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Jeffrey S. Jubera

University of Baltimore School of Law

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THE PEREMPTORY CHALLENGE AT THE FEDERAL LEVEL AND IN MARYLAND: ITS UNCERTAIN FUTURE AFTER *GEORGIA v. McCOLLUM*

I. INTRODUCTION

One of the primary purposes of the Supreme Court is to interpret the Constitution and recognize the rights guaranteed therein. The establishment of personal liberties has usually depended on the composition of the Court and the current political sentiment. One aspect that has not varied, however, is the Court's reluctance to provide detailed, or at times even general, guidelines for the administration of these newly founded rights. The Court has viewed the lower court system as the proper venue for such detailed tasks. One need only examine the problematic impact of the phrase "with all deliberate speed"¹ to understand that in fashioning rights the Court tends to bypass the dramatic repercussions such guarantees may have on the administration of justice.² In its ministrations with the peremptory challenge, the Court has again neglected to examine the overall impact likely to be engendered.

The peremptory challenge has been around since the very early days of English common law.³ It was adopted by the American

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1. *Brown v. Board of Educ.*, 349 U.S. 294, 301 (1955).
 2. The application of *Brown* has generated a considerable number of commentaries. For an overview of the problems encountered, see generally Philip T.K. Daniel, *A Comprehensive Analysis of Educational Choice: Can the Polemic of Legal Problems be Overcome?*, 43 DEPAUL L. REV. 1, 39-47 (1993); James B. Egle, Comment, *Constitutional Implications of School Choice*, 1992 WIS. L. REV. 459, 487-95; Robert B. McKay, "*With All Deliberate Speed*": A Study of School Desegregation, 31 N.Y.U. L. REV. 991 (1956); Mark Tushnet, *What Really Happened in Brown v. Board of Education*, 91 COLUM. L. REV. 1867, 1928-29 (1991).
 3. The earliest usage of the peremptory challenge gave the Crown an unlimited ability to select a jury of its choice. See generally JON M. VAN DYKE, *JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS* 147 (1977). This power was taken away in 1305 when Parliament passed a statute eliminating the Crown's ability to issue a peremptory challenge, creating in its place challenges for "Cause shown." 33 Edw. 1, Stat. 4 (1305). This limitation did not last long, as judges construed the statute to allow the Crown the power to direct any juror to "stand aside." See, e.g., *Mansell v. Regina*, 120 Eng. Rep. 20, 27 (1857) ("no intention of taking away all power of peremptory challenge from the Crown, while that power . . . was left to the prisoner"); *Regina v. Frost*, 173 Eng. Rep. 771, 776 (1839) ("not a correct inference from the words of the statute that the Crown is deprived of its right

system, being recognized by Congress as early as 1780 as a device to be used by defendants in trials of treason and other capital crimes.⁴ Until the mid-1960s, little was done to the peremptory challenge, except occasional measures that regulated the number of challenges either side could issue.⁵ In 1965, however, there began a line of cases that radically affected the peremptory challenge and may ultimately lead to its abandonment.

In *Swain v. Alabama*,⁶ the United States Supreme Court began this progression by recognizing that a criminal defendant's right to equal protection was violated when potential jurors were excluded from a jury on the basis of race.⁷ In 1986, the Court's decision in *Batson v. Kentucky*⁸ redefined the burden of proof for such a claim, making it possible for a criminal defendant to prevail against a prosecutor's use of peremptory challenges to strike jurors on the basis of race.⁹ The cases following *Batson* shifted the equal protection focus, however, from the defendant to the affected juror. With this shift, the decisions in *Powers v. Ohio*¹⁰ and *Edmonson v. Leesville Concrete Co.*¹¹ led inextricably to the Court's recent ruling in *Georgia v. McCollum*,¹² in which it held that a criminal defendant may not use peremptory challenges on the basis of race.

It is this change in focus that is the basis for this Comment. The Court has created a broad substantive right in an area where

to challenges"); VAN DYKE, *supra*, at 148.

As applied to defendants, the peremptory challenge was always allowed for felonies at common law. See *Swain v. Alabama*, 380 U.S. 202, 212 n.9 (1965); 4 BLACKSTONE COMMENTARIES 353 (15th ed. 1809) ("peremptory challenge: a provision full of that tenderness and humanity to prisoners"). However, its application in civil proceedings at common law was questionable. See *Kabatchnick v. Hanover-Elm Bldg. Corp.*, 119 N.E.2d 169, 172 (Mass. 1954) ("right to make a peremptory challenge did not exist at common law but is of statutory origin").

4. Acts of Apr. 30, 1790, ch. 9, § 30, 1 Stat. 119. The defendant was entitled to 35 peremptory challenges in trials for treason and 20 peremptory challenges in other felonies punishable by death. See *Swain*, 380 U.S. at 214. The state's use of peremptory challenges was uncertain in the development of early American law. The general practice, it seems, was to allow the state peremptory challenges by adopting the common law practice of "standing aside." See VAN DYKE, *supra* note 3, at 149. In 1865, Congress statutorily granted the government the power to use peremptory challenges. See *Swain*, 380 U.S. at 215 (citing 13 Stat. 500 (1865)).

5. See VAN DYKE, *supra* note 3, at 150.

6. 380 U.S. 202 (1965).

7. *Id.* at 223-24.

8. 476 U.S. 79 (1986).

9. See *infra* notes 49-52 and accompanying text.

10. 499 U.S. 400 (1991).

11. 500 U.S. 614 (1991).

12. 112 S. Ct. 2348 (1992).

discrimination was traditionally allowed. With every peremptory challenge comes some discriminatory intent. The party using the strike does so believing that the potential juror will be unfavorable to that party's cause. The Court has now stated that certain discriminatory motivations may not be the basis for those strikes.¹³ According to the Court, a party issuing a discriminatory strike violates the equal protection right of the juror.¹⁴ This decision presents a variety of questions. How can a criminal defendant be a state actor? What specific motivations are prohibited? What particular groups are protected? How will the courts deal with these new developments? Will their efforts amount to anything?

Part II of this Comment outlines *Strauder v. West Virginia*¹⁵ and *Batson v. Kentucky*,¹⁶ the federal cases that developed the equal protection right for the criminal defendant. Part III discusses *Powers v. Ohio*¹⁷ through *Georgia v. McCollum*,¹⁸ the cases concerning the shift in equal protection guarantees from the defendant to the juror. Analysis will cover both the protected party and the differing actors involved in using the peremptory challenge. Part IV reviews the developments in Maryland case law. Focus will be directed to two aspects inherent in Maryland law that have limited the application of the equal protection right. Finally, Part V discusses the realities involved in the current situation. Specifically, the analysis will center on three topics: (1) the *McCollum* Court's labeling of the criminal defendant as a state actor; (2) which groups have been, or should be protected; and (3) whether the voir dire system used in Maryland actually encourages illegal strikes.

II. EQUAL PROTECTION FOR THE DEFENDANT: STRAUDER AND BATSON

Although not decided in the context of peremptory challenges, *Strauder v. West Virginia*¹⁹ began the analysis of discrimination in jury selection. In 1880, a black criminal defendant challenged a state law that prohibited blacks from sitting on juries.²⁰ The United States Supreme Court ruled that the State denied the black defendant equal protection when it tried him before a jury from which the State had

13. *E.g.*, *Batson v. Kentucky*, 476 U.S. 79 (1986) (barring racial discrimination in the prosecutor's use of the peremptory challenge).

14. *Id.* at 84.

15. 100 U.S. 303 (1880).

16. 476 U.S. 79 (1986).

17. 499 U.S. 400 (1991).

18. 112 S. Ct. 2348 (1992).

19. 100 U.S. 303 (1880).

20. *Id.* at 305.

purposefully excluded members of his race.²¹ Although the Court would not extend its holding to require that the defendant have a "jury composed in whole or in part of persons of his own race,"²² it did require that the jury venire²³ be selected according to nondiscriminatory criteria.²⁴

In deciding *Strauder*, the Court indicated its belief that the composition of the jury would affect the outcome of the case: "It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy."²⁵ Thus, the basis of the Court's decision was that the individual most affected by a jury selected on the basis of racial grounds was the *defendant* and not the *juror*.²⁶

Peremptory challenges used on the basis of race were the specific issue in the 1965 decision of *Swain v. Alabama*.²⁷ In *Swain*, a black criminal defendant had been convicted by an all-white jury.²⁸ On appeal, the defendant cited *Strauder* for the proposition that the prosecution had violated his equal protection rights by excluding all black members of the jury venire through the use of peremptory challenges.²⁹ The Court's opinion included an exhaustive historical study of the peremptory challenge.³⁰ From this overview, the Court

21. *Id.* at 309-10. The majority could not find any state interest that may have allowed for such a measure:

[H]ow can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone . . . is not a denial to him of equal legal protection?

Id. at 309.

22. *Id.* at 305.

23. The jury venire is the initial large pool of jurors from which the petit jury is taken. See BLACK'S LAW DICTIONARY 1556 (6th ed. 1990).

24. The Court recognized that the State has the power to mandate certain qualifying factors for jurors: "males . . . freeholders . . . persons within certain ages . . . or . . . persons having educational qualifications." *Strauder*, 100 U.S. at 310. However, the Equal Protection Clause was designed specifically to protect "against discrimination because of race or color." *Id.*

25. *Id.* at 309. It was recognized that peremptory challenges could result in "packing juries" against the defendant. *Id.*

26. In its discussion, the Court recognized the prejudicial effects the state statute had on the excluded jurors. See *infra* note 58. However, the final focus was on the "denial of the equal protection of the laws to a colored man when he is put on trial," and judged by a group purposely chosen to discriminate against him. *Strauder*, 100 U.S. at 310.

27. 380 U.S. 202 (1965).

28. *Id.* at 205.

29. *Id.* at 203.

30. *Id.* at 212-19.

concluded that the peremptory challenge had always been afforded wide latitude.³¹ According to the Court, its "essential nature . . . is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control."³² Given this discretion, it was presumed that the prosecutor was using peremptory challenges in such a manner as to seat a "fair and impartial jury."³³

The *Swain* Court recognized, however, that in some extreme instances a defendant's equal protection rights might be violated.³⁴ In order to establish a violation, the defendant had to show the "prosecutor's systemic use of peremptory challenges against Negroes over a period of time."³⁵ The realities of satisfying this burden were then vividly demonstrated. The Court ruled that the defendant had not shown the necessary proof even though there was evidence that no black had served on a jury "within the memory of persons now living."³⁶ The Court required proof that the prosecutor alone was responsible for that result.³⁷

Criticism of the *Swain* decision, and its rigorous burden of proof, came from members of the Court and various commentators.³⁸

31. *Id.* at 220.

32. *Id.*

33. *Id.* at 222. This presumption allows the Court to dismiss a claim based only on the government's use of peremptory challenges in that particular case. *Id.*

34. *Id.* at 223-24.

35. *Id.* at 227. "[W]hen the prosecutor in a county, in case after case . . . is responsible for the removal of Negroes who have been selected as qualified jurors . . . with the result that no Negroes ever serve on petit juries, the Fourteenth Amendment takes on added significance." *Id.* at 223.

The Court likened this burden of proof to the one advanced in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). In *Yick Wo*, a local ordinance required that a license be obtained in order to operate a business. *Id.* at 357-58. There were over 200 Chinese applicants, all of whom were denied a license. *Id.* at 359. All non-Chinese applicants, with only one exception, received their license. *Id.* The Court reasoned that such widespread application must be discriminatory and illegal. *Id.* at 373-74.

36. *Swain*, 380 U.S. at 231 (Goldberg, J., dissenting).

37. *Id.* at 224-28. The Court referred to testimony which revealed that on several occasions black defendants had preferred an all-white jury. *Id.* at 225. To explain the complete lack of blacks on juries in the past, the Court accepted the prosecutor's statement that his use of a peremptory challenge on a black juror depended "upon the circumstances and the conditions and the case and what I thought justice demanded . . . in that particular case." *Id.* at 225.

38. See *Thomson v. United States*, 469 U.S. 1024, 1026 (Brennan, J., dissenting) *denying cert. to* 730 F.2d 82 (8th Cir. 1984) ("With the hindsight that two decades affords, it is apparent to me that *Swain's* reasoning was misconceived."); *Williams v. Illinois*, 466 U.S. 981, 983 (1984) (Marshall, J., dissenting) *denying cert. to* 454 N.E.2d 220 (Ill. 1983) ("As the years pass, it becomes increasingly clear that the problem will not be solved until this Court intervenes."); *Swain*, 380 U.S. at 246 (Goldberg, J., dissenting) ("By adding to the present heavy burden of proof required of defendants in these cases,

The consensus was that this burden would be impossible for a defendant to meet, thereby nullifying the defendant's granted right.³⁹

Defendants battled with this situation until 1986 when the Court decided *Batson v. Kentucky*⁴⁰ and overruled the *Swain* Court's burden of proof requirement.⁴¹ *Batson* involved the trial of a black man for burglary and receipt of stolen goods.⁴² When selecting the jury, the prosecutor excluded all of the black persons on the jury venire.⁴³ The defendant charged that this exclusion violated both his Sixth Amendment right to a jury drawn from a fair cross-section of the community and his Fourteenth Amendment right to equal protection.⁴⁴

The Supreme Court dismissed the Sixth Amendment claim out of hand,⁴⁵ but held that the defendant's equal protection rights were

the Court creates additional barriers to the elimination of [discrimination in jury selections]."); *People v. Wheeler*, 583 P.2d 748, 767 (Cal. 1978) (noting that *Swain* affords no protection to the first defendant to suffer discrimination); VAN DYKE, *supra* note 3, at 166-67; Frederick L. Brown, et al., *The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse*, 14 NEW ENG. L. REV. 192, 193 (1978) (arguing that *Swain* "presents an unworkable standard of review and fails to remedy the most pervasive forms of prosecutorial misuse of the challenge"); Michael N. Chesney & Gerard T. Gallagher, Note, *State Action and the Peremptory Challenge: Evolution of the Court's Treatment and Implications for Georgia v. McCollum*, 67 NOTRE DAME L. REV. 1049, 1052 (1992) (referring to the "immunity from inquiry" which prosecutors enjoyed after *Swain*); Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 119 n.250 (1984) (concluding that *Swain*'s burden of proof is "virtually impossible").

But see Stephen A. Saltzburg & Mary Ellen Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 MD. L. REV. 337, 346 (1982) ("while the test is demanding, it is not beyond satisfaction").

39. See *McCray v. Abrams*, 750 F.2d 1113, 1120-21 (2d Cir. 1984), *vacated and remanded*, 478 U.S. 1001 (1986); *United States v. Childress*, 715 F.2d 1313, 1316 (8th Cir. 1983) (noting that research disclosed only two cases where the defendant had met the burden of proof established in *Swain*), *cert. denied*, 464 U.S. 1063 (1984).

40. 476 U.S. 79 (1986).

41. *Id.* at 93.

42. *Id.* at 82.

43. *Id.* at 83.

44. *Id.* at 83-84.

45. *Id.* at 84 n.4. The Court addressed the denial of Sixth Amendment protection a week later in *Lockhart v. McCree*, 476 U.S. 162 (1986), where the Court soundly rejected the defendant's argument that the fair-cross-section component of the Sixth Amendment applied to peremptory challenges:

We have never invoked the fair-cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to require petite juries . . . to reflect the composition of the community at large. The limited scope of the fair-cross-section

infringed.⁴⁶ The Court relied on the *Strauder* Court's rationale that "the state denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposely excluded."⁴⁷ Much of the Court's language was based on the assumption that a jury selected by excluding members of the defendant's race would not perform in an unbiased manner.⁴⁸

In rejecting the *Swain* Court's burden of proof requirement,⁴⁹ the Court fashioned a new, three-prong test that defendants must meet to establish a prima facie case against a prosecutor's conduct. The defendant must first prove that he is a "member of a cognizable racial group," and that the prosecutor used peremptory challenges to exclude members of that group.⁵⁰ Second, the defendant "may rely on the fact . . . that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'"⁵¹ Finally, the defendant "must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race."⁵² The Court left the lower courts to determine what level of evidence is necessary to establish

requirement is a direct and inevitable consequence of the practicable impossibility of providing each criminal defendant with a truly "representative" petit jury We remain convinced that an extension of the fair-cross-section requirement to petit juries would be unworkable and unsound

Id. at 173-74 (citations omitted).

46. *Batson*, 476 U.S. at 84-88.

47. *Id.* at 85. The Court reiterated its statement in *Strauder* that a "defendant has no right to a 'petit jury composed in whole or in part of persons of his own race.'" *Id.* (quoting *Strauder v. West Virginia*, 100 U.S. 303, 305 (1880)). It then tempered this ruling by providing the defendant with a right to be "tried by a jury whose members are selected pursuant to nondiscriminatory criteria." *Id.* at 86.

48. The Court reasoned that a jury was designed to protect an individual from the arbitrary exercise of power by the government. *Id.* A jury biased against the defendant, specifically selected for that purpose, would be unable to perform that protective function. *Id.* at 86-89.

49. In order to reject the burden of proof requirement, the Court found that prior cases established that "'a consistent pattern of official racial discrimination' is not 'a necessary predicate to a violation of the Equal Protection Clause.'" *Id.* at 95 (quoting *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 n.14 (1977)). Therefore, racial discrimination may be shown by relying on facts established in the defendant's own case.

50. *Id.* at 96.

51. *Id.* (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)).

52. *Id.* at 96. The Court suggested that trial courts look for "patterns" of strikes against black jurors. *Id.* at 97. Also, the prosecutor's questions and statements made during voir dire should be examined for discriminatory motive. *Id.*

a prima facie case of discrimination.⁵³ After applying the three-prong test to the facts in *Batson*, the Court believed that the exclusion of the only four blacks on the venire required remanding the case to enable the trial court to examine these strikes in light of the new test.⁵⁴

After the defendant demonstrates a prima facie case in accordance with the test established by *Batson*, the burden shifts to the prosecutor to "come forward with a neutral explanation for challenging black jurors."⁵⁵ While the prosecutor's explanation need not be as detailed as a challenge-for-cause justification, it cannot merely be a simple denial of discriminatory intent.⁵⁶

The lower courts spent the years after *Batson* establishing what was required for a prima facie showing. Unresolved by *Batson* were the following two questions: What constitutes a "cognizable racial group?" Was the protection applicable only to jurors who were members of the defendant's race? The next Supreme Court decision on the issue of discriminatory peremptory challenges answered the latter question.⁵⁷ In doing so, however, the Court began to shift its focus of concern from the criminal defendant to the affected juror.

III. THE SHIFT TO EQUAL PROTECTION FOR THE JUROR: *POWERS* THROUGH *McCOLLUM*

When the Court established the defendant's right to equal protection in *Swain*, it recognized that the juror was also affected by peremptory challenges that were racially discriminatory. A finding that a defendant's right to equal protection had been violated might

53. "We have confidence that trial judges . . . will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination." *Id.*

The Chief Justice, while not critical of the lower courts' abilities, expressed more sympathy for their upcoming plight:

[This decision] leaves roughly 7,000 general jurisdiction State trial judges and approximately 500 federal judges at large to find their way through the morass the Court creates today. The Court essentially wishes these judges well as they begin the difficult enterprise of sorting out the implications of the Court's newly created "right." I join my colleagues in wishing the Nation's judges well as they struggle to grasp how to implement today's holding.

Id. at 131 (Burger, C.J., dissenting).

54. *Id.* at 100.

55. *Id.* at 97.

56. *Id.* The Court also held that a challenge would be improper if the prosecutor issued it based on the belief that the juror would be partial to the defendant because they are of the same race. *Id.*

57. See *infra*, part III.A., discussing the Court's holding in *Powers v. Ohio*, 499 U.S. 400 (1991).

also

support a reasonable inference that Negroes are excluded from juries for reasons wholly unrelated to the outcome of the particular case on trial and that the peremptory system is being used to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population.⁵⁸

In *Batson*, the Court elaborated on *Swain's* line of reasoning. While it was secondary to the rationale that peremptory challenges based upon racial grounds violated the defendant's right to equal protection, the Court acknowledged that "[r]acial discrimination in selection of jurors harms not only the accused," but also the excluded juror.⁵⁹ Relating its decision to *Strauder*, the Court stated that by "denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror."⁶⁰

The rights of jurors in *Batson* were considered, however, secondary to the rights of the defendant. The Court was able to rationalize that the rights of jurors are secondary because the defendant in *Batson* was black, and its earlier decision in *Strauder* was concerned with the right of an individual to prevent members of his race from being excluded from jury service on the basis of race. *Batson's* argument could not be made if the criminal defendant was white and the prosecutor used peremptory challenges to strike black jurors. In this situation, the primary rationale in *Batson* and *Strauder* would be satisfied—a defendant would have the chance to be judged by members of his own race. Yet, the secondary rationale, the equal protection rights of a juror, would be violated.

A. *Affected Jurors' Rights v. Prosecutors' Strikes*

In 1991, *Powers v. Ohio*⁶¹ brought the question of jurors' rights to the Court, which embraced the analysis of the equal protection

58. *Swain v. Alabama*, 380 U.S. 202, 224 (1965). See also *Strauder v. West Virginia*, 100 U.S. 303 (1880), where the Court stated:

The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color . . . is practically a brand upon them, affixed by law, an assertion of their inferiority, and a stimulant to . . . prejudice.

Id. at 308.

59. *Batson v. Kentucky*, 476 U.S. 79, 87 (1986).

60. *Id.* Indeed, the effects went beyond the particular juror "to touch the entire community . . . and undermine public confidence in the fairness of our system of justice." *Id.*

61. 499 U.S. 400 (1991). The facts provide that a white defendant was to stand

rights of jurors in order to find for the defendant.⁶² The Court stressed that the prior rationales of *Batson* and *Strauder* were controlling, i.e., that a jury should be selected by non-discriminatory means.⁶³ The Court held that the "Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race, a practice that forecloses a significant opportunity to participate in civic life."⁶⁴

A violation of the Equal Protection Clause⁶⁵ requires state action⁶⁶ that deprives an individual of equal protection of the laws. In addition, in order for an equal protection challenge to be justiciable in federal courts, the appellant must have standing to sue.⁶⁷ Previously, this confined peremptory challenge appeals to the appellant's own legal rights and interests.⁶⁸ *Powers* switched the focus, however, from the equal protection rights of the defendant to that of the juror. In order for *Powers* to bring suit, therefore, the Court had to accept the argument that a defendant could assert a juror's equal protection right under the theory of third-party standing.

The Court has established three elements that must be met before a claimant can assert a third-party claim:

trial for aggravated murder. *Id.* at 402. During jury selection, the prosecutor used seven of ten peremptory challenges to exclude blacks. *Id.* at 403. After each strike of a black juror, the defendant, citing *Batson*, asked the court to compel the prosecutor to give nondiscriminatory explanations for those strikes. *Id.* The court refused to do so and, subsequently, the defendant was convicted. *Id.*

62. *Id.* at 402. The first sentence of Justice Kennedy's majority opinion focused on jury service as being "an exercise of responsible citizenship." *Id.* This set the tone of the opinion's focus on the juror and not the defendant.
63. *Id.* at 404. The Court acknowledged that its prior holdings concerning the peremptory challenge hinged primarily on the equal protection rights of a defendant. *Id.* at 404-06. However, it also felt that "*Batson* 'was designed to serve multiple ends.'" *Id.* at 406 (quoting *Allen v. Hardy*, 478 U.S. 255, 259 (1986) (per curiam)).
64. *Id.* at 409.
65. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.
66. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172 (1972) (stating that discriminatory action by a state violates Equal Protection Clause, while private conduct does not). Although the Fifth Amendment does not contain an Equal Protection Clause, its Due Process Clause has been held to impose the same requirements on the Federal government as the Fourteenth Amendment imposes on the states. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). In *Powers*, and in all prior cases involving the discriminatory use of peremptory challenges, the state action element was easily satisfied because the peremptory challenges in question had been issued by the prosecutor, a quintessential state actor.
67. See *Powers v. Ohio*, 499 U.S. 400, 410 (1991) (citing *United States Dept. of Labor v. Triplett*, 494 U.S. 715, 720 (1990); *Singleton v. Wulff*, 428 U.S. 106 (1976)).
68. See *Powers*, 499 U.S. at 410.

[A] litigant may raise a claim on behalf of a third party if the litigant can demonstrate[:]

[1] that he or she has suffered a concrete, redressable injury,

[2] that he or she has a close relation with the third party, and

[3] that there exists some hindrance to the third party's ability to protect his or her own interests.⁶⁹

The Court applied these elements in *Powers*, holding that the criminal defendant did indeed have standing to challenge a juror's exclusion.⁷⁰

The decision in *Powers v. Ohio* took the right of equal protection away from the criminal defendant and placed it squarely on the prospective juror. Once in place, it seemed only reasonable that the right would attach whenever a juror was being selected. Therefore, the result in *Edmonson v. Leesville Concrete Co.*,⁷¹ presented to the Court later in the same term, should have been anticipated.

B. Affected Jurors' Rights v. Civil Litigants' Strikes

Edmonson presented a *Batson* claim of race-based peremptory challenges, but in a civil as opposed to a criminal proceeding.⁷² Because the decision in *Powers* established that a third party had the standing to raise the claims of a juror, only one hurdle remained to prove an equal protection violation. Thus far, the questionable

69. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 629 (1991).

70. *Powers*, 499 U.S. at 415. The first element was proved by reiterating the interests of the criminal defendant:

The discriminatory use of peremptory challenges by the prosecution causes a criminal defendant cognizable injury . . . because racial discrimination in the selection of jurors "casts doubt on the integrity of the judicial process," and places the fairness of the criminal proceeding in doubt.

Id. at 411 (quoting *Rose v. Mitchell*, 443 U.S. 545, 556 (1979)).

As to the second element, the Court recognized that a "relation, if not a bond of trust" develops between the juror and the defendant. *Id.* at 413. It also found that both parties have an interest in eliminating racial discrimination from the process. *Id.*

The third element was met even though jurors have a legal right to sue on their own behalf. *Id.* at 414. The Court recognized that such a suit was "rare" because it provided minimal incentive and contained "daunting" barriers. *Id.*

71. 500 U.S. 614 (1991).

72. The plaintiff had sued Leesville Concrete claiming that its negligence had caused him personal injury. *Id.* at 616. Leesville used two of its three peremptory challenges to strike black jurors. *Id.* The plaintiff, who is black, cited *Batson*, and asked the court to compel Leesville to give a nondiscriminatory explanation for those strikes. *Id.* The court refused, stating that *Batson* did not apply to civil trials. *Id.*

peremptory challenges had been issued in a criminal setting by a prosecutor; therefore, the state action requirement was easily satisfied. But, in a civil proceeding, neither side appeared to be a "state actor."⁷³ The Court applied, however, the two-prong analysis of *Lugar v. Edmonson Oil Co.*,⁷⁴ and found that peremptory challenges issued by either side in a civil proceeding constituted state action.⁷⁵ The *Lugar* test states:

First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible

Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.⁷⁶

The Court had no difficulty finding that the first prong was satisfied because peremptory challenges were a statutory tool created by the state.⁷⁷ The Court had greater difficulty justifying its rationale with respect to the second prong.⁷⁸ The Court reasoned that but for the state, the jury would be unavailable to the participants in the first place.⁷⁹ In addition, a private party "invokes the formal authority of the court, which must discharge the prospective juror."⁸⁰ The end result is that when private parties "participate in the selection of jurors, they serve an important function within the government and act with its substantial assistance."⁸¹

73. See *supra* note 66.

74. 457 U.S. 922 (1982).

75. *Edmonson*, 500 U.S. at 620-28.

76. *Lugar*, 457 U.S. at 937.

77. "[P]eremptory challenges have no significance outside a court of law." *Edmonson*, 500 U.S. at 620. The Court recognized that peremptory challenges are not constitutionally mandated. *Id.* (citing *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988); *Stilson v. United States*, 250 U.S. 583, 586 (1919)). Therefore, without statutory authorization, the civil party would not be able to engage in discriminatory acts. *Id.* at 621.

78. In examining the second prong, the Court relied on precedent to establish three relevant inquiries: 1) "[T]he extent to which the actor relies on governmental assistance and benefits;" 2) "whether the actor is performing a traditional governmental function;" and 3) "whether the injury caused is aggravated in a unique way by the incidents of government authority." *Id.* (citations omitted).

79. "[A] private party could not exercise its peremptory challenges absent the overt, significant assistance of the court. The government summons jurors, constrains their freedom of movement, and subjects them to public scrutiny and examination." *Id.* at 624.

80. *Id.*

81. *Id.* at 628.

Accordingly, after *Edmonson*, the right of jurors to be protected against race-based peremptory challenges was applicable to the prosecutor and both parties in a civil suit. The one party conspicuously missing from this scheme was the criminal defendant—the party *Strauder* and *Batson* originally meant to protect. In 1992, relying on its past decisions, the Supreme Court addressed this last element still affecting jurors.

C. *Affected Jurors' Rights v. Criminal Defendants' Strikes*

*Georgia v. McCollum*⁸² came to the Court with many commentators expecting the Court to finally restrict the criminal defendant from exercising peremptory challenges based on race.⁸³ With the switch in emphasis away from the equal protection right of the defendant, there seemed little reason to allow the defendant the continued ability to discriminate.⁸⁴ In order to advance the rights of jurors over those of a criminal defendant, four main questions needed to be addressed by the Court:⁸⁵

First, whether a criminal defendant's exercise of peremptory challenges in a racially discriminatory manner inflicts the harms addressed by *Batson*.

82. 112 S. Ct. 2348 (1992).

83. See Chesney & Gallagher, *supra* note 38; J. Alexander Tanford, *Racism in the Adversary System: The Defendant's Use of Peremptory Challenges*, 63 S. CAL. L. REV. 1015 (1990); Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right is it Anyway?*, 92 COLUM. L. REV. 725 (1992).

84. Even prior to *Batson*, the inequities of providing only the defendant with the ability to object to racially motivated peremptory challenges was recognized. In 1984, Judge Richard Posner stated the basic line of reasoning that led to the *McCollum* decision.

It would be hard to argue that only a defendant should be allowed to challenge racially motivated peremptory challenges. Suppose counsel for a white defendant thought his client would be more likely to be acquitted if there were no blacks on the jury, and therefore used all his peremptory challenges to exclude blacks. As it cannot be right to believe that racial discrimination is wrong only when it harms a criminal defendant, and not when it harms the law-abiding community represented by the prosecutor, the prosecutor would be allowed to object to defendant's making racial peremptory challenges if the defendant could object to the prosecutor's doing so.

United States v. Clark, 737 F.2d 679, 682 (7th Cir. 1984). For another *McCollum* prediction, see Chief Justice Burger's dissent in *Batson*, where he stated:

the clear and inescapable import of this novel holding will inevitably be to limit the use of this valuable tool to both prosecutors and defense attorneys alike. Once the Court has held that *prosecutors* are limited in their use of peremptory challenges, could we rationally hold that defendants are not?

Batson v. Kentucky, 476 U.S. 79, 125-26 (1986) (Burger, C.J., dissenting) (footnote omitted) (emphasis added).

85. Although several of these questions were dealt with in previous cases, they needed to be specifically tailored in order to apply to the criminal defendant.

Second, whether the exercise of peremptory challenges by a criminal defendant constitutes state action.

Third, whether prosecutors have standing to raise this constitutional challenge.

And fourth, whether the constitutional rights of a criminal defendant nonetheless preclude the extension of our precedents to this case.⁸⁶

In answering the first issue, the Court almost rewrote the primary rationale of *Batson*. The decision in *Batson* was premised upon the equal protection rights of the criminal defendant.⁸⁷ Yet, in *McCullum*, the Court stressed only the right of the juror: "Regardless of who invokes the discriminatory challenge, there can be no doubt that the harm is the same—in all cases, the juror is subjected to open and public racial discrimination."⁸⁸

The second issue, the criminal defendant as a state actor, should have been the most troublesome for the Court to overcome. Although the Court previously found that civil litigants were state actors in their use of peremptory challenges,⁸⁹ viewing the criminal defendant in this light seemed contrary to the criminal justice system.⁹⁰ The Court found, however, the *Edmonson* decision to be directly related to the present situation, and labeled the criminal defendant as a state actor when using peremptory challenges.⁹¹

86. *McCullum*, 112 S. Ct. at 2353.

87. See *supra* notes 46-47 and accompanying text. In *Batson*, the juror's rights were considered, but were seen as secondary to the rights of the criminal defendant. The first element in *McCullum* considers the "harms addressed by *Batson*," yet a true reading of *Batson* would require examining what harms were caused to the criminal defendant and not the juror.

88. *McCullum*, 112 S. Ct. at 2353. The Court also discussed another strong thread running through prior opinions—how overt discrimination affects public confidence in the justice system. *Id.* at 2353-54 (citations omitted).

89. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).

90. See *infra*, part V.A. for a discussion of this apparent contradiction.

91. *McCullum*, 112 S. Ct. at 2354-56. The Court applied the two prong test of *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982). See *supra* text accompanying note 76. Again, as in *Edmonson*, the "source in state authority" prong was established because the peremptory challenge is a right granted by state statute. *McCullum*, 112 S. Ct. at 2355.

In discussing the "party as a state actor" prong, the Court also adopted the three step inquiry set out in *Edmonson*. See *supra* text accompanying note 69. As to the first inquiry, the court stated, "the defendant in a Georgia criminal case relies on 'governmental assistance and benefits' that are equivalent to those found in the civil context." *McCullum*, 112 S. Ct. at 2355 (quoting *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 621 (1991)). As to the second inquiry, the Court used some interesting logic when it held that the defendant was performing a traditional government function when selecting a jury: "[P]eremptory challenges perform a traditional function of the govern-

The Court also dismissed the defendant's claim that the adversarial relationship with the government negated any possibility of state action.⁹² The Court concluded that the peremptory challenge was different than any other action an accused may take in his defense.⁹³ In using the peremptory challenge, the defendant "is wielding the power to choose a quintessential government body."⁹⁴

The third issue, third-party standing, was handled in the same manner in which the Court dealt with third-party standing in *Powers* and *Edmonson*.⁹⁵ Any party can claim third-party standing for an affected juror because the harm defined by the Court in *Powers* is applicable to all.⁹⁶ According to the Court, the harm stated was the casting of "doubt on the integrity of the judicial process."⁹⁷ The state was thought to have an even stronger relationship to jurors than either party approved of in *Powers* and *Edmonson*.⁹⁸

Lastly, the Court examined the direct conflict between the primary and secondary interests expressed in *Batson*.⁹⁹ Based upon the

ment [in selecting the jury] [T]he jury system in turn 'performs the critical government functions of guarding the rights of litigants' *Id.* (quoting *Edmonson*, 500 U.S. at 624). Given this background, the Court determined that any one party wielding a peremptory challenge was performing a traditional government function. The final issue to be addressed in examining the second prong was whether the injury had been aggravated by governmental authority. The Court held that its ruling in *Edmonson* was directly on point. *Id.* at 2356. A "courtroom setting intensifies the harmful effects" of a discriminatory peremptory challenge. *Id.*

92. *Id.* at 2356. The defendant relied on *Polk County v. Dodson*, 454 U.S. 312 (1981), where the Court held that a public defender could be viewed as acting under color of state law when representing a criminal defendant. *Polk County*, 454 U.S. at 324-25. In *McCullum*, the Court stated that the basis for the *Polk County* decision was not the adversarial relationship between the defense and the prosecution: "[i]nstead, the determination whether a public defender is a state actor for a particular purpose depends on the nature and context of the function he is performing." *McCullum*, 112 S. Ct. at 2356. Focusing on the function involved allowed the Court to divide the public defender's duties so that some could be characterized as state actions. See, e.g., *Branti v. Finkel*, 445 U.S. 507 (1980) (holding that public defender is state actor when making personnel decisions).

93. *McCullum*, 112 S. Ct. at 2356.

94. *Id.* That a peremptory challenge was being used to further the defendant's acquittal did not matter: "Whenever a private actor's conduct is deemed 'fairly attributable' to the government, it is likely that private motives will have animated the actor's decision." *Id.*

95. See *supra* notes 67-69 and accompanying text.

96. *McCullum*, 112 S. Ct. at 2357.

97. *Id.* (quoting *Powers v. Ohio*, 499 U.S. 400, 411 (1991)).

98. *Id.* at 2357. "As the representative of all its citizens, the State is the logical and proper party to assert the invasion of the constitutional rights of the excluded jurors in a criminal trial." *Id.*

99. *Id.* at 2357-58. "The final question is whether the interests served by *Batson* must give way to the rights of a criminal defendant." *Id.*

Court's modified equal protection focus, little doubt existed as to which party's right would prevail. The Court began with the reminder that "peremptory challenges are not constitutionally protected fundamental rights."¹⁰⁰ It further stated that the challenges could be withheld altogether without affecting the constitutional rights of the defendant.¹⁰¹

The Court recognized the long history of the peremptory challenge, and indicated that it thought the practice could continue to meet constitutional guidelines.¹⁰² The Court then stated the following: "[I]f race stereotypes are the price for acceptance of a jury panel as fair,' we reaffirm today that such a 'price is too high to meet the standard of the Constitution.'"¹⁰³

The holding in *McCullum* should have come as no great surprise to the legal community. Further, *McCullum* should have little *procedural* impact on the system because *Batson* challenges have been widely litigated since that 1986 decision.¹⁰⁴ The lower courts have spent much of that time developing guidelines for recognizing and reviewing claims of discrimination in the context of jury selection. The Court was able to regulate the use of peremptory challenges by the prosecution under *Batson*. *McCullum* merely adds the final actor, the defendant, to the court's control.

IV. MARYLAND AND THE EQUAL PROTECTION RIGHTS OF JURORS

With the focus of equal protection on the juror, Maryland and other state courts have had to redevelop their guidelines for reviewing claims of discrimination in the context of jury selection. Many states were able to accept the more "minor" intrusion of *Batson*, and

100. *Id.* at 2358.

101. *Id.*

102. *Id.* The Court recognized that there was a difference between excluding a juror who harbored racial prejudices—an allowable practice—and excluding a juror on the assumption that the juror's race says something about her possible prejudices—an unconstitutional practice. *Id.* at 2359.

103. *Id.* at 2358 (quoting *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630 (1991)). Although the majority used the phrase "criminal defendant" throughout its opinion, Justice Thomas, in concurrence, saw *McCullum*'s application as narrower: "Today, we decide only that white defendants may not strike black veniremen on the basis of race. Eventually, we will have to decide whether black defendants may strike white veniremen." *Id.* at 2360 (Thomas, J., concurring).

104. Several of the states that adopted the *Batson* guarantee earlier have had a few more years to work on procedure. See *People v. Wheeler*, 583 P.2d 748, 762 (Cal. 1978); *State v. Neil*, 457 So. 2d 481, 486-87 (Fla. 1984); *Commonwealth v. Soares*, 387 N.E.2d 499, 515-16 (Mass.), *cert. denied*, 444 U.S. 881 (1979).

worked specifically within its guidelines.¹⁰⁵ Other states went beyond that decision, anticipating the expansion of *Powers*, *Edmonson*, and *McCullum*.¹⁰⁶ In any event, the juror has been afforded an equal protection right, and in most cases it is up to the states to ensure that right. Part A of this section reviews the Maryland decisions that have enforced *Batson* and developed workable rules for its daily implementation. Part B examines a recent trend in Maryland and federal case law to limit appellate review in cases concerning the equal protection rights of jurors. Part C reviews how *Batson* fits within the Maryland Constitution and whether the courts are willing to expand upon this concept.

A. *Batson Comes to Maryland*

There are two main issues in any *Batson* challenge of suspect peremptory strikes. The first issue is whether the defendant has shown a prima facie case of discriminatory peremptory challenges.¹⁰⁷

105. As the next section will reveal, Maryland fits into this category of states.

106. See *State v. Levinson*, 795 P.2d 845 (Haw. 1990); *State v. Alvarado*, 534 A.2d 440 (N.J. Super. Ct. Law Div. 1987); *People v. Kern*, 554 N.E.2d 1235 (N.Y.), cert. denied, 498 U.S. 824 (1990). Some courts went well beyond the *Batson* holding. In *State v. Scholl*, 743 P.2d 406 (Ariz. Ct. App. 1987), the court addressed the issue of a prosecutor's discriminatory nonuse of his peremptory challenges. *Scholl*, 743 P.2d at 407. In the jury selection process at issue, the jury venire consisted of twenty-four persons. *Id.* The venire's only black member was number twenty-three on the list. *Id.* The defense counsel used all six allotted peremptory challenges. *Id.* The prosecutor struck, however, only four from the venire, leaving fourteen. *Id.*

In order to seat the twelve person jury, the clerk was required to strike the last two persons on the venire list. *Id.* The defendant claimed that because the prosecutor failed to use all of his peremptory challenges, the sole black member of the jury venire was excluded. *Id.* The trial court held that a prima facie case of discriminatory peremptory challenges had been established. *Id.* at 409. After hearing, and not accepting, the prosecutor's reason for not using all of his strikes, that "it was his practice not to exercise all of his peremptory challenges unless he had a reason for doing so," the trial court agreed to declare a mistrial so that the State could appeal. *Id.* at 407-08.

On appeal, the State argued that "the ruling in *Batson* applies only where the elimination of prospective jurors results from the affirmative exercise of peremptory challenges." *Id.* at 409. The court of appeals did "not believe that *Batson* should be read so narrowly. . . . There is no reason to differentiate between use and nonuse of peremptory challenges in determining whether the State is engaging in purposeful discrimination in its selection of jurors." *Id.* Yet the court of appeals while agreeing with the trial court that a prima facie case had been established, overruled the trial court's determination as to actual discrimination. *Id.* Recognizing that *Batson* did not require that the lone black juror be seated on the jury, the court of appeals found the prosecutor's reasoning to be race neutral. *Id.* at 409-10.

107. *Batson v. Kentucky*, 476 U.S. 79, 96-97 (1986).

The second issue is whether the prosecutor has come forward with proper neutral explanations for those challenges.¹⁰⁸ Much of the early post-*Batson* case law was concerned with the issue of when a prima facie case had been established.

Before the Court shifted its emphasis toward protecting the rights of the juror, the Maryland courts accepted the *Batson* definition concerning the establishment of a prima facie case of discriminatory peremptory challenges. According to the Court of Appeals of Maryland, the defendant:

1. must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race;
2. is entitled to rely on the fact that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate;
3. must show that those facts and any other relevant circumstances raise [a rebuttable presumption] that the prosecutor used that practice to exclude veniremen from the petit jury on account of their race.¹⁰⁹

Early cases gave the court of appeals an opportunity to examine the prima facie issue in a de novo review because most of the trial objections were issued under the burden of proof standard articulated in *Swain v. Alabama*.¹¹⁰ Consequently, the *Batson* standard was not applied in the trial setting.¹¹¹

In *Stanley v. State*,¹¹² the court of appeals held that the prosecutor's use of 80% of his peremptory challenges¹¹³ to remove blacks from the jury venire established a prima facie case of discrimina-

108. *Id.* at 97.

109. *Maryland v. Gorman*, 315 Md. 402, 410, 554 A.2d 1203, 1207 (1989) (citing *Batson v. Kentucky*, 476 U.S. 79 (1986)), *vacated*, 499 U.S. 971 (1991).

110. 380 U.S. 202 (1965); *see supra* note 35 and accompanying text.

111. If *Batson* had been cited in order to question a prosecutor's use of a peremptory challenge, the case was too new for the trial courts to understand the extent of its application. As one judge said: "I will tell you at this point I am the lowly trial judge, and I am at a loss as to what to do Maybe at some later date someone will tell me how to do it. They will have a problem, a real problem." *Stanley v. State*, 313 Md. 50, 68, 542 A.2d 1267, 1275-76 (1988).

112. 313 Md. 50, 542 A.2d 1267 (1988).

113. In Maryland, the number of peremptory challenges allowed per party is governed by the Maryland Rules. For criminal cases, the defendant and the prosecutor are allowed four strikes each, with additional strikes being added as the severity of the sentence increases. MD. RULES 4-313(a) (1993). In civil actions, each side is allowed four peremptory challenges, with additional strikes permitted according to the number of alternate jurors to be impanelled. MD. RULES 2-512(h) (1993).

tion.¹¹⁴ Following the Supreme Court's reasoning in *Batson*, the court of appeals determined that Maryland would examine all of the relevant circumstances in the selection procedure when addressing their constitutionality.¹¹⁵

In *Tolbert v. State*,¹¹⁶ the prosecutor used his first four peremptory challenges to strike black jurors.¹¹⁷ As a result of the prosecutor's actions, the court began to recognize the sometimes informal manner in which a *Batson* challenge will be raised and then dealt with by the trial court.

Although the trial court did not expressly so state, the clear implication raised by the court in calling for the prosecutor to explain why he was striking only black individuals was that the court believed that Tolbert had met his burden to make a prima facie showing of racial discrimination.¹¹⁸

The trial court determined that Tolbert had established a prima facie case even though his defense counsel only mentioned to the judge that the first four peremptory challenges had been used on black jurors, and had made no "formal" *Batson* challenge.¹¹⁹ The court of appeals concluded that the prosecutor's use of peremptory challenges constituted "a prima facie showing of racial discrimination."¹²⁰

Much of the early post-*Batson* case law across the country focused on the proper establishment of a prima facie case of discriminatory peremptory challenges. Most jurisdictions did not set any

114. *Stanley*, 313 Md. at 73, 542 A.2d at 1278. That three blacks remained on the final jury panel was not determinative. "[T]he question is whether the state exercised any of its strikes for a racially discriminatory reason . . ." *Id.* at 72, 542 A.2d at 1278 (quoting *Powell v. State*, 355 S.E.2d 72, 73 (Ga. Ct. App. 1987) (emphasis added)).

In a companion case, *Trice v. State*, the jury array contained only one black member. When the prosecutor used a peremptory challenge to strike this individual from the panel, the defendant made a *Batson* claim. *Id.* at 82, 542 A.2d at 1282. Due to *Batson*'s new status, however, the prosecutor did not believe he had to explain his peremptory challenges, and the judge let the matter drop. *Id.* at 82-83, 542 A.2d at 1283. In light of this event, and the fact that no black would serve on the jury, the court of appeals felt a prima facie case of discriminatory peremptory challenges had been proven. *Id.* at 87-88, 542 A.2d at 1285.

115. For example, a court would look for "a 'pattern' of strikes against black jurors in the particular venire, or the prosecutor's questions and statements during the voir dire examination and the exercise of peremptory challenges might give rise to or support or refute the requisite showing." *Id.* at 60-61, 542 A.2d at 1272 (citing *Batson v. Kentucky*, 476 U.S. 79, 97 (1986)).

116. 315 Md. 13, 553 A.2d 228 (1989).

117. *Id.* at 17, 553 A.2d at 230.

118. *Id.* at 18, 553 A.2d at 230.

119. *Id.*

120. *Id.*

specific limits regarding how many jurors needed to be struck before a prima facie case could be shown.¹²¹ Those jurisdictions took an approach similar to *Stanley*, where all or nearly all of the government's peremptory challenges needed to be used on blacks in order to establish a prima facie case.¹²² But again, the *Batson* challenge tended to be informal and more often than not the judge was willing to ask the prosecutor for justification. As *Tolbert* pointed out, the quick decision to ask for justification established a prima facie case, whether the judge meant to or not.¹²³

The second issue to be addressed in a *Batson* analysis is the prosecutor's justification for using the peremptory challenges. Developing guidelines to evaluate this justification proved to be more troublesome to the Court than the initial prima facie issue. Once a prima facie case is established "[a] new trial will be required if the State cannot produce satisfactory nondiscriminatory reasons for every peremptory challenge exercised to exclude a black juror."¹²⁴ "The State has the burden of showing that 1) a reason other than the race of the juror did exist, and 2) the reason has some reasonable nexus to the case and was in fact the motivating factor in the exercise of the challenge."¹²⁵

121. In these early cases, it should be noted that the law was focused upon the rights of the criminal defendant. The striking of a juror had to affect the defendant, unlike present law, where the strike is examined for its effect on a particular juror. Therefore, the exclusion of one juror alone rarely raised an issue.

122. See *United States v. Battle*, 836 F.2d 1084 (8th Cir. 1987) (prima facie case established where prosecutor used five of six peremptory challenges to strike five of the seven blacks from the jury panel); *Fleming v. Kemp*, 794 F.2d 1478 (11th Cir. 1986) (prima facie case established where prosecutor used eight of ten peremptory challenges to strike eight of the ten blacks from the jury panel); *Ex Parte Branch*, 526 So. 2d 609 (Ala. 1987) (prima facie case established where prosecutor excluded six of the seven blacks from the jury venire); *Powell v. State*, 355 S.E.2d 72 (Ga. 1987) (use of nine of ten peremptory challenges to exclude nine of the twelve blacks from the jury panel established prima facie case).

Some courts were also willing to find a prima facie case when all available blacks were excluded from the panel. See *United States v. Cloyd*, 819 F.2d 836 (8th Cir. 1987) (sole black excluded); *United States v. Love*, 815 F.2d 53 (8th Cir.) (sole black excluded), *cert. denied*, 484 U.S. 861 (1987); *United States v. Thompson*, 827 F.2d 1254 (9th Cir. 1987) (all four blacks on panel excluded).

Maryland courts now allow an inference of discrimination to be drawn from the fact that one hundred percent of a protected group's members have been struck from the panel, even if the group was originally represented by only one member. *Mejia v. State*, 328 Md. 522, 616 A.2d 356 (1992).

123. This set up a much easier avenue for appeal than if the trial judge had dismissed the claim outright. See *infra* part IV.C.

124. *Stanley v. State*, 313 Md. 50, 92, 542 A.2d 1267, 1288 (1988).

125. *Chew v. State*, 317 Md. 233, 247, 562 A.2d 1270, 1277 (1989).

A prosecutor must make such a showing for every questionable strike because the "State will not be allowed one 'free discriminatory strike.'"¹²⁶ This rationale appears to fit nicely with the changing nature of the right created by *Batson* and its current concern with the individual juror.¹²⁷ The court of appeals has held that once a prima facie case of discriminatory peremptory challenges is established, the end result of the jury selection is immaterial with respect to the explanation for challenging black jurors.¹²⁸ Even if the process concludes with twelve black jurors trying the case of a black defendant, the prosecutor will still need to provide a nondiscriminatory reason for "every peremptory challenge exercised to exclude a black juror."¹²⁹

The level of justification required of a prosecutor is usually not that demanding. It can be imagined that a variety of nondiscriminatory reasons could be conjured up by an offending prosecutor who does not want to admit to using race-based peremptory challenges.¹³⁰ The courts have followed the Supreme Court in holding that the state's justifications for its peremptory challenges "need not rise to the level justifying exercise of a challenge for cause . . . [and] reasons need not be scientifically verifiable or politically pleasing. They need only be honest and racially neutral."¹³¹

126. *Stanley*, 313 Md. at 93, 542 A.2d at 1288.

127. When examining the equal protection right granted in *Batson*, it would be rational to assume that the final analysis would focus on the pattern of strikes by the prosecutor. With the right centered on the defendant, it may be argued that discriminating against one juror will not deprive a defendant of equal protection—a violation depends on whether the government's peremptory challenges have affected the final panel.

With the equal protection right on the juror, however, the government's reason for striking each and every juror becomes important, because the violation occurs with respect to the individual. In these instances, the end result of the selection process would not matter.

128. *Tolbert v. State*, 315 Md. 13, 19, 553 A.2d 228, 232 (1989).

129. *Id.* (citing *Stanley*, 313 Md. at 92, 542 A.2d at 1288). This view is consistent with the Supreme Court's view in *Batson*. However, the *Tolbert* court's view seems a more fitting rationale for applying the equal protection right of the juror.

130. See generally *Chew v. State*, 317 Md. 233, 562 A.2d 1270 (1989) (holding that peremptory challenge was justified because the juror's occupation was shown as a laborer—generally the same employment background as defendant); *Brash-ear v. State*, 90 Md. App. 709, 603 A.2d 901 (1992) (holding that peremptory challenge was justified because juror had long hair, dressed casually, and made eye contact with defendant in a manner which suggested sympathy with defendant); *Simpkins v. State*, 79 Md. App. 687, 558 A.2d 816 (1989) (holding that peremptory challenge was justified because prospective juror worked for Social Security Administration and those who do that work are seen as sympathetic to defendants).

131. *Stanley v. State*, 85 Md. App. 92, 100-01, 582 A.2d 532, 536 (1990) (citation omitted), *on remand from* 313 Md. 50, 542 A.2d 1267 (1988) [hereinafter *Stanley II*]. But see *supra* note 56 and accompanying text.

Because *Batson* was being used to protect the defendant's equal protection right, the courts have allowed justifications based upon age,¹³² occupation,¹³³ and until recently, gender.¹³⁴ Nevertheless, courts have refused to allow justifications based upon appearance and demeanor, warning prosecutors: "[T]his may be a difficult explanation to sustain."¹³⁵ Recognizing the rationale in Justice Marshall's concurring opinion in *Batson*, the court of special appeals has stated the following:

A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen" or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported.¹³⁶

Early in the post-*Batson* period this rationale commanded some respect; however, recent decisions have relaxed such scrutiny.

B. *Extending Batson in Maryland*

When the Supreme Court switched its emphasis from the equal protection rights of the defendant to those of the juror, Maryland seemed to forestall an expansive application of *Batson* challenges. Part of the problem resulted from the early post-*Batson* decisions in which the Court of Appeals of Maryland first recognized the right as applicable to criminal defendants. When Maryland adopted *Batson* in *Stanley v. State*,¹³⁷ it did so because the United States Constitution required it to do so, and not because the Maryland Constitution compelled such a guarantee.¹³⁸ In adopting *Batson*, however, the court of appeals continued to affirm that the peremptory challenge

132. See, e.g., *Chew*, 317 Md. at 245, 562 A.2d at 1276.

133. *Id.*

134. *Tolbert v. State*, 315 Md. 13, 23 n.7, 553 A.2d 228, 232 n.7 (1989). In *Tolbert*, the court stated, "[W]e have no need to reach and expressly do not decide whether the rulings of *Batson v. Kentucky* extend to gender or other discrimination in the use of peremptory challenges." *Id.* (citation omitted). For the current treatment of gender-based peremptory challenges, see *infra* notes 148-71 and accompanying text and notes 224-32 and accompanying text.

135. *Chew*, 317 Md. at 247, 562 A.2d at 1277.

136. *Stanley II*, 85 Md. App. at 105, 582 A.2d at 538 (quoting *Batson v. Kentucky*, 476 U.S. 79, 106 (1986) (Marshall, J., concurring)).

137. 313 Md. 50, 542 A.2d 1267 (1988).

138. *Id.* at 63, 542 A.2d at 73. See also *Gray v. State*, 317 Md. 250, 252, 562 A.2d 1278, 1279 (1989); *State v. Gorman*, 315 Md. 402, 417, 554 A.2d 1203, 1210 (1989), *vacated*, 499 U.S. 971 (1991); *Tolbert*, 315 Md. at 24, 553 A.2d at 232-33.

was an important part of the trial of an accused and should not be abolished.¹³⁹

Maryland courts have employed their reverent attitude toward an accused's use of peremptory challenges frequently, never extending the equal protection right beyond what the Supreme Court specifically detailed. In *State v. Gorman*,¹⁴⁰ the court of appeals heard its first *Batson* claim from a white defendant.¹⁴¹ However, because *Gorman I* was decided before *Powers v. Ohio*,¹⁴² the court of appeals refused to recognize the equal protection rights of the black jurors. Utilizing the following rationale, the court declined to go beyond the Supreme Court:

We have learned that it is not wise to prophesy what the Supreme Court will do or to anticipate how it will rule when an unresolved question comes before it. We are content, as was the Supreme Court, to leave the determination of issues unresolved in *Batson* to future litigation.¹⁴³

The court's decision in *Gorman I* is somewhat understandable, because when the decision was rendered the Supreme Court only recognized the equal protection right of the criminal defendant. The court of appeals in *Gorman I* was "unable to conceive of a sound rationalization as to how the peremptory striking of blacks from the . . . panel would deny a white defendant equal protection of the laws."¹⁴⁴

139. The court adopted language from *Batson*: "[N]or do we think that this historic trial practice, which long has served the selection of an impartial jury, should be abolished" *Stanley*, 313 Md. at 63, 542 A.2d at 1273 (quoting *Batson v. Kentucky*, 476 U.S. 79, 99 n.22 (1986)).

140. 315 Md. 402, 554 A.2d 1203 (1989), [hereinafter *Gorman I*], *vacated*, 499 U.S. 971 (1991).

141. At trial, when the prosecutor excluded the only two blacks from the panel, the trial judge refused to hear the *Batson* challenge made by the defendant. *Id.* at 404, 554 A.2d at 1204. In the defendant's initial appeal, the decision of the trial court was affirmed by the court of special appeals. *Gorman v. State*, No. 85-897 (Md. Ct. Spec. App. Mar. 11, 1986) (unreported). His appeal via certiorari was denied by the court of appeals, but was subsequently granted by the U.S. Supreme Court. *Gorman v. Maryland*, 480 U.S. 913 (1987). The Court remanded for further consideration in light of *Griffith v. Kentucky*, 479 U.S. 314 (1987) (holding that in some circumstances *Batson* may be applied retroactively). On remand, the court of special appeals reversed the trial court and remanded for a new trial. *Gorman I*, 315 Md. at 405, 554 A.2d at 1204. The state appealed from this decision and certiorari was granted by the court of appeals. *Id.*

142. 499 U.S. 400 (1991).

143. *Gorman I*, 315 Md. at 415-16, 554 A.2d at 1209.

144. *Id.* at 416, 554 A.2d at 1210. Before the court of appeals could take such a step, the Supreme Court had to change its focus from the equal protection right of the criminal defendant to the equal protection right of the juror.

After the Supreme Court's decision in *Powers*, and the attachment of the equal protection right to the juror,¹⁴⁵ *Gorman II*¹⁴⁶ was heard. Given this new direction by the Supreme Court, the court of appeals found that a prima facie case of discrimination was established in the striking of the two black jurors.¹⁴⁷

With the right to equal protection for the juror firmly established by the Supreme Court in *Powers*, the court of special appeals, in *Eiland v. State*,¹⁴⁸ refused to extend that protection to cover peremptory challenges based on gender. The court of special appeals cited *Gorman I* for the proposition that equal protection coverage should not be extended beyond what the Supreme Court had specifically stated.¹⁴⁹ It should be noted, however, that in *Gorman I* the court of appeals could not imagine how the equal protection right could be expanded to cover a white defendant.¹⁵⁰ In *Eiland*, however, the court had no problem recognizing that such an equal protection right should probably exist:

[I]t is hard to imagine how the scrutiny of the Equal Protection Clause could stop at discrimination aimed only at blacks and Hispanics rather than being aimed at racially motivated peremptories used against members of any race. It is hard to imagine why it should not also be aimed at gender-based peremptories directed at women or at men. It is hard to imagine that it should not be aimed at peremptories based upon a juror's religion.¹⁵¹

Because the Supreme Court had yet to extend *Batson* to cover gender, and the court of appeals had never accepted the *Batson* guarantee as part of Maryland's constitutional law, the court of special appeals refused to do what it deemed rational.

It is arguable that the *Eiland* court had specific guidance in the Maryland Constitution to enable it to reach a different result. As discussed previously, the right to equal protection in the use of peremptory challenges should extend to all suspect classifications.¹⁵² Maryland's Constitution has an Equal Rights Amendment that makes

145. See *supra* notes 61-70 and accompanying text.

146. *State v. Gorman*, 324 Md. 124, 596 A.2d 629 (1991) [hereinafter *Gorman II*].

147. *Id.* at 129, 596 A.2d at 631.

148. 92 Md. App. 56, 607 A.2d 42 (1992), *rev'd sub nom.* *Tyler v. State*, 330 Md. 261, 623 A.2d 648 (1993).

149. *Id.* at 90-91, 607 A.2d at 59.

150. *Gorman I*, 315 Md. 402, 416, 554 A.2d 1203, 1209-10 (1989), *vacated*, 499 U.S. 971 (1991).

151. *Eiland*, 92 Md. App. at 88, 607 A.2d at 58.

152. See *supra* text accompanying note 49.

all gender classifications suspect.¹⁵³ Prior to *Eiland*, states with similar protections had expanded the scope of *Batson* to include gender-based peremptory challenges.¹⁵⁴ In *Eiland*, the court of special appeals' refusal to do so was grounded on the basis that the *Batson* right had never been accepted under the Maryland Constitution in the first place.¹⁵⁵ When *Eiland* was heard on review with a companion case, *Tyler v. State*, the Court of Appeals of Maryland addressed both the Maryland constitutional issue and the gender issue.¹⁵⁶

In *Tyler*, the court of appeals' first step was to include the *Batson* protection within the Maryland Constitution.¹⁵⁷ In deciding *Batson*, the Supreme Court relied on the Equal Protection Clause of the Fourteenth Amendment.¹⁵⁸ Although Maryland has no express equal protection clause, the *Tyler* court recognized that the concept of equal treatment is embodied in Article 24 of the Maryland Declaration of Rights, which is Maryland's functional equivalent of the Fourteenth Amendment.¹⁵⁹ While Maryland courts must follow the Supreme Court's directives as issued through the Fourteenth Amendment, adoption into Maryland constitutional law requires specific acknowledgment.¹⁶⁰ In *Tyler*, the court of appeals recognized past case law that equated the federal clause with its Maryland counterpart.¹⁶¹ Having determined that Supreme Court decisions are

153. MD. CONST. art. 46 states the following: "Equality of rights under the law shall not be abridged or denied because of sex." The effect of this article is to render all "state-sanctioned sex-based classifications suspect." *State v. Burning Tree Club, Inc.*, 315 Md. 254, 269, 554 A.2d 366, 374, *cert. denied*, 493 U.S. 816 (1989).

154. See *State v. Burch*, 830 P.2d 357 (Wash. Ct. App. 1992). In *Burch*, the court stated that the "protections provided by the ERA go beyond those of the equal protection guaranty under the federal constitution." *Id.* at 362 (citations omitted).

155. "The *Batson* principle . . . is not and never has been a part of Maryland law. We cannot extend what we have never adopted." *Eiland*, 92 Md. App. at 92, 607 A.2d at 60.

156. *Tyler v. State*, 330 Md. 261, 623 A.2d 648 (1993).

157. *Id.* at 265, 623 A.2d at 650.

158. *Batson v. Kentucky*, 476 U.S. 79, 85 (1986).

159. Article 24 of the Maryland Declaration of Rights states, "[N]o man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." MD. CONST. art. 24.

160. See *Erbe v. State*, 276 Md. 541, 544-45, 350 A.2d 640, 642 (1976); *Smith v. State*, 276 Md. 521, 527, 350 A.2d 628, 632 (1976).

161. The court stated the proposition as follows:

[W]e deem it settled that this concept of equal treatment is embodied in the due process requirement of Article 24 of the Declaration of Rights. . . . Article 24 has been interpreted to apply 'in like manner and to the same extent as the Fourteenth Amendment of the Federal

“‘persuasive as we undertake to interpret Article 24,’”¹⁶² the court of appeals brought *Batson* within Maryland constitutional protection: “‘So we are brought within the *Batson* framework not only by the Fourteenth Amendment to the Constitution of the United States, but by the equal protection guarantees of Art. 24 of our Declaration of Rights.’”¹⁶³

Once this barrier had been crossed, the court took the logical and constitutionally necessary next step by holding that gender-based peremptory challenges are a form of unconstitutional discrimination.¹⁶⁴ The court of appeals simply applied Supreme Court precedent to a Maryland constitutional provision to reach its holding in *Tyler*. The court began its opinion by finding that the Supreme Court had based its protection from discriminatory peremptory challenges on whether a juror belonged to a “suspect classification.”¹⁶⁵ In addition, Maryland’s Equal Rights Amendment provides that “‘classifications based on gender are suspect and are subject to strict scrutiny.’”¹⁶⁶ The court wed the two concepts with the following reasoning:

The Equal Rights Amendment is pulled into the orbit of *Batson* by the equal protection guarantees of Art. 24 of our Declaration of Rights. *Batson* held that the equal protection guarantees forbid the State . . . to use peremptory challenges to exclude potential jurors solely on account of their race The Supreme Court deemed race to be a suspect classification subject to strict scrutiny. We have held that because of Art. 46 sex, like race, is a suspect classification subject to strict scrutiny. Therefore, under Maryland constitutional law, the State may not use peremptory challenges to exclude potential jurors because of their gender.¹⁶⁷

In reviewing the trial transcript, the *Tyler* court found that the prosecutor had openly stated that it was the State’s desire to seat

Constitution,’ While it is true . . . that the equal protection guaranties of Article 24 and the Fourteenth Amendment are independent, capable of divergent effect, it is apparent that the two are so intertwined that they, in essence, form a double helix, each complementing the other.

Tyler, 330 Md. at 264-65, 623 A.2d at 650 (quoting Attorney General v. Waldron, 289 Md. 683, 704-05, 426 A.2d 929, 940-41 (1981) (citations omitted)).

162. *Id.* at 265, 623 A.2d at 650 (quoting *Waldron*, 289 Md. at 705, 426 A.2d at 941 (1981)).

163. *Id.* at 265, 623 A.2d at 650.

164. *Id.* at 270, 623 A.2d at 653.

165. *Id.* at 263, 623 A.2d at 649-50.

166. *Id.* at 266, 623 A.2d at 651 (quoting *Murphy v. Edmonds*, 325 Md. 342, 357 n.7, 601 A.2d 102, 109 n.7 (1992)).

167. *Id.* at 266, 623 A.2d at 651.

more men on the jury than women.¹⁶⁸ Due to this blatant admission of gender bias, the court of appeals ordered a new trial.¹⁶⁹

The court's opinion in *Tyler* is not, however, as broad a statement as it might first appear. The court was careful to limit its language to provide only those protections outlined in *Batson*.¹⁷⁰ Indeed, *Tyler* presented a factual background similar to *Batson*—the State's use of peremptory challenges in a criminal trial. According to the language of *Tyler*, that is the only scenario where gender-based peremptory challenges are forbidden: "[T]he State [is prohibited] in a *criminal prosecution* from using peremptory challenges so as to exclude a person from service as a juror because of that person's sex."¹⁷¹

In order to limit the use of gender-based peremptory challenges to the State in a criminal prosecution, the court appeared to misapply *Batson*, and seemingly forgot to apply the remainder of the cases in the *Batson* line. As this Comment has discussed, *Batson* set out two themes. The major line of reasoning in *Batson* concerned the equal protection rights of the criminal defendant.¹⁷² A minor element of the Court's decision was the impact that discriminatory peremptory challenges had on a potential juror.¹⁷³ For its decision in *Tyler*, if the court of appeals had wished to rely solely on *Batson*, then the equal protection right should have protected the criminal defendant rather than the juror.¹⁷⁴

Because the court of appeals had to base its decision in *Tyler* on the rights of the juror, it needed to apply the secondary theme of *Batson*. Because the rights of the juror were only subsidiary in *Batson*, the court of appeals should have relied on *Powers*, *Edmon-*

168. *Id.* at 267-68, 623 A.2d at 651-52. At trial, the prosecutor and the reviewing judge relied on the fact that the Supreme Court had not ruled against gender based peremptory challenges. *Id.* Therefore, the prosecutor openly submitted any reason, besides race, to explain the strikes. *Id.* at 268, 623 A.2d at 652.

169. *Id.* at 271, 623 A.2d at 653.

170. *Id.* at 266, 623 A.2d at 651.

171. *Id.* at 270, 623 A.2d at 653 (emphasis added).

172. *Batson v. Kentucky*, 476 U.S. 79, 85-87 (1986).

173. *Id.* at 87.

174. If Maryland continues to limit the application of *Batson* to peremptory challenges issued by the State, the question of whose rights are being protected—the juror's or the criminal defendant's—is merely a matter of semantics. It hardly matters to the criminal defendant whether he is allowed to argue his rights or, through third-party standing, argue the rights of the juror. Either way, the ability to object to a strike by the State and to appeal that determination is utilized by and benefits the criminal defendant.

Now that the right has been placed with the juror, the court will have a difficult time following the limitation set out in *Tyler*. If the right is not that of the criminal defendant, what reason is there to deny the application of *Edmonson* (civil parties' use) and *McCullum* (criminal defendant's use)?

son, and *McCollum*—cases where the Supreme Court set forth the equal protection right of the juror as primary.¹⁷⁵ To have acknowledged these cases in the context of gender, however, would have been to invite expansion beyond merely the State's use of discriminatory peremptory challenges.

C. *Maryland and the Process of Appellate Review*

If one recognizes the informal nature of the *Batson* challenge in a proceeding,¹⁷⁶ one realizes the essential nature of appellate review. Early cases established rules regarding the scope of appellate review, and the court of appeals recognized, as did the Court in *Batson*, that an appellate court should “give great deference to the first level findings of fact made by a trial judge.”¹⁷⁷ The court of appeals also held, however, that “[w]hen a claim is based upon a violation of a constitutional right it is our obligation to make an independent constitutional appraisal from the entire record.”¹⁷⁸ This appraisal goes to the “ultimate second level fact, the existence or non-existence of neutral, nonracial reasons for striking the black venire members.”¹⁷⁹ In cases such as *Stanley v. State*, *Stanley II*, *Tolbert v. State*, and *Chew v. State*, the court of appeals and the court of special appeals were open to reviewing the record for the prosecutor's justifications; however, subsequent case law has all but precluded such review.

The Supreme Court and the Maryland courts soon began limiting the manner in which peremptory challenge appeals were reviewed. In Maryland, this review process began rather innocently in *Bailey v. State*,¹⁸⁰ where the court of special appeals examined a trial court's determination of whether a prima facie case of discriminatory peremptory challenges had been established. The court of special appeals examined court of appeals precedent,¹⁸¹ and held that for this first

175. See discussion *supra* parts III.A., III.B., III.C.

176. See *supra* text accompanying note 118. An objection to a peremptory challenge can be made, acted upon, and dismissed within a matter of moments.

177. *Chew v. State*, 317 Md. 233, 245, 562 A.2d 1270, 1276 (1989). The “first level” finding is the determination of whether a prima facie case of discriminatory peremptory challenges exists. *Id.* at 244-45, 562 A.2d at 1275-76.

178. *Tolbert v. State*, 315 Md. 13, 24, 553 A.2d 228, 232 (1989) (quoting *Harris v. State*, 303 Md. 685, 697, 496 A.2d 1074, 1080 (1985)).

179. *Stanley v. State*, 85 Md. App. 92, 100, 582 A.2d 532, 536 (1990), *cert. denied*, 322 Md. 240, 587 A.2d 247 (1991); see also *Chew*, 317 Md. at 245, 562 A.2d at 1276 (“appellate court will . . . make an independent constitutional appraisal concerning the existence of neutral, non-racial reasons for the striking of a juror”).

180. 84 Md. App. 323, 579 A.2d 774, *cert. denied*, 321 Md. 225, 582 A.2d 531 (1990).

181. *Id.* at 328-30, 579 A.2d at 776-77; see *supra* note 175 and accompanying text.

level inquiry, the trial court's determination should be given great deference.¹⁸² To overturn the trial court's determination of whether a prima facie case had been established, therefore, the appellate court must find that the trial court's ruling was clearly erroneous.¹⁸³ The court of special appeals stated as follows:

It is the trial judge who is in close touch with the racial mood, be it harmonious or be it tense, of the local community, either as a general proposition or with respect to a given trial of high local interest. The trial judge is positioned to observe the racial composition of the venire panel as a whole, a vital fact frequently not committed to the record and, therefore, unknowable to the reviewing court The standard of review, therefore, is perforce that of whether the trial judge's fact finding . . . is clearly erroneous.¹⁸⁴

The clearly erroneous standard set forth in *Bailey* was limited to the first level finding of whether a prima facie case had been established. However, several later decisions by the court of special appeals applied the Supreme Court's decision in *Hernandez v. New York*,¹⁸⁵ and read *Bailey* too broadly, thereby severely limiting appellate review. In *Hernandez*, the Supreme Court focused upon both the first and second level inquiries made by the trial judge. The Court stated that the trial judge was in the best position to determine credibility:

In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based

182. *Bailey*, 84 Md. App. at 328, 579 A.2d at 776. "The determination of whether that threshold has been crossed is entrusted to the trial judge." *Id.* The defendant had requested that the court make an independent review, similar to what earlier cases had required when examining the second level fact finding. *See supra* notes 178-79. On review, the court of special appeals would not extend independent review to the first level finding. Relying on earlier case law, the court held that when examining the first level finding, a reviewing court should "not presume to second-guess the call by the 'umpire on the field' either by way of *de novo* fact finding or by way of independent constitutional judgment." *Bailey*, 84 Md. App. at 328, 579 A.2d at 776.

183. *Bailey*, 84 Md. App. at 329, 579 A.2d at 776.

184. *Id.* at 328-29, 579 A.2d at 776.

185. 500 U.S. 352 (1991).

on demeanor and credibility lies "peculiarly within a trial judge's province."¹⁸⁶

Relying upon this rationale, the Supreme Court rejected independent, de novo review in favor of the more deferential "clearly erroneous" standard for both levels of inquiry.¹⁸⁷ In spite of this ruling, the Court devoted considerable time to a discussion of the facts surrounding the challenged strikes and found that they were nondiscriminatory.¹⁸⁸

Unfortunately, later Maryland cases read *Bailey* as stating the same principle as *Hernandez*.¹⁸⁹ In its opinion in *Eiland v. State*, the court of special appeals credits *Bailey* with anticipating the *Hernandez* decision.¹⁹⁰ The court of special appeals relied on *Bailey* and *Hernandez* in order to ignore the standard of appellate review set out in *Chew v. State* and *Tolbert v. State*, stating: "There cannot be, by its very nature, an independent constitutional review at the appellate level . . ."¹⁹¹ Therefore, according to *Eiland*, when the trial judge hears the prosecutor's justification for the preemptory challenge issued, and believes it to be the truth, "[t]hat is really all there is to it."¹⁹²

As discussed in part IV.B., the court of special appeals' opinion in *Eiland* was decided before the *Batson* guarantee was incorporated

186. *Id.* at 365 (quoting *Wainwright v. Witt*, 469 U.S. 412, 428 (1985)).

187. *Id.* at 368-69. Indeed, the Court had a difficult time even understanding the claim.

Petitioner advocates "independent" appellate review of a trial court's rejection of a *Batson* claim. We have difficulty understanding the nature of the review petitioner would have us conduct. Petitioner explains that "[i]ndependent review requires the appellate court to accept the findings of historical fact and credibility of the lower court unless they are clearly erroneous. Then, based on these facts, the appellate court independently determines whether there has been discrimination." But if an appellate court accepts a trial court's finding that a prosecutor's race-neutral explanation for his preemptory challenges should be believed, we fail to see how the appellate court nevertheless could find discrimination. The credibility of the prosecutor's explanation goes to the heart of the equal protection analysis, and once that has been settled, there seems nothing left to review.

Id. at 366-67 (quoting Pet'rs Rep. Br. at 17).

188. *Id.* at 368-71.

189. *See, e.g., Mejia v. State*, 90 Md. App. 31, 38-39, 599 A.2d 1207, 1211 (1992) (holding that when reviewing a second level finding as to whether "an ultimate case of discrimination has been established," courts should not use *de novo* independent review, but should rather apply a clearly erroneous standard).

190. 92 Md. App. 56, 99, 607 A.2d 42, 65 ("[O]ur own analysis in *Bailey v. State*, of the appropriate standard of appellate review anticipated *Hernandez v. New York* and is in complete harmony with it . . ."), *rev'd on other grounds sub nom. Tyler v. State*, 330 Md. 261, 623 A.2d 648 (1993).

191. *Id.* at 97, 607 A.2d at 62.

192. *Id.* at 94, 607 A.2d at 61.

into the Maryland Constitution.¹⁹³ Prior to such incorporation, decisions were based upon Fourteenth Amendment law as determined by the Supreme Court.¹⁹⁴ Because *Eiland* had to be based upon the application of the Fourteenth Amendment, it is best seen as applying Supreme Court law via *Hernandez*, rather than expanding the basis of *Bailey*. Viewed as an application of *Hernandez*, the *Eiland* court's reading of *Bailey* does not have to be applied as precedent in future cases.

Because Maryland has now incorporated the *Batson* guarantee into its constitution, it has the opportunity to return to the prior line of analysis—independent review of second level findings. Because the Maryland Constitution can provide greater protection to individuals than can the United States Constitution, it would be a simple step for the courts to return to the line of precedent set out in *Stanley*, *Tolbert*, *Chew*, and *Bailey*, where the appellate courts took a more active role in determining whether the party presented a neutral explanation for the challenged peremptory strike.

Allowing independent appellate review would afford greater protection to the equal protection rights of jurors. The entire process of making and ruling on a *Batson* challenge can be accomplished in a matter of moments. In other situations, whole trials are devoted to the determination of whether a discriminatory act has occurred. Yet a *Batson* challenge, designed to protect the same constitutional right to equal protection of the laws, can be conducted with a few questions. Unfortunately, due to the ever-changing nature of this right, the judicial system has been unable to adopt a standard method for trial judges to determine whether a discriminatory act has occurred. This Comment does not advocate the use of a full scale trial within a trial in order to determine the validity of a *Batson* challenge. However, there should be some middle ground between a full trial and a quick question or two directed at the offending party. Until a middle ground is reached, independent appellate review of second level findings is necessary to protect jurors' equal protection rights.¹⁹⁵

V. REALITIES: CURRENT AND FUTURE

The Supreme Court's decision in *Georgia v. McCollum*,¹⁹⁶ barring a criminal defendant's use of race-based peremptory challenges,

193. See *Tyler v. State*, 330 Md. 261, 265, 623 A.2d 648, 650 (1993).

194. See *supra* notes 137-38 and accompanying text.

195. At the very least, independent review will allow the appellate courts to develop procedures necessary to make proper determinations. The appellate courts should address the following questions: Should the parties take an oath before being asked to explain their actions? Should cross-examination be allowed? If testimony is not under oath and subject to cross-examination, how is it preserved for appellate review?

196. 112 S. Ct. 2348 (1992).

should not have come as a surprise, as it was a logical extension of the path the Court had been traveling. Once the equal protection right attached to the juror, it made little sense to allow the criminal defendant the ability to discriminate while denying it to every other player in the field.¹⁹⁷

Because the Court has reached this stage, some realities need to be examined. This section will discuss the following three questions: (1) How could the *McCullum* court classify a criminal defendant as a state actor? (2) How far the courts are, or should be, extending protection to certain groups? (3) Does the *voir dire* system in Maryland actually promote discriminatory peremptory challenges?

A. *The Criminal Defendant as a State Actor*

Although it may have been logical to prohibit a criminal defendant from issuing discriminatory peremptory challenges, a major point in the Court's rationale in *McCullum* is suspect. In order to show a Fifth or a Fourteenth Amendment violation, the denial of equal protection must flow from a state actor.¹⁹⁸ In *McCullum*, the Court determined that the criminal defendant was acting in such a capacity when choosing a jury.¹⁹⁹

It may reasonably be argued that without the criminal defendant, there would be little need for a prosecutor. The earliest hint of practiced "law" came about when the ruling government punished those who disobeyed its edicts. From these early moments, these two entities have struggled against one another; the state to punish, the defendant to avoid punishment.²⁰⁰

Yet in *McCullum*, the Court viewed the State and the criminal defendant as one entity. To counter this position, the defendant cited *Polk County v. Dodson*²⁰¹ for the argument that the adversarial relationship between the defendant and the State would negate this "state actor" classification.²⁰² In re-examining *Polk County*, the Court decided that "the determination whether a public defender is a state actor for a particular purpose depends on the nature and

197. The denial to a criminal defendant of the right to discriminate against jurors should have become even more apparent when the Court decided *Powers*. In *Powers*, the criminal defendant's equal protection rights were seen as secondary to the juror's. *Powers v. Ohio*, 499 U.S. 400, 406-09 (1991). Given the hierarchy of rights, the Court could hardly continue to allow the secondary concern to affect the primary.

198. *See supra* note 66.

199. *McCullum*, 112 S. Ct. at 2356.

200. *See supra* note 91 and accompanying text.

201. 454 U.S. 312 (1981).

202. *McCullum*, 112 S. Ct. at 2356.

context of the function he is performing."²⁰³ The Court saw as determinative the fact that the defendant is choosing a jury, "a quintessential governmental body."²⁰⁴ Other commentators have treated the jury selection process as akin to a government personnel action.²⁰⁵ However, to view this selection procedure as a type of personnel function, simply seating a government body, seems absurd. The defendant is given use of the peremptory challenge precisely because of her adversarial relationship with the State.

While peremptory challenges are not constitutionally mandated,²⁰⁶ no one would suggest that it would be proper only for the government to have such power. Both sides utilize them for opposing purposes. Neither party is trying to select an impartial panel to adjudicate his claim. The selection of a jury, in fact, highlights the opposite positions between the two parties. The State is trying to punish; the defendant is trying to avoid punishment.

The Supreme Court has determined that a proper reading of *Polk County* requires that one examine the nature and context of the function that the criminal defendant is performing.²⁰⁷ If the true nature of the peremptory challenge is emphasized, it will be apparent that it is the traditional adversarial function envisioned by *Polk County*.

B. Who is Protected?

The primary focus in the area of equal protection rights and peremptory challenges has been, of course, the issue of race. The

203. *Id.*; *supra* note 91.

204. *McCollum*, 112 S. Ct. at 2356.

205. Barbara Underwood states that "jury selection takes place as part of a governmental proceeding, in a public courthouse, for public purposes Peremptory challenges are part of the process of constructing a decision-making body that exercises governmental power." Underwood, *supra* note 83, at 751.

Chesney and Gallagher view the selection process as "assist[ing] the government in its obligation to empanel an impartial jury." Chesney & Gallagher, *supra* note 38, at 1072. Like *McCollum*, Chesney and Gallagher cite *Branti v. Finkel*, 445 U.S. 507 (1980), for holding that a public defender would be a state actor when making personnel decisions. *Id.* These commentators view selecting a jury as being a similar personnel matter. *Id.* Chesney and Gallagher examined the public defender's job functions that the Court listed as adversarial in *Polk County*: "[T]o enter 'not guilty' pleas, move to suppress State's evidence, object to evidence at trial, cross-examine State's witnesses, and make closing arguments in behalf of defendants." *Id.* at 1074 (quoting *Polk County v. Dodson*, 454 U.S. 312, 320 (1981)). Chesney and Gallagher state, however, that peremptory challenges should not be on this adversarial list because such challenges are not constitutionally mandated, and therefore, their use is not part of this adversarial role. *Id.* at 1074.

206. *See supra* note 77.

207. *McCollum*, 112 S. Ct. at 2356.

black juror has been the main actor in almost every Supreme Court decision regarding the peremptory challenge.²⁰⁸ Yet supposedly, it is the juror who has been given the equal protection right, and not merely the black juror. Any juror should be free from government denial of equal protection of the laws. It seems logical that standard equal protection analysis should extend beyond race to all suspect classifications.

As the Supreme Court recognized in *Hernandez v. New York*, national origin is a protected suspect classification.²⁰⁹ Religion also fits into this category.²¹⁰ Gender was treated differently, however, because the Court has not labeled it as a suspect class covered by full strict scrutiny protection.²¹¹ Prior to the Supreme Court's recent opinion prohibiting gender-based peremptory challenges,²¹² several

208. See *Georgia v. McCollum*, 112 S. Ct. 2348 (1992); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991); *Powers v. Ohio*, 499 U.S. 400 (1991); *Batson v. Kentucky*, 476 U.S. 79 (1986); *Swain v. Alabama*, 380 U.S. 202 (1965). Only *Hernandez v. New York*, 500 U.S. 352 (1991), which dealt with discrimination based on national origin, did not feature a black juror but instead featured prospective Latino jurors.

209. 500 U.S. 352. See also *Government of Virgin Islands v. Forte*, 865 F.2d 59, 64 (3d Cir. 1989) (holding that whites are a protected group), *appeal after remand*, 904 F.2d 694 (3d Cir. 1990), *cert. denied*, 500 U.S. 954 (1991); *United States v. Chalan*, 812 F.2d 1302, 1313-14 (10th Cir. 1987) (holding that Native-Americans are a protected group); *United States v. Biaggi*, 673 F. Supp. 96, 100-02 (E.D.N.Y. 1987) (holding that Italian-Americans are a protected group), *aff'd*, 853 F.2d 89 (2d Cir. 1988), *and cert. denied*, 489 U.S. 1052 (1989); *Commonwealth v. Gagnon*, 449 N.E.2d 686, 690-93 (Mass. App. Ct. 1983) (holding that persons of French-Canadian origin are a "group with distinct cultural and linguistic traditions" and as such are protected), *aff'd sub nom. Commonwealth v. Bourgeois*, 465 N.E.2d 1180 (Mass. 1984); *Miller v. State*, 733 S.W.2d 287, 289 (Tex. Ct. App. 1987) (holding that the *Batson* rationale protects Hispanics).

But see *Murchu v. United States*, 926 F.2d 50, 54-55 (1st Cir.) (holding that *Batson* protection applied only to groups which had been subject to discrimination, which did not include Irish-Americans), *cert. denied*, 112 S. Ct. 99 (1991); *United States v. Bucci*, 839 F.2d 825, 833 (1st Cir.) (same rationale for Italian-Americans), *cert. denied*, 488 U.S. 844 (1988).

210. See *United States v. Greer*, 939 F.2d 1076, 1085-86 (5th Cir. 1991) (holding that Jews are a protected group), *cert. denied*, 113 S. Ct. 1390 (1993); *People v. Johnson*, 767 P.2d 1047, 1054 (Cal. 1989) (holding that Jews are a protected group), *cert. denied*, 494 U.S. 1038 (1990); *People v. Kagan*, 420 N.Y.S.2d 987, 989-90 (N.Y. Sup. Ct. 1979) (pre-*Batson* decision protecting Jews).

But see *United States v. Clemmons*, 892 F.2d 1153, 1157 (3d Cir. 1989) (allowing prosecutor to strike juror as being "probably Hindu"), *cert. denied*, 496 U.S. 927 (1990); *People v. Malone*, 570 N.E.2d 584, 589-90 (Ill. App. Ct. 1991) (allowing prosecutor to strike juror with strong religious beliefs); *Chambers v. State*, 724 S.W.2d 440, 442 (Tex. Ct. App. 1987) (allowing prosecutor to strike juror because of membership in "fringe religion").

211. See, e.g., *Craig v. Boren*, 429 U.S. 190, 197-99 (1976).

212. *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994). See *infra* notes 224-32 and accompanying text for a more detailed discussion of this case.

lower courts had found that such challenges violated the *Batson* guarantee.²¹³

In *United States v. De Gross*,²¹⁴ the Ninth Circuit held that gender discrimination impacted a juror with the same harms as outlined in *Batson*, and was therefore illegal.²¹⁵ Of additional aid to the Ninth Circuit was the Supreme Court's holding that a defendant's Sixth Amendment rights were violated if women were excluded from juries.²¹⁶ In its analysis, the Ninth Circuit applied the proper "middle-level" test for gender classifications: Whether such challenges are substantially related to the achievement of an important governmental objective.²¹⁷ In doing so, the Ninth Circuit found that peremptory challenges "are a necessary means for achieving the important governmental objective" of seating an impartial jury.²¹⁸ Gender-based strikes are similar, however, to race-based strikes because they are "based either on the false assumption that members of a certain group are unqualified to serve as jurors, or on the false assumption that members of certain groups are unable to consider impartially the case."²¹⁹

When the Court of Special Appeals of Maryland was presented with this gender question in *Eiland v. State*,²²⁰ it chose to follow the

213. See *United States v. De Gross*, 960 F.2d 1433, 1438 (9th Cir. 1992) (en banc); *State v. Levinson*, 795 P.2d 845, 849 (Haw. 1990); *Commonwealth v. Hutchinson*, 481 N.E.2d 188, 191 (Mass. 1985); *Tyler v. State*, 330 Md. 261, 266, 623 A.2d 648, 651 (1993); *State v. Gonzales*, 808 P.2d 40, 49 (N.M. Ct. App.), cert. denied, 806 P.2d 65 (N.M. 1991); *People v. Irizarry*, 560 N.Y.S.2d 279, 280 (N.Y. App. Div. 1990).

But see *United States v. Nichols*, 937 F.2d 1257, 1262 (7th Cir. 1991), cert. denied, 112 S. Ct. 989 (1992); *United States v. Hamilton*, 850 F.2d 1038, 1042-43 (4th Cir. 1988), cert. denied, 493 U.S. 1069 (1990); *Fisher v. State*, 587 So. 2d 1027, 1030 (Ala. Ct. App.), cert. denied, 587 So. 2d 1039 (Ala. 1991), and cert. denied, 112 S. Ct. 1486 (1992); *People v. Thomas*, 559 N.E.2d 262, 267 (Ill. App. 1990), cert. denied, 112 S. Ct. 89 (1991); *State v. Adams*, 533 So. 2d 1060, 1062-63 (La. App. 1988), cert. denied, 540 So. 2d 338 (La. 1989); *State v. Pullen*, 811 S.W.2d 463, 467 (Mo. App. 1991), cert. denied, 114 S. Ct. 200 (1993); *State v. Culver*, 444 N.W.2d 662, 665-66 (Neb. 1989); *State v. Oliviera*, 534 A.2d 867, 869-70 (R.I. 1987).

214. 960 F.2d 1433 (9th Cir. 1992).

215. *Id.* at 1438-39. "[J]ust as racial discrimination in the judicial system is a stimulant to community prejudice which impedes equal justice for racial minorities, so too is gender discrimination in the judicial system a stimulant to community prejudice which impedes equal justice for women." *Id.* at 1438 (citations omitted).

216. *Id.* (citing *Taylor v. Louisiana*, 419 U.S. 522, 536 (1975)).

217. *Id.* at 1439.

218. *Id.*

219. *Id.* (citations omitted).

220. 92 Md. App. 56, 88-94, 607 A.2d 42, 57-61 (1992), rev'd sub nom. *Tyler v. State*, 330 Md. 261, 623 A.2d 648 (1993).

Fourth Circuit.²²¹ The Fourth Circuit, in *United States v. Hamilton*,²²² distinguished equal protection law generally from the "unique situation" involved with peremptory challenges and racial discrimination.²²³

The Supreme Court, in *J.E.B. v. Alabama ex rel. T.B.*,²²⁴ recently put an end to the differing opinions of the circuits and the states in regard to gender-based strikes. Justice Blackmun began the Court's analysis by recognizing past discrimination based on gender.²²⁵ The opinion then outlines the equal protection rule that holds that government policies which result in gender-based classifications are subjected to heightened scrutiny.²²⁶ "Thus, the only question is whether discrimination on the basis of gender in jury selection substantially furthers the State's legitimate interest in furthering a fair and impartial trial."²²⁷ The State of Alabama advanced the rationale that male and female jurors react differently to different issues.²²⁸ However, the Court would not "accept as a defense to gender-based peremptory challenges 'the very stereotype the law condemns.'"²²⁹

While barring gender-based strikes, the Court is careful to explain that this new limit does not mean the demise of the peremptory challenge.²³⁰ Peremptory challenges may be used to strike "any group or class of individuals normally subject to 'rational basis' review."²³¹

221. *Id.* at 89-91, 607 A.2d at 59.

222. 850 F.2d 1038 (4th Cir. 1988).

223. *Id.* at 1042.

224. 114 S. Ct. 1419 (1994).

225. *Id.* at 1422-24. Justice Scalia, in dissent, took exception to this theme: "Today's opinion is an inspiring demonstration of how thoroughly up-to-date and right-thinking we Justices are in matters pertaining to the sexes (or as this Court would have it, the genders), and how sternly we disapprove the male chauvinist attitudes of our predecessors." *Id.* at 1436 (Scalia, J., dissenting).

226. "[O]ur Nation has had a long and unfortunate history of sex discrimination, a history which warrants the heightened scrutiny we afford all gender-based classifications today." *Id.* at 1425 (quoting *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973)).

227. *Id.* at 1425.

228. *Id.* at 1426.

229. *Id.* (quoting *Powers v. Ohio*, 499 U.S. 400, 410 (1991)). The Court cites several studies that concluded that there was little or no difference in the way men and women reacted to issues at trial. *Id.* at 1426-27 nn.9-10. Justice Scalia points out that this stance appears to put the majority at odds with earlier Sixth Amendment "fair cross-section" cases. *Id.* at 1436 (Scalia, J., dissenting). He quotes from *Taylor v. Louisiana*: "'Controlled studies . . . have concluded that women bring to juries their own perspectives and values that influence both jury deliberation and result.'" *Id.* (quoting *Taylor v. Louisiana*, 419 U.S. 522, 532 (1975)).

230. *Id.* at 1429.

231. *Id.*

The Court then elaborates as to future uses of the peremptory challenge: "Even strikes based on characteristics that are disproportionately associated with one gender could be appropriate, absent a showing of pretext."²³²

Protection from discriminatory challenges now extends to mid-level equal protection rationale. The near future should bring substantial litigation fleshing out what other classifications will now enjoy protection.

C. Voir Dire in Maryland: Promoting Discrimination

Discriminatory attitudes are fostered through a multitude of factors. Personal experiences, upbringing, and social structure are some of the variables that shape an individual's view of "others." There is a strong thread of commonality running through these factors that impact discrimination. Information is said to be the key to informed, objective decision-making.²³³ If less information is available to a decision-maker, it is more likely that the end analysis will

232. *Id.* In a footnote the Court explains that strikes based on military service or persons employed as nurses may affect one gender more than the other. *Id.* at 1429 n.16. If no pretext is involved, however, the Court does not view these as unconstitutionally gender-based. *Id.* These examples lead to interesting speculation. If the case appeared to turn on a certain issue, would the Court allow the exclusion of all mothers or all fathers?

233. Judge Richard Posner has written extensively on the subject of the economics of law. What follows is his most basic explanation for discrimination based upon lack of information:

Racial discrimination has a number of possible causes. Sheer malevolence and irrationality are factors in many cases. . . . Race enters as a convenient factor identifying the members of the competing or exploited group. Another factor, however, is cost of information. To the extent that race or some attribute similarly difficult to conceal (sex, accent, etc.) is positively correlated with the desired characteristics, it is rational for people to use the attribute as a proxy for the underlying characteristic with which it is correlated ("statistical discrimination"). If experience has taught me (perhaps incorrectly) that most Mycenaeans have strong garlic breath, I can economize on information costs by declining to join a club that accepts Mycenaeans as members. Although I might be forgoing valuable associations with Mycenaeans who do not have strong garlic breath, this opportunity cost may be smaller than the information cost that more expensive sampling of Mycenaeans would entail.

RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 26.5 at 661 (1992).

Taken out of the economic field, the same principle can be stated in fairly simple terms: Through either lack of desire or lack of ability, people tend to judge the book by its cover. Judge Posner's analysis provides some rational basis to this old adage.

have been based upon personal biases.²³⁴ A striking example of action based upon race stereotyping due to lack of information is provided by the following comment by Reverend Jesse Jackson, made during a speech in Chicago decrying black-on-black crime:

There is nothing more painful to me at this stage in my life than to walk down the street and hear footsteps and start thinking about robbery—then look around and see somebody white and feel relieved.²³⁵

This cost-benefit analysis appears to fit nicely into the current status of the peremptory challenge in Maryland. Peremptory challenges are issued after the process of *voir dire*, and are based upon (1) the information received from the juror in response to *voir dire* questioning,²³⁶ and (2) the physical composition of the potential juror.²³⁷ If the information received during *voir dire* is limited, it is likely that a party will base its peremptory challenges on other factors

234. *The New Republic* once asked several individuals for their response to an article written by Richard Cohen in the *Washington Post Magazine*. *How Would You Respond? The Jeweler's Dilemma*, THE NEW REPUBLIC, Nov. 10, 1986, at 18. Cohen had reported that certain jewelry stores in Washington, D.C. had used a buzzer system to admit customers. *Id.* Through this system, store owners could refuse to admit customers if they feared a robbery. *Id.* Some store owners were excluding young black males as those individuals who were most likely to commit a robbery. *Id.* Cohen defended this discrimination, stating as follows: "[T]he mere recognition of race as a factor . . . is not in itself racism." *Id.*

Walter Williams, a Professor of Economics at George Mason University, responded as follows:

Men are not gods. Therefore, men face challenges gods would not have to endure—ignorance and uncertainty. To make decisions, we need to have information about the world around us. The information we gather is not only imperfect, it is costly as well. So we learn to economize by guessing, prejudging, and using stereotypes. . . . Can we say such a person is a sexist/racist? An alternative answer is that he is behaving like an intelligent Bayesian (Sir Thomas Bayes, the father of statistics). Inexpensively obtained information about race and sex is a proxy for information that costs more to obtain

Id.

235. The Rev. Jesse Jackson, Speech in Chicago, NEWSWEEK, Dec. 13, 1993, at 17.

236. This information consists not only of the actual answers given during *voir dire*, but also the form of the answer and the mannerisms reflected in giving the answer.

237. *Voir dire* in Maryland is governed by the Maryland Rules. Rule 4-312(c) states that each side is provided with a jury list "that includes the name, age, sex, education, occupation, and occupation of spouse" of each potential juror. MD. RULES 4-312(c) (1994). MD. RULES 4-312(d) states that the examination of jurors may be conducted by the parties or by the court in its discretion. *Id.* 4-312(d).

that may be discriminatory.²³⁸ Maryland, it seems, not only subscribes to the view that *voir dire* should be limited, but does so with the specific intent of limiting information for peremptory challenges.

In its 1992 decision of *Davis v. State*,²³⁹ the Court of Special Appeals of Maryland provided an in-depth review of the history of *voir dire* in Maryland. The court found two opposing views of *voir dire* currently in use.²⁴⁰ According to the court, Maryland had chosen

238. See *supra* notes 233-35 and accompanying text.

239. 93 Md. App. 89, 611 A.2d 1008 (1992), *aff'd*, 333 Md. 27, 633 A.2d 867 (1993). The main issue on appeal concerned the defendant's argument that the trial judge should have allowed him to ask an additional question of the jury panel as to whether any of the prospective jurors "had ever been a member of the law enforcement community or had a close relative or friend who was or has been a member of the law enforcement community." *Id.* at 92, 611 A.2d at 1009. The trial judge had previously asked only six questions to the panel. *Id.* Judge Moylan, writing for the majority, provided an extensive historical review in the hope of "reaffirm[ing]—categorically and for reporting—the well-settled limits that have long circumscribed and shall continue to circumscribe the *voir dire* examination of prospective jurors in Maryland" *Id.* at 91, 611 A.2d at 1009. Judge Moylan believed such finality was necessary to put an end to what he termed the "voguish 'Contention of the Year' for the September, 1991 Term"—"that defendants are entitled to a broader scope of inquiry during the jury selection process than is typically allowed." *Id.*

240. *Id.* at 93, 611 A.2d at 1010. The first view is an "expansive" one. *Id.* Under this view, questioning is addressed individually to jurors rather than *en masse*. *Id.* The questioning is usually done by the parties themselves, and the questions can reach beyond what is necessary to establish a challenge for cause. *Id.* Judge Moylan believes questioning works something like this:

The better to pursue those aims, young advocates (and old) pay handsome tuitions at exotic resorts to sit at the feet of storied masters of trial advocacy. They hear wondrous accounts of how virtually unfettered *voir dire* may in the hands of an astute psychologist be employed 1) to psychoanalyze the prospective juror so that the advocate can predict with almost mathematical certainty how the juror will react to a given fact pattern in the case that is about to unfold; 2) to "strike a deal" (a favorite cliché at such seminars) with a juror, so that if certain evidentiary developments come to pass, the juror is almost honor-bound to respond in the "agreed" fashion; and 3) to hypnotize or to condition the juror in advance of the trial proper as to the advocate's theory of the case. The fledglings hear endless tall tales of famous cases won or lost on *voir dire*. At the very least, these are rollicking good war stories told by entertaining spinners of yarns and everyone comes away with a sense of the tuition having been well-spent.

To this school of thought, mentor and pupil alike, expansive *voir dire* is the ultimate palladium of liberty, fair play, and justice. It is the jewel in the crown of trial by jury.

Id. at 94, 611 A.2d at 1010.

The second view is an "austere" one. *Id.* at 94-95, 611 A.2d at 1010. Under this view, questioning is done *en masse* by the trial judge, and is limited to those questions that would establish a challenge for cause. *Id.* at 95, 611

the "Spartan" view as early as 1905, and has yet to deviate from its rationale.²⁴¹ At the heart of this view is that a defendant is entitled to an "impartial jury and no more."²⁴² Therefore, *voir dire* should not be used to provide a party with "every last 'tilt' or 'edge' of favorable predisposition."²⁴³ Because the peremptory challenge is not constitutionally guaranteed, the court found no authority that mandated expansive *voir dire*.²⁴⁴

The court of special appeals determined that the main themes of the "austere" school of thought were well-settled law in Maryland. First, the nature and extent of *voir dire* is "entrusted to the wide discretion of the trial judge."²⁴⁵ From that discretion, the trial judge decides who is to conduct *voir dire*.²⁴⁶ Also, it is within the judge's discretion whether to question the jurors *en masse* or individually.²⁴⁷ Finally, the court turned to the permitted focus of the *voir dire* examination, outlining two goals of *voir dire*.²⁴⁸ The first goal was the constitutional guarantee of an impartial jury.²⁴⁹ The court again stressed that this goal only guaranteed an impartial jury and not an "ideal" or "perfect" jury from a litigant's point of view.²⁵⁰ In order to achieve this first goal, the challenge for cause is available to remove those jurors who cannot render an impartial verdict.²⁵¹

The second goal of *voir dire*, in those states that allow it, is to help a party better utilize peremptory challenges.²⁵² Because Maryland follows the more "austere" school of thought, the court rejected this second goal.²⁵³ The court held that "*voir dire* examination in

A.2d at 1010. Judge Moylan writes that this group views the first school of thought as "errant, if not grotesque, foolishness." *Id.* at 94, 611 A.2d at 1010.

241. *Id.* at 96, 611 A.2d at 1011 (discussing *Handy v. State*, 101 Md. 39, 60 A. 452 (1905)).

242. *Id.* at 95, 611 A.2d at 1011.

243. *Id.*

244. "When a constitution places no value on the *voir dire* guessing game itself, it is perforce indifferent on the sub-issue of informed guessing versus wild guessing." *Id.* at 95-96, 611 A.2d at 1011.

245. *Id.* at 103, 611 A.2d at 1014.

246. *Id.* at 105, 611 A.2d at 1015-16. The court noted that there has yet to be a case where the trial judge's decision has been viewed as a clear abuse of discretion. *Id.* at 106, 611 A.2d at 1016.

247. *Id.* at 106-08, 611 A.2d at 1016-17.

248. *Id.* at 108, 611 A.2d at 1017.

249. *Id.*

250. *Id.*

251. *Id.* at 108-09, 611 A.2d at 1017.

252. *Id.* at 109, 611 A.2d at 1017.

253. *Id.* at 109, 611 A.2d at 1017-18. The court found solid precedent for the rejection of this goal.

The constitutional right to an impartial jury is basically protected by questioning on *voir dire* examination aimed at exposing the existence

Maryland is designed to be employed exclusively in the service of the challenge for cause and not in the additional and gratuitous service of the peremptory challenge."²⁵⁴

Strictly limiting *voir dire* to aiding challenges for cause may indeed have a long history, but considering the changing nature of the peremptory challenge it may be time to adjust its application.²⁵⁵ However, the court of special appeals in *Davis* reasoned just the opposite:

[T]he appellant's invitation comes at a particularly unpropitious time in the life of the peremptory challenge. With more and more varieties of challenge for less than good cause coming under the cold glare of the Equal Protection Clause, the institution of the peremptory challenge is, for the moment at least, in inglorious retreat. Many doomsayers are predicting its drastic curtailment, if not its total abolition. It is hardly the occasion to expand its implementation.²⁵⁶

By refusing to expand the scope of *voir dire*, the courts are continuing to close down the amount of information available to parties. With limited inquiry into a juror's background and beliefs, a party may be more likely to issue a peremptory challenge on the basis of some "group" standard.²⁵⁷ The current *voir dire* standard

of cause for disqualification and the law of this State accordingly so limits the scope of the information which may be obtained as a matter of right; it does not encompass asking questions designed to elicit information in aid of deciding on peremptory challenges.

Id. (quoting *Couser v. State*, 282 Md. 125, 138-39, 383 A.2d 389, 397 (1978)).

254. *Id.* at 110, 611 A.2d at 1018.

255. In *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994), the Court recognized the need for informative *voir dire*:

If conducted properly, *voir dire* can inform litigants about potential jurors, making reliance upon stereotypical and pejorative notions about a particular gender or race both unnecessary and unwise. *Voir dire* provides a means of discovering actual or implied bias upon which the parties may exercise their peremptory challenges intelligently. See, e.g., *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 602 (1976) (Brennan, J., concurring in the judgment) (*Voir dire* "facilitate[s] intelligent exercise of peremptory challenges and [helps] uncover factors that would dictate disqualification for cause"); *United States v. Whitt*, 718 F.2d 1494, 1497 (10th Cir. 1983) ("Without an adequate foundation [laid by *voir dire*], counsel cannot exercise sensitive and intelligent peremptory challenges").

Id. at 1429 (alteration in original).

256. *Davis*, 93 Md. App. at 123, 611 A.2d at 1024-25.

257. Indeed, it may be rational for a party to act in such a way. If statistics show that on average a certain group will behave in a certain way or hold certain beliefs, it is rational to make a choice based on that group average, if that is all of the information that is available. See *supra* notes 217-19 and accompanying text.

in Maryland forces a party to make choices based on limited information. The court in *Davis* saw this as a choice between "informed guessing versus wild guessing."²⁵⁸ However, when "wild guessing" is properly equated with discriminatory practices, the need for a more informed choice is apparent.

VI. CONCLUSION

What has been outlined in the preceding pages is an effect that often occurs when the Supreme Court establishes a constitutionally guaranteed right. The rule is laid down by the Court, and it then takes decades to work out the kinks. The case of the peremptory challenge is no different. In effect, the Court has presented the potential juror with a fundamental right to equal protection of the laws, and yet has offered no adequate remedy to enforce that right. The Court has limited what little protection existed by restricting appellate review.

The peremptory challenge is an old trial tactic and very few, if any, litigators would be happy to see it obliterated. Both sides in a dispute desire the power to exclude certain people from the jury. While all of these strikes are based on some measure of discrimination, probably few are based on grounds that society believes should be protected. By allowing the peremptory challenge, however, the courts are permitting a system to operate that can invidiously discriminate with little or no detection. Either side in a dispute can harbor discriminatory motives, yet mask them in simple terms so that these routines pass constitutional muster. There are also situations, as in Maryland, where the jury selection process may even promote the usage of discriminatory peremptory challenges.

Procedurally, the courts are coming closer to the point when peremptory challenges will be impossible to use. As more groups come under the *Batson* protection, fewer non-discriminatory excuses are left to parties who wish to issue a strike. Everyone is subject to categorization by gender and race, and almost every rationalization for a strike can be traced back to one of these two categories.²⁵⁹ As

258. *Davis*, 93 Md. App. at 95-96, 611 A.2d at 1011.

259. A strike based on a juror's occupation has been held valid. See *Chew v. State*, 317 Md. 233, 245, 562 A.2d 1270, 1276 (1989); *Simpkins v. State*, 79 Md. App. 687, 695, 558 A.2d 816, 820 (1989). Many occupations are connected, however, to the sex or race of a person. While this link between occupations and sex or race may be changing, it does protect the rights of the juror. Can a strike based on someone's "looks" be valid? "Looks" are determined largely by gender and race. It is difficult, though not impossible, to disassociate one's self from one's race or sex.

Today, an entire industry exists whose purpose is to aid attorneys in the

the protections expand, the benefits of the peremptory challenge will soon be outweighed by its constitutional and administrative costs.

The future of the peremptory challenge is dim, and if one accepts the basis of the guarantee, that the equal protection right belongs to the juror, then its demise is long overdue. Justice Thomas, concurring in *McCullum*, summed it up well when he wrote:

In my view, by restricting a criminal defendant's use of such challenges, this case takes us further from the reasoning and the result of *Strauder* I doubt that this departure will produce favorable consequences. On the contrary, I am certain that black criminal defendants will rue the day that this court ventured down this road that will eventually lead to the elimination of peremptory strikes.²⁶⁰

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selection of juries. Rarely are recommendations based on an individual's unique characteristics and experiences. Rather, socioeconomic probability factors are used to determine how a particular juror "type" will act. See Drew Camp & Judith Camp, *Psychological Research and Jury Analysis*, ARK. LAW., Jan. 1991, at 9, 9; Mark Hansen, *Finding Sympathetic Jurors: William Kennedy Smith Defense Lawyer Reveals his Tactics*, A.B.A. J., Apr. 1992, at 29, 29; Howard Varinsky, *What Makes Jurors Tick?: The Expanding Role of Jury Consultants*, ARIZ. ATT'Y, Apr. 1992, at 16, 16.

260. *Georgia v. McCollum*, 112 S. Ct. 2348, 2359-60 (1992) (Thomas, J., concurring) (citation omitted). It must be recognized, however, that the peremptory challenge still exists. As this Comment forecasts the peremptory challenge's ultimate demise, other commentators have also issued faulty predictions. In his 1984 decision that predicted the entire *Batson* case line, including *McCullum*, Judge Richard Posner also saw the peremptory challenge's ultimate demise. See *supra* note 84.

If such [*Batson*] objections are allowed, it is hard to see how the peremptory challenge, which has been called "a necessary part of the trial by jury," will survive. Whenever counsel alleged that his opponent had a racial or similar type of motivation in exercising a peremptory challenge (whether he used that challenge to exclude a white or black — and it would have to be one or the other — or, extending the principle as one could hardly resist doing, a man or a woman, a Jew or a gentile, etc.) the opponent would have to come forward with a reason for wanting to exclude the juror. In other words he would have to provide good cause, or something very close to it; and the peremptory challenge would collapse into the challenge for cause.

United States v. Clark, 737 F.2d 679, 682 (7th Cir. 1984) (citation omitted).