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Emily C. Jeffcott

Mikal C. Watts

WHAT'S REQUIRED TO REMEDY JUROR DISCRIMINATION? A BRIEF DISCUSSION ON *BATSON* AND ITS AVAILABLE REMEDIES

EMILY C. JEFFCOTT**
MIKAL C. WATTS*

I. BRIEF HISTORY OF *BATSON*

"[R]acial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts."[1] Federal and

** Associate, Watts Guerra Craft LLP; B.S., University of Houston; J.D., St. Mary's University School of Law.

* Capital Partner, Watts Guerra Craft LLP; B.A., University of Texas; J.D., University of Texas Law School.

1. Powers v. Ohio, 499 U.S. 400, 402 (1991) (holding "a criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded juror share the same race").

> For over a century, this Court has been unyielding in its position that a defendant is denied equal protection of the laws when tried before a jury from which members of his or her race have been excluded by the State's purposeful conduct. The Equal Protection Clause guarantees the defendant that the State will not exclude members

state jury selection affords all parties to a lawsuit the opportunity to eliminate a certain number of jurors that the parties feel will hinder their case. These eliminations, otherwise known as peremptory challenges, arise from constitutional right,[2] and because they may be made without expressed justification, peremptory challenges have consequently been used to disguise racial discrimination.[3] In the seminal case *Batson v. Kentucky*,[4] the United States Supreme Court held that, in the context of criminal cases, the United States Constitution prohibits racial discrimination in the exercise of peremptory challenges.[5] However, because peremptory challenges do not require a stated reason, the existence of racial discrimination may not be overtly clear. Thus, to discern whether a peremptory challenge is a pretext for racial discrimination, the Supreme Court in *Batson* enunciated a three-step framework:

> "First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race[;s]econd, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question[; and t]hird, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination."[6]

In other words, after the party asserting a *Batson* challenge (objecting party) makes a prima facie showing of discrimination, the party seeking the peremptory challenge (striking party) "must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the

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> of his race from the jury venire on account of race, or on the false assumption that members of his race as a group are not qualified to serve as jurors. Although a defendant has no right to a petit jury composed in whole or in part of persons of [the defendant's] own race, he or she does have the right to be tried by a jury whose members are selected by nondiscriminatory criteria.

Id. at 404 (internal quotations & citations omitted).

2. *See* U.S. CONST. amend. VI ("In 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. VII ("In suits at common law . . . , the right of trial by jury shall be preserved . . . .").

3. *See generally* Mikal C. Watts & Emily C. Jeffcott, *A Primer on* Batson, *Including Discussion of* Johnson v. California, Miller-El v. Dretke, Rice v. Collins, *&* Snyder v. Louisiana, 42 ST. MARY'S L. J. 337 (2011).

4. 476 U.S. 79 (1986) (finding race-based peremptory strikes violated the Equal Protection Clause of the Fourteenth Amendment).

5. Batson v. Kentucky, 476 U.S. 79, 97–98 (1986). "Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." *Id.* at 87.

6. Miller-El v. Dretke (*Miller-El II*), 545 U.S. 231, 277 (2005) (Thomas, J., dissenting) (quoting Miller-El v. Cockrell, 537 U.S. 322, 328–29 (2003)).

challenge[ ]."[7] "The trial court then will have the duty to determine if the [movant] has established purposeful discrimination."[8] Five short years after this framework was announced, the Supreme Court extended its application to civil trials.[9]

Notably, appellate treatment of *Batson* challenges has been focused on the application of the three-step framework.[10] This is primarily due to the inconsistent application of *Batson* among the lower courts, which has resulted in differing levels of proof among the various steps. The Supreme Court has attempted to cure these inconsistencies by refining the *Batson* framework. For example, the Supreme Court in *Johnson v. California*[11] further defined what constitutes a "prima facie case" under step one,[12] specifically holding that an objecting party need only assert an "inference of discrimination," which can be made through a variety of evidence including statistical analysis.[13] In addition, the Supreme Court

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7. *Batson*, 476 U.S. at 97, 98 n.20 (1986) (quoting Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 258 (1981)) (holding that the striking party "must articulate a neutral explanation related to the particular case to be tried").

8. *Id.* at 98 (explaining the purpose of each step in a *Batson* challenge).

> The reality of practice, amply reflected in many state- and federal-court opinions, shows that the challenge may be, and unfortunately at times has been, used to discriminate against black jurors. By requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges, our decision enforces the mandate of equal protection and furthers the ends of justice.

Id. at 99.

9. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 616 (1991) (extending the prohibition of race-based peremptory challenges to civil actions).

> Racial discrimination has no place in the courtroom, whether the proceeding is civil or criminal. Congress has so mandated by prohibiting various discriminatory acts in the context of both civil and criminal trials. The Constitution demands nothing less. We conclude that courts must entertain a challenge to a private litigant's racially discriminatory use of peremptory challenges in a civil trial.

Id. at 630 (citations omitted).

10. *See, e.g.*, People v. Johnson, 71 P.3d 270 (Cal. 2003); State v. Fisher, 748 A.2d 377 (Conn. App. Ct. 2000); State v. Williams, 24 S.W.3d 101 (Mo. Ct. App. 2000).

11. 545 U.S. 162 (2005).

12. *Id.* at 168–70 (holding that the objecting party is not required to show that the opposing party's peremptory strikes were more likely than not based on discriminatory intent under step one of *Batson*).

> The *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process. The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question. The three-step process thus simultaneously serves the public purposes *Batson* is designed to vindicate and encourages "prompt rulings on objections to peremptory challenges without substantial disruption of the jury selection process."

Id. at 172–73 (citations omitted).

13. *Id.* at 170.

similarly refined step three of *Batson* when it enunciated a variety of ways to establish "purposeful discrimination," including (1) statistical analysis of jurors struck;[14] (2) comparison of African-American jurors struck to Caucasian jurors not struck;[15] and (3) whether the reasons provided by the striking party are true or false.[16]

Although the Supreme Court's *Batson* opinions have been limited to the three-step framework, there exists an additional issue—a proverbial "fourth step"—that deserves discussion: remedying a *Batson* violation.[17] If a trial court finds discriminatory intent under step three, it is then charged with fashioning a remedy, a "fourth step," to the *Batson* violation.[18] It is this "fourth step" of *Batson* that is the focus of this Article. Typically, a *Batson* remedy will either reinstate the improperly struck juror or dismiss the entire venire panel and restart *voir dire* anew. However, because trial judges typically retain discretion to craft their own *Batson* remedies,[19] a unique question is presented: Does a trial judge have the discretion to select replacement jurors solely on account of their race?

> 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—that the challenge was more likely than not the product of purposeful discrimination.

Id.; *see also* Price v. Cain, 560 F.3d 284, 287 (5th Cir. 2009) (holding "a defendant satisfies the requirements of *Batson's* first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred").

14. Miller-El v. Dretke (*Miller-El II*), 545 U.S. 231, 240–41 (2005) (discussing the statistical data revealing the number of African-American venire members excluded on prosecutorial peremptory challenges).

15. *Id.* at 241 (comparing the answers of struck African-American jurors with those of Caucasian jurors not struck).

16. *Id.* at 252.

> A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.

Id.

17. Although *Batson*'s fourth step has received little treatment by the courts, it is likely to gain greater significance as issues arise regarding the propriety of a *Batson* remedy. *See* Brief of Appellant at 26, Alexander v. Gulf Stream Coach, Inc., No. 10-30349 (5th Cir. Aug. 23, 2010) ("Although purposeful discrimination is one of the issues in this appeal, this matter also presents a question rarely addressed by the courts—the adequacy of a *Batson* remedy.").

18. *See* Batson v. Kentucky, 476 U.S. 79, 98 (1986) (explaining that the trial court has the duty to weigh the striking party's proffered reason with evidence of discriminatory intent).

19. *See id.* at 99 ("In light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how best to implement our holding today.").

In answering this question, this Article revisits the standard employed to assess the constitutionality of racial classification. In acting within their judicial capacity, trial judges are considered government actors, and accordingly, as government actors, any judicial acts that employ racial classifications, including *Batson* remedies, are subject to strict scrutiny. Evaluating this standard, this Article next considers whether race-based *Batson* remedies can withstand strict scrutiny. Relying on the tenets of strict scrutiny, this Article concludes that beyond reseating an improperly struck juror or dismissing the entire venire panel, a *Batson* remedy may not look to the race of prospective jurors in fashioning a *Batson* remedy. Any remedy that relies on race cannot survive strict scrutiny, and thus violates the Constitution.[20]

II. TRIAL JUDGES ARE CONSIDERED GOVERNMENT ACTORS WHEN REMEDYING *BATSON* VIOLATIONS

"It is now well established that government bodies, including courts, may constitutionally employ racial classifications essential to remedy unlawful treatment of racial or ethnic groups subject to discrimination."[21] Nonetheless, it is also well established that "[c]lassifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'"[22] Although the Constitution does not expressly prohibit the use of racial classifications, the Equal Protection Clause of the Fourteenth Amendment[23] has been interpreted "to prevent the States from purposefully discriminating between individuals on the basis of race."[24] Similarly, the

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20. *See, e.g.*, Brief of Appellant at 12, Alexander v. Gulf Stream Coach, Inc., No. 10-30349 (5th Cir. Aug. 23, 2010) (asserting that the trial court's remedy—which seats jurors outside the strike zone because of their race—violated the equal protection component of the Fifth Amendment).

21. United States v. Paradise, 480 U.S. 149, 166 (1987) (citing Sheet Metal Workers v. EEOC, 478 U.S. 412, 480 (1986)).

22. Shaw v. Reno, 509 U.S. 630, 643 (1993) (citing Hirabayashi v. United States, 320 U.S. 81, 100 (1943)) (holding that such classifications "threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility").

23. U.S. CONST. amend. XIV, § 1.

> No State shall make or enforce any law which shall abridge the privileges or immunities of the 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.

Id.

24. *Shaw*, 509 U.S. at 642 (citing Washington v. Davis, 426 U.S. 229, 239 (1976)); *accord* Palmore v. Sidoti, 466 U.S. 429, 432 (1984) ("A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race.").

Due Process Clause of the Fifth Amendment[25] has been determined to contain an equal protection component that applies to actions by the federal government.[26] Consequently, governmental racial classifications are "constitutionally suspect"[27] and "[a] racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification."[28] Thus, "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."[29]

To determine whether a particular action or course of conduct is governmental, the Supreme Court has looked to (1) "the extent to which the actor relies on governmental assistance and benefits";[30] (2) "whether the

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25. U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law; . . . ").

26. Bolling v. Sharpe, 347 U.S. 497, 498–500 (1954) ("In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."); *see also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978).

27. McLaughlin v. Florida, 379 U.S. 184, 192 (1964).

28. Massachusetts v. Feeney, 442 U.S. 256, 272 (1979).

29. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224 (1995) ("'[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification,' *i.e.*, all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized." (citations omitted)).

> "If it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group, then constitutional standards may be applied consistently. Political judgments regarding the necessity for the particular classification may be weighed in the constitutional balance, . . . but the standard of justification will remain constant. This is as it should be, since those political judgments are the product of rough compromise struck by contending groups within the democratic process. When they touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest. The Constitution guarantees that right to every person regardless of his background."

Id. at 224–25 (quoting *Bakke*, 438 U.S. at 358 (plurality opinion) (opinion of Powell, J.)).

30. Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 621 (1991) (citing Tulsa Prof'l Collection Servs., Inc. v. Pope, 485 U.S. 478 (1988); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961)) (finding that the peremptory challenge system could only exist with "significant participation of the government"). "As discussed above, peremptory challenges have no utility outside the jury system, a system which the government alone administers." *Id.* at 622.

actor is performing a traditional governmental function";[31] and (3) "whether the injury caused is aggravated in a unique way by the incidents of governmental authority."[32] Further, the Court has recognized that the acts of federal or state judges indisputably constitute governmental action,[33] and that a trial judge becomes a discriminatory participant "[b]y enforcing a discriminatory peremptory challenge."[34] Thus, as government actors, state and federal trial judges are required to abide by the equal protection constructs established in the Constitution, and the rulings—the official pronouncements—of a trial judge must therefore conform to the constitutional protections afforded under the Fifth and Fourteenth Amendments.[35]

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31. *Id.* at 621–22 (citing Terry v. Adams, 345 U.S. 461 (1953); Marsh v. Alabama, 326 U.S. 501 (1946); *cf.* S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 544–45 (1987)).

32. *Id.* (citing Shelley v. Kraemer, 334 U.S. 1 (1948)) (enunciating the various factors used to determine whether an action is governmental).

33. *See id.* at 624 ("Without the direct and indispensable participation of the judge, who beyond all question is a state actor, the peremptory challenge system would serve no purpose.").

> It cannot be disputed that, without the overt, significant participation of the government, the peremptory challenge system, as well as the jury trial system of which it is a part, simply could not exist. As discussed above, peremptory challenges have no utility outside the jury system, a system which the government alone administers.

Id. at 622.

34. *Id.* at 624 (explaining that a judge takes on an active role in discrimination when choosing to uphold a challenge based on discrimination).

> By enforcing a discriminatory peremptory challenge, the court "has not only made itself a party to the [biased act], but has elected to place its power, property and prestige behind the [alleged] discrimination." In so doing, the government has "create[d] the legal framework governing the [challenged] conduct," and in a significant way has involved itself with invidious discrimination.

Id. (citations omitted).

35. *See Edmonson*, 500 U.S. at 622 (recognizing, implicitly, the judicial actions of trial judges to be as government actions); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

> [A] free people whose institutions are founded upon the doctrine of equality," [Hirabayashi v. United States, 320 U.S. 81, 100 (1943).], should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons. Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.

Adarand Constructors, Inc., 515 U.S. at 227. Interestingly, some courts have determined that governmental actors not only maintain the authority to remedy the effects of discrimination, but also retain the duty to take remedial action. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 291 (1986). "Indeed, our recognition of the responsible state actor's competency to take these steps is assumed in our recognition of the States' constitutional *duty* to take affirmative steps to eliminate the continuing effects of past unconstitutional discrimi-

With respect to *Batson* challenges, the Supreme Court noted in *Edmonson* the critical role trial judges play in the peremptory strike process:

> The judge determines the range of information that may be discovered about a prospective juror, and so affects the exercise of both challenges for cause and peremptory challenges. In some cases, judges may even conduct the entire *voir dire* by themselves, a common practice in the District Court where the instant case was tried. The judge oversees the exclusion of jurors for cause, in this way determining which jurors remain eligible for the exercise of peremptory strikes. In cases involving multiple parties, the trial judge decides how peremptory challenges shall be allocated among them. When a lawyer exercises a peremptory challenge, the judge advises the juror he or she has been excused.[36]

Thus, in analyzing a *Batson* remedy, it is clear that a trial judge is a government actor whose racially charged remedies are subject to strict scrutiny. Interestingly, this presents a bit of a quandary. Typically, a trial judge maintains the discretion to fashion a remedy under *Batson*'s "fourth step." However, because this action constitutes government action, a remedy that is crafted utilizing racial classifications is reviewed under a strict scrutiny standard, which inherently limits a trial judge's discretion.[37]

III. The Use of Remedial Racial Classifications by Trial Judges is Reviewed Under Strict Scrutiny

"Because racial characteristics so seldom provide a relevant basis for disparate treatment . . . , it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate."[38] Accordingly, as noted by the Supreme Court, "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be

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nation." *Id.* (emphasis in original) (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971); Green v. New Kent Cnty Sch. Bd., 391 U.S. 430, 437–38 (1968)); *see also* Jamie L. Barker, *Back to Basics: A "Functional Strict Scrutiny" Solution to the Affirmative Action Controversy*, 22 Ohio N.U. L. Rev. 1363, 1381 (1996) (showing that some courts have recognized a duty of government actors to rectify racial discrimination).

36. *Edmonson*, 500 U.S. at 623–24.

37. *See Adarand Constructors, Inc.*, 515 U.S. at 227 ("[A]ll governmental action based on race—a *group* classification long recognized as 'in most circumstances irrelevant and therefore prohibited,'—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed." (emphasis in original) (citations omitted)).

38. Fullilove v. Klutznick, 448 U.S. 448, 533–35 (1980) (Stevens, J., dissenting).

analyzed by a reviewing court under strict scrutiny."[39] Under this standard, a remedy looking only to the color of a juror's skin is not an acceptable remedy when it is not narrowly tailored to serve a compelling governmental interest.[40] Thus, as will be detailed further below, a racially-based *Batson* remedy will likely be found unconstitutional as it cannot withstand the strictures of this standard.

A. *Whether a Compelling Governmental Purpose Exists to Racially Classify Remedial, Replacement Jurors is Unclear*

Prior to a determination of whether a specific governmental action is "narrowly tailored," it is first necessary to ascertain the "compelling governmental purpose" at issue. Although the Supreme Court has refrained from drawing a bright line as to what constitutes a "compelling governmental purpose," the Supreme Court has stated that race-conscious relief may be necessary "to dissipate the lingering effects of pervasive discrimination."[41] In other words, judicial race-based classifications may be proper where there is a "legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination."[42]

As evident through *Batson* and its progeny, peremptory challenges have unfortunately served as shelters for disguised racial discrimination. However, whether remedying the past and present effects of such race-based discrimination is a constitutional priority is unclear.[43] In *Cassell v.*

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39. *Adarand Constructors, Inc.*, 515 U.S. at 227 (overruling the prior holding in Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) that provided a different level of review for remedial actions).

40. *See id.* at 230 ("[R]equiring that Congress, like the States, enact racial classifications only when doing so is necessary to further a 'compelling interest' does not contravene any principle of appropriate respect for a coequal branch of the Government."); *see also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 357 (1978) (holding "a government practice or statute which restricts 'fundamental rights' or which contains 'suspect classifications' is to be subjected to 'strict scrutiny'"); Qutb v. Strauss, 11 F.3d 488, 492 (5th Cir. 1993) (stating that the Fifth Circuit Court of Appeals requires a race-based classification to pass strict scrutiny review by a showing that it supports a "compelling government interest" and is "narrowly tailored" toward that purpose).

41. Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 475–76 (1986) (discussing the appropriateness of judicial remedies in the context of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g) (2006)).

42. *Bakke*, 438 U.S. at 307 (noting that "[t]he line of school desegregation cases[ ] . . . attests to the . . . commitment of the judiciary to affirm all lawful means toward its attainment").

43. *Compare* Franks v. Bowman Transp. Co., 424 U.S. 747, 779 (1976) (finding that the prevention and remediation of racial discrimination is a national policy of "highest priority"), *with Bakke*, 438 U.S. at 308-09 (noting that absent specific statutory or judicial

Texas,[44] the Supreme Court unequivocally held that race could not be used in the selection of juries:

> The basis of selection cannot consciously take color into account. Such is the command of the Constitution. Once that restriction upon the State's freedom in devising and administering its jury system is observed, the States are masters in their own household. If it is observed, they cannot be charged with discrimination because of color, no matter what the composition of a grand jury may turn out to be.[45]

Although the Supreme Court has not expressly addressed whether a *Batson* remedy may employ racial classifications, the Louisiana Supreme Court has rejected a race-conscious remedy holding that acceptance of a juror on account of "his or her race, in substitution for a juror improperly excluded because of his or her race, is almost certainly one remedy the Supreme Court would reject."[46] In so holding, the Louisiana Supreme Court disregarded the remedial nature of the racial classification, and instead, focused only on the discriminatory act itself:

> [T]he fundamental equal protection concern has been not whether there has occurred a proportional inclusion or proportional limitation on the jury panel but whether the selection process has "consciously take[n] color into account." *Cassell* thus made plain over 50 years ago that "[a]n accused is entitled to have charges against him considered by a jury in the selection of which there has been neither inclusion nor exclusion because of race.[47]

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violations, the government does not have a greater interest in helping one group of individuals over another).

44. 339 U.S. 282, 286–87 (1950) (holding that limiting a venire panel to meet racial quotas is unconstitutional).

> If, notwithstanding this caution by the trial court judges, commissioners should limit proportionally the number of Negroes selected for grand-jury service, such limitation would violate our Constitution. Jurymen should be selected as individuals, on the basis of individual qualifications, and not as members of a race.
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> . . . .
>
> [T]he Constitution requires only a fair jury selected without regard to race. Obviously the number of races and nationalities appearing in the ancestry of our citizens would make it impossible to meet a requirement of proportional representation. Similarly, since there can be no exclusion of Negroes as a race and no discrimination because of color, proportional limitation is not permissible.

Id.

45. *Id.* at 295; *see also* Labat v. Bennett, 365 F.2d 698, 711–12 (5th Cir. 1966) (accepting the absence of African-Americans serving on juries for thirty years was prima facie evidence and supported grounds for a retrial).

46. State v. Ball, 824 So. 2d 1089, 1100 (La. 2002) (finding a race-conscious remedy under the Equal Protection Clause would likely be unconstitutional).

47. *Id.* (quoting Cassell v. Texas, 339 U.S. 282, 287 (1950)).

Thus, it is unclear at present whether race-based *Batson* remedies constitute such a compelling interest authorizing racial classification. However, even if a compelling purpose may exist for racial classification, the classification may still be deemed unconstitutional if such action is not narrowly tailored to serve the governmental interest.[48]

B. *Using Racial Classifications to Remedy* Batson *Violations is Not a Narrowly Tailored Means to Ameliorate Present Discrimination*

In determining whether race-conscious remedies are "narrowly tailored," the Supreme Court has evaluated them using a variety of factors.[49] Although the Court has never determined whether a race-based *Batson* remedy is narrowly tailored, some of the factors previously employed may be useful in predicting the appropriateness of such a remedy. Specifically, the pertinent factors include "the efficacy of alternative remedies" and "the flexibility and duration of the relief."[50] In evaluating race-based *Batson* remedies under these criterions, their possible constitutionality fades. Because viable alternative remedies exist—remedies that do not infringe on the rights of the moving party or juror—employing racial classifications to remedy *Batson* violations will likely be held to be legally untenable.

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48. Fullilove v. Klutznick, 448 U.S. 448, 498 (1980) (Powell, J., concurring) ("[E]ven if the government proffers a compelling interest to support reliance upon a suspect classification, the means selected must be narrowly drawn to fulfill the governmental purpose."); *see, e.g.*, *Bakke*, 438 U.S. at 311–12, 315 (determining that the attainment of a diverse student body is a constitutionally permissible goal, but finding that the special admissions program employed at the University was not a permissible means to attain that goal and was therefore unconstitutional).

49. *See, e.g.*, United States v. Paradise, 480 U.S. 149, 187 (1987) (Powell, J., concurring). These factors were enunciated by Justice Powell in his concurrence and include:

> (i) the efficacy of alternative remedies; (ii) the planned duration of the remedy; (iii) the relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or work force; (iv) the availability of waiver provisions if the hiring plan could not be met; and (v) the effect of the remedy upon innocent third parties.

Id.; *Fullilove*, 448 U.S. at 510–11, 514 (enunciating the same factors as cited by Justice Powell in his *Paradise* concurrence).

50. *Paradise*, 480 U.S. at 171. According to the Court, when assessing the constitutionality of a race-conscious remedy, access to waiver provisions, the effect of the relief on third party rights, and the manner in which the numerical goals correspond to the pertinent labor market are all important factors to consider. *Id.*

1. Alternative *Batson* Remedies Not Employing Racial Classifications Are Equally Available

The existence of an alternative remedy does not, in and of itself, render a race-based remedy unconstitutional.[51] Instead, what must be considered is the efficacy of the race-neutral alternatives.[52] Although the Supreme Court in *Batson* specifically left the determination of a proper remedy to the trial court's discretion,[53] the Court attributed its decision to the "variety of jury selection practices followed in [ ] state and federal trial courts."[54]

Thus, while *Batson* made clear that trial courts have discretion to craft their own remedies, no appellate court has ever approved a remedy that looks squarely to the race of prospective jurors. Notably, though, the Supreme Court has implicitly approved two remedies: (1) reinstating the improperly struck juror or (2) dismissing the entire venire panel and starting anew.[55] Not surprisingly, these two remedies are by far the most

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51. *See* Grutter v. Bollinger, 539 U.S. 306, 339 (2003) (upholding an affirmative action plan that implemented a highly individualistic, holistic plan that considered race only to be a "plus" factor). "Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups." *Id.*

52. *See* NAACP v. Allen, 493 F.2d 614, 619 (5th Cir. 1974) (holding that where appropriate, racial classifications may be used to remedy past discrimination).

> No one is denied any right conferred by the Constitution. It is the collective interest, governmental as well as social, in effectively ending unconstitutional racial discrimination, that justifies temporary, carefully circumscribed resort to racial criteria, whenever the chancellor determines that it represents the only rational, nonarbitrary means of eradicating past evils.

Id.

53. *Batson*, 476 U.S. at 99 n.24; *accord* Koo v. McBride, 124 F.3d 869, 873 (7th Cir. 1997) (quoting *Batson*, 476 U.S. at 99 n.24). When using the *Batson* test to determine if there was any racial discrimination in selecting jury members, the trial judge must have "perceived a pattern of discrimination develop in peremptory challenges." *Id.*

54. *Batson*, 476 U.S. at 99 n.24. Counsel for the respondent argued that by imposing more restrictions on the use of peremptory challenges, not only would it "eviscerate the fair trial values served by the peremptory challenge," but it would "create serious administrative difficulties." *Id.* at 98–99. The Court responded to the first argument by indicating the importance of trial courts recognizing how peremptory challenges may be used in a racially discriminatory manner. *Id.* at 99. As for the second argument, the Court believed that there was no overwhelming administrative burden created, as the peremptory challenge system was still used in courts employing the standard the Court recognized in *Batson*. *Id.*

55. *Id.* at 99 n.24. The Court declared that, in respect to what trial courts should do when faced with racial discrimination:

> For the same reason, we express no view on whether it is more appropriate in a particular case, upon a finding of discrimination against black jurors, for the trial court to

predominantly-used remedies in *Batson* violations.[56] Nonetheless, a trial judge may disapprove dismissing the entire venire panel because of the time wasted as a result,[57] and likewise, a trial judge may also be reluctant to reinstate an improperly struck juror if a trial judge believes that such juror may be nonetheless predisposed to a particular opinion. Yet despite these potential criticisms, both remedies are equally effective in removing the discriminatory effects of a *Batson* violation. Further, as identified below, the traditional remedies listed in *Batson* ensure that the rights of the party raising the *Batson* challenge and the wrongly struck juror are protected.

> discharge the venire and select a new jury from a panel not previously associated with the case . . . , or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire . . . .

Id. (citations omitted); *cf.* McCrory v. Henderson, 82 F.3d 1243, 1247 (1996) (holding that the *Batson* "error is remediable in any one of a number of ways"). The Court of Appeals for the Second Circuit discussed *Batson* for the issue of "whether a *Batson* objection raised for the first time after the conclusion of jury selection is timely." *McCrory*, 82 F.3d at 1246–47. The Second Circuit was careful to note that a *Batson* challenge is appropriate during the jury selection process, as the remedies of either reinstating the dismissed juror or simply beginning the jury selection process again are available. *Id.* at 1247. However, should the *Batson* objection occur after the jury is selected and the trial begins, then "there can be no remedy short of aborting the trial." *Id.*

56. *See, e.g.*, Rice v. White, 2010 WL 1347610, at *22 (E.D. Mich. March 31, 2010) (slip op.).

> Normally, the remedy for a *Batson* violation is to either (1) discharge the venire and select a new jury from a panel not previously associated with the case, or (2) disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire. However, when the procedural posture of the case is such that neither of these two remedies are available, automatic reversal of the conviction is required.

Id. (citation omitted); *see also* Butler v. Quarterman, 576 F. Supp. 2d 805, 830–31 (S.D. Tex. 2008) (finding that the trial court's dismissal of the venire panel was a proper remedy to the *Batson* challenge despite the fact that the improperly challenged juror was left off the panel); United States v. Walker, 490 F.3d 1282, 1294–95 (11th Cir. 2007). ("Other courts have refused to grant new peremptory strikes or to dismiss the venire following a *Batson* error, finding that doing so would reward offending conduct by the striking party."); *see, e.g.*, Peetz v. State, 180 S.W.3d 755, 760 (Tex. App.—Houston [14th. Dist.] 2005, no pet.) (ordering the "two wrongfully-struck jurors" to be reinstated); People v. Willis, 43 P.3d 130, 135, 139 (Cal. 2002) (imposing monetary sanctions rather than dismissing the remaining jury venire); People v. Moten, 603 N.Y.S.2d 940, 947 (N.Y. 1993) (explaining the need for the retention of jurors, which is another remedy for a *Batson* violation).

57. *See, e.g.*, State v. Parker, 836 S.W.2d 930, 936 (Mo. 1992) (reinstating an improperly struck juror for purposes of judicial economy and other stated reasons).

2. *Batson* Remedies Are Permanent and Inflexible, and Thus, the Effects of Race-Based Remedies Are Impermissible

An additional factor used to determine if a race-based remedy is narrowly tailored is the duration and flexibility of the remedy.[58] This factor, however, has typically only been applied to remedial affirmative action programs.[59] In such cases, the Supreme Court has evaluated flexibility by looking at whether the requirements of the program can be waived and under what circumstances waiver is available.[60] Although this analysis cannot be directly applied to *Batson* remedies, what can be assessed is the permanency of the remedy and the potential effects on the discriminated party and wrongfully discharged juror.

Peremptory challenges are asserted at perhaps the most critical point in a trial: the beginning.[61] A jury trial cannot begin without a jury, and more importantly, a jury verdict cannot be had without a jury.[62] As such, the implications of a race-based *Batson* remedy are pronounced. By not reseating the improperly struck juror and instead selecting a replacement juror on account of his or her race, a trial judge advances the notion that the color of a person's skin affects a jury verdict. Such a result is untenable as "[j]urymen should be selected as individuals, on the basis of individual qualifications, and not as members of a race."[63] Thus, while a race-conscious *Batson* remedy may seek to rectify the presence of racial discrimination, such a remedy, in reality, implicitly confirms the underly-

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58. NAACP v. Allen, 493 F.2d 614, 617 (5th Cir. 1974) (holding that a judicially prescribed race-conscious remedy "must be feasible, workable, effective, and promise realistically to work and to work now" (citations omitted)).

59. *Id.* at 619–20.

60. Korematsu v. United States, 323 U.S. 214, 218–19 (1944) (noting one reason the exclusion based on race was permissible was its temporary nature).

61. *See* Powers v. Ohio, 499 U.S. 400 (1991) (recognizing the important and lasting effect of *voir dire*).

> A prosecutor's wrongful exclusion of a juror by a race-based peremptory challenge is a constitutional violation committed in open court at the outset of the proceedings. The overt wrong, often apparent to the entire jury panel, casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause. The voir dire phase of the trial represents the "jurors' first introduction to the substantive factual and legal issues in a case." The influence of the voir dire process may persist through the whole course of the trial proceedings.

Id. at 412 (citations omitted).

62. *See id.* at 413 ("The purpose of the jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair.").

63. Collins v. Walker, 335 F.2d 417, 419 (5th Cir. 1964) (quoting Cassell v. Texas, 339 U.S. 282, 286 (1950)).

ing motive for the original, improper strike.[64] A jury comprised of venirepersons, of whom one or more are selected for their race, results in a verdict likewise tainted by racial discrimination.

Further, choosing a replacement juror on the basis of race deprives the objecting party of the assurance that all jurors are qualified and not prejudicially predisposed.[65] The simple mechanics of a remedy that replaces an improperly-struck juror results in the deprivation of the objecting party of meaningful participation in juror selection. Because replacement jurors are those who have not been struck for cause or peremptorily challenged, such venirepersons are likely located beyond the strike zone, and thus not within the range of jurors originally contemplated by the objecting party. An objecting party is also precluded from a trial evaluated by a jury panel selected free of racial bias, which is indefensible as noted by the Supreme Court: "[I]f 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."[66]

Finally, utilizing racial classifications to select a replacement juror also offends the rights of the wrongly struck juror. In *Powers v. Ohio*,[67] the Supreme Court recognized that jurors likewise have a right to be selected free of racial discrimination.[68]

> A venireperson excluded from jury service because of race suffers a profound personal humiliation heightened by its public character. The rejected juror may lose confidence in the court and its verdicts, as may the defendant if his or her objections cannot be heard. This congruence of interests makes it necessary and appropriate for the defendant to raise the rights of the juror. And, there can be no doubt that petitioner will be a motivated, effective advocate for the excluded venirepersons' rights.[69]

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64. It should also be noted that a *Batson* remedy that selects a replacement juror—in lieu of reinstating the wrongfully discharged juror—essentially results in success for the striking party as the party is allowed to retain its original peremptory strikes. This further reduces any remedial value of this type of action.

65. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 628 (1991) ("Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there.").

66. *Id.* at 630 ("Racial discrimination has no place in the courtroom, whether the proceeding is civil or criminal.").

67. 499 U.S. 400 (1990).

68. *Id.* at 413–14 (focusing on the effects of racial discrimination on the improperly struck juror).

69. *Id.*; *see also* Alex v. Rayne Concrete Servs., 951 So.2d 138, 155 (La. 2007) ("By denying a person participation in jury service on account of his race or gender, the state unconstitutionally discriminates against the excluded juror."); Christensen v. State, 875 S.W.2d 576, 579 (Mo. Ct. App. 1994) ("[T]he purpose of a *Batson* challenge is not to re-

Thus, replacing an improperly struck juror does nothing to remedy the racial discrimination suffered by the wrongfully struck juror, and deprives an individual of the opportunity to take part in governing.[70] Consequently, a race-based remedy is not narrowly tailored to remedying the discrimination perceived by the wronged juror.[71]

IV. CONCLUSION

Although trial judges, as government actors, have a clear interest, if not a duty, in remediating *Batson* violations, a *Batson* remedy that draws racial lines is not sufficiently tailored to effectuate proper relief. Instead, relying on race in ameliorating a *Batson* violation reinforces the stigma that a person's race dictates who the person is and how the person will render a verdict. Reinforcement of such a stigma lies in contradiction to *Batson* and its progeny, which seeks to ensure that the selection of jurors is an individualized process and not one dictated by racial classifications. While it is undoubtedly a challenge to avoid using a race-based classification when curing a *Batson* violation, equal protection jurisprudence demands that such a challenge be met and not sacrificed.

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place an entire panel, which would effectively deny the wrongly struck jurors their opportunity to serve, but to quash only the prejudice or wrongful strike."); State *ex rel.* Curry v. Bowman, 885 S.W.2d 421, 425 (Tex. Crim. App. 1993) ("If the only remedy is dismissal of the array, the affected veniremember is still not allowed to participate in the process."); State v. Parker, 836 S.W.2d 930, 936 (Mo. 1992) ("[T]he discrimination endured by the excluded venirepersons goes completely unredressed since they remain wrongfully excluded from jury service."); Jefferson v. State, 595 So. 2d 38, 40 (Fla. 1992) ("While striking the venire and beginning selection over with a new jury pool may protect the constitutional rights of the defendant, it does nothing to remedy the recognized discrimination against those improperly removed from the jury.").

70. *Powers*, 499 U.S. at 406, 407.

> Jury service preserves the democratic element of the law, as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people. It "affords ordinary citizens a valuable opportunity to participate in a process of government, an experience fostering, one hopes, a respect for law." Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.

Id.

71. It is worth noting that although a remedy dismissing the entire venire panel would still infringe on the discriminated juror's rights, it is the belief of the authors that in some instances the effects of a *Batson* violation may cause altered perceptions among previously selected venirepersons, and in those instances, it is necessary to dismiss the entire venire panel and begin *voir dire* anew.