St. Mary's Law Journal

Volume 35 | Number 2 Article 3

1-1-2004

Aboilishing the Texas Jury Shuffle.

Michael M. Gallgher

ABOLISHING THE TEXAS JURY SHUFFLE

MICHAEL M. GALLAGHER*

* Law Clerk to the Honorable Richard A. Schell, District Judge, United States District Court for the Eastern District of Texas, 2003-2004. B.A., 2000, Georgetown University; J.D., 2003, University of Houston Law Center. Many thanks to Mike Murray, Kathy Stephens, and the editors of the *St. Mary's Law Journal* for their excellent, thorough work on this Article. I am indebted to Robert Dubose for wise, gracious advice and invaluable teaching.

I. INTRODUCTION

Texas attorneys currently possess an entirely cost and risk-free procedure through which they can discriminate against potential jurors on the basis of race, gender, ethnicity, or anything else that suits their fancy. By utilizing this procedure, attorneys have nothing to lose and everything to gain—they will never get caught discriminating, and the worst that might happen is that they will not actually discriminate. Worse yet, Texas courts condone this procedure to achieve randomness in jury selection,[1] while encouraging lawyers to utilize this procedure to shuffle potential jurors toward the back of the jury pool.[2]

---

1. *See* Jones v. State, 833 S.W.2d 146, 148 n.3 (Tex. Crim. App. 1992) (en banc) (observing that the statute is intended to ensure randomness).

2. *See* Yanez v. State, 677 S.W.2d 62, 64 (Tex. Crim. App. 1984) (en banc) (holding that "[i]n light of the fact that the four Mexican-Americans occupied positions numbered 25, 38, 42, and 45, we find [that Defendant's] request [for a jury shuffle] was a reasonable one"). *But cf.* Bradford v. State, No. 14-96-00115-CR, 1997 Tex. App. LEXIS 5013, at *5-6 (Tex. App.—Houston [14th Dist.] Sept. 18, 1997, no pet.) (not designated for publication) (denying the appellant's ineffective assistance claim where the appellant's lawyer failed to request a jury shuffle when the majority of African-American members were seated in the back of the venire and the defendant was African-American). Allowing litigants in a civil or criminal trial to strategically utilize a procedure designed to achieve randomness seems a bit strange. *See* Eldridge v. State, 666 S.W.2d 357, 360 (Tex. App.—Dallas 1984, pet. ref'd) (Sparling, J., dissenting) (arguing that "the mere concept of using the right to shuffle

This procedure is the jury shuffle, which, if requested, results in a random shuffling of the names of jury pool members.[3] The jury shuffle exists in only one state: Texas.[4] And even in Texas, the jury shuffle is not well regarded.[5] Judges dislike it[6] and consider it redundant[7] and contradictory.[8] Commentators disfavor it and deem it constitutionally deficient.[9] Prosecutors have argued it is obsolete

---

'intelligently' seems to belie my view of the purpose of the shuffle—to insure a random listing—and implies a right of a litigant to rearrange the panel").

3. *See* TEX. CODE CRIM. PROC. ANN. art. 35.11 (Vernon Supp. 1999) (authorizing the re-drawing of panel members' names upon the demand of either party).

4. *Id.*; TEX. R. CIV. P. 223 (providing for a jury shuffle in civil cases); *see also* Donna M. Bobbitt, *The Texas Jury Shuffle: A Question of Constitutionality*, 57 TEX. B.J. 596, 596 (1994) (noting that "Texas is the only state which incorporates the eccentric process of the jury shuffle into its rules of criminal and civil procedure"). Most challenges to jury shuffle requests occur in criminal cases. *Id.* Moreover, all cases that have considered challenges to jury shuffle requests involve challenges to the prosecutor's jury shuffle request. Though this Article focuses on those challenges occurring in criminal cases, I readily acknowledge that the jury shuffle is susceptible to abuse by either party in a criminal trial. This Article does not focus on the ways in which the use of jury shuffle requests may differ in civil trials, nor is it intended to suggest that the implications of the procedure are necessarily the same in both civil and criminal settings.

5. *See infra* notes 6-7 (discussing the various groups that disfavor the jury shuffle).

6. *See* Tom M. Dees, III, *Juries: On the Verge of Extinction? A Discussion of Jury Reform*, 54 SMU L. REV. 1755 app. 7(a) at 1802 (2001) (including the following recommendations: "7. Eliminate the Jury Shuffle—Except When Panelists Have Been Reassigned After Participating in Jury Selection in Another Case"); R.N. Singh et al., *Reforming the Jury System: What Do the Judges Think?*, 63 TEX. B.J. 948, 951 (2000) (recommending that Texas courts "[e]liminate shuffling of jurors when a panel is still random as seated in the assigned court").

7. *See, e.g.*, Sanders v. State, 942 S.W.2d 3, 6 (Tex. Crim. App. 1997) (en banc) (Baird, J., concurring) (concluding that "the Legislature should consider repealing art. 35.11" because of Section 62.001 of the Texas Government Code, which delineates the procedures for selecting citizens for jury duty); Montez v. State, 975 S.W.2d 370, 373 (Tex. App.—Dallas 1998, no pet.) (commenting that "[g]iven the broader, more diverse pool of jurors available under the statute, . . . the purpose of a jury shuffle is normally accomplished even before the venire is seated in the courtroom and subject to a shuffle under article 35.11"); *cf.* Ford v. State, 73 S.W.3d 923, 926 (Tex. Crim. App. 2002) (pointing out that "[r]andomness is ensured by statutes directing the drawing of names, by the certification of the jury list, and by provisions for electronic or mechanical methods of selection"). The State, too, has argued that Article 35.11 is outdated. *Id.* at 928 (Holbomb, J., joined by Price & Johnson, JJ., dissenting).

8. *See* Eldridge v. State, 666 S.W.2d 357, 360 (Tex. App.—Dallas 1984, pet. ref'd) (Sparling, J., dissenting) (stating that "the mere concept of using the right to shuffle 'intelligently' seems to belie my view of the purpose of the shuffle—to insure a random listing—and implies a right of a litigant to rearrange the panel").

9. *See* Donna M. Bobbitt, *The Texas Jury Shuffle: A Question of Constitutionality*, 57 TEX. B.J. 596, 599 (1994) (commenting, "Some scholars and jurists now argue that the peremptory challenge should be eliminated altogether because of its inherent ability to be

and unnecessary.[10] The United States Supreme Court suspects it is susceptible to abuse.[11] Even those brave souls who defend the jury shuffle admit it enables discrimination.[12]

Despite this avalanche of judicial and scholarly criticism, the jury shuffle lives to be abused another day.[13] To be fair, Texas legislators enacted the jury shuffle statute with the best of intentions—to ensure randomness and fairness in jury selection.[14] Despite the intentions of Texas legislators,[15] the jury shuffle allows rampant discrimination by attorneys who wish to discriminate through the free pass granted them by the Texas Legislature.[16]

---

used in a discriminatory fashion. The Texas jury shuffle procedure clearly occupies a similar position."); Elaine A. Carlson, Batson, J.E.B., *and Beyond: The Paradoxical Quest for Reasoned Peremptory Strikes in the Jury Selection Process*, 46 BAYLOR L. REV. 947, 982 (1994) (concluding that "[t]he constitutional premise for *Batson* and subsequent decisions mandate an affirmative response to th[e] question[ ]" of whether the jury shuffle procedures violate equal protection); John D. White, Comment, *Constitutional Law—Equal Protection—A New Hand From the Same Deck of Cards—Randomness and the Intersection of Race with Gender in the Texas Jury Shuffle*, 40 S. TEX. L. REV. 509, 537 (1999) (arguing that "the purpose of the jury shuffle is being subverted by invidious discrimination").

10. *Ford*, 73 S.W.3d at 928, 931 n.6 (Holcomb, J., joined by Price & Johnson, JJ., dissenting).

11. *See* Miller-El v. Cockrell, 123 S. Ct. 1029, 1044 (2003) (agreeing "with petitioner that the prosecution's decision to seek a jury shuffle when a predominate number of African-Americans were seated in the front of the panel, . . . raise[s] a suspicion that the State sought to exclude African-Americans from the jury").

12. *See id.* at 1052 (Thomas, J., dissenting) (pointing out that "the evidence that the prosecution used jury shuffles no more proves intentional discrimination than it forces petitioner to admit that he sought to eliminate whites from the jury, given that he employed the tactic even more than the prosecution did").

13. *Cf.* Donna M. Bobbitt, *The Texas Jury Shuffle: A Question of Constitutionality*, 57 TEX. B.J. 596, 598 (1994) (acknowledging that "[t]he very fact that the shuffle request requires no explanation allows it to be a subtle mechanism to subvert the court's mandate under *Batson*").

14. *See* John D. White, Comment, *Constitutional Law—Equal Protection—A New Hand From the Same Deck of Cards—Randomness and the Intersection of Race with Gender in the Texas Jury Shuffle*, 40 S. TEX. L. REV. 509, 537 (1999) (admitting that "the purpose of the jury shuffle is being subverted by invidious discrimination"); *see also* Donna M. Bobbitt, *The Texas Jury Shuffle: A Question of Constitutionality*, 57 TEX. B.J. 596, 598 (1994) (explaining that "the purpose of the Texas jury shuffle is to assure the selection of a fair and impartial jury," and acknowledging that this procedure is susceptible to abuse).

15. *See* Donna M. Bobbitt, *The Texas Jury Shuffle: A Question of Constitutionality*, 57 TEX. B.J. 596, 598 (1994) (stating that the purpose of the jury shuffle system is "the selection of a fair and impartial jury").

16. *See id.* (describing how the process may be initiated by a party acting with discriminatory intent).

Neutral laws of applicability, like any laws, can be abused by those inclined to abuse them.[17] This is particularly true with the jury shuffle:[18] no reason is required to request a jury shuffle,[19] no judge can ask why a jury shuffle was requested,[20] and no judge can refuse to grant a timely jury shuffle request.[21] Additionally, as presented in Part III of this Article, the jury shuffle does not achieve randomness in jury selection. In practice, the jury shuffle is susceptible to widespread discrimination.[22] Also in Part III, I argue that the Texas Legislature should abolish the jury shuffle.[23] This assumes, of course, that the Texas Legislature can find time to do so in between redistricting disputes.[24] By abolishing the jury

17. *See* Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886) (lamenting that "[t]hough the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, . . . the denial of equal justice is still within the prohibition of the Constitution").

18. *See* Miller-El v. Cockrell, 123 S. Ct. 1029, 1044 (2003) (referring to prior testimony demonstrating discriminatory use of the shuffle process by a prosecutor).

19. *See* TEX. CODE CRIM. PROC. ANN. art. 35.11 (Vernon Supp. 1999) (describing the process without indication of a requirement for justification of the request); Williams v. State, 719 S.W.2d 573, 575 (Tex. Crim. App. 1986) (en banc) (noting that a defendant need not cite a cause or reason for a jury shuffle request); Donna M. Bobbitt, *The Texas Jury Shuffle: A Question of Constitutionality*, 57 TEX. B.J. 596, 598 (1994) (noting that "[t]he rules do not require the moving party to justify or explain his or her desire for a shuffle").

20. *See Williams*, 719 S.W.2d at 575 (stating that denial of a timely demand for shuffle is automatic reversible error).

21. Latham v. State, 656 S.W.2d 478, 479 (Tex. Crim. App. 1983) (en banc) (reiterating that "[w]hen the accused timely presents to the trial court a motion to shuffle, the trial court has no choice of whether to grant or refuse it, because he must always grant such a motion").

22. *See Miller-El*, 123 S. Ct. at 1038, 1044 (discussing jury shuffle requests by attorneys in the Dallas County District Attorney's Office to move racial minorities toward the back of the venire).

23. *Cf.* Ford v. State, 73 S.W.3d 923, 931 n.6 (Tex. Crim. App. 2002) (Holcomb, J., joined by Price & Johnson, JJ., dissenting) (asserting that "[i]f the prosecutors of this state believe the statute is 'obsolete,' they should express that view to the Legislature, not the Judiciary").

24. Considering the political climate in Texas, it is doubtful that the partisan strife between Republicans and Democrats will end anytime soon. *See, e.g.*, R.G. Ratcliffe, *GOP Senators Put "Texas 11" on Probation*, HOUS. CHRON., Sept. 19, 2003, at A1 (reporting that the "Senate's ugly atmosphere darkened" further as Republican senators placed their Democrat colleagues on probation for fleeing the state during the redistricting controversy, and noting that the Democrat senators responded by "accus[ing] the Republicans of segregationist politics").

shuffle, the Texas Legislature will cause Texas to join the other forty-nine states that disallow the jury shuffle.[25]

Though commentators have called for various reforms of the jury shuffle,[26] I argue in Part IV of this Article that these reforms, if adopted, would not succeed. Any proposed cures to the jury shuffle would be far worse than the constitutional wrongs the jury shuffle allows. Applying *Batson v. Kentucky*,[27] which prohibited peremptory challenges based on race, will not work.[28] *Batson* does not and should not apply to the jury shuffle.[29] Moreover, those parties facing a *Batson* challenge can easily defeat a *Batson* challenge.[30] Removing the jury shuffle from the Texas jury selection process will ensure greater fairness and justice for Texas litigants.

II. THE JURY SHUFFLE PROCEDURE

Though it is a fundamental right,[31] the right to a jury trial must be timely and properly requested in a civil or criminal lawsuit.[32] Assuming that a party demands a jury trial, a panel of jurors is

---

25. *Cf. Miller-El*, 123 S. Ct. at 1038 (describing the jury shuffle as "*a Texas criminal procedure practice*" (emphasis added)); Donna M. Bobbitt, *The Texas Jury Shuffle: A Question of Constitutionality*, 57 TEX. B.J. 596, 596 (1994) (referring to Texas as "the only state which incorporates the eccentric process of the jury shuffle into its rules of criminal and civil procedure").

26. *See* Donna M. Bobbitt, *The Texas Jury Shuffle: A Question of Constitutionality*, 57 TEX. B.J. 596, 598 (1994) (arguing that *Batson* should apply to jury shuffle requests); Elaine A. Carlson, Batson, J.E.B., *and Beyond: The Paradoxical Quest for Reasoned Peremptory Strikes in the Jury Selection Process*, 46 BAYLOR L. REV. 947, 982 (1994) (hinting unsubtly that *Batson* should apply to jury shuffle requests); John D. White, Comment, *Constitutional Law—Equal Protection—A New Hand From the Same Deck of Cards—Randomness and the Intersection of Race with Gender in the Texas Jury Shuffle*, 40 S. TEX. L. REV. 509, 537 (1999) (suggesting that "[i]n the interim, perhaps the most immediate and practical approach is to subject the jury shuffle to *Batson* challenges").

27. 476 U.S. 79 (1986).

28. *See* Batson v. Kentucky, 476 U.S. 79, 96 (1986) (delineating a three-part test to examine whether an attorney utilized a peremptory challenge based on racism). *Batson* is codified in the Texas Code of Criminal Procedure. TEX. CODE CRIM. PROC. ANN. art. 35.261 (Vernon 1988). *Batson* applies to both parties in a criminal trial. *See* Georgia v. McCollum, 505 U.S. 42, 59 (1992) (holding that a criminal defendant is also constitutionally prohibited from exercising peremptory challenges on the basis of race).

29. *See infra* Part IV.A.1 (analyzing the application of *Batson* to the jury shuffle).

30. *See infra* Part IV.A.2 (concluding that a jury shuffle request would always survive a *Batson* challenge).

31. TEX. CONST. art. V, § 10.

32. TEX. R. CIV. P. 216.

assembled.[33] In Texas, a jury panel is chosen from a broad cross-section of the population of the county.[34] After the panel is chosen, the judge immediately questions the panel and determines which individuals are qualified to serve as jurors,[35] which potential jurors should be exempted from service,[36] and which potential jurors should be excused.[37] Before voir dire begins, either party in a Texas civil or criminal trial may request a jury shuffle.[38]

The Texas jury shuffle is a unique[39] procedure that dates back to the nineteenth century.[40] The purpose of the jury shuffle is to ensure a random selection of jurors.[41] Once the jury panel has been sworn and assembled, each party has the right to visually examine the race, age, gender, and quite possibly the religion and ethnicity of the potential jurors.[42] A "refusal to agree to a shuffle outside the courtroom does not constitute waiver."[43] Additionally, each

---

33. TEX. R. CIV. P. 223- 225.

34. TEX. GOV'T CODE ANN. § 62.001 (Vernon 2001).

35. *Id.* § 62.102.

36. *Id.* § 62.106.

37. *Id.* § 62.110.

38. TEX. CODE CRIM. PROC. ANN. art. 35.11 (Vernon Supp. 1999); TEX. R. CIV. P. 223.

39. *See* John D. White, Comment, *Constitutional Law—Equal Protection—A New Hand From the Same Deck of Cards—Randomness and the Intersection of Race with Gender in the Texas Jury Shuffle*, 40 S. TEX. L. REV. 509, 524 (1999) (noting that "Texas has the dubious distinction of being the only state that gives the parties . . . the right to reshuffle the names of members of the venire from which the jurors hearing the case will be selected, even after being randomly selected from the general pool of jurors").

40. *See* Yanez v. State, 677 S.W.2d 62, 68 (Tex. Crim. App. 1984) (en banc) (recognizing that the jury shuffle procedure is historically rooted in the state's jurisprudence (citing WILSON'S TEXAS CRIMINAL STATUTES (1888 ed.); WHITE'S CODE OF CRIMINAL PROCEDURE (1895 ed.))). The state's Code of Criminal Procedure, which was adopted in 1895, included provisions referencing the organization of the jury and the defendant's ability to challenge that organization. JOHN P. WHITE, WHITE'S CODE OF CRIMINAL PROCEDURE 29 (1900).

41. Jones v. State, 833 S.W.2d 146, 148 n.3 (Tex. Crim. App. 1992) (en banc).

42. *See* Batchelor v. State, 757 S.W.2d 455, 456 (Tex. App.—Dallas 1988, pet. ref'd) (holding that "[a] party does have the right to see the venire panel seated before it demands a shuffle" (citing Stark v. State, 657 S.W.2d 115, 116 (Tex. Crim. App. 1983))); Elaine A. Carlson, Batson, J.E.B., *and Beyond: The Paradoxical Quest for Reasoned Peremptory Strikes in the Jury Selection Process*, 46 BAYLOR L. REV. 947, 982 (1994) (identifying visible traits that may prompt a jury shuffle request).

43. Eldridge v. State, 666 S.W.2d 357, 358 (Tex. App.—Dallas 1984, pet. ref'd) (citing Latham v. State, 656 S.W.2d 478 (Tex. Crim. App. 1983) (en banc)).

party may examine the juror information cards.[44] After this visual inspection of jurors and juror cards is completed, a jury shuffle request is proper.[45]

The jury shuffle is neither a constitutional nor a fundamental right;[46] it is a creation of the legislature.[47] A party may waive the right to a jury shuffle by failing to timely request one.[48] If either party makes an oral or written request for a jury shuffle[49] before the commencement of voir dire,[50] however, the trial judge must grant that request.[51] The party requesting a jury shuffle need not explain his or her reasons for that request.[52] A trial court's failure to grant a shuffle or erroneous grant of a jury shuffle is evaluated

---

44. *See* Garza v. State, 7 S.W.3d 164, 166 (Tex. Crim. App. 1999) (holding that "a trial court is neither required to allow nor prohibited from allowing a party to review written questionnaires before deciding whether to request a shuffle"); *see also* Holman v. State, 636 S.W.2d 18, 18 (Tex. App.—Dallas 1982, pet. ref'd) (determining that "examination of the juror information cards was not tantamount to the commencement of voir dire").

45. *See Yanez*, 677 S.W.2d at 69 (holding that "voir dire examination of the jury panel does not commence until all of the members of the jury panel have been shown to be qualified to serve as jurors in the cause and are seated in the courtroom"); Latham v. State, 656 S.W.2d 478, 479 (Tex. Crim. App. 1983) (en banc) (noting that a timely motion requesting jury shuffle must be made prior to the beginning of voir dire examination).

46. *Yanez*, 677 S.W.2d at 68.

47. *See id.* (noting that the right to a jury shuffle is provided for by statute and is unique to Texas).

48. *See, e.g.*, Velasquez v. State, 941 S.W.2d 303, 307 (Tex. App.—Corpus Christi 1997, pet. ref'd) (holding that the defendant's right to a jury shuffle was waived because the defendant did not assert his right at the appropriate time); Turner v. State, 828 S.W.2d 173, 177 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd) (concluding that the defendant waived his right to complain on appeal concerning jury selection when he failed to object to the trial court's handling of jury selection).

49. Williams v. State, 719 S.W.2d 573, 575 n.2 (Tex. Crim. App. 1986) (en banc); *Yanez*, 677 S.W.2d at 69.

50. *Yanez*, 677 S.W.2d at 68; *see also* Thomas v. State, 624 S.W.2d 383, 385 (Tex. App.—Fort Worth 1981, no pet.) (holding that a timely demand for jury shuffle must be made after the panel is seated but before initiation of voir dire). "[V]oir dire does not commence simply because a party has read the answers to written jury questionnaires." Garza v. State, 7 S.W.3d 164, 166 (Tex. Crim. App. 1999).

51. Latham v. State, 656 S.W.2d 478, 479 (Tex. Crim. App. 1983) (en banc) (indicating that "[w]hen the accused timely presents to the trial court a motion to shuffle, the trial court has no choice of whether to grant or refuse it, because he must always grant such a motion").

52. *Williams*, 719 S.W.2d at 575.

under the harmless error standard of Texas Rule of Appellate Procedure 44.2(b).[53]

Once a trial judge grants a timely request for a jury shuffle, "[t]he clerk shall randomly select the jurors by a computer or other process of random selection and shall write or print the names, in the order selected, on the jury list from which the jury is to be selected to try the case."[54] After the jury shuffle has occurred, the clerk shall give a copy of the list with the order of jurors to both parties in a civil or criminal trial.[55] Notably, the jury shuffle statute does not require that the shuffle take place in the courtroom, though it is a common practice to do so.[56] Absent a showing of misconduct[57] or a trial judge's sua sponte shuffle,[58] only one jury shuffle may occur in each case.[59] Even in a criminal case with multiple defendants, only one jury shuffle is allowed.[60]

Though the purpose of the jury shuffle is to ensure randomness in jury selection,[61] a jury shuffle request is made based on statistics.[62] In cases tried before a district court, the first twelve unchal-

---

53. TEX. R. APP. P. 44.2(b); Ford v. State, 73 S.W.3d 923, 926 (Tex. Crim. App. 2002). The same is true in civil cases. Rivas v. Liberty Mut. Ins. Co., 480 S.W.2d 610, 611 (Tex. 1972); Carr v. Smith, 22 S.W.3d 128, 135 (Tex. App.—Fort Worth 2000, pet. ref'd).

54. TEX. CODE CRIM. PROC. ANN. art. 35.11 (Vernon Supp. 1999).

55. *See id.* (describing the procedure for criminal trials); *see also* TEX. R. CIV. P. 223 (describing the process in civil proceedings).

56. Mays v. State, 726 S.W.2d 937, 947 (Tex. Crim. App. 1986) (en banc).

57. *See* Chappell v. State, 850 S.W.2d 508, 511 (Tex. Crim. App. 1993) (en banc) (noting that "absent a showing of misconduct, only one shuffle is authorized under art. 35.11").

58. *See* Wilkerson v. State, 681 S.W.2d 29, 30 (Tex. Crim. App. 1984) (en banc) (holding "that a sua sponte shuffle of a jury panel by the trial judge or persons operating at his direction does not foreclose the right of the State and the defendant to a shuffle").

59. TEX. R. CIV. P. 223; *Chappell*, 850 S.W.2d at 511.

60. Latham v. State, 656 S.W.2d 478, 481 (Tex. Crim. App. 1983) (en banc) (declaring that "[i]n a trial involving multiple defendants, our holding is not to be interpreted that the defense side of the table shall be allowed more than one shake of the names of the members of the assigned jury panel").

61. Jones v. State, 833 S.W.2d 146, 148 n.3 (Tex. Crim. App. 1992) (en banc).

62. *See* Donna M. Bobbitt, *The Texas Jury Shuffle: A Question of Constitutionality*, 57 TEX. B.J. 596, 598 (1994) (recognizing that "[a] party . . . is entitled under the present procedural law to shuffle the seating arrangement in the hope of placing a larger number of members of [a] racial group toward the back of the panel"); Elaine A. Carlson, Batson, J.E.B., *and Beyond: The Paradoxical Quest for Reasoned Peremptory Strikes in the Jury Selection Process*, 46 BAYLOR L. REV. 947, 982 (1994) (suggesting that "[t]he order in which jury panelists' names are listed affects the statistical likelihood of service in a given case").

lenged panel members will comprise the jury.[63] Thus, a party often requests a jury shuffle to seek a more favorable jury panel.[64] If a request for a jury shuffle is granted, the odds that the order of potential jurors will stay precisely the same are quite low.[65] Thus, a party faced with what looks like an unfavorable jury panel has every incentive to seek a jury shuffle.[66] The worst that can happen is that the composition and order of the panel does not change.[67] After the jury names are shuffled, voir dire occurs, and both parties may utilize peremptory challenges.[68]

III. WHY THE TEXAS LEGISLATURE SHOULD ABOLISH THE JURY SHUFFLE

A. *The Jury Shuffle Enables Discrimination in Jury Selection*

Many criminal defendants have alleged that the State requested a jury shuffle to discriminate against and move minorities to the back of the jury pool.[69] Texas courts, however, have unanimously ruled against the party alleging discrimination.[70] Before *Miller-El*

---

63. Elaine A. Carlson, Batson, J.E.B., *and Beyond: The Paradoxical Quest for Reasoned Peremptory Strikes in the Jury Selection Process*, 46 BAYLOR L. REV. 947, 982 (1994).

64. *Id.*

65. John D. White, Comment, *Constitutional Law—Equal Protection—A New Hand From the Same Deck of Cards—Randomness and the Intersection of Race with Gender in the Texas Jury Shuffle*, 40 S. TEX. L. REV. 509, 530 n.122 (1999) (suggesting that "[t]he odds of winning the Texas lottery Jackpot are even higher—about 1 in 15,800,000" (citing Chip Brown, *Texas Million Part of Lottery Roster; Game Offers More Ways to Win, Shorter Odds at Big Prize*, AUSTIN AM.-STATESMAN, May 28, 1998, at B3)).

66. *Id.* at 530 (noting that "[i]f the shuffle does not achieve its purpose, the party is in no worse position than had he not requested it"). Alternatively, the result of a jury shuffle can be precisely what the party requesting a jury shuffle did *not* want. *See id.* (cautioning that "[a] shuffle may even increase the number of members of a class seated near the front of the panel even though the shuffle was intended to remove them").

67. *Id.*

68. Peremptory challenges can be exercised based on any reason except race or gender. *See* TEX. CODE CRIM. PROC. ANN. art. 35.261 (Vernon 1988) (codifying *Batson*); J.E.B. v. Alabama, 511 U.S. 127, 146 (1994) (holding that *Batson* prohibits the exercise of peremptory strikes based on gender); Batson v. Kentucky, 476 U.S. 79, 91 (1986) (holding that a party may not utilize peremptory strikes based on race).

69. Ladd v. State, 3 S.W.3d 547, 563 (Tex. Crim. App. 1999); Wearren v. State, 877 S.W.2d 545, 546 (Tex. App.—Beaumont 1994, no pet.); Urbano v. State, 808 S.W.2d 519, 520 (Tex. App.—Houston [14th Dist.] 1991, no pet.); Garrett v. State, No. F92-39878-WV, 1996 Tex. App. LEXIS 2160, at *3 (Tex. App.—Dallas May 29, 1996, pet. ref'd) (not designated for publication).

70. *See Ladd*, 3 S.W.3d at 564 (finding the trial court did not err in overruling the appellant's objection to the jury shuffle request); *Wearren*, 877 S.W.2d at 546 (finding the

v. Cockrell,[71] no court had ever cast any suspicion upon the jury shuffle.[72]

In *Miller-El*, the defendant was indicted for capital murder.[73] After Miller-El pleaded not guilty, the trial court conducted jury selection.[74] During jury selection, the State exercised peremptory strikes against ten of the remaining eleven African-American prospective jurors.[75] Additionally, "[o]n at least two occasions the prosecution requested shuffles when there were a predominate number of African-Americans in the front of the panel."[76] After voir dire, Miller-El "moved to strike the jury on the grounds that the prosecution had violated the Equal Protection Clause of the Fourteenth Amendment by excluding African-Americans through the use of peremptory challenges."[77] The trial court ruled against Miller-El, who was convicted of murder and sentenced to death.[78]

Miller-El appealed to the Texas Court of Criminal Appeals, which remanded his case for new findings after *Batson v. Kentucky* was decided.[79] After conducting a *Batson* hearing, the trial court ruled against Miller-El on his *Batson* claim,[80] as did the Texas

---

trial court did not err in failing to dismiss the jury); *Urbano*, 808 S.W.2d at 520 (overruling the appellant's point of error arguing that the trial court should have held a *Batson* hearing); *Garrett*, 1996 Tex. App. LEXIS, at *8 (declining appellant's request to apply *Batson* to jury shuffle).

71. 123 S. Ct. 1029 (2003).

72. *See* Miller-El v. Cockrell, 123 S. Ct. 1029, 1044 (2003) (agreeing that the decision to request a jury shuffle when a substantial number of jurors were African-American raised a suspicion that the request was racially motivated).

73. *Miller-El*, 123 S. Ct. at 1035. *See generally* Priya Nath, Note, *United States Supreme Court:* Miller-El v. Cockrell, *123 S. Ct. 1029 (2003)*, 15 CAP. DEF. J. 407, 407-17 (2003) (discussing *Miller-El*).

74. *Miller-El*, 123 S. Ct. at 1035.

75. *Id.* at 1036-37. Substantial evidence existed that the prosecution requested a jury shuffle to prevent the formation of a racially unfavorable jury pool. *See id.* at 1038 (noting that "[o]ther testimony indicated that the State, by its own admission, once requested a jury shuffle in order to reduce the number of African-Americans in the venire"); *id.* at 1044 (stating that "the prosecution's decision to seek a jury shuffle when a predominate number of African-Americans were seated in the front of the panel, . . . raise[s] a suspicion that the State sought to exclude African-Americans from the jury").

76. *Id.* at 1038. The prosecutors also objected to a jury shuffle requested by Miller-El that resulted in African-American prospective jurors being moved forward. *Id.*

77. *Id.* at 1035.

78. *Id.*

79. *Miller-El*, 123 S. Ct. at 1035.

80. *Id.*

Court of Criminal Appeals.[81] Miller-El filed a petition for a writ of certiorari and a state petition for a writ of habeas corpus, both of which were denied.[82] Miller-El then sought federal habeas relief by filing a petition for a writ of habeas corpus in federal district court.[83]

The magistrate judge evaluating Miller-El's *Batson* claim recommended that the *Batson* claim be denied; the district court adopted that recommendation.[84] Miller-El sought a Certificate of Appealability (COA) from the district court, but the district court denied that recommendation.[85] On appeal, the United States Court of Appeals for the Fifth Circuit denied Miller-El's COA.[86] The Supreme Court granted certiorari,[87] and reversed the Fifth Circuit.[88]

Writing for the Court, Justice Kennedy concluded that the Fifth Circuit imposed too stringent a standard for Miller-El to gain a COA.[89] The Fifth Circuit had interpreted 28 U.S.C. § 2254 as requiring that Miller-El "prove that the state court decision was objectively unreasonable by clear and convincing evidence."[90] The "clear and convincing" standard of Section 2254(e)(1), however, applies to state factual findings instead of state decisions.[91] The Fifth Circuit decided Miller-El's habeas claim under the "clear and convincing" standard.[92] This, the Court concluded, constituted a misreading of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[93] A habeas petitioner seeking a COA "need only demonstrate 'a substantial showing of the denial of a constitu-

---

81. *Id.* at 1035-36.

82. *Id.*

83. *Id.* at 1036.

84. Miller-El v. Johnson, No. 3:96-CV-1992-H, 2000 U.S. Dist. LEXIS 7763, at *1 (N.D. Tex. June 5, 2000).

85. *Miller El*, 123 S. Ct. at 1036.

86. Miller-El v. Johnson, 261 F.3d 445, 447 (5th Cir. 2001), *rev'd*, 123 S. Ct. 1029 (2003).

87. Miller-El v. Cockrell, 122 S. Ct. 1202, 1202 (2002) (reporting the Court's order granting certiorari).

88. *Miller-El*, 123 S. Ct. at 1045.

89. *Id.* at 1042.

90. *Id.*; *see also* 28 U.S.C. § 2254 (2000) (providing for habeas corpus remedy and specifying the requirements placed upon the applicant).

91. *Miller-El*, 123 S. Ct. at 1042.

92. *Id.*

93. *Id. See generally* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (providing, among other things, reforms to the habeas corpus procedure).

tional right.'"[94] This standard is satisfied when "jurists of reason [can] disagree with the district court's resolution of his constitutional claims."[95]

Applying the proper standard to Miller-El's COA application, the Court concluded that the Fifth Circuit should have issued a COA.[96] Miller-El's habeas claim was debatable "amongst jurists of reason" for three reasons.[97] First, Miller-El brought forth historical evidence of racial discrimination committed by the Dallas County District Attorney's Office.[98] Second, Miller-El produced substantial evidence in support of a prima facie case of purposeful discrimination.[99] Third, "the prosecution's decision to seek a jury shuffle when a predominate number of African-Americans were seated in the front of the panel . . . raise[d] a suspicion that the State sought to exclude African-Americans from the jury."[100] Testimony on the record showed that attorneys in the Dallas County District Attorney's Office had requested jury shuffles in the past "to manipulate the racial composition of the jury."[101]

Because Miller-El's federal habeas claim was debatable, Miller-El satisfied the requirements for a COA.[102] Because the Fifth Circuit erred in concluding otherwise, the Court reversed the Fifth Circuit.[103] Justice Scalia joined the Court's opinion and wrote a concurring opinion, deeming Miller-El's case a very close one.[104]

---

94. *Miller-El*, 123 S. Ct. at 1034 (citing 28 U.S.C. § 2253(c)(2) (2000)).

95. *Id.* As Justice Kennedy noted, "The question is the debatability of the underlying constitutional claim, not the resolution of that debate." *Id.* at 1042.

96. *Id.*

97. *Id.*

98. *Id.* at 1044-45.

99. *See Miller-El*, 123 S. Ct. at 1042 (asserting, "[S]tatistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors. The prosecutors used their peremptory strikes to exclude 91% of the eligible African-American venire members. . . . Happenstance is unlikely to produce this disparity.").

100. *Id.* at 1044. Notably, the prosecution objected to Miller-El's jury shuffle request only after the new composition of the jury panel, which was far more favorable to Miller-El, was revealed. *Id.*

101. *Id.*

102. *Id.* at 1045.

103. *Id.*; *see also* Miller-El v. Johnson, 330 F.3d 690, 691 (5th Cir. 2003) (per curiam) (issuing "a Certificate of Appealability (COA) on Petitioner's jury selection claim premised on *Batson*").

104. *Miller-El*, 123 S. Ct. at 1045 (Scalia, J., concurring).

Justice Thomas was the lone dissenter in *Miller-El*.[105] He first concluded that Miller-El was required, but had failed, to show clear and convincing evidence of purposeful discrimination.[106] Second, Justice Thomas disputed Miller-El's evidence of discrimination, concluding that Miller-El had "not presented anything remotely resembling 'clear and convincing' evidence of purposeful discrimination."[107]

In the *Miller-El* case, more than one hundred years after the inception of the jury shuffle, a court finally recognized the defects inherent in the jury shuffle. This recognition occurred after nearly fifty years of suspicious actions committed by the Dallas County District Attorney's Office.[108] Time and again, attorneys in that office requested jury shuffles to move minorities toward the back of the jury pool.[109] And time after time, Texas courts ignored the suspicion raised by those jury shuffle requests.[110] Fortunately, the Court recognized the particular abuses that can easily occur when an attorney requests a jury shuffle.

Miller-El demonstrates that the jury shuffle and peremptory challenges go hand-in-hand. Those who wish to discriminate in jury selection will always request a jury shuffle before exercising peremptory strikes.[111] It is far better to discriminate indirectly than to discriminate directly. If a jury shuffle moves many racial or ethnic minorities to the back of the panel, then an attorney's mission has been accomplished. At that point, peremptory strikes are

---

105. *Id.* at 1048-57 (Thomas, J., dissenting).

106. *Id.* at 1051 (explaining that "[b]ecause § 2254(e)(1) supplies the governing legal standard, petitioner must provide 'clear and convincing' evidence of purposeful discrimination in order to obtain a COA").

107. *Id.*

108. *See id.* at 1038 (discussing a long-standing policy of exclusion and various prosecutorial tactics).

109. *Miller-El*, 123 S. Ct. at 1038 (pointing to testimony demonstrating a continued practice of exclusion).

110. Ladd v. State, 3 S.W.3d 547, 564 (Tex. Crim. App. 1999); Wearren v. State, 877 S.W.2d 545, 546 (Tex. App.—Beaumont 1994, no pet.); Urbano v. State, 808 S.W.2d 519, 520 (Tex. App.—Houston [14th Dist.] 1991, no pet.); Garrett v. State, No. F92-39878-WV, 1996 Tex. App. LEXIS 2160, at *8 (Tex. App.—Dallas May 29, 1996, pet. ref'd) (not designated for publication).

111. *See* Henry v. State, No. 05-00-01869-CR, 2002 Tex. App. LEXIS 2141, at *8-9 (Tex. App.—Dallas Mar. 25, 2002, no pet.) (not designated for publication) (describing defendant's rebuttal to the State's explanation of peremptory strikes made after the jury shuffle had been completed).

unnecessary.[112] If a jury shuffle moves minorities forward or alters the order of the jury panel only slightly, nothing is lost—peremptory challenges are still available. A racially biased yet cautious lawyer could decide not to use peremptory challenges, or could exercise peremptory challenges and formulate race-neutral reasons for those peremptory challenges.[113]

It is unlikely that a trial court will smoke out a racially motivated jury shuffle. *Miller-El* is a case where the State's conduct raised a suspicion of racially discriminatory motives.[114] In other cases, however, such as a panel that includes some or few minorities in the front, determining an attorney's motivation for requesting a jury shuffle is less certain.[115] One should not read *Miller-El* as concluding that lawyers will always request a jury shuffle because of racial animus.[116] Instead, *Miller-El* recognizes what Texas courts have universally ignored: the susceptibility of the jury shuffle to abuse.[117] Both the State's and the defendant's conduct in *Miller-El* should prove to Texas courts that an attorney can request a jury shuffle to discriminate. At a minimum, more scrutiny of jury shuf-

---

112. *See* TEX. CODE CRIM. PROC. ANN. art. 35.261 (Vernon 1989) (codifying *Batson*).

113. *Cf.* Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring) (noting that "[a]ny prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons").

114. *See* Miller-El v. Cockrell, 123 S. Ct. 1029, 1038, 1044 (2003) (describing the State's request for jury shuffle and its delayed objection to the defense's request for same).

115. *See* John D. White, Comment, *Constitutional Law—Equal Protection—A New Hand From the Same Deck of Cards—Randomness and the Intersection of Race with Gender in the Texas Jury Shuffle*, 40 S. TEX. L. REV. 509, 532 (1999) (noting that "easy cases, such as when the overwhelming majority of black or female venire-persons are seated toward the front of the panel and a shuffle is requested. . . . are likely to be the exception rather than the rule").

116. *See Miller-El*, 123 S. Ct. at 1044 (concluding that the prosecution's request for a jury shuffle and objection to the defense's jury shuffle "*raise a suspicion* that the State sought to exclude African-Americans from the jury" (emphasis added)). Even after *Batson*'s prohibition against discrimination in jury selection, it appears that discriminatory policies were followed. *Compare id.* at 1038 (stating that "[a] 1963 circular by its District Attorney's Office instructed its prosecutors to exercise peremptory strikes against minorities: 'Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated'"), *with* Batson v. Kentucky, 476 U.S. 79, 104 n.3 (1986) (Marshall, J., concurring) (stating that "[a]n earlier jury-selection treatise circulated in [Dallas County] instructed prosecutors: 'Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated'").

117. *See Miller-El*, 123 S. Ct. at 1044 (determining that "the use of the [jury shuffle] here tends to erode the credibility of the prosecution's assertion that race was not a motivating factor in the jury selection").

fle requests is needed.[118] The jury shuffle allows "those to discriminate who are of a mind to discriminate."[119] Consequently, it should no longer exist.

"There is no constitutional right to have members of one's own race on the petit jury."[120] Nor do parties have an automatic right to have people of their own choosing on a jury.[121] Though either party may utilize peremptory challenges to strike jury pool members who appear biased,[122] peremptory challenges may not be utilized based on race.[123] Read more broadly, the Court's equal protection jurisprudence seeks to prevent discrimination in the jury selection process.[124] The jury shuffle is a strategic tool[125] utilized to purposefully discriminate and get people of one's own choosing on a jury.[126] Thus, the use of jury shuffle is quite inconsistent with the

---

118. *See, e.g.*, Donna M. Bobbitt, *The Texas Jury Shuffle: A Question of Constitutionality*, 57 TEX. B.J. 596, 598 (1994) (concluding that "[t]he jury shuffle procedure is a mechanism which allows the demographic patterns to be skewed without the qualifying statistical analysis which validated the general pool selection").

119. *Batson*, 476 U.S. at 96 (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).

120. Harris v. Estelle, 487 F.2d 1293, 1296 (5th Cir. 1974) (citations omitted).

121. *See id.* (affirming that the trial court's denial of defense's request for a jury shuffle did not present a constitutional issue); *see also* Railsback v. State, 95 S.W.3d 473, 483 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd) (declaring that an "[a]ppellant is not entitled to have any particular person serve on the jury" (citing Jones v. State, 982 S.W.2d 386, 393 (Tex. Crim. App. 1998))); Montez v. State, 975 S.W.2d 370, 373 (Tex. App.—Dallas 1998, no pet.) (explaining that "[t]he purpose of article 35.11 is not to guarantee that a defendant will have a jury panel in a preferred order"). Though that is the stated purpose of Article 35.11, a defendant purposefully requests a jury shuffle for the *sole* purpose of having a jury shuffle in a preferred order.

122. *Cf. Batson*, 476 U.S. at 89 (noting that "a prosecutor ordinarily is entitled to exercise permitted peremptory challenges 'for any reason at all, as long as that reason is related to his view concerning the outcome' of the case to be tried" (quoting United States v. Robinson, 421 F. Supp. 467, 473 (Conn. 1976))).

123. *Id.* at 89.

124. *See id.* at 85 (reiterating that "[e]xclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure").

125. *See* Lyon v. State, 885 S.W.2d 506, 520 (Tex. App.—El Paso 1994, pet. ref'd) (commenting that "[i]t is evident that the decision to shuffle the jury is a tactical decision based upon experience and observation").

126. *See* Ladd v. State, 3 S.W.3d 547, 563 (Tex. Crim. App. 1999) (providing the appellant's contention that the State's peremptory strikes were used for racially-motivated reasons); Wearren v. State, 877 S.W.2d 545, 546 (Tex. App.—Beaumont 1994, no pet.) (explaining the appellant's complaint that the prosecutor obtained an unconstitutial jury shuffle); Urbano v. State, 808 S.W.2d 519, 520 (Tex. App.—Houston [14th Dist.] 1991, no pet.) (recognizing the appellant's argument that a *Batson* hearing should have been held after the State requested a jury trial); Garrett v. State, No. F92-39878-WV, 1996 Tex. App.

Court's equal protection jurisprudence[127] and with the stated purpose of the jury shuffle.[128]

B. *Randomness Exists in Jury Selection Without the Jury Shuffle*

Apart from its susceptibility to discrimination,[129] the jury shuffle is entirely redundant and unnecessary.[130] The stated purpose of the jury shuffle is randomness in jury selection.[131] Yet other procedures achieve this very goal, and Texas judges admit as much.[132] The Texas Government Code requires the venire to be drawn from the names of all persons currently registered to vote in the county, all citizens of the county currently holding a valid Texas driver's license, and all citizens currently holding a valid personal identifi-

---

LEXIS 2160, at *3 (Tex. App.—Dallas May 29, 1996, pet. ref'd) (not designated for publication) (discussing the appellant's contention that the State challenged jurors on the basis of race).

127. *Compare Batson*, 476 U.S. at 85 (declaring that "[e]xclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure"), *with Lyon*, 885 S.W.2d at 520 (stating that "[i]t is evident that the decision to shuffle the jury is a tactical decision based upon experience and observation").

128. *Compare* Ford v. State, 73 S.W.3d 923, 926 (Tex. Crim. App. 2002) (recognizing that "the jury shuffle may sometimes be used by the parties as a strategic tool"), *with* Montez v. State, 975 S.W.2d 370, 373 (Tex. App.—Dallas 1998, no pet.) (clarifying that "[t]he purpose of article 35.11 is not to guarantee that a defendant will have a jury panel in a preferred order").

129. *See generally* Miller-El v. Cockrell, 123 S. Ct. 1029 (2003) (adjudging claims of racial discrimination associated with the jury shuffle).

130. *See, e.g.*, *Ford*, 73 S.W.3d at 926 (stating that "[r]andomness is ensured by statutes directing the drawing of names, by the certification of the jury list, and by provisions for electronic or mechanical methods of selection"); Sanders v. State, 942 S.W.2d 3, 6 (Tex. Crim. App. 1997) (en banc) (Baird, J., concurring) (concluding that the jury shuffle statute's "day has passed"); *Montez*, 975 S.W.2d at 373 (determining that "[g]iven the broader, more diverse pool of jurors available under the statute, . . . the purpose of a jury shuffle is normally accomplished even before the venire is seated in the courtroom and subject to a shuffle under article 35.11"). *But see Ford*, 73 S.W.3d at 931 (Holcomb, J., joined by Price & Johnson, JJ., dissenting) (arguing that "Article 35.11 guarantees the right to a jury shuffle even if the venire has already [been] 'randomized' in some fashion"); GEORGE DIX & ROBERT DAWSON, TEXAS CRIMINAL PRACTICE AND PROCEDURE § 35.18 n.7 (2d ed. 2001) (refuting the holding in *Sanders* and arguing for the right to a jury shuffle).

131. Jones v. State, 833 S.W.2d 146, 148 n.3 (Tex. Crim. App. 1992) (en banc).

132. *See, e.g.*, *Ford*, 73 S.W.3d at 926 (stating that "[r]andomness is ensured by statutes directing the drawing of names, by the certification of the jury list, and by provisions for electronic or mechanical methods of selection"); *Montez*, 975 S.W.2d at 373 (determining that "[g]iven the broader, more diverse pool of jurors available under the statute, . . . the purpose of a jury shuffle is normally accomplished even before the venire is seated in the courtroom and subject to a shuffle under article 35.11").

cation card or certificate.[133] Because of this requirement, each jury pool is randomly selected.[134] The district clerk in charge of the jury selection process may utilize electronic or mechanical equipment in selecting potential jurors.[135] Because district court clerks ensure fair, random, and untainted jury pools, the jury shuffle is unnecessary.[136] Texas courts have recognized that the jury shuffle is designed to achieve what already exists: randomness in jury selection.[137]

Once a jury pool is assembled, the jury selection process is as random as possible.[138] After jury pool members appear in court, both parties utilize the full panoply of procedural mechanisms afforded to them by Texas law. Jurors are excused,[139] jurors are challenged for cause by either party,[140] or parties exercise peremptory challenges after eliciting additional information on voir dire.[141] All

133. TEX. GOV'T CODE ANN. § 62.001 (Vernon Supp. 1998).

134. *See Ford*, 73 S.W.3d at 926 (arguing that this requirement ensures randomness in jury selection).

135. TEX. GOV'T CODE ANN. § 62.011(a), (b)(3); *see also* TEX. CODE CRIM. PROC. ANN. art. 33.09 (Vernon 1989) (providing that juries in criminal trials are selected by the same method as in civil cases).

136. *See* John D. White, Comment, *Constitutional Law—Equal Protection—A New Hand From the Same Deck of Cards—Randomness and the Intersection of Race with Gender in the Texas Jury Shuffle*, 40 S. TEX. L. REV. 509, 532 n.134 (1999) (noting that "[o]stensibly, because the jury wheel or electronic method of juror selection is random, the jurors called for duty should fairly represent a broad cross-section of the community"). In cases where the propriety of a jury shuffle request is at issue, the challenging parties have not argued that there has been tampering or misconduct in assembling the jury pool. *See* Harris v. Estelle, 487 F.2d 1293, 1296 (5th Cir. 1974) (noting the absence of an allegation that the selection of the venire had been based on racially discriminatory practice).

137. *See, e.g.*, *Ford*, 73 S.W.3d at 926 (stating that "[r]andomness is ensured by statutes directing the drawing of names, by the certification of the jury list, and by provisions for electronic or mechanical methods of selection"); *Montez*, 975 S.W.2d at 373 (determining that "[g]iven the broader, more diverse pool of jurors available under the statute, . . . the purpose of a jury shuffle is normally accomplished even before the venire is seated in the courtroom and subject to a shuffle under article 35.11"); *see also* Sanders v. State, 942 S.W.2d 3, 6 (Tex. Crim. App. 1997) (en banc) (Baird, J., concurring) (concluding that the jury shuffle statute's "day has passed").

138. *See* TEX. CODE CRIM. PROC. ANN. art. 35.12 (Vernon Supp. 1999) (describing the procedure by which the trial court tests the qualifications of individual panel members).

139. *See* TEX. CODE CRIM. PROC. ANN. art. 35.04 (Vernon Supp. 1999) (describing the various exemptions available for jurors).

140. TEX. CODE CRIM. PROC. ANN. art. 35.16 (Vernon 1999); TEX. R. CIV. P. 228, 229.

141. *See* TEX. R. CIV. P. 232 (declaring that "[a] peremptory challenge is made to a juror without assigning any reason therefor"); TEX. R. CIV. P. 233 (providing that, with exceptions, "each party to a civil action is entitled to six peremptory challenges in a case tried in the district court, and to three in the county court").

of these procedural mechanisms ensure the representativeness of a particular jury panel.[142] Additionally, Texas courts sanction these procedural mechanisms to ensure fair jury panels. The need for the jury shuffle, which does not ensure randomness in jury selection, is unapparent.

The denial of a jury shuffle request "presents no question rising to constitutional dimensions."[143] Nor have those requesting a jury shuffle argued that tampering or discrimination in the jury selection process occurred.[144] Consequently, no constitutional error occurs when a trial court denies one party's request for a jury shuffle.[145] Texas and federal courts have reaffirmed this principle by holding that a lawyer's failure to request a jury shuffle to achieve a more diverse jury panel does not constitute ineffective assistance of counsel.[146] The reason: no one can demonstrate how the result of any trial would have changed if a jury shuffle occurred.[147] A jury shuffle is unnecessary to safeguard a party's constitutional rights.[148] Abolishing the jury shuffle, therefore, would pose no constitutional harm.[149]

---

142. *Cf.* Judge David Hittner & Eric J.R. Nichols, *Jury Selection in Federal Civil Litigation: General Procedures, New Rules, and the Arrival of* Batson, 23 TEX. TECH L. REV. 407, 421 (1992) (suggesting that "[t]he fair cross section requirement in federal court, however, mandates the representativeness of the overall jury *pool*, not the representativeness of a particular panel").

143. Harris v. Estelle, 487 F.2d 1293, 1296 (5th Cir. 1974).

144. *See id.* (stating that "[t]here was no allegation that the venire was selected on a racially discriminatory basis").

145. *See id.* (finding that "shuffling the order of names on the venire could do no more than replace one potential juror with another whose constitutional impartiality toward the defendant was presumably the same").

146. Lyon v. State, 885 S.W.2d 506, 520 (Tex. App.—El Paso 1994, pet. ref'd); Ervin v. State, No. 05-02-00678-CR, 2003 Tex. App. LEXIS 5796, at *7 (Tex. App.—Dallas July 8, 2003, no pet.) (not designated for publication); Diaz v. State, No. 07-97-0277-CR, 1998 Tex. App. LEXIS 8028, at *12 (Tex. App.—Amarillo Dec. 29, 1998, no pet.) (not designated for publication); Hodge v. State, No. 05-93-00432-CR, 1995 Tex. App. LEXIS 3852, at *8-9 (Tex. App.—Dallas Apr. 6, 1995, no pet.) (not designated for publication).

147. Thompson v. State, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999).

148. *See* Ford v. State, 73 S.W.3d 923, 926 (Tex. Crim. App. 2002) (noting that an erroneous denial of a jury shuffle is harmless error because the defendant cannot prove "that the process of assembling a jury panel was subverted in some fashion").

149. Of course, those who wish to discriminate can still discriminate through the use of peremptory challenges. This begs the question of whether peremptory challenges should be abolished. Justice Marshall argues quite eloquently that peremptory challenges should be abolished. *See* Batson v. Kentucky, 476 U.S. 79, 106-08 (1986) (Marshall, J., concurring) (discussing the dangers inherent in the peremptory challenge system and arguing for an end to the practice).

What would occur if the Texas legislature repealed the jury shuffle statute? First, Texas district court clerks would continue to ensure the random compilation of jury pool members. Second, Texas trial courts would avoid the lawsuits and controversies that have plagued jury shuffle requests. Third, both parties in a civil or criminal lawsuit would avoid the arduous, uncertain process of requesting a jury shuffle that may not achieve what they hope it will achieve. Both parties would seek a favorable jury panel through traditionally accepted procedures.[150] Fourth, those who wish to discriminate would have one less mechanism through which to discriminate.[151] The fondness those individuals who would discriminate might have for the jury shuffle does not outweigh the necessity of ending the jury shuffle.

C. *The Jury Shuffle Ensures Neither Randomness nor Fairness in Jury Selection*

1. Randomness

As previously mentioned, randomness in jury selection exists without the jury shuffle. Admittedly, a single jury shuffle will achieve a statistically random outcome and a random order of jury pool members.[152] A party requesting a jury shuffle, however, never makes that request to achieve randomness.[153] Instead, every party requesting a jury shuffle does so to ensure a more favorable jury pool.[154] The intent to request a jury shuffle begins with the realization that it is nearly impossible that the exact order of jurors

---

150. *See* TEX. CODE CRIM. PROC. ANN. art. 35.04 (Vernon Supp. 1999) (describing the various exemptions available for jurors); TEX. CODE CRIM. PROC. ANN. art. 35.16 (Vernon 1999) (listing reasons to challenge a juror for cause); TEX. R. CIV. P. 228 (providing for challenges to jurors for cause); TEX. R. CIV. P. 229 (describing the procedure for challenge for cause); TEX. R. CIV. P. 232 (providing that peremptory challenges may be made without providing a reason); TEX. R. CIV. P. 233 (providing the number of peremptory challenges allowed each party).

151. *Cf. Batson*, 476 U.S. at 96 (stating that peremptory challenges permit "those to discriminate who are of a mind to discriminate" (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953))).

152. *See* TEX. CODE CRIM. PROC. ANN. art. 35.11 (Vernon Supp. 1999) (describing the procedure for shuffling as random).

153. *Cf.* Miller-El v. Cockrell, 123 S. Ct. 1029, 1038, 1044 (2003) (contending that jury shuffle requests were made to exclude racial and ethnic groups from jury panels).

154. Lyon v. State, 885 S.W.2d 506, 520 (Tex. App.—El Paso 1994, pet. ref'd) (pointing out "that the decision to shuffle the jury is a tactical decision based upon experience and observation").

will remain the same after a jury shuffle.[155] The combination of the random result of a jury shuffle and a party's purposeful attempt to discriminate against potential jurors is a rather strange juxtaposition.[156] Quite simply, a jury shuffle is never requested to achieve randomness.[157]

Because a jury shuffle is not requested to achieve randomness, the jury shuffle remains woefully susceptible to discrimination.[158] The reasons why a party purposefully requests a jury shuffle are just as constitutionally important as the result of a jury shuffle.[159] In some situations, a jury shuffle request cannot achieve true randomness. When the front of a jury panel is loaded with minorities or non-minorities, a jury shuffle will almost certainly result in some of those minorities or non-minorities being moved to the back of the jury panel.[160] In that situation, a party of a mind to discriminate will deliberately request a jury shuffle in order to discriminate.[161] And when that party deliberately requests a jury shuffle to achieve a statistically likely outcome—fewer minorities or non-mi-

---

155. John D. White, Comment, *Constitutional Law—Equal Protection—A New Hand From the Same Deck of Cards—Randomness and the Intersection of Race with Gender in the Texas Jury Shuffle*, 40 S. TEX. L. REV. 509, 530 n.122 (1999).

156. *See* Eldridge v. State, 666 S.W.2d 357, 360 (Tex. App.—Dallas 1984, pet. ref'd) (Sparling, J., dissenting) (contending that "the mere concept of using the right to shuffle 'intelligently' seems to belie my view of the purpose of the shuffle—to insure a random listing—and implies a right of a litigant to rearrange the panel").

157. *See id.* (alleging that one could request a jury shuffle to select the exact jury that the litigant desires). One possible reform of the jury shuffle would be to allow a jury shuffle request by whichever party requests it first, but only before the jury pool is seated and before either party can view juror information cards. That way, no possibility of unconstitutional taint exists. Making a jury shuffle request before any of the jurors have been seen and before juror information cards are read would be the best way to reform the jury shuffle. Alternatively, the jury shuffle statute could be amended to provide that the trial court shall automatically conduct only one jury shuffle before voir dire.

158. *See* John D. White, Comment, *Constitutional Law—Equal Protection—A New Hand From the Same Deck of Cards—Randomness and the Intersection of Race with Gender in the Texas Jury Shuffle*, 40 S. TEX. L. REV. 509, 530 (1999) (stating that there is a great risk that jury shuffling could exclude members of protected classes).

159. *See id.* at 529-31 (arguing that jury shuffle requests made with intent to discriminate violate the Constitution).

160. *Cf. id.* at 530 n.122 (arguing that it is highly unlikely that jury shuffle requests will achieve randomness).

161. *See id.* at 530 (stating that a jury shuffle can be used to successfully remove minorities from a panel).

norities in the front of the jury pool—the jury shuffle fails to achieve randomness.[162]

2. Fairness

Even disregarding statistical matters,[163] the jury shuffle does not ensure fairness. Excluding misconduct or a sua sponte jury shuffle by the trial court,[164] only one jury shuffle may occur in each case.[165] Thus, the party quickest to request a jury shuffle could enjoy good luck and have various undesirable members of the jury panel moved to the back of the venire.[166] If fairness is truly the goal of the jury shuffle, then two jury shuffles—not just one—should occur.[167] That way, each party can figuratively win the lottery in jury

162. *See id.* at 531 (recognizing that the jury shuffle can be used to maximize the effectiveness of peremptory strikes made on the basis of impermissible goals).

163. *See* TEX. CODE CRIM. PROC. ANN. art. 35.11 (Vernon Supp. 1999) (providing procedures for randomizing jury panels).

164. *See* Chappell v. State, 850 S.W.2d 508, 511 (Tex. Crim. App. 1993) (en banc) (stating that either the State or the defendant is guaranteed only one shuffle); Wilkerson v. State, 681 S.W.2d 29, 30 (Tex. Crim. App. 1984) (en banc) (finding that there is only one shuffle authorized under Texas Code of Criminal Procedure Article 35.11, unless it is also exercised by the court, or results from a showing of misconduct).

165. *See Chappell*, 850 S.W.2d at 511 (holding that there may be more than one jury shuffle only upon a showing of misconduct or by judicial order); Jones v. State, 833 S.W.2d 146, 147-48 (Tex. Crim. App. 1992) (en banc) (finding that there can be only one reshuffle).

166. *See* John D. White, Comment, *Constitutional Law—Equal Protection—A New Hand From the Same Deck of Cards—Randomness and the Intersection of Race with Gender in the Texas Jury Shuffle*, 40 S. TEX. L. REV. 509, 530 (1999) (noting that "[i]f the majority of jurors at the front of the venire are members of a protected class, a party who wishes to remove them to the rear has no disincentive to prevent him from making a demand").

167. *Cf. Chappell*, 850 S.W.2d at 513 (McCormick, J., dissenting) (arguing that a second shuffle requested by the State, after one shuffle had already occurred at the defendant's request, presented no harmful error because "the random selection [requirement] ha[d] been satisfied"). It is difficult to conceive the harm that would result from allowing both parties to request jury shuffles. *Id.* The right to a jury shuffle is not a personal right of either the defense or the State. *See* Jones v. State, 833 S.W.2d 146, 148 n.3 (Tex. Crim. App. 1992) (en banc) (stating that "the statute is designed to ensure randomness in juror selection—not to accord a defendant with a particularized right to personally cause the panel to be shuffled"). Allowing two jury shuffles, if anything, is consistent with the decisions of the Texas Court of Criminal Appeals. If a trial court allowed two jury shuffles instead of one jury shuffle, greater randomness and fairness would result.

selection.[168] Instead of ensuring fairness, the jury shuffle rewards gamesmanship.[169]

IV. WHY THE JURY SHUFFLE SHOULD CONTINUE—AND A REPLY

A. *Applying* Batson *to the Jury Shuffle Would Reform the Jury Shuffle*

1. *Batson* Does Not and Should Not Apply to the Jury Shuffle

Many defendants and commentators have argued that *Batson*[170] should apply to the jury shuffle.[171] This argument, however, has been entirely unavailing, as Texas courts have unanimously refused to apply *Batson* to the jury shuffle.[172] So, too,

---

168. *See* John D. White, Comment, *Constitutional Law—Equal Protection—A New Hand From the Same Deck of Cards—Randomness and the Intersection of Race with Gender in the Texas Jury Shuffle*, 40 S. TEX. L. REV. 509, 530 n.122 (1999) (comparing the odds of reseating the jurors in the same order after a shuffle with the odds of winning the Texas lottery).

169. *See* Ford v. State, 73 S.W.3d 923, 931 n.6 (Tex. Crim. App. 2002) (Holcomb, J., joined by Price & Johnson, JJ., dissenting) (stating that the court had "previously recognized that Article 35.11, by its very design, provides such a strategic tool to litigants" (citing Yanez v. State, 677 S.W.2d 62, 64-65 (Tex. Crim. App. 1984))).

170. Batson v. Kentucky, 476 U.S. 79, 97 (1986) (holding that the use of peremptory challenges based on race violates the Fourteenth Amendment).

171. *See, e.g.*, Ladd v. State, 3 S.W.3d 547, 563 n.9 (Tex. Crim. App. 1999) (rejecting the scholarly argument that "*Batson* should extend to jury shuffles"); Wearren v. State, 877 S.W.2d 545, 546 (Tex. App.—Beaumont 1994, no pet.) (dismissing appellant's argument that *Batson* should be extended "from peremptory strikes to random jury shuffles"); *see also* Donna M. Bobbitt, *The Texas Jury Shuffle: A Question of Constitutionality*, 57 TEX. B.J. 596, 598 (1994) (stating that "if it were to appear from the record in the case that members of a particular racial group occupied early seating positions among the panel, the motion to shuffle should at the very least be accompanied by proof of racially neutral reasons for the request"); Elaine A. Carlson, Batson, J.E.B., *and Beyond: The Paradoxical Quest for Reasoned Peremptory Strikes in the Jury Selection Process*, 46 BAYLOR L. REV. 947, 982 (1994) (arguing that *Batson* requires that counsel offer a race- or gender-neutral reason for a requested jury shuffle); John D. White, Comment, *Constitutional Law—Equal Protection—A New Hand From the Same Deck of Cards—Randomness and the Intersection of Race with Gender in the Texas Jury Shuffle*, 40 S. TEX. L. REV. 509, 537 (1999) (stating that "the most immediate and practical approach is to subject the jury shuffle to *Batson* challenges").

172. *See Ladd*, 3 S.W.3d at 563 n.9 (refusing to endorse a scholar's argument that *Batson* should be extended to jury shuffles); Wearren v. State, 877 S.W.2d 545, 546 (Tex. App.—Beaumont 1994, no pet.) (finding no authority for the broad extension of *Batson* to random jury shuffles); Urbano v. State, 808 S.W.2d 519, 520 (Tex. App.—Houston [14th Dist.] 1991, no pet.) (refusing to extend *Batson* to jury shuffle process); Sims v. State, No.

have the Fifth Circuit[173] and the United States Supreme Court.[174]

a. Different Functions

The universal refusal of Texas courts to apply *Batson* to the jury shuffle is quite logical.[175] First, the functions of the peremptory challenge and the jury shuffle are quite different.[176] The former exists so that lawyers may strike potential jurors of whom they are wary;[177] the latter exists to achieve randomness when a lawyer does not like the order of jury pool members.[178] Both procedural mechanisms are limited under Texas law. A party is only allowed six peremptory challenges in civil district court[179] and ten peremptory

---

05-96-01395-CR, 1998 Tex. App. LEXIS 6688, at *2 (Tex. App.—Dallas Oct. 27, 1998, no pet.) (not designated for publication) (refusing to extend *Batson* to jury shuffles); Robinson v. State, No. 05-97-00689-CR, 1998 Tex. App. LEXIS 6658, at *8 (Tex. App.—Dallas Oct. 26, 1998, pet. ref'd) (not designated for publication) (declining to extend *Batson* to requests for jury shuffles); Garrett v. State, No. 05-94-01144-CR, 1996 Tex. App. LEXIS 2160, at *8 (Tex. App.—Dallas May 29, 1996, pet. ref'd) (not designated for publication) (stating plainly that "*Batson* and its progeny do not apply to jury shuffles").

173. *Cf.* Ladd v. Cockrell, 311 F.3d 349, 355 (5th Cir. 2002) (listing the arguments for and against applying *Batson* to the jury shuffle, but not deciding whether applying *Batson* to jury shuffles constitutes a new rule of constitutional law under *Teague v. Lane*, 489 U.S. 288 (1989)).

174. *Cf.* Miller-El v. Cockrell, 123 S. Ct. 1029, 1044 (2003) (opining that "the practice of jury shuffling might not be denominated as a *Batson* claim because it does not involve a peremptory challenge").

175. *But see Ladd*, 311 F.3d at 354 (noting that "the purposes behind *Batson* seem implicated by jury-shuffling to disperse potential jurors of a particular race who are near the front of the venire").

176. *See* John D. White, Comment, *Constitutional Law—Equal Protection—A New Hand From the Same Deck of Cards—Randomness and the Intersection of Race with Gender in the Texas Jury Shuffle*, 40 S. TEX. L. REV. 509, 528 (1999) (explaining that "[w]here *Batson* applies to the *exclusion* of individual jurors based on race and gender, a shuffle merely *alters* an individual juror's chances of being seated at the front of the panel").

177. *See* TEX. R. CIV. P. 232 (providing for peremptory challenges without requiring the party challenging to provide a reason for those challenges).

178. John D. White, Comment, *Constitutional Law—Equal Protection—A New Hand From the Same Deck of Cards—Randomness and the Intersection of Race with Gender in the Texas Jury Shuffle*, 40 S. TEX. L. REV. 509, 527 & n.115 (1999).

179. TEX. R. CIV. P. 233.

challenges in criminal district court.[180] By contrast, a party may only have one jury shuffle in each case.[181]

b. Different Results

Second, the difference in results between a peremptory challenge and a jury shuffle is vast.[182] A peremptory challenge guarantees that one potential juror will not sit on a jury.[183] A jury shuffle, however, guarantees nothing—the order of jurors may change slightly or hardly at all.[184] More importantly, a jury shuffle does not exclude anyone from serving on the jury.[185]

c. Different Remedies

Third, the remedies for illegal peremptory strikes and illegal jury shuffles are entirely inapposite. If the challenging party prevails on a *Batson* claim to a peremptory challenge, the trial court strikes the entire array of potential jurors and a new venire is called.[186] The party challenging a timely jury shuffle request will never prevail because no reason is required to request a jury shuffle.[187] In total, the function of, results of, and remedies for a peremptory challenge and a jury shuffle are different. It is quite admirable to utilize a

---

180. TEX. CODE CRIM. PROC. ANN. art. 35.15(b) (Vernon Supp. 2003). In capital cases in which the State seeks the death penalty, both the State and the defendant are entitled to fifteen peremptory challenges. *Id.* art. 35.15(a).

181. *See* Chappell v. State, 850 S.W.2d 508, 511 (Tex. Crim. App. 1993) (en banc) (concluding that only one jury shuffle is allowed absent a showing of misconduct).

182. *See* John D. White, Comment, *Constitutional Law—Equal Protection—A New Hand From the Same Deck of Cards—Randomness and the Intersection of Race with Gender in the Texas Jury Shuffle*, 40 S. TEX. L. REV. 509, 528 (1999) (asserting that "[w]hile each successive peremptory challenge inevitably diminishes the possibility that members of the stricken class will be represented on the jury, a shuffle may have no effect on a class, or may alter the possibility of representation in *either* a positive or negative manner").

183. Ladd v. Cockrell, 311 F.3d 349, 354 (5th Cir. 2002); John D. White, Comment, *Constitutional Law—Equal Protection—A New Hand From the Same Deck of Cards—Randomness and the Intersection of Race with Gender in the Texas Jury Shuffle*, 40 S. TEX. L. REV. 509, 530 (1999).

184. *Ladd*, 311 F.3d at 354; John D. White, Comment, *Constitutional Law—Equal Protection—A New Hand From the Same Deck of Cards—Randomness and the Intersection of Race with Gender in the Texas Jury Shuffle*, 40 S. TEX. L. REV. 509, 530 (1999).

185. *See Ladd*, 311 F.3d at 354 (noting that "the potential harm [of a jury shuffle] seems far less severe than that imposed by the discriminatory use of a peremptory strike").

186. TEX. CODE CRIM. PROC. ANN. art. 35.261(a)-(b) (Vernon 1989).

187. *See* Williams v. State, 719 S.W.2d 573, 575 (Tex. Crim. App. 1986) (en banc) (acknowledging that "[i]t has been said a defendant has an absolute right to have the jury panel reshuffled on demand").

novel legal theory to combat perceived injustices. It is also quite logical to refuse to apply that novel legal theory when little basis in law or policy supports applying that theory. Such is the case with applying *Batson* to the jury shuffle.[188]

2. Even if *Batson* Applied to the Jury Shuffle, a Jury Shuffle Request Would Always Survive a *Batson* Challenge

a. Texas Courts Allow Lawyers to Request Jury Shuffles to Achieve Diversity in Jury Selection

"Equal protection is the cornerstone upon which *Batson* is built."[189] Classifications based on race must pass muster under the Court's most searching analysis: strict scrutiny.[190] The classification must be based on a compelling state interest[191] and must be narrowly tailored to achieve that compelling state interest.[192] Using peremptory challenges to strike potential jurors based on race violates the Fourteenth Amendment because the challenged party cannot assert any interest—compelling or otherwise—to justify the racial classification.[193] Thus, a *Batson* challenge succeeds when a trial court determines that a lawyer utilized a peremptory challenge to discriminate based on race.[194] No compelling governmental interest has been accepted for a peremptory strike exercised because of racial prejudice.[195]

---

188. *But cf. Ladd*, 311 F.3d at 354 (conceding that "reasonable arguments support both positions on whether *Batson* applies to jury-shuffling").

189. Elaine A. Carlson, Batson, J.E.B., *and Beyond: The Paradoxical Quest for Reasoned Peremptory Strikes in the Jury Selection Process*, 46 BAYLOR L. REV. 947, 958 (1994).

190. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

191. *Id.*

192. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995).

193. *See* Batson v. Kentucky, 476 U.S. 79, 85 (1986) (concluding that "[e]xclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure").

194. *Id.* at 98. "[A] defendant may establish a prima facie case for purposeful discrimination in [the] selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial." *Id.* at 96. However, a prosecutor may overcome the prima facie case of racial discrimination by "articulat[ing] a neutral explanation related to the particular case to be tried. The trial court then will have the duty to determine if the defendant has established purposeful discrimination." *Id.* at 98.

195. *See id.* at 87 (stating that "[s]election procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice" (citations omitted)).

The ostensible purpose of the jury shuffle is the achievement of randomness in jury selection.[196] Consequently, it is difficult to imagine how achieving racial diversity is a compelling or even permissible interest.[197] If anything, the only compelling interest would seem to be the achievement of randomness.[198] Texas courts, however, have encouraged jury shuffle requests to achieve racial diversity in jury selection.[199]

In *Yanez v. State*,[200] a Mexican-American defendant requested a jury shuffle immediately after the jury panel had been sworn and examined.[201] The trial court, however, denied this request as untimely made.[202] On appeal, however, the Texas Court of Criminal Appeals found that the defendant's request for a jury shuffle was timely made.[203] Additionally, the Court of Criminal Appeals stated that litigants can request a jury shuffle to achieve diversity in jury selection.[204]

In *Yanez*, there were only four Mexican-Americans in the jury panel of forty-six persons.[205] Additionally, all four Mexican-Amer-

196. *See* Chappell v. State, 850 S.W.2d 508, 513 (Tex. Crim. App. 1993) (en banc) (McCormick, J., dissenting) (stating that the jury shuffle is designed to ensure randomness in jury selection); Jones v. State, 833 S.W.2d 146, 148 n.3 (Tex. Crim. App. 1992) (en banc) (emphasizing that the purpose of the statute is to ensure randomness).

197. *See* John D. White, Comment, *Constitutional Law—Equal Protection—A New Hand From the Same Deck of Cards—Randomness and the Intersection of Race with Gender in the Texas Jury Shuffle*, 40 S. TEX. L. REV. 509, 536 (1999) (suggesting that attempts to achieve racial diversity defeat the purpose behind randomized juries).

198. *See Jones*, 833 S.W.2d at 148 n.3 (supporting randomness as the *raison d'etre* of a jury shuffle).

199. *See* Yanez v. State, 677 S.W.2d 62, 64-65 (Tex. Crim. App. 1984) (en banc) (implying that diversity is a reasonable goal of a jury shuffle); *see also* Hiroshi Fukurai & Darryl Davies, *Affirmative Action in Jury Selection: Racially Representative Juries, Racial Quotas, and Affirmative Juries of the Hennepin Model and the Jury De Medietate Linguae*, 4 VA. J. SOC. POL'Y & L. 645, 647-48 (1997) (stating that "mixed juries enhance the educational role of jury service by requiring jurors of different racial and ethnic backgrounds to work together as equals, debunking racial stereotypes and offering long-term benefits for civil society"). The jury shuffle is effectively a tool of affirmative action in jury selection. *Id.* at 649. If a jury shuffle results in the front of the jury pool being more racially and ethnically diverse, diversity has been achieved.

200. 677 S.W.2d 62 (Tex. Crim. App. 1984) (en banc).

201. Yanez v. State, 677 S.W.2d 62, 64 (Tex. Crim. App. 1984) (en banc).

202. *Id.*

203. *Id.* at 69.

204. *See id.* at 64 (finding that the defendant's request for a jury shuffle was proper because the only four Mexican-Americans on the panel occupied positions that made it unlikely that they would be selected as jurors).

205. *Id.*

icans were sitting far back in the jury panel, and thus, they stood little chance of being selected as jurors.[206] Consequently, the Court of Criminal Appeals concluded that Yanez's request for a jury shuffle was proper to achieve racial diversity.[207] When there are too few members of one race or too many members of another race at the front of a jury pool, a jury shuffle is permissible to seek diversity.[208] Put simply, diversity is a compelling interest in jury selection.[209]

Yanez has been neither overruled nor limited.[210] It is an opinion that receives little notice, yet is quite relevant.[211] *Yanez* would apply when a prosecutor wants a more diverse venire because there are too many (or too few) individuals of a particular race at the front of the jury pool.[212] Alternatively, it would be proper for an Asian male on trial for murder to request a jury shuffle because the first ten venire members are Caucasian and African-American.[213] However many possible permutations of *Yanez* exist—and there are many—*Yanez* provides an affirmative defense to a *Batson* challenge.[214] Because Texas courts have held that achieving diversity in

206. *See Yanez*, 677 S.W.2d at 64 (listing the jurors' respective positions on the panel).

207. *Id.*

208. *See id.* (recognizing that a jury shuffle request may be proper to achieve diversity); *see also* John D. White, Comment, *Constitutional Law—Equal Protection—A New Hand From the Same Deck of Cards—Randomness and the Intersection of Race with Gender in the Texas Jury Shuffle*, 40 S. TEX. L. REV. 509, 535 (1999) (commenting that "Texas courts not only appear to condone the use of jury shuffles to achieve diversity, but they seem to encourage it, at least implicitly by not objecting to it").

209. *Cf.* Grutter v. Bollinger, 123 S. Ct. 2325, 2337 (2003) (finding diversity to be a compelling governmental interest in higher education).

210. *But see* John D. White, Comment, *Constitutional Law—Equal Protection—A New Hand From the Same Deck of Cards—Randomness and the Intersection of Race with Gender in the Texas Jury Shuffle*, 40 S. TEX. L. REV. 509, 527 n.115 (1999) (claiming that the Texas Legislature has limited *Yanez* because "either party may request a shuffle").

211. *See id.* at 528 (suggesting that a fair interpretation of *Yanez* allows either party in a criminal trial to request a jury shuffle "for the sole purpose of diversifying or otherwise increasing the possible representation of a minority class on a jury").

212. *See* Ford v. State, 73 S.W.3d 923, 931 n.6 (Tex. Crim. App. 2002) (Holcomb, J., joined by Price & Johnson, JJ., dissenting) (citing *Yanez* in stating that when it comes to using jury shuffles as an affirmative action tool, "[w]e have previously recognized that Article 35.11, by its very design, provides such a strategic tool to litigants").

213. *See Yanez*, 677 S.W.2d at 64-65 (implying that reasonableness in a request for a jury shuffle depends on the circumstance, particularly the race of the challenging party and the racial breakdown of the jury panel).

214. *See* John D. White, Comment, *Constitutional Law—Equal Protection—A New Hand From the Same Deck of Cards—Randomness and the Intersection of Race with Gender in the Texas Jury Shuffle*, 40 S. TEX. L. REV. 509, 535 (1999) (discussing the possible

jury selection is a compelling governmental interest, *Batson* challenges to jury shuffle requests are doomed to fail.[215]

b. It Would Be Very Difficult for the Challenging Party to Make a Prima Facie Case of Purposeful Discrimination

The first step for the party bringing a *Batson* claim is to make a prima facie case of purposeful discrimination.[216] This step is relatively straightforward. One party accuses the other party of striking minority members because that party did not want minorities to serve on a jury.[217] Statistically, the inquiry is simple: a trial court examines one peremptory challenge at a time.[218] Then, the trial court decides the merits of each peremptory challenge.[219]

Establishing a prima facie case of discrimination for a jury shuffle request, however, is far more difficult.[220] There are hundreds of jury pool alignments that could result from a jury shuffle. While possible, it is highly unlikely that a jury pool lineup will remain the same after a shuffle.[221] More likely, however, is the possibility that

---

application of *Yanez* to sustain a racially motivated jury shuffle for the purpose of achieving diversity).

215. *Cf.* Bradford v. State, No. 14-96-00115-CR, 1997 Tex. App. LEXIS 5013, at *6-7 (Tex. App.—Houston [14th Dist.] Sept. 18, 1997, no pet.) (not designated for publication) (denying the appellant's ineffective assistance claim where the appellant's lawyer failed to request a jury shuffle when the majority of African-American members were seated in the back of the venire and the defendant was African-American).

216. Purkett v. Elem, 514 U.S. 765, 767 (1995) (per curiam); Batson v. Kentucky, 476 U.S. 79, 96-97 (1986). The challenging party must prove purposeful discrimination in the use of peremptory challenges by a preponderance of the evidence. Williams v. State, 767 S.W.2d 872, 874 (Tex. App.—Dallas 1989, writ ref'd) (en banc).

217. *Batson*, 476 U.S. at 96-97.

218. *See id.* at 99 (declining "to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges"); *cf. id.* at 97 (emphasizing the court's flexible approach to determining a circumstance of purposeful discrimination").

219. *See id.* at 89 (contending that in a *Batson* challenge, "the State's privilege *to strike individual jurors through peremptory challenges*, is subject to the commands of the Equal Protection Clause" (emphasis added)).

220. *Cf.* John D. White, Comment, *Constitutional Law—Equal Protection—A New Hand From the Same Deck of Cards—Randomness and the Intersection of Race with Gender in the Texas Jury Shuffle*, 40 S. TEX. L. REV. 509, 528 (1999) (suggesting that showing purposeful discrimination in a request for jury shuffle is difficult because "a shuffle may have no effect on a class, or may alter the possibility of representation in *either* a positive or negative manner").

221. *See id.* (noting the possibility that a jury lineup will remain the same after a jury shuffle).

the new order of jury pool members will closely resemble the old order. A few potential jurors could lose their chance to sit as jurors, yet other ones may be moved forward. Establishing purposeful discrimination in these circumstances is a daunting task. The challenged party could simply claim good luck for a successful jury shuffle, which is quite plausible. Because of the nature of the jury shuffle, establishing a prima facie case of discrimination is basically impossible.[222]

c. The Challenged Party Could Easily Articulate Race-Neutral Reasons for a Jury Shuffle Request

Assuming that a prima facie case of purposeful discrimination has been made, the second step in a *Batson* challenge is for the challenged party to tender a race-neutral explanation for a peremptory challenge.[223] When and if that occurs, the trial court conducts a *Batson* hearing and decides whether the challenging party has proved purposeful discrimination.[224] The challenging party must persuade the trial court by a preponderance of the evidence that the allegations of purposeful discrimination are true.[225]

If the challenged party provides a race-neutral explanation at a *Batson* hearing, the burden shifts to the challenging party to rebut the explanation or show the explanation was merely a pretext.[226] The trial court is the sole judge of the credibility of the witnesses

222. Or it is a matter of dumb luck. Suppose that a corporate defendant in a products liability lawsuit requests a jury shuffle because not many people in the front rows wear coats and ties. The defendant makes this request, however, entirely free of racial animus. Suppose further that the jury shuffle succeeds beyond the defendant's wildest dreams, and those individuals—some of whom are minorities—are moved to the back of the jury pool. The challenging party could utilize this statistical evidence as proof of discriminatory intent even though no such intent existed. In that case, the party who requested a jury shuffle for non-discriminatory reasons would be worse off than those individuals who request jury shuffles only to discriminate. Finding that a prima facie case of discrimination exists because of the result of a jury shuffle would consistently punish the virtuous, yet ignore the sinners who experience less luck with a jury shuffle.

223. Purkett v. Elem, 514 U.S. 765, 767 (1995) (per curiam).

224. *Id.*

225. Williams v. State, 804 S.W.2d 95, 101 (Tex. Crim. App. 1991) (en banc). One commentator argues persuasively that the defendant should appear at a *Batson* hearing to be able to rebut the prosecution's explanations for peremptory challenges. Brett M. Kavanaugh, Note, *Defense Presence and Participation: A Procedural Minimum for* Batson v. Kentucky *Hearings*, 99 YALE L.J. 187, 193-204 (1989).

226. *Williams*, 804 S.W.2d at 101.

and the evidence.[227] Consequently, the trial court need not accept the tendered explanation at face value,[228] nor may the tendered explanation be pretextual or entirely ridiculous.[229] If the trial court accepts the tendered explanation, no *Batson* violation has occurred.[230]

Even as it applies to peremptory challenges, the *Batson* test is not a daunting one.[231] When one applies *Batson* to jury shuffle requests, the burden of proof on the challenged party becomes even smaller.[232] Additionally, the threshold for surviving a *Batson* challenge is not tremendously high.[233] Some Texas trial courts, "out of an abundance of caution,"[234] have held *Batson* hearings regarding jury shuffle requests.[235] Those that have done so have unanimously ruled against the challenging party.[236]

This is entirely logical. Though peremptory challenges concern individual jurors, jury shuffles concern the entire jury pool. Consequently, it is far easier for an attorney to tender race-neutral or gender-neutral reasons for requesting a jury shuffle than it is to tender such a permissible reason for exclusion of a single juror. As Justice Marshall eloquently stated in *Batson*, "[a]ny prosecutor can easily assert facially neutral reasons for striking a juror."[237] Similarly, it is even easier for a prosecutor or a defense attorney to

---

227. Ladd v. State, 3 S.W.3d 547, 563 (Tex. Crim. App. 1999)

228. Keeton v. State, 749 S.W.2d 861, 868 (Tex. Crim. App. 1988) (en banc).

229. *Id.*

230. *Ladd*, 3 S.W.3d at 563 n.8; Malone v. State, 919 S.W.2d 410, 412 (Tex. Crim. App. 1996) (en banc).

231. *See Ladd*, 3. S.W.3d at 563 (discussing the standard of review applied by appellate courts).

232. Even disregarding the burden of proof that is placed on the challenged party, the standard of review of a trial court's adjudication of a *Batson* claim is quite deferential. *See id.* (noting that "[s]ince the trial court's decision will turn largely on an evaluation of credibility, the appellate court must give that decision great deference and must not disturb it unless it is clearly erroneous").

233. *See id.* (finding the State's race-neutral explanations acceptable).

234. *Id.* at 564.

235. *Id.*; *cf.* Wearren v. State, 877 S.W.2d 545, 546 (Tex. App.—Beaumont 1994, no pet.) (affirming a trial court's refusal to extend *Batson* to the jury shuffle).

236. *Cf. Ladd*, 3 S.W.3d at 564 (ruling against the challenging party and holding that "the trial court could have reasonably concluded that the State's race-neutral reasons were sincere and that its request for a shuffle was not racially-motivated"); *Wearren*, 877 S.W.2d at 546 (ruling against the challenging party because "appellant failed to establish a prima facie case, there being no indication in the record of its effect on minority venirepersons").

237. Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring).

articulate race-neutral or gender-neutral reasons for demanding a jury shuffle.[238] Once the challenged party offers a race-neutral explanation for the peremptory challenge and the trial court accepts that explanation, whether the challenging party has made a prima facie case of discrimination is irrelevant.[239]

Batson is not the panacea its proponents believe it to be. Nor will *Batson*'s application solve the problems inherent in the jury shuffle.[240] Texas courts have accepted without fail the range of justifications offered for jury shuffles.[241] Claims that a jury shuffle was requested because venire members in the front of the venire were not wearing coats and ties,[242] had criminal histories,[243] or knew members of the prosecution's trial team,[244] have been deemed valid. Additionally, the Texas Court of Criminal Appeals concluded that the prosecution's observation that there were too few "elderly professional people"[245] among the first venire members was a valid reason to request a jury shuffle.[246] One can only wonder if Texas courts would accept a claim that a jury shuffle was sought because the individuals seated in the front of the jury pool looked too judgmental.[247]

---

238. *See* John D. White, Comment, *Constitutional Law—Equal Protection—A New Hand From the Same Deck of Cards—Randomness and the Intersection of Race with Gender in the Texas Jury Shuffle*, 40 S. TEX. L. REV. 509, 532 (1999) (stating that "[i]n proving disproportionate impact in the request of a race or gender-motivated jury shuffle, the most difficult obstacle to overcome is articulating at what point the presumption of discriminatory intent arises").

239. Malone v. State, 919 S.W.2d 410, 412 (Tex. Crim. App. 1996) (en banc).

240. *But see* John D. White, Comment, *Constitutional Law—Equal Protection—A New Hand From the Same Deck of Cards—Randomness and the Intersection of Race with Gender in the Texas Jury Shuffle*, 40 S. TEX. L. REV. 509, 537 (1999) (stating that *Batson* may provide a temporary solution as "*the most immediate and practical approach*" to the problems related to discrimination).

241. *See Ladd*, 3 S.W.3d at 564 (discussing the justifications for the jury shuffle).

242. *Id.*

243. *See id.* (explaining that one justification offered for a shuffle request was the criminal histories of the jurors).

244. *See id.* (noting that the prosecutor knew a member of the jury panel and did not want to "run the risk of hurting her feelings" by striking her).

245. *Id.*

246. *See Ladd*, 3 S.W.3d at 564 (holding that the aforementioned reasons were "racially neutral"); *see also* Ladd v. Cockrell, 311 F.3d 349, 354-56 (5th Cir. 2002) (noting that, on habeas review, the Fifth Circuit agreed with the Texas Court of Criminal Appeals).

247. *Cf.* THE DEVIL'S ADVOCATE (Warner Bros. 1997) (illustrating this situation in the context of voir dire).

I do not contend that Texas prosecutors consistently discriminate in jury selection. The overwhelming majority of Texas prosecutors are decent, hard-working men and women who seek justice on a daily basis. Their jobs are not easy in the slightest, yet they perform the tasks at hand with dedication and vigor. Neutral rules of applicability, however, allow some individuals to act based on discriminatory intent.[248] The jury shuffle plainly invites racists and bigots to act on their prejudices.[249]

A prosecutor who wishes to move back or bring forward members of a particular race can all too easily discover a race-neutral reason for requesting a jury shuffle.[250] If there are seven whites, blacks, or Hispanics in the first ten members of the venire, and five of those seven are not clean-shaven, a prosecutor could claim that he or she requested a jury shuffle because those individuals seemed to reside in the lower-income bracket.[251] If some or many of these individuals have sullen looks on their faces, a prosecutor could argue for a jury shuffle on that basis.[252] Overall, however, prosecutors make numerous decisions during jury selection based on instinct and intuition.[253] Trial courts are quite reluctant to second-guess these decisions.[254] Consequently, the jury shuffle allows prosecutors to discriminate while cloaking their desires under the guise of trial tactics.[255]

---

248. *Cf.* Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886) (stating that "the denial of equal justice is still within the prohibition of the Constitution" if a neutral law is "applied and administered by public authority with an evil eye and an unequal hand").

249. *See* John D. White, Comment, *Constitutional Law—Equal Protection—A New Hand From the Same Deck of Cards—Randomness and the Intersection of Race with Gender in the Texas Jury Shuffle*, 40 S. TEX. L. REV. 509, 527 (1999) (explaining that "[t]he objective then in requesting a race or gender motivated shuffle is to reconfigure the panel by removing as many objectionable jurors from the front of the venire as possible, or conversely, to remove as many favorable jurors from the rear").

250. *Cf.* Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring) (asserting that "[a]ny prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons").

251. *See id.* (emphasizing that finding a neutral reason to strike a juror can be just that simple).

252. *See id.* (reasoning that "[a] prosecutor's own . . . racism may lead him easily to the conclusion that a prospective black juror is 'sullen,' or 'distant'").

253. *Id.*

254. *See id.* at 105-06 (stating that the burden of evaluating a prosecutor's motives is a difficult one).

255. *See Batson*, 476 U.S. at 106 (Marshall, J., concurring) (noting that "[i]f such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his

d. The Standard of Review of a Trial Court's Adjudication of a *Batson* Challenge Would Almost Always Prevent Successful *Batson* Challenges

Even if a party timely objected to a jury shuffle request,[256] a Texas trial court applied *Batson*, a Texas trial court refused to accept diversity as a legitimate reason for a jury shuffle request, the challenging party made a prima facie showing of discrimination, and the prosecutor or defense lawyer forgot to assert a race-neutral reason for a jury shuffle request, it is quite unlikely the challenging party would prevail if the trial court denied that party's *Batson* claim. The reason is every appellate lawyer's best friend—the standard of review. Texas appellate courts reverse a trial court's determination of a *Batson* claim only if the trial court commits clear error.[257] This standard of review is a daunting one.[258]

Under this standard of review, an appellate court may not substitute its opinion for the trial court's opinion.[259] Decisions regarding *Batson* claims are left to the trial court's discretion.[260] Consequently, it would take a set of rather extraordinary circumstances for a Texas appellate court to reverse the trial court's determination of a *Batson* challenge.[261] The same is true of a challenge to a jury shuffle, a procedure that is far more general and far less obvious than a peremptory challenge.[262] Those lawyers brave enough

---

strikes on nonracial grounds, then the protection erected by the Court today may be illusory"). However, the jury shuffle also allows criminal defendants to discriminate. *Cf.* Miller-El v. Cockrell, 123 S. Ct. 1029, 1038 (2003) (noting that the prosecution objected to Miller-El's request for a jury shuffle).

256. *See* TEX. R. APP. P. 33.1 (noting that the record must show a timely and sufficiently specific objection); Cockrell v. State, 933 S.W.2d 73, 89 (Tex. Crim. App. 1996) (en banc) (reinforcing the requirement for an objection under the rules of procedure).

257. *See* Whitsey v. State, 796 S.W.2d 707, 726 (Tex. Crim. App. 1990) (en banc) (adopting a "clearly erroneous" standard of review).

258. *See* Young v. State, 826 S.W.2d 141, 144 (Tex. Crim. App. 1991) (en banc) (stating that Texas appellate courts do not review the trial court's determination of credibility).

259. *See Whitsey*, 796 S.W.2d at 726 (reiterating that the "clearly erroneous" standard of review does not allow for a substitution of judgment).

260. *Id.*

261. *See id.* (stating that a deferential standard of review applies to the trial court's decisions).

262. *See* Ladd v. Cockrell, 311 F.3d 349, 355 (5th Cir. 2002) (stating that "the mechanics of jury-shuffling has demonstrated that it cannot infringe the rights to a fair and impartial jury and to equal protection as significantly as can the use of a peremptory strike").

to challenge a jury shuffle request under *Batson* would engage in quixotic, unending quests for justice.

B. *Mandating That Jury Shuffles Occur in Open Court Would Reform the Jury Shuffle*

Some commentators have proposed that conducting jury shuffles in open court would also lend more credibility to the jury shuffle.[263] Though this proposal would add more transparency and legitimacy to the jury selection process,[264] this proposal ignores the central problem of the jury shuffle—its susceptibility to racial discrimination.[265] The jury shuffle is unconstitutional as applied not because of how the judge acts, but because of how either the State or the defendant acts.[266] Once a party in a criminal or civil trial demands a jury shuffle with the intent of moving women or minorities either forward or backward in the venire, the jury selection process is tainted.[267] Whether the jury is shuffled in, out of, or near court is constitutionally irrelevant.

Even if a jury shuffle is conducted in court, the methods used to achieve that shuffle, such as hand-shuffling of the juror cards, do not inspire confidence in the jury system.[268] The jury shuffle is a neutral statute that allows "those to discriminate who are of a mind

---

263. *See* John D. White, Comment, *Constitutional Law—Equal Protection—A New Hand From the Same Deck of Cards—Randomness and the Intersection of Race with Gender in the Texas Jury Shuffle*, 40 S. TEX. L. REV. 509, 538 (1999) (suggesting that "[p]erhaps the best solution to eradicating invidious discrimination through use of the jury shuffle is to mandate a court ordered shuffle prior to the commencement of voir dire").

264. *See id.* (arguing that "[r]equiring judges to shuffle the jury in open court ensures the random selection of juries while removing the arbitrariness that attends jury shuffles granted on the motion of parties").

265. *See id.* at 537 (declaring that "[t]he jury shuffle has proved itself to be problematic in several respects, apart from the ability to use it for invidious discrimination"). Furthermore, "the purpose of the jury shuffle is being subverted by invidious discrimination. In its present form, it creates a greater ill than it cures." *Id.*

266. *See id.* at 531 (stating, "The dilemma in determining the constitutionality of a racially motivated shuffle lies not in the role that 'neutrality' plays. It is *acting on discriminatory intent* that renders the practice unconstitutional." (emphasis added)).

267. *See id.* (declaring that such intentional discrimination is a violation of equal protection).

268. *Cf.* McGee v. State, 909 S.W.2d 516, 519 (Tex. App.—Tyler 1995, pet. ref'd) (describing the manner in which the jury was shuffled). "The clerk testified that she combined the jury questionnaires in a box, drawing some slips out one at a time, but occasionally drawing out a handful, and sometimes reshuffling the handful she had drawn." *Id.*

to discriminate."[269] Worse yet, it allows those individuals to do so with almost no chance of being caught.[270] Because litigants can request a jury shuffle to discriminate without suffering any cost or sanction, the Texas Legislature should abolish the jury shuffle.

V. CONCLUSION

It is admirable to seek additional procedural safeguards to ensure constitutional rights. Indeed, the jury shuffle statute was enacted in order to ensure greater fairness and consistency in jury selection.[271] Frequently, however, procedural methods intended as safeguards become unnecessary[272] or allow individuals to subvert the trial system.[273] No safeguards existed to prevent peremptory challenges from wholesale abuse until the Supreme Court decided *Batson*.[274] *Batson* demonstrated the Court's willingness to confront the constitutional infirmities inherent in peremptory chal-

---

269. Batson v. Kentucky, 476 U.S. 79, 96 (1986) (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)); John D. White, Comment, *Constitutional Law—Equal Protection—A New Hand From the Same Deck of Cards—Randomness and the Intersection of Race with Gender in the Texas Jury Shuffle*, 40 S. TEX. L. REV. 509, 531 (1999).

270. *See* Williams v. State, 719 S.W.2d 573, 575 (Tex. Crim. App. 1986) (en banc) (noting that either the State or the defendant is entitled to a jury shuffle); *see also* Donna M. Bobbitt, *The Texas Jury Shuffle: A Question of Constitutionality*, 57 TEX. B.J. 596, 598 (1994) (noting that "[t]he rules do not require the moving party to justify or explain his or her desire for a shuffle").

271. *See* Donna M. Bobbitt, *The Texas Jury Shuffle: A Question of Constitutionality*, 57 TEX. B.J. 596, 598 (1994) (noting that the peremptory challenge and the jury shuffle are designed to achieve "the selection of a fair and impartial jury"); *see also* John D. White, Comment, *Constitutional Law—Equal Protection—A New Hand From the Same Deck of Cards—Randomness and the Intersection of Race with Gender in the Texas Jury Shuffle*, 40 S. TEX. L. REV. 509, 537 (1999) (stating that the shuffle serves a useful function, but averring that that purpose is "being subverted").

272. *Cf.* Steven A. Engel, *The Public's Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. REV. 1658, 1709 (2000) (arguing that the community has a constitutional right to try persons charged with committing alleged crimes there, and claiming that transferring venue in criminal trials is both unnecessary and harmful).

273. *See* John D. White, Comment, *Constitutional Law—Equal Protection—A New Hand From the Same Deck of Cards—Randomness and the Intersection of Race with Gender in the Texas Jury Shuffle*, 40 S. TEX. L. REV. 509, 537 (1999) (arguing that "the purpose of the jury shuffle is being subverted by invidious discrimination" and claiming that "[i]n its present form, it creates a greater ill than it cures").

274. *See* Donna M. Bobbitt, *The Texas Jury Shuffle: A Question of Constitutionality*, 57 TEX. B.J. 596, 596 (1994) (referring to the *Batson* decision as the beginning of "a systematic process to discover and control racial discrimination in the *voir dire* procedures used to select a single jury from the general venire").

lenges and to work to cure those ills.[275] Though it cannot end discrimination resulting from peremptory challenges,[276] *Batson* seeks to reduce "the illegitimate use of the peremptory challenge."[277]

Texas courts recognize the jury shuffle's deficiencies, yet refuse to implement procedures that would ensure greater scrutiny of the jury shuffle.[278] Applying *Batson* to the jury shuffle would not eliminate the jury shuffle's deficiencies.[279] Nor does there exist a legitimate, consistent procedure to examine the intent behind a jury shuffle request.[280] Because any potential cures to the jury shuffle would be worse than the constitutional injuries it allows,[281] the jury

---

275. *See id.* (noting that the *Batson* Court "altered the very nature of the peremptory strike because of its inherent ability to be used as a vehicle for racial discrimination in the *voir dire* process"); *see also* John D. White, Comment, *Constitutional Law—Equal Protection—A New Hand From the Same Deck of Cards—Randomness and the Intersection of Race with Gender in the Texas Jury Shuffle*, 40 S. TEX. L. REV. 509, 528 (1999) (commenting that *Batson* and its progeny "demonstrate[ ] the Court's growing impatience with abuse of neutral statutes, despite their deeply rooted histories").

276. *Cf.* Batson v. Kentucky, 476 U.S. 79, 102-03 (1986) (Marshall, J., concurring) (stating that "[t]he decision today will not end the racial discrimination that peremptories inject into the jury-selection process" and concluding that "[t]hat goal can be accomplished only by eliminating peremptory challenges entirely").

277. *Id.* at 105.

278. Ladd v. State, 3 S.W.3d 547, 563 n.9 (Tex. Crim. App. 1999) (refusing to endorse a scholar's argument that *Batson* should be extended to jury shuffles); Wearren v. State, 877 S.W.2d 545, 546 (Tex. App.—Beaumont 1994, no pet.) (finding no authority for the broad extension of *Batson* to the jury shuffle); Urbano v. State, 808 S.W.2d 519, 520 (Tex. App.—Houston [14th Dist.] 1991, no pet.) (refusing to extend *Batson* to the jury shuffle process); Sims v. State, No. 05-96-01395-CR, 1998 Tex. App. LEXIS 6688, at *2 (Tex. App.—Dallas Oct. 27, 1998, no pet.) (not designated for publication) (refusing to extend *Batson* to the jury shuffle); Robinson v. State, No. 05-97-00689-CR, 1998 Tex. App. LEXIS 6658, at *8 (Tex. App.—Dallas Oct. 26, 1998, pet. ref'd) (not designated for publication) (declining to extend *Batson* to requests for jury shuffle); Garrett v. State, No. 05-94-01144-CR, 1996 Tex. App. LEXIS 2160, at *8 (Tex. App.—Dallas May 29, 1996, pet. ref'd) (not designated for publication) (concluding that "*Batson* and its progeny do not apply to jury shuffles").

279. *But see* John D. White, Comment, *Constitutional Law—Equal Protection—A New Hand From the Same Deck of Cards—Randomness and the Intersection of Race with Gender in the Texas Jury Shuffle*, 40 S. TEX. L. REV. 509, 537 (1999) (stating that *Batson* may be a temporary solution as "the most immediate and practical approach" to the jury shuffle's problems).

280. *See* Williams v. State, 719 S.W.2d 573, 575 (Tex. Crim. App. 1986) (en banc) (noting that the requesting party need not provide an explanation for a jury shuffle request).

281. John D. White, Comment, *Constitutional Law—Equal Protection—A New Hand From the Same Deck of Cards—Randomness and the Intersection of Race with Gender in the Texas Jury Shuffle*, 40 S. TEX. L. REV. 509, 537 (1999).

shuffle has outlived its usefulness.[282] To ensure greater fairness and justice in jury selection, the Texas Legislature should abolish the jury shuffle.

282. *See, e.g.,* Donna M. Bobbitt, *The Texas Jury Shuffle: A Question of Constitutionality*, 57 TEX. B.J. 596, 599 (1994) (comparing the jury shuffle to peremptory challenges, which many scholars and jurists argue should be eliminated); R.N. Singh et al., *Reforming the Jury System: What Do the Judges Think?*, 63 TEX. B.J. 948, 951 (2000) (recommending that Texas courts "[e]liminate shuffling of jurors when a panel is still random as seated in the assigned court"); John D. White, Comment, *Constitutional Law—Equal Protection—A New Hand From the Same Deck of Cards—Randomness and the Intersection of Race with Gender in the Texas Jury Shuffle*, 40 S. TEX. L. REV. 509, 537 (1999) (suggesting that the most efficient way to deal with abuse of the jury shuffle procedure would be to eliminate it).