JUDGE, JUROR, AND THE HOLY SPIRIT, (AMEN!): THE SPLIT ON RELIGIOUS-BASED PEREMPTORY CHALLENGES AND JUROR DISQUALIFICATION

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I. Introduction

You are a criminal defendant in a capital trial facing the death penalty. You sit at the defense table next to your attorney and shift in your seat, discomfort radiating off you. You itch from the nice clothes your attorney insisted you wear, you feel everyone in the gallery's eyes watching you, you know the prosecutor is going to scrutinize your entire life, and you observe the jury—the people who will determine your fate—file in. The last one makes your stomach drop. The jury will determine whether you live or die. While uncomfortable enough, what your attorney told you about jury selection makes it worse, much worse. The court struck any possible jurors who were against the death penalty. Why? Because they do not believe in capital punishment. Which means that all of these jurors are okay with sanctioning your death. What are the odds that they will find you guilty? According to your attorney, significantly higher than most. You know your chances are slim and brace yourself for the worst.

This hypothetical scenario is one that can happen in today's criminal justice system. Accompanied by new religious and legal changes, this situation may become the norm for capital trials in the near future. The above scenario describes death qualification—the ability for courts to remove prospective jurors who oppose the death penalty and whose opposition is rooted in religious reasons.[1] Some speculate that by removing prospective jurors who are opposed to the death penalty, thereby creating death-prone juries, the ultimate verdict is a foregone conclusion.[2] With recent court decisions supporting the striking of jurors on religious grounds and religious pronouncements that can affect personal opinions about the death penalty, the role of religion in jury selection should be the subject of

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[1] Aliza Plener Cover, *Could the Pope's Call to End the Death Penalty Keep Catholics off Juries?,* WASH. POST (Jan. 18, 2019, 10:33 AM), https://www.washingtonpost.com/outlook/could-the-popes-call-to-end-the-death-penalty-keep-catholics-off-juries/2019/01/18/81e96a0a-19cb-11e9-9ebf-c5fed1b7a081_story.html.

[2] *Id.*

judicial scrutiny. However, much of the law surrounding religious-based jury disqualification and peremptory challenges remains unsettled.

This article addresses the enmeshed relationship of religion and peremptory challenges and the implications that follow. Moreover, it will also examine the recent Eleventh Circuit decision in *United States v. Brown*, in which a juror was dismissed for his religious beliefs. It will also expound upon the Pope's announcement of the Catholic Church's condemnation of the death penalty and the potential consequences that such pronouncements will carry for death qualification and capital trials. Furthermore, the majority of this article will focus on the various federal and state court decisions that have left this *voir dire* jurisprudence in disarray and will suggest potential solutions.

II. Background

Corinne Brown was a Congresswoman from Florida until her federal indictment in 2016.[3] Her charges describe a tale of all too familiar political corruption: pocketing charitable donations for personal gain.[4] Brown's office raised more than $800,000 for an educational charity that provides scholarships to poor children, however she spent that stolen wealth on parties, vacations, and concert tickets.[5] Despite the straightforward trial in the United States District Court in Jacksonville, something unexpected occurred.[6]

During deliberations, the thirteenth juror uttered the unbelievable: the Holy Spirit told him that Corinne Brown was not guilty on all charges.[7] The other jurors urged him to consider the evidence and base his decision on the law and according to the judge's instructions.[8] The thirteenth juror remained steadfast, causing the other jurors to alert the judge of the situation.[9] Upon receiving word of this supposed divine intervention, the judge, in an

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[3] Frank Cerabino, *Protecting the Rights of Florida Jurors Who Hear Divine Voices?*, PALM BEACH POST (Jan. 12, 2020, 1:21 PM), https://www.palmbeachpost.com/news/20200112/cerabino-protecting-rights-of-florida-jurors-who-hear-divine-voices.
[4] *Id.*
[5] *Id.; see also* United States v. Brown, 947 F.3d 655, 662 (11th Cir. 2020).
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*

unexpected step, ceased deliberations and questioned the juror directly.[10] The juror further elaborated that he prayed for guidance and "received information [from] My Father in Heaven" about his upcoming decision.[11] The trial judge removed this juror for violating the jury instructions by injecting religious beliefs into the deliberations and not deciding the case based on the evidence.[12]

The defense attorneys vehemently objected to the dismissal and after the jury rendered an unfavorable verdict for their client, appealed her conviction based upon this removal.[13] Ms. Brown's attorneys argued that the juror should have been allowed to remain, which could have caused a hung jury.[14] The Eleventh Circuit Court of Appeals however, disagreed with that reasoning.[15] In January 2020, the Eleventh Circuit affirmed the juror's removal, but the decision produced a blistering dissent from United States Circuit Judge William Pryor.[16]

The dissent chided the majority for not considering more closely the twenty-eight percent of Americans who claim to be recipients of divine instruction.[17] Judge Pryor wrote that excluding individuals from jury service could potentially hamper efforts to find

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[10] Debra Cassens Weiss, *11th Circuit Upholds Dismissal of Juror Who Said Holy Spirit Told Him to Acquit Former Congresswoman*, ABA J., (Jan. 16, 2020, 10:39 AM), http://www.abajournal.com/news/article/11th-circuit-upholds-dismissal-of-juror-who-said-holy-spirit-told-him-to-acquit.

[11] Cerabino, *supra* note 3.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] Weiss, *supra* note 10.

[16] *See Brown*, 947 F.3d at 682; *see also* Kimberly Kindy, *Pryor: Perhaps the Most Polarizing Supreme Court Justice Possibility*, WASH. POST (Jan. 28, 2017), https://www.washingtonpost.com/national/pryor-perhaps-the-most-polarizing-supreme-court-justice-possibility/2017/01/28/f25bb7e2-e4ae-11e6-ba11-63c4b4fb5a63_story.html.

Judge William Pryor was appointed by George W. Bush, but he recently was on President Trump's shortlist of candidates for the Supreme Court. Pryor was the runner-up for the vacant seat left by the late Justice Scalia, one eventually filled by Justice Gorsuch. Pryor's initial Senate confirmation to the federal bench was much delayed due to his controversial beliefs on abortion and LGBTQ+ rights along with his remarks describing Roe v. Wade as "the worst abomination of constitutional law in our history." Pryor is historically a proponent of religious rights and believes that a juror's prayers to God assist in their decision-making, and contrarily to the majority, do not constitute instructions from an outside source.

[17] *Id.*

jurors who represent a cross-section of the community.[18] The majority countered that the decision safeguards defendants by ensuring that a person will not be convicted for any reason other than the governing law and the evidence of the case.[19] While rife with questionable reasoning, Judge Pryor's dissent raised a notable point about the important intersection between black jurors and Christianity.[20]

Black jurors, generally, are subject to a disproportionate and abnormally high amount of peremptory challenges and this is even more true for black jurors who express strong religious beliefs.[21] Pryor's dissent attempts to consider the plight of black and Christian jurors in light of the majority's opinion, pontificating that this demographic will likely be excluded from jury service.[22] However, Judge Pryor fails to consider or fully appreciate the long history of exclusion black jurors, despite the precedential cases declaring juror disqualification and peremptory challenges based on race unconstitutional.[23]

Moreover, the prevailing law has yet to contend with a recent statement from the Vatican.[24] Pope Francis announced that the Catholic Church will, under no circumstances, tolerate capital punishment, and declared it morally unacceptable.[25] While some hope that this call to action might sway the American public—as well as prosecutors, legislators, judges—against the death penalty,

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[18] *Id.*

[19] Weiss, *supra* note 10.

[20] *Id.* While Judge Pryor's dissent shows empathy towards equal justice, it is on its face disingenuous given his long history of racial insensitivity and discrimination.

[21] Christie Stancil Matthews, *Missing Faith in Batson: Continued Discrimination Against African Americans Through Religion-Based Peremptory Challenges*, 23 TEMP. POL. & CIV. RTS. L. REV. 45 (2013). This article highlights the routine and disproportionate exclusion of African Americans from juries despite the governing law that is supposed to prevent this. The current framework is weak and frequently circumvented, with judges too easily accepting thin peremptory challenge explanations from prosecutors without sufficient inquiry into the potential pretexts of racial discrimination. Matthews also delves into the intersection of religion and race in the exercise of peremptory challenges, showing the further exclusion of black Americans.

[22] Weiss, *supra* note 10.

[23] Matthews, *supra* note 19; *see generally* Batson v. Kentucky, 476 U.S. 79 (1986) (ruling that expanded Fourteenth Amendment protections to black jurors, setting forth a test for racial discrimination in the peremptory challenge context); Strauder v. West Virginia, 100 U.S. 303 (1880) (holding that the statutory juror exclusion of blacks violated that Fourteenth Amendment rights of defendants).

[24] Aliza Plener Cover*, The Pope and the Capital Juror*, 128 YALE L.J. F. 599 (2018).

[25] *Id.*

Pope Francis' announcement may in fact have an alarming and dangerous effect.[26] According to Professor Aliza Plener Cover, "because of the anomalous way we select juries in capital cases, greater opposition to the death penalty among Catholics could, counterintuitively, increase the number of death sentences imposed in this country."[27] Professor Cover further explained that this result is possible because of a process where judges can disqualify prospective jurors who are opposed to execution, a concept called death qualification.[28] Death qualification historically produces a pool of jurors more favorable to execution, with research suggesting that death-qualified juries are not only more inclined to elect for the death penalty, but to convict defendants initially.[29] Scholars fear that this papal decree may lead to more juror disqualification of Catholics during jury selection.[30] This decree's prospective effects may provide important fodder for the inevitable court battles to come, as states and circuits are already split on religious-based juror disqualification and the Supreme Court has yet to weigh in.[31]

III. Discussion

Religious-based peremptory challenges remain a thorn in the side of procedural law and equal protection. This area of unsettled law produces interesting and unexpected results in both federal circuits and state courts.[32] The majority of courts tend to sidestep the issue entirely, leaving the lower courts to their own devices and waiting for the higher courts to step in.[33] Some, however

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[26] *Id.*
[27] Cover, *supra* note 1.
[28] Cover, *supra* note 24.
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *See, e.g.*, United States v. Berger, 224 F.3d 107 (2d Cir. 2000) (does not decide whether the Batson requirements extend to religious affiliation challenges); United States v. Stafford, 136 F.3d 1109 (7th Cir. 1998) (commenting that "it would be improper and perhaps unconstitutional" to strike a juror based on religious affiliation, but holding that the law is unsettled on religious-based peremptory challenges); Fisher v. Texas, 169 F.3d 295 (5th Cir. 1999) (citing lack of clarity in reference to whether Batson applies to religious affiliation); United States v. Somerstein, 959 F. Supp. 592 (E.D.N.Y. 1997) (holding that the Batson requirement encompasses religious affiliation); United States v. Greer, 939 F.2d 1076 (5th Cir. 1991), *opinion reinstated in part on reh'g*, 968 F.2d 433, 437 n.7, 445 (5th Cir. 1992) (holding that the Batson test applies to religion).
[33] *Id.*

attempted to further define the jurisprudence in the absence of a binding Supreme Court decision.

A. Federal Circuit Courts & the Issue of Religious-Based Strikes

The Third Circuit may harbor the most surprising and well-defined perspective on this issue.[34] In *Bronshtein v. Horn*, Justice Alito (then sitting on the Third Circuit) suggested that peremptory challenges that are based on religious affiliation are unconstitutional.[35] Previously, in *United States v. DeJesus*, the Third Circuit posed the following distinction: the exercise of peremptory strikes based on religious *affiliation* is unconstitutional, but a strike based on religious *beliefs* is constitutional.[36] The *DeJesus* majority referred to religious affiliation as the denotation of membership in a specific religious faction, not the specific religious beliefs belonging to those factions.[37] In reference to religious beliefs, the majority held that the court condones peremptory strikes based on "heightened religious involvement," distancing itself from line-drawing and alienating certain religions and their practices.[38] The two jurors in question, according to the district court, possessed an "unusual degree of religious involvement" and that this activity in turn implied strong beliefs that may impact their judgment.[39] While progress is commendable, this distinction may be difficult to apply given the inherently personal nature and imprecision of religious affiliations and beliefs.

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[34] Anthony D. Foti, *Issues in the Third Circuit: COULD JESUS SERVE ON A JURY? NOT IN THE THIRD CIRCUIT: RELIGION-BASED PEREMPTORY CHALLENGES IN UNITED STATES v. DEJESUS AND BRONSHTEIN v. HORN*, 51 VILL. L. REV. 1057 (2006).

[35] *Id.*; *see* Bronshtein v. Horn, 404 F.3d 700 (3d Cir. 2005).

[36] *Foti*, supra note 34, at 1078; *see* United States v. DeJesus, 347 F.3d 500 (3d Cir. 2003). In this case, two prospective jurors who were struck from the jury were black men who expressed their religious proclivities. The defense counsel raised a *Batson* argument, claiming that the strikes were unjust as they were based upon not only race, but religion also. The district court denied the *Batson* challenges, stating that the strikes were based not on religion, but on how the prospective jurors spent their time. The district court held that the jurors were struck on permissible grounds. The Third Circuit eventually overturned this decision, laying out the dichotomy discussed above.

[37] *DeJesus*, 347 F.3d 500.

[38] *Id.*

[39] *Id.*

The opinion in *DeJesus* was not unanimous however; the dissent claimed that the affirmation of peremptory challenges based on religious beliefs was discriminatory.[40] The dissent skewered the distinction between affiliation and beliefs, claiming that the sole basis for exercising a peremptory challenge cannot be the juror's religious practice and inferred belief from that involvement.[41] Additionally, the dissent argued that heightened scrutiny under the Equal Protection Clause of the Fourteenth Amendment bars using stereotypes based on religious affiliation or beliefs in implementing peremptory strikes.[42]

Bronshtein quickly followed *DeJesus*, and the Third Circuit issued a unanimous decision condemning peremptory strikes based on religion.[43] This decision was grounded more in a *Batson* analysis than *DeJesus*.[44] In *Batson,* the Supreme Court required a three-part test to determine whether a prosecutor improperly exercised a race-based peremptory strike in violation of the Equal Protection Clause: 1) the defendant must make a prima facie showing that the prosecutor exercised the peremptory challenge on the basis of race, 2) the burden shifts to the prosecutor to provide a race-neutral justification for striking the juror in question, and 3) the court determines whether the defendant successfully satisfied the burden of proving purposeful discrimination.[45] Dicta in *Bronshtein* largely condones the expansion of the *Batson* test to include religion, similar to the way it was expanded to include gender.[46] As of today, both *Bronshtein* and *DeJesus* stand, with the Third Circuit adopting a fairly well-defined take on religious-based peremptory strikes, drawing a distinction between affiliation and religious beliefs, while hoping for an expansion of the *Batson* analysis.[47]

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[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *DeJesus*, 347 F.3d 500; *see Bronshtein*, 404 F.3d 700.
[44] *DeJesus*, 347 F.3d 500; *see Batson*, 476 U.S. 79.
[45] *Batson*, 476 U.S. 79.
[46] *Bronshtein*, 404 F.3d 700; *see* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994). This case involved a paternity suit where the prosecutor used almost all of its strikes to remove male jurors, empaneling a fully female jury. The Supreme Court held that like race, gender is an unconstitutional analysis for juror impartiality and competency because "intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where… the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes." Since this case, *Batson* has been expanded beyond criminal trials, but to that of civil matters as well.
[47] *Bronshtein*, 404 F.3d 700; *DeJesus*, 347 F.3d 500.

The other federal circuits are less certain than their counterparts in the Third Circuit.[48] Many simply refuse to take a stance on the subject as it is yet unheard by the Supreme Court and none seem to follow the Third Circuit's distinction. For example, the Seventh Circuit in 1998 agreed with the decision that it would be unconstitutional to base peremptory strikes on religious affiliation, but ultimately succumbed to the uncertainty and refused to delve any further.[49] In 2013, the Seventh Circuit doubled down on the uncertainty and refused to recognize *Batson*'s application to "religiosity."[50] In *United States v. Greer*, the Fifth Circuit held that the *Batson* analysis simply did not apply to religion at all.[51] A few years later, like the Seventh Circuit, the Fifth Circuit refused to expand *Batson* to religion and cited jurisprudential uncertainty.[52] Moreover, the Second Circuit essentially remained neutral by advocating for every side of the argument.[53] While the Second Circuit discussed the logical extension of *Batson* to religion and seemingly endorsed it, the Court carefully backpedaled to note that this is an unsettled area of law.[54] By doing so, the Second Circuit concluded that it should not consider this question and even if it did, should not expand *Batson* because of the Supreme Court's lack of input.[55]

B. State Courts & the Issue of Religious-Based Strikes

States have taken a similarly tentative view; however, some set a bolder precedent, alluding to violations of their state constitutions and their own equal protection clauses.[56] For example, New Jersey set out on the boldest path in *State v. Fuller*, affording

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[48] *See supra* note 32.
[49] *See Stafford*, 136 F.3d at 1109.
[50] *See* United States v. Heron, 721 F.3d 896 (7th Cir. 2013). Despite straightforwardly addressing whether *Batson* applies in a religious context, the Supreme Court subsequently denied certiorari in this instance. However, the Seventh Circuit majority noted that application of the facts to the religiosity argument was weak.
[51] 939 F.2d at 1076.
[52] *Fisher*, 169 F.3d at 295.
[53] *Brown*, 352 F.3d at 654. Coincidentally, this case shares the same name as the Florida corruption case that opened the Background section of this article. However, the Second Circuit delves much further into the history of religious discrimination and peremptory challenges than the Eleventh Circuit, though does not provide a satisfying or definitive conclusion.
[54] *Id.* at 666.
[55] *Id.*
[56] *See* State v. Fuller, 862 A.2d 1130 (N.J. 2004).

the greatest protection for religion in the jury selection process.[57] While following the Third Circuit's lead initially, the majority wrestled with an often ignored and glaring issue of *voir dire*—peremptory strikes of prospective jurors who wear religious clothing or other visible indications of their religion.[58] New Jersey precedent allowed the majority to extend protections to any cognizable group, and the majority concluded that those who show visible signs of identification with a religious group are protected.[59] Thus, New Jersey adopted a broader view of the religious affiliation distinction, holding that peremptory challenges cannot be used to remove prospective jurors who belong to a cognizable group defined on the basis of religious principles.[60] Other states like Arizona, California, and Connecticut are less sympathetic to the plight of religious beliefs and adhere strictly to the religious affiliation distinction.[61] Stricter still, is Texas, as its Court of Criminal Appeals held that religion-based peremptory strikes were not constitutionally improper.[62] While the federal circuits are muddled, the states that have considered the issue present an even more divided perspective.

C. Waiting for Supreme Revelation & Clarification

Despite the Supreme Court's avoidance of the issue, a few Justices did comment on the denial of certiorari in *Davis v. Minnesota*.[63] In *Davis,* the Minnesota Supreme Court upheld the use of a peremptory strike on a black juror who was a practicing Jehovah's Witness.[64] Justices Thomas and Scalia dissented from this denial.[65] Justice Thomas advocated that *Batson* should apply to

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[57] *Id.*
[58] *Id.*
[59] *Id. see also* State v. Gilmore, 511 A.2d 1150 (N.J. 1986) (extending equal protection, especially to the jury selection process, to cognizable groups which includes those based on religious principles).
[60] *Id.*
[61] *See* State v. Purcell, 18 P.3d 113, 120 (Ariz. Ct. App. 2001) (holding that *Batson* encompasses peremptory strikes grounded upon religious affiliation or membership); See State v. Hodge, 726 A.2d 531, 552-54 (Conn. 1999) (holding that *Batson* extends to religion, but only to the extent that the prosecutor had excused a juror for certain beliefs that could impair their ability to decide the case rather than religious affiliation, the peremptory challenge would stand); People v. Martin, 75 Cal. Rptr. 2d 147 (Cal. App. 1st Dist. 1998) (same as State v. Hodge).
[62] *See* Casarez v. State, 913 S.W.2d 468 (Tex. Crim. App. 1995).
[63] Davis v. Minnesota, 511 U.S. 1115, 1115 (1994).
[64] State v. Davis, 504 N.W.2d 767 (Minn. 1993).
[65] *Id.* at 1116. The Justices were prepared to make a decision on this issue and readily hinted (not so subtly) how they would decide.

any protected class under the Equal Protection Clause that requires heightened judicial review of strict scrutiny.[66] Justice Thomas cited the decision in *J.E.B.* and reasoned that this expansion already set the precedent and inclination towards expanding *Batson* to those in need of additional protection and in danger of discrimination.[67] However, Justice Ginsburg's concurrence specifically countered Justice Thomas' reasoning, elucidating that a person's religious affiliation, unlike their race and gender, is *significantly* less self-evident at first glance.[68] If *Batson* were expanded, the opposing counsel could demand a religion-neutral explanation for every peremptory strike, unduly complicating the already strenuous process of *voir dire* and making the process "excessively intrusive for the end sought to be achieved."[69]

D. Possible Paths for Addressing Religious-Based Strikes

The many sides of the *Batson* debate applying to religion make compelling arguments and considering the controversial territory religion inevitably carries, it is no wonder why the Supreme Court has consistently denied certiorari. While the Court may possibly be waiting for the perfect case to grant certiorari, the best potential solution may be to finally make a definitive decision. This jurisprudence is evidently muddled with contradictions and split courts in desperate need of some guidance. The Supreme Court's main prerogative is to interpret the Constitution and guide the lower courts. Absent a binding decision, the lower courts have been allowed to interpret the silence as they choose, and many consider this silence as a resounding *no* for *Batson*'s extension.[70] A seeming majority of federal circuits and district courts assume that without the Supreme Court's input otherwise, the *Batson* analysis simply does not apply to religion.[71] With many courts already in this camp, it would not be too difficult for the Supreme Court to simply

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[66] *Id.* at 1117.
[67] *Id.; see also J.E.B.*, 511 U.S. at 127. Specifically, Justice Thomas cited Justice Scalia's rationale in *J.E.B.* and how this potential application to religion is the inevitable consequence of the *Batson* expansion to gender. Additionally, the dissents delivered the rather fair argument that this issue needs to be directly heard in front of the Court and analyzed within the Equal Protection Clause context.
[68] *Id.* at 1115; see *Davis*, 504 N.W.2d at 767.
[69] Davis, 504 N.W.2d at 771.
[70] *See Heron*, 721 F.3d at 896; *Fisher*, 169 F.3d at 295; *Brown*, 352 F.3d at 654; *Casarez*, 913 S.W.2d at 468.
[71] *Id.*

affirm their thinking. Despite the trend to follow the Third Circuit's religious affiliation and religious belief distinctions and the fairly logical explanations given by Justice Thomas's dissent, the Supreme Court should make a definitive ruling against extending *Batson* to religion. While New Jersey's protection of visual religious identification is a compelling and persuasive one, the consequences of extending *Batson* too far in this context are severe.[72] Additionally, the majority in *Davis* noted that the protections were granted to race and gender because of a history of systematic and deeply entrenched discrimination, whereas religion has received relatively tolerant treatment within the *voir dire* context.[73] Perhaps the Minnesota Supreme Court said it best; *Batson* does not apply to religion because any "…inquiry on voir dire into a juror's religious affiliation and beliefs is irrelevant and prejudicial and to ask such questions is improper."[74]

IV. Conclusion

The glaring issues involving religion continue to play a key role in the legal landscape of this country and it is evident that remedies are lacking—other than the Supreme Court issuing a definitive ruling (which it is extremely reluctant to do as evidenced here). Religion is inherently enmeshed with other complex issues of race, capital punishment, and jury duty, so it is understandable that any decision related to it may be incendiary. But, with significant federal circuit splits and state courts diverging so significantly on peremptory challenges and juror disqualification, a binding precedent should be set. This is especially true in the context of capital cases where the consequences of a papal pronouncement can have a dramatic influence on the jury pool. The majority of courts declining to expand *Batson* cite that their primary reason for rejection, besides the lack of Supreme Court direction, is that religion has not been the object of discrimination nearly to the same degree as race or gender. But, with these new developments in the Catholic Church and the ever-evolving country we live in, perhaps it is best not to wait for that to happen.

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[72] New Jersey's example should be followed, and this issue should be considered more closely in courts' decisions, however, this would not coincide with the rejection of *Batson*'s extension to religion.
[73] *Davis*, 504 N.W.2d at 767.
[74] *Id.* at 772.