

THE IMPACT OF TECHNOLOGY ON EQUAL PROTECTION AS APPLIED IN VOIR DIRE: EXAMINING INVENTIONS' INFLUENCE ON PEREMPTORY STRIKES AND THE STANDARD OF REVIEW

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I. Introduction

Juror selection is arguably one of the most critical steps of any jury trial. Lawyers use experts, technology, and intuition to obtain favorable juries by eliminating those who are unsympathetic through strikes for cause and peremptory strikes. While peremptory strikes do not require judicial approval, if the strike is based on a juror's race or gender, then there has been a violation of the Fourteenth Amendment's Equal Protection Clause. The Fourteenth Amendment ensures that all persons get equal access to civil rights, which includes the opportunity to sit on a jury. The introduction of technology into voir dire methodology has made the review of strikes as potential violations of the Equal Protection Clause more challenging. While voir dire is meant to ensure the presence of an impartial jury by eliminating those with potential biases¹ lawyers use voir dire as an opportunity to select jurors favorable to their clients. Peremptory challenges are important tools in lawyers' arsenals: they are used to strike jurors who may have preconceived notions about the outcome of the case.² Unlike challenges for cause, peremptory challenges do not require judicial approval.³ Lawyers and jury consultants use a variety of methods, including technologies like jury selection software, to determine which jurors to eliminate. Software programs which consider race, gender, or ethnicity in recommending which jurors to strike may violate the Equal Protection Clause.

II. Jury Selection Software and its Constitutionality

Jury selection software relies on demographic characteristics such as race, gender, and age to determine whether a prospective juror is likely to be ^{*164} more sympathetic toward a particular side.⁴ While there is conflicting research about

the reliability of using demographics to predict juror behavior,⁵ there are also questions about whether these technologies violate the Equal Protection Clause.⁶ In the landmark case *Batson v. Kentucky*, the Supreme Court held that striking jurors on the basis of race violates the Equal Protection Clause.⁷ The Court later held that the Equal Protection Clause also prohibits strikes based on gender⁸ and ethnicity.⁹ Lower courts have expanded *Batson* to include religion,¹⁰ and most recently, sexual orientation.¹¹ Many jurisdictions hold that any consideration of race or gender in the decision to strike a juror will invalidate that challenge, while others uphold strikes as long as a neutral explanation can also be given. Accordingly, software technologies that include race, gender, ethnicity, or sexual orientation in their calculations--and recommend peremptory strikes based on those qualifications--may violate the Fourteenth Amendment.¹² *Batson* challenges are reviewed for clear error at the appellate level. The appellate court usually defers to the trial court's determination of a strike's legitimacy. This is because the trial court, as the fact finder, is presumed to be in the best position to evaluate whether the reason offered for a strike is legitimate, or merely a pretext for discrimination. However, the videotaping of voir dire could justify a de novo standard of review for two reasons: (1) the appellate court would see how a trial developed in its entirety, including the parties' opening and closing statements; and (2) using that omniscient view, the court could then evaluate the entire circumstances of a juror strike and *Batson* challenge. ^{*165} Modern jury selection has been characterized as "part art, part science," and as a "highly scientific art form." Both characterizations suggest an increased use of technology.¹³ Social scientists served the purpose of recently developed jury selection software. The increased reliance on social scientists in the jury selection process in the

1970's facilitated the emergence of an industry of expensive, professional jury consultants. 14 "Now, as proverbial juries deliberate over the efficacy of pricy jury consultants, lawyers have begun to utilize new jury selection technologies incorporating computer software solutions that purport to assist with impaneling a responsible jury." 15 Technological advances have greatly reduced the cost of jury selection software. 16 Some have even referred to jury selection software as "computer-based alternatives to jury consultants." 17 However, it is unclear as to whether peremptory strikes based on recommendation by programs that consider race and gender as part of the formula would survive constitutional scrutiny. 18 A number of jury selection software programs rely on demographic information to predict whether a prospective juror is sympathetic or biased to a case. 19 For instance, JuryQuest factors race, gender, age, education, occupation, marital status, and prior jury service. 20 Other programs consider number of children, income, and religion, in addition to, or in place of factors previously mentioned. 21 Nonetheless, the efficacy of using demographic information to predict jury bias is in dispute. Software designers claim that their statistical models are accurate predictors, and are constantly updated as the *166 technology is used. 22 Some studies suggest that jury selection software can increase a lawyer's ability to correctly classify jurors by nineteen percent: from fifty percent to sixty nine percent. 23 Stereotypes can be valuable tools--especially considering that judges have discretion in limiting the time an attorney may spend conducting voir dire. But relying too heavily on stereotypes can prevent lawyers "from listening to the answer[s] [to questions in voir dire] with an open mind," and can result in elimination of jurors who may favor the desired outcome. 24 Whether demographic information can correctly predict jury bias is debatable. 25 However, many lawyers "behave as if these biases are real and predictable," so it is nonetheless important to discuss the constitutionality of using this type of technology in jury selection. 26

III. The History of Equal Protection and Jury Selection

A. Strauder v. West Virginia (1879)

In *Strauder v. West Virginia*, a seminal case in jury selection jurisprudence, 27 the Supreme

Court struck down a statute prohibiting African-Americans from serving on a jury on the grounds that such an exclusion violated potential jurors' Equal Protection rights. 28 The Court noted that the Fourteenth Amendment "was designed to assure . . . the enjoyment of all the civil rights . . . and to give that race the protection of the general government, in that enjoyment, whenever it should be denied by the States." 29 The Fourteenth Amendment not only bestowed citizenship and privileges, such as the right to sit on a jury, but it also denied states the power to withhold such rights. Equally important, the Fourteenth Amendment gave Congress the power to enforce those rights. 30 Accordingly, "[e]xclusion of black citizens *167 from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure." 31 The *Strauder* Court looked specifically at statutes and state laws that were facially discriminatory. The statutes' express denial of African-Americans' right to participate in the administration of laws as jurors, violated their right to equal justice. 32 The Sixth Amendment guarantees the right to trial by a jury of one's peers. It cannot be said that an African-American man receives equal protection of the laws when a white man is entitled to a jury composed of members of his race, but an African-American man is not. 33 *Strauder* deemed jury selection laws that are facially discriminatory on the basis of race to be unconstitutional. 34 However, that decision did not address the use of peremptory challenges. These challenges require no explanation by the challenger. In addition, it is also unnecessary to challenge a law that is facially neutral, but discriminatory in application. 35 Furthermore, because the Fourteenth Amendment was created to secure civil rights for a "race recently emancipated," the application of Equal Protection was strictly applied to African-American men, and did not create protections on the basis of gender or other racial groups. 36

B. Systematic Exclusion on the Basis of Race

In a series of cases, the Supreme Court held that facially neutral laws that are discriminatorily applied violate the Fourteenth Amendment. 37 Under this analysis, practices resulting in the systematic exclusion of African-Americans are deemed denials of Equal Protection. For example, a Texas procedure for hand-picking grand jurors was found unconstitutional where

the population was twenty percent African-American, only a fraction of that percentage was called for jury duty, and those called were placed at the back of the jury, ensuring they would never serve. 38 The Court outlawed a similar procedure in Georgia where judges handpicked jurors from voter registration cards that were colored-coded, white for white voters, and yellow for African-American voters. This process resulted in the total exclusion of African- *168 American jurors on the jury. 39 These laws were facially neutral, but allowed too much discretion on the part of the grand jury commissioners, resulting in discriminatory elimination of jurors. These laws were therefore deemed violations of the Fourteenth Amendment, and stricken as unconstitutional. 40 In 1968, Congress passed the Jury Selection and Service Act, which required juries to be comprised of a fair cross-section of the communities in which the courts resided. 41 It also mandated that all citizens should have the opportunity to be considered for grand and petit juries in the district courts. 42 However, the law primarily addressed the process of calling jurors to sit on a panel, and focused on establishing uniform ways to call jurors for duty. 43 The Act did not address the use of peremptory strikes. In *Alexander v. Louisiana*, 44 the Court addressed the systematic exclusion of African-Americans from jury panels. The *Alexander* Court held that no mathematical standards exist for calculating what constitutes systematic exclusion, determining that courts need to do a factual inquiry in each case. 45 In that case, the Louisiana court sent questionnaires to potential jurors asking about race in one of the questions. 46 Of the 7,374 questionnaires returned, 1,015 (13.76 percent) had been completed by African-Americans. 47 The commissioners then attached an information card to each returned questionnaire indicating, among other things, the person's race. 48 The commissioners removed about 5,000 questionnaires, ostensibly because those respondents were not qualified for grand jury service, or were exempted under state law. 49 Commissioners placed the remaining 2,000 on a table, selected four hundred of them--supposedly at random--and placed them in juror panels of twenty. 50 Only twenty seven (6.75 percent) were African-American. 51 *169 In *Alexander*, only one member of the juror pool was African-American; but he did not serve on the jury. 52 Although a defendant does not have

the right to have members of his race on the jury, 53 he does have the right to ensure that the state does not "deliberately and systematically deny to members of his race the right to participate as jurors in the administration of justice." 54

IV. Applying the Equal Protection Clause to Peremptory Strikes

A. *Swain v. Alabama* (1965)

The Supreme Court first addressed the discriminatory use of peremptory strikes in *Swain v. Alabama*, where the Court held that eliminating members of a specific race in this manner did not violate the Fourteenth Amendment. 55 In *Swain*, the Court refused to extend *Strauder* to peremptory challenges, reasoning that subjecting "the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the [peremptory] challenge." 56 The Court also relied on the premise that purposeful discrimination must not be assumed or merely asserted, 57 but proven 58 with a quantum of evidence. 59 Relying on precedential decisions, the defendant *Swain* presented the Court with two arguments: (1) that Alabama's jury selection laws were discriminatory; and (2) that the prosecution's use of peremptory strikes violated Equal Protection. 60 The Court rejected the defendant's first argument noting "[w]e cannot say that purposeful discrimination based on race alone is satisfactorily proved by showing that an identifiable group in a community is underrepresented by as much as ten percent." 61 *170 The Court also rejected the defendant's second argument on grounds that peremptory challenges do not require an explanation and afford a method of securing fair and impartial juries. 62 "This system, it is said, in and of itself, provides justification for striking any group of otherwise qualified jurors in any given case, whether they be [African-Americans], Catholics, accountants or those with blue eyes." 63 The Court relied on the tradition of peremptory strikes to justify the lack of judicial scrutiny. 64 Although not guaranteed by the U.S. Constitution, 65 the Court regarded the use of peremptory strikes as one of the "most important rights of the accused." 66 In addition, the presence of challenges for cause provides an avenue to

remove jurors with bias. 67 The majority view was that the nature of a peremptory strike is one that is without reason, without inquiry, and not subject to the court's control. 68 The Swain Court stated that there is a rebuttable presumption that prosecutors exercise peremptory challenges in a constitutional manner. 69 This creates a high burden on the defendant to negate that presumption. 70 "Thus, petitioners must, in order to state a prima facie equal protection violation, 'show [a] pattern of discrimination' by alleging prosecutorial misconduct in prior cases wherein 'the prosecutor used his strikes to remove [African-Americans].'" 71 This requirement to prove systematic discriminatory practices over a period of time put a "crippling burden of proof" on the defendant, and essentially made prosecutorial challenges "largely immune from scrutiny." 72

B. Batson v. Kentucky (1986)

In 1986, twenty-one years after its holding in Swain, the Supreme Court reexamined the use of peremptory challenges and Equal Protection and found the Swain standard inconsistent with the principles of equal justice. In *Batson v. Kentucky*, the Court expressly overruled Swain and extended Equal Protection *171 to apply to the exclusion of jurors by peremptory strikes. 73 The Court reasoned "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." 74 Subsequent decisions applied the Batson protections to gender 75 and ethnicity. 76 Batson gave rise to a three-step burden shifting framework for challenging discriminatory peremptory strikes. 77 First, the challenging party must make a prima facie showing that all of the facts and circumstances give rise to an inference of discrimination. 78 Second, the burden shifts to the striking party to provide a neutral explanation for the strike. 79 Third, the court then determines whether there has been purposeful discrimination; if so, the Equal Protection Clause has been violated. 80 i. Batson's Step One: Prima Facie Showing of Discrimination The Batson Court held that a defendant could establish prima facie purposeful discrimination solely on the basis of peremptory strikes. 81 Originally, the defendant had to prove

that she was a member of a cognizable racial group and the opposing party was trying to exclude members of that same racial group. 82 However, later holdings stated that it was the juror's individual right not to be excluded on the basis of race; therefore, the excluded juror and the defendant do not have to be of the same race. 83 This protection in jury selection applies to civil and criminal cases alike. 84 There are several ways that a defendant can show purposeful discrimination in a peremptory challenge. The Batson Court rejected the notion that repeated exclusions of members of a social group were necessary to show *172 purposeful discrimination, although such history can be used. 85 The "invidious quality" of the action sought to be discriminatory must be traced back to a discriminatory purpose. 86 In some cases, proof of a discriminatory impact may be sufficient to show unconstitutionality because of the difficulty of explaining it on nondiscriminatory grounds. 87 The court must look at the totality of the circumstances to see if the facts give inference to a discriminatory purpose. 88 Whichever standard for showing a prima facie case for discrimination is used, it is the defendant's burden to prove purposeful discrimination. 89 A party issuing a Batson challenge need only present enough evidence to show that there is an inference of discrimination. 90 Raising the standard to "strong likelihood," as stated by the California Supreme Court in *Johnson v. California*, would place too high a burden on the defendant. 91 The trial judge should have the benefit of all information, including the prosecutor's explanation for the strike, before deciding if a challenge was improperly motivated. 92 "We did not intend the first step to be so onerous that a defendant would have to persuade the judge--on the basis of all the facts, some of which are impossible for the defendant to know with certainty." 93 Although the defendant carries the ultimate burden of persuasion to prove purposeful discrimination, the first two steps of Batson are about producing evidence for the trial court to determine the persuasiveness of the defendant's claim. 94 "If the proof requirement in step one is too high, Batson cannot bring 'actual answers to suspicions and inferences that discrimination may have infected the jury selection.'" 95 Furthermore, a lower standard of proof in step one discourages judicial speculation on the

reason for the strike, which is imprecise. *173

96 Thus, a defendant's prima facie showing of discrimination need only rise to the level that permits an inference of discrimination. 97 Some jurisdictions have adopted bright-line rules for determining when a discriminatory purpose has been shown. For example, the South Carolina Supreme Court has held that simply requesting a Batson hearing establishes prima facie evidence. 98 Appealing a trial court's rejection of a Batson objection also gives rise to a prima facie showing of discrimination. 99 If the party challenging the strike makes a prima facie showing of discriminatory intent, the analysis proceeds to step two. ii. Batson's Step Two: Burden Shifting Once the challenging party has established a discriminatory purpose, the burden shifts to the striking party to provide a neutral explanation for the strike. 100 Simple denial of a discriminatory motive or an affirmation of a good-faith challenge is not sufficient to establish a neutral explanation. 101 The striking party must give a clear and reasonably specific explanation of his legitimate reasons for exercising the challenge. 102 The proffered explanation must not violate Equal Protection; therefore, it must be based on something other than race, gender, ethnicity, 103 and in some circuits, sexual orientation. 104 However, the explanation need not be persuasive. 105 "Therefore, an 'implausible,' 'fantastic,' 'silly,' or 'superstitious' explanation—although unlikely to ultimately carry the day in step three—is sufficient to satisfy the burden imposed by Batson's second step so long as it is neutral." 106 Persuasiveness of the explanation does not come into play until the third step where the court decides if the challenging party has sufficiently proven purposeful discrimination. 107 *174 The courts are split on whether the consideration of discriminatory and nondiscriminatory factors in the decision to strike a juror violates the Equal Protection Clause. 108 Some jurisdictions use the "tainted approach," which requires that any consideration of a discriminatory characteristic, even where nondiscriminatory motivations are present, is a violation. 109 Other jurisdictions use the "dual-motivation approach," which purports that offering both neutral and discriminatory reasons for a strike does not per se violate the Fourteenth Amendment, but leaves it to the court to decide if there is presence of purposeful discrimination that would result in an Equal Protection

violation. 110 In jurisdictions that apply the tainted approach theory, any expression of a discriminatory reason for a juror strike will violate the Fourteenth Amendment. "The tainted approach's curtailment . . . merely recognizes that the challenging party's 'ultimate burden' has been satisfied by the challenged party's admission of impermissible considerations and that the third step determination is, therefore, no longer necessary." 111 Any admission of a discriminatory purpose in a tainted approach jurisdiction is unconstitutional; however, crafty lawyers can simply work around this by offering a neutral explanation for the strike. For example, software calculations, which are presumably scientific and mathematical, may provide a neutral explanation. 112 Therefore, the third step in the Batson framework is a determination by the court as to the presence of a discriminatory purpose. iii. Batson's Step Three: Discriminatory Purpose Once a prima facie case of discriminatory intent has been shown, and the party exercising the peremptory challenge has provided a neutral explanation for the strike, the court then decides if the person opposing the strike has proved purposeful discrimination. 113 If purposeful discrimination is *175 proven, then the strike is voided. 114 Jurisdictions which apply the tainted approach will not reach this third step if a discriminatory reason for the strike is stated. 115 However, cognizant attorneys will only give nondiscriminatory reasons for the strike. Thus, the third step is present in jurisdictions that apply the tainted approach, as well as in those that apply the dual-motivation approach. 116 Neutral explanations for jury strikes suggest that the nondiscriminatory explanations offered by the striking party were pretexts. 117 In deciding whether a party has established purposeful discrimination with the use of peremptory strikes, the court must consider all relevant evidence. In *Miller-El v. Dretke*, the Supreme Court went into a detailed analysis of the voir dire jury selection to show the presence of a discriminatory purpose, 118 suggesting proof of discriminatory purpose is very fact specific. The Court compared the voir dire questions presented to white and African-American jurors and their responses, noting where questions differed, and also remarking on the disparate treatment of white and African-American jurors who gave similar responses. 119 Specifically, African-American jurors who were excluded from the jury panel actually had

more favorable responses than those given by their white counterparts who were not similarly challenged. 120 Furthermore, white and African-American jurors received disparate treatment in the voir dire process as well. Fifty three percent of African-American jurors-- versus only six percent of white jurors--were given graphic descriptions of the defendant's possible death sentence. 121 When questioned, the prosecutor stated that only those who expressed ambivalence toward the death penalty got the graphic description. 122 However, the Court rejected this racial neutral explanation, because only thirty percent of white jurors who expressed their doubts received the graphic script, compared to eighty-six percent of the African-American jurors. 123 The racially-neutral explanations provided by the prosecution "reek[[ed] of afterthought" and therefore demonstrated purposeful discrimination. *176

124 This case emphasized the trial court's responsibility to do a fact-intensive inquiry "to assess the plausibility of that reason in light of all evidence with a bearing on it." 125 Where purposeful discrimination is shown, the challenged strike must be voided. 126

iv. The Difficulties of Applying Batson, Post-Miller-El While Miller-El stands for the proposition that the trial court should conduct a detailed analysis of voir dire to determine if a party's proffered explanation for a strike is pretextual, another Supreme Court case shows how subjective that final decision can be. In *Snyder v. Louisiana*, the defendant was convicted of first-degree murder in the trial court and sentenced to death. 127 On direct appeal, the Louisiana Supreme Court denied his Batson claim, confirmed his sentence, and remanded to determine if the defendant was competent to stand trial. 128 On remand, the trial court found him competent to stand trial and affirmed. 129 Snyder then petitioned the Supreme Court for a writ of certiorari, but while his petition was pending, the Court ruled on Miller- El, and remanded his case to the Louisiana Supreme Court for further consideration in light of Miller-El. 130 Louisiana's highest court once again rejected the defendant's Batson claims. 131 However, Snyder's persistence paid off. He petitioned again for certiorari, which the Court granted; it then reversed the holding of the Louisiana high court. 132 Under Miller-El, the trial court must consider "all the circumstances that bear upon the issue of racial animosity." 133

The prosecution in that case used its peremptory strikes to remove all five African-American jurors remaining after the court issued all its challenges for cause; however, Snyder's Batson claim focused on only two of those challenges. 134 When the Court determined the presence of purposeful discrimination against one juror, Mr. Brooks, an analysis of the other strike became unnecessary. 135 When asked the reason for the strike, the prosecution stated that Brooks seemed nervous throughout the questioning and expressed concerns about *177 taking time off from his work as a student teacher. The prosecutors used these concerns to argue that Brooks might concede to an unfair verdict, simply to get done faster and return to work. 136 Because "nervousness cannot be shown from a cold transcript," the trial judge is given great deference. 137 However, there were several problems with the trial court's treatment of Brooks. First, the record did not show the judge's specific findings regarding the juror's demeanor. Additionally, the trial judge did not address the juror challenge until days after Brooks had been questioned. At that point, it was questionable whether the judge was able to specifically recall Brooks' demeanor. 138 The Court also rejected the prosecutor's second reason for striking Brooks, stating there were fifty other members of the venire who expressed a concern that jury service would interfere with work, school, or family. 139 In fact, the trial court actually had a clerk speak to Brooks' boss to confirm that jury service would not interfere with his graduation from school. 140 Brooks did not express any concern about the jury service after the phone call. 141 Thus, the prosecution's "apprehension that Mr. Brooks, in order to minimize the student-teaching hours missed during jury service, might have been motivated to find petitioner guilty, not of first-degree murder, but of a lesser included offense because this would obviate the need for a penalty phase proceeding" was highly speculative. 142 The brevity of the defendant's trial makes the prosecutor's second explanation even more suspicious. 143 The implausibility of the prosecutor's excuse is further emphasized by the fact that white jurors who expressed similar concerns were not struck. 144 The Court specifically compared Brooks to another juror with far more pressing job and family concerns who was not struck. 145 The Court, interestingly enough, made no mention of the prosecutor's

rebuttal argument in the punishment phase, which included a deliberate attempt to bring sensitive racial issues into the case. 146 The prosecutor repeatedly *178 referenced O.J. Simpson's high-profile murder trial, decided just one year before. 147 "During his rebuttal argument of the penalty phase of the Snyder [II] trial, the prosecutor urged the all-white jury not to let this O.J. prototype 'get away with' murder." 148 The Court's silence on this fact could have, in part, resulted from a desire to avoid the media frenzy surrounding the Simpson case. 149 Perhaps the Court wanted to make a statement that discrimination does not have to be so blatant to violate the principles of Batson. 150 Either way, Snyder represents a perfect example of the difficulty in enforcing the Batson framework. The Louisiana Supreme Court was explicitly directed by the Supreme Court of the United States to review Snyder's case in light of Miller-El and consider all the relevant circumstances. 151 Despite the disparate voir dire treatment of jurors and the prosecutor's obvious attempts to invoke discriminatory feelings in them, the highest court of Louisiana found no discrimination in the peremptory strikes of every African-American juror who survived challenge for cause, even when specifically directed by the U.S. Supreme Court to review the specific circumstances of the case. The Court's decision in Snyder sends a message that discrimination does not have to be blatant in order to violate the Batson principles as applied to Equal Protection. The elimination of a sole juror on the basis of race is sufficient to warrant violation. Furthermore, the detailed analysis of the lower court's voir dire sends a message to trial judges that they should actively ensure that race does not play a role in jury selection. However, this is the same message the Court gave in Miller-El, and it was not upheld by the Louisiana Court in spite of explicit instructions to review Snyder in light of that case. Noble principles are only effective when they are enforceable at every level; the Supreme Court cannot grant certiorari on every case where Batson has not been followed. As Justice Kennedy eloquently stated, "despite the clarity of these commands to eliminate the taint of racial discrimination in the administration of justice, allegations of bias in the jury selection process persist." 152

C. Extending Batson

i. Applying Batson to Different Races: Powers v. Ohio (1991) In Powers v. Ohio, the Court held that the exclusion of jurors on the basis of race, even where the excluded juror and the criminal defendant were *179 not of the same race, violates Equal Protection. 153 The Court reasoned that Equal Protection was meant to protect the rights of the defendant, jurors, and community at large. 154 The state argued that a criminal defendant does not have the right to challenge the strike of a juror, because the struck juror is the person whose Equal Protection rights have been violated. 155 However, the Powers Court granted third-party standing to the defendant, noting that third-party standing is appropriate where the defendant suffered an actual injury, shares a close relationship with the third party, and faces some hindrance in bringing his own claim. 156 The Court established several guidelines for future courts to consider in granting third-party standing in this context. First, a criminal defendant is entitled to third-party standing for a juror eliminated under the Batson principles. The logic is that a criminal defendant suffers injury when discriminatory strikes lead to a tainted trial that leaves the "fairness of the criminal proceeding in doubt." 157 Second, criminal defendants and venire members have an interest in eliminating discrimination in the courtroom. 158 A venire person excluded because of his race suffers a personal humiliation, and "may lose confidence in the courts and its verdicts, as may the defendant if his or her objections cannot be heard." 159 Lastly, although venire members have a legal right to bring suits on their own behalf, these claims are rare. 160 Excluded jurors have no opportunity to be heard at the time of the strike, as they are not parties to the suit, often have little financial incentive to pursue litigation, and would have a difficult time showing the likelihood of future voir dire discrimination necessary to get injunctive relief. 161 Thus, defendants meet the qualifications necessary to establish third-party standing on behalf of an excluded juror. 162 ii. Applying Batson to Civil Litigation: Edmonson v. Leesville Concrete Co. (1991) The Supreme Court in Edmonson v. Leesville Concrete Co. noted that racial discrimination harms an excluded juror as much in a civil trial as it *180 does in a criminal trial. 163 Still, the Court found racial discrimination unconstitutional only when done by state actors, which brings Batson's

applicability to civil proceedings in question. 164 There are instances when the Court has found that governmental authority so dominates private conduct that the private actors are deemed to have acted with the government's authority, and are thus subject to constitutional constraints. 165 In determining when this applies, the Court considers the extent to which the actor relies on governmental assistance and benefits. 166 The sole purpose of peremptory challenges is to permit litigants to help the government select an impartial trier of fact. 167 Thus, the use of peremptory challenges by civil parties is pursuant to state action and therefore subject to nondiscriminatory exercise. 168 iii. Applying Batson to Criminal Defendants: Georgia v. McCollum (1992) In Georgia v. McCollum, the Court reasoned that the jurors in voir dire also function as state actors and applied Batson to peremptory strikes lodged by criminal defendants. 169 In McCollum, the defendants were white men accused of killing two African-American victims. 170 Prior to the start of jury selection, the prosecutor sought an order requesting a Batson challenge if the defendants used peremptory strikes to dismiss African-American jurors. 171 Lower courts had previously denied the motion, which left the decision entirely to the United States Supreme Court. 172 The Court considered four questions in determining whether criminal defendants may exercise discriminatory strikes. 173 First, is there harm where a defendant discriminates in voir dire? 174 Second, do defendants count as state actors when exercising peremptory strikes? 175 Third, do prosecutors *181 have standing to raise the constitutional challenge? 176 Finally, do the defendant's constitutional rights preclude the extension of Batson to criminal defendants? 177 Using the Powers rationale, the Court found that jurors are subject to the same harm regardless of who is exercising the strike. 178 Prosecutors also have an equal goal in ensuring fair criminal trials that do not undermine the community's confidence in the court system, which is essential in "preserving community peace." 179 Therefore, prosecutors have valid third-party standing to bring a claim on the juror's behalf. Furthermore, the court applied the reasoning in Edmond to determine that when a defendant exercises peremptory challenges, he becomes a state actor. 180 Lastly, the court held that the use of peremptory strikes is not a right guaranteed by the constitution and therefore, it

does not violate a defendant's constitutional rights to place limitations on the use of peremptory challenges. 181 Accordingly, both defendants and prosecutors in criminal trials are precluded from eliminating jurors on the basis of race. iv. Applying Batson to Gender: J.E.B. v. Alabama ex rel. T.B. (1994) In 1994, the court held that peremptory strikes cannot be used to discriminate based on gender. 182 In a paternity suit, the state used nine peremptory strikes to eliminate all men from the jury. 183 "Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women." 184 "Gender, like race, is an unconstitutional proxy for juror competence and impartiality." 185 Consequently, just as jurors are afforded equal protection on the basis of race, equal protection applies to gender as well.

***182 V. The Difficulties of Implementing Batson**

A. Discretion Given to the Trial Judge

Miller-El illustrates the practical problems with Batson's goal of ending racial discrimination while still preserving the use of peremptory challenges. 186 Miller-El's claim was strong, as he could show disparate questions and treatment of white and African-American jurors whose proffered reasons for the strikes reeked of afterthought. Yet, both the trial court and appellate court found no constitutional violations. There is great discretion given to the court to decide the presence of discriminatory purpose, and a challenge is reviewed for clear error at the appellate level. 187 During the nineteen years between Batson and Miller-El, forty-two Batson challenges were brought in the Seventh Circuit Court of Appeals, and eighty-one percent of those rulings were affirmed. 188 In Miller-El's seventeen years of litigation and twenty-three judges, only six judges found that the Batson standard had been violated. 189 In his concurring opinion, Justice Breyer addressed how technology--specifically jury selection software-- is exasperating the problem. 190 He stated: The use of race- and gender-based stereotypes in the jury-selection process seems better organized and more systematized than ever before. . . . Whether you are trying a civil case or a criminal case, [jury-selection software]

has likely determined the exact demographics (age, race, gender, education, occupation, marital status, number of children, religion, and income) of the type of jurors you should select and the type you should strike. 191 The anti-discriminatory command and use of peremptory challenges that encourage the use of stereotypes work at cross-purposes.

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***183 B. The Difficulty with Articulating a Neutral Response**

In addition, attorneys who rely on subjective factors or instinct to strike jurors may have a difficult time explaining the rationale for the strike in neutral, plausible terms. 193 Some attorneys relying on instinct may use intangibles like eye contact, tone of voice, posture, laughing, or coughing, 194 while other attorneys may subconsciously rely on stereotypes. 195 In order for trial courts to effectively decide if the proffered nondiscriminatory explanation is believable, the court would have to recall the proceedings “with a degree of detail that is wholly unrealistic.” 196 For example: Thus after a prosecutor sets forth a neutral reason for the strike, unless the court can recall whether Juror X was or was not making eye contact with the prosecutor earlier in the day or whether Juror Y was dozing, fidgeting, or laughing on day two of a four day voir dire process, then the trial judge has no evidence upon which to evaluate the prosecutor's credibility. 197 Furthermore, attorneys who strike a juror on the basis of how she looked or acted, rather than on the basis of what she said in voir dire, or how she responded to a jury questionnaire, may not have reliable evidence, because that sort of information does not appear in written transcripts. 198 Appellate courts would have an even harder time than trial courts in determining the plausibility of neutral explanations without the benefit of any situational context. 199

C. Evidence That Can Be Used in Batson Challenges

Both Miller-El and Snyder indicate that a trial judge should carefully scrutinize all of the relevant information to determine if an explanation for a strike is legitimate, or a pretext for discrimination. 200 Judges can use side-by-side comparisons of struck venire persons with those who were empanelled. 201 Where the neutral explanation does not withstand the scrutiny, the judge should find a Batson

violation. 202 Where a prosecutor gives a nondiscriminatory explanation that references the juror's demeanor, the court *184 should evaluate both the juror's demeanor to determine the credibility of the strike, as well as the prosecutor's demeanor to determine if he is concealing a discriminatory intent. 203 Snyder emphasized that a Batson violation can occur with the striking of a single juror if done in a discriminatory manner. 204 Thus, the side-by-side comparison is important to find individual violations. 205 Disparate treatment between jurors of different races can show intent. 206 Disparate treatment can be observed through the questions posed to each venire member, as demonstrated by presentation of a more graphic description of the death penalty in the Miller-El case. 207 Disparate treatment can also be observed in the attorney's tone of voice, language used, or general demeanor towards members of different racial groups. 208 As a result, it becomes important for the attorney challenging the strike to make a detailed record of the situation giving rise to the challenge. 209 In both Miller-El and Snyder, the Court conducted side-by-side comparisons of voir dire to determine that the neutral explanations offered by the prosecution were merely a pretext for discriminatory intent. “If the race-neutral reason given for striking a member of a particular race applies with equal force to a member of a different race, and the prosecutor did not exercise a peremptory challenge against that person, there may be sufficient evidence to prove purposeful discrimination under Batson's third step.” 210 Patterns of discrimination can also be used to show a neutral explanation was merely a pretext to discriminatory intent. 211

VI. Critique of Peremptory Challenges: An Argument for Elimination

Critics of Batson suggest either abandoning the Batson protections, eliminating peremptory challenges entirely, or limiting the scope of Batson in criminal trials. 212 For example, one critic stated: Batson and its progeny, have made a further muck of things by transforming voir dire into a lengthy ordeal involving inquires into inappropriate questions of race and ethnicity that not only have *185 nothing to do with impartiality, but will also become increasingly muddled in the face of our changing society. 213 Additionally, Judge Maureen A. Howard suggests in the Georgetown Journal of Legal

Ethics that prosecutors should voluntarily waive peremptory challenges because they are uniquely bound to “seek justice.” 214 She claims the marginal benefit from peremptory challenges in criminal prosecution is outweighed by the damage done to “actual and perceived fairness of the system.” 215 Furthermore, she posits that while Batson was extended to the defendants in Powers, the court had to first rationalize that any party is a state actor when that party is helping the court select jurors. However, this rationalization is unnecessary because prosecutors are by definition, state employees, and no further explanation is required. The elimination of peremptory challenges would solve the problem in applying Batson fairly and consistently; yet, many attorneys like the control that peremptory challenges provide. Proponents of the peremptory challenge, including most trial lawyers, view peremptory challenges as a critical tool in securing a favorable jury that allows them to strike jurors they find unsympathetic to their case, without having to explain why they think so. 216 Peremptory challenges “allow[] lawyers and their clients to feel that they have some control in selecting the jury and to feel comfortable with the jury that will hear their case.” 217 In addition, the American Bar Association continues to support the use of peremptory challenges, the standards of which presume peremptory challenges to be nondiscriminatory in nature. 218 However, “to ‘presume’ that peremptory challenges are exercised in a permissible manner is to turn a blind eye to the history of this practice as it has been highlighted” in Supreme Court cases from the historic Swain and Batson to recent cases like Johnson and Miller-El. 219 Tradition has power in common law, and peremptory challenges have been around since the beginning. Judges have respect for peremptory challenges because they have always been part of the American legal system and were often used in the nation's infancy to eliminate jurors sympathetic to the *186 Crown. 220 Thus, it seems unlikely that peremptory challenges will disappear from our legal system any time soon.

A. The Standard of Review on Batson Challenges

While strikes for challenge eliminate jurors with obvious bias, peremptory strikes allow attorneys to strike jurors with a subtle bias that may not

rise to the level needed for a strike for cause. 221 However, “the interplay between peremptory challenges and the Fourteenth Amendment to the Constitution has created a riddle: the courts must attempt to maintain a challenge that lawyers can exercise arbitrarily while simultaneously requesting a reason for the challenge.” 222 Because the trial judge has the ability to evaluate the demeanor of both venire persons and attorneys, appellate courts will give substantial deference to the trial judge's decision in a Batson challenge. 223 An appellate court will not overrule a trial court's decision on a Batson challenge unless it is clearly erroneous. 224 For an appellate court to consider the appropriateness of a trial court's ruling on a Batson challenge, the appellate court must have a sufficient record. 225 Therefore, once a Batson challenge has been requested by the defense, the prosecutor should request a finding on-record regarding all the neutral reasons offered by the prosecution to provide a more detailed record for the appellate court. 226 It has been argued that Snyder may have expanded the authority of the reviewing court. 227 Despite the Snyder Court stating that it should defer to the trial judge except in exceptional circumstances, it also reiterated the fact that the trial and reviewing courts should consider all circumstances that bear relevance on the issue of racial animosity. 228 By dictating that the reviewing court look at all relevant circumstances, the Snyder Court gave the appellate court power that the trial court did not have. 229 The appellate court has the benefit of viewing the entire record without the myriad responsibilities a trial judge faces during jury selection, such as handling objections, and making *187 general first-hand observations that allow her to “easily miss many forms of discrimination, subtle or not, that may occur during voir dire.” 230 For example, an appellate judge may be better able to compare disparate questions posed to venire members of different races as the appellate court has as much time as needed to review the record, whereas judges in voir dire are pressed for time. 231 An appellate judge would also have the benefit of viewing the trial in its entirety, including the opening and closing statements to the jurors. Statements, such as those of the prosecutor in Snyder who made references to the racially-charged O.J. Simpson case, may provide further insight into an attorney's true reason for striking a juror. Nonetheless, the appellate judge still

does not have the benefit of these firsthand observations. 232 Some have argued that video-recording voir dire may provide the appellate judges with firsthand observations and the benefit of viewing the situation in toto.

B. Can Video-recording of Voir Dire Be the Solution?

The videotaping of voir dire may offer some additional support in assessing the validity of a juror strike under Batson, as it would provide evidence of some of the intangible things used as the basis for the strike. 233 Without the use of video-recorded voir dire, a judge is charged with determining the plausibility of an attorney's neutral reason based on evidence; yet, there is no evidence other than the judge's own memory and the memory of counsel "who are now required to act in the dual role of witness and advocate." 234 Combining these roles is inherently dangerous. 235 Several realities of jury trials favor videotaping voir dire. For instance, when providing reasons for their strikes, prosecutors often respond with nonverbal reasons which cannot be recorded by a court stenographer. 236 In addition, trial judges review challenges and their explanations after the fact, which does not provide the judge an opportunity to focus on the behavior or responses of any particular juror. 237 Finally, a trial judge's review of a challenge may not even occur until hours or days after the voir dire proceedings. 238 *188 Videotapes of voir dire would provide more evidence for the both the trial and appellate judges to view. 239 Video-recording voir dire may make the trial judge's decision on a Batson challenge stronger, because it provides a record of all the circumstances, including situational context. Video-recorded voir dire may also make de novo appellate review of trial court findings in Batson challenges a real possibility. 240 "Videotaped voir dire records could give new life to Batson. In particular, that technology would permit the appellate court to meaningfully test a prosecutor's claim that she struck a particular juror based on his demeanor." 241 However, appellate courts are reluctant to use video technology, because viewing the trial proceedings as they happen "imperils the legitimacy of the whole enterprise of appellate review." 242 The use of video recordings may blur the lines between the fact finder and the reviewing court. 243 Deference to the trial court is more than a matter of recognition that the

judge who witnesses a situation firsthand is the best finder of fact; it is also a "deliberate political and institutional choice: a preference for finality and economy, even at the possible expense of accuracy." 244 Even where the barriers for substantive oversight are removed through the use of technology, reviewing courts still emphasize the deference to the trial court. 245 Some argue that in a vertical system of review, decision making should be limited at each level as to provide some meaningful level of review of each court in its own right. 246 A video-recorded voir dire would give the appellate court more ability to engage in a comparative analysis of voir dire, like that conducted in Miller-El. 247 It would also provide a meaningful test for the appellate court to determine the plausibility of a prosecutor's claim that a juror was struck for her demeanor where such claims would otherwise be insulated from review, even on the grounds of clear error, on appeal. 248 Technologies may make de novo fact-findings of Batson challenges possible, but courts have not been eager to implement them. Video review *189 does not minimize cost and may lead to a re-presentation of the same argument, essentially taking away the significance of each level of court. 249 The video-recording of voir dire also has privacy concerns for the jurors, as it is more intrusive than a written record. Trial attorneys already have to overcome a juror's natural fear of speaking about their "deep-seated feelings, and indeed biases, which develop over a lifetime." 250 Jurors may feel even less comfortable expressing bias if they are aware of the fact that they are being video-recorded. Despite these potential pitfalls, the video-recording of voir dire may provide evidence for an appellate judge to consider the validity of explanations for strikes challenged under Batson. However, judges are reluctant to allow it. 251 Video-recorded court proceedings may alter the standard of review at the appellate level, which could undermine judicial economy and the lower courts' power. Nonetheless, a visual record of circumstances surrounding the strike of a juror could drastically impact the judicial findings of fact in Batson's step three. It would provide proof of a juror's demeanor that would prove or undermine the prosecutor's offered explanation for a strike. This visual record could be helpful at both the trial and appellate levels.

VII. Applying Batson to Jury Selection Software

The Supreme Court has yet to speak on the legality of jury-selection software and Equal Protection. Despite Justice Breyer's 2005 suggestion in *Miller-El* that jury-selection software that factors race or gender into the equation is unconstitutional, the Court has not discussed it. 252 However, the Court did address whether a similar program for university admissions violates Equal Protection in *Grutter v. Bollinger*. 253 Although the Court ultimately held race could be factored into admissions policies because the First Amendment allowed universities to consider what compelling interests they *190 had, 254 the calculation of race as a "plus-factor" as "one element of many" has possible implications for jury-selection programs. 255 In mixed-motive jurisdictions, the may not violate Equal Protection on its face, because race or gender is only one factor among many. "Grutter encourages and promotes a validly constitutional software scheme in which 'race . . . still matters,'" but is only part of the calculation. 256 Furthermore, the complexity of jury-selection software programs may make it easy for attorneys to fabricate plausible race-neutral explanations for a strike, satisfying step two of the Batson framework. 257 Attorneys could simply run multiple permutations using different factors until the computation and factors are indiscernible. 258 How could a trial or appellate judge, who is not likely versed in methods of computer computations, determine with accuracy what the reason for a strike is, when the attorney may not even be able to articulate a response based on anything other than a computer program? The software is designed to consider multiple objective factors and individualized, subjective factors, which substantially hinders any discriminatory motivation. 259 Any race-based strike traced back to a software recommendation is likely insulated from attack by "an abundance of quantitative and qualitative" neutral variables which the program considers in its calculation. 260 These programs could not only make it harder for defendants to establish prima facie cases of discrimination, they may also provide a neutral explanation to striking attorneys. 261 Software programs may also affect step three of the Batson framework by making it harder for judges to determine the presence of a discriminatory purpose. The complexity of the

programs makes them difficult to explain and understand, which may discourage judicial scrutiny. 262 "Moreover, the absence of uniform policies regarding software usage, educating the court in its mechanics will likely be cumbersome, delaying voir dire with disruptive technological inquiry, and overall impacting the expeditious administration of a court's caseload." 263 *191 The Model Rules of Professional Behavior do not expressly prohibit software usage by lawyers or jury consultants. 264 However, programs that consider race or gender as factors for elimination of a juror likely violate Equal Protection.

VIII. Conclusion

Although the American legal system has always allowed peremptory strikes, which traditionally required no explanation, the courts are now exercising more judicial control over them. Starting in 1986 with *Batson*, the Supreme Court held that striking jurors based on race violates the Equal Protection Clause of the Fourteenth Amendment. Later cases extended these protections to gender, sexual orientation, and ethnicity and applied those protections in both civil and criminal cases. There is a three-part framework for determining whether an Equal Protection violation has occurred. First, the challenger must show a prima facie case of discrimination. This requires only an inference that a discriminatory purpose is present. Second, the attorney issuing the strike must provide a neutral explanation for doing so; but that explanation need not be persuasive. Finally, the trial court determines if the explanation is legitimate or merely a pretext for discrimination. Some jurisdictions use the tainted approach and invalidate a strike if any consideration of a discriminatory factor occurs. Other jurisdictions hold that a strike partially based on discriminatory reasons will be valid if the attorney can iterate a plausible neutral explanation. The Supreme Court has not made any decisions on which approach is correct, but stresses that the totality of the circumstances in each challenge should be evaluated. Several cases, especially *Snyder*, illustrate the difficulties courts face when enforcing the *Batson* framework. The Supreme Court remanded *Snyder* to the Louisiana Supreme Court with specific directions to review it in light of the *Miller-El* fact-intensive inquiry. Yet, the Louisiana Supreme Court found no *Batson*

violation, despite the prosecutor's racially-incited closing argument during sentencing that referenced the recent OJ Simpson case. Video-recording of voir dire may provide trial and appellate judges with more tools to judge the truth of allegedly neutral explanations for strikes. The technology would allow appellate courts to conduct de novo reviews of trial judge's findings on Batson challenges by giving context to visual clues, like demeanor, which may cause an attorney to strike a juror. However, video recording voir dire is met with resistance, because it threatens to change the amount of deference given to trial judges. Despite its potential benefits to the fairness of jury selection, visual recordings of voir dire ultimately threaten the power of the trial court and diminish judicial efficacy. Jury selection software, although not strictly unconstitutional, may in fact violate the Equal Protection Clause, because it considers constitutionally-protected *192 demographic information, such as race and gender, to help attorneys strike jurors who may be unsympathetic to their cause. Furthermore, the algorithms used in such software may be a pretext for discriminatory strikes. They present challenges in all steps of the Batson framework by making it more difficult for (1) a challenging party to establish a prima facie case of discrimination; (2) a striking party to provide a neutral explanation for the strike; and (3) a judge to determine the validity of the reason offered for the strike. These technologies may simply highlight the bigger problem: more than twenty-three years after Batson, the Supreme Court has yet to establish a standard for what constitutes discriminatory intent. The Court has not resolved the dispute between those jurisdictions which apply the tainted approach and those which apply the mixed-motive principles. There is no answer as to whether any consideration of race or gender will violate Batson, even with a neutral explanation. Perhaps the reason the Court has refused to address the issue is because it is impossible to retain peremptory challenges and still ensure that no juror is struck for discriminatory purposes. Justice Marshall, in Batson, suggested that the elimination of peremptory challenges altogether

may be the only way to ensure that jurors are not eliminated for discriminatory purposes. Supporters of this proposition argue that it is impossible to ensure the constitutionality of peremptory strikes, which require no justification, with a mandate that such strikes not be based on race or gender. They, however, represent the minority opinion. Overturning peremptory challenges is unlikely to happen any time soon. Many trial attorneys feel more comfortable when they can eliminate certain peoples from the venire. Furthermore, peremptory strikes have been part of the American legal system since its inception. The courts and legislature are likely to resist uprooting such a longstanding tradition. Nonetheless, it does seem likely that the groups shielded by the Batson umbrella may expand. The Ninth Circuit recently extended the Equal Protection Clause in Batson challenges to apply to sexual orientation. The Supreme Court in *United States v. Windsor* recently held that sexual orientation deserves strict scrutiny and, thus, Equal Protection. 265 It seems likely that the Supreme Court decision will extend similar protections nationwide. Attorneys at both tables in the civil and criminal contexts need to be aware of Batson's limitations on peremptory challenges. Those who strike jurors based on gender, race, and ethnicity in any court in the United States stand to have their verdicts overturned for constitutional violations. They also risk the ire, and subsequent lawsuits, of those jurors whose constitutional rights were abused. Although unlikely, such lawsuits are permissible. Attorneys *193 must also be aware of other categories of people that may be protected by Batson in their specific districts. Jury-selection software that uses race, gender, or ethnicity in its calculations should be used with extreme caution, and attorneys should always be prepared to iterate an explanation for striking a juror that is not based on these technologies. Peremptory strikes, although controversial, will likely continue in our legal system for some time. Attorneys should exercise care and caution when using them.