
Peremptory Challenge by Blind Questionnaire: The Most Practical Solution for Ending the Problem of Racial and Gender Discrimination in Kansas Courts While Preserving the Necessary Function of the Peremptory Challenge

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I. INTRODUCTION

In American jurisprudence, the peremptory challenge is a necessary tool for trial lawyers in establishing confidence in sitting an impartial jury. Unlike the challenge for cause, which requires a reason for juror removal, the peremptory challenge allows lawyers to efficiently remove jurors from the venire, without disclosing a reason. Since lawyers do not have to defend their decision to remove a juror, lawyers are able to exercise some control over the jury selection. This element of control gives lawyers confidence that an impartial jury can be established, which is a key factor in the acceptance of a jury's decision, whether favorable or unfavorable to the specific party.

A criminal defendant, civil litigant, and juror all have a constitutional right not to be discriminated against on the basis of race or gender in jury selection; therefore, the peremptory challenge cannot be exercised on the basis of race or gender. Since the peremptory challenge is widely used in the jury selection process and because it cannot be discriminatory, a practical solution is needed to accommodate the following two ideals: 1) preserve the basic function of the peremptory challenge, which is to allow lawyers to remove jurors without disclosing cause, and 2) prevent the peremptory challenge from being exercised on the basis of racial or gender discrimination.

The most widely used solution to address probable discrimination when using the peremptory challenge is the *Batson* test, which resulted from the 1986 United States Supreme

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Court case of *Batson v. Kentucky*.¹ The *Batson* test allows a lawyer to view and question potential jurors in the customary fashion, then remove the ones that appear to be biased with a peremptory challenge. If, however, the opposing lawyer can demonstrate a prima facie case that the challenge appears to be discriminatory, the lawyer who removed the juror must disclose a non-discriminatory reason for the peremptory challenge, and the judge decides if the challenge will be upheld.

Unfortunately, there are a number of flaws in the *Batson* test, which make it ineffective in accomplishing its purpose. First, it undermines the basic premise of the peremptory challenge, which is *not* disclosing a “reason” for the juror’s removal; thus, making it a somewhat “watered-down” version of a challenge for cause. The *Batson* test also transfers control over the juror’s inclusion or exclusion on the jury from the lawyer to the judge, which weakens the “control” factor needed to instill confidence in establishing an impartial jury. Furthermore, the standards for applying the *Batson* test are too broad; lawyers can easily make a prima facie case against most peremptory challenges, if not all. For example, all jurors are part of a race and gender class; therefore, a lawyer technically can make a prima facie case for every juror removed by peremptory challenge. And, finally, the lawyer defending the peremptory challenge easily can circumvent the challenge; therefore, it has rarely prevented a juror from being removed.

Consistent with all jurisdictions in the United States, the *Batson* test is applied in Kansas’ jury selection. An abundance of Kansas case law shows that the *Batson* test fails in all the ways previously discussed. Therefore, this article proposes that Kansas should consider changing its jury selection process by introducing jury selection by blind questionnaires, restricting peremptory challenges to questionnaire responses before the parties view the jurors and eliminating the *Batson* test. Challenges for cause should continue to be exercised after the parties view the jurors; however, the grounds for challenges for cause should be expanded to include inconsistent answers. For example, if a juror gave an answer that was inconsistent with her questionnaire response, a lawyer could exercise a challenge for cause to remove the juror.

By using blind questionnaires, lawyers can make peremptory challenges based on the juror’s questionnaire responses. Because lawyers will not have viewed the jurors, the potential for race and/or gender influences will be greatly reduced. Therefore, the necessary non-disclosing function of the peremptory challenge would be preserved. Lawyers would no longer have to disclose non-discriminatory reasons for their peremptory challenges required under the *Batson* test because the chance of race and gender discrimination would be essentially eliminated. Therefore, the *Batson* test could be discontinued.

Jury selection that exercises peremptory challenges solely on blind questionnaires combined with exercising challenges for cause after viewing the jury would preserve and upgrade all of the advantages of the jury selection process in

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Kansas in the following ways: 1) the process would eliminate racial and gender discrimination, 2) it would enhance the probability of a more impartial jury, 3) it would increase confidence in the jury selection process, and 4) it would increase judicial economy.

Bias or partiality stems from one's state of mind or psychographic features such as attitudes and mental impressions; bias is not derived from demographic features such as race or gender. Psychographic features can be detected from expressed mental impressions and physical gestures. Racial and gender discrimination will be significantly reduced by exercising peremptory challenges based on blind questionnaire responses combined with exercising challenges for cause after viewing the jury. The blind questionnaire responses will obtain only the expressed mental impressions of the jurors on which the lawyers will solely base their peremptory challenge decisions. This prevents peremptory challenge decisions based on demographic features such as race or gender because the lawyers cannot see or hear the jurors and the questionnaire will not give reference to race or gender.

Once the lawyers are allowed to view the jurors, they may choose to exercise challenges for cause. To exclude a juror with a challenge for cause in Kansas, a court must conclude that a juror has a partial state of mind; therefore, a lawyer must disclose an apparent reason that the juror has a partial state of mind. Knowing this, lawyers will focus only on the behaviors and responses of jurors that indicate a partial state of mind which are psychographic as evidenced by expressed mental impressions and physical gestures. Lawyers will not focus on demographic features such as race or gender because they cannot support a challenge for cause based on these factors. Therefore, this blind questionnaire/viewing process of jury selection, in effect, would systematically reduce the possibility of unconstitutional race and gender discrimination.

The probability of a more impartial jury would be enhanced with the implementation of blind questionnaires. These questionnaires can be administered outside of court. Therefore, the questionnaires would not be subject to the time constraints of conventional jury selection. Lawyers could thoroughly examine all jurors equally and ask as many questions as they want. Blind questionnaires would allow lawyers to get greater insight into the mental impressions of every juror in order to make more informed decisions when exercising peremptory challenges.

The advantage of viewing the jury in Kansas' current state of jury selection would remain intact because lawyers could choose to exercise challenges for cause. Not only would this expose lawyers to the jurors' physical gestures that could indicate bias, but also lawyers could check for inconsistent responses to their questions when compared to the questionnaire portion of the jury selection process. Inconsistent answers could indicate that a juror is untrustworthy or potentially partial and possibly an appropriate ground for a challenge for cause. Therefore, when lawyers actually

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could view the jurors and ask them questions, lawyers would have an opportunity to check for inconsistent answers, which is not an option currently. Jury selection that combines blind questionnaires with viewing, in effect, provides an additional avenue to detect partiality. Thus, the probability of an impartial jury would be enhanced from the current form of jury selection.

Confidence in the jury would increase if lawyers were allowed to check for inconsistent answers. If a lawyer viewed the jury and discovered jurors that she normally would exclude with a peremptory challenge in the current system, her confidence in deciding to challenge or not to challenge would be enhanced greatly if she could determine whether answers to her questions were consistent with responses on the questionnaire. Determining response consistency would confirm the reasons why the lawyer did or did not exclude the juror with a peremptory challenge. Thus, the blind questionnaire/viewing combination gives lawyers an additional measure in seating an impartial jury.

Juror confidence in jury selection would increase because jurors would know that lawyers could not base peremptory challenges solely on viewing. Thus, jurors could feel relatively sure that their exclusion was not due to any type of discrimination.

Judges would have more confidence in such a system because removal of the *Batson* test would eliminate the judge's task of deciding which juror exclusions were possibly based on race and/or gender.

The new system would enhance judicial economy because jurors could respond to the blind questionnaires outside of court. Lawyers could ask as many questions as they deemed necessary without using court time. In addition, the removal of the *Batson* test would prevent the possibility of taking up court time to conduct the test, which is in effect a mini-trial in the jury selection process: the party making the *Batson* challenge attacks the opposing party's juror selection by making a prima facie case and the opposing party defends against this attack.

This article briefly explains the origins of the peremptory challenge, presents arguments for and against its preservation in the jury selection process, and discusses the reasons why the peremptory challenge is a necessity despite the arguments against it. Furthermore, this article explains why the peremptory challenge must not be discriminatory, describes how the Supreme Court in *Batson v. Kentucky* devised a test to eliminate discriminatory peremptory challenges, and how the scope of that test was expanded. This article explains why the application of the *Batson* test in Kansas' jury selection is not effective in ending discriminatory peremptory challenges and, in fact, undermines the basic premise of the peremptory challenge. Finally, this article discusses several alternatives to the *Batson* test and why Kansas should consider exercising peremptory challenges based on blind questionnaires, and challenges for cause with expanded standards to be exercised by viewing the jury pool, as the most

effective solution in the jury selection process.

II. ORIGIN OF THE PEREMPTORY CHALLENGE

Like most of American jurisprudence, the United States inherited the peremptory challenge from England during the colonial era.² Every state in the United States allows peremptory challenges.³ The right to exercise a peremptory challenge in the United States, however, is not guaranteed by the Constitution.⁴ Rather, the peremptory challenge exists as a tool for establishing an impartial jury,⁵ which is constitutionally guaranteed by the Sixth and Seventh Amendments.⁶ Allowing the parties to eliminate individuals in jury selection who may be biased or unfavorable to their case can ensure impartiality of a jury.⁷ Parties can eliminate potentially biased jurors by using either a challenge for cause or a peremptory challenge.⁸

When using a challenge for cause to remove a juror, a lawyer must prove to the court that the juror would not be impartial in determining a verdict.⁹ On the other hand, when using a peremptory challenge to remove a juror, a lawyer is *not* required to prove to the court why the juror would not be impartial.¹⁰ Therefore, the peremptory challenge is based upon the subjective opinion of the challenging party, which remains confidential with that party.¹¹

The basic premise of not disclosing a reason for eliminating a juror is why the peremptory challenge was created—in order to enhance the prospect of sitting an impartial jury.¹² In theory, this non-disclosing element furthers impartiality because it allows for the elimination of those jurors who appear to be untrustworthy or potentially biased for unexplainable or inarticulable reasons.¹³ For example, the responses and gestures of a juror may not indicate that she is biased, but the lawyer, nonetheless, intuitively feels that the juror is untrustworthy for reasons she cannot articulate. Because the attorney cannot articulate a reason why a juror is actually biased, the juror cannot be excluded with a challenge for cause.¹⁴ Therefore, a peremptory challenge is needed to eliminate the juror because the attorney did not have to disclose a reason.¹⁵

III. NECESSITY OF THE PEREMPTORY CHALLENGE

The issue of whether or not a peremptory challenge serves its purpose of increasing the probability of an impartial jury is arguable. On one hand, the time constraints of jury selection are very limited, so lawyers may not be able to examine thoroughly all the jurors to detect partiality. Therefore, they must use their intuitive judgment to exclude jurors with a peremptory challenge.¹⁶ Excluding jurors based on the lawyer's intuitive judgment allowed by a peremptory challenge may increase the probability of an impartial jury. On the other hand, exercising a peremptory challenge

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to exclude a particular juror based on intuitive judgment without any evidence that the juror was actually partial, actually does not prove that the exercise of the peremptory challenge increased the probability of an impartial jury.¹⁷

A. Promotes Confidence Given the Limited Time Constraints

Whether or not the peremptory challenge serves its intended purpose of increasing the probability of an impartial jury, the peremptory challenge is a necessity in the jury selection process of the American legal system because it increases the parties' confidence in the jury system.¹⁸ As previously stated, because the time allotted for questioning jurors in jury selection is limited, lawyers cannot examine thoroughly every juror to detect partiality. In addition, when questioned by lawyers face-to-face, jurors may fail to provide evidence of bias or unfairness.¹⁹ Therefore, lawyers are forced to resort to their "nonverbal, intuitive skills" to search for bias among the jurors.²⁰ When lawyers employ intuitive skills under such limited time constraints, they may be unable to articulate knowledge about the inferred bias of jurors in order to challenge them for cause.²¹ Thus, the peremptory challenge with its non-disclosing function provides lawyers with confidence in jury selection because this challenge allows them to remove jurors based on their inarticulable intuitive feelings about partiality.²²

B. Promotes Confidence by Providing Lawyers with Control

The peremptory challenge instills confidence in litigants because it gives them more control over jury selection.²³ A party's satisfaction with a jury decision, even an unfavorable decision, is more likely when all parties participate in and have some control over the process. Thus, the peremptory challenge gives litigants control because the litigant makes the decision to remove a juror, while a challenge for cause requires a judge's approval.²⁴

C. Widely Supported By American Trial Lawyers

A counterargument to the necessity of the peremptory challenge is that England has virtually the same legal system as the United States, with the exception that the peremptory challenge has been removed from English jurisprudence.²⁵ Therefore, if English lawyers are able to form an impartial jury and have confidence in their jury system without the peremptory challenge, American lawyers arguably should be able to do the same if the standards for cause are expanded similarly to the English system. However, the notion of eliminating the peremptory challenge in the United States may

not be politically feasible because it is so widely supported. Surveys indicate that the vast majority of practicing trial lawyers in the United States want to continue using peremptory challenges in voir dire.²⁶

In 1994, 197 trial lawyers practicing in San Diego participated in a survey on the issue of excluding or preserving the peremptory challenge.²⁷ Of the respondents, ninety-eight were prosecutors, ninety-six were defense lawyers, and three did not identify themselves as either prosecutors or defense lawyers.²⁸ The respondents had varying trial experience: twenty had conducted zero to ten trials, thirty had conducted eleven to twenty-five trials, fifty had conducted fifty-one to 100 trials, and twenty-nine had conducted more than 100 trials.²⁹ Ninety-eight percent of all respondents were in favor of keeping the peremptory challenge, while only two percent wanted it eliminated.³⁰ Among the reasons the trial lawyers cited for keeping the peremptory challenge was that it provides them with a way of excluding jurors that they honestly believe are biased for reasons they cannot articulate.³¹ Other reasons they cited included that the peremptory challenge provides lawyers with an alternative option when a challenge for cause has been denied,³² gives litigants some control over the composition of the jury, and finally, the peremptory challenge was cited as valuable because the time constraints of voir dire do not always give the litigants enough time to uncover bias.³³

The peremptory challenge has been a part of American jurisprudence since the colonial era, and the 1994 survey indicated that the overwhelming majority of lawyers who have real experience with the peremptory challenge expressed many benefits for having it. Therefore, if the peremptory challenge is eliminated in the United States, the vast majority of trial lawyers believe they would suffer hardship in forming an impartial jury, thus having less confidence in the jury system.

IV. PROHIBITION OF DISCRIMINATORY PEREMPTORY CHALLENGES

While the peremptory challenge is considered a necessity and likely will not be eliminated, it cannot be used for racially discriminatory purposes.³⁴ The Supreme Court in *Powers v. Ohio*³⁵ discussed the fact that peremptory challenges based on race would undermine the confidence that both the criminal defendant and the excluded juror have in the jury system.³⁶ The juror who is removed based on race suffers humiliation that may cause the excluded juror to lose confidence in the jury system.³⁷ Likewise, the criminal defendant may lose confidence in the jury system when no weight is given to his or her objections to discriminatory peremptory challenges.³⁸ Furthermore, race-based peremptory challenges are prohibited by the United States Constitution.³⁹ One major function of the Equal Protection Clause of the Fourteenth

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Amendment is to prohibit the government from denying rights or benefits based on classifications such as race or gender.⁴⁰ Therefore, the exclusion of jurors based on race or gender is a violation of the Equal Protection Clause.⁴¹ Even though the juror does not have a right to be on a jury, the juror does have the right not to be excluded from being on a jury due to race or gender discrimination. “Indeed, with the exception of voting, for most citizens, the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process and is considered a benefit,” said the *Batson* Court.⁴²

In addition, the defendant’s equal protection rights are violated when jurors are discriminated against and excluded.⁴³ “The defendant does have a right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria.”⁴⁴ Thus, when a government prosecutor is discriminatory in jury selection, the defendant is denied the equal protection of the law.⁴⁵

Under equal protection analysis, a law that denies rights or benefits based on a suspect classification, such as race, receives a strict scrutiny test.⁴⁶ For a court to uphold a law that denies a suspect class a right or benefit, there must be a finding that the law is a necessary means to achieve an “end that is so compelling that it justifies the limitation of fundamental constitutional values.”⁴⁷ There are two ways a law can be subjected to strict scrutiny analysis under the Equal Protection Clause.⁴⁸ The law may facially discriminate against a suspect class, or the law may be race-neutral on its face but have a disparate impact that is the result of discriminatory intent.⁴⁹

A law that allows for peremptory challenges is facially race-neutral in that it allows lawyers to eliminate any prospective juror without having to disclose the reason for such elimination.⁵⁰ However, when peremptory challenges are based on race or gender, they “are motivated by a discriminatory intent and have a discriminatory impact.”⁵¹

Because race-based peremptory challenges violate the Equal Protection Clause, there must be a test to detect such discrimination and prevent it.⁵² Thus, in an effort to eliminate race-based peremptory challenges, the Supreme Court in *Swain v. Alabama*,⁵³ held that a pattern of discriminatory peremptory challenges must be shown over a series of cases.⁵⁴ The problem with the *Swain* holding is that it did not extend the Equal Protection Clause to prohibit presently active discrimination in a pending case.⁵⁵

However, the Supreme Court in *Batson* overruled *Swain*, and it extended the Equal Protection Clause to prohibit presently active discrimination in a pending case.⁵⁶ Thus, *Batson* held “[a] single invidiously discriminatory governmental act is not immunized by the absence of such discrimination in the making of other comparable decisions.”⁵⁷

To accommodate its holding, the *Batson* Court devised a test to detect and eliminate race-based peremptory challenges during the jury selection process of a

case.⁵⁸ This test requires a defendant to demonstrate: 1) that the defendant is a part of a cognizable racial group, 2) that the prosecutor exercised a peremptory challenge to exclude a juror who is of the same race as the defendant, and 3) that evidence supports the inference of racial discrimination when the prosecutor exercised the peremptory challenge.⁵⁹ Once the defendant establishes a prima facie case, the burden shifts to the prosecutor to show race-neutral reasons for the peremptory challenge that is under review.

The scope of this test established in *Batson* was expanded beyond race to exclude gender-based peremptory challenges by the court in *J.E.B. v. State ex rel T.B.*⁶⁰

The Court also expanded the *Batson* test in *Powers v. Ohio*⁶¹ to permit all criminal defendants to object to racially motivated peremptory challenges by the prosecutor, “regardless of whether the defendant and the challenged juror share the same race.”⁶² The Court came to this conclusion by reasoning that the “Fourteenth Amendment’s mandate that race discrimination be eliminated from all official acts and proceedings of the State is most compelling in the judicial system.”⁶³

Allowing *Batson* challenges in private civil trials expanded the application of the *Batson* test even further.⁶⁴ The Supreme Court in *Edmonson v. Leesville Concrete Co.*⁶⁵ made this decision by reasoning that the Equal Protection Clause requirement of state action was met by finding that a private party “becomes a government actor for the limited purpose of using peremptories during jury selection.”⁶⁶

In *Hernandez v. New York*,⁶⁷ the Court clarified the *Batson* test that peremptory challenges that are not based on race but have a disproportionate impact on a particular racial group are not discriminatory just because of this disproportionate impact.⁶⁸ Thus, the *Hernandez* court mandated that only intent or purposeful discrimination in the use of a peremptory challenge warrants a *Batson* challenge.⁶⁹

The Supreme Court once again clarified the *Batson* test in 1992 by prohibiting criminal defendants from using discriminatory peremptory challenges.⁷⁰ The court in *Georgia v. McCollum*⁷¹ came to this conclusion by reasoning that a defendant’s right to a fair trial does not justify the usage of a peremptory challenge “based on either the race of the juror or the racial stereotypes held by the party.”⁷²

V. THE *BATSON* TEST’S FAILURE AS A PRACTICAL SOLUTION IN KANSAS

The *Batson* test is inadequate in Kansas for numerous reasons. Among other things, it fails to prevent discriminatory peremptory challenges, and its gender-based scrutiny limits the effectiveness of peremptory challenge.

A. *Batson*’s Failure to Prevent Discriminatory Peremptory Challenges in

Kansas

The *Batson* test has failed in Kansas as a practical, effective solution to preserve the basic functions of the peremptory challenge and to prevent discriminatory peremptory challenges. A survey of *Batson* challenges was taken of Kansas Supreme Court and Court of Appeals cases.⁷³ Out of thirty-five cases surveyed, only four *Batson* challenges were successful.⁷⁴

The *Batson* test fails to prevent race-based peremptory challenges in Kansas because it is quite easy to circumvent.⁷⁵ Justice Marshall, concurring in *Batson*, expressed fear that the *Batson* test would not end discriminatory peremptory challenges because courts would have trouble deciphering which reasons articulated by the lawyers for excluding a potential juror were legitimate.⁷⁶ This problem is evident in *State v. Pink*, a Kansas case.⁷⁷ The prosecutor sought to exercise a peremptory challenge to exclude a black juror “because she was nodding and smiling broadly when the question of whether police officers can lie was raised.”⁷⁸ The defense counsel claimed that he did not see such nodding and smiling.⁷⁹ The prosecutor then noted that the nodding and smiling was evident from where he was sitting.⁸⁰ The judge said: “Well, [the prosecutor] is an officer of this Court, and if he says that that’s what he observed, that’s what he observed; and I find that there is a non-racial reason as enumerated, although I will admit I’m very uncomfortable with it.”⁸¹ Therefore, lawyers could deceitfully provide lame excuses to easily counter “prima facie discriminatory challenges” and the courts most likely would allow them.⁸²

To elaborate, lawyers who have the burden of rebutting a *Batson* prima facie case can too easily make up a race-neutral reason for exercising the peremptory challenge because a peremptory challenge can be based on anything but race or gender.⁸³ For instance, a lawyer could say that the juror did not make good enough eye contact with him.⁸⁴ Such a reason is easy to assert, hard to disprove,⁸⁵ and justifiable for exercising a peremptory challenge.⁸⁶ In the Kansas case of *State v. Hood*, the court found that the state was justified in exercising peremptory challenges to remove the only two black jurors.⁸⁷ The court held: “Sitting with arms crossed, leaning forward when defense counsel conducts voir dire, or leaning back while the prosecution asks questions . . . [are all matters] . . . which the trial court may take into consideration in determining whether the prosecutor has a valid and neutral reason for striking the juror.”⁸⁸

In addition, lawyers can circumvent the *Batson* test by strategically making the prima facie case harder to establish.⁸⁹ To illustrate, often times there may be only one or two minority potential jurors in the entire jury pool.⁹⁰ If a lawyer keeps one minority and excludes the other with a peremptory challenge, the opposing lawyer, trying to establish a *Batson* prima facie case, would have a difficult time showing a pattern of discrimination that is commonly used to prove discriminatory intent.⁹¹

This weakness in the *Batson* test tends to be a recurring problem in Kansas. In *State v. Thomas*, the court allowed the state to use three of its peremptory challenges to exclude “three of the four African-Americans from the jury even though the defendant contended that the exclusion of two African-Americans from the jury was acceptable but insisted that three was improper.”⁹² In *State v. Gadelkarim*, of thirty-six perspective jurors, “three were members of a racial minority. Nonetheless, the court allowed the State to strike two of the three minorities with peremptory challenges.”⁹³ In *State v. Conley*, the court allowed the state to use three of its peremptory challenges to exclude “three of the four African-Americans from the jury pool.”⁹⁴ In *State v. Betts*, the court allowed the state to use its peremptory challenges to remove “seven of the eleven African-Americans on the 36 member jury panel and also the only Hispanic juror.”⁹⁵ Finally, in *State v. Arteaga*, five of six Hispanic potential jurors were excluded by the state’s peremptory challenges.⁹⁶

A survey of *Batson* challenges was taken of the federal circuits in 1994.⁹⁷ Out of seventy-six cases, only three *Batson* challenges were successful.⁹⁸ To illustrate some of these failed *Batson* challenges, in *United States v. Sandoval*,⁹⁹ a prosecutor excluded one of two black jurors with a peremptory challenge.¹⁰⁰ To rebut the *Batson* challenge, the prosecutor stated that the black juror “was a cosmetologist, very youthful, and probably did not have a high level of education.”¹⁰¹ The trial judge accepted this reason because he perceived the holding in *Batson* to allow peremptory challenges that are partially based on race but not wholly or predominantly based on race.¹⁰²

Another example is *United States v. Lorenzo*,¹⁰³ a case in Hawaii.¹⁰⁴ A prosecutor exercised a peremptory challenge to exclude the last juror who was of native Polynesian descent.¹⁰⁵ When confronted with a *Batson* challenge, the prosecutor gave the reason that the Polynesian had “long, unkept hair, a long beard, and an appearance otherwise associated with the counterculture beliefs of hippies.”¹⁰⁶ The trial judge upheld this reason.¹⁰⁷

Finally, in *United States v. Uwaezhoke*,¹⁰⁸ the court upheld the exercise of a peremptory challenge on a black female based on the reason that she was a postal worker and “a single parent living in a rental property in the city of Newark”¹⁰⁹ The Court concluded that there was no evidence of intentional discrimination shown.¹¹⁰ In appearance, not only does the *Batson* test fail to prevent most discriminatory peremptory challenges in Kansas; it fails in the federal court system as well.

B. *Batson* Test’s Gender-Based Challenges Limit the Effectiveness of the Peremptory Challenge in Kansas

The Supreme Court expanded the *Batson* test to include gender in 1994 with

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*J.E.B. v. State ex rel T.B.*¹¹¹ This expanded *Batson* test is fallible because it limits the effectiveness of the non-disclosing element of the peremptory challenge. Every juror is either male or female. By expanding the scope of *Batson* to gender, the scope was in effect expanded to cover every type of person. Therefore, theoretically, a *Batson* challenge could be made for every juror excluded by a peremptory challenge. For example, in the Kansas case of *State v. Manard*, the prosecutor exercised a peremptory challenge to exclude a black female juror.¹¹² The defendant initially objected on grounds of race. However, when the prosecutor's reason for the challenge was deemed race-neutral, the defendant then immediately "shifted his objection to gender."¹¹³

C. Additional Failures of the *Batson* Test as a Practical Solution

The *Batson* test also fails to give guidance to courts in its application, which causes inconsistent outcomes.¹¹⁴ The court in *Mintos v. City University of New York*¹¹⁵ noted that the *Batson* Court failed to give any kind of meaningful guidance to the trial courts as to what constitutes an acceptable reason to defeat a *Batson* challenge.¹¹⁶ Thus, *Batson* only states that mere denials of intent to discriminate in the exercise of a peremptory challenge are not acceptable explanations, but the reason behind the peremptory challenge need not rise to the level of a challenge for cause.¹¹⁷ *Batson* also did not proffer any specific or meaningful criteria for establishing a prima facie case, which leaves the lower courts guessing. Because of this lack of guidance, trial courts have difficulty determining which articulable reasons are acceptable or are just mere pretexts for discrimination.¹¹⁸ As a result of this confusion, the trial courts have developed different standards as to what constitutes a successful *Batson* challenge, which results in inconsistent outcomes of *Batson* challenges.¹¹⁹ To illustrate this inconsistency, some state courts in New York, Alabama, Texas, and California require only minimal levels of proof to establish a prima facie case.¹²⁰ Other courts, namely Louisiana state courts, require extremely high levels of proof to establish a prima facie case.¹²¹ Courts have been inconsistent in determining the third step in *Batson*, which is what evidence proves an inference of discrimination.¹²² For the *Batson* test to prevent discriminatory peremptory challenges, it must give the courts guidance to scrutinize more closely the articulated reasons for peremptory challenges and all evidence that may constitute intentional discrimination by the use of a peremptory challenge.¹²³ However, because *Batson* leaves no clear guidelines to set the standard for the type of scrutiny that is needed, the *Batson* test ultimately fails to prevent discriminatory peremptory challenges.¹²⁴

Other factors that contribute to the *Batson* test's failure are the way the test is conducted and administered.¹²⁵ First, a lawyer confronted with a *Batson* challenge has to articulate a nondiscriminatory reason for the peremptory challenge.¹²⁶ Thus, lawyers, with the motive of wanting to help their clients, will be under enormous

pressure from their clients to lie.¹²⁷ Likewise, because the *Batson* prima facie case is easy to make, defense lawyers could make *Batson* challenges simply for the reason of embarrassing the prosecutor, or make a *Batson* challenge simply to retain a juror who could be biased in the defendant's favor.¹²⁸ Arguably, the *Batson* test on particular occasions could facilitate hypocrisy and disrespect toward the justice system.¹²⁹

Second, the way the *Batson* test is conducted creates administrative inefficiency in voir dire.¹³⁰ The *Batson* test essentially creates another separate trial in voir dire, where the party making the *Batson* challenge attacks the opposing party by making a prima facie case and the opposing party defends this attack.¹³¹

Third, Chief Justice Burger, who dissented in *Batson*, feared that the administration of the *Batson* test with its separate trials would imprint "racial differentiation" in the jury selection process, says Jere W. Morehead.¹³² Parties would support their *Batson* claims and rebuttals by "asking jurors to state their race and national origin, even if those questions were personally offensive to the jurors."¹³³

Finally, the expansion of *Batson* to encompass not only race-based peremptories but also gender-based peremptories potentially could create even greater administrative inefficiency in jury selection.¹³⁴ As mentioned previously, because every juror is male or female and has a racial identity, theoretically, every juror who gets excluded by a peremptory challenge could warrant a *Batson* challenge.¹³⁵

VI. FALLIBLE ALTERNATIVES TO THE *BATSON* TEST

One alternative to the *Batson* test is to significantly limit the number of peremptory challenges that each party is allowed.¹³⁶ By limiting the number of peremptory challenges, the litigants would be forced to use their peremptories more sparingly.¹³⁷ Ideally, reducing peremptory challenges ultimately would reduce the amount of discrimination in voir dire.¹³⁸ A hypothetical example might be that each party is limited to only one peremptory challenge.¹³⁹ In this hypothetical, the defendant is a black man. The prosecutor views the jurors and notices one black man and a particular white man. The black man responds correctly to every question the prosecutor asks of him while the white man frowns at the prosecutor with disdain. Because the prosecutor only has one peremptory challenge, he may use it rightfully and exclude the frowning white man.¹⁴⁰

However, this alternative of reduced peremptory challenges would not be a better practical solution than the *Batson* test because it, too, fails to eliminate discriminatory peremptory challenges.¹⁴¹ Referring to the hypothetical situation above, the prosecutor could decide to exercise his peremptory challenge on the black man instead of the frowning white man in thinking that ultimately the black man will side with the black defendant.¹⁴² Clearly, such bias may not always be so obvious;

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therefore, if no one appears partial, the prosecutor may exclude the black juror for racial reasons. Therefore, this alternative fails to prevent discriminatory peremptory challenges.

Another solution to discriminatory peremptory challenges is to define exactly what explanations for peremptory challenges are considered a pretext for discrimination.¹⁴³ This alternative, theoretically, would end race-based peremptory challenges by ending the evasiveness of the *Batson* test which, as stated above, allows litigants to give bogus race-neutral reasons to evade the test. This alternative of precise explanations would prevent litigants from evading *Batson* because the defined list of unacceptable explanations would catch almost every evasive response and automatically hold it as a pretext for discrimination. However, while this proposed solution would prevent discriminatory peremptory challenges, it would limit dramatically the effectiveness of the peremptory challenge due to a lack of judicial discretion.¹⁴⁴ For example, say a lawyer proffers race-neutral reasons for a peremptory challenge that is deemed to be unacceptable by the list. The judge would be forced to deny the peremptory challenge based on the list. However, the lawyer might have a good faith motive behind the reason proffered like eliminating a biased juror; it would leave judges second-guessing lawyers' motives, and it would make judges skeptical in their task of administering justice.¹⁴⁵ Consequently, the practical application of this alternative of precise explanations would create a strong possibility that a lawyer could be wrongfully denied the benefit of a peremptory challenge. Ultimately, this alternative would deteriorate the effectiveness of the peremptory challenge; therefore, it would not be a better practical solution than the *Batson* test.

Another alternative method that may result in nondiscriminatory jury selection is to have an affirmative jury selection process where both parties make a list of acceptable jurors.¹⁴⁶ The judge would select the jurors whose names appear on both lists, then choose the rest of the jury by alternating between the two lists.¹⁴⁷ On the surface, this alternative process appears to eliminate discrimination in that jurors are not excluded by discrimination. Rather, they are selected to sit on the jury panel. The advantage to this method is that jurors who are not picked do not become racially stigmatized. This method takes the pressure off of litigants to produce race-neutral reasons. Another advantage of this method is that it relieves the judge of having to weigh a litigant's race-neutral reason. In conclusion, the systematic rules of picking and alternating appears to promote fairness by preventing possible arbitrary judicial rulings in jury selection. However, this proposal fails as a practical solution because it actually would not eliminate discrimination in jury selection; it only would implement a method that disguised discrimination in jury selection. When using this method, lawyers could easily discriminate by basing their juror selections on "impermissible classifications" and refuse to select jurors for discriminatory purposes.¹⁴⁸ Therefore, this alternative would not be any better than the *Batson* test.

Finally, another proposal is to expand the time of voir dire so that litigants would have an opportunity to get more information on the jurors' mental impressions and attitudes.¹⁴⁹ Such a proposal improves the effectiveness of the peremptory challenge because lawyers could make more informed peremptory challenges.¹⁵⁰ Ideally, the more lawyers know about a juror, the less likely they are to resort to racial or gender stereotypes to form the basis of their peremptory challenges.¹⁵¹ However, despite this improvement to the peremptory challenge, this alternative fails as a practical solution because it would not eliminate the option to exercise a discriminatory peremptory challenge, and because expanding the time of voir dire is not economically or politically feasible.¹⁵² Voir dire would become more time-consuming.¹⁵³ Many judges and lawyers have complained about a time efficiency problem creating a backlog of pending cases.¹⁵⁴ Any more time added to voir dire would, without a doubt, expand this backlog even more.¹⁵⁵ Ultimately, this alternative would not be an effective substitute for the *Batson* test because it would not prevent discrimination in voir dire, and it would be too time-consuming.

**VII. PEREMPTORY CHALLENGES BASED ON BLIND
QUESTIONNAIRES: THE ALTERNATIVE FOR KANSAS JURY
SELECTION**

Out of the many proposed alternatives, Kansas should consider changing its jury selection process by mandating that peremptory challenges be exercised based on blind questionnaire responses before the parties view the jurors. Kansas should continue to allow challenges for cause to be exercised after the parties view the jurors, and Kansas should expand the grounds for challenges for cause to include inconsistent answers when a particular juror's answers to the blind questionnaire are inconsistent with her answers to the questions asked by the lawyers.

Exercising peremptory challenges based on blind questionnaire responses before the lawyers view the jurors meets the two practical solution ideals set forth at the beginning of this article: 1) preserving the basic function of the peremptory challenge, which is to allow lawyers to remove jurors without disclosing cause, and 2) preventing the peremptory challenge from being exercised on the basis of racial or gender discrimination.

The questionnaire would be blind.¹⁵⁶ It would be administered so that litigants would not be able to see or hear the jurors respond to the questions.¹⁵⁷ It would be conducted by identifying jurors by number instead of name.¹⁵⁸ Questions pertaining to the juror's race or gender would be prohibited from the blind questionnaire.¹⁵⁹ Interactive software could be used to read the questions to the jurors and record and type their responses, or jurors could respond to questions by speaking into a tape

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recorder and having a court reporter type the recorded answers. Jurors should be advised before responding that certain language or dialect used in responding to the questionnaires could indicate race and/or gender. Litigants would exercise peremptory challenges based on the juror's typed responses without confronting the juror.¹⁶⁰

A. Blind Questionnaire Preserves the Non-Disclosing Function of the Peremptory Challenge

Because a lawyer would not be influenced so easily by race or gender when exercising a peremptory challenge, she would no longer need to disclose non-discriminatory reasons for the peremptory challenges required under the *Batson* test. Thus, the non-disclosing function of the peremptory challenge would be preserved, and the *Batson* test would be unnecessary.

B. Blind Questionnaire Eliminates Discriminatory Peremptory Challenges in Jury Selection

If the blind questionnaire were administered correctly, it would greatly reduce the chance of discriminatory peremptory challenges.¹⁶¹ Because the lawyers would not see or hear the jurors in voir dire conducted by questionnaire, the race and gender of a juror would not be revealed as in viewing.¹⁶² Therefore, the possibility of the peremptory challenge being based on obvious race or gender would be decreased.¹⁶³

C. Advantages to Jury Selection that Combines Blind Questionnaire with Viewing the Jury

As stated in the beginning of this article, jury selection that exercises peremptory challenges solely on blind questionnaire responses before viewing the jury combined with exercising challenges for cause after viewing the jury would upgrade Kansas jury selection from its current state in several ways: 1) it would greatly reduce racial and gender discrimination in the entire jury selection process, 2) it would enhance the probability of a more impartial jury, 3) it would increase confidence in the jury selection process, and 4) it would increase judicial economy.

Bias or partiality stems from one's state of mind, which is characterized by psychographic features such as attitudes and mental impressions.¹⁶⁴ Bias is not derived from demographic features such as age, race, gender, occupation, socio-economic status, religious affiliation, and marital status.¹⁶⁵ Therefore, jury selection should be based on psychographic features and not on demographic features.¹⁶⁶

Psychographic features that indicate partiality can be detected from expressed

mental impressions and physical gestures. Expressed mental impressions are detected when a juror orally or in writing conveys her thoughts in response to a particular question. Viewing the juror's body movements or listening to the juror's tone of voice, one can detect physical gestures that convey a juror's attitudes and mental impressions. Examples of such gestures might include a juror rolling her eyes, frowning, and speaking in a harsh or sarcastic tone of voice.

By exercising peremptory challenges based on blind questionnaires combined with exercising challenges for cause by viewing the jury, racial and gender discrimination would be systematically decreased because demographic features that include race and gender could not be taken into account easily. Only psychographic features would be used to determine jury selection.

The administration of blind questionnaires before the lawyers view or hear the jurors would result clearly in psychographic features of expressed mental impressions from the jurors. Lawyers would not be exposed to the jurors' demographic features at this point because lawyers would not have an opportunity to view the jurors, nor would the questionnaires be allowed to solicit responses that gave reference to demographic features. Therefore, lawyers would be impeded from basing their peremptory challenges on race or gender.

After the lawyers exercised their peremptory challenges, they would be allowed to view the jury to exercise their challenges for cause, if necessary. In Kansas, "[c]hallenges for cause . . . [are] . . . tried by the court."¹⁶⁷ To exclude a juror with a challenge for cause in Kansas, a lawyer may articulate that the juror's "state of mind with reference to the case or any of the parties is such that the court determines there is doubt that he can act impartially and without prejudice to the substantial rights of any party."¹⁶⁸ Because the court must determine that a juror's state of mind is partial, lawyers will focus only on the psychographic features that depict the juror's state of mind, such as physical gestures and mental impressions, when exercising a challenge for cause. Thus, lawyers may conclude that reasons based on demographic features of the jurors will not persuade a Kansas court to grant their challenges for cause because such features do not indicate the juror's state of mind. Therefore, lawyers would not be allowed to discriminate with a challenge for cause.

The probability of a more impartial jury would be increased with the implementation of blind questionnaires. Because blind questionnaires can be administered outside of court, the questionnaires would not be subject to the time constraints of regular voir dire, which would allow lawyers to ask more questions, allowing lawyers to get more in-depth insight into the mental impressions of every juror to detect partiality.

Additionally, blind questionnaires are more likely to solicit honest responses from jurors because the answers to questionnaires would be given privately, which eliminates the fear of how others might perceive one's responses or the pressure to

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conform.¹⁶⁹ Thus, the privacy that the blind questionnaire provides presents a less threatening environment for the juror, which may result in more insightful and truthful information about the attitudes and mental impressions jurors may have on particular issues regarding a case.¹⁷⁰

The advantage of viewing the jury in Kansas' jury selection process would be preserved when lawyers exercised challenges for cause. By viewing the jurors, lawyers are exposed to the juror's physical gestures that may indicate a partial state of mind. In addition, the probability of an impartial jury would be enhanced from the current form of jury selection by expanding challenges for cause to include inconsistent responses between the lawyer's questions asked in the viewing portion of jury selection and the questionnaire portion of jury selection. By allowing lawyers to view the jurors and ask them questions, they would be equipped with an additional tool to check for partiality because they would have an opportunity to check for inconsistent answers by asking the jurors the same questions in the viewing portion that they asked on the blind questionnaires. Thus, jurors who gave inconsistent answers could be considered untrustworthy or potentially partial.

An inconsistent answer could be in the form of an expressed mental impression where the substance of the juror's oral response in the viewing phase was inconsistent with the substance of the juror's response in the questionnaire phase. Likewise an inconsistent answer could be in the form of a physical gesture when the juror's oral responses were the same, but the juror's physical gestures did not support the response. For example, in the viewing phase, the juror could respond consistently with her questionnaire, but while responding she could be rolling her eyes or speaking in a sarcastic or hostile tone of voice that could indicate a partial state of mind. Thus, such physical gestures could be considered inconsistent with her answer on the questionnaire.

A lawyer's confidence in the jury would be increased if she were allowed to check for inconsistent answers. When a lawyer viewed the jury and discovered jurors that she would normally exclude with a peremptory challenge in the current system, her confidence would be enhanced greatly when she discovered that their answers were consistent with their responses on the questionnaires. For example, a prosecutor in a case with a black defendant intuitively may want to exclude black jurors. Because the prosecutor would not have access to the jurors' racial profiles when exercising peremptory challenges based on blind questionnaires, black jurors might not be excluded by peremptory challenges. However, the prosecutor's confidence would be increased when she could view the black jurors and check for inconsistent answers. Thus, when the prosecutor discovered that the black juror's oral responses and physical gestures were consistent, the prosecutor would realize that her racial stereotyping was false. She would gain faith in her exercises of peremptory challenges and have increased confidence in the jury's verdict. Furthermore, if a juror gave an inconsistent

answer, the lawyer could maintain confidence because of the knowledge that an inconsistent answer is a ground for a challenge for cause to exclude the juror.

A civil party or criminal defendant would have increased confidence because they would realize that jurors could not be excluded based on race or gender with a peremptory challenge as might occur with the *Batson* test. They would realize that the opposing counsel or prosecutor did not have access to the juror's race or gender when exercising peremptory challenges based on the blind questionnaires. To illustrate, in *Batson*, a black defendant was accused of burglary and receipt of stolen property.¹⁷¹ The case was decided by a jury.¹⁷² However, during the jury selection, the prosecution eliminated all of the black jurors by peremptory challenge.¹⁷³ Consequently, this left an all-white jury, which convicted the black defendant on all charges.¹⁷⁴ Therefore, hypothetically, if a black defendant facing the consequence of imprisonment could choose between the *Batson* test and the blind questionnaire/viewing method of jury selection, the defendant would clearly choose the blind questionnaire/viewing method over the easily evadable *Batson* test.

Juror confidence in jury selection would also increase. Under the current form of jury selection, the peremptory challenges arguably may subject the jurors who are eliminated to insulting and distrusting effects.¹⁷⁵ When prospective jurors are called to jury duty, they are told that only fair and truthful jurors who have the ability to apply the law to the facts are acceptable.¹⁷⁶ When prospective jurors are removed by a peremptory challenge that gives no reason for their exclusion, they may feel distrust towards the jury selection process and question the presumption that their exclusion was not based on race or gender.¹⁷⁷ Jury selection that does not allow peremptory challenges to be based on viewing the jury would reassure jurors that their constitutional right not to be excluded from a jury because of race and gender will be preserved. In addition, by not allowing peremptory challenges to be based on viewing the jury, jurors would not fear the embarrassment and humiliation of being stigmatized because of their race or gender.

Judges would have more confidence in such a system because they should recognize that the parties and jurors would have their constitutional rights not to be discriminated against in jury selection significantly preserved. In addition, the *Batson* test would be removed. Therefore, judges no longer would have the difficult task of deciding which juror exclusions were based on race and gender.

Judicial economy also would be enhanced. Because the blind questionnaires could be responded to by the jurors in private and outside of court, lawyers could ask as many questions as they saw fit on the blind questionnaire without taking up any court time. Therefore, lawyers would be allowed to ask more questions than the current system allows in the same amount of time. In addition, the removal of the *Batson* test would prevent the possibility of taking up court time to conduct a *Batson* test, which is, in effect, a mini-trial in the jury selection process. Furthermore,

appellate cases based on peremptory challenges would be decreased.

D. Rebuttal to Exercising Peremptory Challenges Based on Blind Questionnaires

An argument can be made that exercising peremptory challenges based solely on the blind questionnaires distorts a necessary function of the peremptory challenge: the ability to view the jurors, and exclude them for a reason that cannot be articulated.¹⁷⁸ For example, a juror could respond favorably to all of the lawyer's questions, and the juror's physical gestures could reinforce those responses. However, upon viewing the juror and finding no actual evidence of partiality, the lawyer might develop an intuitive feeling that the juror is untrustworthy or potentially partial. The lawyer could act on this feeling by simply exercising a peremptory challenge to exclude the juror. If peremptory challenges only could be based on blind questionnaires, the lawyers would not receive the full benefit of the peremptory challenge because they would not be able to exercise a peremptory challenge based on their intuitive feelings during the viewing section.

E. Counter-Rebuttal to Exercising Peremptory Challenges Based on Blind Questionnaires

The ability of lawyers to ask as many questions as they deem necessary on the blind questionnaires, combined with the expansion of challenges for cause to include inconsistent answers in the blind questionnaire/viewing form of jury selection, will render the peremptory challenge function of viewing the jury unnecessary. As stated above, a necessary function of the peremptory challenge is the ability to exclude jurors for inarticulable reasons: the lawyer intuitively feels that the juror appears untrustworthy without any evidence of the juror having a partial state of mind. By allowing the lawyers to ask as many questions as they deem necessary on the blind questionnaires, they should get much more in-depth mental impressions of each juror than with the current system of jury selection. By receiving more in-depth mental impressions, the lawyers can exercise more informed and just peremptory challenges.

Checking for inconsistent answers in the viewing section is a test for juror trustworthiness. For example, a prosecutor in a case with a black defendant may want to exclude the only black juror in the venire even though the black juror responded correctly to all of the lawyer's questions and showed no signs of partiality. The prosecutor thinks that the black juror will side with the defendant merely because they share the same race. If the prosecutor does not exclude the juror with a peremptory challenge based on the black juror's blind questionnaire, the prosecutor can assume the trustworthiness of the black juror when the prosecutor views the black juror responding

with consistent expressed mental impressions and physical gestures. As a result of the consistent responses of the black juror, the prosecutor should no longer need the peremptory challenge to exclude him for an intuitive reason based on merely viewing the juror. Granted, peremptory challenges cannot be exercised in the viewing section for intuitive reasons. Only challenges for cause can be used in the viewing section; however, the sacrifice of acting on the intuitive feelings in the viewing section would be outweighed by the benefit of the significant reduction in the possibility of racial and gender discrimination.

F. Political Feasibility of Blind Questionnaire/Viewing Jury Selection

The blind questionnaire/viewing form of jury selection would be more politically feasible than the current form of jury selection in Kansas. Most of the advantages of the peremptory challenge and the current form of jury selection that the vast majority of surveyed lawyers support would either be preserved or enhanced. Furthermore, as stated above, every participant in a jury trial—the judge, lawyers, parties, and jurors—should feel more confident in the blind questionnaire/viewing form of jury selection. Clearly, they would favor this system over the current form of jury selection.

Additional costs may be incurred to administer the blind questionnaire portion of jury selection. For example, interactive technology would be needed to read the questionnaire and record and type answers. Nonetheless, these costs will not outweigh the many benefits stated above. Therefore, costs should not be an impediment to implementing the questionnaire system.

VIII. CONCLUSION

To conclude, the peremptory challenge is necessary because it enhances confidence in the jury selection process. It can be exercised for almost any reason, but constitutionally, it cannot be used to discriminate. Therefore, there must be some device that prevents a peremptory challenge from being race and/or gender discriminatory, but yet preserves the non-disclosing function of the peremptory challenge among trial lawyers. As applied in Kansas, the *Batson* test has been proven to undermine the non-disclosing function of the peremptory challenge, and it has been shown to be extremely unsuccessful in preventing discrimination in jury selection.

As a result, Kansas should consider changing its jury selection process by mandating that peremptory challenges be exercised based on questionnaires before the parties view the jurors, by eliminating the *Batson* test, by allowing the exercise of challenges for cause to be based only on viewing the jurors, and by expanding the grounds for challenges for cause to include inconsistent answers when a particular

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juror's answers to the blind questionnaires are inconsistent with her answers in the viewing portion.

Discriminatory peremptory challenges should be significantly reduced by exercising peremptory challenges solely on blind questionnaires without viewing the jury. This process would preserve the non-disclosing function of the peremptory challenge.

In addition, jury selection that exercises peremptory challenges solely on blind questionnaires without viewing the jury combined with exercising challenges for cause by actually viewing the jury would preserve most of the advantages of the current jury selection process in Kansas. It would upgrade Kansas jury selection from its current state in several ways: 1) it would greatly reduce race and gender discrimination in the entire jury selection process, 2) it would enhance the probability of a more impartial jury, 3) it would increase faith in the jury selection process, and 4) it would increase judicial economy.

Since this blind questionnaire/viewing form of jury selection would facilitate such an upgrade, its implementation would make the Kansas justice system more fair. Ultimately, it would further the pursuit of making justice truly blind.

Notes

1. 476 U.S. 79 (1986).
2. Jere W. Morehead, *When a Peremptory Challenge is No Longer Peremptory: Batson's Unfortunate Failure to Eradicate Invidious Discrimination From Jury Selection*, 43 DEPAUL L. REV. 625, 628 (1994).
3. *Id.*
4. Robert T. Prior, *The Peremptory Challenge: A Lost Cause?*, 44 MERCER L.REV. 579, 579 (1993).
5. David Smith & Rachel Dennehy, *Controversy Over the Peremptory Challenge: Should Batson be Expanded?*, 10 ST. JOHN'S J. LEGAL COMMENT. 453, 464 (1995).
6. *Id.* at 453.
7. *Id.* at 453-54.
8. *Id.* at 455.
9. *Id.* at 456.
10. *Id.*
11. Prior, *supra* note 4, at 580.
12. *Id.*
13. *Id.*
14. *See* Smith & Dennehy, *supra* note 5, at 456.
15. Prior, *supra* note 4, at 580.
16. *Id.* at 582.
17. *Id.*
18. *Id.* at 583. *See also* Judith H. Germano, *Preserving Peremptories: A Practitioner's Perogative*, 10 ST. JOHN'S J. LEGAL COMMENT. 431, 446-47 (1995).
19. *Id.* at 447.
20. *Id.*
21. *Id.* at 446-47.
22. Prior, *supra* note 4, at 582.
23. Pam Frasher, *Fulfilling Batson and its Progeny: A Proposed Amendment to Rule 24 of the Federal Rules of Criminal Procedure to Attain a More Race- and Gender-Neutral Jury Selection Process*, 80 IOWA L.R. 1327, 1346 (1995).
24. *Id.*
25. Morehead, *supra* note 2, at 625. In English jurisprudence prior to 1305, a defendant was given thirty-five peremptory challenges for more serious crimes. The Crown, on the other hand, had an unlimited number of peremptory challenges. After 1305, however, the Crown no longer had the right to use peremptory challenges. *Id.* The reason for this elimination is not clear. Prior, *supra* note 5, at 581. Some believe the overall "inequity of the system" could have been the reason for such elimination. *Id.* Nonetheless, the concept of the peremptory challenge was still deemed a necessity for the crown in jury selection. Therefore, after 1305 the Crown was allowed a "stand-aside procedure." *Id.* This procedure allowed the Crown to set aside questionable jurors unless they were needed to complete the jury. *Id.* In effect, the Crown retained its right to an unrestricted number of peremptory challenges. Morris B. Hoffman, *Peremptory Challenges Should be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 821-822 (1997). Most of the time the peremptory challenge and set-aside procedure were

- not used throughout English history, even after 1305, although there is no clear reason for this. *Id.* Peremptory challenges were reduced periodically until by 1989, they basically no longer existed in English jurisprudence. *Id.* at 822. Because of obvious abuses of the peremptory challenge by defense lawyers in a series of trials in the 1980s, Parliament officially eliminated the peremptory challenge. *Id.*
26. Jean Montoya, *The Future of the Post-Batson Peremptory Challenge: Voir Dire By Questionnaire and the "Blind" Peremptory*, 29 U. MICH. J. L. REFORM 981, 985 n.20, 998 (1996).
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at 1000.
32. *Id.*
33. *Id.* at 1001.
34. Prior, *supra* note 4, at 579.
35. 499 U.S. 400 (1991).
36. Prior, *supra* note 4, at 587.
37. *Id.*
38. *Id.*
39. *Strauder v. West Virginia*, 100 U.S. 303, 308-09 (1879). The *Strauder* Court held that if a black juror was excluded from a jury because of race, his equal protection rights were violated because this branded him as inferior. Also, if a black juror was excluded because of race, the black criminal defendant's right to equal protection of the laws was violated. If a white man has a right to have a jury chosen without racial discrimination, a black criminal defendant must have this same right. *Id.*
40. Cynthia Richers-Rowland, *Batson v. Kentucky: The New and Improved Peremptory Challenge*, 38 HASTINGS L.J. 1195, 1201 (1987).
41. *Id.*
42. *Powers v. Ohio*, 499 U.S. 400, 407 (1991).
43. *Batson v. Kentucky*, 476 U.S. 79, 86 (1986).
44. *Id.*
45. *Id.*
46. Richers-Rowland, *supra* note 40, at 1201.
47. *Id.*
48. ERWIN CHEREMINSKY, *CONSTITUTIONAL LAW PRINCIPLES AND POLICIES* 572 (1997).
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. 380 U.S. 202 (1965).
54. CHEREMINSKY, *supra* note 48, at 572.

55. *Id.* at 573.
56. Batson, 476 U.S. 79, 94 (1986). *See also* CHEMERINSKY, *supra* note 48, at 573.
57. *Batson*, 476 U.S. at 94.
58. *Id.*
59. *Id.*
60. 114 S. Ct. 1419 (1994). *See also* Smith & Dennehy, *supra* note 5, at 464.
61. 499 U.S. 400 (1991).
62. Morehead, *supra* note 2, at 629.
63. 499 U.S. at 415; *see also* Morehead, *supra* note 2, at 630.
64. *See id.*
65. 500 U.S. 614, 627 (1991).
66. *See also* Morehead, *supra* note 2, at 630.
67. 500 U.S. 352 (1991).
68. Morehead, *supra* note 2, at 631.
69. *See id.*
70. *See id.* at 631.
71. 505 U.S. 42 (1992).
72. *Id.* at 59. *See also* Morehead, *supra* note 2, at 631.
73. The author conducted this survey, and reviewed the following cases:; *State v. Betts*, 33 P.3d 575 (Kan. 2001); *State v. Wimbley*, 26 P.3d 657 (Kan. 2001); *State v. Pink*, 20 P.3d 31 (Kan. 2001); *State v. Caenen*, 19 P.3d 142 (Kan. 2000); *State v. Conley*, 11 P.3d 1147 (Kan. 2000); *State v. Adams*, 8 P.3d 724 (Kan. 2000); *State v. Alexander*, 1 P.3d 875 (Kan. 2000); *State v. Campbell*, 997 P.2d 726 (Kan. 2000); *State v. Manard*, 978 P.2d 253 (Kan. 1999); *State v. Edwards*, 955 P.2d 1276 (Kan. 1998); *State v. Smallwood*, 955 P.2d 1209 (Kan. 1998); *State v. Sanders*, 949 P.2d 1084 (Kan. 1997); *State v. Lee*, 948 P.2d 641 (Kan. 1997); *State v. Vargas*, 926 P.2d 223 (Kan. 1997); *State v. Harris*, 915 P.2d 758 (Kan. 1996); *State v. Arteaga*, 896 P.2d 1035 (Kan. 1995); *State v. Gadelkarim*, 887 P.2d 88 (Kan. 1994); *State v. Walston*, 886 P.2d 349 (Kan. 1994); *State v. Timley*, 875 P.2d 242 (Kan. 1994); *State v. Kingsley*, 851 P.2d 370 (Kan. 1993); *State v. Walker*, 845 P.2d 1 (Kan. 1993); *State v. Poole*, 843 P.2d 689 (Kan. 1992); *State v. Walker* 843 P.2d 203 (Kan. 1992), *State v. Clemons*, 836 P.2d 1147 (Kan. 1992); *State v. Sledd*, 825 P.2d 114 (Kan. 1992); *State v. Milo*, 815 P.2d 519 (Kan. 1991); *Smith v. Deppish*, 807 P.2d 144 (Kan. 1991); *State v. Belnavis*, 787 P.2d 1172 (Kan. 1990); *State v. Hood*, 780 P.2d 160 (Kan. 1989); *State v. Hood*, 744 P.2d 816 (Kan. 1987); *State v. Thomas*, 20 P.3d 82 (Kan. Ct. App. 2001); *State v. Marbley*, 882 P.2d 1004 (Kan. Ct. App. 1994); *State v. Foust*, 857 P.2d 1368 (Kan. Ct. App. 1993); *State v. Sledd*, 812 P.2d 766 (Kan. Ct. App. 1991); *State v. Woodberry*, 799 P.2d 118 (Kan. Ct. App. 1990).
74. *See, e.g.*, *State v. Belnavis*, 787 P.2d 1172 (Kan. 1990); *State v. Hood*, 744 P.2d 816 (Kan. 1987); *State v. Sledd*, 812 P.2d 766 (Kan. Ct. App. 1991); *State v. Woodberry*, 799 P.2d 118 (Kan. Ct. App. 1990).
75. *See* Montoya, *supra* note 26, at 1003.
76. Montoya, *supra* note 26, at 1003.
77. 20 P.3d 31, 31 (Kan. 2001).
78. *Id.*

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79. *Id.*
80. *Id.*
81. *Id.*
82. Montoya, *supra* note 26, at 1003.
83. *Id.* at 1007.
84. *Id.* at 1008.
85. *Id.*
86. *Id.*
87. 780 P.2d 160,167 (Kan. 1989).
88. *Id.*
89. Montoya, *supra* note 26, at 1008.
90. *Id.*
91. *Id.*
92. State v. Thomas, 20 P.3d 82 (Kan. Ct. App. 2001). *See also* Montoya, *supra* note 26, at 1008.
93. 887 P.2d 88, 103 (Kan. 1994).
94. 11 P.3d 1147, 1154 (Kan. 2000).
95. 33 P.3d 575, 594 (2001).
96. 896 P.2d 1035, 1040 (Kan. 1995).
97. Morehead, *supra* note 2, at 634.
98. *Id.*
99. 997 F.2d 491 (8th Cir. 1993).
100. Morehead, *supra* note 2, at 634.
101. *Id.*
102. *Id.*
103. 995 F.2d 1448 (9th Cir. 1993).
104. *Id.*
105. Morehead, *supra* note 2, at 634.
106. *Id.* at 635.
107. *Id.*
108. 995 F.2d 388 (3d Cir. 1993).
109. *Id.* at 391.
110. *Id.* at 402.
111. 114 S. Ct. 1419 (1994).
112. 978 P.2d 253, 262 (Kan. 1999).
113. *Id.*
114. Patricia J. Griffin, *Jumping on the Ban Wagon: Mintos v. City University of New York and the Future of the Peremptory Challenge*, 81 MINN. L. REV. 1237, 1261 (1997).
115. 925 F. Supp. 177 (1996).
116. *See* Griffin, *supra* note 118, at 1261.
117. *See id.*
118. Griffin, *supra* note 118, at 1262.
119. *Id.* at 1261.
120. *Id.*

121. *Id.*
122. *Id.* at 1262.
123. Brian J. Serr & Mark Maney, *Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 J. CRIM. L. & CRIMINOLOGY 1, 60-61 (1988).
124. *Id.* at 60.
125. Morehead, *supra* note 2, at 634.
126. *Id.* at 634, 629.
127. *Id.* at 636.
128. Montoya, *supra* note 26, at 1008.
129. *See* Morehead, *supra* note 2, at 634.
130. *Id.* at 635-37.
131. *Id.*
132. *Id.* at 636.
133. *Id.* at 637.
134. *See* Barbara L. Horwitz, *The Extension of the Peremptory Challenge: What Will the Jury System Lose by Its Demise?*, 61 U. CIN. L. REV. 1391, 1427 (1993).
135. *Id.* at 1430.
136. Griffin, *supra* note 118, at 1269.
137. *Id.*
138. *Id.*
139. *See* Montoya, *supra* note 26, at 1011.
140. *See id.*
141. Juli Vyverberg, *The Peremptory Challenge: Substance Worth Preserving*, 43 DRAKE L. REV. 435, 455-56 (1994).
142. *Id.*
143. *See* Griffin, *supra* note 118, at 1268.
144. *Id.*
145. *Id.* at 1262.
146. *Id.*
147. Griffin, *supra* note 118, at 1268-69.
148. *Id.*
149. Montoya, *supra* note 26, at 1013.
150. *Id.*
151. *See id.*
152. *Id.*
153. Morehead, *supra* note 2, at 636.
154. *Id.*
155. *Id.*
156. Montoya, *supra* note 26, at 1015.
157. *Id.*
158. *Id.*
159. *Id.* at 1015-16.
160. *Id.* at 1016.

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161. *Id.* at 1017.
162. *Id.*
163. *Id.*
164. Germano, *supra* note 18, at 446-47.
165. *Id.*
166. *Id.*
167. KAN. STAT. ANN. § 22-3410 (2001).
168. *Id.*
169. Germano, *supra* note 18, at 448.
170. *Id.*
171. *Batson v. Kentucky*, 476 U.S. 79, 82 (1986).
172. *Id.*
173. *Id.*
174. *Id.*
175. Hoffman, *supra* note 25, at 854.
176. *Id.*
177. *See id.*
178. Montoya, *supra* note 26, at 1022.