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Batson v. Kentucky: Present Extensions and Future Applications

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I. INTRODUCTION

Historically, the Supreme Court has endorsed the peremptory challenge—though it is not constitutionally guaranteed—as a means of assuring an accused's right to an impartial jury.[1] The Court has recognized the utility of the peremptory challenge to eliminate bias on both sides of litigation as well as to assure that every case will be decided solely on the evidence presented at trial.[2] The Court, however, has moved toward restricting the use of peremptory challenges in cases in which they are used to discriminate.

In 1986, in *Batson v. Kentucky*, the Court prohibited prosecutors from exercising peremptory challenges for the purpose of racial discrimination in criminal trials.[3] Though guardedly, the Court has since extended the reach of that decision, applying the *Batson* rationale to defendants' challenges to ethnic discrimination[4] and to civil litigation.[5] It is unlikely that the *Batson* rationale will be expanded to prohibit age or religious discrimination,[6] but it is possi-

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1. *See* Pointer v. United States, 151 U.S. 396, 408 (1894), wherein the Court explained:

> The right to challenge a given number of jurors without showing cause is one of the most important of the rights secured to the accused. . . . Any system for the empaneling of a jury that pre[v]ents or embarrasses the full, unrestricted exercise by the accused of that right, must be condemned.

For a discussion of the history of the peremptory challenge in Great Britain and the United States and an argument that the peremptory challenge should be abolished, see Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L. Q. 369 (1992); *see also* Robert L. Harris, Jr., Note, *Redefining the Harm of Peremptory Challenges*, 32 WM. & MARY L. REV. 1027 (1991) [hereinafter Harris]. Other commentators argue for a continued, but limited, role for the peremptory challenge. *See, e.g.*, Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725 (1992).

2. *See* Swain v. Alabama, 380 U.S. 202, 219 (1965).

3. 476 U.S. 79 (1986).

4. *See infra* part III.B.

5. *See infra* part III.C.

6. *See infra* parts IV.B and IV.C.

ble that it will be extended to gender-biased challenges, and this possibility has become the subject of controversy among the lower courts.[7] Still unresolved is the question of the application of *Batson* principles to disabled jurors.[8]

II. THE BEGINNING: *BATSON V. KENTUCKY*

In *Batson v. Kentucky*, the Supreme Court held that if a prosecutor deliberately excludes members of a defendant's race from the jury without a race-neutral reason, the prosecutor violates the defendant's Fourteenth Amendment right to equal protection of the laws.[9] In reaching that conclusion, the majority recognized that a defendant does not have the right to a petit jury composed entirely, or even partially, of members of the defendant's race.[10] The Court found, however, that the Equal Protection Clause of the Fourteenth Amendment does guarantee that members of the defendant's race will not be excluded from the jury venire on the basis or the assumption that members of that race are unqualified to serve as jurors.[11]

The "historic step"[12] in eliminating racial discrimination in jury selection lies in the *Batson* Court's application of the Equal Protection Clause to the selection of the petit jury and specifically to the state's use of peremptory challenges in a criminal trial.[13] *Batson* recognized that racial discrimination in the ultimate selection of the jury not only harms the defendant but also denies the excluded juror the right to participate in jury service.[14] Further, the discriminatory use of peremptory challenges harms the community as a whole by casting doubt on the entire judicial system.[15]

The *Batson* decision is also noteworthy for its removal of the crippling evidentiary burden, as articulated in *Swain v. Alabama*, that was imposed on a defendant who alleged denial of this Fourteenth Amendment right.[16] The *Batson* Court ruled that the de-

7. *See infra* part IV.A.
8. *See infra* part IV.D.
9. *Batson*, 476 U.S. at 100.
10. *Id.* at 85.
11. *Id.* at 86.
12. Justice Marshall characterized the opinion as "eloquent" and as "tak[ing] a historic step toward eliminating the shameful practice of racial discrimination in the selection of juries." *Id.* at 102 (Marshall, J., concurring).
13. *Id.* at 89.
14. *Batson*, 476 U.S. at 87.
15. *Id.*
16. The *Swain* Court declared:

> In light of the purpose of the peremptory system and the function its serves . . . .

fendant need not show racially motivated abuse of the peremptory challenge system beyond the confines of his own case.[17] Rather, the defendant may establish a prima facie case of deliberate discrimination by showing that the facts of his or her case give rise to an inference of racially discriminatory motivation for peremptorily challenging jurors of the defendant's race.[18] Upon that showing, the burden of proof shifts to the prosecution to justify the challenges. The prosecution must then present racially neutral reasons for having excluded the jurors.[19]

To establish a prima facie case, the defendant (1) must be a member of a "cognizable racial group"; (2) may rely on the fact that peremptory challenges allow discrimination to be brought into the jury selection process "by those who are of a mind to discriminate"; and (3) must show that these facts, along with any other relevant evidence, give rise to the inference that the prosecutor's use of the peremptory challenge was motivated by racial discrimination.[20] Thus, the Court's application in *Batson* of equal protection principles to the peremptory challenge system, in addition to radically changing the procedural requirements that must be met by the defendant, leaves no question about the Supreme Court's intent to abolish racial discrimination in the selection of the criminal trial jury. Equal protection questions have since arisen, however, in instances in which a defendant did not share the excluded juror's racial identity, the excluded juror shared the defendant's ethnic heritage, the defendant was using the peremptory challenge system to discriminate, and a litigant contested a peremptory challenge in the context of a civil case. The following section will discuss the Supreme Court's application of *Batson* to each of these questions.

> [t]he presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes."

380 U.S. at 222.

17. *Batson*, 476 U.S. at 92-93, 96. In *Swain*, 380 U.S. at 223, the Court had established that the presumption that the prosecutor had properly used peremptory challenges could only be overcome by evidence that the prosecutor, "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors . . . with the result that no Negroes ever serve on petit juries."

18. *Batson*, 476 U.S. at 96.

19. *Id.*

20. *Id.*

III. EXTENSIONS OF *BATSON*

A. Racial Identity Between Juror and Defendant

In *Holland v. Illinois*,[21] the Supreme Court rejected a white defendant's Sixth Amendment challenge to the exclusion of black jurors. The *Holland* Court first determined that the white petitioner did have standing to appeal the exclusion of the only black venirepersons.[22] The Sixth Amendment principle that entitles a defendant to object to a venire that does not represent a cross section of the community does not require that the defendant and the excluded persons be of the same race.[23] Rather, every defendant has the right to make such an objection, regardless of whether jurors have been systematically excluded on the basis of race.[24]

The Court declined to incorporate the *Batson* test for a prima facie violation of the Equal Protection Clause into the Sixth Amendment venire objection.[25] The Sixth Amendment right to a venire representing a fair cross section of the community facilitates an impartial jury, not a representative one.[26] Impartiality would actually be obstructed by stretching the fair cross section requirement to the petit jury.[27] Such an application would serve only to cripple the peremptory challenge, which historically has allowed both prosecutor and defendant to remove biased jurors.[28] The Court concluded that because racial discrimination is beyond the scope of the Sixth Amendment—the only issue before the Court—the petitioner did not present a valid Sixth Amendment challenge.[29]

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21. 493 U.S. 474, 487-88 (1990). For further discussion of *Holland*, see Robert M. O'Connell, Note, *The Elimination of Racism From Jury Selection: Challenging the Peremptory Challenge*, 32 B.C. L. REV. 433 (1991); Carolyn R. Alessi, Comment, *Holland v. Illinois: Are Discriminatory Peremptory Challenges Constitutional?*, 26 NEW ENG. L. REV. 173 (1991).

22. *Holland*, 493 U.S. at 476-77. Only two blacks were in the venire, and both were excluded from the jury. *Id.*

23. *Id.* at 477.

24. *Id.*

25. *Id.* at 478. The Court reasoned that "[a] prohibition upon the exclusion of cognizable groups through peremptory challenges has no conceivable basis in the text of the Sixth Amendment, is without support in our prior decisions, and would undermine rather than further the constitutional guarantee of an impartial jury." *Id.*

26. *Id.* at 480.

27. *Holland*, 493 U.S. at 483-84.

28. *Id.* at 484. The Court also noted that the *Batson* extension of the Equal Protection Clause from the venire stage to the petit jury succeeded "not because the two stages are inseparably linked, but because the intransigent prohibition of racial discrimination contained in the Fourteenth Amendment applies to both of them." *Id.* at 479.

29. *Id.* at 486-87.

The *Holland* Court limited its holding to the invalidity of the Sixth Amendment challenge to racially discriminatory use of the peremptory challenge. The Court expressly declined to hold either that the exclusion of the jurors in that case was lawful or that a white defendant could not constitutionally challenge discrimination against black jurors.[30] Moreover, five justices indicated that a defendant might be able to challenge this type of discrimination on the basis of the Equal Protection Clause.[31] Thus, the door was opened for a white defendant's Fourteenth Amendment challenge to the racial exclusion of black jurors. The following year, in *Powers v. Ohio*,[32] the Supreme Court upheld such an Equal Protection Clause challenge.

The *Powers* Court held that a criminal defendant may object to racial discrimination in the use of peremptory challenges to exclude jurors whether or not the jurors share the defendant's race.[33] In *Powers*, a white defendant invoked the Equal Protection Clause to challenge the prosecution's racially discriminatory use of peremptory challenges against black jurors.[34] The trial and appellate courts had denied the defendant's *Batson* objection to the prosecutor's exercise of seven of its ten peremptory challenges to remove black jurors.[35] The defendant appealed, contending that his own race was irrelevant to his right to object to the prosecution's peremptory challenges.[36] The United States Supreme Court agreed with the defendant, construing *Batson* to encompass the prosecution's racial discrimination in its exercise of peremptory challenges regardless of the defendant's race.[37]

In reaching its conclusion, the Court discussed the distinguishing factor between *Powers* and *Batson*: the element of racial identity between the defendant and the excluded juror.[38] The *Powers* Court determined that limiting the right of a defendant to make an equal protection objection only to the circumstances presented in *Batson* (where there is racial identity) would be inconsistent with

30. *Id.*
31. *See id.* at 489 (Kennedy, J., concurring); *id.* at 491 (Marshall, J., dissenting, joined by Brennan, J., and Blackmun, J.); *id.* at 505-08 (Stevens, J., dissenting).
32. 111 S. Ct. 1364 (1991).
33. *Id.* at 1366, 1373-74.
34. *Id.* at 1366.
35. *Id.*
36. *Id.*
37. *Powers*, 111 S. Ct. at 1366-74.
38. *Id.* at 1368.

the principles underlying federal statutory law,[39] the Equal Protection Clause,[40] and the rules of standing.[41] Basing its decisions on the demands of the statutory prohibition against racial discrimination in jury selection and the Fourteenth Amendment mandate of racial neutrality in the judicial process, the majority determined that the element of racial identity found in *Batson* does not conflict with the *Powers* holding:[42] racial identity may make the defendant's obligation to prove a prima facie case of discrimination easier, but it is not always a relevant factor in discerning discrimination.[43]

B. The Question of Ethnicity

In *Hernandez v. New York*,[44] the Supreme Court affirmed a trial court decision that allowed a prosecutor to exclude two bilingual Latin-American jurors on the basis of the prosecutor's race-neutral explanation for exercising the peremptory challenges. The prosecutor had explained that the prospective jurors looked away from him and hesitated before answering whether they could accept the official translator as the final arbiter of the witnesses' testimony, that he did not know which jurors were Latinos, and that he had no motive to exclude the jurors, since the victims and all of the civilian witnesses were also Latinos.[45]

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39. *Id.* Federal law prohibits racial discrimination in the jury selection process by making it a federal crime. 18 U.S.C. § 243 (1988).

40. *Powers*, 111 S. Ct. at 1368. The Supreme Court also indicated, in *Holland*, that the racially motivated exclusion of jurors by peremptory challenge would violate the Equal Protection Clause. *Holland*, 493 U.S. at 486-87.

41. *Powers*, 111 S. Ct. at 1368. The criminal defendant's right to assert the equal protection rights of such an excluded juror satisfies the three important criteria for establishing standing: (1) the criminal defendant suffers a real injury because of the racial exclusion, (2) the excluded juror and the criminal defendant have a common interest in abolishing racial discrimination from the jury selection process, and (3) the legal and practical barriers to litigation greatly reduce the likelihood of the excluded jurors' asserting their own rights. *Id.* at 1370-74.

42. *Id.* at 1373-74.

43. *Id.* For further discussion of *Powers*, see Bradley R. Kirk, Note, *Milking the New Sacred Cow: The Supreme Court Limits the Peremptory Challenge on Racial Grounds in Powers v. Ohio and Edmonson v. Leesville Concrete Co.*, 19 PEPP. L. REV. 691 (1992) [hereinafter Kirk].

44. 111 S. Ct. 1859, 1873 (1991).

45. *Id.* at 1864-65. The Court observed that the *Batson* three-step test for determining whether a prosecutor's use of the peremptory challenge has violated the Equal Protection Clause allows for prompt rulings on objections to such challenges without disrupting the jury selection process. *Id.* Because the prosecutor explained his use of the peremptory challenges without inquiry from the trial court, the court did not have occasion to rule on whether the defendant made a prima facie showing of discrimination. *Id.* at 1866. The Supreme Court applied the Title VII procedure for establishing a prima facie case under the Civil Rights Act of 1964 to the *Batson* test. *Id.* Therefore, the Court determined that once a prosecutor offers a race-neutral reason for peremptorily striking a

The Court defined a neutral explanation as one "based on something other than the race of a juror."[46] Unless the prosecutor's reason for a peremptory challenge reveals inherent discriminatory intent, the court is to deem the reason race-neutral.[47] Because the prosecutor in *Hernandez* explained that the challenges were not founded on an intention to exclude Latino or bilingual jurors or on an assumption regarding Latinos or bilinguals, the New York courts were correct in finding the prosecutor's basis for exclusion to be race-neutral.[48] Furthermore, the Court noted that even if the prosecution's race-neutral criteria for excluding jurors should result in excluding a disproportionate number of Latinos from the venire, this result does not make a per se *Batson* violation: "Equal protection analysis turns on the intended consequences of government classifications."[49]

Once the prosecution has offered a race-neutral explanation for use of the peremptory challenge, *Batson* imposes the duty on the trial court to determine whether the defendant has established intentional discrimination from the totality of the circumstances.[50] The trial court judge may consider, among other factors, that the community setting of the trial includes a substantial Latin-American population and that interested parties to the litigation are of that same ethnic group, of which a large percentage speak fluent Spanish.[51] The issue becomes whether the trial judge finds the offered explanation to be a pretext.[52]

As the *Batson* Court indicated, a determination of intended discrimination constitutes a finding of fact that turns largely on an evaluation of the prosecution's credibility;[53] therefore, the trial court's ruling must be accorded great deference on review.[54] Accordingly, absent a finding of clear error in the *Hernandez* trial court's decision on the issue of discriminatory intent, the Supreme Court declined to overturn the state trial court's finding.[55]

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venireperson and the trial court has ruled on the issue of discrimination, the preliminary issue of whether a prima facie case has been established becomes moot. *Id.* at 1865-66.

46. *Id.* at 1866.

47. *Id.*

48. *Id.* at 1866-68, 1871.

49. *Hernandez*, 111 S. Ct. at 1867.

50. *Batson*, 476 U.S. at 98; *Hernandez*, 111 S. Ct. at 1868-69.

51. *Hernandez*, 111 S. Ct. at 1868.

52. *Id.*

53. *Batson*, 476 U.S. at 98.

54. *Hernandez*, 111 S. Ct. at 1868-69.

55. *Id.* at 1870-71. The Court determined that no clear error existed because the trial court took an allowable view of the evidence in crediting the sincerity of the prosecutor's explanation. *Id.* at 1871-72. The trial court could have properly considered the

While affirming the state court's determination that the exclusion of bilingual jurors was racially neutral in this case, the majority warned that such an exclusion is not always wise and in some cases might be unconstitutional.[56] It is quite possible, in regard to certain ethnic groups and in some communities, that bilingualism could be treated as a surrogate for race under a *Batson* analysis. The Court made it clear that in a future case, a policy of striking bilinguals without regard to the totality of the circumstances surrounding a particular trial may be found to be a pretext for racial discrimination.[57]

C. *The Question of Civil Litigation*

In *Edmonson v. Leesville Concrete Co.*,[58] the Supreme Court ruled that a private litigant in a civil case may not use peremptory challenges to racially discriminate against jurors. Racially motivated exclusion violates a juror's right to equal protection under the Fifth Amendment.[59] Thus, the Court continued its expansion of *Batson*.[60]

In a personal injury case, Edmonson sued Leesville Concrete Company for negligence in U.S. District Court.[61] Leesville used two of its three peremptory challenges to exclude black jurors.[62] Edmonson, also black, requested a race-neutral explanation for the challenges.[63] The trial court denied the request on the premise that *Batson* did not apply to private civil litigation.[64] Subsequently, a

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prosecutor's demeanor, the fact that the prosecutor volunteered his explanation, that the prosecutor did not know which jurors were Latinos, and that the victims and witnesses, sharing the excluded jurors' ethnicity, undermined the allegation of a discriminatory motive on the part of the prosecution. *Id.* at 1872. Moreover, the court may have also considered that of the four excluded jurors originally contested by the defendant, only three were verified as Latinos, and two of those were dismissed for cause. *Id.* Thus, the exclusion of one, or possibly two Latino jurors who could not agree, without hesitation, to accept the official translation of the court translator, did not constitute clear error on the part of the trial court. *Id.*

56. *Id.* The Court did not have cause in *Hernandez* to resolve the more difficult issue of the extent to which the concept of race should be defined for equal protection purposes. *Id.*

57. *Id.* at 1873.

58. 111 S. Ct. 2077, 2080 (1991).

59. *Id.*

60. For criticism of this expansion, see Kirk, *supra* note 43; Eric D. Katz, Note, *Striking the Peremptory Challenge From Civil Litigation: "Hey Batson, Stay Where You Belong!"*, 11 PACE L. REV. 357 (1991).

61. *Edmonson*, 111 S. Ct. at 2080.

62. *Id.* at 2081.

63. *Id.*

64. *Id.*

divided en banc panel affirmed the trial court's judgment, holding that a civil litigant may exercise peremptory challenges without accountability for racial exclusion; the Supreme Court reversed.[65]

The Court in *Powers v. Ohio* had set out a two-part analysis, from which the Court determined that a criminal defendant could make a *Batson* objection regardless of his own race.[66] First, the Court established that the racially motivated peremptory challenge violated the equal protection rights of the excluded jurors.[67] Second, the Court applied well-established rules of standing and concluded that the criminal defendant could raise the excluded jurors' equal protection rights.[68] While *Powers* and the cases the *Powers* Court relied on were all directed at criminal proceedings, none of the cases implied that racial discrimination was permissible in the context of civil litigation.

Addressing the first prong of the *Powers* analysis, the *Edmonson* Court noted that generally the constitutional guarantees of individual liberty and equal protection apply only to government action.[69] Consequently, the legality of race-based exclusion of prospective jurors in private litigation turns on the extent to which a civil litigant is subject to constitutional restrictions. The conduct of private parties is usually beyond the scope of the Constitution.[70] Nevertheless, Leesville exercised its peremptory challenges in accordance with a course of government action and was thereby subject to constitutional restrictions under an analysis previously described by the Supreme Court in *Lugar v. Edmonson Oil Co.*[71] The peremptory challenge system satisfies both inquiries of the *Lugar* analysis: (1) as the cause of a constitutional deprivation, the system has its source in government authority, and (2) the private party charged with the deprivation can be described as a government actor.[72]

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65. *Id.*

66. *Powers*, 111 S. Ct. at 1374.

67. *Id.* at 1370.

68. *Id.* at 1373.

69. *Edmonson*, 111 S. Ct. at 2082 (citing National Collegiate Athletic Ass'n. v. Tarkanian, 488 U.S. 179, 191 (1988)).

70. *Id.*

71. *Id.* at 2082-83 (citing Lugar v. Edmonson Oil Co., 457 U.S. 922, 936-42 (1982) (concluding that whether conduct is "state action" is a function of (a) whether the claimed constitutional deprivation resulted from the exercise of a right or privilege rooted in state authority, and (b) whether the private party actor could fairly be described as a state actor)).

72. *Id.* at 2083. Because 28 U.S.C. § 1870 authorized the use of peremptory challenges in civil litigation, without which Leesville could not have discriminated against jurors, the system clearly has its source in government authority. *Id.* at 2084. Leesville

Having ruled that the racial exclusion of jurors in a civil trial violated those jurors' equal protection rights, the Court turned to the second part of the *Powers* analysis, which entailed a determination of the defendant's standing to assert the jurors' rights.[73] The Supreme Court found that the three requirements of standing, satisfied in the criminal context in *Powers*, were satisfied in the civil context as well.[74] Finding that prospective jurors in civil trials possess equal protection rights under the Fifth Amendment and that the civil litigant has standing to assert them, the Court concluded that the *Batson* procedure of remanding for a factual determination of whether a prima facie case has been established should also apply to civil litigation.[75]

D. The Criminal Defendant's Exercise of Peremptory Challenges

In *Georgia v. McCollum*,[76] the Supreme Court held that a criminal defendant's racially discriminatory use of peremptory challenges violates the Equal Protection Clause of the Fourteenth Amendment. The *McCollum* Court prefaced its decision by noting the procedure established by *Batson* for finding racial discrimination in the state's exercise of peremptory challenges: once a prima facie showing of discrimination is made, the burden shifts to the State to provide a race-neutral explanation for challenging the jurors.[77] The Court also discussed the development of *Batson* through *Powers* and *Edmonson*.[78]

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had made extensive use of the peremptory challenge system, created by statutory law and administered solely by government officials; therefore, Leesville could in all fairness be deemed a governmental actor. *Id.* The action at issue also involved performing a traditional government function, because the purpose of the peremptory challenge is to select a jury, a quintessential governmental body without any characteristics of a private group. *Id.* at 2085. Moreover, permitting racial exclusion within the official forum of the courtroom casts doubt upon the fairness of the proceedings conducted there and compounds the insult inherent in racial discrimination. *Id.* at 2087.

73. *Id.* at 2087-88.

74. *Edmonson*, 111 S. Ct. at 2087. Jurors are unlikely or unable to assert their own rights because the legal and practical barriers are as high for jurors excluded from a civil trial as they are for jurors excluded from a criminal trial. *Id.* Second, the relation between the litigant and the excluded juror in the criminal proceeding is as close in civil litigation as in a criminal proceeding. *Id.* at 2087-88. Finally, a concrete, redressable injury caused to the criminal defendant by racial discrimination in jury selection is shared by the civil litigant, since racial discrimination casts doubt on the judicial system and the fairness of the proceeding. *Id.* at 2088. Therefore, the civil litigant has standing to assert the equal protection rights of the racially excluded juror. *Id.*

75. *Id.* at 2089.

76. 112 S. Ct. 2348, 2359 (1992).

77. *Id.* at 2353.

78. *Id.*

In determining the constitutionality of precluding the criminally accused from exercising peremptory challenges in a racially discriminatory manner, the *McCollum* Court made four inquiries: (1) whether the criminal defendant's race-biased peremptory challenge caused injuries addressed by *Batson*, (2) whether the use of the peremptory challenge system constituted state action, (3) whether the State had standing to assert the rights of the excluded jurors, and (4) whether the constitutional rights of a criminal defendant nevertheless prohibited the extension of Supreme Court precedent to the case at bar.[79] The Court answered the first three questions yes and the last no.[80]

The *Powers* Court had indicated that the *Batson* decision was designed to serve multiple ends and had been applied as a remedy for the harm caused to personal dignity and to the integrity of the judicial process by racial discrimination in the peremptory challenge system.[81] The *Powers* Court recognized a juror's right not to be excluded from the petit jury because of race, admonishing that such discrimination undermines public confidence in the entire judicial system.[82] Likewise, the *McCollum* Court found that racially motivated peremptory challenges exercised by the criminal defendant harm the jurors as well as the community: "Be it at the hands of the State or the defense, if a court allows jurors to be excluded because of group bias, it is a willing participant in a scheme that could only undermine the very foundation of our system of justice—our citizens' confidence in it."[83] Thus, the Court established that the *McCollum* case addressed the type of harm that *Batson* was designed to remedy.

The Supreme Court's second inquiry led to a finding that the criminal defendant's use of the peremptory challenge system constitutes state action; therefore, the Equal Protection Clause applies.[84] The Court based this determination on the two-part *Edmonson* analysis of government action: the constitutional deprivation resulted from the exercise of a right having its source in government authority; and the private party causing the depriva-

79. *Id.*

80. *Id.* at 2353-59. For further discussion of *McCollum*, see Michael M. Raeber, Note, *Toward an Integrated Rule Prohibiting All Race-Based Peremptory Challenges: Some Considerations on Georgia v. McCollum*, 26 GA. L. REV. 503 (1992).

81. *Powers*, 111 S. Ct. at 1368.

82. *Id.* at 1370.

83. *McCollum*, 112 S. Ct. at 2354.

84. *Id.* at 2354-57.

tion could be described as a governmental actor.[85] The *McCollum* Court followed *Edmonson* in concluding that because the defendant's right to exercise peremptory strikes is given by Georgia state law, state action was present in the defendant's discriminatory use of the peremptory challenge.[86]

The Court also applied three *Edmonson* principles in determining that the second requirement of state action was met. First, because of state-designated procedures for the peremptory challenge system and because of the jury system, the criminal defendant relies on "governmental assistance and benefits."[87] Next, traditional government functions served by the peremptory challenge and by the jury system itself, as established in *Edmonson*, are amplified in the criminal context because "the selection of a jury in a criminal case fulfills a unique and constitutionally compelled governmental function."[88] Lastly, because exercise of peremptory strikes takes place in the courtroom, the public is likely to perceive any racial discrimination in the procedure as being attributable to the state.[89] On the basis of these factors, the source of the deprivation can be described as a state actor, satisfying the second *Edmonson* requirement for government or state action.

Having established the applicability of the Constitution, the *McCollum* Court considered whether the State had standing. The Court applied the three prongs of standing as set out in *Powers*.[90] In addressing the first prong, the Court found that the state undoubtedly suffers a similar injury to that of the defendant when racial discrimination casts doubt on the integrity and fairness of the judicial process.[91] The Court's application of the second prong revealed that the state possesses an even closer relation to potential jurors than does the defendant in its position of representing the people.[92] Owing to this position, the state becomes the logical party for asserting the rights of jurors excluded by racial discrimination.[93] In applying the final prong of the standing analysis, the Court determined that the barriers to the excluded juror's litigating the exclusion are no less daunting when the challenge is exercised

85. *Id.* at 2354 (citing *Edmonson*, 111 S. Ct. at 2082-83).
86. *Id.* at 2355.
87. *Id.* (citing *Edmonson*, 111 S. Ct. at 2083).
88. *McCollum*, 112 S. Ct. at 2355.
89. *Id.* at 2356.
90. *Id.* at 2357. The *Powers* Court's three-pronged standing analysis is explained *supra* note 41.
91. *McCollum*, 112 S. Ct. at 2355.
92. *Id.*
93. *Id.*

by the defendant.[94] The Court, therefore, held that the State had standing to assert the rights of excluded jurors.[95]

The Court's final inquiry was whether the rights of the criminal defendant must prevail over the protection against discrimination offered by *Batson* and its progeny. The *McCollum* Court noted that peremptory challenges are not constitutionally guaranteed but are merely "one state-created means to the constitutional end of an impartial jury and a fair trial."[96] The Court also acknowledged the traditional perception of the challenge as an essential part of a jury trial and of the significant role the litigants play in selecting the jury.[97] Nevertheless, the Court reaffirmed the *Edmonson* determination that the price of racial stereotyping in the selection of the petit jury "is too high to meet the standard of the Constitution."[98]

The Supreme Court determined that prohibiting racial discrimination in the peremptory challenge system does not violate the criminally accused's Sixth Amendment rights.[99] Prohibiting such discrimination does not violate the right of the defendant to effective assistance of counsel, since articulating race-neutral reasons for peremptory challenges would ordinarily not cause counsel to reveal trial strategy or confidential communications.[100] Prohibiting racial discrimination does not impair the defendant's right to a trial by an impartial jury. As the *Holland* Court established, the objective of the Sixth Amendment is an impartial jury with respect to both parties.[101]

With this equal protection inquiry concluded, the Court held that the criminal defendant's racially discriminatory exercise of the

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94. *Id.*

95. *Id.* at 2367.

96. *McCollum*, 112 S. Ct. at 2358.

97. *Id.*

98. *Id.* (quoting *Edmonson*, 111 S. Ct. at 2077). Given the defendant's right to trial by an impartial jury, the Court acknowledged that there should exist a means of eliminating racially biased jurors from the petit jury. *Id.* at 2358-59. Nonetheless, the Court distinguished the invidious discriminatory exercise of the peremptory challenge by a party and the challenging of a racially prejudiced juror. *Id.* at 2359. As the *Powers* Court made clear, stereotyping and assuming prejudice based solely on race is unacceptable. *Id.* (citing *Powers*, 111 S. Ct. at 1370). Thus, the Court reaffirmed that peremptory challenges may be based neither on race nor on racial stereotypes. *Id.*

99. *Id.* at 2358.

100. *Id.* The Court stated that where a peremptory challenge would reveal trial strategy, the trial court could accommodate the defendant's concerns by holding an *in camera* discussion. *Id.*

101. *McCollum*, 112 S. Ct. at 2358; *see also Holland*, 493 U.S. at 483 (stating that "[p]eremptory challenges . . . are a means of 'eliminating extremes of partiality on both sides,' thereby 'assuring the selection of a qualified *and unbiased* jury' " (citations omitted)).

peremptory challenge is unconstitutional and that the state may raise the challenge to the defendant's use of peremptory challenges.[102] Hence, the state's demonstration of a prima facie case of such discrimination by the defendant requires the defense to articulate race-neutral reasons for suspect challenges.[103]

IV. FUTURE APPLICATIONS OF *BATSON*

A. Disagreement About Application to Gender Discrimination

Although there is some disagreement among them, federal appellate courts seem reluctant to extend the equal protection principles of *Batson* to the issue of sex discrimination.[104] The Fourth Circuit concluded that the Supreme Court's omission of gender discrimination in *Batson* indicated its intent to limit the application of equal protection principles to racial discrimination.[105] Acknowledging that the restrictions imposed by the Equal Protection Clause undoubtedly apply to gender discrimination in other circumstances, the Fourth Circuit nevertheless emphasized that there was "no evidence to suggest that the Supreme Court would apply normal equal protection principles to the unique situation involving peremptory challenges."[106] Likewise, the Seventh Circuit refused to recognize black females as a discrete group, construing *Batson* to require only a sensitivity to racially discriminatory peremptory challenges.[107]

Recently, the Fifth Circuit followed the Fourth and Seventh Circuits, ruling that *Batson* does not apply to gender-based peremptory challenges.[108] In *United States v. Broussard*, the court reasoned that "*Batson* is a prophylactic device reached for in response to demonstrated need."[109] Though noting the disagreement

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102. *McCollum*, 112 S. Ct. at 2357, 2359.

103. *Id.*

104. For further discussion of the application of *Batson* to gender-based peremptory challenges, see Note, *Beyond Batson: Eliminating Gender-Based Peremptory Challenges*, 105 HARV. L. REV. 1920 (1992); S. Alexandria Jo, Comment, *Reconstruction of the Peremptory Challenge System: A Look at Gender-Based Peremptory Challenges*, 22 PAC. L.J. 1305 (1991).

105. Hamilton v. United States, 850 F.2d 1038, 1042-43 (4th Cir. 1988), *cert. dismissed*, 489 U.S. 1094 (1989), *and cert. denied*, 493 U.S. 1069 (1990).

106. *Id.* at 1042.

107. United States v. Nichols, 937 F.2d 1257, 1262 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 989 (1992).

108. United States v. Broussard, No. 92-4558, 1993 WL 72937, at *4 (5th Cir. March 17, 1993).

109. *Id.*

in both state and federal courts on the issue,[110] the *Broussard* court reasoned that the *Batson* rationale should not extend to gender bias in the same manner as race bias because women are not a numerical minority and because women do not face the same barriers to jury participation.[111]

The preservation of the peremptory challenge is a common concern among federal courts interpreting the scope of *Batson*.[112] Moreover, at least four Supreme Court Justices have shown concern about the recent trend toward restriction of the peremptory challenge. Justice O'Connor, joined by Chief Justice Rehnquist and Justice Scalia, objected to the classification of the peremptory challenge as state action for the purpose of imposing constitutional restraints.[113] Most recently, Justice Thomas's concurrence in *McCollum* cautioned against using the Constitution to limit the exercise of peremptory challenges.[114] Justice Thomas's ominous conclusion, "[n]ext will come the question whether defendants may exercise peremptories on the basis of sex,"[115] indicates that attempts at such restriction will be met with opposition.

Despite concerns over further restricting the use of peremptory challenges, the Ninth Circuit has espoused a broader interpretation of *Batson*. In *U.S. v. DeGross*,[116] the Ninth Circuit found that the evils resulting from gender discrimination in the exercise of peremptory challenges were the same as those caused by racial discrimination.[117] Both forms of discrimination in the peremptory challenge system injured the excluded juror, undermined public confidence in the judicial process, and provoked community prejudice.[118] The Ninth Circuit held, therefore, that since the Equal Protection Clause of the Fourteenth Amendment was used to address these injuries in *Batson*, so should the Fifth Amendment's equal protection principles apply at the federal level.[119]

State courts are even more divided on the question of whether

110. *Id.* at *3.
111. *Id.* at *4.
112. *See, e.g.*, Dunham v. Frank's Nursery & Crafts, 919 F.2d 1281 (7th Cir. 1990) (noting the conflict between those who would "completely abolish peremptory challenges" and those who would "restore peremptory challenges to the pre-*Batson* right with no exceptions").
113. *Edmonson*, 111 S. Ct. at 2089 (Rehnquist, C.J., O'Connor, J., and Scalia, J., dissenting).
114. *McCollum*, 112 S. Ct. at 2359 (Thomas, J., concurring).
115. *Id.* at 2361 (Thomas, J., concurring).
116. 960 F.2d 1433 (9th Cir. 1992).
117. *Id.* at 1439.
118. *Id.* at 1439-40 & n.9.
119. *Id.* at 1443.

equal protection principles should be applied to sex discrimination. For example, recently the Maryland Court of Special Appeals declined to extend *Batson* to gender discrimination.[120] On the same date, however, in *Washington v. Burch*,[121] the Washington Court of Appeals held that federal equal protection principles prohibited gender discrimination in the exercise of peremptories. Even before the *Burch* decision, in *People v. Irizarry*,[122] a New York court extended *Batson* to gender discrimination, reasoning that striking women from the petit jury on the sole basis of their gender violated the equal protection rights of both the excluded jurors and the defendant. The states in which courts have declined to extend *Batson* to gender discrimination are Kentucky,[123] Louisiana,[124] Missouri,[125] Nebraska,[126] and Rhode Island.[127] States that have applied *Batson* to prohibit gender discrimination in the exercise of peremptory challenges are California,[128] Illinois,[129] New Mexico,[130] and New York.[131]

As exemplified by the Illinois Court of Appeals decision in *People v. Mitchell*,[132] reliance on state constitutional provisions regarding gender discrimination has contributed to the state courts' expansion of the scope of *Batson*. In contrast with the Washington court, which applied federal equal protection principles to prohibit

120. Eiland v. State, 607 A.2d 42, 59-61 (Md. Ct. Spec. App. 1992) (concluding that gender-based peremptory challenges violated neither federal nor state law).

121. 830 P.2d 357, 362 (1992).

122. 560 N.Y.S.2d 279, 281 (N.Y. App. Div. 1990).

123. Hannan v. Commonwealth, 774 S.W.2d 462, 464 (Ky. Ct. App. 1989).

124. State v. Morgan, 553 So. 2d 1012, 1018 (La. Ct. App. 1989), *writ denied*, 558 So. 2d 600 (La. 1990).

125. State v. Clay, 779 S.W.2d 673, 676 (Mo. Ct. App. 1989). *But see* Pullen v. State, Nos. 56820, 58075, 1992 WL 121791, at *1, *9 (Mo. Ct. App. 1992) (noting the *Clay* decision but finding *Batson* applicable to gender discrimination and transferring the case to the Missouri Supreme Court to resolve conflict). In State v. Pullen, 843 S.W.2d 360, 364 (Mo. 1992), the Missouri Supreme Court found that the *Batson* issue was not properly preserved for appeal and declined to resolve the issue. Nevertheless, the court also found that the prosecutor's actions were proper in excluding female members of the venire. *Id.* at 365.

126. State v. Culver, 444 N.W.2d 662, 666-67 (Neb. 1989).

127. State v. Oliviera, 534 A.2d 867, 870 (R.I. 1987).

128. Di Donato v. Santini, 283 Cal. Rptr. 751, 756 (Cal. Ct. App. 1991).

129. People v. Mitchell, 593 N.E.2d 882, 888 (Ill. App. Ct.), *appeal allowed*, 602 N.E.2d 467 (Ill. 1992).

130. State v. Gonzales, 808 P.2d 40 (N.M. Ct. App.), *cert. denied*, 806 P.2d 65 (1991).

131. People v. Blunt, 561 N.Y.S.2d 90, 92 (N.Y. App. Div. 1990); *Irizarry*, 560 N.Y.S.2d at 281.

132. *Mitchell*, 593 N.E.2d at 887, 888.

the state's exercise of gender-biased peremptory strikes,[133] most state courts seem to rely on their own state constitutions, partially or wholly, to achieve the same end.[134]

In Illinois, the *Mitchell* Court based its decision on the guarantee of equal protection provided by Article 1, Section 18, of the Illinois Constitution: "The equal protection of the laws shall not be denied or abridged on account of sex by the State or its units of local government and school districts."[135] Applying the *Edmonson* finding that the exercise of peremptory challenges constitutes state action and the *Powers* determination that the excluded juror possesses a right not to be discriminated against, the Illinois Court of Appeals concluded that sex discrimination in the use of peremptories violated Article I, Section 18, of the Illinois Constitution: "We find no foundation in justice or in logic to differentiate between discriminatory uses of peremptory challenges based on racial or ethnic grounds, rather than on grounds of whether the prospective juror is a male or female."[136]

An indication that the United States Supreme Court may expand *Batson* to include gender bias is found in the recent incorporation of Title VII procedures in decisions such as *Hernandez v. New York*.[137] The *Hernandez* Court applied the Civil Rights Act principle of establishing a prima facie showing of discrimination in the context of employment discrimination to the *Batson* objection.[138] The Court applied Title VII procedures in affirming that the prosecutor's unsolicited, race-neutral reasoning for peremptory challenges rendered the issue of whether the defendant established a prima facie case of discrimination moot.[139] Although *Hernandez* dealt with ethnic discrimination, the Civil Rights Act, the very purpose of which is to further basic personal rights, includes reference to gender discrimination. Section 703 of the Civil Rights Act

133. *Burch*, 830 P.2d at 362.

134. *See, e.g.*, *Di Donato*, 283 Cal. Rptr. at 756 (relying on the California Constitution as well as the Fourteenth Amendment); *Gonzales*, 808 P.2d at 48 (relying on the New Mexico Constitution); and *Blunt*, 561 N.Y.S.2d at 92-93 (relying solely on the New York Constitution).

135. ILL. CONST. art. I, § 18; *Mitchell*, 593 N.E.2d at 888. Quoting People v. Ellis, 311 N.E.2d 98, 101 (Ill. 1974), the *Mitchell* Court stated: "[I]n view of [the] explicit language [of the Illinois Constitution] and the debates, we find inescapable the conclusion that *it was intended to supplement and expand the guaranties* [sic] *of the equal protection provisions of the Bill of Rights*." *Mitchell*, 593 N.E.2d at 888.

136. *Mitchell*, 593 N.E.2d at 888.

137. 111 S. Ct. 1859 (1991).

138. *Id.* at 1869.

139. *Id.* at 1866.

of 1964[140] prohibits employment discrimination based on "race, color, religion, sex, or national origin." Likewise, section 717[141] prohibits the same forms of discrimination in federal government employment.

In *Hernandez*, the Supreme Court applied employment discrimination procedures to ethnic discrimination,[142] but the Court may also use Title IX in the context of gender-based discrimination. Section 902 of the Civil Rights Act of 1964[143] authorizes the Attorney General to intervene in a private action for relief from a denial of the equal protection of the laws under the Fourteenth Amendment on account of race, color, religion, sex, or national origin. The significant addition of *sex* to the listed forms of discrimination in 1972[144] signified the intention of Congress to include women among those deserving equal protection of the laws.

Furthermore, outside of the Civil Rights Act, there is federal statutory support for prohibiting gender-based discrimination in the peremptory challenge system. Section 1862 of Title 28[145] expressly prohibits the discriminatory exclusion of a citizen from a grand or a petit jury in the U.S. district courts. The statute forbids bias based on race, color, religion, sex, national origin, and economic status.[146]

In a case that does not directly involve *Batson* principles, the Supreme Court has given another indication of its possible future direction. In *Lockhart v. McCree*,[147] the Court said:

> "Death qualification," unlike the wholesale exclusion of blacks, women, or Mexican-Americans from jury service, is carefully designed to serve the State's concededly legitimate interest in obtaining a single jury that can properly and impartially apply the law to the facts of the case at both the guilt and sentencing phases of a capital trial.[148]

Overall, the Court's current direction makes the inclusion of gender discrimination a significant possibility in the future. But we

140. Pub. L. No. 88-352, 78 Stat. 241, 255 (1964) (codified at 42 U.S.C. § 2000e-2(a) (1988)).

141. Pub. L. No. 92-261, 86 Stat. 103, 111 (1972) (codified at 42 U.S.C. § 2000e-16 (1988)).

142. 111 S. Ct. at 1866-69.

143. 42 U.S.C. § 2000h-2 (1988).

144. Education Amendments of 1972, Pub. L. No. 92-318, §§ 906(a), 902, 86 Stat. 235, 375 (1972) (codified at 42 U.S.C. § 2000h-2 (1988)).

145. Jury Selection and Service Act of 1968, § 101, 28 U.S.C. § 1862 (1988).

146. *Id.*

147. 476 U.S. 162 (1986).

148. *Id.* at 175-76.

must be careful how gender bias is defined. Sex bias may be banned, but since sex or gender bias would normally be understood to mean bias against men or women, would it apply to sexual orientation? Homosexuals have been determined not to be a cognizable group;[149] therefore, it appears that peremptorily challenging homosexuals is not banned under *Batson* principles.

B. Unlikely Application of Batson *to Age Discrimination*

Life experiences and values differ so greatly within age groups that there are no common characteristics with which to categorize their members in order to form a basis for age discrimination.[150] In 1985, in *Barber v. Ponte*,[151] the First Circuit held that young adults do not constitute a cognizable group for purposes of an equal protection challenge to a peremptory strike. The court noted that persons between the ages of eighteen and thirty-four showed significant contrasts in such social indicators as marriage and divorce rates, school enrollment, years of education, economic sta-

149. Sex discrimination is narrowly defined as gender bias; it does not reach the separate issue of sexual orientation. Title VII of the Civil Rights Act of 1964 is interpreted as extending to gender bias alone. Williamson v. A.G. Edwards & Sons, 876 F.2d 69, 70 (8th Cir. 1989) (finding the Title VII term *sex* to refer to gender only), *cert. denied*, 493 U.S. 1089 (1990). Any attempts at expanding Title VII protection to include sexual identity and orientation have been rejected. Ulane v. Eastern Airlines, 742 F.2d 1081, 1084 (7th Cir. 1984) (holding that Title VII protection did not extend to transsexuals), *cert. denied*, 471 U.S. 1017 (1985); DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 329-30 (9th Cir. 1979) (refusing to extend Title VII coverage to groups alleging discrimination on the basis of sexual orientation).

Similarly, equal protection principles do not afford special protection against discrimination based on sexual orientation. The Ninth Circuit has rejected equal protection challenges to governmental procedures that discriminate on the basis of sexual orientation. *See* High Tech Gays v. Defense Indus. Security Clearance Office, 895 F.2d 563, 571-75 (9th Cir. 1990) (rejecting equal protection challenge by homosexuals against Department of Defense policy of conducting extensive background investigation of all homosexual applicants for high security clearance positions); Dubbs v. Central Intelligence Agency, 866 F.2d 1114 (9th Cir. 1989) (reversing the district court's grant of summary judgment against a gay woman on a claim that she was denied a security clearance because she was gay). Furthermore, the *High Tech* court found that homosexuals do not constitute a suspect or even quasi-suspect group. *High Tech*, 895 F.2d at 573. The court reasoned that homosexuality, though the target of discrimination, is not an immutable characteristic but rather a behavioral characteristic, unlike traits such as race, gender, or alienage that make up the basis of recognized suspect classes. *Id.* Therefore, peremptorily challenging homosexuals cannot be banned under *Batson*, since homosexuals do not constitute a cognizable group. *But cf.* Citizens for Responsible Behavior v. Superior Court, 2 Cal. Rptr. 2d 648 (Cal. Ct. App. 1991) (holding that although homosexuals were not a suspect class, the group is entitled to the protection of the Equal Protection Clause).

150. Harris, *supra* note 1, at 1059.

151. 772 F.2d 982, 996-1000 (1st Cir. 1985) (en banc), *cert. denied*, 475 U.S. 1050 (1986).

tus, employment history, and criminal history.[152] The court noted its concern that "[i]f the age classification is adopted, surely blue-collar workers, yuppies, Rotarians, Eagle Scouts, and an endless variety of other classifications will be entitled to similar treatment."[153] The Kentucky Supreme Court, in a similar vein, concluded that the group young adults defies definition and that its acceptance would begin an endless maze of juror classifications: young adults, middle-aged adults, elderly adults, and so forth.[154]

Two years after *Barber*, the First Circuit affirmed its position on age discrimination in the peremptory challenge system when, in *United States v. Cresta*,[155] it reevaluated the issue in light of *Batson*. The court concluded that nothing in *Batson* extended the principle of cognizability to young adults.[156] In denying certiorari to the specific question of *Batson*'s application to young adults,[157] the Supreme Court seems to have indicated that its decision in *Batson* was not intended to cover age discrimination.

C. *Unlikely Application of* Batson *to Religious Discrimination*

It is unlikely that the Supreme Court will expand *Batson's* reach to include religious discrimination. Given the unique nature of the peremptory challenge and the recent opposition among the Justices to further restriction of its use, the stretching of *Batson* to religious discrimination is improbable. In fact, in his dissent in *Edmonson*, Justice Scalia recognizes religion as a legitimate factor in a private party's exercise of peremptory challenges.[158] Moreover, according to the *Powers* Court, the main premise of the juror's right not to be discriminated against applies only to racial discrimination in the jury selection process.[159] The Court has referred to the prohibition against such discrimination as reflecting "the central concern of the Fourteenth Amendment."[160] If racial discrimination is the core of the Fourteenth Amendment and if Congress has not deemed it necessary to prohibit religious discrimination in jury se-

152. *Id.* at 998-99.

153. *Id.* at 999.

154. Ford v. Commonwealth, 665 S.W.2d 304, 308 (Ky. 1983), *cert. denied*, 469 U.S. 984 (1984).

155. 825 F.2d 538, 545 (1st Cir. 1987), *cert. denied*, 486 U.S. 1042 (1988).

156. *Id.*

157. Impemba v. United States, 486 U.S. 1042 (1988).

158. *Edmonson*, 111 S. Ct. at 2096 (Scalia, J., dissenting).

159. *Powers*, 111 S. Ct. at 1369 (citing 18 U.S.C. § 243 (1988)); *see also supra* note 39.

160. *Powers*, 111 S. Ct. at 1369 (quoting Peters v. Kiff, 407 U.S. 493, 507 (1972) (White, J., concurring)); *see also supra* notes 39-40.

lection, the Supreme Court is not likely to prohibit religious discrimination in this context at this time.

Few courts have addressed the issue of religious discrimination in the context of the peremptory challenge, and among these the trend has been to reject expanding *Batson*. In *People v. Johnson*,[161] the California Supreme Court defined religious discrimination as a form of group bias but doubted that a religious group would constitute a cognizable group under *Batson*. Similarly, in *State v. Antwine*,[162] the Supreme Court of Missouri acknowledged religion as a part of the fundamental background information on which counsel must rely in exercising peremptory challenges.

State courts do have the option of using the equal protection principles embodied in their own constitutions to deal with religious discrimination. For example, the North Carolina Constitution prohibits exclusion of a juror because of "sex, race, color, religion or national origin."[163] Absent Supreme Court direction, states have the power to eliminate religiously discriminatory peremptory challenges through their own means. Even before *Batson*, a lower New York court said that the exclusion of jurors solely because their religious affiliation was the same as the defendant's violated the state constitution.[164]

D. Is Batson *Applicable to the Disabled?*

The Americans with Disabilities Act (ADA),[165] which became effective January 26, 1992, "prohibits discrimination against people with disabilities in employment, transportation, public accommodations, telecommunications, and state and local government services."[166] Congress passed the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[167] Does this congressional enactment move *Batson* into the arena of preventing peremptory challenges based on a person's disability? Maybe. The

161. 767 P.2d 1047, 1053 n.3 (Cal. 1989).

162. 743 S.W.2d 51, 64 (Mo.), *cert. denied*, 486 U.S. 1017 (1988).

163. N.C. CONST. art. I, § 26.

164. People v. Kagan, 420 N.Y.S.2d 987, 989 (Sup. Ct. 1979). However, the court could not find enough evidence of the prosecutor's systematic and discriminatory exclusion of Jewish jurors. *Id.* at 990.

165. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12,102-12,213 and 47 U.S.C. §§ 225, 611 (Supp. II 1990) (effective January 26, 1992).

166. Kroll v. St. Charles County, 766 F. Supp. 744, 752 (E.D. Mo. 1991).

167. 42 U.S.C. § 12,101(b)(1) (Supp. II 1990); Moore v. Sun Bank, 923 F.2d 1423, 1424 n.2 (11th Cir. 1991); Cassista v. Community Foods, 10 Cal. Rptr. 2d 98, 106 n.8 (Cal. Ct. App. 1992).

cases seem to suggest that some disabilities can call on the *Batson* rationale but some cannot. By their very nature, some disabilities suggest that denying the disabled person the opportunity to be a petit juror would not constitute impermissible discrimination.

Even before the ADA was enacted, the court in *People v. Green* relied on a New York constitutional provision banning discrimination against the disabled[168] to hold that a prosecutor cannot peremptorily challenge a deaf juror solely because of the disability of deafness.[169] The challenge violated the juror's right to equal protection under the New York Constitution.[170] The court added that since the prosecutor admitted that the sole reason he excused the deaf juror was the juror's disability and not any doubt he had about the juror's ability to communicate, the prosecutor's challenge did not have a rational basis.[171]

In *People v. Guzman*, decided a few months before *Green*, the New York Court of Appeals did not mention the ADA when it ruled that deafness, in and of itself, would not disqualify a prospective juror as long as the accommodations necessary to allow the juror to fulfill his or her duties would not interfere with the defendant's trial rights.[172] The court stated that although a civil right to serve as a juror exists, "this right is conditioned on [an] individual's ability to carry out the primary functions of the jury—to provide a fair trial."[173]

This decision suggests that not all disabilities would bring *Bat-*

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168. Article I, Section 11 of the New York Constitution provides:

> No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

N.Y. CONST. art. I, § 11. The Constitution of the State of Illinois has a similar provision, Article I, Section 2, that states: "No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws." ILL. CONST. art. I, § 2.

169. People v. Green, 561 N.Y.S.2d 130, 132-33 (1990).

170. *Id.*

171. *Id.* at 133. The court also commented that to challenge the deaf juror solely because of the deafness was contrary to the letter and the spirit of the Americans with Disabilities Act, even though the ADA was not yet effective. *Id.* In sum, the court concluded that "*Batson*-like protection should be afforded to a hearing impaired would-be juror." *Id.* at 131.

172. People v. Guzman, 556 N.Y.S.2d 7, 10 (1990). In this case, the court noted that the presence of a sign-language interpreter would enable the juror to serve effectively but would not interfere with the defendant's "fundamental trial rights." *Id.*

173. *Id.*

son into play. In *Duc Van Le v. Ibarra*,[174] the Colorado Supreme Court considered whether the ADA makes all disabled persons, without regard to the nature of their disabilities, members of one discrete group under the Fourteenth Amendment. Relying on *City of Cleburne v. Cleburne Living Center*,[175] the *Ibarra* court engaged in an exhaustive discussion of which groups are to receive special protection under the Equal Protection Clause of the Fourteenth Amendment and which groups are not. The *Ibarra* court concluded that the ADA declaration that "individuals with disabilities are a discrete and insular minority,"[176] is not applicable to all disabled: mentally retarded persons do not constitute such a discrete group that a state would be prohibited from enacting laws or rules that might ultimately have a discriminatory impact on mentally retarded persons.[177]

The *City of Cleburne* and *Ibarra* decisions appear to require a court that is faced with a *Batson* challenge based on a juror's disability to make a preliminary determination of whether the disability has distinguishing characteristics that are relevant to interests the state has the authority to implement. Is there a rational basis, premised on state interest, to discriminate? Might the *Green*[178] and *Guzman*[179] discussions apply to any determination of whether there is a rational basis to discriminate? A juror must be able to understand all of the evidence presented, evaluate that evidence in a rational manner, communicate effectively with the other jurors during deliberations, and comprehend the applicable legal principles. Any accommodation provided to a disabled juror to allow

174. Duc Van Le v. Ibarra, No. 91SC189, 1992 Colo. LEXIS 385 (Colo. Apr. 20, 1992).

175. *Id.* at *26-27 (noting that in City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985), the Court refused to identify mentally ill persons as a suspect or quasi-suspect class under an equal protection analysis and, thereby, granted great deference to legislative decisions about how the interests of this group should be protected).

176. 42 U.S.C. § 12,101(a)(7). The ADA further states:

> [I]ndividuals with disabilities are a discrete and insular minority, who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and regulated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society . . . .

Id.

177. The court stated that "[t]o declare the mentally ill to be a suspect or quasi-suspect class would be contrary to previous decisions of the United States Supreme Court that have interpreted the Equal Protection Clause of the United States Constitution." *Ibarra*, 1992 Colo. LEXIS 385, at *29.

178. *Green*, 561 N.Y.S.2d at 132-33.

179. *Guzman*, 556 N.Y.S.2d at 10.

the juror to participate must not, itself, interfere with a defendant's fundamental trial rights.[180]

It will be interesting to see how the courts handle ADA-based challenges to the exercise of peremptory challenges. The Michigan Supreme Court has gone so far as to suggest that the ADA may apply to discrimination based on a perceived disability even if, in fact, no disability exists.[181] The permutations are mind-boggling.

V. CONCLUSION

The *Batson v. Kentucky* principles, first applied to ban racial discrimination by prosecutors in the exercise of peremptory challenges in criminal trials, has been extended by the Supreme Court to challenges exercised by defendants, challenges based on race regardless of the race of the juror, challenges based on ethnicity, and challenges exercised in civil cases. It appears that the Supreme Court will not extend *Batson* to peremptory challenges premised on age or on religious affiliation. The jury is out on whether the Supreme Court will apply *Batson* to gender bias. It is likely, however, that both the United States Supreme Court and the Supreme Court of Illinois will extend *Batson* to gender-biased peremptory challenges. The impact of the equal rights provisions of state constitutions on the use of peremptory challenges cannot be ignored, or underestimated, as an alternative basis for further extension of *Batson*. Lastly, the impact of the Americans with Disabilities Act on *Batson* principles is still to be determined.

180. *Id.* at 9.
181. Sanchez v. Lagoudakis, 486 N.W.2d 657, 661-62 (Mich. 1992).