State v. Buggs: Is It Really So Black and White?

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Introduction

In *State v. Buggs*,[1] the appellant, a Black male, sought reversal of his first-degree murder conviction, arguing that the removal of a prospective juror in his trial was racially motivated. The prosecutor had used a peremptory challenge[2] to remove a potential White juror who expressed concerns about the lack of minorities on the jury panel and about how minorities are often treated unfairly by the criminal justice system and society.[3] The trial court ruled that it was an appropriate peremptory challenge, a decision affirmed on appeal by the Minnesota Supreme Court.[4] Although Buggs raised several issues on appeal,[5] this Comment focuses exclusively on Buggs's argument that excluding the potential juror solely on the basis of her expressed racial beliefs violated the Equal Protection Clause of the United States

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1. 581 N.W.2d 329 (Minn. 1998).

2. The peremptory challenge allows either party in a civil or criminal case to remove a potential juror without an explanation of the removal. *See generally* Coburn R. Beck, *The Current State of the Peremptory Challenge*, 39 WM. & MARY L. REV. 961, 963-70 (1998) (describing the history of the peremptory challenge).

3. *See infra* note 99 and accompanying text (showing the excluded juror's responses to the prosecutor's questions).

4. *See Buggs*, 581 N.W.2d at 339.

5. *See id.* at 332. In addition to the argument concerning the peremptory challenge of a juror, Buggs advanced four other arguments that were all rejected by the court. *See id.* First, Buggs argued that the trial court erred in admitting the victim's hearsay statements as dying declarations where the record does not indicate the victim's belief in her impending death. *See id.* Second, Buggs argued that evidence of a prior assault by Buggs against the victim was erroneously admitted. *See id.* Third, Buggs argued that the instructions given to the jury did not provide them with sufficient guidance on how to resolve a deadlock. *See id.* Finally, Buggs argued that the trial suffered from several instances of prosecutorial misconduct. *See id.*

Constitution[6] by denying Buggs a representative jury of fair-minded peers and by denying the juror an opportunity to participate in the judicial process.[7]

This Comment argues that the *Buggs* court erred in refusing to apply the protections of the Equal Protection Clause to Buggs and the excluded juror in his trial. Part I analyzes the history of the peremptory challenge and how its racially discriminatory use was limited by the United States Supreme Court in *Batson v. Kentucky*[8] and its progeny.[9] Part II outlines the facts and the holding of *Buggs*.[10] Part III examines *Batson*'s three justifications for prohibiting race-based peremptory strikes, and argues that courts should consider racial opinion, not simply racial status, when determining whether a juror exclusion is constitutional.[11] This Comment addresses the potential dangers of adhering to the precedent set by *Buggs*, and argues that extending *Batson* protection to the racial beliefs of jurors would not eliminate the usefulness of the peremptory challenge. Ultimately, this Comment concludes that *Buggs* takes a step in the wrong direction by encouraging rather than discouraging racial intolerance and discrimination.

I. Background

The *Buggs* decision raises important questions concerning the continued use of the peremptory challenge as a tool which results in racial discrimination. The opinion effectively undermines the three purposes for eliminating racially motivated peremptory challenges outlined in *Batson* by the United States Supreme Court.[12] In *Batson*, the Court recognized that eliminating racial discrimination from jury selection served three goals: (1) ensuring that defendants are not discriminated against because of

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6. "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV § 1. This clause requires that similarly situated persons receive similar treatment under the law. *See generally* RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW § 8 (5th ed. 1996). This right to equal protection under the law is a fundamental right. *See id.* Therefore, any law which significantly burdens the equal protection rights of a person or class of persons is subject to strict scrutiny and must be narrowly tailored to promote a compelling or overriding interest of the government. *See id.*

7. *See Buggs*, 581 N.W.2d at 339.

8. 476 U.S. 79, 85-88 (1985)(eliminating peremptory challenges based on the race of the juror

9. See infra notes 12-84 and accompanying text.

10. See infra notes 85-126 and accompanying text.

11. See infra notes 127-162 and accompanying text.

12. 476 U.S. at 85-88. See also Buggs, 581 N.W.2d at 329.

their race or on the false assumption that members of defendant's race as a group are not qualified to serve as jurors;[13] (2) ensuring that jurors are not discriminated against because of their race;[14] and (3) fostering public confidence in the fairness of our justice system.[15] In light of the *Batson* holding, *Buggs* is problematic, because the Minnesota Supreme Court construed race as an issue which only concerns racial minorities.

A. History of the Peremptory Challenge

The peremptory challenge of the American legal system derived from English common law[16] and has been codified in federal and state law.[17] The peremptory challenge, also known as a peremptory strike, has traditionally allowed a party to remove a member of the venire[18] without giving any explanation to justify the removal.[19] In addition, either party may exercise a "for cause" challenge to remove a potential juror, but, in contrast to a peremptory challenge, a "for cause" challenge requires that the party give a "narrowly specified, provable and legally cognizable

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13. See Batson, 476 U.S. at 86.

14. *See id.* at 87.

15. *See id.*

16. *See generally* Swain v. Alabama, 380 U.S. 202, 212-13 (1965) (explaining the use of the peremptory challenge in common law England). At common law, the defendant was allowed 35 peremptory challenges in all felony trials. *See id.* Then, the prosecutor was allowed an unlimited number of challenges before examination and could have any juror "stand aside" after examination. *See id.* If this resulted in a deficient number of jurors, the prosecutor would have to show cause with respect to the jurors recalled to make up the required number. *See id.*

17. *See* 28 U.S.C. § 1870 (1994) (in federal court, a party in a civil case ordinarily has three peremptory challenges); FED. R. CRIM. P. 24(b) (explaining that in a criminal case, the number of peremptory challenges varies depending on the potential punishment); *Swain*, 380 U.S. at 217 & n.20 (noting that most states have similar statutory grants of peremptory challenges).

18. *See* JAMES P. LEVINE, JURIES AND POLITICS 44 (1992). The "venire" is the panel of prospective jurors. *See id.* Before every trial, the final jury is selected from a venire provided by the court. *See id.* The method of selecting people for the venire varies in each jurisdiction, but often citizens called to be on the venire are chosen from voter registration lists. *See id.* Once the venire is selected, a process called "voir dire," which translated means "to speak the truth," is used to screen biased jurors. *See* WAYNE R. LAFAVE & JERALD H. ISRAEL, CRIMINAL PROCEDURE 969 (2d ed. 1992). During voir dire, jurors are asked questions and either the court or the parties may strike a prospective juror for cause. *See* VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 67 (1986). Unlike peremptory challenges, a party may exercise an unlimited number of "for cause" challenges. *See* Beck, *supra* note 2, at 964. The court then determines the sufficiency and validity of the "for cause" challenge. *See* LAFAVE & ISRAEL, *supra*, at 973. Finally, the parties may exercise their allotted peremptory challenges in order to finalize the make-up of the jury. *See* HANS & VIDMAR, *supra*, at 67.

19. *See* HANS & VIDMAR, *supra* note 18, at 67.

basis of partiality" to justify the removal.[20] A party may find a prospective juror unfit to serve on the jury of a particular case due to the juror's bias, prior experiences, relationship to the case or the involved parties, or some similar factor that interferes with the juror's ability to adjudicate the matter fairly and impartially.[21]

The peremptory challenge works in combination with the "for cause" challenge to protect litigants from juror bias. Since the "for cause" challenge should, theoretically, eliminate all verifiably biased jurors from the venire, parties only use peremptory challenges on jurors who the court has found qualified to serve fairly and impartially. Thus, as the peremptory challenge is arguably unnecessary to conduct a fair trial, there is considerable debate in the legal community regarding its usefulness.[22] Some commentators call for a return to the unlimited peremptory challenge,[23] while others argue that the practice should be eliminated altogether.[24] Despite its long history, the peremptory challenge is not constitutionally protected,[25] so the debate over its utility will likely continue.

Prior to *Batson*, courts were reluctant to inquire into a party's motive for using a peremptory challenge on a juror.[26] Theoretically, racially motivated jury selection was prohibited in *Strauder v. West Virginia*,[27] decided in 1879. The *Strauder* court addressed the validity of a West Virginia statute that excluded

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20. *Swain*, 380 U.S. at 220.

21. *See* LAFAVE & ISRAEL, *supra* note 18, at 973 (reviewing the development of the "for cause" challenge).

22. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79 (1986) (demonstrating in seven separate and wide-ranging opinions that significant disagreements exist between Supreme Court Justices regarding the legitimacy of the peremptory challenge).

23. *See, e.g.*, Beck, *supra* note 2, at 997-1000 (arguing that the peremptory challenge is a useful safeguard when a "for cause" challenge fails, that giving parties a sense of control over their jury will foster confidence in the jury system and that it is not a truly discriminatory device because all jurors are equally subject to its use).

24. *See, e.g.*, *Batson*, 476 U.S. at 102-08 (Marshall, J., concurring) (arguing for the abolishment of the peremptory challenge). *See also* Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369, 422 (1992) (arguing that the peremptory challenge is a "flaw in our judicial fabric" which should be totally abolished).

25. *See* Georgia v. McCollum, 505 U.S. 42, 57 (1992) (noting that peremptory challenges "are not constitutionally protected fundamental rights; rather they are but one state-created means to the constitutional end of an impartial jury and a fair trial").

26. *See, e.g.*, Swain v. Alabama, 380 U.S. 202, 221-22 (1965) (finding that all potential jurors are equally subject to peremptory strikes, and making every strike open to examination would radically change the nature and operation of the peremptory challenge).

27. 100 U.S. 303 (1879).

Black males from jury service and held that it violated the Equal Protection Clause of the Fourteenth Amendment.[28] Numerous techniques, such as poll taxes, grandfather clauses and voter registration literacy tests, were developed to avoid application of this decision, and racial discrimination in jury selection continued unchallenged until 1965.[29]

That year, in *Swain v. Alabama*,[30] the Court recognized for the first time that racially discriminatory use of peremptory challenges could violate the Equal Protection Clause.[31] *Swain*, however, placed the burden on the defendant to prove that the prosecutor systematically excluded Blacks "in case after case, whatever the circumstances."[32] Despite the defendant's proof that no Black person had served on a jury in Talladega, Alabama for fourteen years, the *Swain* Court found that this fact was insufficient to conclusively establish that the defendant's equal protection rights had been violated.[33] Since few states kept records of the peremptory challenges used by prosecutors, the *Swain* burden of proof was nearly impossible to meet.[34]

B. Batson v. Kentucky

The landmark case *Batson v. Kentucky* reconsidered *Swain*'s holding that the burden of proof rested entirely on the defendant.[35] In *Batson*, a Black criminal defendant claimed that the prosecutor violated the defendant's Sixth[36] and Fourteenth[37] Amendment

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28. *See id.* at 310. The Court addressed "whether, by the Constitution and laws of the United States, every citizen of the United States has a right to a trial . . . by a jury selected and impaneled without discrimination . . . because of race or color." *Id.* at 305. While holding that racial discrimination in jury selection violates the Equal Protection Clause, the *Strauder* court cautioned that its holding did not go so far as to grant a defendant the right to a "petit jury composed in whole or in part of persons of his own race." *Id.*

29. *See* Jose Felipe Anderson, *Catch Me If You Can! Resolving the Ethical Tragedies in the Brave New World of Jury Selection*, 32 NEW ENG. L. REV. 343, 353 n.33 (1998) (noting that voter registration requirements were often employed to prevent blacks from voting, thus limiting the number of registered Blacks available to be selected for jury service). *See also Swain*, 380 U.S. at 220-21 (demonstrating that the Supreme Court essentially permitted unchecked discrimination through the use of peremptory challenges).

30. 380 U.S. 202 (1965).

31. *See id.*

32. *Id.* at 223.

33. *See id.* at 226.

34. *See* George B. Smith, Swain v. Alabama*: The Use of Peremptory Challenges to Strike Blacks from Juries*, 27 HOW. L.J. 1571, 1576-77 (1984) (describing *Swain* as establishing a "virtually impossible standard of proof").

35. *See* Batson v. Kentucky, 476 U.S. 79, 82 (1986).

36. *See* U.S. CONST. amend. VI (guaranteeing a criminal defendant the right

rights by using peremptory challenges to exclude all four Black members of the venire.[38] The trial court denied the defendant's motion to discharge the jury and the Kentucky Supreme Court affirmed the trial court's decision on appeal.[39] The United States Supreme Court reversed the decision of the Kentucky Supreme Court, establishing a new precedent.[40] It held, for the first time, that the Equal Protection Clause prohibits the racially discriminatory use of peremptory challenges against individual jurors.[41]

Batson created a three-part test for detecting race-based peremptory challenges[42] that courts continue to use today.[43] First, the defendant must establish that the circumstances of the peremptory challenge create a prima facie case that the prosecutor removed the potential juror on the basis of race.[44] Second, if the defendant establishes a prima facie case of discrimination, the burden shifts to the State to come forward with a racially neutral explanation for removing the juror from the venire.[45] Third, the court must determine whether the defendant has successfully

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to a trial by an impartial jury). The Court declined to address the defendant's Sixth Amendment argument in its decision. *See Batson*, 476 U.S. at 84 n.3.

37. *See supra* note 6 (discussing the Fourteenth Amendment's Equal Protection guarantee).

38. *See Batson*, 476 U.S. at 83.

39. *See id.* at 83-84.

40. *See id.* at 89-96.

41. *See Batson*, 476 U.S. at 89 (stating that "the component of the jury selection process at issue here, the State's privilege to strike individual jurors through peremptory challenges, is subject to the commands of the Equal Protection Clause").

42. *See Batson*, 476 U.S. at 96.

43. *See, e.g.*, United States v. Huey, 76 F.3d 638, 640-41 (5th Cir. 1996) (applying the *Batson* three-part test); State v. Buggs, 581 N.W.2d 329, 339 (Minn. 1998) (same).

44. *See Batson*, 476 U.S. at 96. To establish a prima facie case of discrimination, the *Batson* court required a defendant to show that: (1) he is a member of a "cognizable racial group"; (2) the prosecutor has used peremptory strikes to remove members of defendant's race from the venire; and (3) any relevant circumstances that raise an inference that the prosecutor used the challenge to exclude the juror on account of race. *See id.* For a discussion of how a person's membership in a racial group is determined for the purpose of legal classification see DAVID A. HOLLINGER, POSTETHNIC AMERICA (1995); NAOMI ZACK, RACE AND MIXED RACE (1993); Michael Omi, *Racial Identity and the State: The Dilemmas of Classification*, 15 LAW & INEQ. J. 7 (1997); Nancy A. Denton, *Racial Identity and Census Categories: Can Incorrect Categories Yield Correct Information?*, 15 LAW & INEQ. J. 83 (1997).

45. *See Batson*, 476 U.S. at 97. A prosecutor's rebuttal may not rely merely on the assumption that the juror would be partial to the defendant because of their shared race. *See id.*

proven purposeful discrimination.[46]

Batson expressly upheld the principle articulated in *Strauder* that a defendant has no right to a "petit jury composed in whole or in part of persons of his own race."[47] Instead, the *Batson* holding rested on a defendant's right to be "tried by a jury whose members are selected pursuant to nondiscriminatory criteria."[48] The Court stated that "[t]he Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury *on account of race*, or on the false assumption that members of his race as a group are not qualified to serve as jurors."[49] *Batson* also held that a racially discriminatory peremptory challenge violates the equal protection rights of the excluded juror, because that person is denied participation in jury service on account of race.[50] Finally, *Batson* sought to eliminate racially discriminatory peremptory challenges because such procedures were likely to undermine public confidence in the fairness of the justice system.[51]

C. *Post* Batson *Decisions*

1. Extensions of the Equal Protection Clause to Peremptory Challenges

In the decade following *Batson*, the Supreme Court extended the reach of the Equal Protection Clause well beyond *Batson*'s particular facts. For example, the Court applied the prohibition against race-based peremptory challenges to defense counsel in

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46. *See id.*; *see also infra*, note 64 (outlining the method that a trial court should utilize in making this determination).

47. *Id.* at 85 (quoting Strauder v. West Virginia, 100 U.S. 303, 305 (1879)). The *Batson* court noted that the number of races and nationalities in the United States makes such a guarantee unrealistic. *See id* at 85, n.6. Similarly, the Court has never required that a jury mirror the community and reflect the various distinctive groups in the population. *See id.*

48. *Id.* at 86 (citing Martin v. Texas, 200 U.S. 316, 321 (1906) and *Ex parte* Virginia, 100 U.S. 339, 345 (1880)).

49. *Id.* at 86 (citation omitted) (emphasis added). The Court noted that "[p]urposeful racial discrimination in selection of the venire" denies a defendant the very protection that "a trial by jury is intended to secure." *Id.* A jury is a body "composed of the peers or equals of the person whose rights it is selected or summoned to determine." *Id.* (quoting *Strauder*, 100 U.S. at 308). "Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial." *Id.* at 87.

50. *See id.* at 87. The Court stressed that a person's race simply "is unrelated to his fitness as a juror." *Id.* (quoting Thiel v. Southern Pacific Co., 328 U.S. 217, 223-24 (1946)).

51. *See id.*

criminal cases and to both parties in civil cases.[52] *Batson* protections were also expanded beyond the racial context to prevent gender discrimination in the selection of a jury.[53]

A number of lower courts have also extended *Batson* protection to White venire members who are challenged on the basis of their race.[54] For example, in *Williams v. State*,[55] the Alabama Court of Criminal Appeals held that Whites are a racial group to which the principles of *Batson* apply.[56] The *Williams* court noted that although the exclusion of minorities or traditionally disadvantaged members is more common, the exclusion of racial groups normally in the majority is no less objectionable.[57] Similarly, in *State v. Gray*,[58] the Missouri Supreme Court ruled that *Batson* prohibits racially motivated peremptory challenges, regardless of the race of the defendant or the excluded juror.[59] The *Gray* holding relied upon the principle articulated by the United States Supreme Court in *Regents of the University of California v. Bakke*,[60] that the Equal Protection Clause protects not only members of minority groups but also persons who are members of a racial majority in the community.[61]

In *Powers v. Ohio*,[62] the United States Supreme Court recognized the equal protection rights of the excluded juror despite the absence of any apparent violation of the defendant's equal protection rights.[63] *Powers* involved race-based peremptory

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52. *See* Georgia v. McCollum, 505 U.S. 42, 50-51 (1992) (prohibiting a criminal defendant from using peremptory challenges to remove jurors on the basis of race); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 628 (1991) (prohibiting the parties in a civil case from using peremptory challenges to remove jurors on the basis of race).

53. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 154 (1994) (Kennedy, J., concurring) (prohibiting the use of peremptory challenges to remove jurors on the basis of gender).

54. *See, e.g.*, Government of the Virgin Islands v. Forte, 865 F.2d 59 (3d Cir. 1989); State v. Knox, 609 So. 803 (La. 1992); Gilchrist v. State, 667 A.2d 876 (Md. 1995); State v. Gray, 887 S.W.2d 369 (Mo. 1994).

55. 634 So.2d 1034 (Ala. Crim. App. 1993).

56. *See id.*

57. *See id.*

58. 887 S.W.2d 369 (Mo. 1994).

59. *See id.* at 369.

60. 438 U.S. 265 (1978) (using the Equal Protection Clause to invalidate separate university admissions procedures based upon the race of the applicant).

61. *See Gray*, 887 S.W.2d at 384-85.

62. 499 U.S. 400 (1991).

63. *See id.* at 406 (noting that *Batson* was "designed to meet multiple ends," including the prevention of harm to the excluded juror). *See also* Duncan v. Louisiana, 391 U.S. 145 (1968) (recognizing the importance and benefits of allowing ordinary citizens to participate in the administration of justice).

challenges of Black venirepersons in the trial of a White defendant. The Court held that "an individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race."[64] This decision hinged on the principle that the White defendant had third-party standing to assert the equal protection claims of the excluded Black jurors.[65] The Court reasoned that the "discriminatory use of peremptory challenges by the prosecution causes a criminal defendant cognizable injury," and that during voir dire, a party can "establish a relation, if not a bond of trust, with the jurors."[66]

The Minnesota Supreme Court, in *State v. McRae*,[67] applied the *Batson* principle in the trial of a Black defendant to prohibit the exclusion of a Black juror who expressed her concern about the justice system's treatment of Black people.[68] After the trial court determined that a prima facie case of racial discrimination was established, the prosecutor justified the challenge by expressing his fear that the juror's concerns about race and the justice system would make her unable to serve impartially.[69] The Minnesota Supreme Court disallowed this strike and remanded the case, stating:

> [T]he juror in question appears to have simply answered the prosecutor's questions . . .in the same way that a large percentage of fair-minded, reasonable black people and fair-minded, reasonable people of any other race would have answered the questions. To allow the striking of this juror on the basis of those answers in effect would allow a prosecutor to strike any fair-minded, reasonable black person from the jury panel who expressed any doubt [that] "the system" is perfect.[70]

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64. *Powers*, 499 U.S. at 409.

65. *See id.* at 404, 415 (finding that third-party standing requires that the vicarious party show an "injury in fact," a close relation to the third party and some hindrance to the third party's ability to protect his or her own interests).

66. *Id.* at 411, 413.

67. 494 N.W.2d 252 (Minn. 1992).

68. *See id.* at 253-58.

69. *See id.*

70. *Id.* at 257. *McRae* also outlined a trial court's two-part role in examining the sufficiency of a racially neutral explanation of a peremptory challenge. *See id.* (citing Hernandez v. New York, 500 U.S. 352 (1991)). First, the trial court must determine whether the prosecutor has articulated a facially race-neutral explanation for the challenge. *See id.* Second, the court must evaluate the validity of that explanation by determining "whether the race-neutral reason is the actual basis for the peremptory strike or whether it was offered to mask a discriminatory intent or purpose." *Id.* "Even if the explanation given by the prosecutor had been acceptable on its face, the trial court's role, in reviewing the prosecutor's explanation for the challenge, is to do more than determine whether the prosecutor

2. Refusals to Extend Equal Protection to Peremptory Challenges

Outside of the racial context, the *Batson* doctrine has rarely been successful in overturning the use of a peremptory challenge.[71] For instance, in *Purkett v. Elem*,[72] the Supreme Court held that a prosecutor's non-racial reason for the exercise of a peremptory challenge need not be plausible.[73] Following an objection to the removal of two Black jurors, the prosecutor explained his strike was based on the long, unkempt hair of one juror and the mustache and goatee-type beard of the other.[74] The Court permitted the strike and held that a prosecutor's explanation is not required to be clear and reasonably specific when the reasoning is based on race-neutral characteristics.[75] The Court clarified that *Batson*'s requirement of a "'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection."[76]

Although the *Batson* doctrine could be used to protect jurors's rights under the First Amendment[77] if, for instance, a juror was removed on the basis of her religion, associations, or expressed beliefs, the Supreme Court has yet to rule on such a case.[78] Two

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articulated some basis for the challenge." *Id.* at 258.

71. Cases involving gender discrimination in jury selection offer the only non-racial examples in which courts have extended the *Batson* doctrine. *See, e.g.*, J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 154 (1994) (O'Connor, J., concurring) (extending *Batson* doctrine to prohibit the use of peremptory challenges that remove jurors on the basis of gender).

72. 514 U.S. 765 (1995) (per curiam).

73. *See id.* at 767-68 (using *Batson* to reverse an Eighth Circuit opinion which required that the prosecution articulate some plausible race-neutral reason for believing that a juror's objectionable characteristics will affect that person's ability to perform his or her duties as a juror).

74. *See id.* at 766.

75. *See id.* at 768.

76. *Id.* at 769. *See also* Joseph D. Phelps, Batson*: Challenges from the Perspective of a Trial Judge - Some Practical Considerations*, 54 ALA. LAW. 320, 322-24 (1993) (listing a number of non-discriminatory explanations for exclusionary strikes).

77. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise therof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances").

78. *See* Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 GEO. L.J. 945 (1998) (arguing that if jury service is a benefit extended by the government to its citizens, potential jurors should not be denied the opportunity to serve because of their First Amendment-protected political beliefs, religious views, marital and childbearing status or group memberships). *See also* Cheryl G. Bader, Batson *Meets the First Amendment: Prohibiting Peremptory Challenges That Violate a Prospective Juror's Speech and*

federal circuit courts, however, have directly addressed the issue and both declined to extend the *Batson* doctrine to the First Amendment context.[79] In *U.S. v. Villarreal*,[80] the Fifth Circuit upheld a prosecutor's peremptory challenges of jurors who had expressed a rigid opposition to capital punishment in a prosecution in which the United States sought the death penalty.[81] In *Morgan v. City of Albuquerque*,[82] the Tenth Circuit upheld a peremptory challenge of two potential jurors based upon the jurors's "association with persons with physical disabilities."[83] Similarly, lower courts have been reluctant to rule that *Batson* can be used to protect potential jurors from being challenged on the basis of their religious beliefs.[84]

II. State v. Buggs

A. Factual Background

Louis Cardona Buggs was tried and convicted by a jury in Hennepin County District Court for the first-degree murder of his ex-girlfriend, Kami Talley.[85] Buggs and Talley's relationship lasted approximately seven years, and included the birth of their daughter and the purchase of a home.[86] They separated in the spring of 1995.[87]

When Buggs learned that Talley was dating someone else in August 1995, he confronted her and assaulted her by repeatedly punching her in the head.[88] Buggs pled guilty to fifth-degree

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Association Rights, 24 HOFSTRA L. REV. 567 (1996) (arguing that the conflict between the litigants's peremptory challenge privilege and the jurors's First Amendment privileges should be resolved in favor of the jurors's constitutionally protected First Amendment rights); Benjamin Hoorn Barton, *Religion Based Peremptory Challenges after* Batson v. Kentucky *and* J.E.B. v. Alabama*: An Equal Protection and First Amendment Analysis*, 94 MICH. L. REV. 191 (1995) (arguing that religious-based peremptory challenges are unconstitutional).

79. *See* Morgan v. City of Albuquerque, 25 F.3d 918 (10th Cir. 1994); U.S. v. Villarreal, 963 F.2d 725 (5th Cir. 1992).

80. 963 F.2d 725 (5th Cir. 1992).

81. *See id.* at 728-29.

82. 25 F.3d 918 (10th Cir. 1994).

83. *Id.* at 920.

84. *See, e.g.*, State v. Davis, 504 N.W.2d 767 (Minn. 1993) (holding that *Batson* did not apply to religious-based peremptory strikes); U.S. v. Clemmons, 892 F.2d 1153 (3d Cir. 1989) (holding that a peremptory challenge can be used as a result of a juror's religious belief). *But see, e.g.*, Casarez v. State, 913 S.W.2d 468 (Tex. 1994) (en banc) (holding that discriminatory religious classification infringed on juror's fundamental right).

85. *See* State v. Buggs, 581 N.W.2d 329, 332 (Minn. 1998).

86. *See id.*

87. *See id.*

88. *See id.*

assault, served 120 days in jail and received probation for two years.[89] As part of his probation, he was to have no contact with Talley or their daughter.[90] After completing his jail sentence, Buggs made a threatening phone call to Talley.[91] Immediately following this violation of the no-contact order, an arrest and detention order was issued for Buggs.[92]

On February 12, 1996, Buggs' probation officer called Buggs to inform him of the arrest and detention warrant and to urge him to turn himself in to the police.[93] Buggs, however, was already aware of the warrant, because Talley had called him and warned him to "watch his back."[94] On February 14, 1996, at Talley's place of employment, her supervisor, William McLellan, heard Talley's voice and the voice of an unidentified male coming from the women's restroom.[95] As McLellan was about to open the door, he heard Talley say "no" three times, the male voice say "you bitch," and a single gunshot.[96] As McLellan fled the building, he heard repeated gunfire.[97]

After arriving at the scene, police officers found Talley lying in a pool of blood on the floor.[98] When asked who did this to her, she first replied "Butch" and then replied "Buggs."[99] Talley died approximately two hours later of multiple gunshot wounds to her chest and abdomen.[100] The day of the murder, Buggs and two friends left Minnesota and stayed with friends and relatives in Texas and Mexico.[101] Police eventually arrested him in Virginia on April 20, 1996.[102]

Buggs was charged with first-degree murder and tried by a Hennepin County District Court jury.[103] During questioning of prospective jurors before trial, the prosecutor exercised a peremptory challenge to remove juror number 32.[104] Immediately

89. *See id.*
90. *See id.*
91. *See id.*
92. *See id.* at 333.
93. *See id.*
94. *See id.*
95. *See id.*
96. *See id.*
97. *See id.*
98. *See id.*
99. *See id.* Butch is Buggs's nickname. *See id.*
100. *See id.*
101. *See id.* at 333-34.
102. *See id.*
103. *See id.*
104. *See id.* at 339 (noting that Juror number 32, the excluded White juror, has a

prior to the peremptory challenge, the prosecutor asked this White juror a number of exclusively race-related questions.[105] The

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black daughter and is often mistaken for a Native American).

105. *See id.* at 343 n.2. The Supreme Court reproduced the entire sequence of questions in its opinion:

> Q. I want to go back to something you talked about with Mr. Lucas and kind of your impressions when you came in at that first kind of gathering that we had when we first called all the jurors together. You know, you indicated some concern about the system, given that you looked around and there were only a few people of color in the room, and I think you said something like the 1950's Minnesota or something. Do you have any perception or information in terms of kind of how that happens or who controls that or where that comes from, that kind of makeup of a group?
>
> A. Well, looking at the division – I found out that the zip code I gave you was incorrect. I didn't realize. I had just recently moved and I had the wrong zip code, so I was looking in the phone book and that's when I realized this is a county court, so it's not just the City of Minneapolis. It's all of these, and some of the prospective jurors are from the outlying suburbs, and so it is reflective of the county, I am sure. It just isn't reflective of the city.
>
> Q. And did that information kind of change maybe how you felt when you saw that or not?
>
> A. That day, yes.
>
> Q. Do you have some concerns about the system in general treating people of color fairly?
>
> A. Yes, I have concerns about it.
>
> Q. Can you verbalize that at all, explain that to me what you are thinking?
>
> A. It all kind of falls back on the media. If I watch the news, if there is a crime committed, and this is my opinion now. I will just be honest about it, if the person that they have as a suspect is black, their picture is flashed on the entire screen. If the person is caucasian, rarely do you see a picture, and so my family and friends that live in the outlying parts of the state, I get this sense of fear from them, and I think that it ahs [sic] been promoted by the media.
>
> Q. And how do you see that played out in the courtroom here in Hennepin County in terms of what happens in these cases?
>
> A. I don't have any experience with it, I am sorry, but I—that was my feeling is that, you know, if that assembly room of jurors reflected what I have known in my acquaintances or just people when I was looking to rent a place.
>
> Q. Were different?
>
> A. It's different. Because I am caucasian, I hear things from caucasian people that they wouldn't talk about around black people.
>
> Q. And given that you are being talked to in a case where you can expect to be a juror and the defendant is African-American, how do you [sic] beliefs about what we are facing as a society here, how do those beliefs affect how you would sit as a juror in a case like this where we do have a defendant of color?
>
> A. I feel—well, the reason I wanted to be a juror so there would be somebody who doesn't have that fear base.
>
> Q. And would you treat this defendant in this case differently based on the fact that he is a person of color and not a white person?
>
> A. No. I didn't know when I saw that assembly room that it was going to be a person of color. I didn't know anything about the case, so I—
>
> Q. And is it kind of your belief or your expectation of your decision making that the defendant's race should not enter into your decision about the

defense objected that the peremptory challenge was racially motivated and deprived Buggs and juror number 32 of their right to equal protection under the law.[106] The trial court agreed that the defense had a persuasive objection to the peremptory challenge.[107] Nevertheless, the trial court ruled that it was a permissible peremptory challenge.[108] Because no prima facie case of discrimination was established,[109] the prosecutor was not required to offer any explanation, race-neutral or otherwise, for the peremptory challenge.[110]

At trial, the State presented strong circumstantial evidence linking Buggs to the shooting.[111] This evidence included a red bag found at the scene of the murder containing Buggs's thumbprint, and evidence that Buggs owned a gun of the same type likely used in the murder.[112] After two days of deliberation, the jury found Buggs guilty of first-degree murder and sentenced him to a mandatory term of life imprisonment.[113] Buggs appealed his conviction to the Minnesota Supreme Court, which rejected all five grounds of his appeal.[114]

B. Majority Opinion

In addressing Buggs's argument concerning the removal of a

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facts of the case?

A. No. I don't feel that I would be affected by race.

Q. And do you feel that it's likely or possible that you would hold the state to a higher burden of proof because of the fact that the defendant is a black man?

A. No.

Id.

106. *See id.* at 339.

107. *See id.* at 346 n.15. The trial court responded to the defense objection:

> I couldn't agree with you more, her answers made her seem like an ideal juror to try to get this to be as representative as possible of a jury from the pool we have to choose from. It's unfortunate, because she does add or would add more, if not minority representation on the panel, at least someone who lives and works and understands the black community, and I got that impression from her.

Id.

108. *See id.* at 344 n.3. The trial court was "not willing to expand [*Batson* protection] to a Caucasian who may be living in a primarily minority family." *Id.*

109. *See supra* note 44 and accompanying text (outlining *Batson*'s requirements for establishing a prima facie case of discrimination).

110. *See Buggs*, 581 N.W.2d. at 346 n.13.

111. *See id.* at 334.

112. *See id.*

113. *See id.*

114. *See id. See also supra* note 5 (outlining all five arguments raised by Buggs on appeal).

potential juror, the Minnesota Supreme Court held that the use of the peremptory challenge did not violate the equal protection rights of Buggs or juror number 32.[115] The court relied in part upon *State v. Stewart*,[116] which stated that "[a] prima facie case of racial discrimination is established by showing that one or more members of a *racial group* have been peremptorily excluded from the jury and that circumstances of the case raise an inference that the exclusion was based on race."[117] The court emphasized that the juror was not herself a member of a racial minority, despite the racial composition of her family.[118] Stating that "*Batson* protects the potential juror's racial status," the court refused to extend *Batson* to protect a potential juror's "racial and political beliefs or philosophies."[119]

C. *Dissenting Opinion*

Justice Page disagreed with the majority's determination that the peremptory challenge did not constitute a prima facie case of racial discrimination.[120] Page criticized the majority for suggesting that because the juror was not a member of a racial minority, race was not an issue in the case.[121] Page argued that if juror number 32 had been Black and made the same comments,[122] *State v. McRae* would have required reversal.[123] He asserted that the majority treated juror number 32 differently simply because she was White.[124] Page noted that the Minnesota Supreme Court's Task Force on Racial Bias made an express commitment to root out racial bias from the judicial system.[125] He argued that *Batson*

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115. *See Buggs*, 581 N.W.2d at 339.

116. 514 N.W.2d 559 (Minn. 1994).

117. *Id.* at 563 (emphasis added).

118. *See Buggs*, 581 N.W.2d at 339.

119. *Id.*

120. *See id.* at 344. Justice Page's dissent was not joined by any other member of the court. *See id.*

121. *See id.* at 345.

122. *See id.* at 346.

123. *See* State v. McRae, 494 N.W.2d 252, 253-58 (Minn. 1992). *See also supra* notes 67-70 and accompanying text (discussing *McRae*).

124. *See Buggs*, 581 N.W.2d at 346.

125. *See id.* at 345. Page points to the court's commitment to eliminate racial discrimination as stated in the MINNESOTA SUPREME COURT, TASK FORCE ON RACIAL BIAS IN THE JUDICIAL SYSTEM, FINAL REPORT 32-38 (May 1993). *See Buggs*, 581 N.W.2d at 345 n.6 (explaining that in 1990, the Minnesota legislature and Supreme Court created a task force on racial bias in the state's judicial system in order to explore, document and make recommendations regarding racial bias in Minnesota courts). Additionally, Justice Page argued that the U.S. and Minnesota Constitutions obligate the court to eradicate racial bias. *See id.* at 345.

sets a floor, rather than a ceiling, for contesting race-based peremptory challenges, and recommended that the court set a higher standard to ensure that racial bias does not infect the selection of jurors.[126]

III. Analysis

A. The Peremptory Challenge in Buggs *Concerns Both Race and Discrimination*

In an attempt to ensure the continued use and integrity of the peremptory challenge, the Minnesota Supreme Court refused to recognize the exclusion of the juror in *Buggs* as an issue concerning race or discrimination.[127] Regardless of the court's intent, however, the decision disadvantaged both the potential juror and the criminal defendant because of their skin color.

1. Racial Discrimination Against the Juror

The juror's removal in *Buggs* resulted from her responses to questions dealing exclusively with race.[128] Looking at the entire set of questions posed during voir dire, the only characteristics revealed about the juror were her concern about the lack of minority representation on the jury panel, and racism in society and the media.[129] Considering that the peremptory challenge immediately followed the voir dire, the prosecution would presumably have had a difficult time giving a truly race-neutral explanation for the exclusion.[130]

Had juror number 32 been Black, *State v. McRae* would have required the prosecutor to offer a race-neutral explanation for her

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126. *See Buggs*, 581 N.W.2d at 347.

127. *See id.* at 339 (arguing that "[w]hile juror number 32 may have appeared to be an ideal juror from the defense perspective, the state could well have perceived her as someone with an agenda who was predisposed to acquit—as the trial court noted in its ruling, '[t]hat's what perempts are for'").

128. *See id.* at 343 n.2.

129. *See supra* note 99 (setting out a portion of the trial transcript). *Cf.* State v. McRae, 494 N.W.2d 252, 257 (Minn. 1992) (noting that "a large percentage of fair-minded, reasonable black people and fair-minded, reasonable people of any other race would have answered" questions about race and the criminal justice system in the same way).

130. Conceivably, the juror might have had characteristics not readily apparent in the voir dire transcript that convinced the prosecutor to exclude her. For instance, something about her physical demeanor, her tone in answering the questions or another characteristic may have made her an undesirable juror. Nevertheless, in light of the apparent racial motivation, the prosecutor should, at a minimum, be required to reveal any such race-neutral explanation.

exclusion.[131] Read together, *Buggs* and *McRae* suggest that a Black juror cannot be excluded solely because she believes that Blacks are treated unfairly by the system, but a White juror can. It follows that the prosecutor in *Buggs* could exclude juror number 32 not only because of her racial beliefs but also because she was not Black. Meanwhile, both federal and state courts have interpreted the Equal Protection Clause to protect potential jurors,[132] including Whites,[133] from racially discriminatory peremptory challenges. Therefore, use of the peremptory challenge in *Buggs* should have been sufficient to establish a prima facie violation of the excluded juror's equal protection rights.[134]

2. Racial Discrimination Against the Defendant

More significant than the discriminatory impact on juror number 32 was the discriminatory impact on Buggs himself. Although Buggs had no constitutional right to a jury made up of a particular racial composition,[135] criminal defendants have a constitutional right to a jury of peers selected pursuant to nondiscriminatory criteria.[136] As recognized in *Batson*, an "indifferently chosen" jury is essential to ensure that a criminal defendant is not deprived of his life or liberty on account of racial prejudice.[137]

Buggs missed the point when it construed *Batson* and *McRae* to only protect a defendant's interest in a jury containing jurors with a particular skin color. Although the facts in *Batson* and *McRae* involved Black defendants and Black jurors, the decisions

131. *See supra* notes 67-70 and accompanying text (discussing State v. McRae, 494 N.W.2d 252 (Minn. 1992)).

132. *See supra* notes 62-66 and accompanying text (describing Powers v. Ohio, 499 U.S. 400 (1991)).

133. *See supra* notes 54-61 and accompanying text (discussing extension of *Batson* protection to White venire members struck on the basis of their race).

134. Buggs would have third party standing to assert a claim of invidious racial discrimination on behalf of the excluded juror. *See supra* note 65 and accompanying text (describing the Equal Protection Clause and third party standing in *Powers*).

135. *See supra* notes 28 and 47 and accompanying text (discussing the "jury of peers" limitation).

136. *See* Batson v. Kentucky, 476 U.S. 79, 86 (1986) (arguing that a racially motivated peremptory challenge denies a criminal defendant equal protection).

137. *See id.* at 86-87. *See also* Strauder v. West Virginia, 100 U.S. 303, 308 (1880) (stating that "[t]he very idea of a jury is a body . . . composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, [and] persons having the same legal status in society as that which he holds").

turned on the premise that a criminal defendant should not be disadvantaged on account of the prosecutor's unfounded or stereotypical assumptions about race.[138] Buggs was disadvantaged by such an assumption.

Because juror number 32 answered the prosecutor's questions in a way that reflected her concerns about the plight of minorities in the criminal justice system and society as a whole,[139] the court permitted the prosecutor to assume this would make her partial and predisposed to acquit.[140] As the court noted under similar circumstances in *State v. McRae*, however, "fair-minded, reasonable people of any other race" would likely express these concerns if prompted by a prosecutor's questions.[141] Moreover, the court has acknowledged that such concerns about racial inequality in the criminal justice system are factually justified.[142] Nevertheless, the *Buggs* majority allowed the prosecutor to use the juror's fair-minded, reasonable opinions as a basis to remove her from the venire. In the process, the court denied the defendant a potentially insightful juror from his group of peers.

If one were to imagine a parallel scenario involving a seventeen-year old criminal defendant, it would be unreasonable to immediately remove a potential juror who expressed legitimate concerns about the educational system or the difficulty teenagers face in the modern world. Logically, if this parallel scenario peremptory challenge is allowed, it would permit the same unfounded assumption as in *Buggs*, that a particular juror, because she has a common, critical, and socially-responsible belief system, will not be able to intelligently and impartially analyze the particular facts of the case at hand. The only difference between the two scenarios is that in the racial context the United States Supreme Court and past cases of the Minnesota Supreme Court have uniformly ruled that such assumptions formed on the

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138. *See supra* notes 33-47 and 63-66 and accompanying text (discussing *Batson* and *McRae*).

139. *See supra* note 99 (quoting prosecutor's questioning of the excluded juror).

140. *See* State v. Buggs, 581 N.W.2d 329, 339 (Minn. 1998) (holding that the prosecutor's perception of the potential juror justified the peremptory challenge).

141. State v. McRae, 494 N.W.2d 252, 257 (Minn. 1992). *See supra* notes 67-70 and accompanying text (describing the facts and holding of *McRae*).

142. *See supra* note 125 and accompanying text (discussing the Minnesota Task Force on Racial Bias). One example of the findings in the FINAL REPORT is that despite the fact that people of color make up 11% of Hennepin County's population, they make up just 6% of the county's petit jurors. *See* MINNESOTA SUPREME COURT, TASK FORCE ON RACIAL BIAS IN THE JUDICIAL SYSTEM, FINAL 12 (May 1993).

basis of race will not be tolerated.[143]

Moreover, it is significant that juror number 32 made her initial comments regarding the racial make-up of the jury before she knew the defendant's race.[144] Had Buggs been a White criminal defendant, juror number 32's comments that the jury pool reflected the racial composition of 1950s Minnesota would presumably have gone unnoticed and her observation would have been insignificant. But because Buggs was Black, the prosecutor focused exclusively on the juror's views on race and was permitted to remove her based on those views. Ironically, in the end Buggs bore the loss of exactly the type of racial disparity that juror number 32 was perceptive enough to notice.[145] By commenting on the disproportionate jury panel, juror number 32 set in motion a process that eventually deprived Buggs of a racially-perceptive and insightful juror. Had Buggs been White, this process would never even have been set in motion.

B. The Dangers of Defining Race Narrowly

In *Buggs*, the court analyzed the issue of race in a way that is likely to limit future decisions and discussions dealing not only with peremptory challenges but with any racial issues. First, the court emphasized that juror number 32, a White woman, was not a member of a racial minority, regardless of the composition of her family.[146] Although this comment may have been simply intended to distinguish *Buggs* from the typical peremptory challenge case, it can also be read as a suggestion that racial discrimination in jury selection is less of a concern for non-minorities. Second, the court differentiated between a person's racial status and her racial beliefs, holding that the former is protected by *Batson*, while the latter is not.[147] *Buggs*'s narrow definition of what constitutes an issue of "race" may seem straightforward and fair at first glance, but it actually presents a number of significant public policy concerns.

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143. *See supra* Parts I.B and I.C.1 (discussing *Batson* and extensions of equal protection to peremptory challenges).

144. *See supra* note 105 (quoting prosecutor's questioning of the excluded juror).

145. *See supra* note 142 (indicating that racial composition of juries in Minnesota does not accurately reflect the racial composition of Minnesota's population).

146. *See* State v. Buggs, 581 N.W.2d 329, 339 (Minn. 1998).

147. *See id.*

1. The Three Goals of *Batson* Are Now Easily Undermined

By holding that the peremptory challenge in *Buggs* does not establish a prima facie case of racial discrimination, the court opened the door for attorneys to exercise peremptory challenges in a way that undermines all three objectives of *Batson v. Kentucky*.[148] *Buggs*'s potential for violating the first two objectives, ensuring that both defendants and jurors are not discriminated against because of their race, is discussed in the previous section.[149] The third goal of *Batson*, maintaining public confidence in the fairness of the justice system, is also impaired by *Buggs*. Just as "empanelling an all-white jury in a heavily black area still raises eyebrows, no matter how fair the selection process was in fact,"[150] the elimination of a competent and racially-sensitive juror in the trial of a Black defendant appears suspect, regardless of the long legal tradition of unquestioned peremptory strikes. Although the community's confidence in the system is impossible to measure with any accuracy, the public, as a whole, is not naive and is capable of recognizing racially discriminatory intent, even when the narrow categories of the law do not.

When a court chooses to ignore even one of these three purposes for prohibiting race-based peremptory challenges, the decision should be carefully scrutinized. Accordingly, where all three goals are undermined, as in *Buggs*, public policy requires an inquiry into whether the value of maintaining the peremptory challenge status quo justifies the costs to the excluded juror, the criminal defendant and the community at large. To effectively reconcile this disparity between the system's goals and its results, a broadening of courts's conceptions of race is essential. First, racial discrimination must not be characterized as exclusively a concern of racial minorities. Instead, the court, the jurors and the parties should all be presumed to be interested in the elimination of racial prejudice in the judicial system. Second, courts should consider racial beliefs and opinions in the determination of whether racial discrimination has facially occurred. These adjustments would not eliminate the usefulness of the peremptory

148. *See supra* notes 49-51 and accompanying text (analyzing the three primary objectives of *Batson*).

149. *See supra* Part III.A.1-2 (discussing the violation of the equal protection rights of prospective jurors and criminal defendants).

150. Leipold, *supra* note 78, at 991 (arguing that peremptory strikes based on race inflict more damage on the public's confidence in the system than would strikes based on first amendment-protected activities).

challenge,[151] yet they would eliminate the inconsistencies in a case like *Buggs* which attempts to faithfully apply *Batson* but ultimately undermines everything *Batson* sought to accomplish.

2. Racial Categorization Is Becoming Increasingly Complex

Another danger of building a body of law on the narrow definition of "race" used in *Buggs* is that the racial status of individuals is difficult to accurately pinpoint.[152] The current categories of racial classification were created by the federal government for statistical and administrative purposes, yet have been widely criticized as being an inaccurate reflection of people's actual racial and ethnic identities.[153] These government categories often fail to conform to biological reality,[154] especially in the case of mixed-race individuals.[155]

In light of the flaws in these socially-constructed racial categories, a rigid system of extending *Batson* protection to individuals only according to their racial status seems both unwise and unjust. With continuing population changes due to immigration and interracial marriage,[156] the practice of identifying racial categories in America will inevitably become more difficult. Furthermore, in the interests of justice, courts should not encourage the practice of imposing government-created racial categories on individuals who perceive their own racial identities differently. Finally, rigid racial categorizations by courts may foster a greater sense of separation between racial groups, which in turn will result in more racial prejudice in the

151. *See infra* notes 159-161 and accompanying text (responding to the potential criticism that extending *Batson* to racial beliefs will eliminate the usefulness of the peremptory challenge).

152. *See* Omi, *supra* note 44, at 23 (arguing that "[r]ace and ethnicity will continue to defy our best efforts to establish coherent definitions over time. The real world is messy with no clear answers. Nothing demonstrates this convolution better than the social construction of racial and ethnic categories.").

153. *See id.* at 9-13 (discussing how a person's membership of a racial group is determined for the purpose of legal classification). *But see* Denton, *supra* note 44 (arguing that despite flaws in reflecting individuals's personal identity, assigning a social identity is essential).

154. *See* HOLLINGER, *supra* note 44, at 29-31 (explaining that the current categories fail to correspond even to the archaic "racial" definitions of Caucasian, Negroid and Mongoloid).

155. *See* ZACK, *supra* note 44, at 142-43 (describing the alienation felt by mixed-race Americans who find that the government categories do not describe them); *see also* HOLLINGER, *supra* note 44, at 43 (arguing that mixed-raced persons will ultimately deal the current categories their death blow).

156. *See* Denton, *supra* note 44, at 84 (discussing how a person's membership in a racial group is determined for the purpose of government classification).

courtroom.

3. Buggs Definition of Race Sets a New Precedent

Prior to *Buggs*, no court had squarely addressed the issue of whether removing a juror on the basis of her racial beliefs constitutes purposeful discrimination. Consequently, in ruling as it did, the Minnesota Supreme Court missed an opportunity to clarify the law in a way that discourages rather than encourages racially motivated peremptory challenges. In light of the court's obligation to eliminate racial bias from the state's courts,[157] Buggs's appeal would have been an ideal opportunity for the court to demonstrate its commitment to thoughtfully confronting racism. Instead, the court defined race quite narrowly and chose to confine *Batson*'s equal protection analysis to only the most clear-cut and simplistic fact scenarios.

C. Potential Criticisms of Extending Batson *Protection to Racial Beliefs*

The proposal to extend *Batson* equal protection analysis to the racial beliefs or opinions of jurors raises a number of potential criticisms. Given the historically unlimited use of peremptory challenges in U.S. courts, any proposal to increase restrictions in this area of the law will probably be met with resistance.[158] This section addresses three likely criticisms of the proposal to extend *Batson* protection to racial beliefs.

1. The Usefulness of Peremptory Challenges Will Not be Undermined

The primary criticism of prohibiting peremptory challenges on the basis of a juror's racial beliefs is that this would effectively eliminate the usefulness of peremptory challenges altogether.[159] This premise is flawed because it mistakenly assumes that extending *Batson* protection to racial beliefs and opinions automatically requires extending *Batson* protection to all beliefs

157. *See supra* note 125 and accompanying text (discussing the MINNESOTA SUPREME COURT, TASK FORCE ON RACIAL BIAS IN THE JUDICIAL SYSTEM, FINAL REPORT and the court's obligations under state and federal constitutions).

158. *See supra* Part I.A. (discussing the history of the peremptory challenge and the slow, evolving process aimed at eliminating race-based peremptory challenges).

159. *See* State v. Buggs, 581 N.W.2d 329, 339 (1998) (refusing to extend *Batson's* equal protection analysis to a juror's beliefs or philosophies, because the purpose of the peremptory challenge is to allow parties to remove any juror whose beliefs suggest a predisposition to decide in favor of the other side).

and opinions.[160] For many people, their beliefs on race likely reflect a very small portion of their total personality or belief system. There are numerous aspects of the human condition that could legitimately justify the exclusion of a juror. Whether it be on the basis of the juror's political, religious or social beliefs, parties could continue to use peremptory challenges to remove potentially unfavorable jurors.

Race, however, is treated differently. In light of the extensive history of racial discrimination in this country and the difficulty of detecting racial discrimination, *Batson* and its progeny recognized that preventing racially discriminatory peremptory challenges required special treatment and heightened scrutiny.[161] Although a party's primary goal in using a peremptory challenge may be to increase their chances of winning the case, racial discrimination should not be accepted as a necessary by-product of a jury trial.

2. Racially Insensitive or Intolerant Jurors Will Not be Protected

It could also be argued that the extension of *Batson* protection to the racial beliefs of a racially sensitive and tolerant juror would require similar protection for the racial beliefs of a racially insensitive or intolerant juror. For instance, supporters of this argument may assert that a white supremacist could not be removed from the trial of a Black defendant on the basis of that juror's racial beliefs. Such a scenario, however, differs from a situation like *Buggs* in three significant respects. First, keeping a White supremacist on the jury would violate *Batson*'s objective of eliminating racial discrimination against the criminal defendant. In such a scenario, a Black defendant's equal protection rights would be violated because having a White supremacist on the jury would disadvantage the defendant solely on the basis of the defendant's skin color. Second, *Batson*'s objective of ensuring that juror's are not discriminated against on account of their race would also be upheld because the exclusion of the overtly racist juror would not depend at all on the juror's skin color, but only on her inability to impartially consider evidence. For example, if a

160. *See id.* The court's argument makes no distinction between racial beliefs and opinions and all types of beliefs and opinions. *See id.*

161. *See supra* notes 35-70 and accompanying text (discussing *Batson* and extensions of *Batson* protection). Significantly, the only similar extension of such special treatment outside the racial context involved gender discrimination, which is comparable to racial discrimination in its deeply-rooted history, its subtlety and its attack on the unmalleable essence of an individual. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 154 (1994).

Black juror demonstrated an intolerance of other Blacks in the trial of a Black defendant, that juror could be removed with a peremptory challenge, yet that removal would have nothing to do with the race of the juror in question. Third, *Batson*'s goal of encouraging public confidence in the justice system would clearly be furthered by the exclusion of racially intolerant jurors. Ultimately, when a peremptory challenge is made on the basis of a juror's racial beliefs, the court must analyze all these factors to determine whether purposeful racial discrimination has truly taken place.

3. Trial Judges Will Not Have Excessive Discretion

Another potential criticism of extending *Batson* protection to a juror's racial beliefs is that such a rule would give too much discretion to the trial judge. This fear of unpredictable or inconsistent application of *Batson*'s principles is not justified. Inevitably, a trial judge will need to look subjectively at each peremptory challenge to determine whether the excluded juror has been discriminated against on the basis of their racial status or their racial beliefs. This is necessarily a fluid test, which will vary depending upon the circumstances of each particular jury selection process. Nevertheless, extending *Batson* protection to racial beliefs will not create any more judicial discretion than is currently exercised in every trial. The trial judge is the only person in a position to neutrally analyze the jury selection process. Regardless of whether an accusation of discrimination is based upon the juror's skin-color or upon the juror's racial beliefs, the ultimate determination will rest with the trial judge to decide if the explanation of the peremptory strike is truly race-neutral.

A criticism that such a rule provides for too much judicial discretion would essentially be an argument in favor of returning to a pre-*Batson* analysis of race and jury selection.[162] By analyzing the relevant circumstances of each individual case, the trial judge plays an indispensable role in eliminating racial prejudice in the use of peremptory challenges.

Conclusion

Buggs takes a step in the wrong direction in the judicial

162. *See supra* notes 30-41 and accompanying text (establishing that prior to *Batson* a defendant needed to prove a prosecutor's pattern of racial discrimination over a series of cases, while *Batson* permitted a trial judge to look exclusively at the relevant circumstances of the immediate case to determine that an equal protection violation had occurred).

system's effort to eliminate racial bias from the courts. The complexity of racial discrimination requires that courts be willing to look beyond skin color to determine whether purposeful racial discrimination is occurring. It must be remembered that despite its lengthy tradition in the U.S. legal system, the peremptory challenge is not a constitutional necessity. By taking into consideration a juror's racial beliefs or opinions, courts will be able to more accurately and more justly determine whether invidious racial prejudices are being acted upon in the courtroom. The final result will be to secure the equal protection rights of the parties and the potential jurors while fostering the community's faith in the fairness of the criminal justice system.