variables. By defining a "Batson function" that incorporates the relevant variables and analyzing each proposal's effect on that function, this article highlights the trade-offs of each proposal and thereby encourages more informed and reasoned decision making. At a minimum, however, the analysis demonstrates that Batson should be extended to limit a civil litigant's ability to discriminate in the jury selection process.

Part Two of this article explains the nature and operation of the peremptory challenge. Part Three provides a brief description of the leading Supreme Court precedents and their lower court progeny. Part Four argues that Batson should apply to civil litigation. This section first demonstrates that case law and policy dictate that a civil litigant's discriminatory peremptory challenge be deemed state action. Then, through analysis with the Batson function, it concludes that the many differences between civil and criminal trials do not justify disparate treatment of discriminatory peremptory challenges in civil and criminal proceedings. Finally, Part Five suggests and analyzes the merits and shortcomings of several legislative proposals that may eradicate discrimination in the juror selection process more fully than Batson.

II. THE NATURE OF THE PEREMPTORY CHALLENGE

The exercise of challenges is the final stage in the selection of a jury. First, a list of eligible jurors is compiled, typi-
cally through voter or motor vehicle registration lists. From that pool a venire is randomly selected. Jurors satisfying specified exemptions, e.g., "undue hardship," are excused. The remaining prospective jurors are subjected to voir dire to elicit information about the jurors' attitudes and possible prejudices. The attorneys then are given the opportunity to challenge individual jurors.

There are two types of juror challenges: challenges for cause and peremptory challenges. Challenges for cause are subject to approval by the court and must be based on either actual or implied bias. Each party may exercise an unlimited number of challenges for cause. Peremptory challenges

6. Id. § 1861 (1988).

9. Actual bias refers to a prejudiced state of mind. To exclude a juror for actual bias, the judge must conclude that the juror cannot overcome her bias and render a verdict based on the evidence. See Project, supra note 8, at 979-80. Uncomfortable with making subjective judgments about a juror's state of mind, courts will often give conclusive weight to a juror's statement that they can try a case fairly. See Babcock, Voir Dire: Preserving "Its Wonderful Power", 27 STAN. L. REV. 545, 550 (1975). Jurors, of course, do not readily admit to many forms of prejudice. Consequently, the challenge for actual bias does not eliminate all forms of prejudice from the jury.

10. Implied bias is the partiality presumed by law from the existence of certain relationships or interests of the prospective juror. For example, a juror related to a party or having a financial interest in the case may be eliminated for implied bias. See J. VAN DYKE, supra note 7, at 143. The grounds for finding implied bias are typically defined by statute. J. VAN DYKE, supra note 7, at 143.
are limited in number, but historically could be exercised for any reason or no reason at all.

A desire to obtain a jury devoid of partiality or bias justifies the arbitrary exclusion of randomly selected jurors. Partiality and bias have a unique meaning in the context of the peremptory challenge. The law presumes a juror not challenged for cause is impartial and unbiased. Nevertheless, potential jurors do not have the same background, experience, values or preconceptions. They may possess a range or spectrum of conscious and unconscious biases that do not rise to the level justifying a challenge for cause. The peremptory challenge permits a party to seek elimination of those prospective jurors that the party believes are most predisposed to their opponent's case. In theory, when both sides eliminate the prospective jurors at the edges of the "partiality spectrum" (but not over the line marking a challenge for cause), the remaining jurors will fall somewhere near the middle of the spectrum of biases and a fairer trial will result. Additionally, the parties will perceive the jury as fair.

11. In civil trials in federal court, each party is entitled to three peremptory challenges. 28 U.S.C. § 1870 (1988). This is substantially fewer than that provided litigants in criminal felony cases. Fed. R. Crim. P. 24(b). The number of peremptory challenges provided civil litigants in state courts varies from two to eight. See J. Van Dyke, supra note 7, at 282-84. State courts typically provide a greater number of peremptories to parties in criminal trials. J. Van Dyke, supra note 7, at 282-84.


The procedure for the exercise of peremptory challenges is generally left to the discretion of the trial court, although it is occasionally prescribed by statute. Under the most common system, the "box" system, a juror challenged peremptorily is randomly replaced in the jury box by one of the remaining prospective jurors. That juror then may be questioned and challenged for cause or peremptorily. See J. Van Dyke, supra note 7, at 146. This process is repeated until all parties are satisfied with the jury or have exercised all their peremptory challenges. By contrast, some courts employ a "struck jury" system. Under that approach, the court and attorneys question jurors and exercise their challenges for cause until they "qualify" a number of jurors equal to the sum of the desired jury size and the total number of peremptories of the parties. The parties then alternate "striking" jurors peremptorily until they reach the final jury size. Id. at 146-47. Variations of either system are possible. See id; Massaro, Peremptories or Peers? - Rethinking Sixth Amendment Doctrine, Images, and Procedures, 64 N.C.L. REV. 501, 519 n.104 (1986).

13. See infra note 240. Nevertheless, based on empirical evidence, some
“[I]n a real sense the jury belongs to the litigant: he chooses it.” Consequendy, the litigant, and through her the community, will view the jury determination as valid and deserving respect. The appearance of impartiality is as important as the reality.

The theoretical basis for the peremptory challenge is not limited to eliminating partiality falling short of the level justifying a challenge for cause. The peremptory challenge may also serve to eliminate bias that crosses the “for cause” threshold, but which could not be proved to the trial court’s satisfaction. Challenges for cause are defined narrowly and it is often difficult to prove hidden or unconscious prejudices. Moreover, extremely biased jurors may lie or otherwise try to hide their prejudices. A party may eliminate such jurors with a peremptory challenge. Additionally, the peremptory challenge protects the exercise of the challenge for cause by allowing a party to remove a juror whom he has alienated through extensive voir dire aimed at identifying possible prejudices.

A conflict arises, however, because attorneys often have insufficient information to make individual judgments about the unconscious or hidden prejudices of prospective jurors. Consequently, attorneys tend to act on the basis of stereotypes and presumptions. The legal literature is replete with suggestions for choosing the “ideal” juror based on demographic stereotypes - race, age, sex and employment. For example, traditional trial lawyer lore dictates that “in complicated cases the young should be preferred over the old and men over women . . . . The Irish, Italians, Jews, French, blacks, Chicanos and those of Balkan heritage are said to sympathize with plaintiffs in civil suits and defendants in criminal actions.” Some of these generalizations are based

commentators suggest that attorneys are generally ineffective at using voir dire and peremptory challenges to identify and eliminate juror partiality. See, e.g., Alschuler, supra note 8, at 203; Massaro, supra note 12, at 523-25 & n.109.

14. Babcock, supra note 9, at 552.
15. Id.
17. See Saltzburg & Powers, supra note 8, at 356; Babcock, supra note 9, at 554-55.
18. See Massaro, supra note 12, at 521 n.107; J. VAN DYKE, supra note 7, at 152-54; Note, supra note 3, 40 RUTGERS L. REV. at 930 n.171.
19. J. VAN DYKE, supra note 7, at 159.
upon ingrained prejudices. Others may be the result of "rational discrimination." In either case, the result is often the same: entire groups of individuals, typically minorities, are removed from the jury. This discrimination exacerbates the existing under-representation of minorities in the jury selection process, and has raised equal protection challenges to the race-based use of peremptory challenges.

III. THE LEGAL LANDSCAPE IN CRIMINAL LITIGATION

A. From Swain to Batson

The Supreme Court first addressed the equal protection implications of race-based use of peremptory challenges in *Swain v. Alabama*. In *Swain*, the prosecutor exercised his peremptory challenges to strike six black jurors from the jury venire. The defendant was convicted of rape by an all-white jury and sentenced to death. The Supreme Court rejected the defendant's contention that the jury selection process violated his equal protection rights. It held that

20. "Rational discrimination," a term borrowed from Professor Strauss, is a generalization of the economists' notion of "efficient discrimination." See Strauss, *The Myth of Colorblindness*, 1986 Sup. Ct. Rev. 99, 108. In the peremptory challenge context, using an explicit racial classification is "rational discrimination" if race is the best available proxy for determining juror partiality. For example, if an attorney represents a Ku Klux Klan member, a challenge to all black jurors would be rational discrimination. More subtly, there is extensive research indicating that prospective jurors will tend to sympathize with parties who share a group identity. See Pizzi, *Batson v. Kentucky: Curing the Disease But Killing the Patient*, 1987 Sup. Ct. Rev. 97, 129-30. Exercising peremptory challenges to eliminate jurors of the same race as the client therefore might also be considered rational discrimination, particularly given the often limited information available through voir dire.

21. See, e.g., J. VAN DYKE, supra note 7, at 154-60; Gurney, *The Case for Abolishing Peremptory Challenges in Criminal Trials*, 21 HARV. C.R.-C.L. L. REV. 227, 232-33 (1986). There appears to be a greater number of juror stereotypes about minority group members. Moreover, it is often impossible for the exercise of peremptory challenges to eliminate all majority group members from the jury panel, particularly in civil trials, where each side receives only a small number of peremptories.

22. See J. VAN DYKE, supra note 7, at 28-35, 311-30. Among the reasons offered for the underrepresentation of minorities on jury panels is the reliance on voter registration lists, which still underrepresent minorities, the larger percentage of minorities excused from jury service, and the greater likelihood of challenge if minorities do make it to the jury venire. Id. at 30-31.

25. Id. at 203.
26. Id. at 221. The Court also rejected the defendant's claims that the grand
the prosecutor could not be required to justify his peremptory challenges in a particular case.\textsuperscript{27}

The Court began by tracing the long history of peremptory challenges.\textsuperscript{28} The Court found that the persistence of peremptories and their extensive use demonstrated that the peremptory challenge was "a necessary part of trial by jury."\textsuperscript{29} The Court believed the peremptory was necessary not only to secure fair and impartial juries,\textsuperscript{30} but to "satisfy the appearance of justice."\textsuperscript{31} The Court frankly admitted that prosecutors often exercise peremptory challenges "on grounds normally thought irrelevant to legal proceedings or official action, namely the race, religion, nationality, occupation or affiliations of people summoned for jury duty."\textsuperscript{32} Nevertheless, the Court found that subjecting the prosecutor's challenges in a particular case to the traditional standards of the equal protection clause would undermine the historic importance of the peremptory challenge.\textsuperscript{33} The Court refused to do this and specifically authorized challenges, in any individual case, based on group affiliations.\textsuperscript{34}

However, unwilling to concede that the prosecutor could never violate a defendant's equal protection rights, the Court suggested that a defendant could state an equal protection claim when a prosecutors' office consistently and systematically exercised its peremptory challenges to exclude all blacks from the jury panel in all cases.\textsuperscript{35} Despite the defendant's showing that no black had served on the petit jury in Talladega County in almost fifteen years, the Court found no violation.\textsuperscript{36} It reasoned that the defendant did not meet its burden of proving that the state alone was responsible for the exclusion of blacks from the jury.\textsuperscript{37}

\begin{flushright}
\textit{Id.} at 205-09.
\end{flushright}

\textsuperscript{27} \textit{Swain}, 380 U.S. at 222.

\textsuperscript{28} \textit{Id.} at 212-21.

\textsuperscript{29} \textit{Id.} at 219.

\textsuperscript{30} \textit{Id.} at 212.

\textsuperscript{31} \textit{Id.} at 219.

\textsuperscript{32} \textit{Id.} at 220.

\textsuperscript{33} \textit{Id.} at 221-22.

\textsuperscript{34} \textit{Id.} at 221.

\textsuperscript{35} \textit{Id.} at 223-24.

\textsuperscript{36} \textit{Id.} at 226.

\textsuperscript{37} \textit{Id.} Three justices dissented from the Court's finding that there was insufficient evidence of systematic state discrimination. \textit{Id.} at 246-47 (Goldberg, J.,
Commentators' reactions to the decision in Swain were swift and hostile. Courts were equally antagonistic. The Second Circuit sarcastically labeled a section heading dealing with the showing required by Swain as "Mission Impossible." The Massachusetts Supreme Court called the defendant's burden under Swain "Sysyphean." The results of defendant challenges to the discriminatory use of peremptory challenges following Swain justified these characterizations. Only two reported cases, both from Louisiana, found that a defendant had proved systematic state discrimination. Believing injustice would otherwise result, several state and federal courts used state constitutional provisions or the sixth amendment of the federal Constitution to circumvent Swain's strictures. In 1983, the Court denied certiorari in a case raising challenges to the prosecutor's use of peremptory challenges to exclude blacks from the jury, but expressed interest in reconsidering Swain at a later date.
Finally, in 1986, the Court decided *Batson v. Kentucky* and sharply limited, if not overruled, *Swain*.

**B. *Batson v. Kentucky***

In *Batson*, following court conducted *voir dire*, the prosecutor used his peremptory challenges to strike all four black persons on the venire. The defendant, a black man, was convicted of second degree burglary and receipt of stolen goods by an all white jury. The trial court denied defendant's equal protection and sixth amendment attacks on the prosecutor's use of his peremptory challenges and the Kentucky Supreme Court affirmed. The Supreme Court granted certiorari to review the defendant's claim that he had been denied his sixth amendment right to an impartial jury by the prosecutor's discriminatory peremptory challenges. The Court did not decide the sixth amendment claim, but reversed the lower court on equal protection grounds.

The Court first emphasized its long-standing commitment to the principle that a "State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." The Court recounted at length its application of this principle in cases raising challenges to the selection of the jury venire. The Court detailed the three bases for its anti-discrimination principle: the right of a defendant "to be tried by a jury whose members are selected pursuant to non-discriminatory criteria;" the right of a prospective juror not to be assumed incompetent for and to be excluded from jury service because of race; and the community's inter-

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44. 476 U.S. 79 (1986).
45. Id. at 82-83.
46. Id.
47. Id. at 84 & n.4. The defendant apparently believed that *Swain* foreclosed his equal protection claim. Id. at 83.
48. Id. at 84 n.4. The Court has subsequently admitted that it departed "dramatically from its normal procedure without explanation" by accepting certiorari on one constitutional question and deciding the case under a different constitutional provision without benefit of briefing or argument. Holland v. Illinois, 110 S. Ct. 803, 811 n.3 (1990).
49. *Batson*, 476 U.S. at 84.
50. Id. at 85-88.
est in preserving "public confidence in the fairness of our system of justice." Justice Powell, writing for the majority, found these same interests to be equally applicable to the stage of the jury selection process at issue in *Batson*. Thus, Justice Powell wrote, "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant."52

According to the Court, the error in *Swain* was not a failure to recognize the Court's established equal protection doctrine, but the imposition of a crippling burden of proof on the accused.53 Based on the standards developed in the jury venire cases, it was no longer necessary to demonstrate systematic exclusion of blacks over a number of cases to prove an equal protection violation.54 Rather, under the new "evidentiary formulation"55 a defendant need only establish a prima facie case of purposeful discrimination in the ongoing litigation. The defendant initially must show that he or she is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of defendant's race.56 The trial court must then consider whether these facts and any other relevant circumstances, such as a pattern of strikes against black jurors or the prosecutor's questions during voir dire,


52. *Batson*, 476 U.S. at 89. The Court specifically declined to express any views on whether the Constitution imposed similar limitations on the exercise of peremptory challenges by defense counsel. *Id.* at 89 n.12. Justice Burger opined that "the clear and inescapable import" of the Court's holding would be to limit defense attorney's use of peremptory challenges. *Id.* at 125-26 (Burger, J., dissenting). Most courts that have addressed the issue have stated that restrictions on the exercise of peremptory challenges must be applied equally to the defense and prosecution. See, e.g., *People v. Kern*, 75 N.Y.2d 638, 554 N.E.2d 1235, 555 N.Y.S.2d 647, cert. denied, 111 S. Ct. 77 (1990); *United States v. Leslie*, 783 F.2d 541, 565 (5th Cir. 1986) (en banc), vacated, 479 U.S. 1074 (1987) and cases cited therein. Nevertheless, the issue may not be as easy as Justice Burger suggests. See, e.g., *Goldwasser, Limiting A Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 HARV. L. REV. 808 (1989) (arguing that *Batson* should not be applied to defense counsel).

54. *Id.* at 94-95.
55. *Id.* at 98.
56. *Id.* at 96; but see infra note 85.
raise an inference of purposeful discrimination. If the trial court finds a prima facie case of discrimination, the burden shifts to the state to justify its challenges with a neutral explanation. The Court emphasized that "the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption - or his intuitive judgment - that they would be partial to the defendant because of their shared race." Finally, the Court rejected the State's claim that its holding would eviscerate the fair trial values served by the peremptory challenge or create serious administrative difficulties. The experience in states that had previously adopted similar evidentiary formulations convinced the Court that the State's concerns were unwarranted. The Court remanded the case to the trial court to rule on the defendant's objection in the first instance.

58. Id. at 97.
59. Id.
60. Id. at 98-99.
61. Id. at 99.
62. Id. at 100. In light of the variety of jury selection procedures, the Court declined to instruct lower courts how to best implement its holding. For example, the Court did not indicate whether, upon a showing of purposeful discrimination, the lower court should dismiss the entire venire or disallow the discriminatory challenge and renew selection with the improperly selected juror reinstated on the panel. Id. at 99 n.24.

Although six justices joined Justice Powell's opinion, several also chose to write separately. Justices White and O'Connor, in separate opinions, emphasized that the Batson decision should not be applied retroactively. Id. at 102 (White, J., concurring); Id. at 111 (O'Connor, J., concurring). Justice Marshall expressed the view that the Court's decision would not end the discriminatory use of peremptory challenges. That result, he opined, could only be accomplished by completely eliminating peremptory challenges. Id. at 102-03 (Marshall, J., concurring). Justice Stevens, joined by Justice Brennan, defended the Court's decision to address issues that were not raised in the petition for certiorari. Id. at 108-10 (Stevens, J., concurring). Justices Burger and Rehnquist dissented. The then Chief Justice believed that the Court improperly reached the Equal Protection issue and lamented that the Court's decision on the merits failed to apply traditional equal protection principles and would undermine the ability of the peremptory challenge to ensure the impartiality essential to a fair trial. Id. at 112 (Burger, J., dissenting). Justice Rehnquist criticized the majority for overruling the principal holding of Swain under the pretext of adjusting "evidentiary burdens." Id. at 134 (Rehnquist, J., dissenting). On the merits, he argued that there was no Equal Protection violation because the peremptory challenge permitted the State to use crude stereotypes to eliminate all groups equally. Id. at 137-38. He also viewed the use of "proxies" by the State as too important to the elimination of bias to subject the State's exercise of peremptory challenges in a given case to court scrutiny. Id. at
Although the Court in Batson suggested that it was merely tinkering with Swain’s “evidentiary formulation,” the Court did much more. The Court in Swain specifically rejected any claim of discrimination based on the exercise of peremptories at a single trial. By contrast, the Batson Court recognized the utility of the peremptory challenge, but found society’s interest in eliminating discrimination in the selection of even a single jury to be of overriding importance. Equally meaningful, the Court found the State’s interest in “rational discrimination” to be insufficient to justify raced-based peremptory challenges. Although in-group bias may be a recognized phenomenon, assumptions based on race are not cognizable justifications for the exclusion of black jurors under Batson. The balance between the interests in impartiality and freedom from discrimination was significantly altered.

C. Implementation of Batson

Lower courts have not applied the guidelines established in Batson uniformly. Courts differ about the quantum of proof necessary for a defendant to establish a prima facie case. As Justice Marshall feared, some courts have refused to find a prima facie case whenever the prosecutor has left one or more minority members on the jury. Other courts have questioned whether striking only a small number of minority jurors, even if no minority members remain on the panel, should constitute a prima facie case. By contrast, several courts have been willing to find a prima facie case of purposeful discrimination even if not all minorities, or if only a small number, have been removed from the jury. Two
courts, as an aid to judicial efficiency, even have required the prosecutor to provide rebuttal reasons whenever the prosecutor strikes a black juror from the panel. 68

Lower courts differ concerning which explanations by the prosecutor are sufficient to rebut an inference of discrimination. Many lower courts have accepted subjective explanations such as “failure to maintain eye contact,” 69 “poor attitude in answering voir dire questions,” 70 and undesirable “posture and demeanor.” 71 Other courts have accepted explanations that may serve as proxies for race, for example, that the juror lives in the same neighborhood as the defendant. 72 A few courts do not even require rebuttal of all the questioned peremptory challenges when the prosecutor has explained a few to the court’s satisfaction. 73 Again, not all courts are as lax. Many courts will scrutinize the prosecutor’s explanations and find them pretextual if the prosecutor did


69. See, e.g., United States v. Cartlidge, 808 F.2d 1064, 1071 (5th Cir. 1987); Townsend v. State, 730 S.W.2d 24, 26 (Tex. Ct. App. 1987); see also United States v. Terrazas-Carrasco, 861 F.2d 93, 94-95 & n.1 (5th Cir. 1988).

70. United States v. Vaccaro, 816 F.2d 443, 457 (9th Cir.), cert. denied sub nom. Alvis v. United States, 484 U.S. 928 (1987); see also United States v. Roberts, 915 F.2d 211, 214 (9th Cir. 1990) (“disinterested”).


not challenge similarly situated non-minority jurors.\textsuperscript{74}

The fact-based inquiry required to create or rebut an inference of purposeful discrimination has permitted courts that are less than enamored with \textit{Batson} to restrict its impact.\textsuperscript{75} As a result, \textit{Batson} has not eliminated discrimination in the selection of jurors. Although, \textit{Batson} has undoubtedly reduced the degree of such discrimination, it has also spawned extensive motion practice and hundreds of appeals. Several commentators have criticized \textit{Batson} on that basis.\textsuperscript{76}

\section*{D. The Continuing Vitality of the Batson Rationale}

Despite the increased litigation costs and less than optimal results, the \textit{Batson} decision remains easy to justify. Our aspiration for a colorblind society is too important to sacrifice to expediency. It is essential that the judicial system take a strong stand against racism. As the Court has recognized, "[d]iscrimination on the basis of race, odious in all respects, is especially pernicious in the administration of justice."\textsuperscript{77} Although the prohibition against racial discrimination in the selection of a jury may not be fully effective, it at least brings us closer to our goal of a society where race is irrelevant. Some judges have raised more fundamental objections to the \textit{Batson} decision. Enforcement problems aside, they question whether race-based exercise of peremptory challenges actually discriminates against or stigmatizes minority jurors.\textsuperscript{78} They reason that prosecutors are merely ac-

\textsuperscript{74} See, \textit{e.g.}, United States v. Chinchilla, 874 F.2d 695, 698-99 (9th Cir. 1989); Garrett v. Morris, 815 F.2d 509 (8th Cir.), \textit{cert. denied}, 484 U.S. 898 (1987); Maloney v. Washington, 690 F. Supp. 687, 691 (N.D. Ill.), \textit{vacated on other grounds sub nom.} Maloney v. Plunkett, 854 F.2d 152 (7th Cir. 1988); State v. Collier, 553 So.2d 815, 822 (La. 1989).


\textsuperscript{76} See, \textit{e.g.}, Alschuler, \textit{supra} note 8, at 169; Pizzi, \textit{supra} note 20, at 134.


knowledging the recognized phenomenon of in-group bias and are attempting to eliminate such bias in all groups equally. They also observe that the excluded juror can always serve on another jury, and hence, neither the juror nor the community suffers any significant injury.

That a minority juror eventually may be seated on another jury or that other groups face similar discrimination cannot justify race-based exercises of peremptory challenges. To be classified based on group stereotypes is to be treated as less than an individual. Given the long history and continued pervasiveness of racism in this country, group-based decision making in even one case can stigmatize minority group members. Moreover, because many of the group-based stereotypes will be applicable in a wide range of cases, entire groups may be excluded from the jury process. For example, some “jury experts” view African-Americans as relatively sympathetic to defendants in criminal cases. Prosecutors in some jurisdictions, therefore, may seek to remove virtually all African-Americans from criminal juries. Thus, the Batson rule not only prevents the repeated stigmatization that the minority group member would otherwise incur, but protects the minority community’s voice in the administration of justice. Involvement in the trial process is one of the unique participatory features in our democracy and helps preserve public confidence in the fairness of our justice system. Such participation is especially critical for minority group members, many of whom already view the judicial system as “the white man’s court.”

493, 502 (E.D. N.Y. 1984); see also Swain v. Alabama, 380 U.S. 202, 221 (1965); Saltzburg & Powers, supra note 8, at 364.

79. As voir dire becomes increasingly perfunctory, forcing litigants to further rely on broad stereotypes rather than case-specific information, the danger that minority group members will be eliminated from the jury only grows.

80. See supra notes 18-19. Similarly, in civil litigation, certain minority groups are reputed to have pro-plaintiff biases. Id.

81. This perception has some basis in reality. See, e.g., Report of the Supreme Court Task Force on Race/Ethnic Issues in the Courts, reprinted in 69 MICH. B.J. 375, (1990) [hereinafter Report]. Minority members comprise a disproportionately small segment of the state and federal judiciary. See, e.g., id. at 379. The Justice Department has argued that many southern states elect their judges in a discriminatory manner. See N.Y. Times, Apr. 27, 1990, at A1, col. 1. Statistics comparing conviction rates and death sentences between Afro-American and white defendants also support the perception of a racist judicial system. See, e.g., McCleskey v. Kemp, 481 U.S. 279, 286-89 (1987); see generally Report, supra, at 378 (general
groups also may face group-based generalizations. But non-minority groups have not been subjected to the same historical discrimination and therefore do not incur the same stigmatization suffered by minority group members. Also, given the limited number of allotted peremptory challenges, majority groups are less likely to be completely excluded from the jury.\textsuperscript{83} In any event, that other groups face discrimination compounds the infirmity of the system, it does not justify race-based decision-making.

Despite some difference in opinion about the value of the \textit{Batson} holding, its continuing vitality cannot be questioned. The Supreme Court has recently reaffirmed that \textit{Batson} remains the law.\textsuperscript{84} Indeed, five justices, focusing on the injuries to the excluded juror and the community, opined that a defendant may raise a \textit{Batson} challenge even if the defendant is not of the same race as the excluded juror.\textsuperscript{85}

Recently, the Supreme Court granted certiorari to decide information concerning the relation between race of victim and defendant and the conviction/acquittal rate).


\textsuperscript{83} Cf. Brown v. Bd. of Educ., 347 U.S. 488 (1954) (although all groups had separate educational facilities, separate facilities held inherently unequal).

\textsuperscript{84} See Holland v. Illinois, 110 S. Ct. 808, 809-11 (1990); see also Alvarado v. United States, 110 S. Ct. 2995 (1990) (per curiam).

\textsuperscript{85} Holland, 110 S. Ct. at 811 (Kennedy, J., concurring), at 812 (Marshall, J., dissenting), at 820 (Stevens, J., dissenting). In \textit{Holland}, the Court rejected a white defendant's claim that exclusion of black jurors from his jury panel violated his sixth amendment right to an impartial jury. The defendant had not pursued an equal protection claim before the Supreme Court. Nevertheless, five justices indicated \textit{Batson} would have supported such a claim if it had been raised. Those justices reasoned that the defendant would have had third party standing to protect the interests of the excluded jurors and the community. \textit{Id.} at 812.

The first element of \textit{Batson}'s prima facie case required a showing by the defendant that the prosecutor had "exercised peremptory challenges to remove from the venire members of the defendant's race." \textit{Batson}, 476 U.S. at 96 (emphasis added). Accordingly, most lower courts that had addressed the issue had assumed \textit{Batson} required the defendant and the excluded juror to be from the same racial group. See, \textit{e.g.}, United States v. Chavez-Vernaza, 844 F.2d 1368, 1375-76 (9th Cir. 1987); Wilson v. Gross, 845 F.2d 163, 165 (8th Cir. 1988). Post-\textit{Holland} cases should not impose that requirement. See, \textit{e.g.}, United States v. Dawn, 897 F.2d 1444, 1448 n.4 (8th Cir. 1990), cert. denied sub nom. Dawn v. United States, 111 S. Ct. 389; People v. Kern, 75 N.Y.2d 658, 654 n.3, 554 N.E.2d 1235, 1244 n.3, 555 N.Y.S.2d 647, 656 n.3, cert. denied, 111 S. Ct. 77 (1990); but see Congdon v. State, 260 Ga. 173, 176 & n.2, 391 S.E.2d 402, 404 & n.2 (1990), petition for cert. filed, No. 90-5491 (U.S. Aug. 15, 1990).
whether the *Batson* decision also applies in civil litigation. Commentators and lower courts have reached conflicting conclusions. The next section addresses this issue.

IV. APPLICATION OF *BATSON* TO CIVIL LITIGATION

The fourteenth amendment provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." This language does not distinguish between criminal and civil trials. Nevertheless, the protections guaranteed by the fourteenth amendment change with the context. Although there are a myriad of differences between civil and criminal litigation, this article demonstrates that few of these differences influence the balance of interests struck by *Batson*. Accordingly, the article concludes that *Batson* should apply to civil litigation. First, however, it is necessary to address whether the exercise of peremptory challenges by a private litigant constitutes "state action." Absent "state action," the fourteenth amendment of the federal Constitution is not operational. Although Supreme Court precedents in this area are ambiguous, the policies justifying the state action requirement unequivocally support treating a private litigant's discriminatory peremptory challenge as state action.

86. Edmonson v. Leesville Concrete Co., Inc., 11 S. Ct. 41 (1990)
87. See supra notes 2-3.
88. U.S. CONST. amend. XIV, § 1. The Supreme Court has held that the Constitution, through the fifth amendment due process clause, also requires the federal government to provide equal protection of the laws. See Bolling v. Sharpe, 347 U.S. 497, 499 & n.4 (1954).
90. In *Batson*, 476 U.S. 79, it was unnecessary to address the state action issue. The conduct of a state prosecutor, an agent of the state, is unquestionably state action.
A. State Action Precedent

The equal protection clause does not prohibit conduct by private parties, "however discriminatory or wrongful."92 Thus, to establish a violation of their constitutional rights, plaintiffs must demonstrate that the state, and not merely a private individual, was the source of the purposeful discrimination. Although this principle is easily stated, the question whether challenged conduct constitutes state action "admits of no easy answer."93 As the amount of interaction between the private individual and the state grows, it becomes increasingly difficult to discern where private conduct ends and state action begins. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."94 The Court has articulated several formulaic tests, such as the "public function," "state compulsion," and "joint action" tests to aid in this analysis.95 The ultimate question, however, is whether the private conduct fairly can be attributed to the state.96

A strong factual argument can be made that a private litigant's discriminatory peremptory challenges are fairly attributable to the state. The state is intimately involved in the jury selection process. The excluded juror is summoned to

96. See Lugar, 457 U.S. at 936-37; Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982); Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974). This circularity - conduct is treated as that of the state if it is state action and conduct is state action if it is fairly attributable to the state - may be one reason that the state action cases have been called a "conceptual disaster area." See, e.g., Chemerinsky, Rethinking State Action, 80 NW. U.L. REV. 503, 504 (1985); Friendly, The Public-Private Penumbra - Fourteen Years Later, 130 U. PA. L. REV. 1289, 1290 (1982); Black, Foreward: "State Action," Equal Protection, and California's Proposition 14, 81 HARV. L. REV. 69, 70 (1967). The absence of a single theory of rights or policy basis to explain the case law contributes to the analytical difficulty in the area. See L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1691-99 (2d ed. 1988); Brest, State Action and Liberal Theory: A Casenote On Flagg Brothers v. Brooks, 130 U. PA. L. REV. 1296, 1297-1302 (1982); see also infra notes 140-72 and accompanying text.
court through a government-issued subpoena. The state requires the juror to appear in a designated courtroom, a government forum open to the public.\textsuperscript{97} The court supervises the questioning during \textit{voir dire}, often acting as the sole questioner. Through its control of the information that may be discovered about the venire, the court affects the exercise of both peremptory and for cause challenges.\textsuperscript{98} The Court rules on all challenges for cause and thereby influences the number of and identity of the jurors subject to peremptory challenge. The peremptory challenge itself is a government created and highly regulated right. The state defines the number of peremptory challenges available to each party. The government, by statute or through the court, regulates the procedure for making such challenges. The peremptory challenge is exercised by an officer of the court and enforced, with the full coercive powers of the state, by the court.\textsuperscript{99} Often, counsel make the peremptory challenge outside the presence of the venire. Thus, when the court excuses a juror, the juror may not know who was responsible for their removal from the jury. In such cases, the "inference is inescapable to both the excluded jurors and the public"\textsuperscript{100} that the state is responsible for the jurors' exclusion. This perception is critical because two of the primary injuries created by race-based peremptory challenges - stigmatization of the excluded juror and loss of public confidence in the judiciary\textsuperscript{101}-depend upon public perceptions.\textsuperscript{102} Although

\textsuperscript{97} The public, therefore, will be able to observe any judicial tolerance of the alleged racial discrimination. See People v. Gary M., 138 Misc. 2d 1081, 1088-89, 526 N.Y.S.2d 986, 992-93 (Sup. Ct. 1988).


\textsuperscript{99} Most often, the judge excuses the challenged juror. On occasion, the court clerk may perform this function.

\textsuperscript{100} People v. Kern, 75 N.Y.2d 638, 657, 554 N.E.2d 1235, 1245, 555 N.Y.S.2d 647, 657 (1990), \textit{cert. denied}, 111 S. Ct. 77 (1990). In some cases, however, counsel's questions during \textit{voir dire} may suggest which litigant chooses to challenge the excluded juror.

\textsuperscript{101} See supra notes 79-83 and accompanying text.

many of these state involvements alone may be insufficient to support a finding of state action, their aggregate should be enough to fairly attribute private conduct to the state. This is especially true when the private conduct is racial discrimination, which generally has been thought to require a lesser showing of state involvement than would otherwise be required to support a finding of state action.

Application of the Court's formulaic tests and analogy to Supreme Court precedent arguably provide further support for finding that a civil litigant's race-based exercise of peremptory challenges constitutes state action. The Court has held that when a private party engages in an "exclusively public function," his or her conduct may be considered state action. The state cannot free itself from the limitations of the Constitution merely by delegating state functions to private individuals. For example, the Supreme Court has held that a state cannot exclude blacks from voting by delegating to a private political organization the task of determining the qualification of voters. In Terry v. Adams, the Court reviewed the Jay Bird Democratic Association's practice of holding its own pre-primary election of nominees. The voluntary club of white Texas Democrats excluded blacks from determining the proper scope of state action).
their pre-primary election and the winner, with few exceptions, ran unopposed in the primary. The Court held that the club was subject to the restrictions of the fifteenth amendment even though there was a complete absence of formal state connection to any of the club's political activities. The majority of justices, although writing separately, appeared to agree that the relationship between the club's practice and the electoral system constituted the delegation of a public function subjecting the club's practice to the fifteenth amendment. Similarly, conducting jury trials is a historic government function. The Court even has equated exclusion from participation in the jury process with the denial of the elective franchise. A state should not be permitted to delegate the power to determine the composition of juries and then disclaim responsibility for the predictably discriminatory way in which counsel exercise that authority.

The Court has also found state action where the government has encouraged or enforced the challenged activity of a private party. For example, in Shelley v. Kraemer, the Court held that judicial enforcement of a racially restrictive covenant constituted state action, notwithstanding that the decisions to include and seek enforcement of the discriminatory clause were made exclusively by private parties. State action existed because "the State ha[d] made available to [persons seeking to discriminate] the full coercive power of government . . . ." Similarly, in Lugar v. Edmondson Oil Co., the Court found state action when a private party made use of ex parte state attachment procedures to deprive another person of her property. The Court reasoned that the state had created the attachment procedures and, through the actions of the court and sheriff, participated in the seizure. Thus, even though the decision to

109. Id. at 463.
110. See id. at 469 (Black, J.), 484 (Clark, J., concurring).
112. 394 U.S. 1 (1948).
113. In Shelley, a white property owner wanted to sell his property to a minority purchaser. Third parties, not the seller or buyer, sought to enforce the restrictive covenant governing the land. Id. at 5-6.
114. Id. at 19.
seek the attachment was purely private, the government assistance and enforcement converted the private actions to state action. Analogously, a private attorney may seek to exercise a discriminatory peremptory challenge, but it is not effective until the court enforces the decision and the marshall escorts the juror from the courtroom.

Finally, the Court has found state action where there are sufficient contacts between the private party and the state to create either the appearance of state authority or the creation of a "symbiotic relationship" between the private and public entities. In the leading case, *Burton v. Wilmington Parking Authority*, the Court held that a privately owned restaurant which leased space in a government parking facility could not refuse service to racial minorities. Although the government did not command or encourage the discrimination, the private party's location and status as a lessee of the government, and its concomitant appearance of state authority, contributed to the Court's finding of state action. The Court reasoned that the state had "not only made itself a party to the refusal of service, but had elected to place its power, property, and prestige behind the admitted discrimination..." The same might be said about the judiciary's enforcement of discrimination in government courtrooms, particularly when jurors frequently are unaware of the source of the discrimination.

Despite these arguments, the precedent supporting a finding of state action in the jury selection process is not overwhelming. Each of the above discussed cases is distinguishable and there are other cases that can be cited to refute a finding of state action.

In *Terry v. Adams*, the state legislature knowingly permitted the Jaybird Club to conduct its pre-primary election to perpetuate discrimination. This type of discrimination had previously been held illegal when more directly perpetrated by the state. In such circumstances, a finding of purposeful state discrimination was compelled. The judiciary has not

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117. Id. at 725.
118. See supra notes 99-101 and accompanying text.
been accused of such purposeful discrimination in the administration of the peremptory challenge process.

*Shelley v. Kraemers* involved the enforcement of a provision discriminatory on its face against a party who did not wish to discriminate. Compulsion of facially discriminatory restrictions justified a finding of purposeful discrimination. A litigant's peremptory challenges, by contrast, are facially neutral. The challenges are private choices that the court accepts, but does not compel. If mere enforcement of private, facially-neutral choices constituted state action, virtually no private decisions would be immune from constitutional restraint. For example, if a party seeking to prevent African-Americans from dining in his or her home sought enforcement of state trespass laws, judicial enforcement would convert the private discrimination to state action. *Shelley* has not been read so broadly.120 *Lugar v. Edmonson Oil Co.* is not to the contrary. In *Lugar*, the Court specifically limited its holding to the particular context of prejudgment attachment.121

Finally, *Burton v. Wilmington Parking Authority*, through gradual erosion, has limited precedential power.122 The Supreme Court has emphasized that the government and private party in *Burton* had a fiscal relationship and the government profited from the private discrimination.123 No such financial relationship exists between the state and the private litigant.

Although the court decisions cited to support a finding of state action are readily distinguishable, the cases cited to refute a finding of state action are equally unpersuasive. Those denying that a private litigant's discriminatory peremptory challenges constitute state action124 primarily rely on *Polk Co. v. Dodson*.125 In *Polk*, the actions of a public de-

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120. See, e.g., Goldwasser, *supra* note 52, at 818.
fender, paid by the state, were held not to be state action. Those opposed to a finding of state action reason that if a public defender is not a state actor, a private litigant surely cannot be. Polk, however, only held that a public defender was not a state actor when seeking to withdraw from pursuing a frivolous appeal. The Court has found public defenders to be state actors in other contexts. A finding of state action in Polk would have risked a substantial infringement on counsel’s liberty interest. Counsel might have been required to continue the employment relationship against her will. Similar risks are not posed if a private litigant’s discriminatory peremptory challenge is deemed state action. Professor Tribe has also distinguished Polk as involving no constitutionally troublesome rule or criterion. In short, although Polk holds that trial counsel’s status as an officer of the court alone does not make his or her conduct state action, it does not preclude finding attorney conduct to be state action without considering the “totality of circumstances” involved.

The Fifth Circuit has also cited Blum v. Yaretsky to support its decision that a private litigant’s discriminatory peremptory challenge is not state action. In Blum, the plaintiffs challenged a nursing home’s decision to transfer them to a facility providing a lower level of care. They alleged that the nursing home violated the patients’ due process rights by not providing them adequate notice or a hearing to challenge the transfer decision. Although the nursing homes were extensively regulated and government Medicaid benefits were reduced as a result of the transfer, the Court found that the decision to transfer the Medicaid patients was not state action. The Court stated that a government “normally can be held responsible for a private decision only when it has exercised coercive power or has provided such

127. For a discussion of the personal autonomy justification for the state action doctrine, see infra notes 144-47 and accompanying text.
128. See L. Tribe, supra note 96, at 1702-03.
significant encouragement . . . that the choice must . . . be deemed to be that of the State . . . Mere approval or acquiescence in the initiatives of a private party is not sufficient . . . .” Thus, the Fifth Circuit has suggested that the mere “ministerial acts” of a judge supervising the empanelment process cannot constitute state action.132

In Blum, however, the decision to transfer the Medicaid patients was not made pursuant to any statute. Thus, the plaintiffs failed to satisfy the first requirement of the Lugar two-part state action test applied by the Fifth Circuit.133 When a private party acts pursuant to a state statute, as a litigant does when exercising a peremptory challenge, there is a greater degree of state involvement and responsibility. In such cases, there is less reason to demand significant government encouragement as a prerequisite for categorizing a private decision as state action. Moreover, when one considers the totality of circumstances, a judge’s participation in the empanelment process is generally more than ministerial.134 The judge’s involvement is at least as significant as the judicial involvement in Lugar135 and Tulsa Professional Collection Services, Inc.136 cases in which the Court found a private

133. In Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982), the Court presented a two-part test for assaying the presence of state action. First, the claimed deprivation “must be caused by the exercise of some right or privilege created by the State . . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.” Id. at 937. The Fifth Circuit conceded that a litigant’s exercise of a peremptory challenge satisfies the first requirement. Edmondson v. Leesville Concrete Co., 895 F.2d at 221.
134. See supra notes 97-104 and accompanying text. It is theoretically possible that a judge would exercise no control over counsels’ questions during voir dire and have the court clerk supervise the peremptory challenge process. Nevertheless, even if such facts would rebut a finding of judicial involvement in the empanelment process, the rarity of such a confluence of events warrants the presumption that the trial judge is more than a ministerial participant in empaneling a jury.
136. 485 U.S. 478 (1988) (probate court’s appointment of an executor, activating time bar in nonclaim provisions of probate code, together with subsequent supervision of probate proceedings, is sufficient involvement to trigger due process requirements of fourteenth amendment).
party's actions pursuant to state statute to be state action.

Although, the cases cited to refute a finding of state action are unconvincing, there is a strong Supreme Court trend toward restrictive interpretation of the state action requirement. Nevertheless, this trend cannot justify finding a civil litigant's discriminatory peremptory challenge immune from constitutional review. The Court's recent state action cases have not involved racial discrimination claims - private discrimination is now generally remedied by statute. Historically, allegations of racial discrimination generally require a lesser showing of state involvement to satisfy the state action requirement than do other fourteenth amendment claims. Thus, the Court's "trend" may only reflect a decrease in the number of cases raising racial discrimination claims. More fundamentally, scrupulous decision-making cannot be based merely on trends. It requires consideration of analogous precedent and reasoned policy and principles. Given the elusive distinction between private and public action and the Court's reliance on malleable formulaic tests, it is not surprising that relevant precedent is ambiguous. Policy considerations, however, are not. The next section demonstrates that no recognized rationale for the state action doctrine justifies protecting a private attorney's discriminatory peremptory challenges from constitutional challenge. In the absence of either controlling precedent or a persuasive policy basis for imposing a rigorous state action requirement, the private litigant's discriminatory per-


139. See supra note 105.

140. See supra note 95 and notes 106-18 and accompanying text; see also Chemerinsky, supra note 96, at 505 & n.8.

141. See supra notes 106-36 and accompanying text.
emptory challenge should be deemed state action.

B. State Action Theory and Policy

The state action doctrine, by immunizing private conduct from constitutional attack, limits the protection provided many fundamental rights. Three primary justifications are given to explain why infringements of our most basic liberties should be tolerated merely because the violator is a private entity rather than the government. The state action doctrine is said to protect a sphere of individual autonomy, honor constitutional concepts of federalism and further the separation of judicial and legislative powers.\textsuperscript{142} Whatever the merits of these rationales generally, neither these nor several other possible justifications for the state action doctrine can justify protecting private discrimination in the peremptory challenge process from constitutional review.\textsuperscript{143}

Adherence to the state action doctrine is thought to preserve an area of individual autonomy by limiting the reach of federal law, particularly federal judicial power. In this sense, the state action doctrine derives from a natural law theory of rights.\textsuperscript{144} Certain rights are deemed so impo-


\textsuperscript{143} Several commentators have opined that the unitary state action doctrine can never be justified. See, e.g., Chemerinsky, supra note 96; L. Tribe, supra note 96, at 1698-1703; J. Nowak, R. Rotunda & J. Young, supra note 95, at 448-50. They argue that a threshold state action determination, which focuses on the status of the actor, is improper. Rather, the Court should openly balance the conflicting rights implicated by the underlying dispute, taking into account that the harm created by a state's actions may be greater than the harm created by a private actor's identical conduct.

Analysis of the merits of the state action doctrine is beyond the scope of this essay. This article assumes the state action doctrine can be justified in the general case, but argues that none of the preferred justifications applies in the peremptory challenge context.

\textsuperscript{144} Natural law theory posits that individuals inherently possess certain basic freedoms that the government may not abridge. See Chemerinsky, supra note 96, at 528. By contrast, a positivist's theory of rights maintains that citizens possess only those rights granted by the state. See Brest, supra note 96, at 1297; R. Dworkin, Taking Rights Seriously xi-xii (1977). The state action doctrine may be viewed as adopting a limited natural law approach because it seemingly recognizes certain inherent rights, but can preclude only judicial, not legislative, interference with those rights. See, e.g., Katzenbach v. McClung, 379 U.S. 294, 300-05 (1964); Schwarzschild, Value Pluralism and the Constitution: In Defense of the State
tant that they are considered immune from regulation. The state action doctrine protects such rights not only by freeing them from judicial control, but by protecting them even from judicial review. For example, without a state action doctrine, individuals might be sued for giving dinner parties that had discriminatory guest lists. Even if the court denied relief in such a case, having to defend such actions on the merits would infringe the defendant's privacy interests. A private party with no intention to discriminate even might cancel her party rather than risk an erroneous judicial decision finding her conduct unconstitutional. The possibility of such suits also would create serious systemic problems. The courts would be clogged with cases asserting private infringements of constitutional rights. Professor Marshall has also suggested that requiring repeated balancing of constitutional rights would be inherently difficult and risk diminishing the value of the non-prevailing constitutional right.

Finding a civil litigant's discriminatory peremptory challenge to be state action would not interfere with any significant personal autonomy interest. The peremptory challenge is not an inalienable or even a constitutional right. The right exists only through state regulation. A party cannot exercise the peremptory challenge until she enters the court system, and any limitation on the peremptory challenge would only compel conduct in that state regulated arena. In short, any claim to a natural law right to exercise a peremp-


145. The argument in the text presumes that the state action doctrine eliminates a greater number of suits than would a substantive rule giving dispositive weight to the defendant's privacy interests. Despite the confusion in the state action area, the result in certain cases, such as the one posited in the text, is clear. The same may not be true if a balancing of constitutional rights is required. See Marshall, Diluting Constitutional Rights: Rethinking "Rethinking State Action", 80 Nw. L. Rev. 558, 563 (1985). Ignorance of the governing standard would likely encourage litigation. See Cole, supra note 142, at 367 & n.161. In any event, dismissal of a suit on the basis of lack of state action rescues the defendant from having to provide a justification for his or her conduct. By freeing the defendant's conduct from judicial scrutiny, the doctrine creates a zone of comfort that may protect the individual's personal autonomy interest. Id. at 368-69.


147. See Marshall, supra note 145, at 564-65.

tory challenge is nonsensical. Furthermore, a challenge to a private party's discriminatory peremptory challenge will not create additional lawsuits. The challenge is only raised in an existing suit. Although the challenge may involve an additional hearing, it does not require a full evidentiary hearing or costly discovery. The experience in the criminal arena has proven that the hearing required is not prohibitively expensive or time consuming. Finally, the decision on the merits does not involve the balancing of constitutional rights feared by Professor Marshall. The right to exercise a peremptory challenge is only a statutory right. Moreover, in Batson the Court already has balanced analogous competing rights with few apparent ill-effects on the rights involved.

The state action doctrine protects federalism concerns by preserving for states the primary role in the adjustment of competing private interests. Historically, states and their representatives feared federal power usurping their rights. The allocation of decision-making authority engendered by federalism concerns also can be justified by a desire to defer to local expertise and avoid trivialization of the federal docket. Without the state action doctrine, many ordinary private contract or tort disputes would become constitutional cases subject to resolution by the federal judiciary. Finally, by deferring to state decision making in the first instance, the states may act as laboratories for experimentation with new rules and approaches.

Initially, one may question the contemporary strength of the federalism justification. It is now widely recognized that Congress has broad powers to legislate in areas historically left to the states. Although there is reason to accept congressional, but not judicial, power to override state control of private behavior, this raises primarily separation of power,
not federalism, interests. Moreover, the zone of state autonomy that the state action doctrine creates exists only for state inaction. Once the state has spoken, either through statute or judicial decision, there is state action that may be reviewed by the federal judiciary. This seems to place an artificial importance on the status quo.

In any event, the interests the federalism justification is thought to advance are not furthered in the peremptory challenge context. A federal decision applying Batson to civil trials would not trample state's rights. First, there is no question that the federal judiciary can control the conduct of the peremptory challenge process in their own courts. This does not usurp any state function. Although state courts would be bound by a federal constitutional pronouncement, the federal courts would not be acting in an area in which they lack expertise. With diversity jurisdiction, they repeatedly hear civil cases raising state claims. And in both federal and state cases, the federal courts are aware of the importance of peremptory challenges and equal protection rights. There is no reason to believe the federal courts are incapable of balancing the private rights involved. Indeed, they would be balancing the identical rights when determining if Batson should apply to civil trials in federal court. Moreover, state courts would have substantial control over the implementation of the federal rule. Accordingly, they would be able to respond to local conditions in effectuating the Batson guidelines. Recognizing a Batson right to be free from discriminatory peremptory challenges in civil trials would not trivialize the federal docket. Such challenges typically do not raise independent claims. Batson hearings in state cases would remain in state courts. Finally, there is no reason to defer to state decision-making to gain experience with different approaches. Such experimentation has already occurred in pre-Batson criminal trials and through application of state constitutional provisions in post-Batson civil trials.

The state action doctrine serves a separation of powers function by allocating to state legislatures or the Congress

154. See infra notes 157-59 and accompanying text for a discussion of the separation of powers justification for the state action doctrine.

155. See L. Tribe, supra note 96, at 1688-89.

156. See supra note 149.
the initial duty to define how private disputes should be resolved. Leaving the ordering of private relationships to the legislative branch may be justified on several grounds. The legislature, elected by and answerable to the public, better expresses the majoritarian view. The legislature often has greater institutional competence, including better information gathering ability. Legislative enactment also provides flexibility. If a legislative rule proves unsatisfactory, it may be repealed or, in appropriate circumstances, invalidated by the courts. On the other hand, a constitutional decision places serious restraints on the ability of both legislatures and the common law to adjust to changing circumstances. Finally, legislative, as opposed to judicial, decision-making provides a valuable notice-giving function which protects the individual's sphere of personal autonomy. A citizen knows in advance what conduct is proscribed and therefore may freely exercise their legitimate liberty interests.

None of these rationales, however, justifies shielding a civil litigant's discriminatory peremptory challenge from judicial review. Even if a legislature best voices majoritarian concerns, the judiciary cannot abdicate its obligation to review equal protection claims. A constitutional right, particularly the right to equal protection, is part of the Constitution precisely to guard against majoritarian excesses. In any event, Congress has already expressed its intent to maintain a jury process free from discrimination. Section 1861 of 28 U.S.C., addressing formation of the jury venire, provides: "No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States . . . on account of race, color, religion, sex, national origin, or economic status." A court applying Batson to civil trials would not be usurping any legislative function, but would be furthering broadly read congressional intent. Alternatively, the Court could be viewed as formulating procedural rules to preserve judicial integrity, a function the Court, through its supervisory powers, has previously reserved to itself. Ad-
ditionally, the peremptory challenge process is an area peculiarly within judicial expertise and a constitutional decision would not create troubling inflexibility in the law. The courts have observed pre- and post-\textit{Batson} behavior for years. They have had more than enough experience to appropriately balance the competing peremptory challenge and equal protection rights. Finally, legislative notice that \textit{Batson} would be applicable to civil trials is unnecessary. Litigants do not face independent suits, much less damage claims, for discriminatory peremptory challenges. The litigant does not have to fear liability for the exercise of any legitimate liberty interest.

Professor Schwarzschild offers an interesting alternative to the traditional justifications for the state action doctrine. He suggests that the state action doctrine is justified because it promotes “value pluralism.”\textsuperscript{163} He reasons that society derives maximum satisfaction when there are many and conflicting values from which each individual may choose.\textsuperscript{164} When the state, a monopoly institution, adopts its own policy, there can be no pluralism. Citizens have no choice but to submit to the government policy. In such circumstances, the Constitution appropriately requires review of the government’s policy decision. In contrast, when a private party acts (or the government vindicates a private choice), “the citizen may potentially enjoy an array of possible choices.”\textsuperscript{165} If the choices available are deemed unsatisfactory, the legislature may enact the will of the majority.\textsuperscript{166} But when choices are available, there should be no constitutional bar to diverse persons pursuing diverse values.\textsuperscript{167} In effect, the state action doctrine creates a presumption of limited harm when there is an “exit option” available to the victim of a private party’s conduct.

At most, Professor Schwarzschild provides a justification for a state action doctrine. As Professor Schwarzschild recognizes, it does not describe the existing state action test.\textsuperscript{168}

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\textsuperscript{163} See Schwarzschild, \textit{supra} note 145, at 132.
\textsuperscript{164} \textit{Id.} at 132, 137-38.
\textsuperscript{165} \textit{Id.} at 145.
\textsuperscript{166} See \textit{id.} at 137.
\textsuperscript{167} \textit{Id.} at 138.
\textsuperscript{168} \textit{Id.} at 142, 145. The value pluralism conception of the state action doc-
On a theoretical level, one also may question whether value pluralism should be the sole governing standard. Often one person's freedom to choose may preclude another person's choice. For example, a restaurant owner may choose to discriminate when deciding whom she wishes to serve. The victim of the discrimination may dine elsewhere, but once refused service, can no longer choose to live in a world free from discrimination and the stigma such discrimination creates. It is no answer to suggest that the legislature may remedy such conflicts. As suggested earlier, this ignores the judiciary's constitutional role to protect minority interests. As a practical matter, the value pluralism model appears to suffer from the same indeterminacy afflicting the current standard. For example, Professor Schwarzschild acknowledges that strict application of his model in *Shelley v. Kraemer* would have required enforcement of the racially restrictive covenant. Yet, because he views that outcome as intolerable, Professor Schwarzschild offers an argument under his model to justify reaching the same result as the Court. Such malleability precludes meaningful predictability. Similarly, Professor Schwarzschild offers no standard with which to measure how satisfactory the "exit option" must be to avoid categorization as state action. For example, why isn't the citizen's option to move to a different state as satisfactory (and realistic) as the worker's option to change jobs if he or she experiences discrimination in the workplace? In any event, even if value pluralism is the applicable standard, a civil litigant's discriminatory peremptory challenge should be treated as state action. The state is a monopolist in the jury empanelment process. A juror who is a potential victim of discrimination cannot choose to avoid it. The state summons the juror and assigns him or her to designated panels. The juror has no choice in the matter.

One might submit that even if all justifications for the state action doctrine appear inapplicable in the peremptory challenge context, simple administrative efficiency counsels

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169. See *supra* note 160 and accompanying text.
170. 334 U.S. 1 (1948).
171. See *Schwarzschild*, *supra* note 145, at 155.
172. *Id.* at 155-60.
for strict application of the doctrine, rather than case by case consideration of state action policies. This argument misconstrues the thesis of this essay. This article does not recommend abandonment of a unitary state action doctrine. Rather, it merely suggests that, as in all areas of the law, underlying policies provide standards with which to resolve difficult cases. Analysis of facts without standards results in unprincipled decision-making.

In sum, there is a strong factual argument for considering a civil litigant's discriminatory peremptory challenge to be state action. Case law is ambiguous, but the policies underlying the state action doctrine unequivocally fail to justify an immunity from judicial review. Accordingly, a civil litigant's discriminatory peremptory challenge should be judged state action.

C. Applying Equal Protection Analysis to the Exercise of Discriminatory Peremptory Challenges in Civil Trials

If the state action requirement of the fourteenth amendment can be satisfied, it is necessary to address whether Batson's equal protection analysis should apply equally to civil litigation. Cases that have addressed this question are most notable for their lack of reasoning. Courts that have

173. See Chemerinsky, supra note 96.
174. See Burke & Reber, supra note 105, at 1012.
175. See supra notes 97-105 and accompanying text.
176. See supra notes 106-36 and accompanying text. In Batson, five justices declined to address whether the Court's holding applied to defense counsel. Batson v. Kentucky, 476 U.S. 79, 89 n.12 (1986). This suggests that those justices believed there is at least an arguable case for finding state action in a private attorney's discriminatory peremptory challenge. Two other justices positively assumed that defense counsel's peremptory challenges would be considered state action. See Batson v. Kentucky, 476 U.S. at 107-08 (Marshall, J., concurring), at 125-26 (Burger, C.J., dissenting).
177. The applicability of Batson's equal protection balance to the civil setting merits attention even if one concludes that a civil litigant's peremptory challenge does not constitute state action. All courts that have faced the issue have agreed that at least a government attorney's discriminatory peremptory challenge in civil litigation constitutes state action. See, e.g., Reynolds v. City of Little Rock, 893 F.2d 1004, 1008 (8th Cir. 1990), petition for cert. filed, 58 U.S.L.W. 2418 (Jan. 12, 1990); Clark v. City of Bridgeport, 645 F. Supp. 890, 895 & n.6 (D. Conn. 1986); see also Edmondson v. Leesville Concrete Co., 895 F.2d 218, 222 n.10 (5th Cir.) (en banc), cert. granted, 111 S. Ct. 41 (1990). Moreover, the same equal protection balance may be relevant to application of state constitutional provisions or the court's supervisory powers. See supra note 91.
rejected the application of Batson have generally relied on the inherent differences between civil and criminal trials without explaining the relevance of those differences.\textsuperscript{178} Courts that have applied Batson to civil trials, on the other hand, ignore those differences and merely state, without analysis, that the fourteenth amendment applies equally to civil and criminal cases.\textsuperscript{179}

Unquestionably, there are manifest differences between civil and criminal proceedings. For example, the burden of proof, the number of peremptory challenges allowed each litigant, and the right to a jury in civil and criminal trials are different. Whether these or the myriad other differences between civil and criminal proceedings should influence the applicability of Batson to civil litigation requires a reconsideration of the balance of interests inherent in Batson.

In Batson, the Court balanced three primary interests: elimination of discrimination in the jury selection process, preservation of the historic function of the peremptory challenge, and avoidance of serious administrative burdens.\textsuperscript{180} The Court identified three justifications for eliminating discriminatory peremptory challenges. Limiting the prosecutor's use of peremptory challenges (1) vindicates the equal protection right of the defendant, (2) protects the juror's right to serve on a jury and (3) furthers the community's interest in maintaining confidence and a voice in the judicial process.\textsuperscript{181} On the other hand, the Court acknowledged the
historic importance of the peremptory challenge.\textsuperscript{182} The challenge can limit both actual and perceived partiality on the jury. The challenge permits a party to excuse a potential juror who perhaps should have been excused for cause, who has been offended by counsel's \textit{voir dire} questions, or who just does not "sit right" with the litigant.\textsuperscript{183} The Court, of course, held that the harm from discrimination as a result of an unfettered exercise of the peremptory challenge right outweighed both the injury to the historic peremptory challenge right and the administrative costs resulting from limited review of peremptory challenges.

To determine whether the differences between civil and criminal trials affect this balance, this article defines a so-called "Batson function":

\[
BF = (d)(x) + (p)(y) + (a)(z) \text{ where}
\]

\begin{align*}
&d = \text{Harm from Discrimination} \\
&p = \text{Harm from Partiality} \\
&a = \text{Administrative Costs}\textsuperscript{184} and \\
&x, y \& z \text{ are coefficients such that } x > y > z \text{ to reflect the relative importance of the three respective interests.}
\end{align*}

This function serves as a theoretical model of the balance of interests inherent in \textit{Batson}. The objective, of course, is to keep the Batson function as low as possible, i.e., to minimize the harms from discrimination and partiality and to lower administrative costs. \textit{Batson} itself illustrates the function's application. In effect, the \textit{Batson} Court imposed limitations on the prosecutor's exercise of his peremptory challenge right because judicial review lowered the "Batson function."\textsuperscript{185} Review reduced\textsuperscript{186} the amount of discrimina-

\textsuperscript{182} See supra note 85.
\textsuperscript{183} See \textit{Batson} v. Kentucky, 476 U.S. at 98.
\textsuperscript{184} Administrative costs include the cost of a \textit{Batson} hearing as well as the costs from potentially increased \textit{voir dire} or appeals. This article also considers any effect on the respect for or efficient functioning of the judicial system as an administrative cost.
\textsuperscript{185} In equal protection terms, discriminatory peremptory challenges could not survive the strict scrutiny standard of review. See J. NOWAK, R. ROTUNDA & J. YOUNG, supra note 95, at 530-31. The Court, in effect, found that because limited review of discriminatory challenges had a net positive effect for society, the gov-
tion and increased administrative costs and the degree of partiality on the jury. The Batson function was lowered because, in the Court's view, the decrease in the harm from discrimination, when multiplied by the abstract coefficient \( x \) that reflects the importance of an anti-discrimination policy to our society, exceeded the increase in \((p)(y) + (a)(z)\).

Quantification of the variables, much less the coefficients, in the Batson function is, of course, impossible. Nevertheless, use of this function serves to focus the analysis. If \( \Delta BF \) in civil trials does not significantly differ from \( \Delta BF \),

\[ \Delta BF = (BF_{without\ Batson\ procedures}) - (BF_{with\ Batson\ procedures}) \]

ernment did not have a compelling interest in the unfettered exercise of the peremptory challenge right. If the alleged discriminatory challenge had excluded non-suspect group members, the government would have needed to show only a rational basis for not reviewing the prosecutor's peremptory challenges. Under that lower standard of review, the Court undoubtedly would have deferred to the government’s determination of the benefits of an unfettered peremptory challenge right. Id. at 530. This clarifies why Batson should not require a litigant to explain the litigant's systematic elimination of all engineers, poets, poor people, or jurors wearing black shoes and white sox (although some view the latter group as suspect) from the jury. Fear that a “cross-section of the community” analysis would require review of challenges striking members of such non-suspect groups may also explain why the Court rejected petitioner's sixth amendment claim in Holland v. Illinois, 110 S. Ct. 803, 809 & n.2 (1990).

186. Batson does not eliminate discrimination in the peremptory challenge process because of difficulties of proof and some courts' hostility to the Batson rule. See supra notes 64-75 and accompanying text.

187. The increase in partiality includes primarily the actual and perceived bias of jurors for whose exclusion the prosecutor cannot provide a neutral reason. Jury partiality also may increase if the requirement that the prosecutor justify facially discriminatory challenges chills the prosecutor’s exercise of her peremptory challenge right. Finally, mandating that the prosecutor provide reasons for discriminatory peremptory challenges requires the court to “traffic” in prejudices that would otherwise go unexplored. See Babcock, supra note 9, at 553. Because the partiality variable is a proxy for the value of the peremptory challenge, this too will be deemed to increase the harm from partiality.

188. There are two additional reasons to weigh the degree of discrimination more than the degree of partiality. Both variables include harm resulting from the perception of unfairness. If the peremptory challenge right is limited a litigant may view the randomly selected jury as being partial and feel helpless to cure that defect. Nevertheless, the perception of unfairness that results from random selection arguably is less than that which arises from the deliberate and systematic exclusion of minority jurors. Jury discrimination also potentially affects a wider audience. Jurors, litigants and the community observe and are affected by discrimination in the jury selection process. Ostensibly, only the litigant is harmed by an increase in partiality (falling short of that necessary for a challenge for cause) resulting from limitations on the peremptory challenge. But see Babcock, supra note 9, at 552.

189. \( \Delta BF \) is defined as \((BF_{without\ Batson\ procedures}) - (BF_{with\ Batson\ procedures})\). It represents the degree to which imposing Batson procedures im-
in criminal trials, than Batson should apply in the civil setting. Accordingly, the following paragraphs address seriatim the effects on the Batson function of the most significant differences between civil and criminal trials.

Courts rejecting application of Batson to civil trials emphasize that the accused in a criminal trial has greater rights and typically more at stake than the litigant in a civil proceeding. This would seem to lower the benefits of Batson procedures in civil relative to criminal trials. That is, ΔBF would be lower in civil cases because the reduction in harm from discrimination (and the change in (d)(x)) would be less in civil compared to criminal cases. The harm from discrimination is undoubtedly greater when it contributes to a minority member's loss of freedom. Nevertheless, many civil trials involve interests that are at least as significant as some criminal trials. A civil litigant has more at stake in a multi-million dollar civil lawsuit than a criminal defendant in a misdemeanor action punishable by only a small fine. More fundamentally, Batson apparently applies even if the criminal defendant suffers no harm from discrimination. In Holland, five justices opined that a non-minority criminal defendant was entitled to Batson's protections based on third party standing. If an effect on the defendant's interests is unnecessary for application of Batson, the strength of those interests cannot be a relevant distinction between criminal and civil cases. Juror and community interests alone support application of Batson, and those interests are not significantly different in criminal and civil trials. When the civil liti-

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proves the Batson function (i.e., lowers harms and costs).


191. See supra note 85. This article does not suggest that a non-minority defendant is never personally harmed when minorities are excluded from the jury. For example a white civil rights worker may have as much interest as a minority defendant in maintaining minority representation on the jury. Nevertheless, Holland suggests that Batson can apply even if no such interest exists.

192. The special protections afforded the accused, however, may argue against imposing Batson limitations on the exercise of the criminal defendant's peremptory challenge right. By increasing the relative harm from partiality, application of Batson's requirements to defense counsel would produce a lower ΔBF than results from similar application to the prosecution. A full analysis of Batson's application to peremptory challenges by the criminal defendant is beyond the scope of this article. But see Goldwasser, supra note 52.
gant is a minority group member, $\Delta BF$ even may be greater than in a criminal case in which the defendant does not personally suffer from discrimination.

In criminal trials the state must prove guilt beyond a reasonable doubt. Society prefers an erroneous acquittal to an improper conviction. Civil trials, on the other hand, are governed by the lesser preponderance standard. The public does not want to favor one civil litigant over another. Arguably, this suggests that the increase in partiality from *Batson* procedures is more significant (and hence $\Delta BF$ is less) in civil than in criminal trials. This argument, however, is only a repackaged version of the "defendant has greater rights" argument rejected above. The burden of proof is imposed to protect the defendant's special interests, not because the public believes the prosecution should be disfavored.\footnote{193. If the accused's rights were not the primary justification for the beyond a reasonable doubt standard, the government also would face a heavier burden of proof in civil trials.} Indeed, absent the accused's interest, society would probably prefer to have a civil litigant, rather than a government prosecutor, improperly lose. The public does not want guilty criminal defendants to roam the streets. Thus, the harm from increased partiality under *Batson* actually may be greater in criminal, rather than civil cases, and therefore $\Delta BF$ even may be greater in the civil setting.

The prosecutor's goal is justice. The civil litigant is an advocate whose first aim is to win. This, according to the Fifth Circuit, justifies the civil litigant's "rational discrimination" and ostensibly increases the harm from partiality created by imposing *Batson* procedures in civil trials.\footnote{194. See Edmondson v. Leesville Concrete Co., 895 F.2d 218, 225-26 (5th Cir.) (en banc), *cert. granted*, 111 S. Ct. 41 (1990).} To the extent the Fifth Circuit relies on the value of "rational discrimination," it ignores the teaching of *Batson*. The *Batson* Court did not question whether certain generalizations might be crude approximations for juror bias. Rather, it held that approval of exclusions based on such generalizations would undermine the "core guarantee of equal protection."\footnote{195. *Batson* v. Kentucky, 476 U.S. 79, 97-98 (1986).} Stereotypical assumptions based on race are insufficiently tailored to be cognizable as anything but purposeful discrimination. Arguably, the Court might impose the costs of eliminat-
ing “rational discrimination” on the state, but not a private litigant. When the government is held to a higher standard, all of society shares the costs associated with the aspirational goal of colorblindness. A civil litigant, perhaps, should not be forced to shoulder the entire burden of society’s aspirations. Private citizens, however, often are required to bear an additional burden when their interests conflict with this country’s aspirations for a colorblind society. For example, the prospect that white children’s education would be temporarily disrupted by a desegregation order did not prevent the Court from ordering such relief in Brown v. Board of Education. Similarly, a business owner cannot refuse employment to minority members merely because his customers prefer to be served by white workers. There is no reason a civil litigant, when exercising race-based peremptory challenges, should be treated differently. In fact, society may be more willing to impose aspirational costs on civil litigants, whose primary interest is economic, than on the government, whose interests include society’s safety. The civil litigant’s interest in winning, however, may have an impact on the extent Batson procedures reduce discrimination. Unconstrained by a standard of justice, the civil litigant may more aggressively seek to exploit the loopholes in the Batson deci-

196. See, e.g., Metro Broadcasting Inc. v. FCC, 110 S. Ct. 2997, 3025-26 (1990) (“[a]s part of this Nation’s dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy”); see also Strauss, supra note 20, at 100-05; Cf. Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (“the reality of private biases and the possible injury they may inflict” cannot justify consideration of race in child custody dispute). The Court, however, might view costs associated with the aspirational goal of colorblindness as too great to bear when an individual’s freedom is at stake. This would be an additional reason to refuse to apply Batson to criminal defense counsel. See Goldwasser, supra note 52, at 834-38; see also supra note 190.

197. 347 U.S. 483 (1954). Of course, the Court has imposed some limits on the costs that private citizens must bear to achieve society’s goal of colorblindness. For example, the Court has disapproved quotas as a means of remedying societal discrimination. See Richmond v. J.A. Groson Co., 488 U.S. 469 (1989). The Court’s primary concern, however, is the imposition of costs on innocent bystanders. See Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 282 (1986); Regents of the Univ. of California v. Bakke, 438 U.S. 265, 307-08 (1978). The litigant guilty of discriminatory peremptory challenges does not have such status.

sion. For example, they may more often “manufacture” race-neutral reasons to rebut a prima facie case of discrimination. By decreasing the ability to prove discrimination, this would lower ΔBF in civil relative to criminal cases. Advocate or not, every litigant has an obligation to act in good faith and with respect for the law. Even if civil litigants ignored these obligations more frequently than prosecutors, basing constitutional decisions on anticipated ethical failings has dubious merit. The overzealous civil litigant’s possible effect on ΔBF should be ignored.

In a criminal suit, the prosecutor represents the state. When she discriminates against an individual, the discrimination carries the imprimatur of the state and therefore results in greater juror stigmatization and injury to judicial integrity than when a civil litigant discriminates.¹⁹⁹ This, of course, is the state action issue revisited. Still, it is not enough to say that this article has already provided a principled basis for finding a civil litigant’s race-based peremptory challenge to be state action. The state’s involvement with challenged behavior and the harm it may create constitutes a continuum. A minority member suffers far greater injury when the President of the United States uses a racial epithet than when an IRS clerk employs a similar derogatory term. Nevertheless, juror stigmatization and injury to judicial integrity (and community respect for the judicial process) results from perceptions, not the fact, of state involvement. And jurors and the community will often perceive a civil litigant’s discriminatory peremptory challenge to be as much the responsibility of the state as a prosecutor’s race-based peremptory. In civil trials, the judge presides over voir dire, often asks the jurors questions, and supervises virtually all the proceedings in the government courtroom. The judge rules on all challenges for cause. When the civil litigant exercises her peremptory challenge, it is the court, usually the judge, that excuses the juror. Whether the law recognizes judicial inaction as state action or not, much of the public perceives judicial acquiescence as judicial approval. Furthermore, most jurors will not be familiar with a state prosecutor’s code of ethics and the prosecutor’s obligation to further justice, as

opposed to merely win. Thus, jurors may perceive prosecutors as advocates, just like civil litigants. Finally, in some jurisdictions, challenges are made and ruled upon outside the presence of the jury. Jurors may not know who is responsible for their exclusion. Accordingly, they cannot ascribe greater state involvement to the prosecutor’s peremptory challenge than to any other litigant’s challenge. In sum, perceptions, not actualities, determine the effect on ABF of disparate degrees of state involvement and the perception of state involvement in civil cases will often be just as great as in criminal cases. Many will view the judicial system, not the conduct of individual litigants, as discriminatory.

Justice White, concurring in *Batson*, suggested that a prosecutor’s inability to justify a peremptory challenge implies a belief that blacks cannot fairly try black defendants or are incapable of serving as jurors. "This, in effect, attributes to the prosecutor the view that all blacks should be eliminated from the entire venire." When a civil litigant exercises a peremptory challenge, arguably her discrimination affects only a single trial. This suggests that the prosecutor’s challenge creates greater harm to the community’s interest in maintaining minority representation in the judicial system and more severely stigmatizes minority jurors. It follows that applying *Batson* procedures in criminal trials would result in

200. One might posit the question, “why shouldn’t the remedy be a judicial instruction explaining the nature of peremptory challenges, rather than imposition of *Batson* procedures?” Suppose the judge stated to the jury: “Counsel is allotted three peremptory challenges to exclude jurors that they prefer not be on the jury for any reason whatsoever. No explanation is required for the challenge and the individual litigant is solely responsible for the decision to exclude. Even if I ask you to leave the jury box, do not assume that I agree with or approve of counsel’s decision to exclude any particular juror or series of jurors.” Would this really change juror perceptions? The natural reaction to a series of discriminatory challenges would still be “why don’t you [the judge] do something about it,” or worse yet, a passivist acceptance that the judicial system just is not designed to protect minority interests.

201. This essay acknowledges that some jurors will perceive greater state involvement when a prosecutor, as opposed to a civil litigant, discriminates. Nevertheless, in many, probably most, cases juror perceptions will be identical and therefore a presumption that the perception of state involvement is greater in criminal as compared to civil trials is misplaced (or at least vastly overbroad).


a greater ΔBF than in civil trials. Justice White's premise ignores rational discrimination. Prosecutors' exercise of race-based peremptory challenges does not necessarily imply a view that black jurors are inferior and should never serve on the venire. Rather, it may reflect the belief that minority members likely are not the most sympathetic jurors for a particular government case. In any event, well known generalizations about minority groups exist in the civil setting and therefore also create a substantial risk that such minority groups may face ongoing, rather than isolated, discrimination with its attendant greater injury.

In civil trials, the party whose peremptory challenge is questioned, unlike the prosecutor, has a personal stake in the litigation that may justify "personal dislike" peremptories. It is important that the civil litigant feel like they are being treated fairly. Restricting the civil litigant's peremptory challenge right, therefore, may create harm from perceived partiality that is not incurred when the prosecutor's peremptories are similarly limited. This concern with the perception of partiality suggests application of Batson in civil proceedings may produce a greater increase in the harm from partiality and hence a lower ΔBF than in criminal trials. The largest component of the litigant's perception of unfairness probably results from the litigant's inability to "rationally discriminate." It may be inappropriate, however, to give much weight to that harm given the Court's holding in Batson that "rational discrimination" cannot rebut an inference of purposeful discrimination. Additionally, the litigant remains free under Batson to discriminate rationally against non-suspect groups. A less significant source of a litigant's perception of unfairness, improper Batson findings, may be mitigated somewhat by the availability of appellate, albeit very deferential, review. In any event, a concern about the perception of unfairness is only a fractional component of the harm from the partiality variable. That variable is most concerned

204. See Goldwasser, supra note 52, at 829-31. The "personal dislike" peremptory preserves the perception, if not the reality, of juror neutrality.
205. See supra note 20.
206. Batson v. Kentucky, 476 U.S. at 97; see also supra text accompanying notes 59-63. Of course, if the litigant's complaint is the inability to exercise her irrational prejudices, her interest is entitled to even less, if any, weight.
207. See supra note 185.
with an increase in actual partiality. The civil litigant's "per-
sonal stake" does not affect the harm from actual partiality.
Finally, even if the civil litigant's "personal stake" in the pe-
remptory challenge marginally lowers $\Delta BF$ in civil relative to
criminal trials, this decrease should be offset by the increase
in $\Delta BF$ from those cases in which the opposing civil litigant
has a personal stake (that criminal defendants, after $Holland$,
do not need to have) in preventing discrimination.208

Counsel for civil litigants, unlike government prosecu-
tors, consult with their clients and have established
attorney-client relationships. One commentator has suggested
that requiring private counsel to justify their peremptory
challenges may require disclosure of communications protect-
ed by the attorney-client privilege.209 This may be viewed as
increasing administrative costs (or the harm from partiality if
counsel's peremptory challenge right is chilled) and hence re-
ducing $\Delta BF$ in civil relative to criminal trials. The possibility
that $Batson$'s application to civil trials will require counsel to
breach the attorney-client privilege does not seem to be a
serious problem. Hearings that require disclosure of
attorney-client communications can be, and sometimes are,
ex parte.210 Moreover, litigants frequently must explain
challenges for cause. Disclosure of privileged conversations
has not proven to be a major dilemma in that setting or in
state courts that have required $Batson$-like procedures in civil
trials under state constitutional provisions. Any effect on
$\Delta BF$, at most, should be de minimis.

One court, rejecting application of $Batson$ to a civil trial,
emphasized that a criminal defendant, unlike a civil plaintiff,
is "haled into court against his will."\textsuperscript{211} Civil plaintiffs, however, do not choose to be injured and forced to go to court to receive compensation. Moreover, civil defendants are also haled into court involuntarily. It seems untenable to grant them \textit{Batson} rights yet deprive civil plaintiffs, equals before the court, of equivalent rights. It might be argued that civil plaintiffs should be treated differently because they choose the forum and therefore can select a venue with a large minority population. That would lower the risk that they would be harmed by discrimination and hence, decrease \( \Delta BF \). This assumes, however, that the harm from discrimination is primarily concerned with the party's, as opposed to the jurors' and community's, equal protection interests. \textit{Holland} has placed that assumption in doubt. In any event, personal jurisdiction and venue requirements restrict a plaintiff's ability to select a forum based on the jurisdiction's minority population.

The right to a jury trial is different in civil and criminal trials. Criminal cases are required to be tried by a jury unless the defendant waives the jury trial right in writing and with the approval of the court.\textsuperscript{212} In civil cases, the parties often do not have a right to a jury.\textsuperscript{213} When a jury right exists, the litigant must timely demand a jury trial or that right will be waived.\textsuperscript{214} The greater right to a jury might suggest that the criminal defendant has a greater interest in maintaining minority representation in the jury process and hence a greater interest in limiting discrimination. Following \textit{Holland}, however, the defendant's interest in avoiding discrimination can no longer support differential treatment between civil and criminal trials.\textsuperscript{215} The remaining BF variables do not appear to be influenced by the difference in jury trial rights. Once a jury is requested, its function is similar in civil and criminal cases.\textsuperscript{216}

\begin{itemize}
\item[211.] Esposito v. Buonome, 642 F. Supp. 760, 761 (D. Conn. 1986).
\item[212.] FED. R. CRIM. P. 23(a).
\item[213.] The seventh amendment preserves the right to a jury trial only as it existed at common law. Purely equitable claims are not entitled to jury determinations. \textit{See} Parsons v. Bedford, 28 U.S. 433, 446-47 (1830); \textit{see also} Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959).
\item[214.] \textit{See} FED. R. CIV. P. 38(d).
\item[215.] \textit{See} supra notes 190-92 and accompanying text.
\item[216.] \textit{See} Note, supra note 3, 40 \textit{RUTGERS L. REV.} at 946-49.
\end{itemize}
Criminal trials frequently involve more volatile issues than civil trials. Accordingly, it may be more important that the community perceive criminal proceedings as fair. Therefore, requiring *Batson* procedures in criminal trials arguably has a greater impact on ΔBF than would application of *Batson* to civil trials. Civil litigation, however, often involves the same, and equally volatile, issues as criminal matters. For example, when a white police officer shoots an African-American teenager, a civil rights or wrongful death action may engender as much publicity and community interest as a criminal prosecution. Additionally, *Batson* applies to criminal cases even if they completely lack notoriety. Finally, much of the public does not distinguish between criminal and civil cases. They perceive the judicial system, not criminal or civil litigation, as fair or unfair. Thus, the interest in maintaining community respect for the judicial process may not be significantly different in, and should not justify disparate treatment between, criminal and civil trials.

The Fifth Circuit has suggested that civil and criminal trials differ because the criminal jury, through the double jeopardy clause, has the de facto power to pardon. Because the criminal jury has greater power to protect the accused, the court apparently believed that the harm from discrimination in civil proceedings is less than in criminal trials. *Holland* undermines the court's reasoning. *Batson* may apply even if the accused suffers no injury whatsoever from the alleged discrimination. Nevertheless, the jury's greater power may have a small effect on the community's interest in maintaining a voice in and respect for the judicial system. In criminal trials, unlike civil proceedings, the community's voice is the last word, at least if the jury acquits. Protecting the community's interest against discrimination, therefore, potentially increases ΔBF in criminal compared to civil trials. On the other hand, the ability of a civil litigant to appeal an improper verdict reduces the potential harm from partiality under *Batson* and therefore increases ΔBF. This should at least offset the decrease in ΔBF caused by the fractional increase in the harm from discrimination.

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The number of peremptory challenges allotted litigants in civil and criminal trials typically is disparate.\(^{219}\) This potentially affects several of the BF variables. With fewer peremptories, the civil litigant cannot cause as much harm from discrimination. Detection of discrimination also becomes more difficult. Thus, Batson's requirements should produce reduced benefits when there are fewer peremptory challenges allotted each party. On the other hand, imposing Batson procedures would have a lesser impact on jury partiality. Fewer peremptories means greater difficulty establishing a prima facie case, and therefore less interference with the litigant's peremptory challenge right. The decision to allot fewer peremptories to civil litigants also suggests that the government is not as concerned with partiality in civil cases. In effect, the coefficient "\(y\)" may be less in civil relative to criminal cases. Finally, the increase in administrative costs under a Batson rule would be less in civil trials. With fewer peremptories and the greater difficulty establishing a prima facie case, there should be fewer Batson hearings requested, and when a Batson claim is raised, fewer challenges will have to be justified. The net effect on \(\Delta BF\) is indeterminate. Although the benefits from imposing Batson requirements on the civil litigant would be less, the harms it would create would also be less. It may be that the fewer number of peremptories in civil trials affects the variables in BF proportionally and therefore does not significantly affect \(\Delta BF\). In any event, the substantial overlap that exists among civil and criminal peremptory challenge allotments undermines the significance of this difference between criminal and civil trials. The federal courts and more than half the states provide for a greater or equal number of peremptory challenges in civil trials than in criminal misdemeanor cases.\(^{220}\) If the Court has not limited application of Batson to capital and other felony cases, the number of peremptories permitted by statute in civil trials should not preclude Batson's application in the civil setting.

In civil trials, the jury size is often smaller and non-unanimous verdicts are more frequent than in criminal proceedings. A smaller jury potentially affects \(\Delta BF\). A minority

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219. See supra note 11.
220. See J. VAN DYKE, supra note 7, at 282-84.
member that remains on the jury will have a potentially greater influence on the verdict. Consequently, the juror’s discriminatory exclusion may result in a greater harm from discrimination. On the other hand, with fewer challenges necessary to impact the jury composition, the excluded jurors may not perceive a challenge as discriminatory and hence may suffer less stigmatization because of the smaller jury size. For similar reasons, Batson’s success in reducing the harm from discrimination may also be less when there is a smaller jury. A litigant may be able to eliminate an entire segment of the community from the jury without triggering a Batson hearing. Of course, this also suggests that the administrative costs under a Batson rule in civil cases would be less than in criminal cases. The greater relative influence of a single juror also increases the harm from partiality resulting from application of Batson procedures. Again, the net result of these various effects on $\Delta BF$ is indeterminate. Requiring less than a unanimous verdict potentially increases $\Delta BF$ (and hence favors application of Batson in civil cases). When a non-unanimous verdict is permissible, there is less harm if a partial juror remains on the jury. Accordingly, $(p)(y)$ is not as great when Batson procedures are required in jurisdictions permitting non-unanimous verdicts. Batson’s effect on harm from discrimination $(\Delta(d)(x))$ would seem to be less for much the same reason. In criminal trials, however, Holland suggests that Batson applies even if the alleged discrimination has no effect on the jury’s verdict. Whether the verdict must be unanimous does not appear to significantly affect the juror and community injury components of the harm from the discrimination variable. Thus, the smaller increase in the harm from partiality in civil compared to criminal trials may not be offset by a corresponding smaller reduction in the harm from discrimination. In any event, the greater likelihood of twelve member juries and unanimous verdicts in criminal proceedings should not justify application of Batson in criminal, but not civil, cases. Some criminal cases permit non-unanimous verdicts or less than twelve member juries. Conversely, numerous civil cases do have twelve member

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221. The community also may not perceive the civil litigant’s challenges as discriminatory and therefore the community’s confidence in the judicial system may not be affected by the alleged discrimination.
juries and require unanimous verdicts. As with the number of peremptory challenges allotted, juror size and unanimity of verdict requirements are independently identifiable and do not necessarily coincide with whether the case is a civil or criminal matter. A civil/criminal dichotomy to isolate the effects of jury size and unanimity of verdict on ΔBF would be unreasonably under- and over-inclusive.

The parties' interests in delay are different in criminal and civil cases. The prosecutor and the accused typically want to settle or move the case to trial. By contrast, defendants in civil cases often will want to postpone the proceedings. Accordingly, application of Batson to civil cases may encourage discrimination. Hearings, further voir dire and empaneling of a new jury all delay the action. There is no question that an increased incentive for delay in civil cases could increase the harm from discrimination and the administration costs resulting from imposition of Batson procedures. Nevertheless, the proper cure is not a rejection of Batson, but an adjustment of the remedy upon finding a Batson violation. The court can reduce the number of peremptories allotted to a party guilty of discrimination, grant the opponent additional peremptories, or in a particularly heinous case, award sanctions against the party deliberately violating Batson's directives.

Undoubtedly, one can marshall additional differences between civil and criminal cases. Nevertheless, analysis of the effects on ΔBF of the primary differences cited by courts and commentators suggests several conclusions. First, the strongest justifications for treating civil and criminal cases differently rely on the greater rights of the criminal defendant. Under Holland, however, the defendant may invoke the protections of Batson even if she does not have any interest affected by the alleged discrimination. The accused's greater interests, therefore, cannot distinguish civil from criminal cases. Second, the primary harm to juror and community interests results from the perception, not the fact, of discrimination. The public's and jurors' perceptions, however, are often indistinguishable in civil and criminal trials. Third, although some criminal cases are likely to have a greater ΔBF

222. See J. Van Dyke, supra note 7, at 286-88.
than many civil cases, there are many criminal cases where *Batson* is applicable that probably do not have a higher $\Delta BF$ than the majority of civil cases. Moreover, most of the factors that might create a greater $\Delta BF$ in criminal cases are easily identified and more accurately predict $\Delta BF$ than the overbroad criminal/civil dichotomy. For example, whether the party alleging a *Batson* violation is a member of the same minority group as the excluded juror, whether unanimous verdicts are required, and the number of challenges allotted each party potentially affects $\Delta BF$. Each factor, however, is easily identified and cannot be predicted from the categorization of a case as criminal or civil. Finally, and perhaps most importantly, none of the differences between civil and criminal trials appears to affect the coefficient “x”. In either type of proceeding, the judicial system has a strong interest in avoiding even the appearance of racism. In civil, no less than criminal cases, judicial acquiescence in discriminatory peremptory challenges places a particularly pernicious imprimatur to race-based decision-making and potentially undermines the integrity of, and public confidence in, our system of justice. This alone, absent proof of some significant difference in $\Delta BF$, probably justifies application of *Batson* to civil trials. No significant differences are apparent. Quite simply, the differences between civil and criminal trials do not justify application of *Batson* to criminal, but not civil, proceedings.

V. LEGISLATIVE ALTERNATIVES

In Part Four, this article demonstrated that a civil litigant’s discriminatory peremptory challenge should be deemed state action and that there is no principled reason to reject the extension of *Batson* to civil trials. *Batson*, however, is no panacea. Enforcement difficulties and administrative costs make *Batson* a less than ideal solution to the problems of discrimination in the jury selection process.\(^{223}\)

In the criminal context, several commentators have suggested that *Batson* does not go far enough and recommend the elimination of all peremptory challenges.\(^{224}\) This section

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223. See *supra* notes 64-76 and accompanying text.
investigates the merits of that alternative for civil cases. Again, the Batson function variables help to focus the analysis. Unfortunately, the answers do not seem as clear as in the preceding section. Eliminating all peremptories would create greater harm from partiality, but would result in less harm from discrimination and administrative costs than under Batson. Which interests predominate may depend on the reader's predispositions. This article offers several compromise positions and endorses legislation reducing the number of peremptory challenges in civil cases to one per side.  

Eliminating all peremptory challenges would reduce both actual and perceived discrimination from the level existing under Batson. Although one cannot underestimate the symbolic importance of a judicial rule prohibiting discrimination, the tangible effects of Batson are not as impressive. Batson does not eliminate much of the discrimination in the jury selection process. In many jurisdictions, it is difficult to establish a prima facie case of discrimination. If a party establishes a prima facie case, the opposing party can too easily rebut that showing by manufacturing race-neutral reasons for the questioned peremptories. As recognized by Justice Marshall, "outright prevarication" is not the only danger. An attorney's own conscious or unconscious racism may cause her honestly to believe that a prospective minority juror is "sullen" or "uninterested," a characterization that might not have come to mind if a non-minority juror acted identically. A judge's own conscious or unconscious racism may lead her to accept such an explanation as well supported. A judge's simple reverence for the historic
Peremptory challenge right may produce the same result.\textsuperscript{231} Abolishing peremptory challenges would eliminate the unproven or unprovable discrimination that exists under \textit{Batson}. Also eliminated would be the community disrespect engendered by the declaration of a fundamental right that the judiciary is helpless to enforce fully.\textsuperscript{232} Abandoning the right to exclude jurors arbitrarily would even more dramatically reduce the harm from perceived discrimination. Under \textit{Batson}, juror and community injury results not only when proof problems or unconscious racism leads to erroneous rulings, but also when a party establishes a prima facie case that is rebutted outside the presence of the jury. The prima facie case creates the perception of discrimination and the jurors and community never learn the race-neutral reasons for the minority members' exclusion. In such cases, the harm from perceived discrimination is just as great as when the party exercises her peremptory challenges with the most invidious motives. Such injury would not exist under a system which permitted only challenges for cause. Perhaps most important, eliminating peremptory challenges would reduce reliance on group stereotypes of all kinds. Such broad-based generalizations primarily foster discrimination and demean human beings. They should be discouraged in all segments of society, much less in the judicial system.

Eliminating all peremptory challenges should greatly decrease administrative costs. First and foremost, it would eliminate the need for \textit{Batson} hearings. Although the Court in \textit{Batson} declared "[n]or are we persuaded by the State's suggestion that our holding will create serious administrative difficulties,"\textsuperscript{233} judges and commentators have not been as sanguine about the burden created by \textit{Batson}.\textsuperscript{234} \textit{Batson} may

\textsuperscript{231} A judge's racist attitudes or reverence for the historic peremptory challenge right also may contribute to a party's threshold inability to prove a prima facie case of discrimination.

\textsuperscript{232} See People v. Wheeler, 22 Cal. 3d 258, 266-87, 583 P.2d 748, 768, 148 Cal. Rptr. 890, 909-10 (1978).

\textsuperscript{233} Batson v. Kentucky, 476 U.S. at 99.

\textsuperscript{234} See, e.g., United States v. Wilson, 884 F.2d 1121, 1127 (8th Cir. 1989) (Beam, J., dissenting); Schreiber v. Salamack, 619 F. Supp. 1433, 1440 (S.D.N.Y. 1985), aff'd, 822 F.2d 214 (2d Cir. 1987), cert. denied, 109 S. Ct. 1311 (1989) (pre-Batson case discussing application of similar test); Alschuler, supra note 8, at 199; Pizzi, supra note 20, at 140-142. As Professor Pizzi notes, the \textit{Batson} court's reliance on the lack of any evidence of serious administrative burdens in states
not require full evidentiary hearings, but the numerous motions and appeals Batson engenders are hardly cost-free. The number of hearings only should increase if lower courts, following Holland, no longer require the complaining party to be a minority group member or the same race as the excluded juror. Second, without Batson hearings, there would be no need for a Batson remedy. In particular, there would be fewer new trials and no need to empanel new juries. A third minor benefit of the proposal to eliminate all peremptories would be to reduce slightly the expense of assembling the jury pool. The government would not require as many jurors to serve each day. That may have the additional peripheral advantage of eliminating the frustration many citizens feel when they are summoned to jury service, forced to wait for several hours and then dismissed by counsel for no apparent reason. Arguably, the proposal might increase the duration and cost of voir dire. Stripped of several of their peremptory challenges, counsel might feel a greater need to question prospective jurors to establish challenges for cause. The proposal, however, may offer offsetting voir dire procedure benefits. Under Batson, counsel are encouraged to question jurors to establish race-neutral reasons for the discriminatory exclusion of minority members. That charade could be eliminated. Additionally, without the availability of peremptory challenges to remove jurors who have been offended by counsel's questions, counsel may choose to restrict their voir dire questioning. In any event, whatever incentives counsel may feel, the court has the ultimate power to control voir dire. Thus, eliminating all peremptories in civil trials need not have any negative effect on the duration or cost of voir dire. The proposal, however, probably would increase the costs of litigating challenges for cause. In many jurisdictions, rulings on challenges for cause are not reviewable if the objecting party can peremptorily challenge the

that previously adopted Batson-like procedures may have been misplaced. The Court cited People v. Hall, 35 Cal. 3d 161, 672 P.2d 854, 197 Cal. Rptr. 71 (1983), as support for its position. In Hall, however, the California Supreme Court stated only that "the People have not produced, or called to our attention, any empirical evidence in support of their criticism of Wheeler." People v. Hall, 672 P.2d at 859. The Court did not affirmatively find that administration of Wheeler [a state constitution variant of Batson] was simple or cost-effective.

235. See supra note 85.
questioned juror.\textsuperscript{236} Eliminating peremptory challenges, therefore, will create additional appeals of disputed for cause rulings and result in extra reversals and new trials. Finally, eliminating peremptory challenges might raise administrative costs by increasing the number of hung juries as more diverse jurors are permitted to remain on the petit juries.\textsuperscript{237} This, however, may be an illegitimate concern. Hung juries do not represent system failures. They are a "treasured part" of the legal system's respect for minority viewpoints.\textsuperscript{238} If juror agreement, rather than justice, was the goal, there would be no attempt to maintain a fair cross section of the community on the jury.

Against the benefits of reduced discrimination and administrative costs must be weighed the harm from increased partiality that would result from elimination of the peremptory challenge right. Peremptory challenges can reduce jury partiality by removing jurors who should have been, but were not, excused for cause. Extremely prejudiced jurors may not be dismissed for cause either because the judge makes an error or because the juror is unaware of or successfully hides her prejudices.\textsuperscript{239} The peremptory challenge also reduces the harm from partiality by excluding jurors who, although not so prejudiced as to justify a challenge for cause, are at the extremes of permissible bias. All jurors are not equal. Everyone comes to the jury room with some predispositions. These predispositions may be viewed as within a normal distribution range, beyond which a challenge for cause is justified. With a normal spin of the jury wheel, the permissible prejudices should be minor and offsetting. Occasionally, however, the spin of the wheel may produce a skewed jury or a jury with at least one member at the extreme of permissible bias. The peremptory challenge permits the litigant to eliminate these "aberrational" jurors.\textsuperscript{240} The peremptory

\begin{itemize}
\item 236. See Jurywork, \textit{supra} note 8, at 10-32, section 10.02[4]; \textit{cf.} Ross v. Oklahoma, 487 U.S. 81 (1988) (upholding state requirement that litigant exercise peremptory challenges to cure erroneous refusals to excuse jurors for cause).
\item 237. See Pizzi, \textit{supra} note 20, at 145.
\item 238. See Gurney, \textit{supra} note 21, at 256.
\item 239. Jurors often are reluctant to admit racist attitudes to themselves, much less to strangers in open court.
\item 240. For example, assume a jury's spectrum of biases could be illustrated by the following continuum:
\end{itemize}
challenge also is said to protect the litigant by permitting intense voir dire questioning without fear of antagonizing jurors for whom cause cannot be shown. Jurors who react hostilely to counsel's questions may be removed peremptorily. Finally, the peremptory challenge allows the litigant to deselected jurors with whom the litigant, for whatever reason, does not feel comfortable.

Nevertheless, there are several reasons to believe that the harm from partiality under a system without peremptory challenges may not be as serious as first appears. First, there is empirical evidence that attorneys frequently cannot successfully identify juror bias with their peremptory challenges. Thus, peremptory challenges do not necessarily reduce actual juror partiality. Second, in most cases, attorneys do not identify specific bias. Rather, they rely on indicia such as race, religion, national origin, and occupation to isolate juror bias. Those are precisely the generalizations that the judicial system should discourage. Subtle manifestations of juror bias often only reflect counsel's own prejudices. Third, although eliminating peremptory challenges leaves the litigant at the mercy of the spin of the jury wheel, litigants are equally subject to the vagaries of chance in judge-tried cas-

\[ x \quad * \quad * \quad ***** \\
| cause \quad neutral \quad cause |

The peremptory challenge furthers neutrality by permitting the litigant to eliminate juror X.

241. See Babcock, supra note 9, at 554-55.

242. See Zeisel & Diamond, The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court, 30 STAN. L. REV. 491 (1978); see also Gurney, supra note 21, at 250-52; Note, The Use of Peremptory Challenges to Exclude Blacks from Petit Juries in Civil Actions: The Case for Striking Peremptory Strikes, 4 REV. LITIG. 175, 213 & n.182 (1984). The Zeisel and Diamond study concluded that not only was attorney performance on voir dire erratic, but when one side performed well and the other did not, the disparity may have distorted justice. Zeisel & Diamond, supra, at 518-19. This, however, may be more a problem with the adversary system than with the peremptory challenge process. Trials are often a battle of attorneys with victory determined by counsel's competence, rather than a search for the truth with the facts and law dispositive.

243. Modern scientific juror evaluation methods may enhance attorneys' performance during voir dire, see McConahay, Mullin & Frederick, The Uses of Social Science in Trials with Political and Racial Overtones: The Trial of Joan Little, 41 LAW & CONTEMP. PROBS. 205, 226 (Winter 1977), but they also exacerbate the degree to which peremptory challenges discriminate against the poor who cannot afford jury experts or community sampling techniques. In any event, sophisticated juror selection procedures remain the exception rather than the rule.

244. See Note, supra note 242, 4 REV. LITIG. at 179 n.23.
es.245 Judges often differ in their private prejudices and political philosophies.246 Additionally, the unfairness perceived from random selection cannot compare to the impression of unfairness created by systematic discrimination. There is also a question whether it is desirable to remove the "aberrational" juror from the jury. Unless subject to exclusion for cause, the "aberrational" juror may be considered a valued ingredient of the cross-sectional jury.247 Fourth, the peremptory is not necessary to protect intense voir dire. Persistent questioning, rather than antagonizing jurors, often indoctrinates them to counsel's view of the case and sensitizes the jurors to their own prejudices.248 A juror questioned about her bias even may favor the party doubting her integrity, rather than confront the possibility that she is prejudiced. There is also little evidence that counsel can successfully identify those few jurors who are antagonized by the invasion of their privacy.249 In any event, counsel rarely has the opportunity for extensive questioning of prospective jurors during voir dire. Judges control voir dire and frequently are the only questioners during the process. Eliminating the peremptory challenge right, therefore, should not affect counsel's conduct during voir dire. Fifth, a greater judicial willingness to grant challenges for cause250 and appeals of erroneous decisions can partially substitute for the elimination of peremptory challenges. Peremptory challenges would no longer be needed to remove the most biased jurors. Similarly, more intensive voir dire may more accurately identify juror bias. The resultant number of additional successful challenges for cause even may exceed the number of peremptory challenges now allocated to each litigant.251

245. Even in jury cases, the identity of the judge can influence the outcome of litigation. The judge may supervise settlement negotiations, rules on all motions and can consciously or unconsciously sway the jury.
246. One might argue that judges are more capable of insulating their decisions from their private biases than are lay jurors. The ease with which one can categorize many judges as conservative or liberal, however, suggests that this argument is more theoretical than real.
247. See Gurney, supra note 21, at 247-49.
248. Id. at 253-54.
249. See supra note 242.
250. See infra notes 252-53 and accompanying text.
251. In a study of voir dire in capital cases, Nietzel & Dillehay found that when judges and jurors questioned prospective jurors en masse, the court granted
There is no escaping, however, that elimination of peremptory challenges will increase partiality if, as under current practice, judges are reluctant to exclude jurors for cause. It is extremely difficult to convince a judge to strike a juror for cause.\textsuperscript{252} Many courts will refuse to grant a "cause" challenge whenever the juror says that she would decide the case "only on the evidence presented."\textsuperscript{253} Jurors, quite naturally, are generally willing to make such a declaration, rather than admit to being prejudiced and close-minded. Thus, the true value of the peremptory challenge may be to eliminate extremely biased jurors while protecting citizens from the humility of accusations of racism and judges from the embarrassment of rejecting jurors' protestations of impartiality.\textsuperscript{254} The peremptory challenge also saves the costs associated with its likely substitute—more extensive voir dire and litigation over challenges for cause.\textsuperscript{255}

Do these benefits outweigh the potential harms from peremptory challenges? Eliminating all peremptory challenges, even in cases that don't involve racial issues and in which there is no reason to expect juror discrimination, seems overbroad. On the other hand, preserving the peremptory challenge as a face-saving device for cases close to or over the line of appropriate exclusion for cause permits irrational and sometimes invidious discrimination in countless cases far from the line.\textsuperscript{256} The appropriate balance is not obvious. Resolution of this conundrum depends on one's values and views about the judicial process. Specifically, the balance will vary with one's perspectives concerning the weight to be given variables "x," "y," and "z" in the Batson function,\textsuperscript{257} the success of Batson in eliminating discrimina-

\begin{itemize}
\item [252.] See Pizzi, supra note 20, at 146.
\item [253.] See Babcock, supra note 9, 549-50; see also Wainwright v. Witt, 469 U.S. 412, 423 (1985).
\item [254.] See Alscher, supra note 8, at 206.
\item [255.] More extensive voir dire not only is costly and time consuming, but also seriously may invade juror privacy. See Saltzburg & Powers, supra note 8, at 361.
\item [256.] See Alscher, supra note 8, at 208.
\item [257.] It is tempting to suggest that variable "z" must be given de minimis
\end{itemize}
tion and the ability of the Court to foster more rigorous enforcement of Batson, the ability of counsel to identify hidden bias through hunches or physical observation, the prevalence of disagreements between counsel and judges on for cause rulings and the practicality of reducing those disagreements through greater voir dire or more searching judicial scrutiny of challenges for cause. Obviously, judges and commentators may reasonably disagree about each of these issues.

One possible compromise proposal would invalidate peremptory challenges if, but only if, a litigant established a prima facie case of discrimination. This proposal effectively adopts Batson, but does not give opposing counsel the right to rebut the prima facie case of discrimination. This alternative would reduce much of the harm from discrimination that Batson does not successfully remedy. No longer would “the jurors don’t look attentive” be an acceptable explanation for a series of seemingly race-based peremptory challenges. Moreover, as suggested previously, much of the harm from discrimination results from juror and community perceptions of discrimination. The prima facie case, at least if rebuttal reasons are heard outside the presence of the jury, determines those perceptions. The harm from partiality, however, would be greater than under Batson. Some litigants, even if not guilty of actual discrimination, would be precluded from removing jurors whom the judge erroneously determined could not be excluded for cause. Similarly, the litigant could not remove minority members whose hidden bias was revealed through physical observation, e.g., the juror who, through gritted teeth and with a scowl, unconvincingly denied bias. Additionally, jurors who perceived counsel’s peremptory challenge as discriminatory are likely to harbor resentment. Restoring them to the jury would seem to unfair-

weight relative to the other variables. A concern over administrative costs should pale in comparison to society’s interests in eliminating discrimination and maintaining confidence in the fairness of the jury process. Nevertheless, courts consider administrative costs a significant interest. If they didn’t, all courts would engage in extensive voir dire to isolate juror bias more accurately. The prevalence of less than twelve person juries also illustrates the prominence of administrative costs in many jurisdictions’ balance.

ly prejudice a litigant who had race-neutral reasons for the peremptory challenge.\textsuperscript{259} The degree of increase in the harm from partiality, however, should be less than the increase accompanying the complete elimination of peremptory challenges. The proposal does not interfere with the peremptory challenge right unless the challenge threatens harm from discrimination. Challenges to non-suspect class jurors would always be permitted. In effect, this proposal reduces the overbreadth from which the no peremptory challenge recommendation suffers, but introduces a new form of partiality (the resentful juror) and increases administrative costs (hearings to establish a prima facie case).

A variation of the above proposal would permit the opposing party to rebut the prima facie case of discrimination, but only by proving "cause" for the challenge, albeit under a standard more lenient than existing law. Objectively verifiable proof of specific bias could justify the challenge and the court would not give dispositive weight to juror declarations that the juror could decide the case only on the evidence presented. "The juror was inattentive," however, still would be insufficient to rebut the prima facie case. In effect, this variation adopts \textit{Batson}, but demands that courts more closely police counsels' rebuttal explanations. Compared to complete elimination of the right to rebut a prima facie case, this variation would reduce the harm from partiality, but would probably also increase the harm from discrimination and administrative costs. Jurors who were unaware of the justifications for the facially discriminatory challenges would suffer stigma and the community respect for the judicial system similarly would be reduced. Erroneous findings of "pseudo-cause" also could leave actual discrimination unremedied. Finally, there would be no guarantee that courts would scrutinize counsels' rebuttal reasons with the desired rigor.\textsuperscript{260}

Nevertheless, compared to \textit{Batson} procedures alone, this variation should eliminate additional discrimination without

\textsuperscript{259} Beginning the selection process anew, however, would encourage discriminatory strikes when there was an unusually large number of jurors on the panel and would further increase administrative costs.

\textsuperscript{260} The demand for objectively verifiable proof of specific bias, however, would at least permit greater appellate review of lackadaisical lower court analysis.
significantly increasing the harm from partiality or administrative costs. Harm from discrimination would decrease because it would be more difficult for counsel to manufacture neutral reasons for facially discriminatory challenges. Partiality would increase to the extent the litigant would be precluded from striking jurors based on hunches, stereotypes, or physical observations. These bases for peremptory challenges, however, are the least reliable and most subject to abuse. Unless one has an unshakeable faith in the ability of attorneys to identify hidden bias, restricting such challenges should, at least in most cases, sacrifice little. Thus, this variation would seem to be an almost guaranteed improvement on *Batson*.

Perhaps the best, and most administrable, balance might be reached by legislation reducing the number of peremptory challenges allotted each side to one. This recommendation may minimize the *Batson* function if, as is assumed, peremptory challenges provide benefits and harms logarithmically, not linearly. That is, the marginal damage from each peremptory challenge is not identical. The first peremptory challenge does not create one-third the harm from discrimination that three peremptory challenges provide. With only one challenge, in only the rarest case will jurors and the community perceive any discrimination when a minority juror is excused. The excluded juror would have no reason to feel stigmatized and the community should not lose respect for the judicial system. The same is not true when there has been a series of exclusions of minority members. Similarly, each peremptory challenge does not af-

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261. A variation of this proposal would grant the judge the discretion to increase the number of peremptory challenges per side in cases where juror prejudice appears to be a particularly strong risk. This article rejects this variation. The same function could be accomplished through liberalized "for cause" rulings. Permitting judges to increase the number of peremptories in cases where prejudice is more likely seems to sanction judicial reliance on group-based stereotypes and would increase litigation costs.

262. Although the one peremptory proposal would permit each party to exercise one discriminatory challenge, the reality of practice under *Batson* is little different. One discriminatory challenge generally will not support a prima facie case of discrimination under *Batson*. *But see* People v. Bryant, 159 A.2d 962, 552 N.Y.S.2d 778 (N.Y. App. Div. 1990). Rarer still is the case in which counsel cannot rebut a prima facie case that is based on a single questioned challenge.

263. When more than one juror is excluded, the only factor in common between or among the jurors may be their minority status. This might raise an
flect the harm from partiality proportionally. The first challenge should achieve a disproportionate amount of the benefits provided by the peremptory challenge. The first challenge eliminates the juror viewed as most partial. If there is a normal distribution, there may not even be more than one juror on the panel that significantly deviates from the norm. Additionally, appellate review of “cause” rulings is not permitted in many jurisdictions if the challenged juror could have been removed peremptorily. Therefore, unless the frequency of judicial error on challenges for cause is great, the first peremptory also should protect against the greatest number of appeals. Thus, additional peremptories will have increasingly diminishing benefits, both in terms of eliminating partiality and reducing appeals of “for cause” rulings. Finally, because one peremptory challenge should not raise an inference of discrimination, the one peremptory proposal would avoid the costs associated with Batson hearings.

Hence, compared to a peremptory challenge system with three or more peremptories, limited by Batson, the one peremptory proposal should decrease discrimination. Minority members’ equal protection rights would not be held hostage to the judiciary’s inability or unwillingness to police counsels’ peremptory challenges. Not only would the proposal reduce the unproven or unprovable discrimination existing under Batson, it would also eliminate most of the harm from perceived discrimination that results when prima facie cases are rebutted outside the presence of the jury. The harm from partiality would increase, but only marginally. The one challenge protects against most of the potential harm from partiality. Elimination of Batson hearings should vastly decrease administrative costs. Compared to complete elimination of peremptory challenges, the one peremptory proposal should only marginally increase actual (but not perceived) discrimination. Relatively little damage can be done with just

inference of purposeful discrimination. Absent unusual circumstances, e.g., exclusion of the lone black juror without questioning, the same inference should not be permissible when only one juror is excluded.

264. To guarantee that the litigant may challenge the juror viewed as most partial, the one peremptory proposal should be enacted as part of a struck jury system. See supra note 12. Otherwise, a party may exercise their peremptory challenge before the most aberrational juror enters the jury box.

265. See supra text accompanying notes 232-33.
one peremptory. The harm from partiality would be significantly reduced. Administration costs, in many jurisdictions, would also decrease because litigants would need to appeal fewer questionable for cause rulings.266

It is impossible to perfectly accommodate two irreconcilable interests. Some will argue that equal protection interests mandate the complete elimination of the peremptory challenge. Others will insist that the peremptory challenge right should remain unfettered. Many will prefer a compromise proposal. This article recommends reducing the number of peremptory challenges per side to one. The recommendation, however, is less important than the methodology. Analysis through use of the Batson function at least reveals the costs inherent in each suggested balance and encourages reasoned decision-making.

VI. CONCLUSION

There is no disagreement that discrimination pervades the jury process in many civil courthouses. Courts and commentators only disagree about how best to eradicate such discrimination. Batson may not be a perfect cure. Legislation reducing the number of peremptory challenges allotted each litigant may more efficiently eliminate juror discrimination. Reasonable minds may differ. One even might disagree with the wisdom of Batson itself. A critic may find that the inability fully to enforce and the costs attendant to Batson outweigh the tangible benefits achieved and the important symbolic message conveyed by Batson. What there should be no question about, however, is that there is no principled way to distinguish Batson’s application in criminal from civil trials. None of the differences between criminal and civil proceedings significantly impacts the critical interests identified by Batson and Holland. The fourteenth amendment’s state action requirement also presents no basis for rejecting application of Batson to civil trials. Case law can support and consideration of state action policies dictates that a private litigant’s discriminatory peremptory challenge be deemed state action. Thus, until Batson or the dicta in Holland are overruled, or Congress or the states enact legislation modifying the per-

266. See supra note 236 and accompanying text.
emptory challenge right, courts should require judicial review of alleged discriminatory peremptory challenges in all civil trials.