A STRIKE AGAINST BLACK LIVES MATTER: A BATSON VIOLATION OR PRESERVING IMPARTIALITY

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INTRODUCTION

We are "a government of laws, not of men."[2] Yet an impartial, disinterested group of people ultimately stand between the accused and the power of the State to take his or her right to life and liberty away.[3] Our society wants to believe the jury system determines guilt or innocence on impartial and fair fact,[4] but that is not always the case as the jury is made up of people—each coming with biases, beliefs, perceptions.[5] The voir dire is the process the courts use to ensure members of the petit jury, those who determine guilt or innocence, will follow the judge's instructions and determine the outcome of the case based solely on the facts presented to them at trial.[6] The process differs slightly in federal and state courts as voir dire in federal court is conducted mainly by the judge, whereas, in most state courts the attorneys play a more active role in vetting jurors.[7]

The voir dire is not supposed to be a major part of the trial, but in recent jurisprudence it has come under closer scrutiny. Parties have weaponized the process, particularly prosecutors, by using discriminatory tactics to remove people from the jury pool based off their race, sex, and ethnicity.[8] In order to get into the particular legal questions of this Note, it is important to understand how members of the petit jury are selected or removed from sitting at trial—the ultimate objective to sit, as much as possible, an impartial jury.[9] The first step to seating a jury is a random

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[2] Richard Samuelson, *A Government of Laws, Not Men*, 17 CLAREMONT REV. BOOKS: J. POL. THOUGHT AND STATESMANSHIP,45, 46 (2017) (reviewing RICHARD RYERSON, JOHN ADAMS'S REPUBLIC: THE ONE, THE FEW, AND THE MANY (2016) and LUKE MAYVILLE, JOHN ADAMS AND THE FEAR OF AMERICAN OLIGARCHY (2016)) (quoting John Adams on the foundation of the American republic).

[3] Batson v. Kentucky, 476 U.S. 79, 86 (1986).

[4] Powers v. Ohio, 499 U.S. 400, 413 (1991).

[5] Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 U.C. IRVINE L. REV. 843, 847 (2015).

[6] *Id.* at 845.

[7] *Id.*

[8] *Batson*, 476 U.S. at 88 (holding that race-based peremptory challenges violate the Equal Protection Clause of the Fourteenth Amendment); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 145 (1994) (holding that gender-based peremptory challenges violate the Equal Protection Clause of the Fourteenth Amendment). The Supreme Court has only recognized peremptory challenges based solely upon the cognizable characteristics of race and gender as unconstitutional. However, this Note, will also examine lower court and state court rulings of challenges based on sexual orientation, religion, and certain group affiliations.

[9] Michael L. Neff, *In Defense of Voir Dire: Legal History and Social Science Demand Appropriate Voir Dire*, 17 GA. BAR J. 14, 15 (2011) (quoting Thomas Jefferson "I consider trial by jury as the only anchor ever imagined yet by man, by which a government can be held to the principles of its constitution.").

selection of members from the community.[10] Second, those selected are divided into a smaller group and sent to a courtroom for their specific case.[11] Lastly, the parties then can challenge jurors and try to have jurors they find not to be sympathetic to their side removed.[12] The Supreme Court has clearly opined that voir dire plays an essential part in protecting the defendant's right to an impartial jury allowing the judge and parties to discover potential bias in a venireperson.[13] An attorney may remove a venireperson by exercising a "challenge for cause" asking the judge to remove the juror for a reason of impartiality or bias or by using a peremptory strike.[14]

A peremptory strike allows an attorney to remove a venireperson from the jury pool for any reason, but they are statutorily limited to a set number.[15] The idea of a peremptory strike is it ensures the parties are given a "fair and impartial jur[y]" by allowing "each side to exclude those jurors it believes will be most partial toward the other side . . . eliminating extremes of partiality on both sides, thereby assuring the selection of a qualified and unbiased jury."[16] However, recent studies have made it increasingly clear prosecutors use peremptory strikes to create prosecution friendly juries by excluding minorities and women to create a nearly all-white male jury.[17]

As many Americans have begun to take a more active role in confronting systemic racism, Black Lives Matter (BLM) has become a mainstream political and civil rights group seeking change to society, focusing primarily on the judicial system.[18] Parties have begun to inquire into juror's support of BLM.[19] This inquiry has led to an increase in the use of peremptory strikes to remove supporters of BLM when the judge has refused to remove the juror for cause based on him or her supporting the group.[20] As BLM has become more prevalent in society, it is apparent that questions about a venireperson's support for the group will become more prevalent.[21] An issue courts now must decide is whether asking venirepersons about BLM and using a peremptory strike to remove the venireperson violates the Equal Protection Clause, or does using a peremptory strike on a BLM supporter provide a race-neutral reason ensuring a fair and impartial jury.[22]

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[10] Flowers v. Mississippi, 139 S. Ct. 2228, 2238 (2019).
[11] *Id.*
[12] *Id.*
[13] *J.E.B*, 511 U.S. at 143–44.
[14] Mark E. Wojcik, *Extending Batson to Peremptory Challenges of Jurors Based on Sexual Orientation and Gender Identity*, 40 N. ILL. U. L. REV. 1, 4 (2019).
[15] *Id.*
[16] *J.E.B.*, 511 U.S. at 147 (O'Connor J., concurring) (quoting Holland v. Illinois, 493 U.S. 474, 484 (1990)).
[17] ELISABETH SEMEL ET AL., WHITEWASHING THE JURY BOX: HOW CALIFORNIA PERPETUATES THE DISCRIMINATORY EXCLUSION OF BLACK AND LATINX JURORS, 13 (2020).
[18] Abbie Vansickle, *You Can Get Kicked Out of a Jury Pool for Supporting Black Lives Matter: But is it Legal? A California Appeals Court is Going to Decide*, THE MARSHALL PROJECT (Jul. 7, 2020, 6:00 AM), https://www.themarshallproject.org/2020/07/07/you-can-get-kicked-out-of-a-jury-pool-for-supporting-black-lives-matter [https://perma.cc/EYL2-4ZUR].
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*; Batson v. Kentucky, 476 U.S. 79, 86 (1986); U.S. CONST. amend. XIV, § 1.

North Carolina upheld the convictions of Black men despite the prosecutor asking a venireperson about their views on BLM and using a peremptory strike to then remove the juror.[23] However, Nevada ordered a new trial after criticizing the prosecutor for asking about BLM saying it was a pretextual reason to remove a Black juror.[24] In *State v. Gresham*, the Minnesota Court of Appeals affirmed a lower court decision that acknowledged "racial overtones" surrounding the prosecution's line of questioning, but declined to accept the defense's Batson challenge "because the . . . question[ing] did not establish purposeful discrimination based on the juror's race."[25] California is set to soon rule on a prosecutor peremptorily striking a Black woman for her answering on a questionnaire that she supports BLM.[26]

Part I of this Note reviews the Supreme Court's decision in *Batson v. Kentucky* and its progeny to eliminate the use of discriminatory peremptory strikes. Part II looks at how the lower courts and state courts have been expanding *Batson.* Part III shows how asking BLM impacts a juror's rights of Equal Protection and First Amendment rights. Part IV discusses how the defendant's rights to an impartial jury and a juror's right to be equally protected by the law require courts to not allow parties to ask about supporting BLM because it provides too easy of a pretextual reason to discriminate against minority juror members.

I. BATSON AND ITS PROGENY

In *Batson*, after the prosecutor used all of his peremptory strikes to remove all Black people from the venire, Mr. Batson, a Black man, was convicted by the jury of second-degree burglary and receiving stolen goods.[27] Mr. Batson argued that the prosecutor had violated his Sixth and Fourteenth Amendment right "to a jury drawn from a cross section of the community," and violated his right to equal protection of the laws.[28] The intention of the Supreme Court in *Batson* was to make it easier for a defendant to challenge a prosecutor from purposefully removing minorities from the jury when a person of their race stood accused.[29] The Court stated, "The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, or on the false assumption that members of his race as a group are not qualified to serve as jurors."[30] The Court made clear that not only does purposeful discrimination violate the Equal Protection Clause, it also calls into question the defendant's right to an impartial jury, the constitutional protection from "the arbitrary exercise of power by [a] prosecutor or judge."[31]

In *Batson*, the Supreme Court created a three step analysis to use when a party objects to the use of a peremptory strike based on an impermissible stereotype of a

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[23] State v. Campbell, 846 S.E.2d 804, 806-07, 811 (N.C. Ct. App. 2020).
[24] Cooper v. State, 432 P.3d 202, 206 (Nev. 2018).
[25] *See* State v. Gresham, No. A15-1691, 2016 Minn. App. Unpub. LEXIS 1104, at *1 (Minn. Ct. App. Dec. 19, 2016).
[26] Vansickle, *supra* note 18.
[27] *Batson*, 476 U.S. at 82–83.
[28] *Id.* at 83.
[29] *Id.* at 85–86.
[30] *Id.* at 86 (citation omitted).
[31] *Id.*

venire member.[32] First, the opponent to the strike must establish an "inference of purposeful discrimination" using "all relevant circumstances."[33] This requires the defendant to establish (a) "that he is a member of a cognizable racial group"; (b) the prosecution has improperly utilized its peremptory strikes to "remove from the venire[,] members of the defendant's race"; (c) that he "is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate'"; and (d) that the surrounding "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."[34] Second, the prosecutor must then provide a race-neutral reason for excusing the juror.[35] Finally, the trial court is to weigh the reason given by the prosecutor based on the totality of the circumstances and decide if the reason or reasons given are true or merely pretextual covering a discriminatory intent.[36]

Batson immediately received criticism as many legal scholars, and a sitting Supreme Court Justice, believed the Court did not do enough to end the discrimination against minorities. In his concurring opinion, Justice Marshall applauded the Court's efforts, but predicted discriminatory practices would continue—unless peremptory challenges were eliminated completely.[37] Justice Marshall's argument for abolishing the peremptory strike in its entirety was it would be too easy for prosecutors to provide a race neutral explanation cover rendering the courts largely ineffective in stopping discrimination.[38] Justice Marshall's opinion proved accurate as prosecutors and other parties have continually discriminated, consciously or unconsciously, against minorities evidenced by both prosecutors own accounts and statistical analysis.[39]

In subsequent decisions, the Court has explained how "discriminatory use of peremptory challenges harms the excluded jurors and the community at large."[40] The jury is a well thought out safeguard to the powers of the legal system which allows the people to trust the legal system knowing there is a buffer between them and the

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[32] *Batson*, 476 U.S. at 96.
[33] *Id.*; Flowers v. Mississippi, 139 S. Ct. 2228, 2243 (2019) (stating defendants may use statistical evidence of peremptory strikes used against black prospective jurors compared to white prospective jurors, evidence of disparate questioning and investigation of black and white jurors, a comparative analysis of those struck and left on the case, prosecutions reason for striking the juror, relevant history from past case, and other relevant circumstances showing racial discrimination.).
[34] *Batson*, 476 U.S. at 96. Following its decision in *Batson*, the Supreme Court has broadened the scope of this element. *See* Powers v. Ohio, 499 U.S. 401, 415 (1991) (holding that a criminal defendant may assert a claim of purposeful discrimination in jury selection, irrespective of whether he and the excluded jurors were of the same racial group); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 630 (1991) (holding that private parties in a civil suit are barred from racially discriminatory peremptory strikes); Georgia v. McCollum, 505 U.S. 42, 59 (1992) (holding that a criminal defendant is barred from racially discriminatory peremptory strikes); J.E.B. v. Alabama ex rel. T.B., 511 U.S. 129, 146 (1994) (holding that gender-based peremptory strikes violate the Equal Protection Clause).
[35] *Batson*, 476 U.S. at 98.
[36] *Flowers*, 139 S. Ct. at 2241.
[37] Batson v. Kentucky, 476 U.S. 79, 102–03 (1986) (Marshall, J., concurring).
[38] *Id.* at 105–06.
[39] Semel, *supra* note 17, at 36.
[40] Powers v. Ohio, 499 U.S. 400, 406 (1991).

oppressive power of the State.[41] In *Powers v. Ohio*, the Supreme Court expanded *Batson* by ruling the Equal Protection Clause not only protects defendants from discrimination, but it also protects each individual juror from being discriminated against.[42] The Court recently reaffirmed the importance of extending *Batson* to each juror saying, "[o]ther than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process."[43] Realizing how important the perception of fairness is to the judicial system, the Supreme Court expanded *Batson* to civil cases seeking to rid the courtroom of "state-sponsored group stereotypes rooted in, and reflective of, historical prejudice."[44]

The Court repeatedly holds discrimination has no place in the courtroom and hurts society at large, yet the Court continues to reject a growing push to get rid of peremptory strikes. Many legal scholars and activists support Justice Marshall's argument that peremptory strikes have become a tool for discrimination used to deprive defendant's right to a fair trial, and the only way to ensure fairness is to completely eliminate the peremptory strike.[45] However, proponents of the peremptory strike remain steadfast in believing the peremptory strike must remain a part of the voir dire process.[46] Courts and proponents of peremptory strikes maintain the benefit of ensuring a fair and impartial trial outweighs the cost of discrimination.[47]

One argument for continuing the use of peremptory strikes is it allows the attorneys, who are most familiar with the facts and best equipped to detect bias, to strike jurors who they know will be prejudice against their client without being able to articulate a for-cause reason.[48]In her concurring opinion in *J.E.B. v. Alabama ex rel. T.B.*, Justice O'Connor described peremptory strikes as a well-established and needed tradition that allows both sides to feel secure in knowing they will be tried in front of an impartial jury.[49] The issue of peremptory strikes is judged with a balancing test, and proponents of peremptory strikes argue the defendant's right to a fair and speedy trial is benefited from their use.[50] Peremptory strikes also serve the goal of efficiency and ensuring the voir dire is quick allowing parties to focus on the merits of the case.[51] Lastly, proponents argue peremptory strikes actually protect jurors because it allows the parties to remove them without having to dig too far into the potential juror's private life offending his or her right to privacy.[52] While there

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[41] *Id.* at 406–07.
[42] *Id.* at 409.
[43] Flowers v. Mississippi, 139 S. Ct. 2228, 2238 (2019) (citing Powers v. Ohio, 499 U.S. 400, 407 (1991)).
[44] J.E.B v. Alabama *ex rel.* T.B., 511 U.S. 127, 128 (1994).
[45] Batson v. Kentucky, 476 U.S. 79, 105 (1986) (Marshall, J., concurring); Semel, *supra* note 17, at 36.
[46] *See* A.C. Johnstone, *Peremptory Pragmatism: Religion and the Administration of the Batson Rule*, 1998 U. CHI. LEGAL F.441, 452–55 (1998).
[47] *J.E.B*, 511 U.S. at 146–51 (1994) (O'Connor J., concurring) (arguing that gender-based peremptory strikes should be barred from government use but preserved for civil litigants and criminal defendants); Johnstone, *supra* note 46, at 461; *see* Michael L. Neff, *In Defense of Voir Dire: Legal History and Social Science Demand Appropriate Voir Dire*, 17 GA. BAR J. 14, 18, 20 (2011).
[48] Johnstone, *supra* note 46, at 444.
[49] *J.E.B.*, 511 U.S. at 147 (O'Connor J., concurring).
[50] Johnstone, *supra* note 46, at 459.
[51] *Id.* at 444.
[52] *Id.* at 445.

are some benefits of peremptory strikes, the question still remains, do they outweigh the costs of court room discrimination? Should our society tolerate questions "tantamount to interrogating [someone's] Blackness."[53]

The *Batson* decision was a good starting point by the Supreme Court to clean the courtroom of discriminatory practices, but it did not do enough. Our justice system only works if people perceive it to be fair and impartial.[54] The U.S. Constitution is clear on how important the right to a fair trial is before a person's life, liberty, and property are taken away.[55] The courts appear to be set in keeping the peremptory strike as being a way to ensure a fair jury.[56] However, it appears misplaced to utilize a "mere strategic device" to violate someone's equal protection rights.[57]

If the courts are to amend their public image, they need to expand *Batson* to exclude prosecutors from (a) asking questions that clearly target a juror's race, and (b) striking a potential juror because of their affiliations with groups seeking to advance equality for minorities. Many courts, at both the federal and state level, have already begun to expand *Batson* to other cognizable groups and expressed a desire to protect a jurors' First Amendment rights.[58] These cases will illustrate why the courts should not allow questions about affiliations that easily allow for pretextual reason to exclude a juror.

II. EXPANDING BATSON TO OTHER COGNIZABLE GROUPS

The lower courts and state courts have wrestled with *Batson* ever since it was decided. Since then, the courts have had *Batson* challenges that the Supreme Court could not have envisioned with only a handful reaching the Supreme Court since deciding *Batson*.[59] Courts now have ruled on many issues involving peremptory strikes and discrimination with the problem being inconsistent on how to apply *Batson* beyond race, ethnicity, and gender.[60] In the federal system, courts have applied *Batson* to peremptory strikes used against potential jurors that are members of groups that have traditionally received heightened judicial scrutiny.[61] Additionally, some lower courts have found *Batson* violations in striking potential jurors because they were "Jews, Italians, whites, and Native Americans."[62]

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[53] Andrew Karpan, *When Can a Juror Say Black Lives Matter?,* LAW 360, (Aug. 9, 2020 8:02 PM), https://www.law360.com/articles/1299398 [https://perma.cc/D4RR-YSQS].
[54] *J.E.B.*, 511 U.S. at 136–37.
[55] *See* U.S. CONST. amend. V; U.S. CONST. amend. VI; U.S. CONST. amend. XIV.
[56] *See* J.E.B., 511 U.S. at 147–48 (O'Connor J., concurring) (describing the benefits of peremptory strikes); *See Batson*, 476 U.S. at 98–99.
[57] Cheryl G. Bader, *Batson Meets the First Amendment: Prohibiting Peremptory Challenges that Violate a Prospective Juror's Speech and Association Rights*, 24 HOFSTRA L. REV. 567, 570 (1996).
[58] U.S. CONST. amend. I.
[59] Johnstone, *supra* note 46, at 452–55 (1998); Bader, *supra* note 57, at 570.
[60] United States v. DeJesus, 347 F.3d 500, 510–11 (3d Cir. 2003) (discussing how different states have treated peremptory strikes based on religious affiliations and beliefs); SmithKline Beecham Corp. v. Abbott Labs, 740 F.3d 471, 484 (9th Cir. 2014) (ruling a strike based upon a juror's sexual orientation violated the Equal Protection Clause); Card v. United States, 776 A.2d 581, 595 (D.C. 2001), *vacated*, 863 A.2d 821 (D.C. 2004) (finding that a juror's affiliation to a religious activist was a race-neutral reason to remove the juror); State v. Davis, 504 N.W.2d 767, 771 (Minn. 1993) (declining to extend *Batson* to peremptory strikes based on religious affiliations).
[61] Mark E. Wojcik, *Extending Batson to Peremptory Challenges of Jurors Based on Sexual Orientation and Gender Identity*, 40 N. ILL. U. L. REV. 1, 11 (2019).
[62] *Id.* at 12.

The groups that have proven hardest for the courts to decide are groups that an individual chooses to affiliate with or join.[63] Both state and federal courts have drawn a fine line between a permissible strike and a *Batson* violation. When evaluating the permissibility of a religion-based peremptory challenge, the distinguishing fact appears to be whether the strike was based on religious affiliation, which would be unconstitutional, or on the juror's religious beliefs or belief system, which is allowed due to beliefs being an indicator of how the juror may decide the case.[64] Then-Judge Alito opined that questioning if someone was a Quaker was fine because it would indicate whether or not she could vote for the death penalty.[65] These distinctions between strikes, due to affiliations, or strikes, due to beliefs, will prove to be the best analogy for determining if asking about BLM is a *Batson* violation or permissible. Before analyzing the cases that deal with peremptory strikes and affiliations, it is important to see how the courts have dealt with a juror's group affiliations and for-cause challenges.

A. For-Cause Removal of Jurors Based on Group Affiliations

In *U.S. v. Salamone*, the defendant was charged with multiple firearms charges.[66] The trial judge asked venire members if they supported the National Rifle Association (NRA) or had any affiliation with the NRA.[67] The trial court then dismissed one potential juror and five potential alternates from the venire.[68] The Third Circuit discussed how allowing "trial judges and prosecutors to determine juror eligibility based solely on their perceptions of the external associations of a juror" would afford them too much arbitrary power and would call into question the impartiality and fairness of the jury.[69] The court went onto to criticize the government's argument that someone affiliated with the NRA would not be a fair juror because the case was gun-related.[70] The court pointed out that juror competence is an individual assessment and excluding "for cause of NAACP members [in] enforcement of civil rights statutes, Moral Majority activists from pornography cases, [or] Catholics from cases involving abortion clinics" bears not on their ability to be a juror.[71]

Courts have affirmed trial courts' decision allowing a former police officer or police officer's spouses to sit on the jury.[72] In *United States v. McIntyre*, the United States Court of Appeals for the Tenth Circuit denied a criminal defendant's appeal arising from a jury member's former occupation as a police officer. Citing the trial

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[63] *See* United States v. Brown, 352 F.3d 654, 666–67 (2d Cir. 2003); *DeJesus*, 347 F.3d at 510.
[64] *Brown*, 352 F.3d at 666-67; *DeJesus*, 347 F.3d at 510–11; United States v. Stafford, 136 F.3d 1109, 1114 (7th Cir. 1998) (stating in dicta how "[i]t would be improper and perhaps unconstitutional to strike a juror on the basis of his being a Catholic, a Jew, a Muslim, etc.," but a strike due to a belief even a religious one would be proper.).
[65] Bronshtein v. Horn, 404 F.3d 700, 725 (3d Cir. 2005).
[66] United States v. Salamone, 800 F.2d 1216, 1217–18 (3d Cir. 2003).
[67] *Id.* at 1220.
[68] *Id.* at 1218.
[69] *Id.* at 1225.
[70] *Id.* at 1225–56.
[71] *Id.*
[72] United States v. McIntyre, 997 F.2d 687, 697–98 (10th Cir. 1993); United States v. Grismore, 546 F.2d 844, 849 (10th Cir. 1976) (concluding that a juror's status as wife of a policeman did not instantaneously justify a just-cause challenge); Mikus v. United States, 433 F.2d 719, 724 (2d Cir. 1970).

judge's "careful and thorough examination" of the former policeman, in conjunction with the surrounding circumstances, the court failed to identify any error requiring judicial relief.[73] This notion has also been applied in the context of federal employees. The Supreme Court ruled employment to the federal government is not grounds for dismissal,[74] and a lower court reasoned that a federal employee could serve as juror even when her employer is a party to the case.[75]

The courts are clear that they do not believe affiliations are enough to dismiss a juror for cause without the trial judge finding the potential juror has actual biasness.[76] Jurors are not to be judged for being part of a group because that does not show if they are competent to fairly decide a trial. These cases dealing with dismissal by a for-cause challenge are illustrative of how courts can protect the right to a fair trial but not infringe upon the rights of the jurors. But why treat peremptory strikes so differently when the potential for discrimination is larger and often changes the outcome of a case?[77]

B. Peremptory Strikes Based on Religious Affiliations

State and federal courts have struggled to create a consistent rule for evaluating peremptory strikes based on affiliations with a religious group. Again, the deciding factor has been whether the strike was based on religious affiliations or a juror's belief system.[78] There is a trend of cases where judges allow peremptory strikes based on a juror's religious activities or beliefs but decline to extend this to religious affiliation.[79] Some states allow jurors to be removed due to the juror's religious affiliation, reasoning the defendant's right to having a fair and impartial jury is greater than that of the individual jurors.[80] Comparing two cases will show how inconsistent state courts have been when applying *Batson* to affiliations which is a problem as the makeup of the jury often determines the outcome of the trial.

In *State v. Davis*, the prosecutor used a peremptory strike to remove a Black man from jury service due to his affiliation with the Jehovah's Witness religious group.[81] The trial court asked the prosecutor to state her reason for striking the Black juror after the defense raised a Batson challenge.[82] The prosecutor was upfront saying the juror's affiliation with Jehovah's Witness was the sole reason for her strike because "in [her] experience J[e]hovah Witness are reluctant to exercise authority over their

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[73] *McIntyre*, 997 F.2d at 697–98.
[74] Dennis v. United States, 339 U.S. 950, 171–72 (1950).
[75] United States v. Polichemi, 219 F.3d 698, 704 (7th Cir. 2000) ("government employment alone is not . . . enough to trigger the [implied bias] rule under which an employee is disqualified from serving as a juror in a case involving her employer.").
[76] *See* United States v. Mitchell, 690 F.3d 137, 143 (3d Cir. 2012) (citing Smith v. Phillips, 455 U.S. 209, 102 (1982)).
[77] Semel, *supra* note 17, at 11–13.
[78] United States v. DeJesus, 347 F.3d 500, 510–11 (3d Cir. 2003).
[79] *See* United States v. Brown, 352 F.3d 654, 669 (2d Cir. 2003); United States v. Stafford, 136 F.3d 1109, 1114 (7th Cir. 1998); State v. Hodge, 726 A.2d 531, 553 (Conn. 1999); Thorson v. State, 721 So.2d 590, 595 (Miss. 1998).
[80] *See* Casarez v. State, 913 S.W.2d 468, 496 (Tex. Crim. App. 1994) (en banc); State v. Davis, 504 N.W.2d 767, 772 (Minn. 1993).
[81] *Davis*, 504 N.W.2d at 768.
[82] *Id.*

fellow human beings in this Court House."[83] The prosecutor explained, "I would never fail . . . to strike a J[e]hovah Witness," if she had a peremptory strike still to use at the close of jury selection.[84]

The Minnesota Supreme Court analyzed the Supreme Court's ruling in *Powers v. Ohio*.[85] There, the Court examined a claim of "cross-bias" discrimination concerning a white defendant and black juror. Ultimately, the Court concluded that the removed juror's right to equal protection had been violated, though the defendant's had not, because (a) "racial discrimination 'invites cynicism respecting the jury's neutrality and its obligation to adhere to the law'" and (b) "the juror rejected solely because of skin color 'suffers a profound personal humiliation."[86] The Minnesota Supreme Court started their review by asking if the peremptory strike was used to "perpetrate religious bigotry to the extent that the institutional integrity of the jury had been impaired."[87] The court, like so many other opinions, made sure to emphasize the importance of the peremptory strike and its aid in ensuring a fair trial.[88] The court conceded that some unbiased jurors are excused, but that was outweighed by the need to ensure no biased jurors could influence the decision.[89] The court then highlighted and explained the differences between religious discrimination and race or gender discrimination.[90]

The opinion distinguished *Davis* with the fact that religion has not faced the same bias that race has in the use of peremptory strikes.[91] The court emphasized how, unlike race, religious affiliations can give insight into one's beliefs, which provide a good indicator on how one will decide the facts, and the assumption is not based on a bias against the potential juror.[92] Lastly, the court stressed that "religious affiliation (or lack thereof) is not as self-evident as race or gender," which would complicate voir dire and invade a jurors right to privacy.[93] In denying *certiorari*, Justice Ginsburg agreed with the Minnesota Supreme Court's reasoning stating a juror is much more easily discriminated against due to self-evident characteristics.[94] She also discussed how extending *Batson* to religious affiliation would complicate the voir dire and posed some practical concerns.[95]

In *State v. Fuller*, a case factually similar to *Davis*, the Supreme Court of New Jersey decided to not allow jurors to be excused for their religious affiliations.[96] Here,

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[83] *Id.*
[84] *Id.*
[85] *Id.* at 769 ("[I]n Powers, . . . the Court sustained the Batson challenge [not] on the theory that the defendant's equal protection rights were violated; rather, the decision was based on an equal protection violation of the excused juror's rights.") (citations omitted).
[86] *Id.* at 769.
[87] *Id.* at 770.
[88] *Id.*
[89] *Id.*
[90] *Id.* at 771.
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] Davis v. Minnesota, 511 U.S. 1115, 1115 (1994) (Ginsburg J., concurring in denial of certiorari).
[95] *Id.*
[96] State v. Fuller, 862 A.2d 1130, 1140 (N.J. 2004).

a prosecutor struck two jurors due to their religious practices.[97] One juror was struck for wearing what the prosecutor described as a "Muslim 'garb' ('a skull cap or rather long outer garment')," and the other was struck due to his work as a missionary which indicated to the prosecutor that both jurors would favor the defendant.[98] On review, the Court opined that this was a blanket stereotype of an individual which the law sought to eliminate.[99] While the court agreed that finding a biased belief would be enough to remove a juror, removal based solely on a stereotype would frustrate the goals of peremptory strikes and could not be permitted.[100] Following, the New Jersey Supreme Court agreed with two federal opinions that religious affiliations are part of a cognizable group and may not be the basis for a peremptory strike.[101]

These two cases illustrate the difficulty jurors' affiliations pose in the voir dire process. Trial courts are forced into balancing the protected rights of the defendant and the potential juror. Some argue that because the defendant's life, liberty, and property are on the line, attorneys should be able to ask about affiliations and strike jurors based on them to ensure a fair trial.[102] While others argue, asking about group affiliations has become another way for parties to discriminate against jurors they find to not be sympathetic to their side.[103] The problem with allowing questions about group affiliations is they give parties pretextual reason to exclude potential jurors who are part of cognizable groups. Lawyers, primarily prosecutors, have proved to be quite good at providing race-neutral reasons for excluding jurors that are but a mere pretext to race.[104] The ability to ask about jurors' affiliations to groups who are socially and politically active should be a violation of their First Amendment rights and will undoubtedly be used to target minorities. The next section of this Note will look at how asking about BLM is harmful to defendants, the venire member, and society as a whole.

III. BLACK LIVES MATTER PROTECTED BY THE FIRST AND FOURTEENTH AMENDMENTS

"Injustice anywhere is a threat to justice everywhere."[105] The idea that our justice system can survive racial stereotypes is a farce. People are looking for reassurance that they will be treated equally under the law. The ultimate danger of continuing to allow parties to ask racially charged questions is people will lose faith in the justice system.[106] The American democratic experience is built on the idea people will not be targeted for their beliefs or for whom they affiliate with.[107] It is a good thing for

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[97] *Id.* at 1144.
[98] *Id.*
[99] *Id.* at 1147.
[100] *Id.* at 1143, 1147.
[101] *Id.* at 1144–46. *See* United States v. DeJesus, 347 F.3d 500, 510 (3d Cir. 2003); United States v. Stafford, 136 F.3d 1109, 1114 (7th Cir. 1998).
[102] *See* Johnstone, *supra* note 46, at 461–62.
[103] Bader, *supra* note 57, at 621.
[104] Semel, *supra* note 17, at 44.
[105] Martin Luther King Jr., *Letter from Birmingham Jail*, 26 U.C. DAVIS L. REV. 835, 835 (1993).
[106] Miller-El v. Dretke, 545 U.S. 231, 238 (2005).
[107] *See* Bader, *supra* note 57, at 621.

society when citizens actively seek to participate in the democratic process. Jury duty has been repeatedly recognized by the courts as one of the best ways for someone to participate in that process.[108] This means the court needs to be seen as a protector serving in the democratic process, not an agent for carrying out blanket stereotypes preventing participation.

While many people may feel jury duty is a waste of time or an extreme annoyance, there are some who look at jury duty as one of the best means to participating in the democratic process. The Supreme Court in 2019 said, "[o]ther than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process."[109] Many people, like Crishala Reed, are excited to serve as a jury member and participate in the judicial system.[110] Ms. Reed went into the courtroom excited to be on the jury serving her community, but her hopes were cut short when a prosecutor used a preemptive strike to remove her from the jury pool after she said she supported BLM.[111] In response, Ms. Reed said, "'I felt targeted . . . [i]t was a life-changing experience for me, personally.'"[112]

Her story illustrates how hurtful and embarrassing discrimination in the voir dire can be. As the Supreme Court recognized, not only is the right of the defendant implicated in discriminatory use of peremptory strikes, but the image of the justice system is tarnished, and the individual juror's right has been infringed.[113] The justice system works best when the system is perceived as inclusive and fair, not excluding people based on their affiliations.[114] Courts are running into the danger of turning trials into a show of who supports what group. If obvious racially charged questions are allowed to persist, people will lose faith in the judicial system.

One of the problems with allowing a party to question someone's support of BLM is that it is hard for a venire person to fully answer that question. It is safe to assume a majority of people will agree each person's individual life matters and would affiliate with a group that promotes that general idea. However, the juror may not necessarily support all the beliefs that BLM supports. Allowing the question about supporting BLM, gives prosecutors an easy way to ask a question which allows them to get their preferred jury—mostly white males.[115]

Another harm with asking about BLM is it has great potential to infringe on an individual's fundamental rights. The Equal Protection Clause guarantees an individual equal treatment under the law and provides protection for an individual when he or she seeks to exercise a fundamental right.[116] A party removing a venireperson for supporting BLM has the effect of a judge enforcing a stereotype that infringes on the right of the individual to assemble and affiliate with whomever

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[108] Flowers v. Mississippi 139 S. Ct. 2228, 2238 (2019); *see* Powers v. Ohio, 499 U.S. 400, 402 (1991).
[109] *Flowers*, 139 S. Ct. at 2238.
[110] Vansickle, *supra* note 18.
[111] *Id.*
[112] *Id.*
[113] Powers v. Ohio, 499 U.S. 400, 402 (1991); Wojcik, *supra* note 14, at 15.
[114] *See* Bader, *supra* note 57, at 570.
[115] *See* Cooper v. State, 432 P.3d 202, 206 (Nev. 2018) (comparing asking about Black Lives Matter to asking about feelings about O.J. Simpson's murder trial when there were no relevant racial issues in the case).
[116] U.S. CONST. amend. XIV. § 1; Bader, *supra* note 57, at 593.

they want. An affiliation with a group is not a good enough reason to remove someone from participating in the democratic process, and courts have not allowed removal based solely on affiliation.[117]

We want people to feel free to participate in democracy, whether that be by voting, serving in the jury, or seeking change through engaging in intellectual debate and activism. BLM has become a mainstream movement for seeking such change. No one should be barred from serving because they are exercising rights so dear and precious to our democracy. Let alone being barred by the very system supposed to protect those rights. If people are worried that questions about BLM will create impartial juries, there are already readily available safeguards and procedures in place that will ensure the jury stays as fair as possible. The safeguard is allowing for questions that go to someone's beliefs, but not allowing questions on affiliations that perpetuate and enforce stereotypes. The good news is courts already have a workable framework with cases dealing with religious groups, and other well-known groups, which will allow them to determine these apparent conflicting rights.

IV. SOLUTIONS

Legal scholars and practitioners propose many ways to stop discrimination from being a factor in picking a jury. On one extreme, there are people who argue for an out right end to the use of peremptory strikes to pick a jury.[118] Opponents of the peremptory strike join Justice Marshall in his *Batson* concurrence, arguing that as long as the peremptory strike is allowed, parties will abuse it to discriminate against jurors. While this may be the best way to ensure against discrimination, there are two main issues with this argument. Firstly, the accused is the one with his or her life and liberty at stake, and his or her attorney needs to have all the tools available to them to ensure a fair trial. Secondly, too many Justices and judges believe in the peremptory strike and are unwilling to end the practice all together.[119] Therefore, this is not a good or viable solution as of now.

However, there are two solutions which would allow courts to more effectively police and stop the use of discriminatory peremptory strikes. One is to follow the Nevada Supreme Court's *Cooper v. State* analysis and question the relevance of such questions.[120] The other is to rework the framework of *Batson* to discourage the use of questions asking about affiliations with socially active groups.[121]

In *Cooper v. State*, the Nevada Supreme Court reviewed the appeal of a criminal defendant convicted of child abuse, neglect, or endangerment, and some domestic violence related charges.[122] During voir dire, the prosecutor asked venirepersons if they had a strong opinion about BLM.[123] On appeal, the court found a *Batson*

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[117] *See* United States v. Brown, 352 F.3d 654, 666–67 (2d Cir. 2003); United States v. DeJesus, 347 F.3d 500, 510–11 (3d Cir.2003); United States v. Stafford, 136 F.3d 1109, 1114 (7th Cir. 1998).
[118] Batson v. Kentucky, 476 U.S. 79, 102–03 (1986) (Marshall, J., concurring).
[119] *Id.* at 98 ("the peremptory challenge occupies an important position in our trial procedures"); J.E.B v. Alabama *ex rel.* T.B. 511 U.S. 127, 147 (1994) (O'Connor J., concurring) ("[t]he principal value of the peremptory is that it helps produce fair and impartial juries.").
[120] Cooper v. State, 432 P.3d 202, 206 (Nev. 2018).
[121] *See Batson*, 476 U.S. at 96–98 (outlining the *Batson* burden-shifting framework).
[122] *Cooper*, 432 P.3d at 204.
[123] *Id*. at 206.

violation, thus vacating and remanding.[124] The court noted how the question itself was problematic with "indisputable racial undertones" and had little-to-no relevance to the case.[125] Combined with the fact that the prosecutor used 40% of its peremptory strikes to remove two of three jurors Black jurors from jury was enough to find a violation of the Equal Protection Clause.[126]

This is a good approach to eliminating discrimination from the voir dire. One, if there are no racial issues at stake in the case, then the question about affiliating with BLM should be outright barred. As several cases discussed in this Note have shown, affiliations do not reflect on a juror's ability to fairly decide a case.[127] Questions about one's beliefs could still be allowed to ensure an impartial jury, but beliefs are always relevant to a case whereas affiliations usually are not. After questions about support for BLM alerted the Nevada Supreme Court to possible discrimination, the Court took appropriate action by scrutinizing the statistics of Black Jurors being removed.[128] If a party wants to ask about BLM and like groups, an appellate court should then be more willing to find a *Batson* violation when the statistics show a pattern of discrimination not the usual deference to the trial court. This is a good approach for how to evaluate *Batson* violations where there are no racial implications, but unfortunately, racial issues are relevant in cases like the O.J. Simpson case or the Derek Chauvin trial.[129] This is where a slight reworking of *Batson* comes into play.

To show a *Batson* violation, a party alleging a violation must make a prima facie showing of intentional discrimination to remove a juror with the trial judge considering all the relevant circumstances.[130] The burden will then be on the opposing party to provide a race neutral reason for removing the juror.[131] Then, the prosecutor needs to offer a non-discriminatory based explanation that is a race neutral explanation for removing the juror.[132]

When a party asks questions about one's views of BLM, the courts should assume a prima facie case has been made by the party challenging the peremptory strike. No further evidence should be needed to show discrimination. After all, even if one is removed from the jury, the damage to the court's image can have lasting effects.[133] Once the court allows the challenge to the peremptory strike, the burden on the party exercising the peremptory strike should be raised to a level not satisfied by general

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[124] *Id.* at 206–07.
[125] *Id.* at 206.
[126] *Id.* at 206–07.
[127] United States v. McIntyre, 997 F.2d 687, 697–98 (10th Cir. 1993).
[128] *Compare* Cooper, 432 P.3d at 204–05, *with* State v. Campbell, 846 S.E.2d 804, 807–11 (N.C. Ct. App. 2020) (holding the prosecutor using 75% of their peremptory strikes to remove Black jurors and asking about Black Lives Matter was not enough to find a *Batson* violation).
[129] Rory Carroll, *OJ Simpson: An Eternal Symbol of Racial Division – Or Has America Moved On?*, THE GUARDIAN, Oct. 1, 2017, https://www.theguardian.com/us-news/2017/oct/01/oj-simpson-prison-release-america-race-debate; Adrian Florido, *Half of the Jury in the Chauvin Trial is Nonwhite. That's Only Part of the Story*, NPR, (Mar. 25, 2021, https://www.npr.org/2021/03/25/980646634/half-of-the-jury-in-the-chauvin-trial-is-non-white-thats-only-part-of-the-story [https://perma.cc/DN5P-B79D].
[130] Batson v. Kentucky, 476 U.S. 79, 96 (1986).
[131] *Id.* at 97.
[132] *Id.*
[133] Miller-El v. Dretke, 545 U.S. 231, 238 (2005).

explanations-for the use of the strike which often reflect racial stereotypes.[134] General explanations should not be accepted because they do not provide a "neutral explanation"[135] to a specific question that targets one fundamental right to association. The courts have a "duty to determine if the defendant has established purposeful discrimination."[136] The prosecutor should need to give an explanation as to what answer the juror gave that called into question his or her credibility to be impartial. They need to be able to articulate a plausible reason for bias, which should be more than just not liking the demeanor or appearance of the venireperson.[137] The right to freely assemble and affiliate is a treasured right we hold in our society. It is upsetting to allow people to be removed from a jury simply because they affiliate or support a group for social change.

If the court is worried about prejudice slipping into the jury, the court is always free to remove a juror for cause. This is where looking to precedent on removal for religious reasons will help. If the venireperson were to give an answer that his belief would affect his judgment, a for-cause challenge would remove him or her. Questions that go towards a general belief system are clearly allowed. But questions that make jurors feel singled out, discriminated against or amount "to interrogating their Blackness" have no place in voir dire.[138]

V. CONCLUSION

Courts can still easily administer a fair trial without allowing for questions that ask about a venireperson's support or affiliation with a group. The rights of the defendant to an impartial jury cuts both ways in this argument. A party is entitled to a fair and impartial jury whose beliefs should be found out in voir dire, but a party can easily do that by asking about beliefs not affiliations. However, by allowing for questions about BLM a defendant's right to a fair trial is much more likely to be infringed because when a prosecutor is able to sit a predominately white jury, they are more likely to get a conviction.[139] The rights of all the people involved a case, the defendant and jurors, are harmed when discrimination creeps into the court.[140] The court system is an integral part of our society that needs to have a clean, clear perception for society to believe in equitable justice. The benefits of having a trial free of racial prejudice are obvious. The courts should take an affirmative step in clearing out racial prejudice by not allowing questions about BLM and similar groups when there are many alternative questions to find out one's belief.

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[134] *See* Semel, *supra* note 17, at 14 (discussing racial and ethnic stereotypes California prosecutors relied on when using peremptory strikes to excuse Black and Latino jurors).
[135] *Batson*, 476 U.S. at 98.
[136] *Batson*, 476 U.S. at 98.
[137] Semel, *supra* note 17, at 16.
[138] Karpan, *supra* note 53.
[139] *See* Flowers v. Mississippi, 139 S. Ct. 2228, 2235 (2019). The case is an example of how a different jury make up will affect the verdict of the trial.
[140] Miller-El v. Dretke, 545 U.S. 231, 238 (2005).