HIDDEN IN PLAIN SIGHT: THE DUE PROCESS ALTERNATIVE TO *BATSON*'S FAILED EQUAL PROTECTION PARADIGM

Martin Cronin, J.S.C. (retired)[*]

TABLE OF CONTENTS

---

* Judge (retired), Superior Court of New Jersey, Law Division (2001–22); Lecturer, Rutgers Law School (2022–23); J.D., Fordham Law School (1983); B.A., Rutgers College (1980). Thank you to my family for their ongoing support, and to my mentor, John J. Carlin Jr. (1936–2014), for providing a practical legal education. My thanks extend to my colleagues for their insightful comments and pointed criticisms, especially Charles McKenna, Esq., and Henry Collins, Esq., and to both my former law clerks and my student assistant, Max Hermann, for their diligence in researching our jury selection procedure. The opinions advanced in this Article are mine and not necessarily those of my colleagues or that of the New Jersey Judiciary which continues to reevaluate the constitutionality and fairness of our present jury selection system.

I. INTRODUCTION

In *Batson v. Kentucky*,[1] the Supreme Court sought to both eliminate invidious discrimination in jury selection and to preserve counsel's use of peremptory challenges[2] during the jury selection process. In its attempt to accommodate these irreconcilable objectives, however, the Court crafted a burden-shifting paradigm[3] which accomplished neither of them.

Thirty-six years later, it is widely recognized that the *Batson* paradigm simply does not work.[4] Through peremptory challenge use,

1. 476 U.S. 79 (1986).

2. Peremptory challenges allow a litigant to excuse a prospective juror without requiring the litigant to articulate any reason for the exclusion. *See Batson*, 476 U.S. at 127 (Burger, C.J., dissenting). Blackstone provided its most quoted description as "an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all." 4 WILLIAM BLACKSTONE, COMMENTARIES *353 (15th ed. 1803), *quoted in* Swain v. Alabama, 380 U.S. 202, 212 n.9 (1965). Peremptory challenges are distinguished from a challenge for cause which, as the name suggests, requires the litigant to articulate a reason to excuse the juror which the court determines is legally sufficient. *See Batson*, 476 U.S. at 127 (Burger, C.J., dissenting).

3. This burden shifting paradigm is described *infra* Part IV.

4. This acknowledgment is reflected in judicial opinions, "blue ribbon" committee reports, and academic publications. *See, e.g.*, Miller-El v. Dretke, 545 U.S. 231, 270 (2005) (Breyer, J., concurring) (observing that, since *Batson*, "the use of race- and gender-based stereotypes in the jury-selection process seems better organized and more systematized than ever before"); State v. Saintcalle, 309 P.3d 326, 329 (Wash. 2013) (finding *Batson* procedures are not "robust enough to effectively combat race discrimination in the selection of juries"); *id.* at 334 ("[I]t is evident that *Batson* . . . is failing us."); State v. Holmes, 221 A.3d 407, 428–29 (Conn. 2019) (enumerating *Batson*'s "shortcomings"); People v. Bolling, 582 N.Y.S.2d 950, 957 (N.Y. 1992) (Bellacosa, J., concurring) (stating that *Batson* has "proved unworkable" in the state judicial laboratories); State v. Wellknown, 510 P.3d 84, 95 (Mont. 2022) (Baker, J. concurring) (documenting judicial and academic agreement of inadequacy); State v. Vandyke, 507 P.3d 339, 342 (Or. Ct. App. 2022) (Aoyagi, J., concurring) (stating that *Batson* "has proven demonstrably not up to the task"); State v. Veal, 930 N.W.2d 319, 344 (Iowa 2019) (Appel, J., concurring in part and dissenting in part) (finding that *Batson* is very ineffective and recommending elimination); *id.* at 340 (Wiggins, J., concurring in part and dissenting in part) (recommending elimination); *id.* at 363 (Cady, C.J., concurring) (same); ELISABETH SEMEL ET AL., WHITEWASHING THE JURY BOX: HOW CALIFORNIA PERPETUATES THE DISCRIMINATORY EXCLUSION OF BLACK AND LATINX JURORS 11 (2020) (finding "intractable and irremediable" discriminatory peremptory challenge use under *Batson*). *See generally* Caren Myers Morrison, *Criminal Law: Negotiating Peremptory Challenges*, 104 J. CRIM. L. & CRIMINOLOGY 1, 57 (2014) ("The system of peremptory challenges we currently employ does not work."); Kenneth J. Melilli, Batson *in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 501 (1996) (writing that peremptory challenges exercised on the basis of

discrimination on the basis of race, gender, and ethnicity continues.[5] This recognition of *Batson*'s inefficacy provides the impetus for a rapidly developing movement to reform this paradigm[6] that is easily

group stereotypes "do not advance any legitimate interests in impartial juries"); Darby Gibbins, *Six Trials & Twenty-Three Years Later: Curtis Flowers and the Need for a More Expansive* Batson *Remedy*, 59 HOUS. L. REV. 713, 724 (2022) ("Concerns regarding *Batson*'s ineffectiveness are well-founded, as racial discrimination in jury selection remains a serious and alarming problem in the U.S. justice system."); Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies,* 77 WASH. U. L.Q. 713, 793 (1999) ("*Batson*'s goal to protect the integrity of the judicial system by eliminating bias is laudable, but the means the Court chose to reach it was deeply flawed. Judicial inquiry into prosecutorial motives invites responses that may not always be candid, and indeed sometimes will be an outright lie."); Matt Haven, *Reaching* Batson*'s Challenge Twenty-Five Years Later: Eliminating the Peremptory Challenge and Loosening the Challenge for Cause Standard*, 11 U. MD. L.J. RACE, RELIGION, GENDER, & CLASS 97 (2011); Anthony Page, Batson*'s Blind Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 BOS. U. L. REV. 155 (2005) (arguing *Batson* is "woefully ill-suited to address the problem of race and gender discrimination in jury selection"); Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection*, 4 HARV. L. & POL'Y REV. 149, 151 (2010) (recommending elimination); Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 810, 812 (1997) ("[T]he very notion of peremptory challenges is in hopeless conflict with our ideals of what an impartial jury is and how it should be selected."); Nancy S. Marder, *Justice Stevens, the Peremptory Challenge, and the Jury*, 74 FORDHAM L. REV. 1683, 1693 (2006) (noting the insufficiency of the *Swain* Court's admonition); N.J. SUP. CT. COMM. ON MINORITY CONCERNS, 2013–2015 REPORT 33 [hereinafter N.J. REPORT ON MINORITY CONCERNS]; EQUAL JUST. INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY (Aug. 2010); RANDALL KENNEDY, RACE, CRIME & THE LAW 211 (Pantheon 1997) [hereinafter EJI REPORT]; N.J. CTS., A GUIDE TO THE NEW JERSEY JUDICIAL CONFERENCE ON JURY SELECTION attach. D 14–15 (2021) [hereinafter JCJS GUIDE] (citing fourteen studies critical of peremptory challenge use); Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369, 416–23 (1992); JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 167–69 (Ballinger 1977) (recommending elimination). *Cf.* State v. Andujar, 254 A.3d 606, 611 (N.J. 2021) (acknowledging that it is time to reconsider the jury selection process and to "consider additional steps needed to prevent discrimination in the" jury selection process).

5. *See Miller-El*, 545 U.S. at 270 (Breyer, J., concurring) (stating that nineteen years after *Batson*, "the use of race- and gender-based stereotypes in the jury-selection process seems better organized and more systematized than ever before"); Semel, *supra* note 4 (asserting that thirty-four years after *Batson*, racial discrimination still persists in California); *see also Batson*, 479 U.S. at 103 (Marshall, J., concurring) ("Misuse of the peremptory challenge to exclude black jurors has become both common and flagrant.").

6. *See* Batson *Reform: State by State*, BERKLEY L. DEATH PENALTY CLINIC [hereinafter *Batson* Reform], https://www.law.berkeley.edu/experiential/clinics/death-penalty-clinic/projects-and-cases/whitewashing-the-jury-box-how-california-perpetuates-the-discriminatory-exclusion-of-black-and-latinx-jurors/batson-reform-state-by-state/ (last visited Dec. 20, 2023) (outlining ongoing reform efforts in fifteen states); Thomas Ward Frampton & Brandon Osowski, *The End of* Batson*? Rulemaking, Race, and Criminal Procedure Reform*, 124 COLUM. L. REV. (forthcoming 2024) (manuscript at 23) (on file with SSRN Online) (explaining that, since 2018, states representing approximately one sixth of our nation's population have departed from *Batson*); Daniel Edwards, *The Evolving Debate*

circumvented due to basic structural defects. These defects include its focus upon purposeful discrimination which requires judicial evaluation of the subjective mental state of counsel seeking to exercise a peremptory challenge.[7] These defects extend to its allocation of the burden to prove that mental state upon counsel objecting to that challenge[8] and its causation requirement that this proof must establish that counsel's discriminatory purpose was the sole reason that they exercised the peremptory challenge.[9] The equal protection basis of defendant Batson's objection affected the resulting paradigm's structure.[10]

Over Batson*'s Procedures for Peremptory Challenges*, NAT'L ASS'N OF ATT'YS GEN. (Apr. 14, 2020) (observing that discriminatory peremptory challenge use "betray[s] the jury's democratic origins and undermine[s] its representative function" (citing *Miller-El*, 545 U.S. at 272–73 (Breyer, J., concurring))); Marder, *supra* note 4, at 1713 (2006) (documenting emerging dissatisfaction with peremptory challenges). These reforms include: (1) eliminating peremptory challenges, see discussion *infra* Section VI.B, and (2) modifying the *Batson* paradigm through some variation of Washington State's General Court Rule 37, *see infra* Section VIII.A.

7. *Saintcalle*, 309 P.3d at 329 (finding racial discrimination in jury selection remains rampant, in part, because *Batson* recognizes only "purposeful discrimination" and "racism is often unintentional, institutional, or unconscious"); State v. Aziakanou, 498 P.3d 391, 407–09 n.12 (Utah 2021) (noting the ineffectiveness of *Batson* against implicit bias); *Veal*, 930 N.W.2d at 342 (Appel, J., concurring in part and dissenting in part) (same); *Holmes*, 334 Conn. at 234 (stating that *Batson*'s failings include the inability to address implicit bias); CHASE T. ROGERS & OMAR A. WILLIAMS, REPORT OF THE JURY SELECTION TASK FORCE TO CHIEF JUSTICE RICHARD A. ROBINSON 18 (Dec. 31, 2020) [hereinafter CONNECTICUT REPORT], https://jud.ct.gov/Committees/jury_taskforce/ReportJurySelectionTaskForce.pdf (same); Semel, *supra* note 4, at 31; *see Batson*, 476 U.S. at 97–99 (requiring purposeful exclusion, subjectively evaluated), discussed *infra* Part IV. The party seeking to exercise a peremptory challenge shall be referred to as "the striking party." *See infra* Part IV. The party objecting to the exercise of a peremptory challenge shall be referred to as "the objecting party." *See infra* Part IV.

8. *Batson*, 476 U.S. at 93. Seeking to remedy this deficiency, Judge Bennett recommended elimination of peremptory challenges and recognized that cause challenges ensure that "[t]he onus of justifying the strike . . . always lie[s] with the party that wished to strike, rather than the one resisting the strike." Bennett, *supra* note 4, at 167. As applied to peremptory challenges, Professor Semel sought to remedy this deficiency in equal protection enforcement by reallocating *Batson*'s burden of persuasion to the striking party. Semel, *supra* note 4, at ix (recommendation). As applied to cause challenges, this Article also recommends this reallocation and provides additional support for it. *See infra* Section VI.B.

9. *See infra* Section VIII.B.

10. *Batson*, 476 U.S. at 82. More specifically, application of principles of stare decisis to this equal projection challenge required the Court to retain the "purposeful" requirement and to address the crippling "burden of proof" imposed in *Swain v. Alabama*, 380 U.S. 202 (1965). *See infra* Section III.B.2. Significantly, petitioner Batson's challenge to his conviction focused upon the alleged violation of his rights to equal protection and a fair trial. *See Batson*, 476 U.S. at 82. Although the Court did acknowledge the rights of prospective jurors, the record does not reflect that these juror rights were raised by the litigants. *See Batson*, 476 U.S. at 91–92. Moreover, at that time, it was unclear whether

That equal protection structure has also hampered subsequent efforts to modify this paradigm or otherwise eliminate invidious discrimination in jury selection.[11]

This Article provides alternative doctrinal bases to address invidious discrimination during jury selection—substantive and procedural due process. As portended by this Article's title, this alternative has been "hidden in plain sight" within the Supreme Court's language in *Batson*, its progeny, and the Court's earlier cases involving standing and the exercise of its supervisory authority.[12] In these decisions, the Supreme Court recognized that citizens have a constitutionally protected right or interest to serve on a particular petit jury.[13] Once this right or interest is recognized, then both substantive and procedural due process address invidious discrimination *indirectly*, by requiring that the denial of *any*

---

these litigants had standing to assert the rights of prospective jurors. *See* Powers v. Ohio, 499 U.S. 400, 416 (1991) (recognizing litigant standing), discussed *infra* notes 169–79.

11. *See infra* Sections VI.A.1., 3. This equal protection focus is reflected in my prior comments to the New Jersey Judicial Conference on Jury Selection ("JCJS") recommendations 13 and 25. The former comment recommended the elimination of peremptory challenges. *See* Martin Cronin, Comment Letter on Recommendation 13 of the Committee of the Judicial Conference on Jury Selection (June 8, 2022) [hereinafter Cronin, Comment Letter on Recommendation 13], https://www.njcourts.gov/sites/default/files/sccr/comments/2022/06/juryselection003.pdf. Exhibits appended to Comment Letter on Recommendation 13 include: my June 25, 2019, letter recommending the elimination of peremptory challenges; my November 2018 comments suggesting a reexamination of peremptory challenges; excerpts from oral argument in *State v. Andujar*; and my November 2020 analysis of Washington Gen. R. 37. Comment Letter on Recommendation 13 retained an equal protection focus in its recommendation to eliminate peremptory challenges. The latter comment also recommended their elimination as a matter of procedural due process. *See* Martin Cronin, Comment Letter on Recommendation 25 of the Committee of the Judicial Conference on Jury Selection (June 9, 2022) [hereinafter Cronin, Comment Letter on Recommendation 25], https://www.njcourts.gov/sites/default/files/sccr/comments/2022/06/juryselection004.pdf. It also reluctantly proposed a vastly less preferable alternative to elimination which retained a limited number of "discretionary challenges." *Id.* at 2. Discretionary challenges were defined as challenges legally insufficient to qualify as cause challenges. *Id.* at 1, 7. Since they are legally insufficient to qualify as "cause" challenges, discretionary challenges retained the arbitrary essence of peremptory challenges. *Id.* at 7. Based upon this arbitrary essence as reevaluated in light of subsequent substantive due process research, this Article does not embrace "discretionary challenges." *See infra* Section VI.A.5. Comment Letter on Recommendation 25 also proposed modifications of the *Batson* paradigm as applied to both discretionary and cause challenges. Cronin, Comment Letter on Recommendation 25, *supra*, at 7–10. Those modifications included a reallocation of the burden of persuasion in *Batson*'s third step from the objecting party to the striking party. *Id.* at 8. As applied to cause challenges, this Article retains that modification and recommends a reformulation of *Batson*'s causation requirement, *see infra* Sections VIII.A., B.

12. *See* discussion *infra* Section V.A.

13. *See* discussion *infra* Section V.A.

citizen's right to serve on a particular petit jury[14] be based upon the citizen's demonstrated inability to perform the duties of a deliberating juror fairly and impartially. Since the empirical nexus between such juror competency and a citizen's race, ethnicity, or gender ranges between tenuous and nonexistent,[15] reliance upon such group stereotyping to justify denial of that right will be similarly constrained or eliminated.[16] By focusing upon individualized determinations of juror competency, these due process approaches protect the jury service rights of *all* citizens, regardless of their race, gender, or ethnicity.[17]

In contrast to the *Batson* paradigm, these approaches are primarily[18] based upon due process rather than equal protection; the rights of the prospective jurors rather than only those of the litigants; juror inclusion rather than exclusion; individual juror competency rather than group stereotyping; and the citizenship which unites us rather than any group classification which may divide us.[19]

Drawing upon the role of individual citizens which our founders envisioned in their formulation of our majoritarian form of self-government, this Article documents their creation of each citizen's right to fully participate in our democracy through their service on a particular petit jury.[20] This right is independently supported by a prospective juror's liberty interest in maintaining their good reputation and in their fundamental fairness interest in freedom from arbitrary government action.[21] Once this right is recognized, then both substantive and procedural due process requirements apply.[22]

---

14. *See infra* Section III.B. (documenting basis for constitutional recognition of the right).

15. *See* Thiel v. S. Pac. Co., 328 U.S. 217, 219 (1946) (daily wage earner status); Ballard v. United States, 329 U.S. 187, 195 (1946) (gender); J.E.B. v. Alabama, 511 U.S. 127, 129 (1994) (gender); *Batson*, 476 U.S. at 79, 83–85 (race).

16. Presently, this reliance upon stereotyping is most pronounced in counsel's exercise of peremptory challenges. *See infra* Section VI.A.1.

17. *See infra* Part V.

18. Since juror incompetence as demonstrated through the successful exercise of a cause challenge can theoretically be exercised in a discriminatory manner, these due process proposals do retain a modified version of *Batson*'s third step. *See infra* Part VIII. This modification reallocates the burden of persuasion to the striking attorney exercising the cause challenge. *See infra* Section VIII.A.

19. *See infra* Section VI.B. (explaining why the Alternative Procedure's "cause-only" standard advances legitimate interest in selecting a fair and impartial jury).

20. *See infra* Part II. This "participatory" right is analogous to the right to vote in general elections. *See infra* Part II and note 58.

21. *See infra* Part II and notes 48 (liberty) and 49 (fundamental fairness).

22. *See infra* Part II and notes 63, 66.

Substantive due process requires a state actor[23] who seeks to deny or limit a citizen's exercise of their fundamental constitutional right to demonstrate that such denial or limitation is: (1) necessary to advance a legitimate government interest and (2) the least restrictive method to advance that legitimate government interest.[24] As applied to selecting a petit jury from among those prospective jurors who are statutorily eligible to serve, these principles require the striking attorney to demonstrate that their exercise of a peremptory challenge is necessary to select a fair and impartial jury.[25] Counsel must also demonstrate that the less restrictive alternative of a cause challenge is insufficient to secure that fair and impartial jury.[26]

Procedural due process requires a state actor[27] seeking to deny or interfere with a citizen's use or enjoyment of a constitutionally protected right or interest to provide that citizen with: (1) notice and (2) a meaningful opportunity to be heard.[28] Application of these principles to petit jury selection requires the striking attorney to provide notice of the reason supporting their effort to deny or limit the exercise of the juror's right.[29] Since peremptory challenges do not require the articulation of any such reason,[30] their exercise fails to satisfy this threshold notice

23. The exercise of peremptory challenges constitutes state action because it involves the exercise of a practice "having its source in state authority." *See* Lugar v. Edmonson Oil Co., 457 U.S. 922, 939 (1982), *quoted in* Georgia v. McCollum, 505 U.S. 42, 51 (1992). Clarifying this authority, the *Edmonson* Court explained that peremptory challenges "are permitted only when the government, by statute or decisional law, deems it appropriate to allow parties to exclude a given number of persons who otherwise would satisfy the requirements for service on the petit jury." Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620 (1991).

24. *See* Peters v. Kiff, 407 U.S. 493, 501 (1972) (jury selection); United States v. Texas, 252 F. Supp. 234, 236 (W.D. Tex. 1966) *aff'd. mem.*, 384 U.S. 155 (1966) (voting), discussed *infra* Section III.B.2.

25. The legitimate purpose of jury selection is to empanel a fair and impartial jury. *See McCollum*, 505 U.S. at 56. The individualized exclusion of jurors through the exercise of a cause challenge is less restrictive than their wholesale exclusion through peremptory challenges and their reliance upon group stereotyping. *See infra* Section III.B.

26. *See infra* Sections V.B, C. Analysis of justifications previously advanced to preserve peremptory challenges reveals that they may not withstand substantive due process scrutiny. *See infra* Part IV. The present availability of cause challenges as a less restrictive alternative reinforces the vulnerability of peremptory challenges to elimination as violative of substantive due process. The effective elimination of peremptory challenges through mandatory exercise of cause challenges under procedural due process analysis may be viewed as a less restrictive alternative to their complete elimination under substantive due process analysis.

27. *See supra* note 23 (state actor requirement).

28. *See infra* Part VII and Section VII.A.1 (discussing Mathews v. Eldridge, 424 U.S. 319, 335 (1976) and Mullane v. Cent. Hanover Bank, 339 U.S. 306, 313 (1950)).

29. *See infra* Section VI.A.4.

30. *See supra* note 2.

requirement. In contrast, counsel's successful exercise of a cause challenge would satisfy this requirement because it requires the striking attorney to provide a reason justifying the juror's exclusion.[31] The trial court's determination of cause, taking into consideration any objections by opposing counsel,[32] would provide the requisite meaningful opportunity to be heard before the juror is excused and thereby deprived of their right to serve on that jury.

To address any claims that cause challenges may have been exercised in violation of the Equal Protection Clause,[33] this Article also recommends a modification of the *Batson* paradigm's third step.[34] Those modifications include: (1) a reallocation of the burden of persuasion from the objecting party to the striking party seeking to exercise a cause challenge[35] and (2) a reformulation of the causation standard from the "sole" factor to a "but for" factor.[36]

The proposed elimination of peremptory challenges and modification to the paradigm significantly modify[37] long-established jury selection

---

31. *See infra* Section VI.B. Cause challenges require an individualized demonstration that "there is a reasonable basis to doubt that the [prospective] juror would be fair and impartial." N.J. Ct. R. 1:8-3(b); *see infra* note 395 and accompanying text.

32. The litigants, through counsel, have standing to assert prospective juror rights. *See infra* notes 171–73 and accompanying text.

33. *See* State v. Ridley, 776 N.W.2d 419, 431 (Minn. 2009) (opining that an equal protection violation may occur in the "rare case" where the facts "undoubtedly suggest" racial animus in the exercise of a cause challenge) (dictum), *cited in* N.J. STATE BAR ASS'N, INTERIM REPORT TO JUDICIAL CONFERENCE ON JURY SELECTION 40 (Nov. 2021). For an example of a potential violation, assume that two prospective jurors for an armed robbery trial may have had close family members who were violent-crime victims. Even if both prospective jurors stated that they could separate the incidents and be fair and impartial, the similarity of the incidents to the charged offense may nevertheless satisfy the relaxed cause standard. *See infra* Section VI.A.2. and note 342 (discussing relaxed cause standard as applied to totality of circumstances). If these jurors were members of different racial groups and counsel challenged one for cause, but not the other, then an equal protection inquiry may be appropriate. *Compare* Batson v. Kentucky, 476 U.S. 79, 96–98 (1986) (peremptory challenges; prohibiting juror exclusion based solely on race), *with* People v. Suarez, 471 P.3d 509, 566–68 (Cal. 2020) (Liu, J., concurring) (cause challenges; acknowledging racial exclusion concerns). Although the Author's research has not revealed any published judicial decision holding that a cause challenge was exercised in violation of the equal protection clause, the foregoing example illustrates the clause's potential application.

34. *See infra* Section VIII.A.

35. *See infra* Section VIII.A.

36. *See infra* Section VIII.B.

37. Implementation would require statutory and/or court rule amendments. Under the U.S. Constitution and virtually all state constitutions, peremptory challenges are not constitutionally protected rights, but "rather, they are but one state-created means to the constitutional end of an impartial jury and a fair trial." Georgia v. McCollum, 505 U.S. 42, 57 (1992) (interpreting the U.S. Constitution). Accordingly, peremptory challenges may be "withheld altogether without impairing the constitutional guarantee of an impartial jury

procedures. At a minimum, their implementation would require statutory or court rule amendments.[38] Some states may also require either a constitutional amendment or a judicial decision resolving any conflict between due process principles compelling the elimination of peremptory challenges and any other constitutional principle arguably supporting their retention.[39] To support those modifications, this Article applies those due process principles to the exercise of peremptory challenges.[40] This Article also seeks to demonstrate why the (equal protection) burden of persuasion and causation standards should be revised as applied to cause challenges.[41] Those efforts entail review of the origins and historical purpose of our jury system and the participatory rights of prospective jurors operating within that system.[42] They extend to descriptions of present jury selection procedures and how the exercise of peremptory challenges facilitates their abuse.[43]

This Article proposes the constitutionally compelled alternative—a citizen may be denied their right to serve on a particular petit jury only upon an individualized determination of their: (1) statutory ineligibility or (2) excusal for cause. It is anticipated that this alternative will function to curb the abuse of our jury selection system more effectively than the current equal protection approach. When applied to a jury venire reflecting a fair cross-section of the community, this alternative is designed to minimize invidious discrimination in jury selection, recognize

---

and a fair trial." *Id.* (citing Frazier v. United States, 335 U.S. 497, 505 n.11 (1948)*; accord* State v. Hoffman, 412 A.2d 120, 121 (N.J. 1980) (interpreting the New Jersey Constitution); Commonwealth v. Fernandes, 170 N.E.3d 286, 298 n.6 (Mass. 2021) (interpreting the Massachusetts Constitution); ARIZ. TASK FORCE ON JURY DATA COLLECTION, POL'YS, AND PROCS., REPORT AND RECOMMENDATIONS 36 (Oct. 4, 2021) [hereinafter ARIZONA REPORT] (interpreting the Arizona Constitution). Jury trial rights secured in some state constitutions have been interpreted to preserve this practice. *See, e.g.*, CONNECTICUT REPORT, *supra* note 8, at 27 ("[T]he parties shall have the right to challenge jurors peremptorily . . . ." (quoting CONN. CONST. art. I, § 12 (acknowledging that Connecticut is "uniquely among the states [that have] constitutionalized peremptory challenges"))); State v. Eames, 365 So. 2d 1361, 1364 (La. 1978) (Dennis, J., concurring) (citing LA. CONST. art. I, §§ 10, 17 (1921)) (arguing that the Louisiana Constitution preserves a criminal defendant's ability to peremptorily strike)*; see also* State v. Saintcalle, 309 P.3d. 326, 347 (Wash. 2013) (Stephens, J., concurring) (interpreting the right of trial by jury under WASH. CONST., art. I, § 21 as requiring some state constitutional protection). *See generally* Frampton, *supra* note 7, at 60, app. A (estimating that peremptory challenges could be abolished via rulemaking in at least thirty states).

38. *See supra* note 37.

39. *See supra* note 37.

40. *See infra* Parts VI (discussing substantive due process application) and VII (discussing procedural due process application).

41. *See infra* Part VIII (discussing equal protection modifications).

42. *See infra* Section III.A and Part V.

43. *See infra* Sections VI.A.1., 3.

the right of each citizen to fully participate in our democracy through jury service, preserve our majoritarian form of self-government, promote the selection of a fair and impartial petit jury, and bolster public confidence in the integrity of our justice system.

II. THE AMERICAN CITIZEN'S RIGHT TO PARTICIPATE IN OUR DEMOCRACY THROUGH JURY SERVICE

When selected to deliberate as a petit juror, individual jurors perform two interrelated functions: (1) adjudicatory[44] and (2) participatory.[45] The former pertains to the resolution of criminal prosecutions or civil disputes through the return of a verdict. To be competent to perform this adjudicatory function, individual jurors must be "fair and impartial," meaning that they must be capable and willing to render the verdict based upon the evidence presented and the law as instructed during the trial.[46] Such verdicts not only resolve the individual cases presented but they also increase public confidence in the legitimacy of that resolution and in the integrity of the justice system itself.[47]

Equally important is the participatory function of individual deliberating jurors. Their importance arises from their role in the operation and preservation of our majoritarian system of self-government. The historical context of this function is reflected in *Duncan v. Louisiana*, wherein the Supreme Court held that due process required Louisiana to provide a jury trial to a defendant charged with an offense punishable by two years' imprisonment.[48] Central to this holding was the

---

44. This function is reflected in the definition of juror "competency" as an ability to be fair and impartial in rendering a verdict based upon the evidence presented and the law as instructed. *See* Georgia v. McCollum, 505 U.S. 42, 56 (1992); *accord* Powers v. Ohio, 499 U.S. 400, 413 (1991) (stating that one goal of the jury system is to deliver a verdict "in accordance with the law by persons who are fair").

45. *See* Duncan v. Louisiana, 391 U.S. 145, 151, 156 (1968).

46. *See* J.E.B. v. Alabama, 511 U.S. 127, 136–37 (1994); Batson v. Kentucky, 476 U.S. 79, 87 (1986); *Duncan*, 391 U.S. at 158; State v. Gilmore, 511 A.2d 1150, 1165 (N.J. 1986).

47. *Duncan*, 391 U.S. at 157–58; *see* Taylor v. Louisiana, 419 U.S. 522, 532 n.12 (1975) ("Illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process.").

48. *Duncan*, 391 U.S. at 148–49. Defendant Duncan was charged with battery, an offense punishable by up to two years' imprisonment. *Id.* at 146. His demand for a jury trial was denied. *Id.* In a state court bench trial, he was convicted. *Id.* Relying upon the Due Process Clause of the Fourteenth Amendment, the defendant claimed that this denial of a jury trial violated his rights under the Sixth Amendment of the U.S. Constitution. *Id.* The test for determining whether a Sixth Amendment right, applicable in federal criminal proceedings, is also protected against state action is whether it is among those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Id.* at 148 (citations omitted).

Duncan Court's finding that a jury trial in a criminal case is fundamental to the American system of government and conception of justice.[49] This fundamental importance was established through the *Duncan* Court's analysis of the history and language of our Federal Constitution.

Tracing its credential back to the Magna Carta, the *Duncan* Court observed that a jury trial placed a strong barrier between "the liberties of the people and the prerogative of the crown."[50] After the colonists severed their ties with the Crown, they maintained the jury trial to protect them as citizens against *arbitrary* government action.[51] This government action includes executive branch initiation of criminal prosecutions that are ultimately decided by a petit jury.[52] It also extends to the judicial branch, which previously decided the outcomes of a wide range of criminal prosecutions through bench trials.[53] The elimination of these bench trials, together with the corresponding recognition of a right to a petit jury for certain serious criminal offenses, "reflect[s] a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges."[54]

Following the Revolutionary War, the importance that early Americans attached to "the inestimable right of trial by jury" is demonstrated by it being the only right protected in each of the eighteenth-century state constitutions.[55] The jury trial right within the 1776 Virginia Constitution recognized "the Commonwealth's venerated tradition of viewing the citizen jury as a constituent and essential part of the judiciary."[56] Interpreting their 1776 state constitution, the Virginia Supreme Court in *Revi, LLC v. Chicago Title Insurance*, explained that "the jury does not function as a 'mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.'"[57] From this perspective, "*the common man in the jury box, no less than the citizen in the voting booth, was central to a democratic theory*

49. *Id.* at 148–49.
50. *Id.* at 151 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES, *349–50).
51. *Id.* at 151, 156.
52. *Id.* at 155.
53. *See id.* at 156.
54. *Id.*
55. G. ALAN TARR, WITHOUT FEAR OR FAVOR: JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY IN THE STATES 21 (2012).
56. Revi, LLC v. Chi. Title Ins. Co., 776 S.E.2d 808, 818–19 (Va. 2015); *see* VA. CONST. art. 1 §§ 8, 11; N.J. CONST. art. XXII, XXIII (1776).
57. *Revi*, 776 S.E.2d at 819 (quoting Blakely v. Washington, 542 U.S. 296, 305–06 (2004) (finding no jury trial right for bad faith insurance claim)).

that asserted the sovereignty of the people through self-government."[58] As de Tocqueville observed, the American jury system is "as direct and as extreme a consequence of the sovereignty of the people as universal suffrage."[59] Thus, our Founders viewed jury service and voting as fundamental to the creation and preservation of our majoritarian form of self-government.[60] Critically, although the citizen litigants benefit from proper performance of a jury's adjudicatory function, their fellow citizens hold an independent participatory right to assert their sovereignty through their service on the jury performing that adjudicatory function.

Although each state constitution expressly guaranteed a right to trial by jury, the original United States Constitution of 1787 did not expressly confer either a right to a jury trial or to vote.[61] Opponents to ratification (so called anti-Federalists) sharply objected to the absence of a jury trial right in the original Federal Constitution.[62] The Federalists responded through their support of the Fifth, Sixth, and Seventh Amendments which, among other things, secured to all persons their rights to a jury trial in federal court and rights to both due process and equal protection.[63] Thus, the Sixth Amendment[64] responded to concerns that our original Constitution failed to adequately protect the institution of

---

58. *Id.* at 819–20 (emphasis added) (citations omitted) (quoting Ronald J. Bacigal, *Putting the People Back into the Fourth Amendment*, 62 GEO. WASH. L. REV. 359, 409 (1994)); *Blakely*, 542 U.S. at 305–06 (judicial fact-finding which increases sentence above statutory maximum violates Sixth Amendment). This perspective was supported by the Virginia Supreme Court's quotation of Alexis de Tocqueville; "[t]he system of the jury, as it is understood in America, appears to be as direct and as extreme a consequence of the sovereignty of the people as universal suffrage." *Revi*, 227 S.E.2d at 820 n.19 (quoting ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 362 (Henry Reeve trans., 3d ed. 1863)). This passage has been cited with approval in *Attridge v. Cencorp. Division*, 836 F.2d 113, 113–14 (2d Cir. 1987); *Anderson v. Miller*, 346 F.3d 315, 326 (2d Cir. 2003); and *Mitchell v. Superior Court*, 729 P.2d 212, 229 (Cal. 1987) (Bird, C.J., concurring). The Supreme Court has also cited with approval de Tocqueville's assessment of American juror roles. *See, e.g.*, Powers v. Ohio, 499 U.S. 400, 406–07 (1991).

59. *Attridge*, 836 F.2d at 113–14 (quoting TOCQUEVILLE, *supra* note 58, at 362 (discussing sanctity of jury deliberations precludes impeachment of verdict)).

60. *Id.*; Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 218 (1995).

61. *See* Amar, *supra* note 60, at 218.

62. *Id.* at 218 (citing HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR: THE POLITICAL THOUGHT OF THE OPPONENTS OF THE CONSTITUTION 19 (1981)). The jury trial was viewed as a "means by which the people . . . are enabled to stand as the guardians of each others rights, and to restrain, by regular and legal measures, those who otherwise might infringe upon them." STORING, *supra*, at 19.

63. *See* Amar, *supra* note 60, at 218.

64. The Sixth Amendment provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. CONST. amend. VI.

juries and the participatory rights of all citizens as jurors.[65] Inclusion of jury trial rights in the Bill of Rights supports the *Duncan* Court's findings of its central importance and "fundamental right" status.[66]

III. PEREMPTORY CHALLENGES AND THE ROAD TO *BATSON*

A. English Origin and Purpose

As previously noted, the origins of jury trials for criminal cases traces back to thirteenth-century England.[67] There, the purpose of jury selection was to secure a fair and impartial jury.[68] Prosecutors were then permitted to exclude an unlimited number of jurors without having to state a reason because, as the King's representatives, their decisions were immune from scrutiny under the doctrine of royal infallibility.[69] In response, courts sought to promote the selection of a fair jury by permitting defendants in capital cases to excuse some of these jurors without articulating a reason.[70] Hence, peremptory challenges were initially created in response to the doctrine of royal infallibility.

Their continuation was supported by the size and nature of the English jury pools. This pool was small, as eligibility was limited to

65. *See* Duncan v. Louisiana, 391 U.S. 145, 151, 153 (1968); *supra* note 48 and accompanying text. These Amendments applied to the actions of federal officials. They neither address the right to vote, nor the state control of elections as conferred in the 1789 Constitution. *See* U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding elections . . . shall be prescribed in each State by the legislature thereof . . . ."). Recognition and enforcement of the rights to vote and to a jury trial in state court remained matters of state law. Their recognition in the Federal Constitution awaited the resolution of yet another armed conflict and subsequent ratification of the Reconstruction Era Amendments (Thirteenth, Fourteenth, and Fifteenth Amendments) and the subsequent voting rights amendments (Nineteenth, Twenty-Fourth, and Twenty-Eighth Amendments). *See* Amar, *supra* note 60, at 204.

66. *Duncan*, 391 U.S. at 153–56. Moreover, omission of voting from the Bill of Rights further reflects our Founders' reliance upon the participation of individual citizens on juries to preserve our majoritarian form of self-government.

67. *See Duncan*, 391 U.S. at 151 (referencing Magna Carta (1215)); *see also* Swain v. Alabama, 380 U.S. 202, 212–13 (1965); State v. Gilmore, 511 A.2d 1150, 1162 n.5 (N.J. 1986); Hoffman, *supra* note 4, at 819.

68. *See* Hoffman, *supra* note 4, at 812. Initially, the doctrine of royal infallibility applied to whomever the Crown chose to exclude. *Id.* There is virtually no research reflecting that promotion of juror participation was an objective of the English jury selection procedure. Indeed, the English jury pool was particularly undemocratic, as it was limited to propertied males. In contrast, citizen participation is a fundamental interest advanced in its American adaptation. *See infra* Section III.B.

69. *See* Hoffman, *supra* note 4, at 819. The Crown's challenges were actually challenges "for cause" which, under the doctrine of royal infallibility, did not require the prosecutor's articulation. *Id.*

70. *See id.*

propertied males.[71] Because of that limited jury pool, it was not unusual for a potential juror to have personal animus against a litigant arising from a prior business transaction or personal interaction.[72] Hence, use of peremptory challenges facilitated a fair and impartial jury by eliminating potential jurors who may have harbored personal animus against a litigant.[73] Thus, in the country of their origin, peremptory challenges were created to promote selection of a fair jury, meaning one that could decide the case based on the facts and the law, rather than based upon any personal bias for or against a litigant.[74]

B. American Continuation, Purpose, and Subsequent Abuse in Opposition to Reconstruction

Many English institutions and common law practices continued in colonial America. After the Revolutionary War, each state continued the jury trial institution and the peremptory challenge practice.[75] As in England, the purpose of jury selection in America remained the selection of a fair and impartial jury.[76] Dramatic differences in the subsequent use of peremptory challenges in England and the United States can be traced to United States' sordid history of slavery, civil war, and opposition to Reconstruction.[77]

---

71. *See* Amy Wilson, *The End of Peremptory Challenges: A Call for Change Through Comparative Analysis*, 32 HASTINGS INT'L & COMPAR. L. REV. 363, 364–65, 377 (2009); John Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution*, *in* THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY 1700–1900 25 (A. Schioppa ed., 1987). Due to the demographics of thirteenth-century England, these jury pools were also racially homogeneous. *See Gilmore*, 511 A.2d 1150, at 1162–63 (noting the homogeneous nature of English society). Dramatic changes in those conditions contributed to their elimination in England more than thirty years ago. *See infra* note 364 and accompanying text.

72. *See* Hoffman, *supra* note 4, at 820; Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 165 n.51 (1989); Cronin, Comment Letter on Recommendation 13, *supra* note 11, Ex. A at 6–7 (citing ASSIGNMENT JUDGES COMMITTEE, REPORT TO REVIEW THE USE OF PEREMPTORY CHALLENGES 5 (1997) [hereinafter WEISS REPORT]).

73. *See* sources cited *supra* note 71.

74. Several commentators have observed that these juror exclusions were more akin to present American definitions of cause challenges, as opposed to peremptory challenges. *See, e.g.*, Hoffman, *supra* note 4, at 820 (citing Alschuler, *supra* note 72, at 165 n.51).

75. *See, e.g.*, N.J. CONST. of 1776, art. XVI, § 22 (continuing English common law practices not conflicting with statutes or repugnant to Constitution and the practices for a jury trial). While the jury trial right was enshrined in each eighteenth-century state constitution, peremptory challenges were not. TARR, *supra* note 55, at 21; *see also* Amar, *supra* note 60, at 255. In many states, the practice of peremptory challenge use is not constitutionally protected. *See supra* note 37.

76. *See* Georgia v. McCollum, 505 U.S. 42, 56 (1992).

77. *See* Hoffman, *supra* note 4, at 827–30; Alexis Hoag, *An Unbroken Thread: African American Exclusion from Jury Service Past, and Present*, 81 LA. L. REV. 55, 57–62 (2020);

Before the Civil War, there is little evidence to suggest that peremptory challenges were extensively used to exclude Black people from jury service.[78] At that time, Black jurors were excluded through slave codes which expressly prohibited them from voting and serving on juries.[79] In its pre-Civil War, *Dred Scott v. Sandford*[80] decision, the United States Supreme Court held that enslaved peoples were not "citizens" of the United States and, therefore, could not expect protection from the federal government.[81] Concluding that the Framers of our 1789 Constitution did not contemplate including Black slaves as "citizens," our highest Court observed that, when that original Constitution was drafted, Black people were regarded as "a subordinate and inferior class of beings, who had been subjugated by the dominant race, and . . . had no rights or privileges but such as those who held the power and the Government might choose to grant them."[82]

In those states without slave codes, Black people were often excluded through a two-step process which: (1) tied juror eligibility to voter eligibility and then (2) subjected voter eligibility to several facially neutral requirements which functioned to disenfranchise Black voters and thereby disqualify them from jury service.[83] For example, in New York, Black people could vote, and thereby serve on a jury, only if they owned more than $250 of property.[84]

Following the Civil War, the exclusion of newly emancipated slaves from fully participating in our democracy took many forms, including limitations upon the exercise of the rights to vote and to sit on a jury.[85]

Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561, 570–81 (2012).

78. *See* Hoffman, *supra* note 4, at 827.

79. *Id.* at 828.

80. 60 U.S. 393 (1859). This decision was effectively overruled by ratification of the Thirteenth Amendment. U.S. CONST. amend. XIII.

81. *Dred Scott*, 60 U.S. at 404–05. The Court further observed that ongoing discrimination reflected "enduring marks of inferiority and degradation." *Id.* at 416.

82. *Id.* at 404–05. Attempting to further clarify our Founders' intent when drafting our Constitution, the Court observed that Black people "had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect." *Id.* at 407.

83. Hoffman, *supra* note 4, at 828. Judge Hoffman observed that "[s]ince juror qualification was initially tied to voter qualification, the de jure and de facto disenfranchisement of [B]lacks served also to exclude them as jurors." *Id.*

84. *Id.* at 828 n.96. This property requirement did not apply to White citizens. *Id.*

85. *See* Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 116 (1990) ("[T]he continu[ing] disqualification of [B]lack jurors remains a badge signifying the subordinate status of people of African [American] ancestry."); Hoag, *supra* note 77, at 58 (observing that several states patterned their jury service requirements after voting

Some states simply reenacted the Slave Codes.[86] Other southern states "enacted Black Codes to subjugate newly freed slaves and maintain the prewar racial hierarchy."[87] These Black Codes included prohibitions against freedmen from both voting and serving on juries.[88]

Eventually, our nation responded by ratifying the Thirteenth Amendment in 1865,[89] the Fourteenth Amendment in 1866,[90] and the Fifteenth Amendment in 1870.[91] Several of the rights previously withheld under the Black Codes were deemed so "fundamental to our scheme of ordered liberty" that due process of the Fourteenth Amendment was interpreted to require incorporation of their

---

requirements); Amar, *supra* note 60, at 205 (documenting linkage between participatory rights to vote and to serve on a jury); *see also* IBRAM X. KENDI, STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA 245 (2016) (noting reliance upon physical violence (lynching) and documenting segregationist views that Black "voting, holding office, and sitting in the jury box, are all wrong"); McAward, *supra* note 77, at 563 (observing that reductions in racially motivated violence responds to a badge or incidence of slavery).

86. *See generally* Timbs v. Indiana, 139 S. Ct. 682 (2019).

87. *See id.* at 688. After reviewing this sordid history, the *Timbs* Court concluded that the Eighth Amendment's Excessive Fines Clause ("EFC") was "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition[s]." *Id.* at 687 (quoting McDonald v. City of Chicago, 561 US. 472, 754 (2010)). Further noting that the EFC functions as a safeguard against government abuse, the *Timbs* Court held that the EFC is an incorporated protection applicable to the states under the Fourteenth Amendment's Due Process Clause. *Id.* at 691.

88. *See The Southern "Black Codes" of 1865–66*, TEACH DEMOCRACY, https://www.crf-usa.org/brown-v-board-50th-anniversary/southern-black-codes.html (last visited Dec. 20, 2023). They also included draconian fines for violations of vaguely worded vagrancy laws which subjected freedmen into forced labor to repay these fines. *Id.*

89. The Thirteenth Amendment provides that: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1.

90. The Fourteenth Amendment provides that: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. This Amendment was drafted by Union legislators who feared that representatives of the former Confederate States would seek to continue their discriminatory Black Codes. *See* Nina W. Chernoff, *Wrong About the Right: How Courts Undermine the Fair Cross-Section Guarantee by Confusing It with Equal Protection*, 64 HASTINGS L.J. 141, 154 (2012). As a condition to rejoining the Union and regaining congressional representation, the Union states required the Confederate states to agree to the adoption of the Fourteenth Amendment guaranteeing that no state would deny a citizen "the equal protection of the laws." *Id.*; *see also* Amar, *supra* note 60, at 230.

91. The Fifteenth Amendment provides that: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

constitutional protections to the states.[92] One of these fundamental incorporated rights was the Sixth Amendment jury trial right.[93]

Despite these Federal constitutional amendments and their state applicability, the group or class subjugation of Black people seeking to serve as jurors was accomplished by their: (1) exclusion from the jury venire through discriminatory application of statutory eligibility criteria and (2) exclusion from the petit jury through discriminatory use of peremptory challenges.[94] Early legal challenges to these practices were based exclusively upon alleged violations of the Equal Protection Clause.[95]

1. Jury Venire

In *Strauder v. West Virginia*, the Court invalidated a state statute that expressly provided that only White men qualified to be included in the jury venire.[96] Focusing upon the defendant-litigant's rights, the Court held that the State denied a Black defendant equal protection of the laws when it expressly excluded Black people from the jury venire on account of their race.[97] In addition to violating our Constitution, the *Strauder*

92. Timbs v. Indiana, 139 S. Ct. 682, 687 (2019) (quoting *McDonald*, 561 U.S. at 574) (Eighth Amendment: prohibition of excessive fines); *see* Duncan v. Louisiana, 391 U.S. 145, 148 (1968) (Sixth Amendment: jury trial). In *United States v. Texas*, the Court recognized the right to vote as a fundamental liberty. 384 U.S. 155 (1966).

93. *Duncan*, 391 U.S. at 148.

94. *See* discussion *infra* Sections III.B.1 (jury venire), 2.

95. *See* discussion *infra* Sections III.B.1, 2. *But see* Peters v. Kiff, 407 U.S. 493, 494 (1972) (due process challenge).

96. 100 U.S. 303, 308 (1879). A jury venire is defined as "the entire group from which jurors are drawn. Accordingly, the term may be used in some contexts to describe the full cohort of individuals summoned for jury service, or to the subset of individuals required to report to the courthouse, or even to the panel sent to a particular voir dire." JCJS GUIDE, *supra* note 4, attach. A at 12. In contrast, a petit juror or trial juror is defined as an individual "summoned to report for potential selection for a civil or criminal trial." JCJS GUIDE, *supra* note 4, attach. A at 10.

97. *Strauder*, 100 U.S. at 308. While the Court's language in *Strauder* expressly referenced the defendant-litigant's rights, the Court later clarified that this ruling also acknowledged the rights of prospective jurors. Batson v. Kentucky, 476 U.S. 79, 87–88 (1986). More specifically, the *Batson* Court observed that,

> Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try. Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial . . . [a] person's race simply "is unrelated to his fitness as a juror." As long ago as *Strauder*, therefore, the Court recognized that *by denying a person participation in jury service* on account of his race, *the State unconstitutionally discriminated against the excluded juror.*

Court observed that these express exclusions of Black prospective jurors implied their "inferiority in civil society."[98]

Once the *Strauder* Court prohibited this express or *de jure* disqualification of Black people from the jury venire, some state officials sought to achieve the same result through *de facto* discriminatory practices.[99] These included vague laws which did not expressly refer to race, but rather empowered local officials to disqualify prospective jurors based upon their subjective assessment of their honesty, intelligence, and/or lack of "good moral character."[100] Alabama enacted such a law which was challenged by a Black defendant in *Norris v. Alabama*.[101] Seeking to explain the absence of any Black people in the grand jury venire, the county jury commissioner testified that he did not know of any potential Black venireperson who possessed the requisite good moral character.[102] Rejecting this explanation, the *Norris* Court held that "[the] long-continued, unvarying, and wholesale exclusion" of Black people from the grand juries violated the Equal Protection Clause.[103] Significantly, this holding was not based upon the express disqualification of Black people as in *Strauder*, but rather upon the jury commissioner's "false assumption that members of [the Black] race as a group are not qualified to serve as jurors."[104]

2. Petit Jury

After the *Norris* Court limited the wholesale *de facto* exclusion of Black people from the jury venire, the exclusion of Black people from the petit jury was effectuated through a "new procedural weapon, the

---

Id. (emphases added) (citations omitted). The Court further observed that this harm extends to the entire community because discriminatory jury selection "undermine[s] public confidence in the fairness of our system of justice." *Id.*

98. *Strauder*, 100 U.S. at 308.

99. *See* Hoag, *supra* note 77, at 62–63.

100. *See id.*

101. 294 U.S. 587, 599 (1935).

102. The county jury commissioner testified that: "I do not know of any negro in Morgan County . . . who is generally reputed to be honest and intelligent and who is esteemed in the community for his integrity, good character and sound judgment, who is not an habitual drunkard, [and] who isn't afflicted with a permanent disease or physical weakness . . . ." *Id.* at 598–99.

103. *Id.* at 597 (jury venire). The Court's reference to "long-continued" discrimination was later interpreted to require proof of systemic discrimination over time to establish an equal protection violation. *See* Swain v. Alabama, 380 U.S. 202, 226–27 (1965) (petit jury).

104. Batson v. Kentucky, 476 U.S. 79, 86 (1986) (interpreting Strauder v. West Virginia, 100 U.S. 303, 308 (1879), and *Norris*, 294 U.S. at 599); *accord* Neal v. Delaware, 103 U.S. 370, 397 (1880) (finding the presumption of Black ineligibility for jury service violates Equal Protection Clause).

peremptory challenge."[105] Shortly after the *Norris* decision, one commentator sought to assuage concerns that this decision posed "a new threat to 'White Supremacy'" by emphasizing that then-existing Mississippi law authorized exclusion of Black jurors through peremptory challenge use and limited their eligibility to serve on a jury by conditioning it upon their eligibility to vote.[106] Since full payment of all back taxes and a poll tax were required to vote, the author predicted that very few Black people would qualify to sit on either grand or petit juries in Mississippi.[107] Even if Black citizens were to satisfy these threshold voter eligibility requirements, the author reassured that very few Black citizens would actually serve on a particular jury due, in part, to the exercise of peremptory challenges.[108] Employing reasoning similar to the Alabama jury commissioner who testified in *Norris*,[109] the commentator predicted that "[b]oth sides will be equally anxious to excuse Negro jurors, because of their notorious unreliability."[110]

The Court first addressed an equal protection objection to peremptory challenge use in *Swain v. Alabama*.[111] Defendant Swain, a Black man, was convicted by an all-White jury of raping a White girl and sentenced to death.[112] The trial occurred in a county where no Black man had sat on a petit jury in over fifteen years.[113] The prosecutor exercised

105. Colbert, *supra* note 85, at 81. Contending that the Thirteenth Amendment provides an independent basis to preclude the exercise of racially conscious peremptory challenges, Professor Colbert argues that "the continued disqualification of [B]lack jurors remains a badge signifying the subordinate status of people of African [American] ancestry." *Id.* at 6.

106. J.F. Barbour, Jr., *Exclusion of Negroes from Jury Service–Effect on Defendant's Right to A New Trial*, 8 MISS. L.J. 196, 201 (1935). Analyzing these exclusionary practices, Judge Hoffman observed that "[s]ince juror qualification was initially tied to voter qualification, the de jure and de facto disenfranchisement of blacks served also to exclude them as jurors." Hoffman, *supra* note 4, at 828.

107. Barbour, *supra* note 106, at 201, 203. Mr. Barbour estimated that the ratio of jurors drawn from among qualified Mississippi voters was one Black citizen for every 1,000 White citizens. *Id.* at 203. He attributed this ratio to the "foresight and sagacity" of the framers of the 1890 Mississippi Constitution which established voter eligibility requirements. *Id.* at 201. Under those requirements, "the odds are overwhelmingly against Negroes serving as jurors, even if all qualified electors [are] called for [jury] service." *Id.* This reliance upon voting eligibility to limit jury participation further evidences the interrelationship between these two rights of citizenship and the participatory interest of citizens to serve on a particular petit jury. *See supra* note 83 and accompanying text.

108. Barbour, *supra* note 106, at 201 ("An occasional Negro will sit on a grand jury. One or two will be called on a trial venire from time to time, and will then be excused for cause or challenged peremptorily.").

109. *See supra* note 102 and accompanying text.

110. *See* Barbour, *supra* note 106, at 196, 201.

111. Swain v. Alabama, 380 U.S. 202 (1965).

112. *Id.* at 231 (Goldberg, J., dissenting).

113. *Id.* at 205.

peremptory challenges against all six Black prospective petit jurors.[114] Despite that record, a sharply divided Court determined that it could not "hold that the striking of Negroes in a particular case [was] a denial of equal protection of the laws."[115]

A contrary holding, the *Swain* majority reasoned, would "subject the prosecutor's challenge in any particular case to the demands . . . of the Equal Protection Clause [and] would entail a radical change in the nature and operation of the challenge. The challenge . . . would no longer be peremptory . . . ."[116] Those demands would involve an inquiry into the prosecutor's purpose in exercising a peremptory challenge.[117] The majority emphasized that any such judicial inquiry conflicted with "the essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control."[118] Hence, in order to preserve the "essential nature" of peremptory challenges, the *Swain* Court essentially insulated their exercise in individual trials from equal protection scrutiny.

The *Swain* Court preserved peremptory challenges even though they acknowledged that their exercise facilitates juror exclusion based upon counsel's impressions of their "real or imagined partiality," which is frequently premised upon group affiliations, such as race, religion, and nationality.[119] In *dicta*, the *Swain* majority envisioned that circumstances might arise where "the purpose[s] of the peremptory challenge are being perverted."[120] These circumstances, the majority predicted, could be proven only where "the prosecutor in a county, 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."[121] While admonishing prosecutors not to racially discriminate in their exercise of peremptory challenges, the *Swain* Court required

---

114. *Id.* at 210.
115. *Id.* at 221.
116. *Id.* at 221–22.
117. More specifically, these equal protection demands would require the defendant to establish that the prosecutor's *sole* purpose in exercising a peremptory challenge is to discriminate against the prospective juror based on their race. This actionable discriminatory purpose was distinguished from reasons related to the outcome of the particular case on trial. *Id.* at 224. Potential reliance upon an articulated trial-related reason enables counsel to pursue a "favorable jury" largely immune from equal protection scrutiny. *See infra* Section VI.A.1.
118. *Swain*, 380 U.S. at 220.
119. *Id.* at 220–21.
120. *Id.* at 224.
121. *Id.*

proof of systemic violations over time as a condition precedent to any judicial review of a peremptory challenge in a particular case.[122]

Eighteen years later, a divided Court in *McCray v. New York* declined to revisit *Swain*.[123] Denying certiorari, the *McCray* majority emphasized the absence of any present conflict among federal courts.[124] In his dissenting opinion, Justice Marshall observed that *Swain* imposed a "nearly insurmountable burden" of proof which had drawn "almost universal and often scathing criticism."[125] Despite the federal judicial adherence to *Swain*, the *McCray* majority noted that the highest courts of both California and Massachusetts had departed, on independent state constitutional grounds, from the *Swain* standard.[126] Rather than immediately overruling the long-standing federal precedent of *Swain*, the *McCray* majority decided "to allow the various states to serve as laboratories in which the issue receives further study before it is addressed by [the] Court."[127] Thus, the *McCray* majority set the stage for the Court to eventually reexamine *Swain*.

IV. *BATSON* AND THE EXISTING PARADIGM

Three years later, in *Batson*, the Court determined that it received sufficient results from its state laboratories to reexamine the *Swain* standard.[128] These results revealed that, despite the *Swain* Court's contrary admonition,[129] counsel continued to use peremptory challenges to discriminate against Black jurors.[130] This continued discrimination was facilitated by the "crippling burden of proof" imposed in *Swain* which rendered the use of peremptory challenges "largely immune from constitutional scrutiny."[131] That "crippling burden of proof," in turn, arose from the Court's desire to retain the "essential nature" of the

122. *See* Batson v. Kentucky, 476 U.S. 79, 92–93 (1986) (interpreting *Swain*).
123. McCray v. New York, 461 U.S. 961, 966 (1983) (Marshall, J., dissenting).
124. *Id.* at 962 (majority opinion).
125. *Id.* at 964–65 (Marshall, J., dissenting).
126. *See McCray*, 461 U.S. at 962 (majority opinion) (citing People v. Wheeler, 583 P.2d 748 (Cal. 1978)); Commonwealth v. Soares, 387 N.E.2d. 499, 515–16 (Mass. 1979), *cert. denied*, 444 U.S. 881 (1979)).
127. *McCray*, 461 U.S. at 963.
128. *See* Batson v. Kentucky, 476 U.S. 79, 98–99 (1986).
129. *See* Swain v. Alabama, 380 U.S. 202, 220 (1915).
130. *Batson*, 476 U.S. at 99 ("The reality of practice . . . shows that the challenge may be, and unfortunately at times has been, used to discriminate against black jurors.").
131. *Id.* at 92 (citing *Wheeler*, 583 P.2d at 767–68) (describing the burden as insurmountable).

peremptory—an "arbitrary" challenge beyond the court's control.[132] Thus, as emphasized by its concurring and dissenting members, the *Batson* Court was presented with a binary choice.[133] This choice was to either: (1) retain peremptory challenges in their unaltered common law form, as the *Swain* majority decided and the *Batson* dissenters supported,[134] or (2) eliminate them altogether, as urged by Justice Marshall in his *Batson* concurrence and by Justice Goldberg in his *Swain* dissent.[135]

The *Batson* majority chose neither but sought instead to forge a middle ground.[136] Its efforts to both fully preserve and meaningfully review peremptory challenges achieved neither objective.[137] Their efforts yielded the *Batson* paradigm which seeks to enforce the equal protection prohibition against *purposeful* discrimination[138] through a three-step process:

> (1) objecting counsel must establish a prima facie case by "showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose"[;]
>
> (2) striking counsel must articulate a race neutral reason supporting exercise of a peremptory challenge; and

---

132. *See id.* at 91 (beyond court control); *id.* at 123 (Burger, C.J., dissenting) (quoting *Swain*, 380 U.S. at 219) (stating that judicial inquiry is "inapplicable" with the exercise of the "arbitrary and capricious right"); *see also* 2 WILLIAM BLACKSTONE, COMMENTARIES *717 (defining peremptory challenge as "arbitrary" and beyond the court's control).

133. *See Batson*, 476 U.S. at 127 (Burger, C.J., dissenting) ("Analytically, there is no middle ground: A challenge either has to be explained or it does not.").

134. *See Swain*, 380 U.S. at 222; *Batson*, 476 U.S. at 127 (Burger, C.J., dissenting).

135. *See Batson*, 476 U.S. at 102–03 (Marshall, J., concurring) ("The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely."); *Swain*, 380 U.S. at 244 (Goldberg, J., dissenting) ("Were it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former.").

136. *Batson*, 476 U.S. at 127 (Burger, C.J., dissenting) (observing that the majority "attempts to decree a middle ground" and that "[a]nalytically, there is no middle ground: A challenge either has to be explained or it does not").

137. Under the paradigm, peremptory challenges are not preserved after a prima facie case is established. *See Batson*, 476 U.S. at 96–98. At that time, the striking attorney must articulate a nondiscriminatory reason for the strike. *Id.* at 97. This paradigm created an "untenable duality" between an ability to exclude without articulating a reason (peremptories) and an obligation to articulate a reason (*Batson* step two). People v. Bolling, 591 N.E.2d 1136, 1143 (N.Y. 1992) (Bellacosa, J., concurring); *accord* Melilli, *supra* note 4, at 483 ("[*Batson*] seeks a middle ground which either does not exist or is impossible to locate.").

138. *Batson*, 476 U.S. at 90.

> (3) objecting counsel must establish that the striking counsel exercised the peremptory challenge with the sole purpose of discriminating against a member of a legally cognizable group.[139]

To establish a prima facie case, step one requires an exclusion pattern premised upon the exercise of at least two peremptory challenges upon members of a legally cognizable group.[140] The nondiscriminatory reason articulated in step two "does not demand an explanation that is persuasive, or even plausible."[141] Thus, "[i]t is not until the third step that the persuasiveness of the justification [for the peremptory challenge] becomes relevant."[142] At that time, the trial court must determine trial counsel's *subjective* mental state.[143] More specifically, the court must determine whether the striking party seeks to exclude the juror for the articulated facially nondiscriminatory reason or for the *purpose* of discriminating against a legally cognizable group.[144] It is widely recognized that application of this third step has undermined the efficacy of the entire paradigm.[145]

---

139. *Id.* at 94, 96–98. Formulating this paradigm, the *Batson* Court relied upon the burden shifting framework that it previously applied in Title VII employment discrimination litigation. *Id.* at 94, n.18 (citing McDonald Douglas Corp. v. Green, 411 U.S. 792 (1973)) (Title VII disparate treatment); *see also* State v. Gilmore, 511 A.2d 1150, 1163 (N.J. 1986) (interpreting *Batson*).

140. *See Batson*, 476 U.S. at 97. Analyzing this first step, Justice Marshall observed that "where only one or two black jurors survive the challenges for cause, the prosecutor need have no compunction about striking them from the jury because of their race." *Id.* at 105 (Marshall, J., concurring).

141. Haven, *supra* note 4, at 107 (quoting Purkett v. Elem, 514 U.S. 765, 768 (1995)). Articulated reasons satisfying this step are virtually unlimited, as courts have accepted trial counsel's dissatisfaction with the juror's facial hair, hair color, employment status, residential neighborhood, demeanor, body language, attitude, and even "vibe." *See* EJI REPORT, *supra* note 4; *see also* Haven, *supra* note 4, at 115–18. These examples suggest that "[a]ny neutral reason, no matter how implausible or fantastic, even if it is silly or superstitious, is sufficient to rebut a prima facie case of discrimination." Bennett, *supra* note 4, at 163 (alteration in original).

142. Haven, *supra* note 4, at 108 (quoting Johnson v. California 545 U.S. 162, 171 (2005)) (alteration in original).

143. *See id.*

144. *See id.*

145. *See, e.g.*, State v. Saintcalle, 309 P.3d 326, 338 (Wash. 2013) ("The main problem is that *Batson's* third step requires a finding of 'purposeful discrimination.'"); Bennett, *supra* note 4, at 150; Haven, *supra* note 4, at 112, 115, 117; Melilli, *supra* note 4, at 503 (application of step three results in "hopelessly irremediable inconsistency"); CONNECTICUT REPORT, *supra* note 8, at 19; JURY SELECTION WORK GROUP, FINAL REPORT TO THE CALIFORNIA SUPREME COURT 2 (Aug. 12, 2022) [hereinafter CALIFORNIA REPORT]; *see also* EJI REPORT, *supra* note 4, at 211 (observing that trial courts often give benefit of doubt to prosecutors due "partially from the difficulty in accurately delineating motive").

Before it announced this paradigm, the *Batson* Court had to overrule *Swain*. The harm in *Swain* was to the defendant when he was tried by a jury from which members of his own race were excluded through the exercise of peremptory challenges.[146] Defendant Swain challenged those exclusions by alleging that they violated *his* equal protection rights.[147] To explain their decision to overrule *Swain*, the *Batson* Court dramatically shifted from *Swain*'s exclusive litigant focus and expressly recognized that the exercise of peremptory challenges also harms prospective jurors.[148] To support its abrupt shift from *Swain*'s litigant focus, the *Batson* Court relied upon its prior exercise of its supervisory authority[149] to prohibit the wholesale exclusion jurors based upon stereotypes not based upon their race.[150] Those supervisory authority decisions, in turn, also recognized that prospective jurors are "harmed" by their exclusion based upon presumed group behavior as distinguished from "individualized" determination of juror competency.[151]

As will be more fully explained in the following section, the *Batson* Court's focus upon prospective jurors and individualized determinations of their competency fully supports the Due Process approach proposed in this Article.[152]

V. PROSPECTIVE JURORS HAVE CONSTITUTIONALLY PROTECTED RIGHTS OR INTERESTS THAT ARE ADVERSELY AFFECTED BY THEIR EXCLUSION FROM SERVING ON A PARTICULAR PETIT JURY

Batson and its progeny have sought to curb the discriminatory exercise of peremptory challenges solely through enforcement of equal protection rights. This Article approaches discrimination indirectly, by analyzing the exclusion of *all* prospective citizen-jurors through the

146. *See* Swain v. Alabama, 380 U.S. 202, 203–05. *See generally* Powers v. Ohio, 499 U.S. 400, 406 (interpreting Batson v. Kentucky, 476 U.S. 79, 87 (1986)).

147. *Swain*, 380 U.S. at 203–04.

148. *Batson*, 476 U.S. at 87 (finding unconstitutional discrimination "against the excluded juror"). Logically, this discrimination finding is predicated upon the excluded juror's underlying right or interest to serve on that particular jury. *See infra* Section V.A (identifying right or interest protected by due process clause).

149. *See* McNabb v. United States, 318 U.S. 322, 340 (1943) (establishing that the Supreme Court has supervisory authority over administration of justice in federal courts). State appellate courts have similar supervisory authority in their jurisdictions. *See, e.g.*, State v. Andujar, 254 A.3d 606, 618, 626 (N.J. 2021).

150. *See Batson*, 476 U.S. at 87 (discussing Ballard v. United States, 329 U.S. 187, 195 (1946)) (gender); Thiel v. S. Pac. Co., 328 U.S. 217, 220 (1946) (daily wage earner).

151. *See* sources cited *supra* note 150.

152. *See supra* Parts VI (substantive due process) and VII (procedural due process).

prism of the Due Process Clauses.[153] Substantive and procedural due process requirements apply only when state action[154] deprives or intrudes upon the exercise of a person's constitutionally recognized rights or interests.[155] Hence, application of these due process requirements is dependent upon the existence of an underlying constitutionally protected right or interest.[156]

Each citizen holds a right to serve on a particular petit jury based upon: (1) their participatory interest in the operation and preservation of our majoritarian form of self-government;[157] (2) their "liberty" interests in maintaining a good reputation;[158] and (3) their interest to be protected

153. The Due Process Clauses of the Fifth Amendment provides: "No person shall . . . be deprived of life liberty, or property, without due process of law." U.S. CONST. amend. V. The Due Process Clauses of the Fourteenth Amendments provide: "No State shall . . . deprive any person of life liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. Although the interest in the New Jersey State Constitution "'does not enumerate the right to due process,' Article 1, Paragraph 1 'protects "values like those encompassed by the principle[] of due process."' State v. Robinson, 160 A.3d 1, 19 (N.J. 2017) (quoting Doe v. Poritz, 662 A.2d 367, 401 (N.J. 1995) (alteration in original)). Article I, paragraph 1 has also been broadly interpreted "to embrace the fundamental guarantee of due process." State v. Melvin, 258 A.3d 1075, 1091 (N.J. 2021) (quoting State v. Njango, 255 A.3d 1164, 1173 (N.J. 2021)).

154. Since peremptory challenges are exercised during a trial, the "government action" requirement is satisfied. *See* Lugar v. Edmonson Oil Co., 457 U.S. 922, 950 (1982) (Burger, C.J., dissenting).

155. *See* Peters v. Kiff, 407 U.S. 493, 496 (1972) (applying substantive due process); Mathews v. Eldridge, 424 U.S. 319, 332–35 (1996) (analyzing and applying procedural due process); Goldberg v. Kelly, 397 U.S. 254, 269 (1970) (explaining that due process generally requires hearing); *Poritz*, 662 A.2d at 382–83, 415 (procedural process guaranteed by state constitution).

156. In deciding this threshold question, only the nature of the affected interest is relevant. Goss v. Lopez, 419 U.S. 565, 575–76 (1975) (quoting Bd. of Regents v. Roth, 408 U.S. 564, 570–71 (1972)) ("Whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake."). So long as the deprivation is not *de minimis*, the severity of the infringement is only relevant in resolving the second question of what process is due. *Id.* at 576 (citing Sniadach v. Fam. Fin. Corp., 395 U.S. 337, 342 (1969) (Harlan, J., concurring)); *see* Boddie v. Connecticut, 401 U.S 371, 378–79 (1971); *Bd. of Regents*, 408 U.S. at 570 n.8. In *Goss*, the students were suspended for only ten days, "but the length and consequent severity of a deprivation, while another factor to weigh in determining the appropriate form of hearing, 'is not decisive of the basic right' to a hearing of some kind." *Goss*, 419 U.S. at 576 (citing Fuentes v. Shevin, 407 U.S 67, 86 (1972)).

157. *See infra* Section V.A.

158. *See infra* Section V.B. The prospective juror's reputational interest includes being free from any stigma of presumed partiality and unfitness for jury service attributed to them based upon racial group stereotypes. This stigma of inferiority or unfitness extends to the exclusion of any prospective juror from their peers selected to deliberate on that petit jury. *See infra* note 218 and accompanying text.

from arbitrary government action under "fundamental fairness" principles.[159]

This Part will now address each of these three interrelated, yet independent and sufficient, grounds to recognize the requisite underlying constitutionally protected right or interest.

A. Each Citizen Holds a Right or Interest to Fully Participate in Our Democracy Through Service on a Particular Petit Jury.

In *Batson*, the Court observed that "the harm from discriminatory jury selection extends beyond that inflicted on the defendant [to] and the excluded juror."[160] Identification of this juror "harm" was essential to the *Batson* Court's justification of the dramatic doctrinal shift from their prior *Swain* decision.[161] Quoting *Strauder v. West Virginia*, the *Batson*

---

159. *See infra* Section V.C.

160. Batson v. Kentucky, 476 U.S. 79, 86–87 (1986) (quoted in Georgia v. McCollum, 505 U.S. 42, 49 (1992), and Powers v. Ohio, 499 U.S. 400, 425 (1990)). The harm recognized by the *Batson* Court is more fully understood within the context of an individual juror's function within the petit jury. This function is to be part of our country's judicial system and thereby "prevent its arbitrary use or abuse." Balzac v. Porto Rico, 258 U.S. 298, 310 (1922) (quoted with approval in *Powers*, 499 U.S. at 406). A jury trial in a criminal case is fundamental to the American scheme of justice. Duncan v. Louisiana, 391 U.S. 145, 149 (1968). The jury trial lies at "the base of all our civil and political institutions" and functions to protect our citizens against arbitrary government action. *Id.* at 178. In somewhat more majestic terms, de Tocqueville observed that "[t]he institution of the jury places the people themselves . . . on the judge's bench . . . [and] puts the direction of society into the hands of the people or of this class." TOCQUEVILLE, *supra* note 58, at 334–37 (quoted with approval in *Powers*, 499 U.S. at 407 and Miller-El v. Dretke, 545 U.S. 231, 272 (2005) (Breyer, J., concurring)). Justice Breyer further observed that the discriminatory use of peremptory challenges, "betray[s] the jury's democratic origins and undermine[s] its representative function." *Miller-El*, 545 U.S. at 272.

161. *See supra* Part IV. After meticulously analyzing virtually every reported judicial decision interpreting *Batson* over more than seven years, Professor Kenneth Melilli concluded that,

> *Batson* only makes analytical sense if one recognizes that it has shifted the primary focus from the rights of the litigants to the rights of prospective jurors. *Batson* is only able to depart so dramatically from *Swain* because it stands for the proposition that, at least in the context of racial discrimination, the rights of citizens to participate in their government, and in particular the right to participate by service on juries, outweighs the rights of litigants to remove jurors without cause.

Melilli, *supra* note 4, at 453 (quoted in Cronin, Comment Letter on Recommendation 13, *supra* note 11, Ex. A at 14). While these competing interests were identified within the context of equal protection objections to peremptory strikes, this litigation context is analytically distinct from the origins of the underlying right. In other words, just because the right has been discussed in connection with alleged efforts to violate it on racial grounds, it does not follow that the prospective juror's right can only be recognized when the striking party allegedly attempts to violate it on racial grounds. *See infra* notes 472–80 and accompanying text (explaining Professor Melilli's voting analogy).

Court explained that this juror harm arises from their exclusion from the jury, a body composed of the accused's "peers or equals."[162] This collective body of peers safeguards all citizens "against the arbitrary exercise of power by prosecutor or judge."[163] Thus, in its explanation of juror harm, the *Batson* Court relied upon the participatory interest of each citizen juror to function as a check upon arbitrary government action.[164] This participatory interest arises from our Founders' vision that citizens selected to deliberate as petit jurors would function to curb excessive or abusive exercise of governmental power.[165] Together with voting, this participation operates to maintain our Founder's design of majoritarian self-government.[166] Equally significant is a citizen's participation through the voting franchise functions as a check upon the legislative and executive branches.[167] Based upon this interrelationship, de Tocqueville observed that the American jury system is "as direct and extreme a consequence of the dogma of the sovereignty of the people as universal suffrage. They are . . . equally powerful means of making the majority prevail."[168]

This historical linkage between voting and jury service was essential to the Court's identification of juror "harm" in *Powers v. Ohio*.[169]

---

162. *Batson*, 476 U.S. at 86 (quoting Strauder v. West Virginia, 100 U.S. 303, 308 (1879)).

163. *Id.* at 86 (citing *Duncan*, 391 U.S. at 156).

164. *See id.*

165. *See supra* Part II. In *State v. Saintcalle*, the Washington Supreme Court recognized that juries are "a ground level exercise of democratic values. The government does not get to decide who goes to the lockup or even the gallows. Ordinary citizens exercise that right as a matter of democracy." 309 P.3d 326, 337 (Wash. 2013).

166. *See* sources cited *supra* notes 59–60 and accompanying text. Professor Amar observed that "the link between jury service and [voting] . . . is an important part of our overall constitutional structure . . . ." Amar, *supra* note 60, at 206. Moreover, "[j]ury service was understood at the time of the founding by leaders on all sides of the ratification debate as one of the fundamental prerequisites to majoritarian self-government." *Id.* at 218. The Equal Protection Clause seeks to ensure that state action reflecting the majority's will equally protects the minority's rights and interests. *See Batson*, 476 U.S. at 87.

167. *See* TARR, *supra* note 55, at 21–24. The inclusion of jury trial, but not voting, guarantees in every state's eighteenth-century constitution and in the Sixth Amendment further reflect that our Founders envisioned the deliberating juror as an indispensable vehicle through which citizens may participate in the operation of their government. *Id.*

168. TOCQUEVILLE, *supra* note 58, at 334–37 (quoted in Attridge v. Cencorp, Div., 836 F.2d 113, 113 (2d Cir. 1987) (explaining that the sanctity of jury deliberations precludes impeachment of verdict)). This coequal status is further supported in the United States Supreme Court holdings that citizen participation in both jury service and voting are "fundamental" rights or interests. *See* discussion *supra* Part II.

169. *See* 499 U.S. 400, 406–08 (1991). These interests are also raised in response to arguments that a litigant may not object to the exclusion of other citizens based upon their gender, "social class," or by a criminal defendant's exercise of a peremptory challenge. *See* Ballard v. United States, 329 U.S. 187, 195 (1946) (gender); Thiel v. S. Pac. Co., 328 U.S.

Defendant Powers was a White male charged with murder who objected under *Batson* to the State's use of peremptory challenges to remove seven Black prospective petit jurors.[170] The objecting party (i.e., the State) challenged the criminal defendant's standing to raise that equal protection claim.[171] Rejecting this standing argument, the Court did not exclusively focus on the rights of the litigants, but also considered the rights and interests of the prospective jurors.[172] The *Powers* Court concluded that the litigant had a sufficient interest in securing an untainted and enforceable verdict to be an effective proponent on behalf of the prospective juror.[173]

While resolving the defendant's equal protection claim, the *Powers* Court did acknowledge that peremptory strikes also harm the excluded jurors by "foreclos[ing] a significant opportunity to participate in civic life."[174] Emphasizing the importance of this participation, the Court further observed that "[t]he opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system."[175] This justification, the *Powers* Court clarified, was that jurors participate in "the machinery of justice" as part of the judicial system and thereby

---

217, 220 (1946) (social class); Georgia v. McCollum, 505 U.S. 42, 57 (1992) (exercise of a peremptory challenge).

170. *Powers*, 499 U.S. at 402–03.

171. *Id.* at 406.

172. *See id.* at 408–10.

173. *See id.* at 410–16. To further support litigant standing, the *Powers* Court observed that "it is unlikely that a juror dismissed because of race will possess sufficient incentive to set in motion the arduous process needed to vindicate his or her own rights." *Id.* at 401. Thus, the *Powers* decision partly explains why the contours of a prospective juror's right to serve on a jury has not been fully defined during the course of criminal litigation. *See id.* In such litigation, juror rights are addressed only when one litigant refers to them during an objection to the other litigant's effort to effectively exclude them through the exercise of a peremptory challenge. *See* Cronin, Comment Letter on Recommendation 13, *supra* note 11, at 10. Trial counsel are not focused on the rights of prospective jurors, but rather upon the interests of their clients. *See id.* at 6. *But see* JCJS GUIDE, *supra* note 4, at 18–19, L1–L9 (documenting experiences of excluded jurors in New Jersey). These practical realities of criminal litigation beg the question—*who speaks on behalf of the prospective jurors*? It is respectfully submitted that the spokesperson could be any government entity that eliminates peremptory challenges as proposed in this Article.

174. 499 U.S. at 409 (1991) (interpreting Batson v. Kentucky, 476 U.S. 79, 86–87 (1986)). Thus, the jury's function was not limited to protect litigants against government overreaching, but also "the jury was an essential democratic institution because it was a means by which citizens could engage in self-government." Amar, *supra* note 60, at 218. Professor Amar also notes the educational function of jury service—"[jurors] learn self-government by doing self-government." *Id.* at 221.

175. *Powers*, 499 U.S. at 406 (citing Duncan v. Louisiana, 391 U.S. 145, 147–58 (1968)).

"prevent its arbitrary use or abuse."[176] Emphasizing the importance of this participatory interest, the *Powers* Court observed that, apart from voting, most citizens view "the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process."[177] Expressly linking a citizen's right to vote with their right to serve on a jury, the *Powers* Court declared that "[w]hether jury service be deemed a right, a privilege, or a duty, the State may no more extend it to some of its citizens and deny it to others on racial grounds than it may invidiously discriminate in the offering and withholding of the elective franchise."[178] Thus, while deemphasizing its descriptive label, the *Powers* Court clearly recognized that participating in our democracy through jury service is a protected interest under our Federal Constitution.[179]

Although the *Powers* Court made this recognition in the context of a criminal defendant's racial discrimination claim, the prospective juror's right is not limited by the circumstances under which others seek to violate it. Logically, either the underlying right exists, or it does not. If it did not exist, then the prosecutor's purpose to preclude its exercise would be totally irrelevant and would not merit discussion by the *Powers* Court. Moreover, any suggestion that this recognition is limited to a Black criminal defendant's racial discrimination claim is undermined by the Court's prior consideration of excluded juror "harm" to women[180] and daily wage earners[181] and by its subsequent consideration of excluded juror harm in the exercise of peremptory challenges by criminal defendants.[182] Furthermore, this suggestion is squarely refuted by the

176. *Id.* at 406 (quoting Balzac v. Porto Rico, 258 U.S. 298, 310 (1922)).

177. *Id.* at 407; *see also* Marder, *supra* note 4, at 1721 (describing voting and jury service as the "badge[s] of full citizenship").

178. *Powers*, 499 U.S. at 408 (quoting Carter v. Jury Comm'n of Greene Cnty., 396 U.S. 320, 330 (1970)); *accord* JCJS GUIDE, *supra* note 4, at 18 ("Whether viewed as an obligation or an opportunity, the *right to serve as a juror* is essential to our democracy.") (emphasis added); Jon M. Van Dyke, *Jury Service Is a Fundamental Right*, 2 HASTINGS CONST. L.Q. 27, 28–29 (1975) ("[J]ury service and the vote are essential democratic links between the government and the people that must be protected against any legislative or bureaucratic action.") (linking voting and jury service rights as both are "fundamental" for equal protection analysis). The *Powers* Court also stated that "[a]n individual juror does not have a right to sit on *any particular petit jury*, but he or she does possess the right not to be excluded from one on account of race." 499 U.S. at 409 (emphasis added). Since the prospective jurors' rights were not being directly litigated in that case, the italicized language was dictum. Moreover, its relative insignificance is reinforced by the Court's de-emphasis of descriptive labels. *See id.* at 408.

179. *See* 499 U.S. at 408.

180. *See* Ballard v. United States, 329 U.S. 187, 193 (1946); *see also* Batson v. Kentucky, 476 U.S. 79, 102 (1986) (White, J., concurring).

181. Thiel v. S. Pac. Co., 328 U.S. 217, 223–24 (1946).

182. Georgia v. McCollum, 505 U.S. 42, 59 (1992).

Court's prior recognition in both *Batson*[183] and *Carter*[184] and its subsequent recognition, in *Edmonson v. Leesville Concrete Co.*,[185] and in *J.E.B. v. Alabama*[186] that prospective jurors hold rights protected by the Equal Protection Clause. "[B]y denying a person participation in jury service on account of his race," the *Batson* Court explained, "the State unconstitutionally discriminated *against the excluded juror.*"[187] These excluded jurors had standing to assert their equal protection claim, the *Carter* Court held.[188] In *Edmonson*, the Court upheld a *Batson* objection to the exclusion of two Black prospective jurors during a civil negligence trial.[189] "Recognizing the impropriety of racial bias in the courtroom," the *Edmonson* Court held that "the race-based exclusion *violates the equal protection rights of the challenged jurors.*"[190] *J.E.B.* involved the exclusion, through peremptory challenges, of all male prospective jurors in a paternity lawsuit.[191] The male defendant-petitioner alleged a gender-based *Batson* violation.[192] Citing *Powers* and *Edmonson*, the *J.E.B.* Court observed that, since *Batson*, it has repeatedly recognized that "*potential jurors*, as well as litigants, *have an equal protection right* to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice."[193]

---

183. *Batson*, 476 U.S. at 87.

184. Carter v. Jury Comm'r of Greene Cnty., 396 U.S. 320 (1970).

185. 500 U.S. 614, 616 (1991).

186. *J.E.B.*, 511 U.S. 127, 129, 143 (1994). The *Edmonson* Court maintained that its prior decisions in *Batson*, *Powers*, and *Carter* "made clear that a prosecutor's race-based peremptory challenge violates the equal protection rights of those excluded from jury service." *Edmonson*, 500 U.S. at 618 (first citing *Batson*, 476 U.S. at 84; then citing *Carter*, 396 U.S. at 320; and then citing Powers v. Ohio, 499 U.S. 400, 407–09 (1991)); *see also* Barbara D. Underwood, *Ending Race Discrimination in Jury Selection, Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 761 (1992).

187. *Batson*, 476 U.S. at 87 (emphasis added) (first citing Strauder v. West Virginia, 100 U.S. 303, 308 (1879); then citing *Carter*, 396 U.S. at 329–30; and then citing Neal v. Delaware, 103 U.S. 370, 386 (1880)).

188. *Carter*, 396 U.S. at 330.

189. *Edmonson*, 500 U.S. at 616–18.

190. *Id.* at 616 (emphasis added).

191. *J.E.B.*, 511 U.S. at 129–30.

192. *Id.* In that paternity and child support trial, the State-respondent exercised nine of its ten peremptory challenges to exclude male jurors. *Id.* After the defendant-petitioner used one of his peremptory challenges to excuse the remaining male juror, an all-female jury was emplaned and found that petitioner was the child's father. The trial court then ordered him to pay child support. *Id.*

193. *Id.* at 128 (emphasis added) (citing Powers v. Ohio, 499 U.S. 400, 411–13 (1991); *Edmonson*, 500 U.S. at 629–32). *Cf. Carter*, 396 U.S. at 329–31 (finding excluded jurors have standing to assert equal protection claim); Georgia v. McCollum, 505 U.S. 42, 59 (1992) (considering harm to excluded jurors).

After tracing the historical exclusion of women from both voting and jury service,[194] the *J.E.B.* Court then considered whether peremptory challenges based on gender stereotypes aided a litigant's effort to secure a fair and impartial jury.[195] Seeking to refute the gender discrimination claim, the respondent frankly acknowledged that he relied upon gender stereotypes to secure a "favorable" jury, rather than to purposefully discriminate against prospective jurors on the basis of their gender.[196] The Court found that respondent's effort to tactically "stack" the jury violated the Equal Protection Clause, holding "that gender, like race, is an unconstitutional proxy for juror competence and impartiality."[197] If the prospective jurors did not hold an underlying right or interest recognized under our Constitution, then there would be nothing that the Court in *Batson*, *J.E.B.*, and *Edmonson* would be required to protect

194. *J.E.B.*, 511 U.S. at 136 (quoting Frontiero v. Richardson, 411 U.S. 677, 685 (1973)) (observing that both Black people and women were "totally excluded" from voting). Regarding jury service, the Court noted that "[t]he prohibition of women on juries was derived from the English common law which, according to Blackstone, rightfully excluded women from juries under 'the doctrine of *propter defectum sexus,* literally, the "defect of sex."'" *Id.* at 132 (citing United States v. De Gross, 960 F.2d 1433, 1438 (9th Cir. 1992) (en banc) (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES *362)). This comparison was prompted by the defendant's argument that *Baston* was inapplicable because gender-based discrimination has never reached the same level of discrimination as race. *Id.* at 153. Rejecting this argument, the Court considered voting in determining that race and gender discrimination have similarities which "overpower those differences." *Id.* at 135 (quoting Note, *Beyond* Batson: *Eliminating Gender Based Peremptory Challenges*, 105 HARV. L. REV. 1920, 1921 (1992)).

195. *J.E.B.*, 511 U.S. at 136–40 (recognizing the "State's legitimate interest in achieving a fair and impartial trial" and phrasing the relevant issue as "whether peremptory challenges based on gender stereotypes provide[s] substantial aid to a litigant's effort to secure a fair and impartial jury"). This recognition expresses the Court's determination that "juror competency" is an ability to be fair and impartial and that impermissible juror "bias" is an inability to be fair and impartial. *See id* at 129.

196. *See id.* at 137–40. The respondent maintained,

> [T]hat its decision to strike virtually all the males from the jury in this case "may reasonably have been based upon the perception, supported by history, that men otherwise totally qualified to serve upon a jury . . . might be more sympathetic and receptive to the arguments of a man alleged in a paternity action to be the father of an out-of-wedlock child, while women equally qualified to serve upon a jury might be more sympathetic and receptive to the arguments of the complaining witness who bore the child."

Id. at 137–38. Thus, the *J.E.B.* defendant-respondent unsuccessfully proffered an arguably "trial related" reason, his desire to select a "favorable" jury, as his nondiscriminatory purpose to exclude the male prospective jurors. *See id.*

197. *J.E.B.*, 511 U.S. at 129. This holding reaffirms that juror competency "is an individual rather than a group or class matter." Thiel v. S. Pac. Co., 328 U.S. 217, 220 (1946). As applied to peremptory challenges, this individualized determination logically requires the striking party to articulate the reason for excluding a particular juror. *See supra* notes 23–24 (substantive due process), 27–28 (procedural due process).

under the Equal Protection Clause. The existence of that underlying juror right, therefore, was essential to the Court's equal protection holdings. Since that recognition was embedded within the Court's equal protection analysis, its potential due process application was "hidden in plain sight."

A unifying theme emerging from these decisions is the Court's recognition that the prospective jurors' "harm" arises from denial of their participatory rights or interests which, in turn arise from their citizenship.[198] Since this is a right of citizenship, it is shared by all citizens regardless of their race, gender, or socioeconomic classification.[199] This harm exists regardless of whether the exclusion of an individual prospective juror, or group of similarly classified jurors, would have made "an iota of difference"[200] in the outcome of the trial from which they were excluded. As *citizens*, they have a right to participate.[201]

This participatory right of jurors has also been recognized by the highest courts of several states. Explaining the Arizona Supreme Court's decision to abolish peremptory challenges, Chief Justice Brutinel stated that:

> In terms of effectuating people's *constitutional rights to* be able to *serve on a jury*, which is really what I think is what *Batson* is about, in order to make that process more effective and more efficient, [abolition] just makes a lot of sense. And I think that

198. *See supra* Section V.A.

199. *See id.*

200. *J.E.B.*, 511 U.S. at 134 (quoting Ballard v. United States, 329 U.S. 187, 193–94 (1946)).

201. The Court's Fourth and Fourteenth Amendment equal protection analysis has been distinguished from its Sixth Amendment fair-cross-section analysis, in part, upon the latter's consideration of an alleged enhancement of the quality of deliberations by diverse juries. *Compare J.E.B.*, 511 U.S. at 134, 146 (finding equal protection violation was not dependent upon outcome), *with* Taylor v. Louisiana, 419 U.S. 522, 532 (1975) (discussing "a flavor, a distinct quality" of diverse jury deliberations). Justice Rehnquist criticized the *Taylor* approach, describing reliance upon the qualities of jury deliberations as rooted in "transcendental notions[s]" and "mystical incantations." Duren v. Missouri, 439 U.S. 367, 371 n.* (1979) (Rehnquist, J., dissenting). Discussion of the deliberation content has contributed to the conflation of equal protection standards with fair cross section standards." *See Chernoff*, *supra* note 90, at 172. Since the content of jury deliberations are confidential, the positions advocated in this Article are not dependent upon what their content may be in any particular case. Those positions are dependent upon the citizen's right to engage in those deliberations and thereby participate in our democracy. *See supra* Section V.A. Their right is not dependent upon how their participation may affect the content of deliberations or the outcome of the verdict in any particular case. *Id.*

> was probably the driving motivation; it certainly was for me, and [I suspect] for a number of my colleagues.[202]

Similarly, interpreting the broad protections afforded under their state constitution,[203] the New Jersey Supreme Court in *State v. Andujar* found that the State's exclusion of a Black prospective juror implicated that juror's equal protection rights.[204] Applying *Batson* and its corresponding state standard,[205] the *Andujar* court observed that the exercise of a peremptory challenge upon the prospective juror "implicates constitutional concerns regarding that person's *rights* to sit on a jury."[206] Thus, the *Andujar* court recognized some residual right of a prospective juror to serve on a particular petit jury.

B. Each Prospective Juror Holds a Liberty Interest in Maintaining Their Good Reputation

The breadth of protection accorded to a prospective juror's liberty interest is illustrated through analysis of due process objections to sex offender registration and supervision statutes. Convicted sex offenders have a liberty interest sufficiently affected by state sexual offender registration laws to trigger due process scrutiny.[207] It is well established

---

202. *See* Frampton, *supra* note 7, at 49–50 (emphasis added) (quoting Chief Justice Brutinel interview).

203. Despite the absence of express "due process" language, the New Jersey Constitution has been interpreted to provide more protections for an individual than afforded under the Federal Constitution. *See* Doe v. Poritz, 662 A.2d 367, 414 (N.J. 1995) (sex offender registration; due process); State v. Andujar, 254 A.3d 606, 621 (N.J. 2021) (jury selection; equal protection). Several other state constitutions have been interpreted to afford more due process protection than presently recognized under our Federal Constitution. *See, e.g.*, Ryan v. Cal. Interscholastic Fed'n-San Diego Section, 114 Cal. Rptr. 2d 798, 814 (Cal. Ct. App. 2001) (comparing protections under the California State Constitution and the Federal Constitution); State v. Gunwall, 720 P.2d 808, 814–15 (Wash. 1986) (same; Washington); Ramos v. Town of Vernon, 761 A.2d 705, 719 (Conn. 2000) (same; Connecticut); Nguyen v. State, 878 N.W.2d 744, 755 (Iowa 2016) (same; Iowa). *See Batson* Reform, *supra* note 7.

204. *Andujar*, 254 A.3d at 619; *see also* State v. Andrews, 78 A.3d 971, 983 (N.J. 2013) (applying *Batson* to defense strikes); *accord* State v. Saintcalle, 309 P.3d 326, 337 (Wash. 2013) ("[F]undamental to our democracy is that all citizens have the opportunity to participate in the organs of government, including the jury."). This juror right is independent from any litigant right.

205. *See* State v. Gilmore, 511 A.2d 1150, 1170–71 (N.J. 1986) (Clifford, J., dissenting).

206. *Andujar*, 254 A.3d at 616 (emphasis added).

207. *See e.g.*, Conn. Bd. of Pub. Safety v. Doe, 538 U.S. 1, 3–4 (2003); Smith v. Doe, 538 U.S. 84, 99 (2003); Doe v. Tandeske, 361 F.3d 594, 597 (9th Cir. 2004); Neal v. Shimoda, 131 F.3d 818, 829 (9th Cir. 1997). For an opposing view, see *Sturm v. Clark*, 835 F.2d 1009, 1012–13 (3d Cir. 1987), which is distinguished in *Poritz*, 662 A.2d at 418–20. *See generally* Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1113–14 n.293 (2011); Wayne A.

that sex offender classification is stigmatizing, adversely affecting the defendant's reputation.[208] Distinguishing defamation cases in which mere damage to reputation or stigma was insufficient to qualify as a federally protected liberty interest, federal courts have found "stigma plus" in sex offender cases.[209] This "plus" was often based on other aspects of the sex offender laws, including limitations upon the registrant's physical movement.[210] While it remains unclear what the outer boundary of this federal "plus" is, a state-mandated limitation upon a citizen's physical movement qualifies under the Federal Constitution.

As applied to the jury selection process, it is submitted that the exercise of a peremptory challenge impinges a prospective juror's liberty interest in maintaining their good reputation. One need to look no farther than the *Dred Scott* decision for evidence of the stigma of inferiority which our government branded upon enslaved peoples.[211] This stigma continued through the exclusion of Black citizens from jury service.[212] As previously noted, the *Strauder* Court held that de jure exclusion of Black citizens from the jury venire violated their equal protection rights.[213] Explaining this holding, the Court recognized that:

> The very fact that [Black people] are singled out and expressly denied . . . all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, *is practically a brand upon them*, affixed by the law, an assertion *of their inferiority*, and a stimulant to that race prejudice which is an impediment to

---

Logan, *Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws*, 89 J. CRIM. L. & CRIMINOLOGY 1167, 1185 (1999).

208. *See* Carpenter & Beverlin, *supra* note 207, at 1113 (noting "public shame and humiliation" accompanying disclosure of sex offender status). In *Neal*, the court opined that "[w]e can hardly conceive of a state's action bearing more 'stigmatizing consequences' than the labeling of a prison inmate as a sex offender." *Neal*, 131 F.3d at 829. That consequence seemingly also occurs whenever the criminal justice system permits the label of "unfit for jury deliberations" to be imprinted upon the juror through their exclusion via peremptory challenge use.

209. *See* Logan, *supra* note 207, at 1185–86 (criticizing "stigma plus" test). *Compare* Paul v. Davis, 424 U.S. 693, 708–11 (1976) (stigma alone is insufficient), *with Smith*, 538 U.S. at 99 (stigma plus).

210. *See* Carpenter & Beverlin, *supra* note 207, at 1098, 1111 (citing prohibitions against residing within proximity to an elementary school and requiring an ankle monitor).

211. *See* Dred Scott v. Sandford, 60 U.S. 393, 409, 416–17 (1857).

212. *See generally* Strauder v. West Virginia, 100 U.S. 303 (1879).

213. *Id.* at 310.

> securing to individuals of the race that equal justice which the law aims to secure to all others.[214]

Although this stigma was recognized more than 140 years ago, the judiciary continues its acquiescence to trial counsels' reliance upon racial stereotypes in their exercise of peremptory challenges.[215] This acquiescence perpetuates this stigma of inferiority.[216] The conceptions of a racial hierarchy that underlie this stigma are particularly relevant in determining the applicability of due process protections which were enacted, in large part, to eradicate the official practices which perpetuate this stigma.[217] A petit jury is "a body . . . composed of the peers or equals of the person whose rights it is selected or summoned to determine."[218] The removal of a prospective juror through a peremptory strike, therefore, reflects a determination that the juror is not the equal of either the litigant or any seated juror. More specifically, the prospective juror is inferior to both their fellow citizens seated in the jury box and at counsel table. This stigma is most clearly apparent when the peremptory challenge is exercised to exclude a prospective juror who is Black or within another protected group.[219] However, the stigma is not so limited. It flows from counsel's determination that the excused juror is not the "peer" of their client or of their fellow citizens who remains in the jury box. Thus, each exercise of a peremptory challenge stigmatizes the

---

214. *Id.* at 308 (emphasis added); *accord* State v. Saintcalle, 309 P.3d 326, 337 (Wash. 2013) (acknowledging a "badge of inferiority" affixed through juror exclusion).

215. *See* News Release, Arizona Sup. Ct., Administrative Office of the Courts, Arizona Supreme Court Eliminates Peremptory Strikes of Jurors, (Aug. 30, 2021), https://www.azcourts.gov/Portals/201/Press%20Releases/2021/083021Jury.pdf (announcing that Arizona's State Courts would be the first in the nation to eliminate peremptory challenges on January 1, 2022).

216. Kennedy, *supra* note 4, at 228 (explaining that continued acquiesce contributes to the public perception that "race not only matters but *should* matter in the adjudication of guilt or innocence"); s*ee also* Batson v. Kentucky, 476 U.S. 79, 87–88 (1986) (acknowledging that this "[d]iscrimination within the judicial system is most pernicious").

217. *See supra* Section III.B. These origins are also relevant in determining the nature of the interests suitable for due process protection. *See* Bd. of Regents State Colls. v. Roth, 408 U.S. 564, 569–70 (1972) ("The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property.") Since the exercise of a peremptory challenge precludes the exercise of this right, the severity of the infringement is total. *See supra* note 156 (explaining that loss need only be more than *de minimis*).

218. *Batson*, 476 U.S. at 86; *accord* Duncan v. Louisiana, 391 U.S. 145, 151–52 (1968) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *349–50 (Cooley ed., 1899)) (acknowledging that every criminal accusation "should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours").

219. *See supra* notes 97–100 and accompanying text.

"inferior" excluded juror.[220] Under penalty of contempt, prospective jurors are summoned to appear in court to sit on petit juries.[221] It is submitted that this court-compelled limitation upon the jurors' physical movement provides the "plus" to the stigma of inferiority required to constitute a liberty interest recognized under the federal Due Process Clause.

While the scope of "stigma plus" may remain an unsettled area of federal law, damage to reputation alone may be sufficient to trigger due process protection in certain states, such as New Jersey. Interpreting its state constitution, the New Jersey Supreme Court in *Doe v. Poritz* found that a convicted defendant subject to sex offender registration and notification requirements had a protectable liberty interest in their reputation.[222]

While the confluence of reputation and privacy may arguably satisfy the federal "stigma plus" standard,[223] the *Poritz* court clearly held that either interest is sufficient to support due process scrutiny under the New Jersey Constitution.[224] Although no privacy interest is affected by the nontransparent exercise of a peremptory challenge, the *Doe* decision establishes that prospective jurors do have a liberty interest in maintaining their good reputation, and this interest is cognizable under the New Jersey Constitution.[225]

---

220. Significantly, these jurors are excluded in open court and in the presence of their fellow citizens. *Cf.* Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971) (finding public posting of "excessive drinking" names imposes stigma warranting due process protection). The stigmatizing conduct of juror exclusion occurs during an official proceeding subject to judicial supervision. Continued judicial acquiescence to this practice undermines the check upon exercise of judicial power which our founders envisioned. *See supra* Part II (discussing jurors' role in our majoritarian form of self-government).

221. *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 622–24 (1991) (summarizing jury summons procedure); JCJS GUIDE, *supra* note 4, attach. E at 1, 3 (same).

222. Doe v. Poritz, 662 A.2d 367, 419 (N.J. 1995), *cited with approval in* Doe v. Att'y Gen., 686 N.E.2d 1007, 1011–12 (Mass. 1977); *cf.* Noble v. Bd. of Parole & Post-Prison Supervision, 964 P.2d 996, 997 (Or. 1998) (finding designation as a "predatory sex offender" requires notice and a hearing); State v. Guidry, 96 P.3d 242, 244 (Haw. 2004) (explaining lifetime sex offender registration "implicates a [defendant's] protected liberty interest"). The *Poritz* court further observed that, under the Federal Constitution, "[m]ere damage to reputation, apart from the impairment of some additional interest previously recognized under state law, is not cognizable under the due process clause." *Poritz*, 662 A.2d at 418–19 (quoting Sturm v. Clark, 835 F.2d 1009, 1012 (3d Cir. 1987)).

223. Logan, *supra* note 207, at 1193–95.

224. *Poritz*, 662 A.2d at 419.

225. *See Doe*, 686 N.E.2d at 1011–12.

C. Each Prospective Juror Holds an Interest to Be Protected from Arbitrary Government Action Under "Fundamental Fairness" Principles.

The essence of due process is an abiding sense of "fundamental fairness" in the relationship between the government and its citizens.[226] While this concept clearly affects what process is due under the federal courts,[227] some state courts also employ fundamental fairness.[228] Alternatively stated, in addition to interpreting "property" and "liberty" language within their state constitutions, these state courts have extended these protections on independent state grounds through application of the "fundamental fairness" doctrine. For example, the New Jersey Supreme Court in *Doe v. Poritz* concluded that considerations of "fundamental fairness" required that defendants subject to potential sex offender registration and reporting were entitled to a pre-classification hearing.[229] The *Poritz* court described this doctrine as follows: "New Jersey's doctrine of fundamental fairness 'serves to protect citizens generally against unjust and arbitrary governmental action, and specifically against governmental *procedures* that tend to operate arbitrarily.'" [230]

---

226. *See* Goss v. Lopez, 419 U. S. 565, 573–74 (1975) (referring to fundamentally fair procedures applicable to a recognized right); *accord* Galvin v. Press, 347 U.S. 522, 530 (1954); Rochin v. California, 342 U.S. 165, 173–74 (1952) (fundamental fairness; substantive due process).

227. *See infra* Section VII.B.

228. *See, e.g.*, *Poritz*, 662 A.2d at 421–22; *Doe*, 686 N.E.2d at 1010–11.

229. *Poritz*, 662 A.2d at 421–22. Finding the *Doe v. Poritz* decision "instructive," the Massachusetts Supreme Court held the "principle of fundamental fairness" requires a prenotification hearing for a convicted sex offender. *Doe*, 686 N.E.2d at 1011, 1014.

230. *Poritz*, 662 A.2d at 421 (quoting State v. Ramseur, 524 A.2d 188, 318 (1987) (Handler, J., dissenting)). Describing the reach of this doctrine's protections, the *Poritz* court explained that,

> [T]his doctrine has been invoked when the actions of government, though not quite rising to the level of a constitutional violation, nonetheless included aspects of unfairness which required this Court's intervention . . . Although we have applied the doctrine of fundamental fairness in a variety of contexts, there is one common denominator in all of those cases: a determination that someone was being subjected to potentially unfair treatment and there was no explicit statutory or constitutional protection to be invoked.

Id. at 422; *accord* State v. Melvin, 248 A.3d 1075, 1091, 1094 (N.J. 1995) (finding "arbitrary" government action by trial court which imposed sentence in compliance with Federal Constitution and relies upon "fundamental fairness" doctrine to support both divergence and reversal). Significantly, the fundamental fairness doctrine may support procedures which are not otherwise constitutionally compelled. *Poritz*, 662 A.2d at 421 (citing Monks v. N.J. State Parole Bd., 277 A.2d 193, 199 (N.J. 1971)) (holding that a prisoner is entitled to a statement of reasons for denial of parole); *accord* Donaldson v. Bd.

Peremptory challenges are, by definition, arbitrary.[231] Blackstone described them as "an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all."[232] To effectuate their intended purpose of empaneling a fair jury, it was envisioned that this arbitrary challenge "must be exercised with full freedom, or it fails of its full purpose."[233] This arbitrary nature enables counsel to exclude prospective jurors for a good reason, a bad reason, or for no reason at all. Thus, the *essential nature* of a peremptory challenge lies in its preservation of counsel's ability to exclude a potential juror without a reason stated, without inquiry and without being subject to the court's control.[234]

When their exercise does not promote the selection of a fair and impartial jury, peremptory challenges are equally arbitrary in operation.[235] Thus, even if the participatory and liberty interests of prospective jurors were deemed insufficient, it is submitted that principles of fundamental fairness provide an independent and sufficient basis to find prospective jurors have a constitutionally recognized right or interest which is adversely affected by the exercise of peremptory challenges.

---

of Educ., 320 A.2d 857, 861–62 (1974) (finding fundamental fairness requires a statement of reasons for tenure denial to a public-school teacher).

231. *See* sources cited *supra* note 3.

232. 4 WILLIAM BLACKSTONE, COMMENTARIES *353 (15th ed. 1809), *quoted in* Swain v. Alabama, 380 U.S. 202, 212 n.9 (1965).

233. *Swain*, 380 U.S. at 219 (quoting Lewis v. United States, 146 U.S. 370, 379 (1892)); *see also* State v. Gilmore, 511 A.2d 1150, 1162 (N.J. 1986).

234. Batson v. Kentucky, 476 U.S. 79, 91 (1986) (stating that peremptory challenges have historically been "free of judicial control"); *Swain*, 380 U.S. at 291 (finding judicial inquiry is "inapplicable" with the exercise of this "arbitrary and capricious right"). By acquiescing to the continuation of a practice which is definitionally *beyond the court's control*, the judiciary is arguably abdicating its supervisory responsibilities over the jury selection process. *See* State v. Saintcalle, 309 P.3d 326, 348 (Wash. 2013) (Gonzalez, J., concurring); Cronin, Comment Letter on Recommendation 13, *supra* note 11, Ex. A at 19. Relying upon this definition, some proponents erroneously maintain that "[t]he selection of a jury is the job of the trial lawyers, not the judge." Letter from Eileen O'Connor, Essex County Bar Association President, Letter to the 2021 Judicial Conference of New Jersey on Jury Selection 3 (Oct. 28, 2021) [Hereinafter Essex County Bar Letter]. However, it is well established that "the job of enforcing *Batson* rests first and foremost with trial judges." Flowers v. Mississippi, 139 S. Ct. 2228, 2243 (2019); *see also* State v. Andujar, 254 A.3d 606, 623 (N.J. 2021) ("'The courts, not the parties, oversee jury selection." (citation omitted)); Stave v. Holmes, 221 A.3d 407, 442 (Conn. 2019) (Mullins, J., concurring) (questioning whether protection of litigant and juror rights "should be left to self-interested parties"); *Broderick*, *supra* note 4, at 417 (criticizing peremptory challenges for entrusting to private individuals the decision of who may participate in our democracy through jury service).

235. *See infra* Section VI.A.1. (relying upon stereotypes unrelated to a prospective juror's ability to be fair and impartial are arbitrary in exercise).

VI. THE EXERCISE OF PEREMPTORY CHALLENGES VIOLATES SUBSTANTIVE DUE PROCESS

In *Peters v. Kiff*, the Supreme Court summarily affirmed a district court's holding that the exclusion of Black jurors from a White defendant's criminal trial violated the defendant's due process rights.[236] While this standing ruling[237] and the resolution of a due process claim[238] have been favorably cited, the actual substantive due process analysis approved by the Court has drawn scant attention.[239] While possible explanations abound,[240] this Article will not belabor them, but rather shall apply the substantive due process jurisprudence which has evolved over the seventy-four years since that decision.

After its *Peters v. Kiff* decision, the Court applied substantive due process guarantees to the related voting right in *United States v. Texas*.[241] Since voting is a fundamental personal liberty, the district court required the State to establish that the challenged poll tax was necessary to accomplish a permissible state interest.[242] The fundamental importance of the affected voting right and underlying personal liberty interest also required the State to demonstrate that their poll tax was

---

236. Peters v. Kiff, 407 U.S. 493, 505 (1972). Since the issue presented by defendant Peters involved his due process rights, rather than those of the prospective jurors, this decision is factually distinguishable. However, once the due process rights of prospective jurors are recognized, *Peters* supports the application of substantive due process protections to that recognized right.

237. *See, e.g.*, Powers v. Ohio, 499 U.S. 400, 408 (1991).

238. *See, e.g.*, *id.* at 421 (Scalia, J., dissenting) (noting due process prohibition of arbitrary juror exclusion).

239. *See* Stanton D. Krauss, Peters v. Kiff *and the Debate About the Standing of White Defendants to Object to the Exclusion of Black Jurors After* Batson*: The Nonuse and Abuse of Precedent*, 68 WASH. U. L.Q. 103, 104 (1990). These explanations include perceptions that it is a case resolving "standing" or an equal protection challenge, its reasoning arguably conflates due process, equal protection and fair cross section jurisprudence, and the ambiguity of its language. *Id.* at 103–05.

240. *See generally* United States v. Texas, 252 F. Supp. 234 (W.D. Tex. 1966), *aff'd* 384 U.S. 155 (1966).

241. *Texas*, 252 F. Supp. at 250–51; *see also* Griffin v. Burns, 570 F.2d 1065, 1075, 1078–79 (1st Cir. 1978) (explaining that any restrictions on the right to vote "strike at the heart of representative government;" procedures for certifications of absentee and shut-in votes failed "on its face to afford fundamental fairness") (due process). *Cf.* League of Women Voters v. Brunner, 548 F.3d 463, 476 (6th Cir. 2008) (quoting Dunn v. Blumstein, 405 U.S. 330, 336 (1972) (stating that "a citizen has a constitutionally protected right to participate in elections" and the right to vote is "fundamental")) (equal protection).

242. *Texas*, 252 F. Supp. at 251. When fundamental rights are abridged, the breadth of that "abridgement must be viewed in the light of less drastic means available to achieve the same basic purpose." *Id.* (quoting Shelton v. Tucker, 364 U.S. 479, 488 (1960)).

the least drastic means to achieve a legitimate state policy objective.[243] The record reflected four proffered State justifications for the poll tax.[244] The district court found that these proffered justifications were unpersuasive, particularly in view of the less restrictive methods to achieve the proffered objectives.[245] For example, the court concluded that voting registration could be accomplished through a system that does not require payment of a fee which functions to constrict exercise of the voting franchise.[246] Accordingly, the Supreme Court summarily affirmed the district court's holding that the poll tax violated substantive due process principles.[247]

In view of the "fundamental" status of both voting rights and jury trial rights,[248] it is submitted that the Court's affirmance in *Texas v. United States* fully supports application of substantive due process principles to the denial of the fundamental right of prospective jurors to serve on a particular petit jury.[249] This conclusion is further supported by the widespread conditioning of juror eligibility upon voter eligibility[250] and efforts by some to rely upon limited Black voter eligibility to limit Black citizens' ability to serve on a particular petit jury.[251] Application of the Court's due process analysis of the right to vote in *United States v. Texas* to the jury right is further supported by its subsequent observation in *Powers* that the State can no more deny jury service than it can withhold the elective franchise.[252]

---

243. *Id.* at 251. These justifications were that: (1) it protects the integrity of the ballot, (2) it serves as a registration device, (3) it limits the electorate to those "interested enough" to pay the poll tax and "competent enough" to acquire the required funds, and (4) it enforces an otherwise valid tax. *Id.*

244. *Id.* at 251–52.

245. *Id.*

246. *Id.*

247. *Texas v. United States*, 384 U.S. 155 (1966).

248. *See supra* Part II.

249. *See* Texas v. United States, 252 F. Supp. 234 (W.D. Tex. 1966), *aff'd*, 384 U.S. 155 (1966). As applied to peremptory challenge use, it is submitted that the legitimate state interest would be the selection of a fair and impartial jury. Proponents will be unable to establish that peremptory challenges promote the selection of a fair and impartial jury. *See infra* Section VI.A.3. The justifications historically proffered to preserve peremptory challenges are either substantively insufficient or are more onerous than necessary to obtain the legitimate objective. *See infra* Section VI.A.5. It is submitted that the least onerous procedure is the cause challenge. *See infra* Section VI.B.

250. *See* JCJS GUIDE, *supra* note 4, attach. E at 5.

251. *See supra* notes 105–10 and accompanying text (discussing segregationist response to *Norris v. Alabama*).

252. Powers v. Ohio, 499 U.S. 400, 408 (1991) (quoting Carter v. Jury Comm'n of Greene Cnty., 396 U.S. 320, 330 (1970)) (applying Equal Protection Clause); *see also* Professor Melilli's voting, *infra* notes 476–83.

Once a right is recognized, the exercise of that right must be adversely affected by a state actor to trigger substantive due process scrutiny. In *United States v. Texas*, a poll tax restrained, but did not prohibit, any otherwise qualified citizen from voting.[253] In comparison, the adverse effect of peremptory challenges upon a prospective juror's right is far more extensive. It is total—the exercise of a peremptory challenge completely prohibits the otherwise qualified citizen juror from exercising their right to serve on a particular jury.[254] Hence, the exercise of a peremptory challenge upon an otherwise qualified prospective juror has the requisite adverse effect upon that juror's exercise of their constitutionally protected right or interest.

Substantive due process analysis then requires the state actor who limits the exercise of a constitutional right to demonstrate that the limitation is necessary to advance a legitimate government interest.[255] The Court has repeatedly held that the "sole purpose [of peremptory challenges] is to permit litigants to assist the government in the selection of an impartial trier of fact."[256] Similarly, the Court has emphasized that "peremptory challenges are not constitutionally protected fundamental rights; rather, they are but one state-created means to the constitutional end of an impartial jury and a fair trial."[257] As applied to selecting a petit jury, this sole legitimate purpose requires its proponents to demonstrate why peremptory challenges are necessary to select a fair and impartial jury. In Section VI.A., this Article analyzes the justifications that proponents most frequently proffer for continued peremptory challenge use. This analysis will be guided by the Supreme Court's repeated determination that "the right to a peremptory challenge may be withheld altogether without impairing the constitutional guarantee of an impartial jury and a fair trial."[258] This analysis will be influenced by the widespread recognition that "the very notion of peremptory challenges is

253. *Texas*, 252 F. Supp. at 251.

254. *See supra* Part V (explaining origins of this constitutionally cognizable right).

255. *See Texas*, 252 F. Supp. at 251.

256. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620 (1991) (quoted in Georgia v. McCollum, 505 U.S. 42, 52 (1992)); *accord* Batson v. Kentucky, 476 U.S. 79, 125 (1986) (Burger, C.J., dissenting) (explaining that peremptory challenges are "a means to achieve an impartial jury," thereby providing a "substantial, if not compelling" state interest for their retention).

257. *McCollum*, 505 U.S. at 57.

258. *Id.* (citing Frazier v. United States, 335 U.S. 497, 505 n.11 (1948); United States v. Wood, 299 U.S. 123, 145 (1936); Stilson v. United States, 250 U.S. 583, 586 (1919); Swain v. Alabama, 380 U.S. 202, 219 (1965)); *see also Swain*, 380 U.S. at 243 (Goldberg, J., dissenting).

in hopeless conflict with our ideals of what an impartial jury is and how it should be selected."[259]

Substantive due process also requires state actors to demonstrate that the limitation it imposes is the least restrictive method to advance a legitimate government interest.[260] In Section VI.B., we shall analyze whether, despite the availability of cause challenges,[261] these proponents can establish that a fair and impartial jury cannot be selected through less restrictive methods than continued peremptory challenge use.

A. Proffered Justifications

Proponents of peremptory challenges have proffered five principal justifications[262] for their retention. They maintain that peremptory

---

259. Hoffman, *supra* note 4, at 812; *accord* Broderick, *supra* note 4, at 371 (arguing that a peremptory challenge "stands as an anti-democratic artifact that countermands a century of civil rights legislation and without a substantial justification"); Melilli, *supra* note 4, at 502 (arguing that peremptory challenges are "entirely counterproductive" in securing a fair and impartial jury).

260. *See Texas*, 252 F. Supp. at 251.

261. *See* Lewis F. Powell, Jr., *Due Process Limits on Prosecutorial Peremptory Challenges*, 102 HARV. L. REV. 1013, 1034 (1989) ("[T]he due process clause essentially demands that all state challenges [be] for cause.").

262. These justifications have been proffered in response to efforts to eliminate peremptory challenges because the *Batson* paradigm was insufficient to protect citizens' equal protection rights. *See* Cronin, Comment Letter on Recommendation 13, *supra* note 11, Ex. A at 16–18. In that context, these proffered justifications were premised upon "various benefits . . . identified in theory, but these alleged benefits remain unsupported, specious, or de minimis and clearly outweighed by related costs." State v. Saintcalle, 309 P.3d 326, 363 (Wash. 2013) (Gonzales, J., concurring) (citing, Hoffman, *supra* note 4 at 812–13); *accord* Broderick, *supra* note 4, at 370 ("The peremptory[] utility in furthering the objective of a fair trial [has never] been demonstrated. Indeed, claims extolling the value of the peremptory challenge are predicated on nothing more than baseless speculation and courthouse apocrypha."). It is submitted that their legal insufficiency will be similarly exposed under due process analysis. *See infra* Section VI.C. The vehemence of proponents' efforts to retain peremptory challenges has influenced the willingness of reform advocates to pursue elimination. *See* JURY SELECTION WORKGROUP, PROPOSED NEW GR 37 FINAL REPORT app. 2, at 1 (Wash. State Cts. 2018) [hereinafter GR 37 FINAL REPORT] (efforts to eliminate peremptories will generate "vigorous push back from trial attorneys"); CONNECTICUT REPORT, *supra* note 8, at 31 (noting that "great resistance" to eliminating peremptory challenges could make the required constitutional amendment a "non-starter"); WEISS REPORT, *supra* note 72, at 8–9 (acknowledging "hue and cry" of trial bar renders elimination in New Jersey "impractical"), ACLU-NJ, Comment on JCJS, at 4 (Nov. 5, 2021) (declining to recommend "utopian" remedy of eliminating peremptory challenges); Cronin, Comment Letter on Recommendation 25, *supra* note 11, at 1–2 (proposing "discretionary challenges" as an alternative to the preferred remedy of eliminating peremptory challenges); Frampton, *supra* note 7, at 35 (observing that since many Arizona Task Force members did not believe that elimination was possible, they initially supported a variation of Washington General Rule 37); Frampton, *supra* note 7, at 35 (noting "organized opposition" in every jurisdiction considering jury selection reform). Advocates who drafted

challenges promote the selection of a fair and impartial jury by allowing counsel to: (1) exclude "extreme" jurors in term of "bias and impartiality"; (2) exclude jurors harboring "subtle biases"; (3) increase the likelihood that their clients will accept the verdict; (4) benefit from a "safety net" protecting them from unduly restrictive judicial interpretation of excusal for "cause";[263] and (5) preserve these challenges in deference to their "very old credentials."[264] These justifications will be assessed in view of the availability of cause challenges and the promising jury selection reforms which are currently underway throughout America.

This assessment will include consideration that peremptory challenges are arbitrary and nontransparent in both definition[265] and exercise.[266] This non-transparency facilitates both impermissible tactical "stacking,"[267] conscious strategic racial discrimination,[268] and the continued potential influence of implicit bias in the jury selection system.[269] The *Batson* paradigm's ineffectiveness to curb these abuses and to otherwise promote the selection of a fair and impartial jury will be the final topic addressed in this assessment.

Washington's General Rule 37 frankly acknowledged that "[d]oing away with peremptory challenges altogether was ruled out early on because of strong opposition from several constituent organizations." *See* La Rond Baker, et al., *Fixing* Batson, 48 LITIG. 1, 4 (Summer 2022), https://www.americanbar.org/content/dam/aba/publications/litigation_journal/summer-2022/fixing-batson.pdf. However, since the vehemence of that opposition is not a legal justification, it is not amenable to substantive discussion in this Section.

263. *See* N.J. STATE BAR ASS'N, *supra* note 33, at 23–27; Cronin, Comment Letter on Recommendation 13, *supra* note 11, Ex. A at 12, 16–18; *see also* Powers v. Ohio, 499 U.S. 400, 425 (1991) (Scalia, J., dissenting) (referencing "unquestionable advantage" of "winnowing out possible (though not demonstrable) sympathies and antagonisms on both sides, to the end that the jury will be the fairest possible").

264. *See* N.J. STATE BAR ASS'N, *supra* note 33, at 23; Cronin, Comment Letter on Recommendation 13, *supra* note 11, at 5; *accord Swain*, 380 U.S. at 212, 219 (referencing these "very old credentials" and notes the "long and widely held belief that peremptory challenge is a necessary part of trial by jury") (cited in Batson v. Kentucky, 476 U.S. 79, 91 n.15, *id.* at 118–119 (Burger, C.J., dissenting)). Before *Batson*, frequently proffered justifications also included: (1) to "avoid[] trafficking in the core . . . truth in most common stereotypes" by allowing juror exclusion without having to admit group bias is the reason for the exclusion, and (2) to permit litigants to screen out common ethnic or group biases. Barbara Allen Babcock, *Voir Dire: Preserving its Wonderful Power*, 27 STAN. L. REV. 545, 551–54 (1975) (pre-*Batson*) (quoted with approval in *Batson*, 476 U.S.at 121 (Burger, C.J., dissenting)). As other commentators have observed, these justifications were expressly rejected by the *Batson* majority. *See Due Process Limits on Prosecutorial Peremptory Challenges*, *supra* note 261, at 1030–31.

265. *See supra* note 3 (definition).

266. *See infra* Section VI.A.1. (exercise).

267. *See infra* Section VI.A.1.

268. *See infra* Section VI.A.1.

269. *See* Cronin, Comment Letter on Recommendation 13, *supra* note 11, at 2–12.

Many of these proffered justifications require consideration of the potentially corrupting influence of implicit bias which operates through a heuristic or mental short cut.[270] Implicit bias is best understood in light of System I and System II processes.[271] System I "is rapid, intuitive, and error-prone; System II is more deliberative, calculative, slower, and often more likely to be error-free."[272] Implicit bias is rooted within System I as it "is largely automatic; the characteristic in question (skin color, age, sexual orientation) operates so quickly . . . that people have no time to deliberate. It is for this reason that people are often surprised to find that they show implicit bias."[273] Through the cognitive process of categorization, a readily observable characteristic, such as skin color, is assigned to a group attribution, such as violence.[274] Although much heuristic-based thinking is rooted in System I, it may be overridden, under certain conditions, by the deliberate thought contemplated within System II.[275] This is the "cognitive override" process.[276] Categorization is inherent in group stereotyping which, in turn, is heavily relied upon by the striking party in their exercise of peremptory challenges.[277] In

---

270. *See* Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 973–74 (2006).

271. *Id.* at 975.

272. *Id.* at 974.

273. *Id.* at 975.

274. *See* Page, *supra* note 4, at 160. As Judge Bennett explains, "implicit bias is formed by repeated negative associations—such as the association of a particular race with crime—that establish neurological responses in the area of the brain responsible for detecting and quickly responding to danger." Bennett, *supra* note 4, at 152. These "intuitive associations, for example, of African Americans with violence, 'seem to reflect automatic, intuitive judgments, while active deliberation limits such biases.'" *Id.* at 157 (quoting Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 31 (2007)). These unconscious biases may directly conflict with egalitarian values which the actor consciously holds. Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCH. 5, 15 (1989); Bennett, *supra* note 4, at 150, 157 ("[W]e unconsciously act on implicit biases even though we abhor them when they come to our attention.") (explaining that implicit bias affects judges).

275. Jolls & Sunstein, *supra* note 270, at 974–75. This process has also been described as "intuitive-override." *See* Bennett, *supra* note 4, at 156 (citing Guthrie, *supra* note 271, at 28) (describing studies reflecting that deliberative thinking can override intuition). Cause challenges would impose a System II override of the implicit biases otherwise operating under System I. *See* Jolls & Sunstein, *supra* note 270, at 974.

276. *See id.*

277. *See* Stephen A. Saltzburg & Mary Ellen Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 MD. L. REV. 337, 361 (1982) (explaining that when exercising peremptory challenges, counsel "[rely] on stereotypes that experience indicates are accurate"). Professor Saltzburg observed that trial counsel "naturally . . . rely on stereotypes" which are often invidious: "in some cases attorneys have made race or sex or religion the dominant, sometimes the exclusive, criterion for deciding whom to challenge." *Id.* at 342; *accord* Melilli, *supra* note 4, at 497–98 (calculating that

contrast, the exercise of a cause challenge requires deliberate thought, thereby potentially providing a cognitive override to the influence of implicit bias in peremptory challenge use.[278] This Article will apply these scientific concepts in its evaluation of the proffered justifications for peremptory challenges.

1. Efforts to Exclude Some "Extreme" and "Subtly Biased" Jurors Through Peremptory Challenges Perpetuates the Potentially Corrupting Influence of Implicit Bias and Facilitates both Impermissible Tactical Stacking and Conscious Strategic Racial Discrimination.

Proponents maintain that the use of peremptory challenges by each trial attorney enables them to "cancel out" those jurors whom counsel believes to harbor "extreme bias" or "extreme partiality."[279] Once each side "cancels out" these "extreme" jurors, proponents contend that the remainder somehow yields a "fair and impartial" jury.[280] This is a procedure of juror exclusion, rather than one of juror selection.[281] The excluded jurors may include some who are truly "extreme," properly defined as those who would not be fair and impartial.[282] These excluded jurors also include many jurors who could be fair and impartial but are excused because the striking counsel perceives that they "would not view [their client or] their client's case favorably."[283] Since counsel is not required to provide any reason for striking a juror via a peremptory challenge, both opposing counsel and the supervising court are denied the most critical information necessary to meaningfully assess whether

---

fifty-two percent of peremptory challenges are exercised based upon impermissible group stereotyping).

278. *See* discussion *supra* notes 268–69 (explaining cognitive override); *infra* Section VI.B (asserting that cause challenges are the less restrictive alternative).

279. *See* Swain v. Alabama, 380 U.S. 202, 219–20 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79, 92–93 (1985). This tactic often obscures conscious racial discrimination. *See infra* text accompanying notes 296–98; *see also* Cronin, Comment Letter on Recommendation 13, *supra* note 11, Ex. A at 5, 9.

280. During the JCJS, this process was more fully described and pointedly critiqued by former New Jersey Supreme Court Justice Barry Albin. NJ Cts., *Judicial Conference on Jury Selection—Justice Barry Albin Testimony*, YOUTUBE (Nov. 18, 2021), https://www.youtube.com/watch?v=e6e5f3MzBUM. A former trial attorney, Justice Albin observed that he "never met an attorney interested in picking a fair jury"—they all want a favorable one. *Id.* Rhetorically, he seemed to inquire what system of justice would condition the exercise of one citizen's right to serve on a jury upon the effectively unreviewable whim of another citizen? *Id.* Unfortunately, that system is ours.

281. *See* Cronin, Comment Letter on Recommendation 13, *supra* note 11, at 3 (discussing State v. Manley, 255 A.2d 193, 205–07 (N.J. 1969)).

282. *Id.* at 12.

283. *Id.* at 2.

the juror was properly excluded as extremely "unfair" or improperly excluded as "unfavorable."[284]

This lack of transparency facilitated tactical "stacking," an abuse which contributed to the elimination of peremptory challenges in England.[285] The most pernicious form of tactical stacking, conscious strategic racial discrimination, arises from counsel's reliance upon racial stereotypes when deciding which jurors to exclude through peremptory strikes.[286] This discriminatory practice continues in America through this "cancel out" procedure.[287] The distorting effect of peremptory challenge use upon the diversity of petit juries also contributed to their elimination in England.[288] Their use to exclude Aboriginal peoples from petit juries was the primary reason that peremptory challenges were eliminated in Canada.[289] Similarly, their use to exclude prospective jurors from participating in our democracy, based on their race or ethnicity, provided the impetus to eliminate peremptory challenges in Arizona.[290]

Proponents also contend that peremptory challenges enable them to excuse prospective jurors harboring "subtle bias."[291] Developments in cognitive science, specifically regarding implicit bias, reveals four fundamental flaws in this contention.

---

284. *See id.* at 10. This information would be provided through counsel's exercise of a "cause" challenge. *See id.*

285. Cronin, Comment Letter on Recommendation 13, *supra* note 11, Ex. A at 6; *see also* Wilson, *supra* note 71, at 374.

286. *See infra* note 307 (quoting KENNEDY, *supra* note 4) (criticizing this practice).

287. *See infra* text accompanying notes 318–20.

288. *See* Wilson, *supra* note 71, at 374.

289. *See* R. v. Chouhan, [2021] S.C.R. 26, 54 (Can.) (upholding the constitutionality of C-75, a court rule eliminating peremptory challenges, the court observed that peremptory challenges involve guess work to ascertain a prospective juror's belief based on their appearance); *The Justice System and Aboriginal People*, ABORIGINAL JUST. IMPLEMENTATION COMM'N (Nov. 1999), http://www.ajic.mb.ca/volumel/chapter9.html (recommending elimination of peremptory challenges in Canada due to their use to exclude Aboriginal people because of their race); *see also* Cronin, Comment Letter on Recommendation 13, *supra* note 11, at 2 (discussing Canadian elimination).

290. *See* Frampton, *supra* note 7, at 50 (quoting Arizona Supreme Court Justice Robert Brutinel); *see also Batson* Reform, *supra* note 7 (Arizona); Cheryl Corley, *Arizona's Supreme Court Eliminates Peremptory Challenges*, NPR (Sept. 6, 2021, 5:04 AM), https://www.npr.org/2021/09/06/1034556234/arizonas-supreme-court-eliminates-peremptory-challenges. Arizona Court of Appeals Judge Peter Swann observed that "[t]here is no other means of skewing a jury other than the peremptory strike," and that strikes of potential jurors without cause are often "based on stereotypes and unconscious bias." *Id.*

291. Cronin, Comment Letter on Recommendation 13, *supra* note 11, Ex. A at 16.

First, while proponents vigorously assert that their "experience" enables them to perceive the "subtle bias" of prospective jurors,[292] they vastly overstate their actual perceptive ability. While a voir dire may assist counsel and the court in exposing the *concealed explicit bias* of a juror, this process offers little assistance in exposing their *implicit* bias.[293] This perceptual limitation arises from the nature of implicit bias whose existence is often unknown by the person harboring it.[294]

Second, those persons harboring implicit bias may include the striking counsel and their client. Hence, the decision of which juror to strike may reflect their own implicit (and explicit) biases. It is widely recognized that trial attorneys rely upon their "gut," "hunches," or "seat of the pants" instincts when exercising peremptory challenges.[295] These instincts "are undoubtedly crudely stereotypical and may in many cases be hopelessly mistaken."[296] Cognitive scientists have determined that such reliance upon instincts or intuition is "the likely pathway by which undesirable influences, like [] race . . . affect the legal system."[297] Thus, striking counsel's hunches may reflect their own implicit bias.

Third, counsel exercising peremptory challenges often rely upon stereotypes of anticipated group behavior.[298] Reliance upon these

---

292. *See, e.g.*, Cronin, Comment Letter on Recommendation 13, *supra* note 11, at 8; Raymond Brown, *Voices Not Heard at Judicial Conference on Jury Selection*, N.J. L.J. (Nov. 17, 2021) [hereinafter Brown, *Voices Not Heard*]; Raymond Brown, *Peremptory Challenges as a Shield for the Pariah*, 31 AM. CRIM. L. REV. 1203 (1994) [hereinafter Brown, *Peremptory Challenges as a Shield*].

293. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 U.C.L.A. L. REV. 1124, 1179 (2012); *cf.* State v. Saintcalle, 309 P.3d 326, 355–56 (Wash. 2013) (Gonzales, J, concurring) (arguing that attorneys are generally ineffective in identifying "favorable" jurors); Broderick, *supra* note 4, at 413 (citing empirical studies). Thus, some proponents maintain that counsel's *express* reliance upon stereotypes in exercise peremptory challenges is justified by their purported efficacy in excluding jurors whom counsel perceive may harbor *implicit* prejudices. Neither the trial court nor counsel possess any special expertise in discerning the implicit bias of others, including jurors. *See* Kang, *supra*, at 1179 (cited in Cronin, Comment Letter on Recommendation 13, *supra* note 11, Ex. A). This lack of expertise exposes the logical flaw within this proffered justification—to protect their clients from the *implicit* biases of jurors (which the jurors may not be aware of, and that counsel have no particular expertise in discerning), counsel seek to *expressly* rely upon stereotyping to identify and exclude those jurors. *See id.*

294. Kang, *supra* note 293, at 1168. All of us, including prospective jurors, counsel, and judges, are often unaware of our own implicit biases. *Id.*

295. State v. Gilmore, 511 A.2d 1150, 1160–66 (N.J. 1986) (Marshall, J., concurring) (interpreting Batson v. Kentucky, 476 U.S. 79, 105–06 (1986)); *accord* EJI REPORT, *supra* note 4, at 18 (criticizing hunch challenges).

296. *Batson*, 467 U.S. at 138 (Rehnquist, J., dissenting).

297. Guthrie, *supra* note 271, at 31 (citing Jolls & Sunstein, *supra* note 270, at 975–76); *see also* CALIFORNIA REPORT, *supra* note 145, at 29–31.

298. *Batson*, 476 U.S. at 90 n.15 (Burger, C.J., dissenting) (citing Saltzburg & Powers, *supra* note 277, at 342). Professor Saltzburg further maintained that counsel may address

stereotypes, in turn, is "baked into" the trial attorney culture and often reflects the implicit biases of decision-makers who initially applied these stereotypes long ago.[299] Accordingly, "the trial court must be sensitive to the possibility that 'hunches,' 'gut reactions,' and 'seat of the pants instincts' may be colloquial euphemisms for the very prejudice that constitutes impermissible presumed group bias or invidious discrimination."[300] Yet, *the nontransparent essence of peremptory challenges permits counsel to act upon these prejudices and deprives trial courts of the most significant fact (namely, the reason for the strike) that they need to meaningfully supervise their use*. Moreover, many of these stereotypes, including those based on race[301] and gender,[302] are not only "hopelessly mistaken," but also factually unrelated to the only relevant

---

jurors' "hidden predispositions" through their "reliance on stereotypes that experience indicates are accurate." Saltzburg, *supra* note 277, at 361. To justify this reliance, Professor Saltzburg focused upon the limited information which the litigants typically receive from jurors through the voir dire process. *Id.* He then observed that when trial counsel lacks relevant information concerning the prospective jurors, then they naturally rely upon stereotypes. *Id.* at 342. In response to this information deficit, some states have dramatically increased the relevant information gathered through juror questionnaires and direct attorney questioning of prospective jurors. *See, e.g.*, N.J. JUDICIARY, BENCH MANUAL ON JURY SELECTION (2014) (questionnaires); N.J. JUDICIARY, NOTICE TO THE BAR & PUBLIC REGARDING JURY REFORM 4 (2022) [hereinafter JCJS NOTICE] (voir dire).

299. *See supra* note 269 (discussing implicit bias) and *infra* notes 307–20 (discussing stereotype reliance); *see also* Saltzburg & Powers, *supra* note 277, at 361 (discussing implicit bias and stereotype reliance); Babcock, *supra* note 261, at 551–53 (same); *cf.* CONNECTICUT REPORT, *supra* note 8, at 31 (stating that peremptory challenge use is "written into our legal DNA").

300. *Gilmore*, 511 A.2d. at 1166 (interpreting *Batson*, 476 U.S. at 105). Nevertheless, because of their desire to preserve peremptory challenges, the *Gilmore* court also preserved hunch challenges. *Id.* at 1165–67.

301. *Batson*, 476 U.S. at 105. In his *Batson* dissent, Justice Rehnquist maintained that,

> The use of group affiliations, such as age, race, or occupation, as a "proxy" for potential juror partiality, based on the assumption or belief that members of one group are more likely to favor defendants who belong to the same group, has long been accepted as a legitimate basis for the State's exercise of peremptory challenges.

Batson, 476 U.S. at 138 (Rehnquist, J., dissenting) (first citing Swain v. Alabama, 380 U.S. 202, 219 (1965); then citing United States v. Leslie, 783 F.2d 541, 548–49 (5th Cir. 1986) (en banc); and then citing United States v. Carter, 528 F.2d 844 (8th Cir. 1975)). Justice Rehnquist supported this prior tolerance of group affiliation as a proxy of future group behavior with the definition of peremptory challenges which permits counsel to exercise them for any reason, including those "normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty." *Batson*, 476 U.S. at 123 (Burger, C.J., dissenting) (quoting *Swain*, 380 U.S. at 219); *see Gilmore*, 511 A.2d at 1166–67; s*ee also Batson*, 476 U.S. at 135–36 (Rehnquist, J., dissenting) (quoting *Swain*, 380 U.S. at 224). The *Batson* majority, however, rejected this position. *Batson*, 476 U.S. at 91 (majority opinion).

302. J.E.B v. Alabama, 511 U.S. 127, 143 (1994); Ballard v. United States, 329 U.S. 187, 195 (1946).

issue: prospective juror's ability to be fair and impartial.[303] Nevertheless, these discredited and prohibited biases are perpetuated through counsels' continued reliance upon those stereotypes today.

Fourth, the potentially corrupting influence of implicit bias may be "overridden" through required deliberate thought.[304] Since they do not require striking counsel to articulate any reason, reflecting their deliberate thought, for the juror exclusion, peremptory challenges are not subject to cognitive override. Therefore, they provide a fertile ground for the potentially corrupting influence of implicit bias to flourish.[305]

The interplay between implicit (unconscious) and explicit (conscious) bias in the exercise of peremptory challenges was described by Justice Marshall as follows:

> A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported . . . Even if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels—a challenge I doubt all of them can meet.[306]

While the "extreme" and "subtly biased" justifications involve the operation of implicit bias, counsel's efforts to obtain a "favorable" jury through tactical stacking also often reflects their *conscious* decision-making.

Addressing this pursuit of a "favorable" jury, Professor Randall Kennedy observed that "many attorneys, prosecutors as well as defense

---

303. *See supra* notes 188–92 (discussing *J.E.B.*, 511 U.S.).

304. *See supra* note 257 and accompanying text. Such thought is required to present a cause challenge. It is communicated on the trial record to both opposing counsel and the court.

305. *See supra* notes 253–58; Cronin, Comment Letter on Recommendation 13, *supra* note 11, Ex. A. at 7–8.

306. *Batson*, 476 U.S. at 106 (Marshall, J., concurring) (quoted in Bennett, *supra* note 4, at 162). By referencing "unconscious racism," Justice Marshall's prescient observations foreshadowed operation of implicit bias, a concept that was not widely recognized by cognitive scientists until three years after the *Batson* decision. *See* Devine, *supra* note 271, at 5. While directly addressing racial stereotypes, these observations logically apply to all stereotypes of presumed group behavior. The racial stereotype was determined to be not probative of the prospective juror's ability to be fair and impartial. Unless a stereotype is probative of that issue as applied to the individualized facts of the pending trial, the litigants, and the prospective juror, then it should not be relied upon to exclude that juror. *See supra* text accompanying notes 188–92 (discussing *J.E.B.*, 511 U.S. at 129).

counsel, racially discriminate in their deployment of peremptory challenges because they reasonably believe that doing so redounds to the benefit of the side they represent. Here . . . emerges the phenomenon of strategic . . . racial discrimination."[307] As an example of this strategic racial discrimination, assume that trial counsel is privy to opinion surveys reflecting that Black persons are more likely than White persons to view the police with mistrust and to view themselves as targets of aggressive police investigation tactics.[308] Given these opinion surveys,

> [I]f a prosecutor is attempting to convict a defendant in a jury trial, and his main witnesses are police officers, the prosecutor has every reason to try to strike as many black venire members as possible. When a prosecutor knows that he can statistically improve his chances of having a jury with more favorable jurors, he is likely to jump at this chance. The same can be said for the defense, who is more likely to strike white jurors in a case where police testimony is used because white jurors statistically, are likely to view police testimony more favorably.[309]

Such strategic racial discrimination is a particularly egregious form of prohibited "stacking."[310] Assuming, arguendo, that trial counsel's

---

307. KENNEDY, *supra* note 4, at 226. Although the *Batson* paradigm was initially developed in response to prosecutorial abuse of peremptory challenges, Professor Kennedy accurately observed that this paradigm fully applies to defense counsel who are equally susceptible to both implicit bias and the "trial related" incentives to engage in strategic racial discrimination. *Batson* was later extended to defense counsel's exercise of peremptory challenges. *See, e.g.*, Georgia v McCollum, 505 U.S. 42, 49 (1992); State v. Andrews, 78 A.3d 971, 983 (N.J. 2013).

308. *See* Haven, *supra* note 4, at 117 (discussed in Cronin, Comment Letter on Recommendation 13, *supra* note 11, Ex. A at 9); CALIFORNIA REPORT, *supra* note 145, at 41–43 (summarizing empirical studies reflecting juror skepticism). Trial counsel select jurors with "less than perfect information," and therefore "naturally . . . rely upon stereotypes . . . ." Saltzburg & Powers, *supra* note 277, at 342. These stereotypes are often invidious: "in some cases attorneys have made race or sex or religion the dominant, sometimes the exclusive, criterion for deciding whom to challenge." *Id.*

309. Haven, *supra* note 4, at 113–14; *see Batson*, 476 U.S. at 138 (Rehnquist, J., dissenting) (observing that counsel can rely upon "[t]he use of group affiliations, such as age, race, or occupation, as a 'proxy' for potential juror partiality" in the exercise of peremptory challenges).

310. This particularly egregious form of tactical "stacking" can occur because the *Batson* majority sought to preserve counsel's ability to exercise peremptory challenges for "trial related" reasons. *See Batson*, 476 U.S. at 91. This definition leaves open the legality of mixed motive strikes (e.g., based on racial proxy and any other reason potentially related to the outcome of the case). Counsel's ability to pursue a "favorable" jury would be greatly diminished if: (1) "trial related" were more precisely defined in terms of an individual juror's competence (i.e., ability to be fair and impartial) rather than the trial outcome (i.e., acquittal or conviction), and (2) the striking counsel was required to articulate why the

reliance upon group stereotypes may support some increased statistical probability that a particular juror may not be "favorable" or even "fair" or "impartial," it is submitted that exclusion of all prospective jurors falling within the stereotypes group or class is simply a cost too great for our society to accept.[311] This cost/benefit analysis was aptly synthesized by Professor Kennedy as follows:

> Even if it were possible for judges to distinguish easily and confidently between prejudiced racial discrimination and strategic racial discrimination, the Court would still be correct in outlawing *all* racial discrimination. The benefits of permitting strategic racial discrimination are not worth the costs. When both the defense and the prosecution have used their peremptory challenges in a racially discriminatory but strategically sensible way, it may be that they have accomplished a good: removing from the trial jury extremes of predilection, thereby creating a jury more likely to agree on one verdict or another than a jury formed without the molding of racially discriminatory peremptory challenges. Assuming that to be true, however, one must balance against that good the costs of permitting lawyers to exclude prospective jurors on a racial basis. *A major cost is the public perception that the judicial system is unwilling to disentangle itself from the race line and that race not only matters but should matter in the adjudication of guilt or innocence.*[312]

The current prevalence of this strategic racial discrimination is reflected in several studies, including one recently commissioned by the New Jersey judiciary. In this study, Professor Mary Rose found that "[o]f the 135 peremptory challenges exercised by criminal defense attorneys, just six were against African American venirepersons, whereas 114 were against Whites."[313] These findings were consistent with her prior analysis

---

juror to be struck is not competent. The latter requirement would effectively eliminate peremptory challenges. *See supra* Section VII.A (discussing procedural due process notice requirement).

311. The *Edmonson* Court concluded that "if race stereotypes are the price for acceptance of a jury panel as fair, the price is too high to meet the standard of the Constitution." Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 630 (1991) (quoted in Miller-El v. Dretke, 545 U.S. 231, 273 (2005) (Breyer, J., concurring)); *cf.* Hoffman, *supra* note 4, at 810 ("[T]he benefits of the peremptory challenge system are outweighed by the damage which that system causes to the most basic principles of an impartial jury.").

312. KENNEDY, *supra* note 4, at 235–36 (emphasis added).

313. MARY R. ROSE, FINAL REPORT ON NEW JERSEY'S EMPIRICAL STUDY OF JURY SELECTION PRACTICES AND JURY REPRESENTATIVENESS 71 (June 1, 2021) [hereinafter ROSE REPORT].

of thirteen noncapital felony trials in North Carolina[314] and with other empirical studies conducted in North Carolina,[315] as well as studies in South Carolina[316] and other jurisdictions.[317] In her North Carolina study, Professor Rose found that when viewed "overall," Whites (49%) and African Americans (42%) were excused via peremptories at rates that were not statistically significant.[318] However, this "overall" finding is attributable to each side "canceling out" the other:

> African Americans were much more likely to be dismissed by the State: 71% of African Americans dismissed from service were excused by the prosecution. The reverse was true for Whites: 81% of White persons excused were dismissed by the defendant. This association between prosecution/defense and the race of the juror who was excused was highly significant . . . .[319]

These highly statistically significant differences supported Professor Rose's conclusion that *the "canceling out" effect upon the overall exclusion rate "masked the adversary [or trial related] nature of excusing African-Americans and Whites."*[320] The ACLU-NJ described this process as "the

---

314. *See* Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 LAW & HUM. BEHAV. 695, 697 (1999).

315. *See* Catherine M. Grasso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-*Batson *North Carolina Capital Trials*, 97 IOWA L. REV. 1531, 1539 (2012) (finding that prosecutors used sixty percent of their strikes to exclude Black people and defense counsel used eighty-seven percent of their strikes to exclude White people).

316. *See* Anne M. Eisenberg, *Removal of Women and African Americans in Jury Selection in South Carolina Capital Cases, 1997–2012*, 9 NE. U.L. REV. 299, 339 (2017) (finding that prosecution eliminated twelve percent of White people and thirty-five percent of Black people and defense eliminated thirty-five percent of White people and three percent of Black people).

317. *See* Witney DeCamp & Elise DeCamp, *It's Still About Race: Peremptory Challenge Use on Black Prospective Jurors*, 57 J. RSCH. CRIME & DELINQ. 3 (2020) (finding that Black people are 4.51 times more likely than White people to be eliminated by prosecution and White people are 4.21 times more likely than Black people to be eliminated by defense). In its written comments to the JCJS, the American Civil Liberties Union ("ACLU") cited several of these studies and concluded that they have "shown that peremptory challenges are still used in an expressly discriminatory fashion." ACLU, Comment Letter Regarding Proposed Changes to the Jury Selection Process in New Jersey, at 3 n.7 (Nov. 5, 2021) [hereinafter ACLU, Comment Letter].

318. *See* Rose, *supra* note 314, at 698.

319. *Id.* at 698–99.

320. Mary R. Rose, *A Voir Dire of Voir Dire: Listening to Jurors Views Regarding the Peremptory Challenge*, 78 CHI. KENT L. REV. 1061, 1069 (2002) (emphasis added) (discussing North Carolina study).

courtroom version of gerrymandering."[321] "In a utopian world," the ACLU-NJ opined that "elimination of peremptories would be ideal." [322]

After reviewing similar data, the Arizona Supreme Court ordered the "utopian" remedy of elimination.[323] Jury selection data from Maricopa County, Arizona revealed not only that prosecutors exercised peremptory challenges disproportionately against Black and Native American jurors, but also that defense counsel exercised them disproportionately against White jurors.[324] Consideration of this data marked the "turning point" towards elimination in the Arizona Supreme Court's deliberations. [325]

Evaluation of this data from several states reveals the invidious discrimination which both underlies and undermines the proffered "cancel out" of "extreme" juror justification.[326]

2. Peremptory Challenges Are Not Necessary to Provide a "Safety Net" as Cause Challenges Are Now Liberally Granted and Recent Reforms Have Further Relaxed the Cause Standard.

Some proponents maintain that peremptory challenges are necessary to protect their clients because trial courts interpret "cause" challenges too narrowly and inconsistently.[327] In other words, these proponents assert that peremptory challenges are required to provide a "safety net" for the narrow judicial interpretation of cause challenges.

Unlike their first proffered justification, which lacks empirical support,[328] it is widely recognized that many trial courts have previously interpreted "cause" too narrowly.[329] However, it is also widely recognized

---

321. ACLU, Comment Letter, *supra* note 317, at 3. The ACLU's "gerrymandering" reference is particularly apt in view of the historical linkage between citizen's voting and jury service rights and the reliance by opponents of Reconstruction upon Black disenfranchisement as a de facto limitation upon their jury service. *Cf. id.* at 5.

322. *Id.* at 4. Rather than pursuing this "utopian" remedy, the ACLU-NJ recommended a reduction in the number of peremptory challenges. *Id.* While no further explanation was provided, the vehemence of organizational opposition may have influenced their recommendation. *Cf.* GR 37 FINAL REPORT, *supra* note 262, at 3 (decision of Washington's General Rule 37 advocates not the seek elimination).

323. *See* Frampton, *supra* note 7, at 48–50.

324. *Id.* at 48–49. As compared to their population in the venire, prosecutors struck Black jurors forty percent more and Native American jurors fifty percent more. *Id.* at 49. This data also demonstrates bias against White jurors by defense counsel exercising peremptory challenges. *Id.*

325. *Id.* at 48.

326. *See supra* notes 318–20 and accompanying text.

327. *See, e.g.*, Cronin, Comment Letter on Recommendation 13, *supra* note 11, at 4 (articulating and then responding to this argument).

328. *See supra* Section VI.A.1.

329. *See* N.J. SUP. CT. SPECIAL COMM. ON VOIR DIRE AND PEREMPTORY CHALLENGES, REPORT OF THE SPECIAL SUPREME COURT COMMITTEE ON PEREMPTORY CHALLENGES AND

that proponents' "safety net" is cast far too widely.[330] It extends beyond prospective jurors concerning whom there is reasonable basis to doubt their impartiality.[331] It extends to those fair and impartial jurors whom striking counsel perceive to be "unfavorable."[332] Hence, the remedy which proponents offer—retention of peremptory challenges—is overbroad. To capture those few unfair or impartial jurors who somehow survive a cause challenge evaluated under a relaxed or liberal standard, proponents seek to retain not only peremptory challenges, but also the *Batson* paradigm which has been proven to be so ineffective in safeguarding the rights and interests of the litigants, the prospective jurors, and the community.[333]

This overbreadth is further established by ongoing reforms in many states which encourage trial courts to grant cause challenges more liberally. For example, in 2005, New Jersey trial courts were directed to "be more liberally disposed to excusing jurors for cause where the issue is a close one."[334] Subsequent empirical studies reflect that New Jersey trial courts embraced that recommendation and granted cause challenges "with remarkable frequency."[335] More recently, the New Jersey Supreme Court promulgated a rule further relaxing the cause standard[336] by instructing trial courts to excuse a juror for cause "[i]f

---

JURY VOIR DIRE 5, 15 (May 16, 2005) [hereinafter LISA REPORT]; Melilli, *supra* note 4, at 481, 500–01. Particularly in those jurisdictions authorizing a large number of peremptory challenges, such as New Jersey, these proponents accurately observe that trial courts have been historically criticized for being reluctant to award cause challenges. *See* LISA REPORT, *supra*, at 5, 15.

330. *See, e.g.*, Melilli, *supra* note 4, at 500.

331. This is the cause standard applied under the Alternative Procedure. *See infra* Section VII.A.2.

332. *See supra* Section VI.A.1.; *see also* Melilli, *supra* note 4, at 499.

333. *See supra* Section VI.A.1.

334. *See* LISA REPORT, *supra* note 329, (quoted in Cronin, Comment Letter on Recommendation 13, *supra* note 11, Ex. A at 13–14 (recommendation implemented through the New Jersey Jury Manual at 22 (2006))); *see also* State v. Silvers, No. A-2353-21, 2023 WL 8010248, at *29 (N.J. App. Div. Nov. 16, 2023) (finding trial court erred in denying defense cause application under LISA REPORT's recommended "relaxed" standard). In 2022, this standard was further relaxed. *See* N.J. Ct. R. 1:8-3A (2022); *infra* text accompanying note 336.

335. *See, e.g.*, ROSE REPORT, *supra* note 313, at 85. The ROSE REPORT confirms that "the most common way for individuals to conclude their voir dire experience was through a challenge for cause." *Id.* at 76. Fifty-seven percent of these individuals were excused for cause, which "dwarfed . . . all other categories." *Id.* In view of the frequency that trial courts grant cause challenges, Dr. Rose concluded that, "the notion of 'stingy' judges . . . seemed unlikely." *Id.* at 78. To the contrary, the data reflects that "[j]udges in New Jersey trials use cause challenges with remarkable frequency." *Id.* at 85.

336. N.J. Ct. R. 1:8-3(b) (effective Sept. 1, 2022) (recommended in JCJS NOTICE, *supra* note 298, at 23). The rule did not previously contain this "reasonable basis to doubt" language. *See* N.J. Ct. R. 1-8-3(b) (1994). This relaxed cause standard is embraced in this

the court finds there is a reasonable basis to doubt that the juror would be fair and impartial."[337] Promulgation of such a sensible cause standard constitutes a "best practice" designed to sufficiently accommodate the legitimate concerns of the striking party while protecting the rights and interests of the objecting party, the prospective jurors, and the community.[338]

Some proponents also contend that cause challenges are insufficient to protect their clients when jurors self-evaluate themselves and maintain that they can be fair and impartial.[339] During voir dire, this self-evaluation would occur if a prospective juror acknowledged a fact, such as a prior negative interaction with law enforcement, which would support further inquiry into whether they can be fair and impartial.[340] These proponents suggest that these jurors would not be excused for cause.[341] This suggestion ignores that trial courts are not obligated to accept a prospective juror's self-assessment of impartiality.[342] Moreover, to excuse a juror for cause, the trial court does not have to find that the juror was lying when communicating their self-assessment.[343] To the contrary, the court may grant the cause challenge based upon its determination that the juror was merely overly optimistic or mistaken in their self-assessment of impartiality.[344] Alternatively stated, a trial court

---

Article. *Accord* ARIZONA REPORT, *supra* note 36 (recommending relaxed cause standard); Bennett, *supra* note 4, at 167 (same); Melilli, *supra* note 4, at 481, 500–01 (same).

337. N.J. Ct. R. 1:8-3(b) (effective Sept. 1, 2022).

338. *See* Melilli, *supra* note 4, at 486–88; Haven, *supra* note 4, at 118; Bennett, *supra* note 4, at 167.

339. *See* Brown, *Voices not Heard*, *supra* note 289 (stating that judges are "reluctant to grant challenges for cause" and the judicial culture is "loath to grant applications for cause" and therefore counsel use peremptories in response); *accord* Essex County Bar Letter, *supra* note 234, at 3 (arguing peremptories are "the last remaining tool that trial lawyers can use to protect their clients from discrimination"); Brown, *Peremptory Challenges as a Shield*, supra note 289, at 1207–08 (referencing counsel's use of "racially conscious strikes" as a "tool" to "right the imbalance" faced by a defendant who "jurors start out hating because of the color of his skin").

340. *See* Wash. Gen. R. 37(h) (presumptively invalid reason for peremptory); N.J. Ct. R. 1:8-3A(d)(1) (same).

341. *See* Essex County Bar Letter, *supra* note 234, at 4 (asserting that trial counsel should not be required to rely upon jurors' self-assessments of impartiality).

342. *See* CONNECTICUT REPORT, *supra* note 8, at 21 (providing that venireperson's self-assessment of objectivity not controlling).

343. *See* State v. Jackson, 203 A.2d 1, 7–8 (N.J. 1964) (holding that excusal for cause does not require a juror credibility finding; juror's impartial self-assessment may be rejected if court determines that it "runs counter to human nature").

344. *See id.* at 7 (explaining that excusal for cause must be evaluated "according to the common knowledge, experience and observation of mankind"). Thus, excusal for cause can be based upon finding that a juror impartiality claim calls for more compartmentalization from the juror than the justice system could reasonably expect from them. Alternatively stated, a trial court could excuse that juror for cause if, based upon the totality of the

could excuse that juror for cause if, contrary to any self-assessment, the court finds that "there is a reasonable basis to doubt that the juror would be fair and impartial." [345]

Hence, ongoing jury selection reforms and the continued application of well-established legal principles to cause determinations substantially diminish the weight of this "safety net" justification.

3. Privileged Litigant Participation in Peremptory Challenge Use Often Impedes the Selection of a Fair and Impartial Jury and Reduces both the Actual and Perceived Fairness of the Jury Selection Process.

Proponents contend that peremptory challenges should be retained because litigants are more likely to accept the jury's verdict when they participate in selecting the jury that decides their fate.[346] Rejecting a similar argument raised in opposition to applying *Batson* in civil trials, the *Edmonson* Court concluded that "if race stereotypes are the price for acceptance of a jury panel as fair, the price is too high to meet the standard of the Constitution."[347] In addition to this insufficiency as applied to explicitly race-based peremptory challenges, this justification is unpersuasive for the following four reasons.

---

circumstances involving that juror and that trial, the court concludes that there is a reasonable basis to doubt that juror's self-assessment of impartiality is more than the justice system could reasonably expect from them. *Id.*; N.J. Ct. R. 1:3-3A(b). Significantly, this case and juror specific finding does not carry the stigmatizing label of inferiority which arises from the reliance upon group stereotyping inherent in peremptory challenge use. *See supra* Section V.B.

345. *See* N.J. Ct. R. 1:8-3(b). It is submitted that application of this relaxed standard could be facilitated through integration of the presumptively invalid reasons and conduct for peremptory challenge use, identified Washington's General Rule 37(h)–(i), into the cause determination. More specifically, "cause" involves a judicial evaluation of (1) the legal sufficiency of the proffered reason and (2) the factual nexus between that proffered reason and the prospective juror's ability to be fair and impartial. Cautious consideration of the disfavored status of reasons and conduct identified in Washington's General Rule 37 (h)–(i) may assist in the first evaluation. This consideration would not involve any presumption of invalidity, but rather an acknowledgement that their historical association with invidious discrimination in peremptory challenge use cautions against a finding of their legal sufficiency in cause challenge use. *See* JCJS NOTICE, *supra* note 298, at 38–39 (noting historical association).

346. *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 630 (1991) (acknowledging the contention); Cronin, Comment Letter on Recommendation 13, *supra* note 11, Ex. A at 16–17 (same); CONNECTICUT REPORT, *supra* note 8, at 30 (providing attorneys and litigants a sense of control).

347. *Edmonson*, 500 U.S. at 630. The Court supported this conclusion, in part, upon the existence of "rational" alternatives to reliance upon stereotypes in selecting a fair and impartial jury. *See id.* It is submitted that a relaxed cause standard is that alternative. *See supra* Section VIII.B.

First, through their input concerning the exercise of a peremptory challenges, litigants may insert their own explicit and implicit biases into jury selection.[348] Since the *Batson* paradigm focuses upon counsel's mental state[349] and attorney-client communications are privileged,[350] these litigant's biases completely evade judicial scrutiny. Understandably, litigants seek favorable verdicts or outcomes. Their pursuit of those verdicts provides a powerful incentive for them to act upon their biases through peremptory challenge use. The privileged status of their communications with counsel allows these litigant biases to flow virtually unchecked[351] into the jury selection process. Thus, this privileged litigant participation potentially impedes the selection of a fair and impartial jury.

Second, meaningful litigant participation in jury selection would continue without peremptory challenges. Presently, litigants consult with counsel regarding which jurors should be challenged for cause. Particularly under the recently relaxed cause standards, there may be legally sufficient reasons to strike a juror for cause, but counsel may exercise their discretion not to challenge that juror for cause. This decision is informed by juror information acquired through juror questionnaires and voir dire. Litigants have access to that information

348. Cronin, Comment Letter on Recommendation 13, *supra* note 11, Ex. A. at 13. During voir dire, counsel frequently advises the court of their client's "concerns" regarding a prospective juror which may arise from the client's perception of a "bad vibe" from that juror. *Id.* at 13 n.23 (citing Haven, *supra* note 4, at 116) (stating litigant concern could reflect their implicit bias).

349. *See supra* Part IV; *accord* Brown, *Voices Not Heard*, *supra* note 289 (describing clients expressing concerns to attorney that "we don't see anyone like us in the panel").

350. N.J.R.E. 504 (lawyer-client privilege).

351. While counsel are subject to ethical constraints during jury selection, litigants are not. *See* N.J. Ct. R. 8.4. The New Jersey Advisory Committee on Professional Ethics ("ACPE") previously interpreted New Jersey Court Rule 8.4(g) *not* to prohibit the exercise of race-based peremptory challenges. *See* N.J. Advisory Comm. Pro. Ethics, Op. 685, 154 N.J.L.J. 434 (Nov. 9, 1998) [hereinafter ACPE Opinion 685]. Recently, the ACPE withdrew that opinion, clarifying that peremptory challenge use is not categorically excluded from the proscriptions of New Jersey Court Rule 8.4(g). *See* N.J. Advisory Comm. on Pro. Ethics, Notice to the Bar Requesting Comments on Revisiting Opinion 685 (Oct. 7, 2021). Thus, if a *Batson* objection is sustained, striking counsel may be subject to charges of professional misconduct. *Id.* A striking counsel's potential exposure to such disciplinary charges has been identified as a having a "chilling effect" upon judicial willingness to sustain a *Batson* objection, thereby diminishing the paradigm's effectiveness. *See id.* at 3–4. Unlike the denial of a peremptory challenge under *Batson*, the denial of a cause challenge does not entail a finding of purposeful discrimination or bias. *See* JCJS NOTICE, *supra* note 298, at 41. Accordingly, denial of a cause challenge does not expose striking counsel to the potential disciplinary exposure associated with the denial of a peremptory challenge. *Id.* Thus, any chilling effect accompanying New Jersey Court Rule 8.4(g) enforcement is inapplicable to a judicial determination of cause. *Id.*; *see also infra* Section VII.A.2. (explaining that alternative "cause only" procedure more effectively protects affected rights and interests).

during trial. They may also strategize with counsel regarding the content of these questionnaires and areas for follow up questioning, thereby providing further opportunities for meaningful litigant participation.

Third, this proffered justification exclusively focuses upon the litigant's participation in their trial. It completely ignores the prospective juror's participation in the operation of their government. Our Founders envisioned that participation of these citizens as petit jurors would function as a check upon the exercise of official power by the judicial and executive branches of our government.[352] Peremptory challenges eliminate that check by eliminating that juror's participation in the trial.

Fourth, this justification's litigant focus ignores the harm inflicted by continued peremptory use upon the excluded jurors and the community. It is now recognized that the harm inflicted upon excluded jurors is tangible, personal, and stigmatizing.[353] Regarding the exclusion of jurors on racial grounds, the New Jersey judiciary observed that:

> [T]he experience of being dismissed by a peremptory strike may suggest that when the application of stated standards (dismissal of jurors who are unable to be fair and impartial) fails to remove jurors of color, there is a back-up plan (in the form of peremptory challenges) designed to enable direct elimination based on race or other observable but unarticulated personal characteristics.[354]

The perception that the judiciary is complicit in any "back up" plan can only serve to undermine the excluded juror's confidence in the integrity of the entire judicial system.[355] This perception is not limited to jurors with observable personal characteristics, but fully extends to all "unworthy" jurors excluded through peremptory strikes.[356] This

352. *See supra* notes 48, 55–58.

353. JCJS GUIDE, *supra* note 4, at 18–19 (citing EJI REPORT, *supra* note 4 (juror observation of process validates perceptions of systemic racism)). The New Jersey Judiciary acknowledged that "[a]ccounts by black jurors peremptorily struck during selection substantiate the personal harms that flow from the process." JCJS GUIDE, *supra* note 4, at 18. These accounts reflected "that there are real consequences to the exercise of peremptory strikes, including individual and group experiences of the jury process." *Id.*

354. *Id.*

355. *Id.* at 18–19. The *J.E.B.* Court recognized that when race and gender discrimination occurs, then "[t]he community is harmed by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders." J.E.B. v. Alabama, 511 U.S. 127, 140 (1994); *accord* CONNECTICUT REPORT, *supra* note 8, at 18 (public perception). This diminished public confidence contributed to the elimination of peremptory challenges in Arizona. *See* Corley, *supra* note 289.

356. *See supra* text accompanying notes 174–76. Whether viewed as an obligation or an opportunity, the right to serve as a juror is essential to our democracy. Like the right to

perception and its attendant harm further extends to the entire community through "the inevitable loss of confidence in our judicial system" that flows from continued judicial acquiesce to this perceived "back up" plan.[357]

4. Although Their Origins Are "Ancient" and Their Original Purpose Was Salutary, Peremptory Challenges Have Outlived Their Historical Justifications and Currently Function to Impede the Selection of a Fair and Impartial Jury.

The *Batson* Court acknowledged that it previously declined to examine the prosecutor's actions in *Swain* due to its desire to preserve the peremptory challenges.[358] This desire, in turn, was premised upon deference to the "ancient" origins and "very old credentials" of those challenges.[359] Proponents seek to continue this deference. Significantly, these origins did not deter English authorities from eliminating peremptory challenges more than thirty years ago.[360]

The origins of peremptory challenges date back to thirteenth-century medieval England.[361] At that time, they were created to remedy the prosecution's reliance upon the English doctrine of royal infallibility in their exercise of cause challenges.[362] Not only has that doctrine been abandoned in England, it also has been expressly rejected in the United States, as it directly conflicts with our democratic principles.[363]

Historically, peremptory challenge use also had some justification in the limited numbers of persons eligible for jury duty.[364] Eligible persons in eighteenth-century England were limited to male property owners. Based upon that limited jury pool, particularly in rural areas, it was not unusual for a potential juror to have personal animus against a litigant arising from a prior business transaction or personal interaction. Hence, peremptory challenges were created to promote a "fair jury" by

---

cast a ballot in an election, the chance to serve as a juror is intended to be equally available to all citizens, regardless of their demographic identity. JCJS GUIDE, *supra* note 4, at 18.

357. *Cf. J.E.B.*, 511 US. at 140 (gender discrimination).

358. Batson v. Kentucky, 476 U.S. 79, 91 (1986).

359. Swain v. Alabama, 380 U.S. 202, 212–17 (1965).

360. *See* Wilson, *supra* note 71, at 374 (elimination in 1989).

361. *See* State v. Gilmore, 511 A.2d 1150, 1163 n.6 (N.J. 1986) (citing *Swain*, 380 U.S. at 212–13) (referencing 1305 A.D. origin); *see also* Cronin, Comment Letter on Recommendation 13, *supra* note 11, Ex. A at 16–17.

362. *See* Hoffman, *supra* note 4, at 812, 819.

363. *See id.* at 812.

364. *See id.* at 820; Albert W. Alshuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 165 n.51 (1989); Cronin, Comment Letter on Recommendation 13, *supra* note 11, Ex. A at 7 (citing WEISS REPORT, *supra* note 72, at 5).

eliminating from within a small pool those potential jurors who may have harbored personal animus against a litigant.[365] Dramatic changes in those conditions contributed to their elimination in England and fully support their elimination here.[366]

Since our nation was founded, the population of the United States is more than 135 times larger, increasing from 2.5 million to more than 330 million persons.[367] From within that exponentially increased population, the eligibility qualifications for jury service have expanded far beyond being a White male property owner. In other words, the pool of potential jurors within the larger general population has also expanded. This larger pool results from reforms such as including women; eliminating virtually all occupational disqualification; reducing statutory disqualifications; and expanding source lists from which jurors are summoned.[368] Accordingly, "[w]ith the broadening of representation in jury pools, the historical basis for peremptory challenges has lost its justification."[369]

In addition to these demographic changes, England's elimination of peremptory challenges was based upon their abuse in the pursuit of a favorable jury, rather than a fair and impartial jury[370] Over time, savvy English barristers began to use peremptory challenges strategically.[371]

---

365. Several commentators have observed that these juror exclusions were more akin to cause challenges than peremptory challenges. *See, e.g.*, Hoffman, *supra* note 4 at 820; Alshuler, *supra* note 359, at 165 n.51.

366. *See* Wilson, *supra* note 71, at 371–74 (alteration in original) (citing Criminal Justice Act 1988, c. 33, § 118 (Eng.)) (referencing England's elimination of peremptory challenges in 1989, "[t]he right to challenge jurors without cause in proceedings for the trial of a person on indictment is abolished"). In 1825, England eliminated the use of peremptory challenges by prosecutors. *See* WEISS REPORT, *supra* note 72, at 7. For defendants, the number was reduced to three in 1977. *Id.* In 1988, the use of peremptory challenges in criminal trials in England was eliminated altogether "because defense attorneys were misusing the system to 'stack' juries with individuals who favored their side." *Id.* at 6–7. Thus, "in England, from whom we inherited the practice of allowing peremptory challenges, the practice has now been eliminated." LISA REPORT, *supra* note 329, at 13.

367. *Quick Facts*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/ (last visited Nov. 4, 2023) (estimating population in 2022 as 333,287,557); *United States Population*, WORLD POP. REV., https://worldpopulationreview.com/countries/united-states-population (last visited Nov. 4, 2023) (estimating population in 1776 as 2,500,000).

368. For example, in New Jersey, our legislature has substantially enlarged the pool of potential jurors through methods including expansion of juror lists and elimination of virtually all occupational disqualifications. Earlier this year, the New Jersey Supreme Court approved recommendations to further enlarge this pool through use of additional source lists, decreased statutory disqualifications, and community outreach. *See* JCJS NOTICE, *supra* note 298, at 2–3, recommendations 1–8.

369. *See* WEISS REPORT, *supra* note 72, at 6.

370. *See* Wilson, *supra* note 71, at 372–74 (elimination in 1989).

371. Cronin, Comment Letter on Recommendation 13, *supra* note 11, Ex. A, at 18.

More specifically, they used them to excuse potential jurors whom these barristers perceived would not view their clients or their client's case favorably.[372] This strategic "stacking" by criminal defense counsel, as exemplified during several high-profile trials, was identified as an abuse of the jury selection system.[373] Another contributing factor was the effect of peremptory challenge use on the increasing ethnic diversity of the English population and "the threat to that diversity posed by the peremptory challenge."[374] That threat arose from the exclusion of this diverse population through strategic stacking, distorting the ethnic diversity of the resulting English petit jury.[375] Similar discriminatory use against indigenous populations was the primary rationale for the elimination of peremptory challenges in Canada in 2019.[376]

Our nation's population is far more heterogeneous and diverse than that of the populations of England or Canada when they eliminated peremptory challenges.[377] Strategic stacking is now occurring throughout the United States.[378] Our sordid legacy of slavery has fueled the misuse of peremptory challenges and heightens our need to prevent them from continuing to exclude Black citizens from jury service.[379] Hence, it is submitted that the "ancient" origins of peremptory challenges provides less of a justification to maintain them here in America, than it provided in England, where they were eliminated decades ago, and Canada where they were eliminated four years ago.[380]

---

372. *Id.*

373. *See* Wilson, *supra* note 71, at 373. These high-profile cases included the Cyprus Spy prosecution during which several defense counsel "pooled" their challenges to exclude all seven jurors whom they perceived to be unfavorable. *Id.*

374. Wilson, *supra* note 71, at 374 (quoting Hoffman, *supra* note 4, at 868).

375. *See id.*

376. *See supra* note 279 and accompanying text.

377. *Compare United States*, U.S. CENSUS BUREAU, https://data.census.gov/profile/United_States (last visited Jan. 12, 2024) (showing that 38% of the U.S. population was comprised of nonwhite people as of 2020), *with* Feng Hou et al., *Changing Demographics of Racialized People in Canada*, STATS. CAN. (Aug. 23, 2023), https://www150.statcan.gc.ca/n1/pub/36-28-0001/2023008/article/00001-eng.htm (stating that 26.5% of the Canadian population was comprised of nonwhite people as of 2021), *and Population of England and Wales*, GOV. UK (Dec. 22, 2022), https://www.ethnicity-facts-figures.service.gov.uk/uk-population-by-ethnicity/national-and-regional-populations/population-of-england-and-wales/latest/ (indicating that 18.3% of the U.K. population was comprised of nonwhite people as of 2021).

378. *See supra* Section VI.A.1.

379. *See* Batson v. Kentucky, 476 U.S. 79, 106–07 (1986) (Marshall, J., concurring); EJI REPORT, *supra* note 4, at 9–13; Haven, *supra* note 4, at 113, 116, 118; *supra* notes 209–14 (documenting discriminatory use).

380. *See* Cronin, Comment Letter on Recommendation 13, *supra* note 11, Ex. A, at 19. To support his elimination recommendation, Justice Bellacosa observed that "[p]eremptories have outlived their usefulness and, ironically, appear to be disguising

When confronted with "our people's traditions" of gender discrimination, the Court in *J.E.B.* did not hesitate to abandon those traditions which conflicted with existing constitutional mandates.[381] In addition to prohibiting invidious discrimination, these constitutional mandates include preserving a prospective juror's right or interest to serve on a particular jury.[382] Thus, the ancient origins of peremptory challenges fail to justify their continued use.

5. Peremptory Challenge Use, Even as Reviewed Through the *Batson* Paradigm, Fails to Promote the Selection of a Fair and Impartial Jury.

To varying degrees, all proponents maintain that systemic change is unnecessary and that the need for such change has not been established. It ranges from the derisive description of any recommendations to reduce or eliminate peremptory challenges as the judiciary's long-preferred "solution in search of a problem."[383] They extend to a more conciliatory acknowledgement that the *Batson* paradigm is not fully effective in curbing invidious discrimination, coupled with an assertion that, with some modifications, the paradigm can become effective and thereby promote the selection of a fair and impartial jury.[384] Among their many shortcomings,[385] both of these formulations attempt to place an obligation upon others to demonstrate why peremptory challenges should be eliminated. Since peremptory challenge use impinges upon the exercise of a fundamental juror right, the burden is upon proponents to demonstrate why their use is necessary to promote the legitimate government interest in selecting a fair and impartial jury.[386] It is submitted that the unpersuasive arguments advanced previously to support and preserve peremptory challenges will leave proponents hard

discrimination—not minimizing it, and clearly not eliminating it." People v. Bolling, 79 N.Y.2d 317, 326 (N.Y. 1992) (Bellacosa, J., concurring); *see generally infra* notes 426–28 (citing support for elimination among blue ribbon panels, judges, and scholars).

381. J.E.B. v. Alabama, 511 U.S. 127, 130–31 (1994); *see id.* at 163 (Scalia, J., dissenting).

382. *See supra* Part V.

383. Cronin, Comment Letter on Recommendation 13, *supra* note 11, at 2 (quoting position of New Jersey Association of Criminal Defense Lawyers); *see* Brown, *Voices Not Heard*, *supra* note 289.

384. *See* JCJS NOTICE, *supra* note 298, at 37, 41 (acknowledging wide support by stakeholders, including trial bar, for modifications modeled after Washington's General Rule 37, including elimination of *Batson*'s second step (prima facie case requirement) and adoption of an "objective observer" standard).

385. *See* Cronin, Comment Letter on Recommendation 13, *supra* note 11, at 2–10 (providing six reasons why peremptory challenges should be eliminated).

386. *See supra* Section V.A.

pressed to sustain their burden of demonstrating that peremptory challenge use is necessary to select a fair and impartial jury.

The derisive formulation ignores that there is a problem, and that the arbitrary and nontransparent essence of peremptory challenges lies at its core.[387] As illustrated in section VI.A.1.,[388] these problems are caused by several factors,[389] including the *Batson* Court's threshold decision not to eliminate *peremptory challenges* which, by definition, *may be "exercised* without a reason stated, without inquiry and *without being subject to the court's control."*[390] This lack of transparency precludes any judicial inquiry into the exercise of peremptory challenges until after opposing counsel establishes a *prima facie* case of discrimination under *Batson*'s second step.[391] It also inhibits opposing counsel's ability to sustain their ultimate burden of proving discriminatory purpose under

387. Hon. H. Lee Sarokin observed that "[r]ecent rulings of the U.S. Supreme Court and appellate courts on the abuse of peremptory challenges recognize what trial judges and lawyers have always known—that discrimination in selecting jurors has been practiced systematically for decades, with the knowledge and acquiescence of the courts." H. Lee Sarokin & G. Thomas Munsterman, *Recent Innovations in Civil Jury Trial Procedures*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 378, 383 (Robert E. Litan ed., 1993) (quoted in Wilson, *supra* note 71, at 370–71); *see also* Cronin, Comment Letter on Recommendation 13, *supra* note 11 at 2 (addressing derisive formulation).

388. *See supra* Section VI.A.1. (documenting how peremptory challenge use perpetuates the potentially corrupting influence of implicit bias and facilitates both impermissible tactical stacking and conscious strategic racial discrimination).

389. This paradigm contains crippling structural defects, including its ambiguous and arguably contradictory language, its focus upon the subjective mental state of the striking party, and the allocation of the burdens of both production and persuasion on an objecting party. *See* Cronin, Comment Letter on Recommendation, *supra* note 11, at 8–12; JCJS GUIDE, *supra* note 4, at 5, D-1–D-15. These defects are compounded by: (1) the definitional incompatibility of peremptory challenges to judicial review, (2) the sole causation standard to establish purposeful discrimination, and (3) the preservation of counsel's ability to exercise peremptory challenges based upon their intuition.

390. Swain v. Alabama, 380 U.S. 202, 220 (1965) (emphasis added).

391. *See* Batson v. Kentucky, 476 U.S. 79, 105 (1986) (Marshall, J., concurring). This lack of transparency inhibits effective trial court supervision and appellate review whether they are being exercised in compliance with equal protection guarantees. Concerning *Batson*'s second step, Justice Marshall observed that "[a]ny prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons." *Id.* at 106. Moreover, judges are reluctant to doubt counsel's proffered reason for their challenged strikes. *See* Kennedy, *supra* note 4, at 211. This judicial reluctance may be even more pronounced when the striking party is a prosecutor or public defender regularly assigned to the presiding trial court. *See* State v. Holmes, 221 A.3d 407, 428 (Conn. 2019). In addition to trials, these attorneys often assist the court in administering its calendar and its attendant backlog. Due to this weekly and often daily interactions, personal relationships develop, thereby heightening the court's psychological disincentive to find purposeful discrimination. *See* Page, *supra* note 4, at 177 (recognizing nationwide judicial reluctance); *see also supra* note 334 (chilling effect of potential attorney disciplinary proceedings).

Batson's third step. To sustain their ultimate burden of establishing purposeful discrimination, opposing counsel must establish striking counsel's *subjective* state of mind. Synthesizing *Batson*'s deficiencies, one commentator accurately observed that "unconscious bias is almost undetectable, and conscious bias is too easy to hide."[392]

The more conciliatory formulation exclusively focuses upon the discriminatory use of peremptory challenges and efforts to curb such invidious discrimination through modifications to the *Batson* paradigm. Both this formulation and its derisive alternative ignore that the constitutional infirmary of peremptory challenge use arises not only from its discriminatory use in violation of equal protection guarantees,[393] but also upon its preclusive use in violation of due process guarantees.[394] The preclusion is of the excluded jurors' right to serve on a particular petit jury.[395] That preclusion occurs through peremptory challenge use.

It is submitted that analysis of the historically proffered justifications reveals that proponents will be unable to sustain their burden of demonstrating that peremptory challenge use is necessary to select a fair and impartial jury. That inability establishes a Substantive Due Process violation.

B. The Less Restrictive Alternative – Cause Challenges

Assuming, arguendo, that proponents could satisfy their threshold burden, this Article shall now evaluate whether proponents will be able to demonstrate that peremptory challenge use is the least restrictive method to select a fair and impartial jury. Since prospective jurors may be excused for cause if the striking attorney establishes that "there is a reasonable basis to doubt that the juror would be fair and impartial,"[396] cause challenges would enable counsel to exclude all those prospective jurors necessary to advance the legitimate government objective of selecting a fair and impartial jury.[397] Thus, the availability of cause challenges would be a less restrictive alternative to peremptory

392. Haven, *supra* note 4, at 112, 115, 117; *see, e.g.*, Bennett, *supra* note 4, at 150; *see also, e.g.*, Melilli, *supra* note 4, at 503 (finding application of step 3 results in "hopelessly irremediable inconsistency"); *see also* Kennedy, *supra* note 4, at 204 (discussing high evidentiary bar related to motive.).

393. *See supra* Sections VI.A.1–4.

394. *See infra* Section VI.C. (substantive) and Part VII (procedural).

395. *See supra* Part V.

396. N.J. Ct. R. 1:8-3(b), reproduced in JCJS NOTICE, *supra* note 298, at 22–23.

397. *See supra* Section VI.A.1. (identifying legitimate state interest); *see also* Melilli, *supra* note 4, at 486–87 (promotion of fair and impartial jury); *see Due Process Limits on Prosecutorial Peremptory Challenges*, *supra* note 79, at 1034 ("[T]he due process clause essentially demands that all state challenges [be] for cause.").

challenges. This alternative provides an independent and sufficient basis to establish that peremptory challenge use violates substantive due process.

While this definitional analysis identifies a less restrictive alternative, some proponents may contend that it would be difficult, if not impossible, to select a jury with only cause challenges in the absence of peremptory challenges.[398] Any such contention is belied by the increased reliance upon cause challenges arising from the elimination of peremptory challenges in Arizona, England, Canada, and other former commonwealth nations.[399] This reliance occurred "without any chaos in the courts."[400] Moreover, the "ancient" origins of cause challenges actually precede those of peremptory challenges.[401] They have been administered together in American courts for centuries.[402] Accordingly, both trial practitioners and the courts are intimately familiar with cause challenges, thereby assuaging any legitimate implementation concerns.[403]

Although not directly addressing due process protections, the groundbreaking analysis by Professor Kenneth Melilli outlines how the application of a relaxed, or in his words "sensible," cause standard could be implemented without peremptory challenges.[404] This analysis further

---

398. *See* CONNECTICUT REPORT, *supra* note 8, at 20–21 (addressing similar implementation argument opposing *Batson* reform); *see also* GR 37 FINAL REPORT, *supra* note 262, app. 2, at 1 (predicting increased appeals from denial of cause challenges).

399. *See supra* notes 287–89 and accompanying text; J.E.B. v. Alabama, 511 U.S. 127, 134–37 (1994) (observing extension of *Batson* to gender discrimination by several states).

400. *See* JCJS GUIDE, *supra* note 4, at C-2 (referencing elimination in England and Canada), Miller-El v. Dretke, 545 U.S. 231, 272 (2005) (observing that English courts now administer fair trials without peremptory challenges) (citing 2 Jury Service in Victoria, Final Report, ch. 5, p. 165 (Dec. 1997)) (1993 study of English barristers showed a majority support for system without peremptory challenges); *cf.* CONNECTICUT REPORT, *supra* note 8, at 20–21 (observing that although Washington's General Rule 37 was controversial, attorneys "adapted to it . . . as part of a changed legal landscape" and concluding that we have no reason to believe that Connecticut attorneys will not adapt to a similar rule); Cronin, Comment Letter on Recommendation 13, *supra* note 11, at 17 (noting that New Jersey attorneys responded "with alacrity" to criminal justice bail reform).

401. *See supra* note 334. There is some historical evidence suggesting that cause challenges predate peremptory challenges. *See* Hoffman, *supra* note 4, at 820; Swain v. Alabama 380 U.S. 202, 217 (1965) (using the word "ancient").

402. See Hoffman, *supra* note 4, at 822–24.

403. *See* Cronin, Comment Letter on Recommendation 13, *supra* note 11, Ex. A, at 14–15.

404. *Id.* at 15. Professor Melilli's analysis (of peremptory challenges use recommendations and relaxation of the cause standard) has received widespread approval by both courts and scholars. *See, e.g.*, *Miller-El*, 545 U.S. at 269 (Breyer, J., concurring); State v. Saintcalle, 309 P.3d 326, 334 (Wash. 2013); Page, *supra* note 4, at 262; Hoffman, *supra* note 4, at 871; R. Wright, *The Jury Sunshine Project, Jury Selection as a Political Issue*, 2018 U. ILL. L. REV. 1407, 1442 (2018); Haven, *supra* note 4, at 123; McAward, *supra*

reveals how a "cause only" approach would more effectively[405] respond to the equal protection concerns that the *Batson* Court sought to address through its paradigm.[406] Professor Melilli meticulously analyzed virtually every reported judicial decision which interpreted *Batson* from May 1986 through December 1993.[407] Based upon his evaluation of 3,898 peremptory challenges, Professor Melilli placed the reasons supporting these challenges into sixteen categories.[408] While reasonable minds could disagree concerning some of these characterizations, Professor Melilli provides a sound framework to analyze the actual implementation of the *Batson* paradigm. After characterizing these challenges, he then analyzed them consistently with the individual characteristic /group stereotyping distinction drawn by the *Batson* Court.[409] In view of his recommendation to eliminate peremptory challenges, Professor Melilli acknowledged that "any system of jury selection which would seek to function without the peremptory challenge would have to require the revitalization, and possibly the expansion, of the challenge for cause."[410]

Seeking to determine "whether a system which allowed only challenges for cause could sufficiently accommodate the legitimate concerns of litigants and their counsel," Professor Melilli examined each of these 3,898 challenges and reached three significant conclusions.[411]

---

note 78, at 630; Thomas W. Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1654 (2018); Willamette Racial Justice Task Force, *Remedying* Batson*'s Failure to Address Unconscious Juror Bias in Oregon*, 57 WILLAMETTE L. REV. 85, 100 n.85 (2021); J Bellin & J. Semitsu, *Widening* Batson*'s Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1113 (2011).

405. The comparative efficacy of peremptory and cause challenges is discussed in the procedural due process section. *See infra* Part VII.

406. Melilli, *supra* note 4, at 500.

407. *Id.* at 456.

408. *Id.* at 485. These categories were: (1) Prior Involvement with Criminal Conduct or Litigation, (2) Behavior During Voir Dire, (3) Possession of Extrajudicial Information or Bias, (4) Difficulty Following Instructions, (5) Age, (6) Employment or Training, (7) Economic Characteristics, (8) Family Situation, (9) Education and Intelligence, (10) Location of Home, Workplace or Other Activities, (11) Incapacity, (12) Personal Appearance, (13) Prior Jury Service, (14) Gender, (15) Miscellaneous Characteristics, and (16) Neutral Explanation Did Not Involve Any Objection to the Challenged Venireperson. *Id.* at 486–88.

409. *Id.* at 487–97.

410. *Id.* at 486–87, 502. This recommendation was supported by his analysis which revealed that "[b]oth the critics and the defenders of the peremptory challenge agree that challenges for cause are unrealistically narrow, both as defined and as applied." *Id.* at 486–502; *accord* Haven, *supra* note 4, at 118 ("Completely eliminating the peremptory challenge, and slightly loosening of [sic] the 'for-cause' challenge standard, is the only way to realize *Batson*'s, and the Constitution's, promise."); *see* LISA REPORT, *supra* note 329, at 39 (recommending liberal excusal for cause) (cited in Cronin, Comment Letter on Recommendation 13, *supra* note 11, Ex. A, at 13–14 (same)).

411. Melilli, *supra* note 4, at 485–87.

First, a "sensible" system for cause would excuse nearly 44% of those jurors for whom counsel exercised peremptory challenges.[412] This analysis supports the legitimacy of practitioner concerns that "cause" challenges are often too narrowly interpreted. Second, 52% of the peremptory challenges were based upon impermissible group stereotyping.[413] Third, the remaining 4% of the peremptory challenges were based upon subjective judgments of counsel.[414] Noting that these subjective judgments often reflect the effects of "intuiti[on]" or "hunches," Professor Melilli also characterized them as "impermissible" manifestations of group stereotyping.[415]

The application of a relaxed cause standard, therefore, would satisfy litigant's legitimate interest in the selection of a fair and impartial jury and, if accompanied with the elimination of peremptory challenges, would substantially reduce their ability to rely upon subjective intuition and impermissible group stereotyping.[416]

These principles of cognitive science and Professor Melilli's analysis reveal how the "cause only" standard required by substantive due process *indirectly* addresses in a far more effective manner the equal protection abuses the *Batson* Court sought to remedy through its paradigm. His analysis further reveals the unpersuasive nature of any potential implementation objections to this "cause only" standard. Therefore, it is submitted that proponents will be hard pressed to establish that cause challenges are not a less restrictive alternative in the selection of a fair and impartial jury.

---

412. *Id.* at 497.

413. *Id.* at 497. Characterizing this group stereotyping as "impermissible," Professor Melilli applied the distinction between permissible individual case-specific bias and impermissible group stereotyping biases established by the *Batson* Court. *Id.* at 482, 487.

414. *Id.* at 497.

415. *Id.* at 482, 501–02.

416. Cronin, Comment Letter on Recommendation 13, *supra* note 11, Ex. A, at 15. Cognitive science explains why cause challenges function to dramatically reduce the potentially corrupting effect of implicit bias, inherent in counsel's reliance upon their intuition. Unlike peremptory challenges, cause challenges require counsel for the striking party to articulate a reason why the prospective juror should not serve on that petit jury. By requiring the articulation of a legally sufficient reason, the exercise of a cause challenge compels counsel to engage in a conscious, deliberative thought process. This invokes System II, which "'overrides' the otherwise operational unconscious or automatic processes (System I) within which implicit bias flourishes." *See supra* notes 263–65 (quoting Cronin, Comment Letter on Recommendation 13, *supra* note 11, Ex. A, at 7–8). Anecdotal evidence corroborates not only operation of the "override," but also its self-regulatory effect upon counsel's use of peremptory challenges. During his twenty years on the bench, this Author presided over several jury trials during which he repeatedly observed this "override" in action. On several occasions, once a prima facie case was established, thereby requiring counsel to articulate a non-discriminatory reason to support any additional peremptory challenges, counsel attempted to exercise very few, if any, additional peremptories.

C. *The Substantive Due Process Violation*

As applied to those prospective jurors who are otherwise statutorily qualified to serve and who are not excused for cause, the peremptory challenge precludes a prospective juror's exercise of their right to serve on a particular petit jury. It is submitted that previously proffered justifications for depriving prospective jurors of this fundamental right fail to establish that the peremptory challenge use is necessary to select a fair and impartial jury. Moreover, since cause challenges authorize striking prospective jurors for whom there is a reasonable basis to doubt that they would be fair and impartial, it is submitted that proponents will be unable to establish there is no less restrictive alternative to secure a fair and impartial jury. Accordingly, it is submitted that the continued use of peremptory challenges upon citizens who are otherwise statutorily qualified to serve and who are not excused for cause violates substantive due process.

VII. THE EXERCISE OF PEREMPTORY CHALLENGES VIOLATES PROCEDURAL DUE PROCESS

In Section V, a citizen's constitutionally protected right or interest to serve on a particular petit jury was established. We now turn to the second due process inquiry—what process is due? Procedural due process requires that a state actor who seeks to deny or interfere with a citizen's use or enjoyment of a constitutionally protected right or interest to provide: (1) notice and (2) a meaningful opportunity to be heard.[417] The formality of these requirements has been determined under two distinct, but often complementary, standards: *Mathews* balancing analysis[418] and fundamental fairness analysis.[419]

A. *What Process Is Due:* Mathews *Balancing Analysis*

This assessment is made through the test first articulated in *Mathews v. Eldridge*,[420] which requires the balancing of three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and

417. Mathews v. Eldridge, 424 U.S. 319, 348 (1976).
418. *Id.* at 335.
419. *See, e.g.*, Doe v. Poritz, 662 A.2d 367, 421 (N.J. 1995).
420. *Mathews*, 424 U.S. at 335 (applied in *Poritz*, 662 A.2d at 412–13).

> finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[421]

Analytically, this test requires comparison of a baseline procedure with a substitute procedure.[422] Here, the "Baseline Procedure" is: (1) the exercise of peremptory challenges and (2) the judicial review of these challenges through the *Batson* paradigm. The substitute, which this Article will refer to as the "Alternative Procedure" is the "cause only" approach—the elimination of peremptory challenges and the application of a relaxed cause standard. The official action is the jury selection procedure.[423] The affected interests are those of the prospective juror, the litigants, and the community in that juror's service on a particular trial.[424] Peremptory challenge use affects those interests by precluding jury service. The risk of erroneous deprivation of that interest under the *Batson* paradigm will be addressed in this Section. The balance of the *Mathews* test will be addressed in the following Section.

1. The Baseline Procedure Erroneously Deprives Prospective Jurors of Their Right or Interest to Serve on a Particular Petit Jury and Fails to Protect both These Jurors and Litigants from Invidious Discrimination.

Analysis of the Baseline Procedure begins with the threshold observation that *Mathews* and most of its early progeny analyzed procedures which already articulated a reason supporting infringement upon a constitutionally protected property interest.[425] Those cases essentially addressed whether, in addition to that initially articulated

---

421. *Id.*
422. *Id.*
423. *See supra* note 17.
424. *Mathews* involved the plaintiff's "private" interest in receiving property, namely disability benefits, to which he claimed entitlement under the Social Security Act. *Mathews*, 424 U.S. at 323. While not diminishing an individual's property interest in continuing to receive disability benefits, it is submitted that such private interests pale in comparison to the public or societal interest in promoting full participation in our democracy through jury service. *Compare Mathews*, 424 U.S. at 323 (receipt of disability benefits), *with supra* Part II (societal interest in jury service).
425. *See Mathews*, 424 U.S. at 336 (preliminary assessment of ineligibility to receive disability benefits); United States v. James Daniel, 510 U.S. 43, 53–57 (1993) (forfeiture of real property); Connecticut v. Doehr, 501 U.S. 1, 4 (1991) (affidavit supporting probable cause determination before real property subject to civil prejudgment attachment statute); Fuentes v. Shevin, 407 U.S. 67, 96–97 (1972) (basis for replevin attachment filed with court clerk); Van Harkin v. Chicago, 103 F.3d 1346, 1350–51 (7th Cir. 1997) (basis for parking ticket filed with municipal court).

reason, some form of an adversarial or evidentiary hearing was also required.[426] Expressed in terms of the minimum requirement of due process, those Baseline Procedures provided notice, but not necessarily a sufficient opportunity to be heard.[427] This distinction is illustrated by the Court's earlier decision in *Goss v. Lopez*.[428]

The Court in *Goss* held that public high school officials' failure to provide such notice and reason before suspending a student violated due process.[429] Central to this holding was the Court's determination that "the claimed right of the State to determine unilaterally and without process whether that misconduct [warranting suspension] has occurred immediately collides with the requirements of the Constitution," specifically the Due Process Clause's prohibition against *arbitrary* deprivation of liberty.[430] Thus, the *Goss* Court equated the State's failure to articulate a reason supporting its suspension decision to an arbitrary exercise of state authority in violation of the Due Process Clause.[431] Critically, the baseline jury selection procedure involves the exercise of peremptory challenges which are, by definition, arbitrary.[432] These arbitrary challenges do not require the striking party to articulate *any* reason for depriving the prospective juror of their constitutionally protected right. It is submitted that this absence violates the threshold due process notice requirement.

The holding in *Goss* was further supported by timing—the disciplinary procedure did not require either notice or an opportunity to be heard *before* the student served their suspension.[433] This timing is critical in applying the due process requirement that the opportunity to be heard must be afforded "at a meaningful time and in a meaningful manner."[434] Since meaningful notice is provided *before* the protected interest is adversely affected, the disciplinary procedure in *Goss* violated due process.[435] Until opposing counsel establishes a prima facie case, striking counsel is not required under the *Batson* paradigm to articulate

426. *See, e.g.*, Doe v. Poritz, 662 A.2d 367, 372, 382–83, 423 (N.J. 1995).

427. *See* Mullane v. Cent. Hanover Bank, 339 U.S. 306, 313 (1950) (notice of civil settlement).

428. *See* Goss v. Lopez, 419 U.S 565, 584 (1975).

429. *Id.* at 568, 584.

430. *Id.* at 575.

431. *See id.*; *see also Poritz*, 662 A.2d at 413 (discussed *supra* notes 215–20).

432. This essence of the peremptory challenge shrouds its exercise in secrecy and fatally compromises any meaningful judicial review of its exercise. *See* Lewis v. United States, 146 U.S. 370, 378 (1892).

433. *See Goss*, 419 U.S. at 567.

434. Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (citing Armstrong v. Manzo, 380 U.S. 545, 552 (1965)); *see also* Grannis v. Ordean, 234 U.S. 385, 394 (1914).

435. *See Goss*, 419 U.S. at 582, 584.

any reason for their exercise of a peremptory challenge before a prospective juror is excused.[436] Hence, as applied, the *Batson* paradigm also fails to satisfy even the threshold minimum due process requirement of timely notice.

In addition to this fatal notice deficiency, the Baseline Procedure goes far beyond merely risking erroneous deprivation of the citizen's jury service right. Peremptory challenges are the procedural mechanism used to deprive those rights.[437] The *Batson* paradigm has proven itself to be incapable of curbing that deprivation.[438] Indeed, the Baseline Procedure's failure to safeguard the equal protection rights of prospective jurors and litigants has supported elimination of peremptory challenges in Arizona[439] and has fueled the growing chorus of blue-ribbon panels,[440] judges,[441] and scholars[442] who recommend their elimination. The paradigm's systemic defects include its focus upon purposeful discrimination which, in turn, requires judicial evaluation of the subjective mental state of counsel seeking to exercise a peremptory

436. *See* Batson v. Kentucky, 476 U.S. 79, 106–07 (1986) (Marshall, J., concurring).

437. *See supra* Section VI.A.4.

438. *See supra* Section VI.A.5.

439. By court rule, peremptory challenges were eliminated in Arizona. *See* Order Amending Rules 18.4 and 18.5 of the Rules of Crim. Proc., and Rule 47(e) of the Rules of Civ. Proc., No. R-21-0020 (Ariz. Aug. 30, 2021).

440. *See generally* ARIZONA REPORT, *supra* note 36; N.J. REPORT ON MINORITY CONCERNS, *supra* note 4, at 33. Legislation to eliminate peremptory challenges was introduced (but not yet enacted) in several states including New Jersey, California, and New York. *See* Gen. Assemb. B. 3765, 217th Sess. (N.J. 2016); *Batson* Reform, *supra* note 7, at 2, 10 (citing S.B. 212, 2021 Reg. Sess. 2019 (Ca. 2021)); S.B. S6066, 2021 Reg. Sess. (N.Y. 2021).

441. *See, e.g.*, *Batson*, 476 U.S. at 105–08 (Marshall, J., concurring); Swain v. Alabama, 380 U.S. 202, 246–47 (1965) (Goldberg, J., dissenting); Minetos v. City Univ. of N.Y., 925 F. Supp. 177, 183 (S.D.N.Y. 1996) (Motley, D.J.); Broderick, *supra* note 4, at 416–23; State v. Saintcalle, 309 P.3d 326, 350 (Wash. 2013) (Gonzalez, J., concurring); State v. Veal, 930 N.W. 319, 340–41 (Iowa 2019) (Wiggins, J.); *Veal*, 930 N.W. at 340 (Cady, J., concurring); *Veal*, 930 N.W. at 341 (Appel, J., concurring); Alen v. State, 596 So. 2d 1083, 1086–95 (Fla. Dist. Ct. App. 1992) (Hubbart, J., concurring); People v. Brown, 796 N.E.2d 1266, 1273 (N.Y. 2022) (Kaye, C.J., concurring) (acknowledging moving closer to elimination); People v. Bolling,79 N.Y.2d 317, 326 (N.Y. 1992) (Bellacosa, J., concurring); People v. Bryant, 253 Cal. Rptr. 3d 289, 309–11 (Cal. Ct. App. 2019) (Humes, J., concurring); Flowers v. State, 947 So. 2d, 910, 937–39 (Miss. 2007); Spencer v. State, 149 A.3d 610, 648 (Md. 2016) (McDonald, J., dissenting); Bennett, *supra* note 4, at 150; Hoffman, *supra* note 4, at 812; Cronin, Comment Letter on Recommendation 13, *supra* note 11, Ex. A, at 1–2 (Cronin, J., commenting).

442. *See, e.g.*, Van Dyke, *supra* note 177, at 29; Haven, *supra* note 4, at 117–18; Melilli, *supra* note 4, at 487.

challenge.[443] These defects extend to its allocation of the burden to prove that mental state upon counsel objecting to that challenge[444] and its causation requirement that this proof must establish that counsel's discriminatory purpose was the sole reason that they exercise the peremptory challenge.[445]

Focusing upon the practical problems in proving purposeful discrimination, Washington, California, Connecticut, and New Jersey have shifted the burden of production to the striking party upon request by either objecting counsel or the trial court.[446] This shift occurred through rulemaking or legislation. Through judicial decisions, this burden of production has been reduced in at least four other jurisdictions.[447]

Seeking to facilitate opposing counsel's ability to satisfy their burden of persuasion, Washington identified several "presumptively invalid" reasons to exercise a peremptory challenge.[448] With some adjustments, this approach has been followed in New Jersey, Connecticut, and California.[449]

Several states, including those four, have also relaxed *Batson*'s sole-causation standard.[450] Departure from the sole-causation standard has

---

443. *See supra* note 8 and accompanying text; *supra* note 310 (noting difficulty of proving "mixed motive" causation involving consideration of race and "trial related" considerations); *see, e.g.*, *Batson*, 476 U.S. at 101–02 (White, J., concurring).

444. *See supra* text accompanying note 134; *infra* Section VIII.A.

445. *See infra* Section VIII.B; *see also supra* note 310 ("mixed motive" causation involving consideration of race and "trial related" considerations).

446. *See* Wash. Gen. R. 37(c); N.J. Ct. R. 1:8-3A(b); A.B. 3070, Reg. Sess. (Cal. 2020); Conn. R. Super. Ct. P. § 5-12(b). Building on these reforms, this Article also proposes reallocation of the burden of persuasion to the objecting party. *See infra* Section H.1.

447. *See, e.g.*, Commonwealth v. Carter, 172 N.E.3d 367, 374 (Mass. 2021); Melbourne v. State, 679 So. 2d 759, 764 (Fla. 1996); State v. Parker 836 S.W.2d 930, 939 (Mo. 1992); United States v. Moore, 28 M.J. 366, 368 (C.M.A 1989); *see also* Frampton, *supra* note 7, at 23–26 (summarizing ongoing state reform efforts).

448. Wash. Gen. R. 37(h). By triggering this presumption upon the articulation of a (presumptively invalid) reason, this rule's operation conflicts with the essential nature of the peremptory challenge—"one exercised without reason stated." Swain v. Alabama, 380 U.S. 202, 220–21 (1965). This conflict was by design, as the presumptively invalid reasons were those historically "associated with improper jury selection in Washington." Wash. Gen. R. 37(h).

449. *See* N.J. Ct. R.1:8-3A(d)(1)(3); AB 3070, A.B. 3070, Reg. Sess. (Cal. 2020); Conn. R. Super. Ct. P. § 5-12(g).

450. In Washington, once the striking party articulates why the challenge was exercised, then "[t]he court shall [] evaluate the reasons given to justify the peremptory challenge in light of the totality of circumstances. If the court determines that an objective observer *could* view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied." Wash. Gen. R. 37(d), (e) (emphasis added). In New Jersey, once the striking party articulates why the challenge was exercised, then "[t]he court shall determine, under the totality of the circumstances, whether a reasonable, fully

been recommended in other states, including North Carolina,[451] Colorado,[452] and New York.[453]

The following Section shall demonstrate why the alternative "cause only" approach builds upon these salutary reforms and is more fully capable of providing meaningful protection to the rights of both prospective jurors and the litigants than the Baseline Procedure.

2. The Alternative Procedure More Fully Protects the Rights of both Prospective Jurors and Litigants and Preserves the Integrity of the Criminal Justice System.

The second due process assessment requires a comparison of the Baseline Procedure and the alternative procedure—the "cause only" approach.

Peremptory challenges remain the critical component of the Baseline Procedure. They function to preclude the exercise of the prospective juror's right to serve on a particular jury. Moreover, their use facilitates continued invidious discrimination. It is submitted that their elimination, through the Alternative Procedure, is the most direct and effective way to end this abuse.

Central to this facilitation of discrimination is the nontransparent nature of peremptory challenges. Until a prima facie case is established under the paradigm's second step, striking counsel is not required to provide any reason for their exclusion of a particular juror.[454] In contrast to that nontransparent procedure, if the striking party articulates a legally cognizable reason to support a cause challenge as required under the Alternative Procedure, then the exclusion of that prospective juror satisfies the threshold due process notice requirement. Absent this reason as articulated through a cause challenge, the Baseline Procedure fails to satisfy that notice requirement.[455]

---

informed person *would* find that the challenge violates paragraph (a) of this rule." N.J. Ct. R.1:8-3A(d) (emphasis added). While California clearly applies the "could" standard, Connecticut is more nuanced, prescribing challenges that "legitimately raise[] the appearance" that race or ethnicity was "a factor." *Compare* A.B. 3070 (d)(1) (Cal. 2020), *with* Conn. R. Super. Ct. P. § 5-12(d).

451. N.C. TASK FORCE FOR RACIAL EQUITY IN CRIM. JUST., REPORT 2020 102 (Dec. 2020).

452. COLO. SUP. CT. IMPLICIT BIAS SUBCOMM., REPORT 2–6 (June 20, 2022) (recommending rule similar to Wash. Gen. R. 37).

453. *See Batson* Reform, *supra* note 7, at 9–10 (citing N.Y. STATE JUST. TASK FORCE, RECOMMENDATIONS REGARDING REFORMS TO JURY SELECTION IN NEW YORK (Aug. 2022)).

454. *See* Batson v. Kentucky, 476 U.S. 79, 127 (1986) (Burger, C.J., dissenting).

455. The purpose of jury selection is to empanel a petit jury composed of individuals who are willing and able to be fair—to decide the case based upon the evidence presented and applicable law. By definition, a cause challenge empowers counsel to excuse all jurors who are unwilling or unable to be fair. Hence, cause challenges alone fully empower counsel to

If a cause challenge is disputed, then counsels' argument before the trial court satisfies the other minimal due process requirement—a meaningful opportunity to be heard before the right is adversely affected. This hearing is on the record and subject to appellate review.[456] Moreover, the prospective juror's liberty interest in maintaining a good reputation is not violated when that juror is excused for cause. To the contrary, where the striking attorney convinces the trial court that a prospective juror harbors a case specific bias, then that juror's excusal for cause is based upon a judicial finding on their ability to be fair and impartial in that trial.[457]

Given the underlying non-transparency of peremptory challenges, the *Batson* Court's decision to review their exercise through their paradigm yielded the ambiguous and often contradictory language which further undermined this Baseline Procedure's overall effectiveness.[458] These difficult distinctions, focusing upon the striking counsel's subjective state of mind, are not relevant[459] in resolving cause challenges. These cause determinations are based upon an "individualized" determination of the *legal sufficiency* of the proffered reason as applied

---

select the jury to which they are entitled—a fair but not necessarily favorable one. Therefore, "cause" is the finding relevant to divest a prospective juror of their right to serve on a particular petit jury in compliance with due process. *Compare* Goss v. Lopez, 419 U.S. 565, 582 (1975) (past misconduct is relevant; failure to provide prior notice violates due process), *with* Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 4 (2003) (future dangerousness is not relevant; failure to establish through a prior adversarial hearing does not violate due process).

456. *See, e.g.*, N.J. Ct. R. 1:8-3(b).

457. *See* JCJS GUIDE, *supra* note 4, at 2–3. The exclusion is specific to that juror's participation in trial, rather than that to juror. Hence, the juror's overall reputation is not implicated. In other words, such excusal for cause only reflects a judicial conclusion that "this trial is not for you." It does not support broader conclusions, such as "jury service is not for you" or that "full participation in our democracy is not for you." Those latter conclusions can be fairly drawn whenever peremptory challenges are exercised, particularly after the trial court denied a cause challenge to that juror.

458. *See supra* note 138. This language included efforts to distinguish counsel's permissible from impermissible reliance upon intuition, hunches, "trial related" strikes, and group stereotyping in their exercise of peremptory challenges. *See id.*

459. The denial of a cause challenge does not entail a finding of purposeful discrimination. *Compare* Cronin, Comment Letter on Recommendation 13, *supra* note 11, Ex. A, at 19 (cause challenge) (citing Bennett, *supra* note 4, at 167), *with* JCJS NOTICE, *supra* note 298, at 41 (peremptory challenge). While counsel's state of mind is not relevant to the initial cause determination, their mental state may become relevant to determine whether a cause challenge was exercised in violation of the equal protection clause. *See supra* note 32. To resolve those potential equal protection claims, modifications to the *Batson* paradigm, as applied to cause challenges, are proposed in Part VIII. *See infra* notes 58–62. Since the Alternative Procedure effectively eliminates peremptory challenges, these *Batson* modifications would not preserve the Baseline Procedure which retains them.

to the prospective juror's ability to be fair and impartial in the pending trial.

Trial courts are fully familiar with deciding cause challenges as their "ancient origins" also trace back to thirteenth-century England. For over two centuries, American trial courts have developed a robust body of case law delineating legally sufficient reasons to excuse a prospective juror for cause.[460] Contrary to protestations of peremptory challenge proponents, trial courts grant cause challenges with "remarkable frequency."[461] To address any legitimate litigant concerns that trial courts would be unduly restrictive in granting cause challenges, the Alternative Procedures embraces an even more relaxed "cause" standard.[462]

The third *Mathews* factor was initially applied to the increased fiscal and administrative burden associated with the government hearing demanded by the individual whose property interest was adversely affected.[463] It is submitted that the alternative procedures would not impose any additional fiscal or administrative burdens upon any criminal justice system stakeholder, including the judiciary which is responsible for designing and supervising jury selection procedures.[464] To the contrary, the Alternative Procedure of eliminating peremptory challenges and requiring "cause" challenges impose no additional fiscal burden upon any branch of government. Moreover, the Alternative Procedure's "cause" requirement would function as a System II "override," reducing the effect of implicit bias upon counsel and their client.[465] Factors including the resulting attorney "self-regulation"[466] would reduce the number of excluded jurors, thereby *decreasing* the administrative and fiscal burdens associated with jury selection.[467]

---

460. This case law is reflected in Professor Melilli's conclusion that nearly forty-four percent of those jurors for whom counsel exercised peremptory challenges would be excusable under a sensible "cause" standard. *See* Cronin, Comment Letter on Recommendation 13, *supra* note 11, Ex. A, at 15 (citing Melilli, *supra* note 4, at 487, 497). Fifty-two percent were exercised based upon impermissible group stereotyping and the remaining four percent were exercised based upon impermissible subjective "hunch" challenges. *Id.*

461. ROSE REPORT, *supra* note 313, at 85.

462. *See* N.J. Ct. R. 1:8-3 (2022), reproduced in JCJS NOTICE, *supra* note 298, at 23. More specifically, they require the trial court to excuse a juror for cause if the court "finds there is a reasonable basis to doubt that the juror would be fair and impartial." *Id.*

463. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

464. *See* State v. Andujar, 254 A.3d 606, 623 (N.J. 2021) (judicial responsibility).

465. *See supra* text accompanying notes 254–57.

466. *See supra* note 326.

467. This anticipated decrease supported efficiency arguments previously advanced as the primary reason to reduce or eliminate peremptory challenges. *Cf.* JCJS GUIDE, *supra* note 4, at 8 (eliminating peremptory challenges would drastically reduce summoning requirements); *see* Cronin, Comment Letter on Recommendation 13, *supra* note 11, Ex. A,

While these efficiency arguments are certainly well grounded, the alternative procedure is also supported by a far more fundamental consideration—to preserve the integrity of the jury selection process.[468] The continued strategic use of peremptory challenges, depriving prospective jurors of their right to serve, provides a far more compelling reason to replace the Baseline Procedure with the "cause only" Alternative Procedure.[469] Adoption of this alternative would preserve the integrity of this procedure and refute any suggestion that any criminal justice stakeholder remains complicit in any nefarious "back up plan" to consider race in the determination of guilt or innocence.[470]

B. What Process Is Due: Fundamental Fairness Analysis

Determining that due process requires a pre-classification hearing for convicted defendants subject to potential sex offender registration and reporting requirements, the New Jersey Supreme Court in *Doe v. Poritz* applied the *Mathews* balancing analysis.[471] The court also supported its

---

at 1 (first citing WEISS REPORT, *supra* note 72, at 9; then citing LISA REPORT, *supra* note 329, at 12).

468. In *McCollum*, the Court recognized that if "a court allows jurors to be excluded because of loup bias, '[i]t is [a] willing participant in a scheme that could only undermine . . . citizens' confidence in it.'" Georgia v. McCollum, 505 U.S. 42, 49 (1992) (alterations in original) (quoting State v. Alvarado, 534 A.2d 440, 442 (N.J. Super. Ct. App. Div. 1987)); Minetos v. City Univ. of N.Y., 925 F.Supp. 177, 183 (S.D.N.Y. 1996) (observing that peremptory challenges "by their very nature, invite corruption of the judicial process"); Cronin, Comment Letter on Recommendation 13, *supra* note 11, Ex. A, at 17–19 (arguing that elimination would promote public confidence in the criminal justice system).

469. *See* Spencer v. State, 149 A.3d 610, 647–49 (Md. 2016) (McDonald, J., dissenting). Seeking to address *Batson*'s ineffectiveness in safeguarding equal protection rights, Justice McDonald recommended "to eliminate peremptory challenges altogether" and then, "[t]he burden would be on counsel from the outset to explain a good reason for excluding a person from a jury. If all strikes were for cause, a reason that is neither persuasive nor plausible would carry no weight at all and would not be able to camouflage a discriminatory strike." *Id.*; Ray-Simmons v. State, 132 A.3d 275, 291 (Md. 2016) (McDonald, J., dissenting) (recommending eliminating peremptory challenges and then observing that "[a]s long as we retain challenges for cause as part of the jury selection process, there is no reason to enshrine such arbitrary judgments as part of our system of justice"); *see supra* note 136 (explaining that *Batson* step two does not require reasons to be persuasive or plausible).

470. Kennedy, *supra* note 4 (condemning perception of judicial acquiesce to the consideration of race in determining guilt or innocence).

471. Doe v. Poritz, 662 A.2d 367, 421 (N.J. 1995) (applying Mathews v. Eldridge, 424 U.S. 319, 348 (1976)). The court's holding was based upon application of the fundamental fairness doctrine to principles of procedural, as opposed to substantive, due process. *Id.* at 417. The record does not reflect that a substantive due process argument was advanced in that case. *See id.* However, it is well established that the fundamental fairness doctrine equally applies to substantive due process analysis. *See, e.g.*, Rochin v. California, 342 U.S. 165, 169 (1952) (fundamental fairness; substantive due process).

ruling through application of the "fundamental fairness" doctrine,[472] which it described as follows: New Jersey's doctrine of fundamental fairness,

> [S]erves to protect citizens generally against unjust and arbitrary governmental action, and specifically against governmental *procedures* that tend to operate arbitrarily. [It] serves, depending on the context, as an augmentation of existing constitutional protections or as an independent source of protection against state action.[473]

Peremptory challenges are, by definition, arbitrary.[474] Moreover, their exercise facilitates the arbitrary exclusion of prospective jurors.[475] This arbitrary exclusion is illustrated by Professor Melilli's voting analogy:

> [S]uppose we allowed each of the Democratic and Republican parties in [a State] to exercise 10,000 peremptory challenges for the election of the governor. In other words, each of the two parties could designate 10,000 people (who would otherwise be eligible to vote) as ineligible to vote in the election. This would change the election result not at all. Presumably, each of the two

472. *Poritz*, 662 A.2d at 421–22. Considerations of fundamental fairness affect judicial determinations of what process is due under the United States Constitution. *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 573–74 (1975) (referring to fundamentally fair procedures applicable to a recognized right); *accord* Galvan v. Press, 347 U.S. 522, 530 (1954). Indeed, the *Goss* Court described the essence of due process as an abiding sense of "fundamental fairness" in the relationship between the government and its citizens. *Goss*, 419 U.S. at 573–74.

473. *Poritz*, 662 A.2d at 421 (quoting State v. Ramseur, 524 A.2d 188 (N.J. 1987) (Handler, J., dissenting)); *accord* State v. Melvin, 258 A.3d 1075, 1091 (N.J. 2021) (holding that "arbitrary" government action by trial court which imposed sentence in compliance with Federal Constitution and relies upon "fundamental fairness" doctrine to support both divergence and reversal). Significantly, the fundamental fairness doctrine may support procedures which are not otherwise constitutionally compelled. *Poritz*, 662 A.2d at 421–22 (citing Monks v. New Jersey State Parole Bd., 277 A.2d 193 (1971) (holding that a prisoner is entitled to a statement of reasons for denial of parole)); *accord* Donaldson v. Bd. of Educ., 320 A.2d 857, 861–62 (N.J. 1974) (finding fundamental fairness requires a statement of reasons for tenure denial to a public-school teacher).

474. *See supra* note 3 (definition).

475. *See* Wilson, *supra* note 71 (quoting David Zonana, *Discriminatory Use of Peremptory Challenges*, 105 HARV. L. REV. 225, 265–66 (1991) (observing that exercise relies on stereotyping which are often based on arbitrary classifications)).

> candidates would receive 10,000 fewer votes, but the relative vote count would be unaltered.[476]

Professor Melilli concluded that we would never permit such a thing because we would never allow partisans to selectively remove the right of individual citizens to participate in their government.[477] This is exactly what we allow partisans to do through their exercise of preemptory challenges.[478]

Returning to the voting analogy, Professor Melilli further observed that we would not allow this to happen without regard to whether the party was disqualifying citizens based upon a constitutionally disfavored classification such as race or upon some other criteria.[479] This observation is critical as applied to jury selection because it highlights the distinction between *Batson*'s equal protection focus and this Article's due process focus. While equal protection analysis is dependent upon group classification and proof of purposeful discrimination against persons within that group,[480] due process analysis requires neither.[481]

Completing the analogy to jury selection, Professor Melilli rhetorically inquired, "if we would never allow partisans to disqualify citizens from voting, why do we allow partisans to disqualify citizens from jury service?"[482] "For no good reason" is the answer advanced throughout this Article.[483]

---

476. Memorandum from Martin Cronin on Professor Kenneth Melilli Conversations to Jury Selection Rsch. File (Oct. 14, 2023) (on file with author) [hereinafter Prof. Melilli Conversations]; *see* Melilli, *supra* note 4, at 502–03. This analogy is particularly apt in view of the historical linkage between a citizen's right to vote and their right to jury service. *See supra* Part II.

477. Prof. Melilli Conversations, *supra* note 476; *see* Melilli, *supra* note 4, at 502–03. Each citizen has a right to vote "free of arbitrary impairment by state action." Baker v. Carr, 369 U.S. 186, 208 (1962); *accord* Reynolds v. Simms, 377 U.S. 533, 562 (1964) ("Any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."). As applied to voting, a legal basis to deny that permission was established in *United States v. Texas*, 384 U.S. 155 (1966). *See* discussion *supra* Part D (substantive due process).

478. *See supra* Part VI; *see also supra* note 280 (quoting Justice Albin's observations); *accord* Broderick, *supra* note 4, at 417 (observing that the peremptory challenge "has no parallel in our democratic form of government. It entrusts to private individuals the distribution of the goods of political participation;" illustrating improper delegation with a voting analogy).

479. Prof. Melilli Conversations, *supra* note 476; *see* Melilli, *supra* note 4, at 502–03.

480. *See supra* Part IV.

481. *See supra* Part VI.

482. Prof. Melilli Conversations, *supra* note 476; *see* Melilli, *supra* note 4, at 502–03. This partisan exclusion is most clearly exercised through the "cancel out" procedure of perceived "extreme" jurors. *See supra* Section VI.A.1.

483. *See supra* Part VI.

Describing the expansive reach of the "fundamental fairness" doctrine's, the *Doe v. Poritz* court explained that:

> [T]his doctrine has been invoked when the actions of government, though not quite rising to the level of a constitutional violation, nonetheless included aspects of unfairness which required this Court's intervention . . . . Although we have applied the doctrine of fundamental fairness in a variety of contexts, there is one common denominator in all of those cases: a determination that someone was being subjected to potentially unfair treatment and there was no explicit statutory or constitutional protection to be invoked. Fundamental fairness is a doctrine that is an integral part of due process, and is often extrapolated from or implied in other constitutional guarantees. The doctrine effectuates imperatives that government minimize arbitrary action, and is often employed when narrowed constitutional standards fall short of protecting individual defendants against unjustified harassment, anxiety, or expense.[484]

Since prospective jurors are not litigants, their rights have been neither directly addressed nor fully defined in reported decisions.[485] The *Powers* Court explained that "[t]he barriers to a suit by an excluded juror are daunting. Potential jurors are not parties to the jury selection process and have no opportunity to be heard at the time of their exclusion."[486] Thus, reported judicial decisions resolving equal protection objections fall short of protecting those due process rights identified in this Article.[487]

The "existing constitutional standards," including the *Batson* paradigm, clearly fall short of adequately protecting affected citizen's due process rights.[488] Thus, the fundamental fairness doctrine provides an independent state constitutional ground to remedy this unfair treatment[489] by requiring, as a matter of procedural due process, both

---

484. Doe v. Poritz, 662 A.2d 367, 421–22 (N.J. 1995) (internal citations omitted) (quoting State v. Yoskowitz, 563 A.2d 1, 27 (N.J. 1989) (Handler, J., dissenting)).

485. *See supra* notes 165, 185.

486. Powers v. Ohio, 499 U.S. 400, 414 (1991). The paucity of precedent is attributable to the lack of practical incentive for excluded jurors to assert their rights during the course of a litigation in which they are not a party. *See id.* at 414 (recognizing that "[t]he barriers to a suit by an excluded juror are daunting"); *see also supra* note 165 and accompanying text.

487. *See supra* notes 440–41.

488. *See supra* Section VI.A.5.

489. Similar to other applications of the fundamental fairness doctrine, peremptory challenges are "unjust," as their exercise deprives prospective jurors of their constitutionally recognized right to serve on a particular petit jury and facilitates both

notice and an opportunity to be heard[490] before partisans may deprive a fellow citizen of their right to serve on a particular petit jury.

VIII. MODIFIED *BATSON* PROCEDURE FOR CAUSE CHALLENGES

The Alternative "cause only" Procedure eliminates peremptory challenges but retains cause challenges. Particularly considering the relaxed standard under which these cause challenges are now being evaluated, many prospective jurors may qualify for cause excusal. Theoretically, cause challenges may be exercised in violation of the Equal Protection Clause.[491] Thus, a framework must remain to evaluate claims of potential equal protection violations in the exercise of cause challenges.

In the Baseline Procedure, the *Batson* paradigm provided this framework. This framework has proven to be ineffective for several reasons, including: (1) its focus upon the striking attorney's subjective intent,[492] (2) its allocation of the burden of persuasion upon the objecting party,[493] and (3) its sole causation requirement.[494] To address these deficiencies, the Alternative Procedure modifies *Batson*'s third step by: (1) reallocating the burden of persuasion and (2) reformulating the causation standard. Each modification will be addressed separately in this Section.

A. Reallocated Burden of Persuasion

The Alternative Procedure shifts the burden of persuasion to the striking party seeking to deprive the prospective juror of their right to serve on a particular petit jury and away from the objecting party seeking to preserve that right.[495]

---

prohibited strategic "stacking" and invidious discrimination. *See supra* Section VI.A.1 (describing strategic racial discrimination).

490. As outlined during our discussion of *Mathews* balancing, notice is provided through the exercise of a cause challenge and the pre-deprivation hearing is provided through the trial court's resolution of that challenge. *See supra* Section VII.A.2. and note 287. This resolution is outside the presence of the jury, but on the record and subject to appellate review.

491. *See supra* note 32.

492. *See supra* note 8.

493. *See supra* Part IV.

494. *See supra* note 139.

495. This proper reallocation of the burden of persuasion was critical to Judge Bennett's support of both increased juror participation in voir dire and in the elimination of peremptory challenges. *See* Bennett, *supra* note 4, at 158 (voir dire), 167 (peremptories).

This reallocation is fully supported by well-established principles for determining the proper allocation of evidentiary burdens of production and persuasion,[496] and with promising, ongoing reforms in several states.[497] These principles place the burden of persuasion upon the party:

> (1) relying upon establishment of the disputed fact,
> (2) benefiting from superior access to relevant information or proofs,
> (3) demonstrating greater expertise in evaluating the disputed fact, and
> (4) possessing a lesser comparative interest arising from an adverse determination of the disputed fact.[498]

While each of these factors is relevant, none are outcome determinative.

Each of these factors support shifting the burden of persuasion to the striking party seeking to exercise a discretionary challenge. Factor one's application is illustrated by "bailable offense" clause interpretations.[499] These clauses appear in many states' constitutions which provide that "[a]ll persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great."[500] The question presented to the New Jersey Supreme Court in *State v. Konigsberg* was "who should have the onus of establishing" that the certain capital offense exception applies.[501] Interpreting the constitutional language to confer every citizen with the right to bail except those charged with certain capital offenses, the New Jersey

---

496. *See, e.g.*, State v. Wright, 980 A.2d 17, 21 (N.J. Super. Ct. Law Div. 2008); State v. Casavina, 394 A.2d 142, 144 (N.J. Super. Ct. App. Div.1978).

497. See *supra* Section VII.A.1, for a discussion of the burden of persuasion reallocation in states including Washington, California, Connecticut, and New Jersey.

498. *See* Norfolk S. Ry. Co. v. Intermodal Props., 35 A.3d 726, 738 (N.J. Super. Ct. App. Div. 2011) (quoting J.E. *ex rel.* G.E. v. Dep't of Hum. Servs., 622 A.2d 227, 235–36 (N.J. 1993) ("Generally, burdens of persuasion and production are placed on the party 'best able to satisfy those burdens.'")).

499. *See generally* State v. Konisberg, 164 A.2d 740, 742 (N.J. 1960).

500. *See, e.g.*, S.D. CONST. art. VI, § 8. New Jersey's Constitution has similar wording. N.J. CONST. Art. I, ¶ 11; *see Konigsberg*, 164 A.2d at 742 (noting that over forty other states have similarly worded clauses).

501. *Konigsberg*, 164 A.2d at 743, *quoted in* Comment, *Criminal Procedure—Determination of Accused's Right to Bail in Capital Cases*, 7 VILL. L. REV. 438, 440 (1962) ("[T]he general mode of construction of a constitutional mandate: the party asserting an exception to a constitutional decree must prove that his case is properly within the exception.").

Supreme Court concluded that "[t]he answer is not difficult. The burden should rest on the party relying on the exception."[502]

Since the striking party is relying upon the existence of some juror "bias" or "partiality" which counsel perceives as precluding them from being "fair," the striking party is relying upon an exception.[503] Hence, factor one supports the shift.[504] Clearly, the striking attorney has the best information concerning their own mental state. Application of factor two is further supported by the striking counsel's superior ability to marshal those facts, developed during voir dire, which counsel relies upon to demonstrate juror "bias" and, inferentially, the absence of a racially discriminatory purpose in counsel's decision to strike that juror.[505]

Concerning the third factor, peremptory challenge proponents have consistently claimed that they are highly skilled at discerning juror bias.[506] The scientific validity of this claim is dubious, particularly concerning implicit bias.[507] Nonetheless, proponents' continued assertion of their superior "expertise" further supports reallocating the burden of persuasion to them as the striking party.

The fourth factor, comparative interest analysis, begins with a recognition of the constitutionally protected right of prospective jurors to fully participate in our democracy through service on a particular petit jury.[508]

Whether one party's claim impinges the exercise upon another person's constitutional rights is relevant under the fourth factor. For example, in those jurisdictions where a criminal defendant had a constitutional right to bail, the State bears the burden of persuasion when it seeks to impinge upon that right by claiming that the bail was

---

502. *Konigsberg*, 164 A.2d at 743. Several other states have adopted this reasoning in interpreting their bailable offense clauses. *See, e.g.*, Orona v. Dist. Ct. of Denver, 518 P.2d 839, 840 (Colo. 1974) (interpreting COLO. CONST. art. II, § 19); State v. Menillo, 268 A.2d 667, 670 (Conn. 1970) (interpreting CONN. CONST. art. I, § 8); State v. Roth, 482 P.2d 740, 742–43 (Or. 1971) (interpreting OR. CONST. art. I, § 14); State v. Arthur, 390 So. 2d 717, 719–20 (Fla. 1980) (interpreting, FLA. CONST. art. I, § 14).

503. Cronin, Comment Letter on Recommendation 25, *supra* note 11, at 8.

504. *Id.* at 9.

505. *Id.*

506. *See, e.g.*, Cronin, Comment Letter on Recommendation 13, *supra* note 11, Ex. A, at 8.

507. *See* Kang, *supra* note 293; s*ee also* Page, *supra* note 4, at 160–61; a*ccord* Alschuler, *supra* note 72, at 203 ("Trial lawyers . . . use their peremptory challenges . . . to secure juries likely to favor their positions. Nevertheless, the available evidence suggests that they often fall short of their partisan goals. Their folk wisdom, trial experiences, mystic intuitions, and crude group stereotypes do not in fact enable them to predict which jurors will favor their positions.").

508. *See supra* Part V.

posted with criminally derived funds,[509] or that the defendant was not eligible to post a ten percent cash alternative to a surety bond.[510] Similarly, it is submitted that the existence of a prospective juror's constitutionally recognized right or interest to serve on a particular petit jury overwhelmingly supports reallocating the burden of persuasion upon the litigant who seeks to preclude that juror from exercising that right.

Rather than impinging upon the litigants' right to a fair trial, this burden reallocation actually promotes those litigants' rights.[511] By placing the burden upon striking counsel to demonstrate that they would have moved to excuse that juror for cause regardless of their membership in a protected class, counsel's reliance upon racial stereotypes as a proxy for juror competence will probably decrease dramatically.[512] Clearly, this process would be more transparent, thereby facilitating trial court supervision of the jury selection process and appellate review of that process.

Efforts in other jurisdictions to address deficiencies in the Baseline Procedure's burden of persuasion provide further support for the Alternative Procedure. For example, as an alternative to eliminating peremptory challenges,[513] the Washington Supreme Court promulgated General Rule 37 ("GR 37").[514] Responding to criticisms that the burden of persuasion in *Batson*'s third step undermines the paradigm's effectiveness, GR 37(c)(d) reallocates the burden of production in *Batson*'s first step to the striking attorney and GR 37(h) enumerates presumptively invalid reasons under *Batson*'s third step.[515]

GR 37(c) and (d) effectively eliminate the prima facie case requirement within *Batson*'s first step.[516] Upon request of the court or opposing counsel, this court rule imposes a burden of production upon the

509. *See* New Jersey v. Casavina, 394 A.2d 142, 144 (N.J. Super. Ct. App. Div. 1978); *see also* New Jersey v. Wright, 980 A.2d 17, 24 (N.J. Super. Ct. App. Div. 2009).

510. *Casavina*, 394 A.2d at 144; *Wright*, 980 A.2d at 21.

511. *See* Cronin, Comment Letter on Recommendation 13, *supra* note 11, at 3–10, and Ex. A, at 13–19.

512. *See supra* note 450 (objective observer standard); *supra* note 466 (attorney self-regulation). Juror competence is determined by their ability to be fair and impartial. *See supra* text accompanying note 43; *see also* Georgia v. McCollum, 505 U.S. 42, 56 (1992); *accord* Powers v. Ohio, 499 U.S. 400, 413 (1991) (stating that one goal of the jury system is to deliver a verdict "in accordance with the law by persons who are fair").

513. Washington's General Rule 37 was a compromise based, in part, upon arguable protection of peremptory challenges under the Washington Constitution. *See supra* note 36. The JCJS recommended a modified form of Washington's General Rule 37. *See* JCJS NOTICE, *supra* note 298, at 22–23.

514. In Washington, the burden of production shifts upon request of the trial court or opposing counsel. *See* Wash. Gen. R. 37(c).

515. *See* Wash. Gen. R. 37 (c)–(d), (h).

516. *See* Batson v. Kentucky, 476 U.S. 79, 105–08 (1986); Wash. Gen. R. 37 (c)–(d).

striking party to articulate a nondiscriminatory reason for exercising the peremptory strike.[517] The Washington Supreme Court Workgroup reasoned that:

> Historically, the burden has rested with the objecting party. Therefore, instead of requiring the . . . objecting party to prove a *prima facie* case of discrimination against a particular juror, workgroup members generally agreed the burden should be carried by the striking party to give reasons to justify the peremptory challenge . . . .[518]

Hence, GR 37(c) and (d) are fully consistent with the Alternative Procedure's further modification of the *Batson* paradigm to reallocate the burden of persuasion to the party seeking to exercise a cause challenge.[519]

To more fully protect a prospective juror's right to serve on a jury, the Alternative Procedure builds upon GR 37(c) and (d) by placing not only the burden of production, but also the burden of persuasion, upon the striking party.[520]

The enumeration in GR 37(h) of presumptively invalid reasons[521] to exercise a peremptory challenge further reflects dissatisfaction with

---

517. *See* Wash. Gen. R. 37 (c)–(d).

518. GR 37 FINAL REPORT, *supra* note 262, at 4. Echoing this conclusion, the Workgroup emphasized that the "proposed rule is intended to shift the burden to the striking party *to prove* a race-neutral basis for the challenge, instead of the current standard that requires a judge to make sometimes subjective determinations about the motivations of a peremptory challenge." *Id.* at 8 (emphasis added).

519. *See id.* at 4. Other commentators support shifting the burden of persuasion to the striking party because it "takes into account the significant role peremptory challenges have played and continue to play in the exclusion of African-American and Latinx citizens from Juries." SEMEL ET AL., *supra* note 4, at ix (recommendation 2).

520. *Cf.* WASH. GEN. R. 37(e) (placing burden of persuasion on objecting party; using "could" standard; limiting proscription to race). The Alternative Procedure does not condition its reallocation of the burden of production upon request of the trial court or opposing counsel. *Id.* The striking party must establish that an "objective observer" would not find that their removal of a prospective juror was based on that juror's race. *Id.*

521. This court rule provides that:

> Because historically the following reasons for peremptory challenges have been associated with improper discrimination in jury selection in Washington State, the following are presumptively invalid reasons for a peremptory challenge: (i) having prior contact with law enforcement officers; (ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling; (iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime; (iv) living in a high-crime neighborhood; (v) having a child outside of marriage; (vi) receiving state benefits; and (vii) not being a native English speaker.

WASH. GEN. R. 37(h). These seven reasons reflect appellate decisions proscribing reliance upon them in the context of the factual circumstances presented in the appellate record.

Batson's burden proof allocation.[522] By identifying these presumptively invalid reasons, the Washington Supreme Court sought to reduce the objecting party's difficulty in satisfying their burden of persuasion.[523] To rebut this presumption of invalidity, modifications of GR 37(h) adopted in New Jersey, Connecticut, and California require the striking party to demonstrate that they excluded the juror based upon legitimate concerns about the prospective juror's ability to be fair and impartial.[524] This focus upon fairness and impartiality is the essence of a cause challenge.[525] The Alternative Procedure builds upon these rebuttal standards by embracing a "cause only" standard for all juror exclusions[526] and by reallocating the burden of persuasion under *Batson* for all juror exclusions for cause, not just those in which the striking party relies upon a reason historically associated with invidious discrimination.[527] This reallocation protects the jury service rights of all prospective jurors, not just those whom counsel seek to exclude for historically disfavored

---

GR 37 FINAL REPORT, *supra* note 262, at 3. These presumptions of invalidity were rejected by Arizona officials who view them as "lopsided" towards defense counsel and unlikely to capture their discriminatory strikes against White jurors. *See* FRAMPTON, *supra* note 7, at 47–48 (citing interviews with Arizona workgroup members).

522. *Cf.* GR 37 FINAL REPORT, *supra* note 262, at 4.

523. *See* WASH. GEN. R. 37(e), (h). This occurs through the operation of the GR 37(h) presumption which assists the objecting party to satisfy their burden of persuasion under GR 37(e). *Id.*; s*ee also* GR 37 FINAL REPORT, *supra* note 262, at 4–5.

524. GR 37 FINAL REPORT, *supra* note 262, at 4. GR 37 did not specify a standard to rebut its presumption of invalidity. *Id.* However, those standards were expressly stated in its modifications subsequently implemented. *See* N.J. Ct. R. 1:8-3A(d)(1), Conn. R. Super. Ct. P. § 5-12(h), and Assemb. B. 3070, 2020 Reg. Sess. (Cal. 2020).

525. *See supra* Section VI.B.

526. *See supra* Section VI.B.

527. *See* WASH. GEN. R. 37(h). In determining whether cause exists, the trial court could consider the historical disfavor associated with the articulated reason. Rather than listing presumptively invalid reasons, the Alternative Procedure embraces a relaxed cause standard under which "many presumptively invalid and demeanor-based challenges highly scrutinized in Washington would simply not qualify as cause challenges." Cronin, Comment Letter on Recommendation 13, *supra* note 11, Ex. C, at 3. The Alternative Procedure permits consideration of prior pretextual use of the reasons listed in GR 37(h) as part of the totality of the circumstances relevant in determining whether the striking attorney has sustained their burden of persuasion. WASH. GEN. R. 37(h). It is submitted that application of this relaxed standard could be facilitated through integration of the presumptively invalid reasons for peremptory challenges, identified GR 37 (h)–(i), into the cause determination. More specifically, "cause" involves a judicial evaluation of: (1) the legal sufficiency of the proffered reason, and (2) the factual nexus between that proffered reason and the prospective juror's ability to be fair and impartial. Cautious consideration of the disfavored reasons and conduct identified in GR 37(h) and (i) may assist in the first evaluation. Under the Alternative Procedure, this consideration would not involve any presumption of invalidity, but rather an acknowledgement that their historical association with invidious discrimination in peremptory challenge use cautions against a finding of their legal sufficiency in cause challenge use.

reasons. It is more straightforward in application, as it always places the burden of persuasion upon the striking party.[528] Accordingly, it is submitted that the Alternative Procedure more directly and effectively addresses *Batson*'s proof deficiencies by reallocating the burden of persuasion to the party seeking to exercise a cause challenge.

B. Reformulated Causation Requirement

Batson's third step, requiring the opposing party to prove that the striking party's *sole* purpose in exercising a peremptory strike was to invidiously discriminate, has been identified as a systemic defect which undermines the paradigm's overall effectiveness.[529] Seeking to address this defect, the Alternative Procedure recommends that the striking party must establish to the trial court, by a preponderance of the evidence, that they would have moved to excuse that juror for cause regardless of their membership in a protected class.[530] Alternatively stated, the striking party must establish that the prospective juror's membership in a protected class did not arise to a "but for" causation factor in their decision-making process.[531]

Applied together with the Alternative Procedure's burden of proof reallocation to the striking party, it is submitted that this "but for" causation standard provides an effective and workable alternative to both *Batson*'s "sole factor" standard[532] and Washington's "could be a

528. GR-37-inspired reforms initially place the burden of persuasion on the objecting party and then effectively reallocate it to the striking party who relies on a historically disfavored reason. *See* GR 37 FINAL REPORT, *supra* note 262, at 11–12.

529. *See* sources cited *supra* note 139.

530. *Cf.* Gattis v. Snyder, 278 F.3d 222, 233–35 (3d Cir. 2002) (Title VII employment discrimination). The *Snyder* court articulated the "dual motivation" test as follows: "an action motivated in part by an impermissible reason will withstand challenge if the same action would have been taken in the absence of the impermissible motivation." *Id.* at 232–33. Juror strikes implemented during "strategic racial discrimination" strategies present an area ripe for "dual" motive juror exclusions. *See supra* Section VI.A.1. These strategies presently evade effective scrutiny under the *Batson* paradigm. *See* sources cited *supra* note 8. Since the Alternative Procedure recommends elimination of peremptory challenges on due process grounds, this causation standard would only apply to equal protection objections to the exercise of cause challenges. *See* discussion *supra* Section VII.A.2. Accompanied by the burden of persuasion shift, this causation standard could be applied to the exercise of peremptory challenges in those jurisdictions, such as Connecticut, containing express state constitutional protection for the exercise of peremptory challenges. *See* discussion *supra* Section VIII.A; sources cited *supra* note 36.

531. *See* discussion *supra* Section VII.A.2.

532. *See* Batson v. Kentucky, 476 U.S. 79, 89–91 (1986) (Marshall, J., dissenting from denial of certiorari).

factor" standard.[533] While *Batson*'s standard is clearly too narrow,[534] Washington's standard has been persuasively criticized as being too broad.[535] As the GR 37 Workgroup co-chair acknowledged, nearly anything "could be" a factor.[536]

The *Batson* paradigm's focus on conscious bias was a structural defect which several states have sought to remedy through court rules or legislation modeled after Washington's GR 37.[537] Washington's broad "could be" standard was created, in large part, to ameliorate the difficulty encountered by an objecting party seeking to establish the striking party's conscious discriminatory purpose.[538] Relatedly, this standard also sought to address the effects of implicit bias upon the striking attorney's unconscious decision-making.[539]

Since the striking attorney may be unaware of their own implicit or unconscious biases, they may not "know, that, in fact, *but for* the juror's

---

533. *See* GR 37 FINAL REPORT, *supra* note 262, at 6, 11–12 (discussing "would view" alternative); Wash. Gen. R. 37(e).

534. *See* GR 37 FINAL REPORT, *supra* note 262, at 3.

535. *See id.* at 6 and app. 2 (individual statements of Judges Gibson and Dacca, and organizational statement of Washington Defense Trial Lawyers). The "could view" versus "would view" debate was one of the most significant areas of disagreement among GR 37's drafters. *See id.* at 6. In its efforts to foster agreement among its Working Group colleagues, the Washington Association of Prosecuting Attorneys ("WAPA") withdrew its earlier "but for" proposal and embraced the "would view" alternative. *See id.* app. 2. The fact that the WAPA proposal and its GR 37 alternative both placed the burden of persuasion on the objecting party distinguishes them from the Alternative Procedure. *See supra* text accompanying note 484.

536. Judge Gibson, Co-Chair of the GR 37 Workgroup, objected, stating that "[t]he problem with this standard is that it is the same as asking if it is 'possible' race or ethnicity was a factor in the use of the challenge. As everyone knows, anything is possible." GR 37 FINAL REPORT, *supra* note 262, at app. 2. Drafters of the Washington standard intended it to be very broadly interpreted. *See* La Rond Baker, *supra* note 259, at 4. More specifically, they crafted a rule that "if there were *any* possibility that race was a factor in a peremptory challenge, that challenge would be disallowed." *Id.* (emphasis added). Ultimately, Judge Gibson's criticisms were embraced in New Jersey, California, and Connecticut, which declined to follow Washington's "could be" approach. *See e.g.*, N.J. Ct. R. 1:8-3A(d)(2) (applying "would" standard); JCJS NOTICE, *supra* note 298, at 40–41; Cronin, Comment Letter on Recommendation 13, *supra* note 11, Ex. D, at 10 n.10 (supporting "would" standard); Assemb. B. 3070, 2020 Reg. Sess. (Cal. 2020) (applying substantial likelihood "would" be a factor); Conn. R. Super. Ct. P. § 5-12(d) (Connecticut) (applying if the use of the challenge legitimately raises the appearance that race or ethnicity was "a factor").

537. These states are Washington, Connecticut, California, and New Jersey. *See* Batson *Reform*, *supra* note 7; GR 37 FINAL REPORT, *supra* note 262, at 3; GR 9 cover sheet at 2 and n.10–11; State v. Holmes, 221 A.3d 407, 429 (Conn. (2019); CONNECTICUT REPORT, *supra* note 8, at 19; CONN. PRAC. BOOK 180 (The Comm'n on Legal Publ'ns ed., 2023); Assemb. B. 3070, 2020 Reg. Sess. (Cal. 2020); *supra* note 143; State v. Andujar, 254 A.3d 606, 621–23 (N.J. 2021); JCJS NOTICE, *supra* note 298 at 37–38; N.J. Ct. R. 1:8-3A(d)(2).

538. *See* GR 37 FINAL REPORT, *supra* note 262, at 3.

539. *See id.*; *Holmes*, 221 A.3d. at 440 n.1 (Mullins, J., concurring).

race or gender [they] would not have exercised the challenge."[540] Seeking to extend *Batson*'s reach to protect these "unconsciously" excluded jurors, Washington's GR 37(e) applied the broad "could be" standard. [541] The Alternative Proposal seeks to protect these same prospective jurors through direct application of the "but for" causation standard.[542] This protection is also accorded through a striking attorney's marshaling of the facts supporting their conscious decision to seek a prospective juror's excusal for cause which, in turn, may trigger a cognitive override of the potentially corrupting influence of unconscious or implicit bias.[543]

This "but for" causation standard is further supported by the *Batson* Court's reliance upon the burden shifting framework which it previously applied in Title VII employment discrimination litigation.[544] Presently, both the employee objecting to an employment decision and the party objecting to a juror exclusion bear the burden of establishing their adversary's discriminatory purpose.[545] However, in the employment context, the plaintiff-employee need not prove that this prohibited purpose was the *sole* reason for the defendant-employer's decision.[546] Sole causation remains the *Batson* standard.

In employment discrimination litigation, the "but for" standard applies.[547] Criticism of this standard is primarily based upon the difficulties which it imposes upon the plaintiff-employee bearing the statutorily imposed burden of persuasion.[548] In the Alternative

---

540. *See Holmes*, 221 A.3d at 430 (quoting Page, *supra* note 4, at 156) (emphasis added).

541. *See* GR 37 FINAL REPORT, *supra* note 262, at 3.

542. This "but for" standard is definitionally closer to New Jersey's "would be" standard than it is to Washington's "could be" standard. *See* discussion *supra* Section VII.B. The Alternative Procedure utilizes the "but for" standard because of its use in employment discrimination litigation, the nexus between that litigation and the *Batson* decision, and the familiarity that trial practitioners have acquired by applying it in that litigation over the last 50 years. *See* discussion *supra* Section VIII.B.

543. *See* discussion *supra* Section VI.A.

544. *See* Batson v. Kentucky, 476 U.S. 79, 94 n.18 (1986) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).

545. *See id.* (citing Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 252–56 (1981)) (employment discrimination).

546. *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1739–40 (2020) (applying but-for causation).

547. *See id.*

548. *See* Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489, 515–16 (2006). The article further observed that:

> [T]he fact in question (the role of the protected characteristic in the decision-making formula) occurs entirely inside the decisionmaker's head. Moreover, in these cases, the defendant generally has control over most of the evidence that might be used to prove this fact. Finding and presenting proof of such a fact can be daunting.

Procedure, the striking party whose mental state is at issue, and who has greater access to evidence bearing upon their mental state, has the constitutionally mandated burden of persuasion. Therefore, those employment litigation criticisms are largely inapplicable to the Alternative Procedure's modification of *Batson* as applied to cause challenges.

IX. CONCLUSION

Thirty-six years ago, the Supreme Court in *Batson* sought to end invidious discrimination in jury selection and to preserve peremptory challenges. The resulting paradigm accomplished neither objective. It simply does not work. Its deficiencies arise from its exclusive equal protection focus upon the exercise of a procedure which is arbitrary and nontransparent in both definition and practice.

This Article provides an alternative doctrinal basis to address invidious discrimination during jury selection—substantive and procedural due process. Each form of due process addresses invidious discrimination *indirectly*, by requiring that the denial of *any* citizen's right or interest to serve on a particular petit jury be based upon that citizen's demonstrated inability to perform the duties of a deliberating juror fairly and impartially. By focusing upon individualized determinations of juror competency, these due process approaches protect all the rights of both prospective jurors and litigants, regardless of their race, gender, or ethnicity.

In contrast to the *Batson* paradigm, this alternative approach is primary based upon due process rather than equal protection, the rights of prospective jurors rather than solely those of the litigants, juror inclusion rather than exclusion, individual juror competency rather than group stereotyping, and the citizenship which unites us rather than any group classification which may divide us.

When applied to a jury venire reflecting a fair cross-section of the community, this alternative approach is designed to minimize invidious discrimination in jury selection, to recognize the right of each citizen to fully participate in our democracy through jury service, to preserve our majoritarian form of self-government, to promote the selection of a fair and impartial jury, and to restore public confidence in the integrity of our justice system.

Id.