Marquette Law Review

Volume 70
Issue 4 *Summer 1987*

Article 8

1987

Jury Discrimination: Batson v. Kentucky, 106 S. Ct. 1712 (1986)

Carolyn A. Yagla

Follow this and additional works at: https://scholarship.law.marquette.edu/mulr

Part of the Law Commons

Repository Citation
Carolyn A. Yagla, *Jury Discrimination: Batson v. Kentucky, 106 S. Ct. 1712 (1986)*, 70 Marq. L. Rev. 736 (1987).
Available at: https://scholarship.law.marquette.edu/mulr/vol70/iss4/8

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized editor of Marquette Law Scholarly Commons. For more information, please contact elana.olson@marquette.edu.

JURY DISCRIMINATION—*Batson v. Kentucky*, 106 S. Ct. 1712 (1986).

The United States Supreme Court has long recognized that the purposeful exclusion of blacks from jury service is a denial of the equal protection of the laws guaranteed by the fourteenth amendment.[1] Nevertheless, prosecutors consistently use unfettered peremptory challenges to remove prospective black jurors from the petit juries of black defendants.[2] *Batson v. Kentucky*,[3] illustrates a recent effort by the Supreme Court to reach a compromise between these conflicting interests. By virtue of this decision, a defendant is able to establish a prima facie case of discrimination in selection of a jury relying solely on the facts in his or her case.[4] Once such a showing is made, the burden shifts to the prosecutor to offer a neutral explanation for his challenges.[5] Thus, discriminatory acts resulting from the unchecked use of peremptory challenges are no longer protected within a single case,[6] and the promise of equal protection to all is enhanced.[7]

After a brief statement of the case, this Note will offer a historical perspective of this area of the law and discuss the various opinions of the *Batson* Court. The Note will conclude

---

1. Strauder v. West Virginia, 100 U.S. 303 (1880). *See infra* notes 22-23.

2. A peremptory challenge is a statutory right to dismiss any party from jury service without having to give a reason for the elimination. Swain v. Alabama, 380 U.S. 202, 220 (1965). Traditionally, courts have given great deference to the unrestricted use of these challenges:

> American courts and legislatures first confronted the issue of representative juries following the Civil War. In succeeding years, racial prejudice was attacked at each step in the jury selection process, but the final step, the exercise of peremptory challenges, has been traditionally unassailable. Counsel for both plaintiff and defendant were, and still are privileged to strike an alotted number of veniremen from a final panel without explanation. Prosecutorial exercise of the government's peremptory challenges against non-white potential jurors often results in the empanelment of an all-white jury to determine the guilt or innocence of black and other racial minority criminal defendants.

Comment, *The Prosecutor's Exercise of the Peremptory Challenge to Exclude Nonwhite Jurors: A Valued Common Law Privilege in Conflict with the Equal Protection Clause*, 46 U. CIN. L. REV. 554, 554 (1977) (footnotes omitted).

3. 106 S. Ct. 1712 (1986).

4. *Id.* at 1722.

5. *Id.* at 1723.

6. *See infra* note 46 and accompanying text.

7. *Batson*, 106 S. Ct. at 1722.

with a critique comparing the decision's strengths with its predominant weakness.

I. Statement of the Case

James Kirkland Batson was brought to trial on charges of second-degree burglary[8] and receipt of stolen goods.[9] After the court excused certain jurors for cause, the prosecutor used his peremptory challenges[10] to strike all four black veniremen.[11] As a result, an all-white jury was selected to try the black defendant. The defense counsel moved to discharge the jury, contending that the prosecutor's purposeful exclusion of blacks constituted a denial of Batson's sixth amendment right to a jury drawn from a cross section of the community[12] and

---

8. 19__ KY. REV. STAT. & R. SERV. § 513.030 (Baldwin).

9. *Id.* at § 514.110.

10. The peremptory challenge is used in every state. It is regarded as an essential tool in finding an impartial jury because it permits parties to remove anyone suspected of being biased without assigning a specific cause. In most jurisdictions, the number of peremptory challenges allotted varies with the offense. Some jurisdictions allow the prosecution and the defense the same number of challenges, while many others give more challenges to the defense. *See generally* A.L.I. CODE OF CRIMINAL PROCEDURE, 855-62 (1930).

11. Batson v. Kentucky, 106 S. Ct. 1712, 1715 (1986). The Kentucky Rules of Criminal Procedure provide:

> After jurors have been excused for cause, the parties exercise their peremptory challenges simultaneously by striking names from a list of qualified jurors equal to the number to be seated plus the number of allowable peremptory challenges. Rule 9.36. Since the offense charged in this case was a felony, and an alternate juror was called, the prosecutor was entitled to six peremptory challenges, and defense counsel to nine. Rule 9.40.

Batson, 106 S. Ct. at 1715 n.2.

12. *Batson*, 106 S. Ct. at 1715. The sixth amendment to the Constitution provides in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . . ." U.S. CONST. amend. VI. Courts have interpreted this to mean that "criminal defendants are entitled, as a matter of due process, to a jury drawn from a representative cross section of the community. This is an essential element of a fair and impartial jury." Johnson v. Louisiana, 406 U.S. 356, 378 (1972).

There is a split of authority as to whether peremptory challenges used to strike black jurors in any particular case are a denial of the cross section requirement. Cases asserting that striking black jurors is a violation of the sixth amendment include: Booker v. Jabe, 775 F.2d 762 (6th Cir. 1985), *cert. denied*, 107 S. Ct. 910 (1987); McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984), *vacated*, 106 S. Ct. 3289 (1987). The opposite view is illustrated in United States v. Childress, 715 F.2d 1313 (8th Cir. 1983) (en banc), *cert. denied*, 464 U.S. 1063 (1984).

his fourteenth amendment right to equal protection of the laws.[13] The motion was denied.[14]

Batson was tried and convicted on both criminal counts.[15] On appeal to the Supreme Court of Kentucky,[16] the constitutionality of the prosecutor's conduct was again challenged without success.[17] Following the precedent of *Swain v. Alabama*,[18] the court held that a defendant who alleges lack of a fair cross section must establish a pattern of discriminatory challenges over a period of time.[19] The United States Supreme Court reversed, however, ruling that a defendant may make a prima facie showing of purposeful racial discrimi-

13. *Batson*, 106 S. Ct. at 1715. Equal protection of the laws ensures that "equal protection and security shall be given to all under like circumstances in his life, his liberty, and his property, and in the pursuit of happiness, and in the exemption from any greater burdens and charges than are equally imposed upon all others under like circumstances." Sovereign Camp, W.O.W. v. Casodos, 21 F. Supp. 989, 994 (D.C.N.M. 1938).

14. *Batson*, 106 S. Ct. at 1715. Jury selection is a three-step process. First, a list of prospective jurors is compiled. Next, those on the list who meet certain statutory requirements are excused from jury duty leaving the venire. The third step, known as *voir dire*, gives both the prosecution and the defense an opportunity to question the veniremembers in an effort to uncover any biases. Challenges for cause and peremptory challenges are then exercised resulting in the formation of the petit jury. For an overview of this process, see J. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 85-177 (1977). In *Batson*, the judge denied the petitioner's motion to discharge the jury, opining that the selection of the venire is subject to the cross section requirement but the selection of the petit jury is not. *Batson*, 106 S. Ct. at 1715. *See infra* note 26.

15. *Batson*, 106 S. Ct. at 1715.

16. Batson v. Kentucky, No. 84-6263 (D. Ky. June 25, 1985) (available on LEXIS, Genfed library, Dist file).

17. *Batson*, 106 S. Ct. at 1715. The petitioner argued on two grounds. First, he cited caselaw holding that discriminatory use of peremptory challenges in a single case is a violation of the sixth amendment. *See* People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978); Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979). Second, the petitioner argued that the facts showed that the prosecutor had engaged in a "pattern" of discriminatory challenges within the case and thus had established an equal protection claim under Swain v. Alabama, 380 U.S. 202 (1965).

18. 380 U.S. 202 (1965).

19. *Batson*, 106 S. Ct. at 1716. *Swain* held that it would not be enough to prove that all prospective black jurors had been removed by the prosecutor in the defendant's trial. Instead, systematic exclusion of an identifiable group of jurors from the venire is necessary to establish a violation of the equal protection clause. 380 U.S. at 220-23. The Supreme Court of Kentucky recently reaffirmed this position in Commonwealth v. McFerron, 680 S.W.2d 924 (Ky. 1984).

nation by relying solely on the facts concerning the selection of the jury in his or her case.[20]

II. Historical Perspective

A. *Equal Protection of the Laws*

Courts have struggled to eliminate racial discrimination in jury selection procedures since 1875 when Congress made it a crime to "exclude or fail to summon a qualified citizen for jury service on the basis of race."[21] The case of *Strauder v. West Virginia*[22] was the first in a long line of decisions[23] establishing that exclusion of blacks from jury service is a denial of equal protection of the laws guaranteed by the fourteenth amendment.[24] As stated in *Strauder*:

> The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine . . . . [H]ow can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is not a denial to him of equal legal protection?[25]

---

20. *Batson*, 106 S. Ct. at 1722.

21. 18 U.S.C. § 243 (1948).

22. 100 U.S. 303 (1880). In *Strauder*, the Supreme Court struck down a statute excluding blacks from jury service as a violation of the equal protection clause. The Court held that a defendant is entitled to a jury composed of his peers. It further declared that denying black people the opportunity to participate on juries branded them as inferior and stimulated prejudice. *Id.* at 308.

The same year, the Supreme Court applied these rules in the selection of grand juries. *Ex parte* Virginia, 100 U.S. 339 (1880). The following year, the Court extended the principles announced in *Strauder* to racially discriminatory use of facially neutral jury selection laws. Neal v. Delaware, 103 U.S. 370 (1881).

23. *See, e.g.*, Rose v. Mitchell, 443 U.S. 545 (1979); Castaneda v. Partida, 430 U.S. 482 (1977); Carter v. Jury Comm'n 396 U.S. 320 (1970); Whitus v. Georgia, 385 U.S. 545 (1967); Eubanks v. Louisiana, 356 U.S. 584 (1958); Reece v. Georgia, 350 U.S. 85 (1955); Hernandez v. Texas, 347 U.S. 475 (1954); Avery v. Georgia, 345 U.S. 559 (1953); Cassell v. Texas, 339 U.S. 282 (1950); Patton v. Mississippi, 332 U.S. 463 (1947); Akins v. Texas, 325 U.S. 398 (1945); Hill v. Texas, 316 U.S. 400 (1942); Smith v. Texas, 311 U.S. 128 (1940); Pierre v. Louisiana, 306 U.S. 354 (1939); Hale v. Kentucky, 303 U.S. 613 (1938); Norris v. Alabama, 294 U.S. 587 (1935); Carter v. Texas, 177 U.S. 442 (1900); Gibson v. Mississippi, 162 U.S. 565 (1896).

24. The fourteenth amendment provides in pertinent part: "No State shall abridge the privileges or immunities of citizens of the United States, nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

25. *Strauder*, 100 U.S. at 308-09.

The equal protection clause of the fourteenth amendment does not require a jury to contain representatives of the defendant's racial, religious or political group.[26] It does, however, require that prospective jurors be selected by nondiscriminatory criteria.[27] The desired result is juror selection on the basis of individual qualifications rather than group characteristics.[28] To exclude an eligible class of the community undermines the protection a jury trial is intended to secure.[29]

The equal protection clause prevents a prosecutor from challenging potential jurors solely because of their race,[30] or on the assumption that black jurors as a group will necessarily be partial to a black defendant.[31] As a result, every person whose life, liberty, or property is at issue is guaranteed that he

---

26. *Id.* at 305. It is interesting to note the sharp distinction the Supreme Court makes between venire selection and the composition of individual juries. In general, the cases involving selection of venires stress that the exclusion of minorities inhibits impartiality and public confidence in the jury system. It seems that this reasoning would lead the Court to require minority representation on the petit jury as well. Yet, the Court has consistently maintained that all the Constitution prohibits is the systematic exclusion of particular groups from jury panels. There are three factors responsible for the Court's reluctance to extend the cross section requirement to petit juries. First, there are problems in attaining statistically representative panels. *See* Comment, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 YALE L.J. 1715, 1732 (1977). Second, a representative jury might include those who could theoretically be challenged for cause. *Id.* at 1733. Finally, requiring a true cross section of the community to serve on the final jury panel would limit the scope of the peremptory challenge. *See* Swain v. Alabama, 380 U.S. 202 (1965).

27. Martin v. Texas, 200 U.S. 316, 321 (1906); *Ex parte* Virginia, 100 U.S. 339, 345 (1880).

28. Thiel v. Southern Pac. Co., 328 U.S. 217, 223-24 (1946).

29. *Strauder*, 100 U.S. at 308. In a more recent decision, Justice Marshall explained the harm in purposefully excluding a group of the community:

> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unworkable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

Peters v. Kiff, 407 U.S. 493, 503-04 (1972).

30. *Batson*, 106 S. Ct. at 1717. *See also* Hernandez v. Texas, 347 U.S. 475, 482 (1954); Cassell v. Texas, 339 U.S. 282, 287 (1950); Akins v. Texas, 325 U.S. 398, 403 (1945); Neal v. Delaware, 103 U.S. 370, 394 (1881); Strauder v. West Virginia, 100 U.S. 303, 305 (1880).

31. *Batson*, 106 S. Ct. at 1717. *See also* Norris v. Alabama, 294 U.S. 587, 599 (1935); Neal v. Delaware, 103 U.S. 370, 397 (1881).

or she will not be put on trial before a jury from which members of his or her race have been purposely excluded.[32]

B. The Peremptory Challenge

The peremptory challenge provides both the prosecutor and the public defender with a method of eliminating veniremembers whose statements do not justify a challenge for cause.[33] They are often exercised upon sudden impressions, stereotypes and affiliations that indicate a particular juror might be biased in favor of the opposition.[34] Courts do not require an explanation for these perceptions, nor do they review their validity.[35] Instead, parties are allowed to rely on their instincts. The system's goal is to eliminate extremes of partiality in order to produce a body of jurors who will be able to view the evidence objectively.[36] While the peremptory challenge is widely recognized as a necessary tool in securing an impartial jury, it has never been given constitutional status.[37]

---

32. *Batson*, 106 S. Ct. at 1718. The Court pointed out that while many of their decisions have concerned discrimination during selection of the venire, the principles announced also forbid discrimination on account of race in selection of the petit jury. The fourteenth amendment protects an accused throughout the proceedings bringing him to justice. *Id. See* Hill v. Texas, 316 U.S. 400, 406 (1942).

33. A challenge for cause is made on a "narrowly specified, provable and legally cognizable basis of partiality." Swain v. Alabama, 380 U.S. 202, 220 (1965). These challenges may be exercised only when an actual or implied bias exists. Actual bias is a state of mind that will prevent the juror from acting impartially. Implied bias is a bias presumed by the law on the basis of a relationship between the prospective juror and some aspect of the case.

34. *See* Pointer v. United States, 151 U.S. 396, 403 (1894); Hayes v. Missouri, 120 U.S. 68 (1887). Peremptory challenges allow parties to excuse a certain number of jurors even though it is difficult to express any legal objection to them. It is often exercised upon the "sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another." Lewis v. United States, 146 U.S. 370, 376 (1892).

35. The Supreme Court has often acknowledged the importance of the peremptory challenge, but its views on the exercise of the challenge have been contradictory. *Compare* Sawyer v. United States, 202 U.S. 150, 165 (1906) (holding that the exercise of peremptory challenges are subject to the court's review) *with* Swain v. Alabama, 380 U.S. 202, 220 (1965) (holding that the exercise of peremptory challenges are beyond the court's control).

36. *Swain*, 380 U.S. at 219.

37. *See* Stilson v. United States, 250 U.S. 583, 586 (1919); *Pointer*, 151 U.S. at 408; *Lewis*, 146 U.S. at 376.

C. *Striking a Balance*

The equal protection principles announced in *Strauder* have never been questioned. In relation to the peremptory challenge, however, their application presents a unique problem. The conflict stems from two competing interests.[38] The peremptory challenge, which is protected from scrutiny, allows the prosecution to excuse prospective jurors for any reason, including race, religion, nationality and occupation.[39] At the same time, a defendant has the right to be tried by a jury from which his peers have not been excluded solely on the basis of race.[40]

The landmark case of *Swain v. Alabama*[41] attempted to balance these considerations by ruling that a prosecutor's removal of blacks from a particular jury is insulated from constitutional review based on the assumption that the challenges are exercised for acceptable trial-related reasons.[42] The rationale for this determination was that the peremptory chal-

---

38. *See* Note, *Peremptory Challenge-Systematic Exclusion of Prospective Jurors on the Basis of Race*, 39 MISS. L.J. 157 (1967).

> Analysis must start with the basic reality that, where racial identification is concerned, the rationale of the peremptory challenge is at war with the ideal of nondiscriminatory selection of jurors. The latter is intended to produce juries that are fair and are recognized as such by the public. It rests on the premise that to accomplish this purpose the jury must reasonably reflect the community's heterogeneous elements, or at least not exclude any of the community's components. The peremptory challenge system, on the other hand, is intended to allow each party to exclude members of groups which may be unfriendly to his own cause or predisposed towards his opponents. It permits the lawyer to eliminate heterogeneity in pursuit of the friendliest, *i.e.* most partial, jury. Since both sides are permitted to play this game, their efforts in some circumstances may cancel each other and produce a reasonably heterogeneous set of jurors whose counteracting biases produce overall impartiality, or may eliminate extremes of partiality and produce a more nearly neutral body of jurors.

Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235, 287 (1968).

39. *See supra* note 34 and accompanying text.

40. *See supra* note 30 and accompanying text.

41. 380 U.S. 202 (1965). In *Swain*, a black defendant who had been convicted of rape by an all-white jury, presented two arguments alleging improper use of the peremptory challenge by the prosecutor. First, the defendant contended that there had been a violation of the fourteenth amendment when the prosecutor struck all six blacks on the venire. Second, the defendant argued that the prosecutor's systematic use of the peremptory challenge against blacks over a long period of time constituted discrimination and the rationale behind the peremptory challenge system was insufficient justification. *Id.* at 205-11.

42. *Id.* at 223. *Swain* stated that the "presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Ne-

lenge is an absolute right "frequently exercised on grounds normally thought irrelevant to legal proceedings . . . ."[43] Thus, people of all races, religions and occupations are subject to being challenged.[44] The Court reasoned that subjecting the prosecutor's motives regarding the peremptory challenge to limitations would radically alter the nature and usefulness of the procedure.[45]

Although striking blacks in any particular case was held to be permissible,[46] *Swain* indicated that a prosecutor's use of the peremptory challenge over a period of time to systematically exclude all blacks from jury service might constitute a denial of equal protection of the laws.[47] The Court explained:

> When the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes . . . it would appear that the purposes of the peremptory challenge are being perverted. If the State has not seen fit to leave a single Negro on any jury in a criminal case, the presumption protecting the prosecutor may well be overcome.[48]

---

groes were removed from the jury or that they were removed because they were Negroes." *Id.* at 222.

43. *Id.* at 220.

44. The Court noted that "[i]n the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause." *Id.* at 221. This position is in accord with numerous decisions in lower federal and state courts. *See, e.g.,* Hall v. United States, 168 F.2d 161 (D.C. Cir. 1948), *cert. denied,* 334 U.S. 853 (1948); People v. Roxborough, 307 Mich. 575, 12 N.W.2d 466 (1943), *cert. denied,* 323 U.S. 749 (1944).

45. *Swain,* 380 U.S. at 221-22.

46. Both the majority and the dissenters agreed that the exclusion of blacks from a particular case was permissible. Their views differed, however, regarding the prosecutor's discriminatory use of peremptory challenges over a period of time. Justice Goldberg stated that the fact that no black person had ever served on a petit jury in Talladega County constituted a prima facie case of discrimination which shifted the burden of proof to the State. Swain v. Alabama, 380 U.S. 202, 238 (1965) (Goldberg, J., dissenting). Justice Goldberg's "rule of exclusion" does not provide an adequate solution since a prosecutor could easily evade the rule by leaving a token number of blacks on the jury panel in an unimportant case.

47. *Swain,* 380 U.S. at 224. The evidence offered by the defendant in *Swain* did not meet that standard. While the defendant showed that the prosecutors in the jurisdiction had exercised their strikes to exclude blacks from the jury, he offered no proof of the circumstances under which prosecutors were responsible for striking black jurors beyond the facts of his own case. *Id.* at 224-28.

48. *Swain,* 380 U.S. at 223-24.

The Supreme Court's decision in *Swain v. Alabama*[49] has been criticized as being both impractical[50] and theoretically unsound.[51] One major objection centered on the numerous requirements a defendant must meet in order to carry the burden of proof:

> To make out a case of discrimination where juries are chosen by the strike system, then, the individual defendant is required to make some kind of showing with respect to the prosecutor's conduct and the motives behind it, in earlier trials extending over an indefinite period of time, trials in which he was not involved and regarding which his opportunities for gathering evidence are severely restricted.[52]

To require affirmative proof of how often and under what circumstances the prosecutor has removed blacks in past cases imposes an impossible burden on the defendant. Not being a party to the previous actons, the defendant is forced to rely on the faded recollection of others or on incomplete court records.[53] Consequently, only one defendant alleging system-

---

49. The systematic exclusion standard announced in *Swain* presented a formidable hurdle for a variety of reasons.

> First, *Swain* declared that the mere absence of blacks on juries over an extended period of time does not establish systematic exclusion if the defendant cannot show that the state was solely responsible for that result. Second, the Court announced a rebuttable presumption that the prosecutor used the government's peremptory challenges to obtain a fair and impartial jury in any given case. Finally, the Court never fully delineated the elements of a pattern of systematic exclusion.

Comment, *The Prosecutor's Exercise of the Peremptory Challenge to Exclude Nonwhite Jurors: A Valued Common Law Privilege in Conflict with the Equal Protection Clause*, 46 U. CIN. L. REV. 554, 560 (1977) (footnotes omitted).

50. Lower courts have noted the practical difficulties of proving that the State systematically exercised the peremptory challenge to exclude blacks from the jury because of their race. *See, e.g.*, United States v. Person, 448 F.2d 1207, 1217 (5th Cir. 1971); People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

51. *See, e.g.*, Note, *Fair Jury Selection Procedures*, 75 YALE L.J. 322, 325 (1965); Imlay, *Federal Jury Reformation: Saving A Democratic Institution*, 6 LOY. L.A.L. REV. 247, 268-70 (1973); Comment, *A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process*, 18 ST. LOUIS U.L.J. 662 (1974); Note, *Rethinking Limitations on the Peremptory Challenge*, 85 COLUM. L. REV. 1357 (1985).

52. Comment, *Swain v. Alabama: A Constitutional Blueprint for the Perpetuation of the All-White Jury*, 52 VA. L. REV. 1157, 1161 (1966).

53. Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235, 302 (1968). Inadequate records pose a virtually insurmountable problem for the defendant. Even if the time and money needed for a proper investigation were there, the data generally is not. Records are rarely kept of which jurors were challenged or the race of those excused.

atic exclusion of blacks had met the high evidentiary standards proposed in *Swain* by the time of the *Batson* decision.[54]

III. The Batson Opinions

A. *The Majority*

Justice Powell, writing for the majority, began by rejecting the evidentiary formula outlined in *Swain v. Alabama*.[55] The Court then outlined a three-step prima facie test which would enable a defendant to establish a presumption of purposeful discrimination relying solely on the facts in the case.[56] In order to raise the presumption, the defendant must begin by showing membership in a cognizable racial group.[57] Second, the defendant must prove that the prosecutor exercised peremptory challenges to remove members of the defendant's race from the venire.[58] Third, from all the circumstances of the case, the defendant must show a strong likelihood that such persons were challenged solely on the basis of race.[59] The Court suggested that a defendant might make such a showing by demonstrating a "pattern" of strikes against black jurors or by using the prosecutor's questions and statements during *voir dire*.

---

54. *See* State v. Brown, 371 So.2d 751, 752 (La. 1979). Defendants have failed to meet their burden of proof for a variety of reasons. Some have failed to establish the role of the state, as opposed to that of the defense, in peremptorily challenging blacks. *See* Swain v. Alabama, 380 U.S. 202 (1965). Some defendants have not shown that the percentage of black veniremen peremptorily challenged was sufficiently high to constitute a systematic exclusion of blacks. *See* United States v. Carter, 528 F.2d 844 (8th Cir. 1975), *cert. denied*, 425 U.S. 961 (1976). Other defendants have failed to allege a sufficient quantity of cases in which blacks had been peremptorily challenged by the prosecution. Finally, some defendants have failed to show that blacks had been peremptorily challenged regardless of the circumstances.

55. 380 U.S. 202 (1965).

56. Batson v. Kentucky, 106 S. Ct. 1712, 1723 (1986). The Court relied on standards that have been "fully articulated" since the *Swain* decision to formulate the new evidentiary standard. *See* Castaneda v. Partida, 430 U.S. 482, 494-95 (1977); Washington v. Davis, 426 U.S. 229, 241-42 (1976); Alexander v. Louisiana, 405 U.S. 625, 629-31 (1972).

57. *Batson*, 106 S. Ct. at 1723. Race, ancestry, and national origin are considered to be cognizable groups. *See* Hernandez v. Texas, 347 U.S. 475, 478 (1954). Sex is a cognizable group also. *See* Taylor v. Louisiana, 419 U.S. 522, 537 (1975).

58. *Batson*, 106 S. Ct. at 1723.

59. *Id.* This does not mean that members of the defendant's race are immune from peremptory challenges. Individual members may still be struck on grounds of specific bias or reasons other than race.

Once a prima facie showing is made and the presumption arises, the burden shifts to the prosecutor to offer a neutral explanation for the challenges. While the prosecutor is required to give a "clear and reasonably specific"[60] explanation of his actions, the Court stressed that the response "need not rise to the level justifying exercise of a challenge for cause."[61] If the prosecutor fails to respond, the defendant will have established purposeful discrimination. If the prosecutor offers some explanation, then the trial court has the responsibility of determining whether the defendant has established the discriminatory use of premptory challenges.[62] As concerns the *Batson* case in particular, the Supreme Court remanded the case to the trial court for application of the three-pronged test stating: "If the trial court decides that the facts establish, prima facie, purposeful discrimination, and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed."[63]

B. The Concurrences

While agreeing with the result, five Justices filed concurring opinions to emphasize different aspects of the case. Justice White agreed that an opportunity to question the prosecutor's motives should be afforded when members of the defendant's race are peremptorily challenged.[64] However, he

60. *Batson*, 106 S. Ct. at 1723. Requiring an explanation for a peremptory challenge is a significant departure from its traditionally arbitrary character. The Court noted that the prosecutor may not rebut a prima facie showing of discrimination by stating that the juror might be partial to the defendant because of their shared race. Nor may the prosecutor simply deny that the challenges were made without a discriminatory motive. *Id.*

61. *Id.*

62. *Batson*, 106 S. Ct. at 1724. The State argued that the holding would gradually erode the usefulness of the peremptory challenge. Not only did the Court state that the modification would "further the ends of justice," they cited lower courts who have not found the procedure burdensome. *Id.* at 1724 n.23.

63. *Batson*, 106 S. Ct. at 1725. The retroactivity of the holding drew criticism from both the concurring Justices and the dissenters. *See infra* notes 65, 70, 75.

64. Batson v. Kentucky, 106 S. Ct. 1712, 1725 (1986) (White, J., concurring). Justice White, who authored the *Swain* decision, conceded that it had led to widespread discrimination in the selection of juries and thus, a modification of the peremptory challenge was justified.

did not feel that the decision should apply retroactively.[65] Justice Marshall also concurred but thought the Court should go one step further in fashioning a remedy.[66] He asserted that "[t]he inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely . . . ."[67]

Justices Stevens and Brennan pointed out that Batson's argument was based on the constitutional provisions of the sixth amendment rather than the provisions of the fourteenth amendment relied upon by the Court.[68] Because the equal protection claim was asserted as a basis of affirmance by the party defending the judgment, however, the Justices felt the Court was wise in addressing it.[69] Finally, Justice O'Connor agreed with Justice White that the decision would not require reversal of Batson's conviction.[70]

C. *The Dissent*

Chief Justice Burger and Justice Rehnquist dissented, criticizing the majority for addressing the equal protection issue

65. *Id.* Justice White pointed out that Batson's conviction need not be reversed just as DeStefano v. Woods, 392 U.S. 631 (1968), did not require a retroactive applicatin of Duncan v. Louisiana, 391 U.S. 145 (1968).

66. *Batson*, 106 S. Ct. at 1712, 1727 (1986) (Marshall, J., concurring).

67. *Id.* at 1728. Some commentators question whether the peremptory system is really necessary anymore. Jury lists that represent a cross section of the community and the ability to challenge a juror for cause may be enough to ensure the impartial jury guaranteed by the sixth amendment. The jury system could survive without the peremptory challenge but it is unlikely that it will be banned.

> First of all, there are surely those who would advocate the total abolition of the peremptory challenge. This is, of course, by far the most unlikely. We have seen . . . how the peremptory challenge serves a useful and needed function to both sides of the controversy, civil or criminal. There may well be many times where one's intuition or experience leads to the feeling that a given juror would not fairly and impartially consider the evidence presented in court. Although this intuitive objection would not sustain a challenge for cause, the peremptory challenge may be used quite satisfactorily at no risk to the attorney's case.

Note, *Peremptory Challenge-Systematic Exclusion of Prospective Jurors on the Basis of Race*, 39 MISS. L.J. 157, 164 (1967).

68. Batson v. Kentucky, 106 S. Ct. 1712, 1729 (1986) (Stevens, J., concurring).

69. *Id.* Justices Stevens and Brennan believed that it was proper for the Court to consider a problem that has been "percolating" in the courts for years. Review of an issue not presented was one of the dissent's major objections. *See infra* note 71 and accompanying text.

70. Batson v. Kentucky, 106 S. Ct. 1712, 1731 (1986) (O'Connor, J., concurring).

despite the petitioner's failure to present it: "In such circumstances, review of an equal protection argument is improper in this Court."[71] Even if Batson had based his claim on a violation of the fourteenth amendment, the Chief Justice felt that the standards applied under the equal protection clause were not fully applicable to the peremptory challenge.[72] His rationale was that peremptory challenges based on racial classifications do not "stigmatize" people in the way that racial classifications *per se* stigmatize:

> The [latter] singles out the excluded group, while individuals of all groups are equally subject to peremptory challenge on any basis, including their group affiliation. Further, venire-pool exclusion bespeaks a priori across-the-board total unfitness, while peremptory strike exclusion merely suggests potential partiality in a particular isolated case.[73]

Chief Justice Burger pointed out that it would be difficult to distinguish between a "reasonably specific" explanation of "legitimate reasons" and a challenge for cause: "Apparently the Court envisions permissible challenges short of a challenge for cause that are just a little bit arbitrary - but not too much."[74] Without any guidelines, he feared that trial judges

---

71. Batson v. Kentucky, 106 S. Ct. 1712, 1731 (1986) (Burger, C.J., dissenting). Chief Justice Burger pointed out that since the petitioner relied solely on a sixth amendment claim, the Court could have directed the parties to brief the equal protection question after granting certiorari. *See, e.g.*, Paris Adult Theatre I v. Slaton, 408 U.S. 921 (1972). Similarly, following oral argument, the Court could have directed reargument on the issue. *See, e.g.*, Illinois v. Gates, 459 U.S. 1028 (1982); Brown v. Board of Educ., 345 U.S. 972 (1953). He urged the Court to use one of these accepted courses of action before disregarding centuries of experience.

72. *Batson*, 106 S. Ct. at 1736. The Chief Justice objected to the Court's use of general equal protection principles to support its holding:

> [P]eremptory challenges are often lodged, of necessity, for reasons "normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty." . . . Moreover, in making peremptory challenges, both the prosecutor and defense attorney necessarily act on only limited information or hunch. The process can not be indicted on the sole basis of "assumption" or "intuitive judgment." . . . As a result, unadulterated equal protection analysis is simply inapplicable to peremptory challenges exercised in any particular case.

Id. at 1737 (footnotes omitted).

73. *Id.* at 1736.

74. *Id.* at 1739.

would be left with the difficult task of sorting through the implications of the holding.[75]

Justice Rehnquist stated that the use of peremptory challenges would not violate the equal protection clause as long as they were used against prospective jurors of all races:

> In my view there is simply nothing "unequal" about the State using its peremptory challenges to strike blacks from the jury in cases involving black defendants, so long as such challenges are also used to exclude whites in cases involving white defendants, Hispanics in cases involving Hispanic defendants, and so on.[76]

Consequently, the dissenters concluded that a time-honored procedure such as the peremptory challenge should not be altered.

IV. CRITIQUE

By holding that racial discrimination may be established using the facts surrounding the selection of a jury in a single case, the Supreme Court attempted to give defendants a more effective method of vindicating their constitutional rights. The Court's reliance on "fully articulated" standards, however, prevented it from exploring and defining the practical aspects of the new ruling.[77] Unfortunately, without clearly establishing some guidelines, the protection might prove to be illusory.

A. Correction of Swain's *Theoretical Errors*

Batson v. Kentucky[78] represents a judicial commitment to the view that all people, regardless of their race, must be allowed to participate in the administration of justice.[79] Implicit in the holding is the recognition that racial discrimination in the selection of juries is a violation of the equal protection clause, and that all jury selection procedures

75. The Chief Justice joined Justice White in concluding that retroactive application was not necessary in this case.

76. Batson v. Kentucky, 106 S. Ct. 1712, 1744 (1986) (Rehnquist, J., dissenting).

77. The standards were articulated in a series of decisions. *See* Castaneda v. Partida, 430 U.S. 482, 494-95 (1977); Washington v. Davis, 426 U.S. 229, 241-42 (1976); Alexander v. Louisiana, 405 U.S. 625, 629-31 (1972).

78. 106 S. Ct. 1712 (1986).

79. *See* Strauder v. West Virginia, 100 U.S. 303, 308 (1880).

are subject to fourteenth amendment commands. *Swain v. Alabama* enabled prosecutors to use peremptory challenges as a tool of individious discrimination.[80] By eliminating all jurors of a particular race, prosecutors were able to escape the cross sectional representation and produce a jury that was more biased than those coming from randomly selected venires.[81] Consequently, the defendant's right to equal protection and a trial by a fair and impartial jury was denied. By permitting such discrimination within a single case, the *Swain* decision sacrificed individual rights in order to spare the arbitrary character of the peremptory challenge.[82] In view of the importance of the individual and community interests involved, however, it is the peremptory challenge that should be sacrificed, or at least modified.

As opposed to *Swain*, the *Batson* decision provides a more workable standard to ensure the equal protection promise for every defendant. If the goal is to uncover the truth behind the prosecutor's exclusion of blacks, it seems reasonable to require the prosecutor, who has access to the evidence and the witnesses, to demonstrate that the challenge was not based solely on race.[83] Inevitably the state is in a better position to show its motives were impartial than a defendant is to prove the contrary.[84]

The Supreme Court stressed that requiring the prosecutor to give a neutral explanation would not undermine the traditional role of the peremptory challenge.[85] A prosecutor is still

---

80. *See supra* note 49 and accompanying text.

81. Comment, *Survey of the Law of Peremptory Challenges: Uncertainty in the Criminal Law*, 44 U. PITT. L. REV. 673 (1983).

82. In a recent case Justice Brennan, who joined the majority in the 1965 *Swain* decision, stated that the Court's equal protection analysis was wrong:

> With the hindsight that two decades affords, it is apparent to me that *Swain's* reasoning was misconceived. Stripped of its historical embellishments, *Swain* holds that the state may presume in exercising peremptory challenges that only white jurors will be sufficiently impartial to try a Negro defendant fairly. In other words, *Swain* authorizes the presumption that a Negro juror will be partial to a Negro defendant simply because both belong to the same race.

Thompson v. United States, 469 U.S. 1024, 1026 (1984).

83. Comment, *Swain v. Alabama: A Constitutional Blueprint for the Perpetuation of the All-White Jury*, 52 VA. L. REV. 1157 (1966).

84. *Id.* at 1163.

85. There is a great deal of controversy surrounding this point. Many people believe that modification of the peremptory challenge will lead to its gradual erosion:

allowed to exercise peremptory challenges for stereotypical or intuitive reasons so long as they are not based on race alone. Thus, the modification does not destroy the peremptory system and the discriminatory use of the challenges is no longer protected.

B. *Practical Limitations*

Although the basic premise of the *Batson* decision is admirable in its effort to further constitutional rights,[86] application of the holding illustrates its weaknesses. The opinion alludes to circumstances that might affect the trial court's determination of a prima facie showing. As noted earlier, "a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose."[87] Knowing this, a prosecutor could easily circumvent the ruling by asking a series of questions which would lay the foundation necessary to dismiss black jurors on non-racial grounds. Requiring a prima facie showing of discrimination leaves the defendant without a remedy in cases where the prosecutor's tactics are less than flagrant.[88] Thus, a prosecutor's motives would still be protected from judicial review as long as his methods of discrimination were subtle.[89]

If a prima facie case is established and the burden shifts to the prosecutor to give a neutral explanation, trial courts face the difficult task of assessing the prosecutor's motives. As one

---

> Once we ban the use of race, we are inevitably led to ban the use of ethnicity and religion, and almost as inevitably led to ban the use of gender. From there we may progress to the view that the use of virtually any identifiable attribute an individual may possess is illegal. Long before we reach this point, however, we will have completely abolished the system of peremptory challenges as it exists today and as it has existed in the past.

King v. County of Nassau, 581 F. Supp. 493, 501 (E.D.N.Y. 1984).

86. Since peremptory challenges are granted by statute, they must yield to fourteenth amendment rights. Yet, courts in the past have gone to great lengths to ensure their unrestricted use. *See supra* note 2.

87. *Batson*, 106 S. Ct. at 1723.

88. *Id.* at 1727.

89. *Id. See also* Commonwealth v. Robinson, 382 Mass. 189, 195, 415 N.E.2d 805, 809-810 (1981).

court noted, "attorneys, confronted with a rule completely or partially restricting their right to act with the internal motive of helping their clients when making peremptory challenges, will be under enormous pressure to lie regarding their motives."[90] Such a rule will foster hypocrisy instead of furthering the ends of justice as the Court had hoped.[91]

The most difficult question arising from the *Batson* decision is the sufficiency of the prosecutor's neutral explanation. Every prosecutor could develop a standard list of reasons for striking jurors, such as the person was distracted or unresponsive. It is unclear whether such general assertions would suffice. If the peremptory challenge is to remain reasonably peremptory, parties must be given a wide degree of discretion in their exercise of the challenge.[92] But if any seemingly neutral explanation is enough to rebut the presumption of discrimination, then the protection afforded under the *Batson* decision is no more helpful to a defendant than the insurmountable burden of proof proposed in *Swain*.[93]

The tragedy of the *Batson* decision is that the Court offers no guidance in resolving these practical considerations. As the dissent stated, the decision "leaves roughly 7,000 general jurisdiction state trial judges and approximately 500 federal trial judges at large to find their way through the morass the Court creates . . . ."[94] A discussion of the practical aspects would have made the Court's holding more effective. Nevertheless, the decision represents a step in the right direction. Because of the *Batson* case, and in particular its constitutional presumption of invidious discrimination, prosecutors will be hesitant to exclude all black veniremembers.[95]

---

90. King v. County of Nassau, 581 F. Supp. 493, 502 (E.D.N.Y. 1984).

91. *Id.*

92. *Id.*

93. One commentator thinks the *Batson* decision comes too late: "Relaxing *Swain's* difficult burden of proof and regulating the peremptory challenge attacks the problem of unrepresentative juries after the seeds of prejudice sown in the preliminary stages of the jury selection process have grown to maturity and borne fruit." Comment, *The Prosecutor's Exercise of the Peremptory Challenge to Exclude Nonwhite Jurors: A Valued Common Law Privilege in Conflict with the Equal Protection Clause*, 46 U. CIN. L. REV. 554, 570 (1977).

94. *Batson*, 106 S. Ct. at 1741.

95. Although the *Batson* decision only addressed racial discrimination in jury selection procedures, the holding may be extended to include discriminatory acts based on sex and national origin. *See* Note, *Batson v. Kentucky: Can the 'New' Peremptory Chal-*

V. Conclusion

The virtually unchecked exercise of peremptory challenges on the basis of race has tended to make equal protection of the laws a hollow promise. At the same time, the peremptory challenge plays a major role in securing an impartial jury. Thus, there must be a compromise between the two interests.

The Supreme Court has suggested a solution which protects constitutional rights without completely destroying the peremptory challenge system. Defendants now have a more effective method of challenging discrimination in the selection of their petit juries. Since *Batson v. Kentucky* changes the nature of the peremptory challenge, however, the decision is likely to receive criticism from those believing in the necessity of the challenge's arbitrary character. The Court was correct in stating that "[m]uch litigation will be required to spell out the contours of the Court's equal protection holding . . . ."[96] Only time will tell if the decision has struck the proper balance between the peremptory challenge and the promise of equal protection to all in securing a fair and impartial jury.[97]

CAROLYN A. YAGLA

lenge Survive the Resurrection of Strauder v. West Virginia?, 20 AKRON L. REV. 355, 361 (1986).

96. Batson v. Kentucky, 106 S. Ct. 1712, 1725 (1986) (White, J., concurring).

97. In Allen v. Hardy, 106 S. Ct. 2878 (1986), the Supreme Court concluded that the *Batson* holding should not be given retroactive effect on collateral review of convictions that became final before *Batson* was decided. In Brown v. United States, 106 S. Ct. 2275 (1986), the Supreme Court granted certiorari to decide whether the *Batson* holding should be applied retroactively in cases pending on direct appeal. *See also* Griffith v. Kentucky, 106. S. Ct. 2274 (1986).