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Batson v. Kentucky: Curing the Disease but Killing the Patient

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A. INTRODUCTION

The Supreme Court's efforts to make all citizens equally eligible for jury service has a long history. In 1880 in *Strauder v. West Virginia*,[1] the Court held unconstitutional as a violation of the defendant's right to equal protection of the laws the murder conviction of a black defendant who had been tried by an all-white jury under a statute that restricted eligibility for jury service to "white male persons." In reaching its result the Court emphasized that the purpose of the Fourteenth Amendment was to prohibit "discrimination because of race or color"[2] and the Court asked rhetorically, "[H]ow can it be maintained that compelling a colored man to submit to 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?"[3]

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[1] 100 U.S. 303 (1880).

[2] 100 U.S. at 310.

[3] 100 U.S. at 309.

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A year after *Strauder*, in *Neal v. Delaware*,[4] the Court extended the equal protection analysis of *Strauder* to cover a statute that was not discriminatory on its face, but which was administered so as to exclude all blacks from the jury venire. In the years since *Strauder* and *Neal*, the Court has made it clear that the Equal Protection Clause prohibits discrimination on bases other than race, such as national origin.[5] The Court has also eased significantly defendants' difficulties in showing discrimination on the part of the state by ruling that a defendant only need show a prima facie case of discrimination before the burden shifts to the state to prove that there was not deliberate discrimination.[6] The result of these decisions and modern jury selection statutes[7] has been an emphasis on making sure that lists of those eligible for jury service are compiled in neutral ways that help ensure that those citizens called for jury service will come from a cross section of citizens in the community.

Over the past quarter century the battleground over jury selection has shifted from the jury venire to the selection of the petit jury, as defendant after defendant has complained in jurisdiction after jurisdiction[8] that the prosecution used its peremptory challenges on a systematic basis to remove all prospective black jurors with the result that the defendant was tried by an all-white jury. The exact extent of the problem is not known because data on jury demographics at either the state or federal level are sparse,[9] but there is no dispute that it is a serious problem in the criminal justice system,

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[4]103 U.S. 370 (1881).

[5]See Hernandez v. Texas, 347 U.S. 475 (1954).

[6]See Norris v. Alabama, 294 U.S. 587 (1935). See generally 2 LaFave & Israel, Criminal Procedure §21.2(c) (1984).

[7]The Federal Jury Selection and Service Act of 1968, codified 28 U.S.C. §§1861–69, aims at ensuring that juries are "selected at random from a fair cross section of the community in the district or division wherein the court convenes," 28 U.S.C. §1861. The Act specifically prohibits exclusion from service as a juror "on account of race, color, religion, sex, national origin, or economic status." 28 U.S.C. §1862.

[8]One treatise on jury selection lists lines of cases from Arkansas, Georgia, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Tennessee, Texas, California, Illinois, Massachusetts, Michigan, New Jersey, Pennsylvania, and the federal courts in which all or most blacks were excluded by prosecutorial use of peremptory challenges, Van Dyke, Jury Selection Procedures 156 (1977), but it is doubtful if there are many jurisdictions in which there is not such a line of cases. See also 2 Ginger, Jury Selection in Civil and Criminal Trials §20 (2d ed. 1984).

[9]See Jorgenson, Back to the Laboratory with Peremptory Challenges: A Florida Response, 12 Fla. St. U.L. Rev. 558, 578 n.137 (1984).

especially when one starts with the fact that minorities are often underrepresented on jury panels as an initial matter.[10] The use of peremptory challenges systematically to remove prospective black jurors is most likely to occur when the defendant is black and the prosecution wants to remove jurors who may be sympathetic to the defendant, but it is not limited to such cases. As one treatise explained:[11]

> The prosecution is frequently looking for a juror who is middle-aged, middle-class, and white, on the assumption that this type of juror identifies with the government rather than the defendant and will thus be more likely to convict.

This is consistent with the traditional "folklore" surrounding jury selection which suggests that minorities are more likely to sympathize with plaintiffs in civil cases and with defendants in criminal cases:[12]

> The traditional trial-lawyer lore dictates, for instance, that in complicated cases the young should be preferred over the old and men over women. When a child is either the victim or the plaintiff, women jurors are considered desirable, but when women are parties, female jurors should be avoided because they are hard on their own sex. The Irish, Italians, Jews, French, Blacks, Chicanos and those of Balkan heritage are said to sympathize with plaintiffs in civil suits and defendants in criminal actions. The English, Scandinavian, and Germans allegedly have the opposite perspective.

The major roadblock for the past twenty years to an attack on the use of peremptory challenges to remove prospective black jurors has been *Swain v. Alabama*,[13] a decision issued at the height of the Warren Court era, where the Court refused to extend the equal protection analysis used in the venire cases to cover the use of peremptory challenges in the confines of a single case.[14] But in 1983

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[10]See Van Dyke, note 8 *supra*, at 28. Among the reasons offered for the underrepresentation of minorities on jury panels is the fact that they are underrepresented on voter registration lists as an initial matter and, in addition, tend to move more frequently than whites so that those voter registrations will often not be accurate. *Id.* at 30.

[11]*Id.* at 152.

[12]*Id.* at 153. See also 1 Lane, Goldstein Trial Technique §§9.45, 9.48 (3d ed. 1984); Simon, The Jury and the Defense of Insanity 111 (1967).

[13]380 U.S. 202 (1965).

[14]See text starting at note 17 *infra*.

the Court hinted that it was preparing to reconsider the issue of the prosecutorial use of peremptory challenges to remove blacks from the trial jury in a trial of a black defendant,[15] and, finally, in 1986 the Court decided *Batson v. Kentucky*[16] and struck down on equal protection grounds the use of peremptory challenges by prosecutors to remove blacks on the basis of race where the defendant is also black. In doing so, the Court avoided the Sixth Amendment ground, which is the issue on which certiorari had been granted.

I. The Discriminatory Use of Peremptory Challenges: The Background to the Problem

A. SWAIN V. ALABAMA

Until *Batson* was decided, the landmark decision on the prosecutorial use of peremptory challenges to remove blacks from the jury was *Swain v. Alabama*,[17] decided in 1965. In *Swain*, a black defendant, convicted of rape and sentenced to death, raised two related challenges. First, he challenged the selection of the grand jurors and the selection of the venire in the county in which he was tried. In support of his argument that his right to equal protection was violated, he showed that blacks were substantially underrepresented on grand juries and on petit jury venires.[18] Secondly, Swain argued that his right to equal protection was violated in the selection of petit jurors. Swain showed that no black had served on a petit jury in his county since 1950[19] and in his particular case, although there were eight blacks on the jury panel, no blacks were on the petit jury that convicted him because two blacks were exempt from service and the prosecutor had used peremptory challenges to strike the other six blacks.[20]

Concerning the underrepresentation of blacks on grand juries and jury panels, the Court concluded that although the selection system was "somewhat haphazard and little effort was made to

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[15]See text at note 63 *infra*.

[16]106 S.Ct. 1712 (1986).

[17]380 U.S. 202 (1965).

[18]*Id.* at 205.

[19]*Id.* at 222–23.

[20]*Id.* at 210.

ensure that all groups in the community were represented,"[21] the percentage of underrepresentation of blacks was relatively small[22] and the record failed to show purposeful discrimination based on race.

The Court also denied Swain's challenge to the prosecutor's peremptory strikes of prospective black jurors. The Court began by reviewing the long history of peremptory challenges which the Court traced to the Ordinance of Inquests in 1305.[23] The Court then explained that "[t]he essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control"[24] and it "permits rejection for a real or imagined partiality that is less easily designated or demonstrable."[25] The Court pointed out that peremptories are often exercised on the basis of a prospective juror's looks, gestures, habits, and associations.[26] More importantly, the Court frankly acknowledged that peremptory challenges are often exercised "on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, national origin, occupation or affiliations of people summoned for jury duty."[27]

From these premises concerning the nature of the peremptory challenge and its purpose, the Court concluded that the striking of blacks in a single case could not amount to a denial of equal protection:[28]

> In the quest for an impartial and qualified jury, Negro and White, Protestant and Catholic, are alike subject to being challenged without cause. To subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge.

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[21] *Id.* at 209.

[22] The methodology whereby Justice White concluded that the underrepresentation of blacks in the county in which Swain was tried was relatively small has been strongly criticized. See Brown, McGuire, and Winters, The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse, 14 New Eng. L. Rev. 192, 201 (1978); Note, 65 Yale L.J. 322, 326 (1965).

[23] 380 U.S. at 213.

[24] 380 U.S. at 220.

[25] *Ibid.*

[26] *Ibid.*

[27] *Id.* at 220–21.

[28] *Id.* at 221–22.

Any other conclusion, the Court feared, would subject the prosecutor's judgment "to scrutiny for reasonableness and sincerity."[29]

The Court did not close the door entirely on challenges to the alleged misuse of peremptory challenges. It indicated that if it could be shown that in a particular jurisdiction the prosecutors are "consistently and systematically" exercising their challenges to prevent "any and all" blacks on jury panels from serving on petit juries, such a systematic practice would constitute invidious discrimination in violation of the Equal Protection Clause.[30] Since Swain had failed to show under what circumstances the prosecutor in the county at issue had been responsible for striking blacks in cases other than his own, the Court concluded that there had been no violation of Swain's right to equal protection.[31]

Commentators[32] and courts[33] in the years after *Swain* have been highly critical of the opinion. The Second Circuit sarcastically titled a section of an opinion dealing with the showing required by *Swain* "Mission Impossible,"[34] and a state supreme court referred to the burden imposed on defendants to make out an equal protection claim after *Swain* as "Sisyphean."[35] While a number of differing explanations have been offered to account for the failure of black defendants to make the showing required by *Swain*,[36] there is no

[29]*Id.* at 222.

[30]*Id.* at 223–24.

[31]*Id.* at 224.

[32]See, *e.g.*, Sullivan, Deterring the Discriminatory Use of Peremptory Challenges, 21 Am. Crim. L. Rev. 477 (1984); Note, 92 Harv. L. Rev. 1770 (1979); Brown, McQuire, and Winters, The Peremptory Challenge as a Manipulative Device in Criminal Trials, 14 New Eng. L. Rev. 192 (1978); Kuhn, Jury Discrimination: The Next Phase, 41 S. Cal. L. Rev. 235 (1968); Note, 39 Miss. L. J. 157 (1967): Comment, 52 Va. L. Rev. 1157 (1966). But see Saltzburg and Powers, Peremptory Challenges and the Clash between Impartiality and Group Representation, 41 Md. L. Rev. 337 (1982).

[33] See, *e.g.*, United States v. Childress, 715 F.2d 1313, 1316–18 (8th Cir. 1983) (en banc), cert. denied, 464 U.S. 1063 (1984); McCray v. Abrams, 750 F.2d 1113, 1120 (2d Cir. 1984), vacated, 106 S.Ct. 3289 (1986); People v. Wheeler, 22 Cal. 3d 258, 148 Cal. Rptr. 890, 583 P.2d 748, 767 (1978).

[34]McCray v. Abrams, 750 F.2d 1120.

[35]Commonwealth v. Soares, 471 Mass. 461, 471 n.10, 399 N.E.2d 499, 509 n.10 (1979).

[36]The lack of success defendants have had under *Swain* is frequently attributed to the fact that an individual defendant is unlikely to have either the time or the resources to compile and analyze the raw data necessary to mount a statistical attack on the prosecution's use of peremptory challenges. See United States v. Childress, 715 F.2d at 1316; United States v. Pearson, 448 F.2d 1207, 1217 (5th Cir. 1971). But with the emergence of strong and organized

dispute that in the years since *Swain*, the number of successful attacks on the discriminatory use of peremptory challenges to remove blacks on a systematic basis over many cases have been almost nonexistent. In *United States v. Childress*,[37] decided by the Eighth Circuit *en banc* in 1983, the court reported that it had found two such cases,[38] both from the same Louisiana parish, where a defendant had successfully established systematic exclusion of blacks.

B. NEW DEVELOPMENTS UNDER STATE CONSTITUTIONAL LAW: WHEELER AND SOARES

In the late 1970s, after the Supreme Court had extended the Sixth Amendment right to jury trial to the states[39] and had also established as part of the right to an impartial jury the right of a defendant to a jury pool that is drawn from a fair cross section of the community,[40] two state courts, California and Massachusetts, using state constitutional analogs to the Sixth Amendment, took a new approach to the problem raised by the use of peremptory challenges by the prosecutor to remove blacks from the jury.

In *People v. Wheeler*,[41] the California Supreme Court, using article I, section 16 of the California Constitution,[42] ruled that it was unconstitutional for a party to employ its peremptory challenges to remove prospective jurors solely on the basis of group bias. The court reversed the convictions of two black defendants in cases in which the prosecution had used its peremptory challenges to strike every

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public defender systems, the empirical difficulties of proof seem somewbat exaggerated. A more obvious reason why defendants bave been unable to show the systematic exclusion by the prosecution of "any and all blacks" from petit juries in a given jurisdiction is that assuming a normal mix of eases and a normal cross section of defendants and victims, it would seem extremely unlikely that there would be many offices in which prosecutors would remove all blacks from all juries in all cases. There will obviously be cases in which black jurors would be very desirable from the prosecution's perspective. See Saltzburg and Powers, note 32 *supra*, at 353–65 (arguing that prosecutors try to keep blacks off some but not all juries).

[37]715 F.2d 1313, 1316 (8th Cir. 1983) (en banc), cert. denied, 464 U.S. 1063 (1984).

[38]State v. Brown, 371 So.2d 751 (La. 1979); State v. Washington, 375 So.2d 1162 (La. 1979).

[39]See Duncan v. Louisiana, 391 U.S. 145 (1968).

[40]See Taylor v. Louisiana, 419 U.S. 522 (1975).

[41]22 Cal. 3d 258, 148 Cal. Rptr. 890, 583 P.2d 748 (1978).

[42]Article I, section 16 of the California Constitution provides in relevant part: "Trial by jury is an inviolate right and sball be secured to all. . . ." Cal. Const., art. I, §16.

prospective black juror.[43] While making it clear that a defendant is not entitled to a jury that proportionately mirrors the community nor even to a jury that includes members of his particular ethnic group,[44] the California court explained "that a party is entitled to a petit jury that is as near an approximation of the ideal cross-section of the community as the process of random draw permits."[45] By striking jurors on the basis of what the court referred to as "group bias," which the court defined to include bias against "groups distinguished on racial, religious, ethnic, or similar grounds," the court reasoned that the impartiality that comes from "allowing the interaction of the diverse beliefs and values the jurors bring from their group experiences"[46] would be destroyed. The result of peremptories based on group bias, the court feared, would be a jury "dominated by the conscious or unconscious prejudices of the majority."[47]

Under the procedure set up in *Wheeler*, if a party believes that the other side is using peremptory challenges to strike jurors on the ground of "group bias alone," the party must raise the issue and make a prima facie case of discrimination to the satisfaction of the court.[48] If the court finds a reasonable likelihood that peremptory challenges were used on the ground of group bias alone, the burden shifts to the challenging party to show that the peremptory challenges were not predicated on group bias alone, but were instead based on the "specific bias" of the prospective jurors which the court defined to include "bias concerning the particular case on trial or the parties or witnesses thereto."[49]

The reasoning of *People v. Wheeler* was relied on heavily by the Supreme Judicial Court of Massachusetts in *Commonwealth v. Soares*.[50]

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[43]The court stated that because members of the venire are not required to indicate their race, religion, or ethnic origin, it was unclear exactly how many blacks had been struck by the prosecution. 583 P.2d at 752.

[44]*Id.* at 762.

[45]*Ibid.*

[46]*Id.* at 761. In another passage in the opinion, the court seemed to suggest that group bias might extend even to groups based on sex, age, education, economic condition, place of residence, and political affiliation. *Id.* at 755.

[47]*Id.* at 761.

[48]*Id.* at 764.

[49]*Id.* at 764–65.

[50]377 Mass. 461, 387 N.E.2d 499, cert. denied, 444 U.S. 881 (1979).

Soares involved a first-degree murder prosecution brought against three black defendants who had scuffled in the early morning hours on the streets of Boston's "Combat Zone" with several members of the Harvard football team—athletes who, after the conclusion of a team banquet, had gone to explore life in and around the topless bars of Boston. During the scuffle, someone had stabbed one of the students, who later died from his wounds. Prior to the trial of the three defendants, the prosecution had used its peremptory challenges to remove twelve of the thirteen blacks on the venire.[51]

The *Soares* court interpreted article 12 of the Massachusetts Constitution, which states in part that no citizen shall be "deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land," to provide a right to " 'a petit jury that is as near an approximation of the ideal cross-section of the community as the process of random selection permits.' "[52] This right, the court ruled, is violated when peremptory challenges are used to strike prospective jurors solely on the base of group membership or affiliation, which the court defined to include: sex, race, color, creed, or national origin.[53] Although there is a "presumption of proper use" of peremptory challenges, if there is a "pattern of conduct" whereby members of a cognizable group have been excluded and there is "a likelihood they are being excluded from the jury solely by reason of their group membership," then the burden shifts to the offending party to demonstrate that the strikes were not exercised on the basis of group affiliation.[54] While the court indicated that the party's explanation "need not approximate the grounds required by a challenge for cause," the reason for the challenge "must pertain to the individual qualities of the prospective juror and not to that juror's group association."[55]

Wheeler and *Soares* had at best a mixed reaction in other states, and most states refused to go down the path presented by the

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[51]The thirteenth black juror remained on the petit jury and was later appointed the jury's foreman by the trial judge. 387 N.E.2d at 508.

[52]*Id.* at 516, quoting from People v. Wheeler, 583 P.2d at 762.

[53]The court used as its source for determining which groups may not be excluded solely on the basis of group affiliation the Equal Rights Amendment of the Massachusetts Constitution. 387 N.E.2d at 516.

[54]*Id.* at 517.

[55]*Ibid.*

decisions.[56] In a dissenting opinion in 1983, Justice Marshall observed that in the five years following *Wheeler* and *Soares*, no other state supreme court had imposed state constitutional limits on peremptory challenges; but in the same period nineteen states had indicated they would continue to follow *Swain*.[57] But in the three-year period between 1983 and the Court's decision in *Batson*, three other states used their state constitutions to reach results similar to those in *Wheeler* and *Soares*.[58]

C. PEREMPTORIES UNDER THE FEDERAL CONSTITUTION

In 1984 Michael McCray, a black who had been convicted of robbery in the New York courts, filed a petition for certiorari in the United States Supreme Court.[59] At McCray's first trial a jury of three blacks and nine whites had hung with either two or all three of the black jury members voting for acquittal.[60] At McCray's retrial, at which he was convicted, the prosecution used eleven or twelve of the state's fifteen peremptory challenges to exclude all blacks and Hispanics from the jury.[61] The state courts had affirmed the conviction on the authority of *Swain*.[62]

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[56]See, *e.g.*, Flowers v. State, 402 So.2d 1088, 1093 (Ala. Crim. App. 1981); Beed v. State, 271 Ark. 526, 530, 609 S.W.2d 898, 903 (1980); Doepel v. United States, 434 A.2d 449, 457–59 (D.C.), cert. denied, 454 U.S. 1037 (1981); Blackwell v. State, 248 Ga. 138, 281 S.E.2d 599, 599–600 (1981); People v. Davis, 95 Ill.2d 1, 69 Ill. Dec. 136, 447 N.E.2d 353 (1983), cert. denied 464 U.S. 1001; State v. Stewart, 225 Kan. 410, 591 P.2d 166 (1979); Gaines v. State, 404 So.2d 557 (Miss. 1981); Commonwealth v. Henderson, 497 Pa. 23, 438 A.2d 951 (1981); State v. Ucero, 450 A.2d 809, 812–13 (R.I. 1982); State v. Thompson, 276 S.C. 616, 281 S.E.2d 216 (1981); People v. McCray, 57 N.Y.2d 542, 457 N.Y.S.2d 441, 443 N.E.2d 915 (1982), cert. denied, 461 U.S. 961 (1983); Drew v. State, 588 S.W.2d 562 (Tenn. Crim. App. 1979); State v. Grady, 93 Wisc.2d 1, 10–11, 286 N.W.2d 607, 611 (App. 1979); State v. Lynch, 300 N.C. 534, 268 S.E.2d 161 (1980).

[57]See Gilliard v. Mississippi, 464 U.S. 867 (1983) (Marshall, J., dissenting from denial of certiorari).

[58]See Riley v. State, 496 A.2d 997 (Del. 1985); State v. Gilmore, 199 N.J. Super. 389, 489 A.2d 1175 (1985), affirmed 511 A.2d 1150 (N.J. 1986); State v. Neil, 457 So.2d 481, 486 (Fla. 1984). New Mexico had also indicated in 1980 in dicta that it was leaning toward following *Wheeler*. See State v. Crespin, 94 N.M. 486, 612 P.2d 716 (App. 1980). Since the Court's decision in *Batson*, two other states have followed the approach to peremptory challenges pioneered in *Wheeler*. See text at notes 294–97 *infra*.

[59]McCray v. New York, 461 U.S. 961 (1983) (denial of certiorari).

[60]McCray v. Abrams, 750 F.2d 1113, 1115 (2d Cir. 1984), vacated, 106 S.Ct. 3289 (1986).

[61]*Ibid.*

[62]See People v. McCray, 57 N.Y.2d 542, 457 N.Y.S.2d 441, 443 N.E.2d 915 (1982), cert. denied, 461 U.S. 961 (1983).

The Supreme Court denied certiorari,[63] but at the same time the Court hinted that it was interested in reconsidering *Swain*. In an opinion joined by Justices Blackmun and Powell, Justice Stevens explained that the denial of certiorari was intended to enable the state courts to serve as laboratories for further study which would "enable the Court to deal with the issue more wisely at a later date. . . ."[64] Justice Marshall, joined by Justice Brennan, filed an opinion dissenting from the denial of certiorari in which he argued that it was time to reconsider *Swain* in light of intervening developments extending the protections of the Sixth Amendment to the states.[65] The two opinions revealed that at least five justices were concerned about the use of peremptory challenges to strike prospective jurors on the basis of race.

When *McCray* reached the federal district court on habeas corpus, that court took the hint and ruled that the action of the prosecutor in using peremptory challenges to strike black jurors violated both the cross-sectional requirements of the Sixth Amendment and the Equal Protection Clause.[66] On appeal, the Second Circuit reluctantly reversed on the equal protection ground, but affirmed on the Sixth Amendment ruling.[67] The court reasoned that since the Sixth Amendment guaranteed a venire that represents a fair cross section of the community,[68]

> [I]t must logically be because it is important that the defendant have the chance that the petit jury will be similarly constituted. The necessary implication is that the Sixth Amendment guarantees the defendant that possibility. It guarantees not that the possibility will ripen into actuality, but only the fair and undistorted chance that it will.

The result with respect to the use of peremptory challenges is that "the Sixth Amendment's guarantee of trial by an impartial jury allows the prosecution to exercise its peremptory challenges to excuse jurors to whom, on the basis of their personal history or behavior, some bias may be imputed; but it forbids the exercise of

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[63]See McCray v. New York, 461 U.S. 961 (1983).

[64]*Id.* at 962.

[65]*Id.* at 969.

[66]See McCray v. Abrams, 576 F.Supp. 1244 (E.D.N.Y. 1984).

[67]See McCray v. Abrams, 750 F.2d 1113.

[68]750 F.2d at 1128–29.

such challenges to excuse jurors solely on the basis of their racial affiliation."[69]

Under the procedure set out in *McCray*, a defendant must first establish a prima facie violation of his "right to the possibility of a fair cross section" by showing that in his case (1) the group alleged to be excluded is a cognizable group in the community, and (2) there is a substantial likelihood that the challenges leading to exclusion have been made "on the basis of the individual venirepersons' group affiliation rather than because of any indication of a possible inability to decide the case on the basis of the evidence presented."[70] If the defendant makes such a showing, then the burden shifts to the prosecutor to rebut the presumption of unconstitutional action by showing that "permissible racially neutral selection criteria" supported the peremptory challenge.[71]

The issue was joined when, after certiorari had been granted in *Batson*,[72] the Fifth Circuit issued an *en banc* opinion, *United States v. Leslie*,[73] that challenged the reasoning and the conclusion reached in *McCray*.[74]

Leslie, a prominent fight promoter in the city of New Orleans, was charged with distributing cocaine.[75] During the voir dire the government used its six peremptory challenges to remove six blacks—the only six blacks on the twenty-eight-person panel left after challenges for cause.[76] The defense had challenged ten white jurors with its ten peremptories.[77] The government had also struck the only black on the four-person alternate pool, while the defense had used

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[69]750 F.2d at 1131.

[70]750 F.2d at 1131–32.

[71]750 F.2d at 1132. The court stated further that the prosecutor's rebuttal need not rise to the level of a challenge for cause because "there are any number of bases on which a party may believe, not unreasonably, that a prospective juror may have some slight bias that would not support a challenge for cause but that would make excusing him or her desirable." *Ibid.*

[72]471 U.S. 1052 (1985).

[73]783 F.2d 541 (5th Cir. 1986), vacated, 107 S.Ct. 1267 (1987).

[74]In Booker v. Jabe, 775 F.2d 762 (6th Cir. 1985), vacated *sub nom.* Michigan v. Booker, 106 S.Ct. 3289 (1986), the Sixth Circuit had adopted the reasoning in *McCray* in ruling that the prosecutor's use of peremptory challenges to exclude prospective black jurors at the trial of a black defendant violated the sixth amendment right to an impartial jury.

[75]783 F.2d at 543.

[76]*Ibid.*

[77]*Ibid.*

its peremptory with respect to alternates to strike one of the three whites in the alternate pool.[78]

The Fifth Circuit began its analysis by arguing that challenges on the basis of race or religion or any other characteristic common to a "cognizable group" were proper as long as the prosecutor acted on the basis of considerations going to the particular case being tried, such as the nature of the crime and the background of the particular defendant. The Fifth Circuit saw this as the teaching of *Swain*. It thus drew a sharp distinction between peremptory challenges exercised for adversary advantage and the complete exclusion of cognizable groups from jury service condemned by the Court in the venire cases:[79]

> To be peremptorily challenged by one side or the other . . . bespeaks a judgment which is neither societal nor even normative, but merely reflects the tactical determination of one contesting litigant's counsel that the challenged person is, under the discrete facts of that particular case, more likely than not to favor the other side.

The court rejected the Sixth Amendment approach pioneered by the Second Circuit and concluded that systematic peremptory challenges of a cognizable group of citizens are not a violation of the right to the "possibility of a cross section of the community" on the jury. It reasoned that although the jury system does embrace "cross-sectional values," such values are embraced in the context of, and are limited by, the overall concept of trial by jury which includes the right to challenge jurors for both individual and group characteristics.[80] The court also refused to bar the use of peremptory challenges by the prosecution on the basis of group affiliation under its supervisory power.[81]

II. Batson v. Kentucky

Three years after the Court hinted that it was preparing to reconsider the issue of the prosecutorial use of peremptory chal-

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[78] *Ibid.*

[79] 783 F.2d at 554.

[80] *Id.* at 556.

[81] *Id.* at 566.

lenges to strike prospective jurors on the basis of race,[82] the Court decided *Batson v. Kentucky*.[83] Batson was a black defendant charged with second-degree burglary and receipt of stolen goods. In Batson's case, the prosecutor used four of his six peremptory challenges[84] to remove all four prospective black jurors from the jury list. *Batson* was tried and convicted by an all-white jury.[85]

Following his conviction on both counts, *Batson* appealed to the Supreme Court of Kentucky. Conceding that *Swain* foreclosed an equal protection attack on his conviction, *Batson* argued that the prosecutor's act of striking the blacks from his jury violated his right to a jury drawn from a cross section of the community under the Sixth Amendment and its analog in the Kentucky Constitution. The Supreme Court of Kentucky affirmed the conviction in a one-paragraph opinion which relied on *Swain*.[86] The Supreme Court granted certiorari on the Sixth Amendment issue.

But the Court had a major surprise in store. Its opinion in *Batson* turned not on the Sixth Amendment issue, but instead on the Equal Protection Clause of the Fourteenth Amendment. Not surprisingly, this development produced some background skirmishing in the opinions over the propriety of the Court's resolving an important issue of criminal procedure on a theory other than that on which certiorari had been granted.[87]

A. THE OPINIONS IN BATSON

Writing for the seven-person majority, Justice Powell argued that the protection afforded an accused under the Equal Protection Clause does not stop with the exclusion of cognizable racial groups from

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[82]See text at notes 63–65 *supra*.

[83]106 S.Ct. 1712 (1986).

[84]In noncapital felony cases in Kentucky the prosecution is entitled to five peremptory challenges and the defense is entitled to eight challenges, but where there is an alternate to be chosen, as was the case in Batson's trial, 106 S.Ct. at 1715 n.2, each side receives an additional peremptory challenge. Ky. R. Crim. P., Rule 9.40.

[85]106 S.Ct. at 1715.

[86]*Id.* at 1715–16.

[87]In his dissenting opinion, Chief Justice Burger criticized the majority for departing from normal procedures in order to decide the case on an issue that had not briefed and argued. See 106 S.Ct. 1731, 1731–32. Justice Stevens responded to this criticism in a concurring opinion in which he argued that the issue was properly before the Court because several *amici curiae*, including the Solicitor General in his brief, had raised the issue. See *id.* at 1729.

the jury venire, but rather "the Fourteenth Amendment protects an accused throughout the proceedings bringing him to justice."[88] Thus "the State's privilege to strike individual jurors through peremptory challenges, is subject to the commands of the Equal Protection Clause,"[89] and equal protection "forbids a prosecutor from challenging potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant."[90]

Although the majority argued that its decision was a logical extension of *Strauder* and the Court's historical condemnation of discrimination on the basis of race, the majority seemed a bit uncertain about what to do with *Swain*. The opinion noted that, despite the denial of relief to the defendant in that case, the *Swain* opinion did indicate that the Equal Protection Clause placed some limits on peremptory challenges in certain cases.[91]

The problem with *Swain*, for the majority, was the "interpretation"[92] of that case so as to place on defendants a "crippling burden of proof"[93] by making a defendant show systematic exclusion of blacks over a number of cases in order to establish a prima facie case of discrimination. It was this "evidentiary formulation"[94] which the majority claimed to reject in *Batson*, because those standards are "inconsistent with standards that have been developed since *Swain* for assessing a prima facie case under the Equal Protection Clause."[95]

The standards "developed since *Swain*" to which the Court referred had been developed for assessing equal protection challenges to jury venires. The Court in *Batson* took the procedures developed in venire cases for evaluating claims of racial discrimination on the part of the state and applied them to the petit jury. As in the venire cases, the defendant must show initially a prima facie case of purposeful discrimination by the prosecutor in the exercise of the state's peremptory challenges.[96] To establish such a case the defendant

[88] *Id.* at 1718.

[89] *Ibid.*

[90] *Id.* at 1719.

[91] *Id.* at 1720.

[92] *Ibid.*

[93] *Ibid.*

[94] *Id.* at 1721.

[95] *Ibid.*

[96] *Id.* at 1722.

must show (1) that he is a member of a cognizable racial group and (2) that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race.[97] In making the requisite showing, the defendant must show facts and circumstances that raise an inference that the prosecutor used peremptory challenges to exclude prospective jurors on account of race. Among the relevant facts which the Court indicated might give rise to an inference of discrimination was a " 'pattern' of strikes against black jurors" or similarly "the prosecutor's questions and statements during voir dire."[98]

Just as with equal protection challenges to the composition of a jury venire, once the defendant has succeeded in raising a prima facie case of discrimination, "the burden shifts to the State to come forward with a neutral explanation for challenging black jurors."[99] Such an explanation, the Court emphasized, "need not rise to the level justifying exercise of a challenge for cause,"[100] but "the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race."[101]

The Court left to the lower courts the task of working out the procedures to be followed if the prosecutor does not rebut the defendant's prima facie case—whether, for example, to start the jury selection process over with a new panel[102] or to require the reinstatement of improperly challenged jurors.[103] It reasoned that given the variety of jury selection practices followed in state and federal trial courts, it was better not "to attempt to instruct those courts how best to implement our holding today."[104]

Because *Batson* had made a timely objection to the prosecutor's use of peremptory challenges, the case was remanded to permit the

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[97]*Id.* at 1723.

[98]*Ibid.*

[99]*Ibid.*

[100]*Ibid.*

[101]*Ibid.*

[102]See, *e.g.*, McCray v. Abrams, 750 F.2d at 1132; Booker v. Jabe, 775 F.2d 773; People v. Wheeler, 583 P.2d at 765.

[103]See United States v. Robinson, 421 F. Supp. 467, 474 (Conn. 1976), mandamus granted *sub nom.* United States v. Newman, 549 F.2d 240 (2d Cir. 1977).

[104]106 S.Ct. at 1724 n.24.

trial court to determine whether the facts had raised a prima facie case of discrimination, and if so, to permit the prosecutor an opportunity to offer a neutral explanation for his actions.[105]

There were four concurring opinions, but two were not directed to the merits of the majority opinion. Justice Stevens's concurring opinion was directed solely to the propriety of the Court's finding a violation of the Equal Protection Clause when the petitioner had not raised that issue in the request for certiorari.[106] Justice O'Connor added a one-paragraph opinion[107] to express agreement with the conclusion of Justice White in his concurrence[108] and of Chief Justice Burger in his dissent[109] that the decision in *Batson* should not be applied retroactively.[110] Justice White was more candid in his concurring opinion than was the majority. He acknowledged at the start of his opinion that the Court was overruling the "principal holding" of *Swain v. Alabama*, which had traditionally shielded a prosecutor's use of peremptory challenges in a particular case from inquiry into the reasons for the exercise of those challenges.[111] But he explained that prosecutors had not heeded the warning implicit in *Swain* "that using peremptories to exclude blacks on the assumption that no black juror could fairly judge a black defendant would violate the Equal Protection Clause."[112] Thus he concluded that because "the practice of peremptorily eliminating blacks from petit juries in cases with black defendants remains widespread, . . . an opportunity to inquire should be afforded when this occurs."[113] If the issue is properly raised by the defendant and the judge "is not persuaded otherwise, the judge may conclude that the challenges rest on the belief that blacks could not fairly try a black defendant."[114]

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[105]*Id.* at 1725.

[106]*Id.* at 1729. See note 87 *supra.*

[107]106 S.Ct. at 1731.

[108]*Id.* at 1726.

[109]*Id.* at 1741.

[110]The Court has subsequently ruled that *Batson* is to be applied retroactively to all cases, federal and state, pending on direct review and not yet final, Griffith v. Kentucky, 107 S.Ct. 708 (1987), but *Batson* is not to be applied retroactively on collateral review to cases that had become final before *Batson* was handed down, Allen v. Hardy, 106 S.Ct. 2878 (1986).

[111]106 S.Ct. at 1725.

[112]*Ibid.*

[113]*Ibid.*

[114]*Ibid.*

Justice Marshall wrote a concurring opinion in which he welcomed the Court's conclusion that use of peremptory challenges to remove blacks from juries violates the Equal Protection Clause, but he questioned the adequacy of the Court's remedy.[115] His analysis of cases in California[116] and Massachusetts[117] following the decisions in *Wheeler* and *Soares* suggested to him that only in a particularly flagrant case will a defendant be able to establish a prima facie case so as to require judicial inquiry into the prosecutor's motives. The result was that "[p]rosecutors are left free to discriminate against blacks in jury selection provided that they hold discrimination to an 'acceptable' level."[118]

Moreover, he argued, even where a prima facie case is found, it will be extremely difficult for a trial judge to second-guess facially neutral reasons for the exclusions—reasons that an unscrupulous prosecutor could always supply.[119] And he worried that, even putting the issue of dishonesty aside, "conscious or unconscious racism" may cause a prosecutor to view a prospective black juror as "sullen" or "distant," and the same source could cause the judge to accept that explanation as well supported.[120]

Since it has often been declared that peremptory challenges are not constitutionally required, Justice Marshall concluded that the best solution would be for the Court to ban the use of peremptory challenges by prosecutors and allow states to eliminate the defendant's peremptory challenges, since "[t]he potential for racial prejudice . . . inheres in the defendant's challenge as well."[121]

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[115]*Id.* at 1726.

[116]From California, Justice Marshall cited People v. Rousseau, 129 Cal. App.3d 526, 536–37, 179 Cal. Rptr. 892, 897–98 (Cal. Ct. App. 1982), where no prima facie case was found even though the prosecutor had peremptorily struck the only two blacks on the jury panel. 106 S.Ct. at 1727–28.

[117]From Massachusetts, Justice Marshall cited Commonwealth v. Robinson, 382 Mass. 189, 195, 415 N.E.2d 805, 809–10 (1981) where, in a case involving a black defendant, the prosecutor had used one challenge for cause and three peremptory challenges to remove three blacks and a Puerto Rican with the result that the jury that convicted the defendant was all-white. 106 S.Ct. at 1727.

[118]*Id.* at 1728.

[119]*Ibid.*

[120]*Ibid.*

[121]*Id.* at 1729.

Both Chief Justice Burger and Justice Rehnquist filed dissents. On the merits,[122] Chief Justice Burger expressed agreement with *Strauder* and the long line of cases that have found exclusion of cognizable groups from jury venires to be a violation of equal protection, but, relying heavily on *United States v. Leslie*, he maintained that the decisions of the litigants in a particular case to strike prospective jurors stands on a different footing. Peremptory challenges, he explained, are exercised on limited information about the prospective jurors. They are "peremptory" precisely because they are often made on the basis of assumptions and hunches about people and how they might act as jurors in a particular case.[123] Quoting *Swain*, Burger explained that peremptories "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.' "[124]

Instead of being a logical extension of equal protection principles, Burger argued that the majority in *Batson* was in fact departing from "conventional equal protection principles."[125] In the first place, he maintained, the majority's careful attempt to limit the holding of the case to cognizable racial groups was inconsistent with settled equal protection law which required any such application of equal protection to extend beyond racial groups to embrace exclusions from a petit jury on the basis of sex, religious or political affiliation, mental capacity, number of children, living arrangements, and employment in a particular industry or profession, and so on.[126] In addition, he argued that the Court departed from settled equal protection principles by failing to determine the level of scrutiny to which the state's use of peremptories was subject and then weighing the unrestrained use of peremptories against that test.[127] He expressed his opinion that, given the long history of peremptory

[122]The Chief Justice initially argued that it was not proper for the Court to resolve this case on an issue that was not raised by the petitioner. *Id.* at 1731, 1731–34 (Burger, C.J., dissenting). See note 87 *supra*.

[123]106 S.Ct. at 1737.

[124]*Id.* at 1737, quoting from *Swain*, 380 U.S. at 220.

[125]106 S.Ct. at 1737.

[126]*Id.* at 1737.

[127]*Id.* at 1738.

challenges, which he claimed have been in existence almost as long as the concept of trial by jury,[128] and the Court's own statement nearly a hundred years ago that the peremptory challenge is " 'essential to the fairness of trial by jury,' "[129] it may well be that under conventional equal protection analysis, "a state interest of this magnitude and ancient lineage" might well overcome any equal protection objection to the state's unrestrained use of peremptories.[130]

Finally, Burger was highly critical of the majority for giving trial judges a difficult task for which the Court had given them no clear guidelines. He stated, for example, that he was "at a loss to discern the governing principles" that will satisfy the Court's requirement that a prosecutor provide a "neutral explanation" for his challenges, but that such explanation, although it is to be "clear and reasonably specific," "need not rise to the level justifying a challenge for cause."[131] And he concluded that the result of the majority opinion would simply be the interjection of racial matters into the jury selection process as prosecutors and defense attorneys build records to challenge or support the exercise of their peremptories.[132]

Justice Rehnquist argued in his dissent that the majority was doing much more than simply adjusting the "evidentiary burden" on defendants under *Swain*.[133] He objected that the majority was overruling *Swain*, an opinion in which, he pointed out, even the dissenters had viewed the use of race and other group affiliations as a necessary and constitutional means for sorting out potential juror partiality.[134] Justice Rehnquist concluded that as long as the State is treating all defendants the same way—striking Asian jurors when the defendant is Asian, white jurors when the defendant is white, and Hispanic jurors when the defendant is Hispanic—the use of such "crudely stereotypical" strikes "may in many cases be hopelessly mistaken" but does not violate the Equal Protection Clause.[135]

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[128] *Id.* at 1734–35.

[129] *Id.* at 1738, quoting from Lewis v. United States, 146 U.S. 370, 376 (1892).

[130] *Id.* at 1738.

[131] *Id.* at 1739.

[132] *Id.* at 1740.

[133] *Id.* at 1742, 1744.

[134] *Id.* at 1744. See note 230 *infra*.

[135] *Id.* at 1744–45.

B. EQUAL PROTECTION VERSUS THE SIXTH AMENDMENT

The decision to decide *Batson* on equal protection rather than Sixth Amendment grounds was a surprise because the Sixth Amendment approach to the problem of discriminatory challenges would have offered the Court several advantages. In the first place, under the approach pioneered in *Wheeler* and *Soares,* which views the systematic striking of members of a racial, religious, or ethnic group as violative of the right of a defendant to an impartial jury, any defendant—regardless of the defendant's own racial, ethnic, or religious identity—can challenge the systematic use of peremptory challenges to remove jurors on the basis of race, ethnic origin, or religion. This speaks more completely to the problem the Court was facing, because systematic striking of members of minority groups is not limited to situations where the defendant is also a member of that group.[136] Moreover, the Sixth Amendment approach seems more consistent with the rationale of *Batson,* which turned on the effects of exclusion on those jurors being removed, rather than the effects of exclusion on the defendant's trial. The Court in Batson emphasized that "a defendant has no right to a 'petit jury composed in whole or in part of persons of his own race.' "[137] Instead it is the exclusion of jurors from participation in the process that was the Court's concern.[138]

A second advantage of the Sixth Amendment approach to the problem of discriminatory peremptory challenges is that it more easily allows courts to take a balanced approach to peremptory challenges. A serious distinction between the selection of the venire and the selection of the petit jury is that peremptory challenges are part of the adversary process and, in the battle for a favorable jury, it is sometimes the defendant who is interested in using peremptory challenges to remove jurors on the basis of their race, religion, or ethnic origin. Perhaps recognizing that their opinions were in effect legislating important changes in the rules governing peremptory challenges and thus that a balanced approach to the problems raised by peremptory challenge was important, both *Wheeler* and *Soares* made their rulings applicable to both the prosecution and the de-

[136]See text at notes 11–12 *supra.* See also note 190 *infra.*

[137]106 S.Ct. at 1716, quoting from Strauder v. West Virginia, 100 U.S. 303, 305 (1880).

[138]106 S.Ct. at 1724.

fense. While the right to an impartial jury is a right guaranteed to defendants, those courts reasoned that it would be inconsistent if a court were to enforce the right to an impartial jury and the possibility of a fair cross section against the state and at the same time permit the defendant to use peremptory challenges to deprive the state of the same possibility. The California Supreme Court explained:[139]

> [T]o hold to the contrary would frustrate other essential functions served by the requirement of cross-sectionalism. For example, when a white defendant is charged with a crime against a black victim, the black community as a whole has a legitimate interest in participating in the trial proceedings; that interest will be defeated if the prosecutor does not have the power to thwart any defense attempt to strike all blacks from the jury on the ground of group bias alone.

In *Batson*, the Court left for another day the issue of discriminatory peremptory challenges on the part of the defense, stating simply in a footnote, "We express no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel."[140] If the Court intends to use the Equal Protection Clause to reach defense challenges, it must confront a state action problem. As one commentator explained, in suggesting that the Court ought not to restrict defense peremptory challenges, "the defendant is not a state actor."[141] This oversimplifies the matter because state action under *Shelley v. Kraemer*[142] seems to have a fairly broad sweep when a private party acts in concert with government officials.[143] It is certainly arguable that the use of peremptory challenges—provided by state rules of procedure and exercised in a state court by "officers of the court" under judicial sanction—would give the Court ample room to conclude that the exercise of such challenges, even by the defense, amounts to state action,[144] but the issue is not beyond doubt.

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[139]583 P.2d at 765 n.29.

[140]106 S.Ct. at 1718 n.12.

[141]See Note, 92 Harv. L. Rev., note 32 *supra*, at 1786.

[142]334 U.S. 1 (1948).

[143]See Lugar v. Edmundson Oil Co., Inc., 457 U.S. 922 (1982).

[144]In *Lugar, ibid.*, the Court set forth a two-part test for determining if deprivation of a federal right may fairly be attributable to the state, 457 U.S. at 932, and this test would seem to be met when a private defense attorney systematically strikes prospective jurors on the basis of race under state rules of procedure which are enforced by the trial judge.

But even if the state action objection can be met, the Court would need to modify the approach it took in *Batson* if it were to extend its equal protection ruling to defense challenges. Since the state is not a member of a "cognizable racial group," the initial step in the *Batson* analysis would have to be modified or abandoned. Perhaps the state could be permitted to raise equal protection concerns on behalf of prospective jurors who lack standing to vindicate their own rights.

The state action problem raises another major contrast between the Sixth Amendment and the equal protection approaches and a third reason why the Sixth Amendment approach might have seemed a more attractive alternative for controlling discriminatory peremptory challenges. The Sixth Amendment is limited to criminal prosecutions, and thus the Court would be able to limit the impact of its decision to the main area of concern: criminal cases. Having chosen to regulate peremptory challenges under the Equal Protection Clause, *Batson* seems to have obvious implications for any case in which an attorney for the state strikes jurors on the basis of race. Thus, for example, in a civil rights suit against the government in which racial discrimination is alleged, *Batson* and its restrictions on peremptory challenges would seem fully applicable to the exercise of peremptory challenges by the state.[145] And, if the exercise of peremptory challenges by private defense counsel in a criminal case amounts to state action, presumably private attorneys representing private parties in civil cases are subject to constitutional limitations as well.

But although there are a number of reasons that seem to suggest the Sixth Amendment might have provided a better route than the Equal Protection Clause for controlling discriminatory peremptory challenges, there is a major drawback to the Sixth Amendment approach that must have persuaded the Court to use the Equal Protection Clause to control discriminatory peremptory challenges. The fair cross-section approach is based on a myth; the reality is that neither our system of jury selection nor the remedy imposed in *Wheeler* and *Soares* is designed to assure defendants a demographically representative cross section on the jury.

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[145]In King v. County of Nassau, 581 F.Supp. 493 (E.D.N.Y. 1984), a race discrimination case decided prior to *Batson*, the court held peremptory challenges on the basis of race by the attorney for a public college to be proper under *Swain*. This result would presumably be different after *Batson*.

In the first place, any realistic possibility of obtaining a fair cross section of citizens on the petit jury is incompatible with a system of peremptory challenges where the total number of peremptory challenges the parties are allowed to exercise is, as in Kentucky, in excess of the number of petit jurors to be seated, and where there exist almost no constraints on the exercise of such challenges.[146] As Professor Jon Van Dyke, the author of the leading treatise in the field, explained:[147]

> . . . if we are committed to a completely representative jury, it is anomolous to allow either side to eliminate a juror thought to be unfriendly to its position. The use of peremptory challenges inevitably makes the jury more homogeneous than the population at large—because each side is eliminating the person who are suspected of holding extreme positions on the other side—and to that extent the jury becomes less representative.

This observation led the Fifth Circuit in *United States v. Leslie*[148] to observe that if a fair cross section were really central to the proper function of the jury, "we would take steps" to more nearly ensure that the composition of each jury mirrors that of the community.[149] Instead, the decisions in the area of peremptory challenges have always emphasized that no defendant is entitled to a jury that proportionately reflects his community,[150] nor is any defendant entitled to have even a single juror of his own background or race on the jury.[151]

Wheeler[152] and *Soares*[153] recognize this and instead fall back on the argument that the systematic use of peremptory challenges deprives the defendant, not of his right to a fair cross section of jurors, but rather of his right to " 'as near an approximation of the ideal cross-

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[146]See Van Dyke, note 8 *supra*, at 162.

[147]*Id.* at 168.

[148]See text starting at note 73 *supra*.

[149]783 F.2d at 555.

[150]See, *e.g.*, Taylor v. Louisiana, 419 U.S. at 538; Apodaca v. Oregon, 406 U.S. 404, 413 (1972). The reason that a cross section has never been required is not the administrative nightmare of a cross-section requirement, but rather the divisive implication that such a concept implies: that without such a system jurors would be unable to be impartial. See Ristaino v. Ross, 424 U.S. 589, 596 n.8 (1976).

[151]See *Strauder*, 100 U.S. at 305.

[152]583 P.2d at 762.

[153]387 N.E.2d at 513.

section of the community as the process of random draw permits.' "[154] This argument has a labored quality to it, but "approximation of the ideal cross-section of the community" is not really the concern of the courts in *Wheeler* and *Soares*. It is no defense under those cases to a claimed misuse of peremptories that the actual jury reflected a cross section of the community.[155] More importantly, even after those decisions, prosecutors or defense attorneys may systematically strike important segments of the community—all college-educated jurors, all union members, all veterans, all Democrats, perhaps even all young people[156]—as long as they do not systematically strike jurors on the basis of sex, race, color, creed, or national origin in Massachusetts[157] or on the basis of race, religion, ethnic origin, or "other similar groups" in California.[158] It is suspect classification that is the real heart of *Wheeler* and *Soares*.[159] Recognition of this fact led one California judge to suggest that it might be better "to recognize cross sectional analysis for what it is—vicarious assertion of an equal protection challenge."[160] And commentators on *Wheeler* and *Soares* have reached the same conclusion: that it is a concern with values protected by the Equal Protection Clause that drives those cases.[161]

The Court's decision to steer clear of the Sixth Amendment and the fair cross-section theory was no doubt heavily influenced by the fact that, at the time that *Batson* was under consideration, it was also wrestling with *Lockhart v. McCree*,[162] which was handed down five days after the decision in *Batson*. McCree had been charged

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[154]387 N.E.2d at 516, quoting from *Wheeler*, 583 P.2d at 762.

[155]See Note, 92 Harv. L. Rev., note 32 *supra*, at 1786.

[156]The exact scope of *Wheeler* is unclear. While the court did not specifieally include age or political affiliation in its list of cognizable groups, 583 P.2d at 761, it left the door open to a further expansion of the bases which would allow attacks on group-based peremptory challenges, 583 P.2d at 755.

[157]387 N.E.2d at 516.

[158]583 P.2d at 755.

[159]Although McCray v. Abrams was decided on Sixth Amendment grounds, it was the court's concern over the use of racial stereotypes in jury selection that was the main factor, suggesting that equal protection concerns are the heart of the ease. 750 F.2d at 1121–22. See Note, 85 Col. L. Rev. 1357, 1373–74 (1985).

[160]People v. Smith, 186 Cal. Rptr. 650, 664 n.24 (Cal. Ct. App. 1982).

[161]See Note, 85 Col. L. Rev., note 159 *supra*, at 1374–77; Note, 92 Harv. L. Rev., note 32 *supra*, at 1785–89.

[162]106 S.Ct. 1758 (1986).

with capital felony murder in Arkansas and had been convicted, although the jury had rejected the state's request for the death penalty.[163] McCree had argued in his habeas corpus petition that the process of "death qualifying" a jury in capital cases produced juries that were more prone to convict and thus violated the fair cross-section requirements of the Sixth Amendment. In support of his position, McCree's attorneys had introduced into evidence fifteen social science studies which they claimed supported the conclusion that death qualification had the effect of making the jury more inclined to convict.[164]

Although the Court began its opinion by expressing "serious doubts about the value of these studies in predicting the behavior of actual jurors,"[165] the Court concluded that, even assuming their validity, it was "convinced that an extension of the fair cross-section requirement to petit juries would be unworkable and unsound."[166] The Court rejected the notion that an impartial jury must be constructed by assembling a balance of viewpoints and dispositions and stuck to the much more limited view "that an impartial jury consists of nothing more that 'jurors who will conscientiously apply the law and find the facts.' "[167]

The Court's handling of *Batson* and the Court's rejection of the fair cross-section theory in *Lockhart v. McCree* seem to suggest that the Sixth Amendment does not any longer provide an alternative approach for attacking racially based peremptory challenges. The Court will certainly have opportunities to resolve that question in the future as the Second Circuit recently reaffirmed the Sixth Amendment approach it pioneered in *McCray v. Abrams*, concluding that nothing in *Batson* or *McCree* casts doubt on its earlier opinion,[168] and the Sixth Circuit has reached a similar conclusion.[169]

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[163]*Id.* at 1761.

[164]*Id.* at 1762–63.

[165]*Id.* at 1763.

[166]*Id.* at 1765.

[167]*Id.* at 1767, quoting from Wainwright v. Witt, 469 U.S. 412, 423 (1985).

[168]See Roman v. Abrams, 822 F.2d 214 (2d. Cir. 1987).

[169]See Booker v. Jabe, 801 F.2d 871 (6th Cir. 1986).

III. Batson and Peremptory Challenges: Problems in Theory and Practice

A. THE WAY PEREMPTORY CHALLENGES WORK

The Court's heavy reliance in *Batson* on the long line of venire cases, starting with *Strauder* in 1880, that have attempted to make all citizens eligible for jury service seems at first glance appropriate. The notion that people are being struck from a jury on the basis of race is offensive, and the frequent result of such challenges—trial of a black defendant by an all-white jury—seems to conflict with a system that strives to be race neutral in the way it treats defendants and other citizens. Moreover, if the state cannot constitutionally prevent citizens of a certain race from serving on a jury by discriminating against those citizens on the basis of race in the selection of the venire, it seems only logical that the state should not be permitted to use its peremptory challenges during voir dire to achieve the same result. The constitutional victories over the exclusion of black citizens from the venire seem to be rather hollow, if the prosecutor, armed with several peremptories, can achieve the same result by systematically excluding jurors on the basis of race. Justice Rehnquist, in his dissent, argued that there is "simply nothing 'unequal' " in a system that permits the state to strike black jurors on the basis of race where there is a black defendant, as long as the state strikes Hispanic jurors when the defendant is Hispanic, Asian jurors when the defendant is Asian, and so on.[170] But this seems to miss the point. Except in the most pressing situations, such as cell assignments in prison where safety is a concern[171] or in the interest of maintaining racial balance in public housing,[172] there are very few instances where the state is permitted to differentiate among citizens solely on the basis of race. The naked use of race by the prosecution to remove qualified jurors, taking place as it does in a court of law before a room full of fellow citizens,

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[170]106 S.Ct. at 1745.

[171]See Lee v. Washington, 390 U.S. 333 (1968). See also Cruz v. Beto, 405 U.S. 319, 321 (1972); Holt v. Hutto, 363 F.Supp. 194, 203 (E.D. Ark. 1973), modified, 505 F.2d 194 (8th Cir. 1974).

[172]See Otero v. New York City Housing Authority, 484 F.2d 1122, 1135–36 (2d Cir. 1973).

simply has no analog. Rehnquist's argument seems to be that many wrongs make a right.[173]

But problems start to emerge when one tries to understand *Batson* in the context of peremptory challenges used to select jurors. It soon becomes clear that the Court has seriously oversimplified the nature of peremptory challenges and their traditional role in the jury selection process. The result is an opinion that sounds nice in theory, but that seems very detached from what happens at trial.

To understand the problems more fully, consider the jury selection process in Kentucky from which *Batson* emerged. Kentucky uses the so-called "struck jury system," in which the first step in jury selection is the questioning of all prospective jurors on the panel.[174] The questioning is conducted by the trial judge, or, in the judge's discretion, by the prosecutor and the defense attorney.[175] If, during the questioning of the jury panel members, there develops "reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence," the Kentucky Rules of Criminal Procedure provide that the juror is to be excused for cause.[176]

Only after all challenges for cause have been made and ruled upon and only after completion of the entire voir dire does the exercise of peremptory challenges take place.[177] The task of exercising peremptory challenges is made easier for the lawyers in a struck jury system because the lawyers are given a rather short list of jurors, selected at random from the panel member from which the lawyers are allowed to "strike" prospective jurors. The list is limited to the number of jurors to be seated plus the number of peremptory challenges allowed both sides.[178] In Batson's case, because the court was seeking a jury of twelve and one alternate,[179] the lawyers had twenty-eight names on the list. The prosecutor

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[173]Justice Rehnquist's starting premise also seems questionable, because there are indications that prosecutors often use peremptory challenges to strike prospective black jurors even when the defendant is not black. See note 190 *infra*.

[174]On the variety of systems in use for the selection of juries, see generally 2 LaFave & Israel, Criminal Procedure §21.3 (1984).

[175]Ky. R. Crim. P. 9.38.

[176]*Id.* at 9.36 (1).

[177]*Ibid.*

[178]*Id.* at 9.36 (2).

[179]106 S.Ct. at 1715 n.2.

was allowed to strike six names from the list and the defense nine.[180] The exercise of peremptories takes place simultaneously with each side striking the jurors not wanted from the list and returning the list to the trial judge.[181] If, after the peremptory challenges are exercised there are more than the number of jurors being sought remaining on the list,[182] the judge eliminates at random the extra jurors to arrive at a jury of twelve (plus alternates).

Contrast the actual process of jury selection in Kentucky with the picture of peremptory challenges offered in the opinions of Justice Powell and Justice White in *Batson*. Justice Powell, for the majority, concluded that it is a violation of the Equal Protection Clause for a prosecutor to strike blacks from a jury on the assumption that "black jurors as a group will be unable impartially to consider the State's case against a black defendant."[183] Justice White in his concurrence similarly condemned prosecutors who use peremptories to exclude blacks "on the assumption that no black juror could fairly judge a black defendant."[184] But the assumption that peremptory challenges are exercised in a system like that in Kentucky on the basis of categorical judgments about the inability of large groups of citizens to be "impartial" or "fair" gives a misleading impression of the nature of peremptory challenges.

The terms "biased" and "unbiased" and "partial" and "impartial" are ambiguous in the context of jury selection. As far as the law is concerned, jurors who are not challengeable for cause are people who are unbiased and impartial with respect to the individual case to be tried. This is clear in Kentucky: those jurors who are not challengeable for cause are those jurors for whom there is no "reasonable ground" to believe that they "cannot render a fair and impartial verdict on the evidence."[185] Obviously, this does not mean that they are all the same in terms of values, religious beliefs, political leanings, experience, sex, race, background, and all those things that make each of us different. But it means that none of

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[180]See note 84 *supra*.

[181]Ky. R. Crim. P. 9.36 (2).

[182]There would be more than the desired number of jurors if either side chooses not to exercise all of its allotted peremptory challenges or if both sides have jurors in common on their strike list.

[183]106 S.Ct. at 1719.

[184]*Id.* at 1725.

[185]See text at note 176 *supra*.

these people has been shown to be biased in the sense that he or she cannot judge the case before the court on the basis of the evidence and in accordance with the court's instructions.

The characterization of peremptory challenges as involving strikes of jurors because of a belief that they cannot be "impartial" or "cannot fairly judge the defendant" is not an accurate reflection of what happens. This is language appropriate for challenges for cause and not peremptory challenges as traditionally exercised. What really happens at the peremptory challenges stage is comparison shopping, with each side trying to remove prospective jurors who are perceived as being less favorable in the hope of getting jurors who are more favorable on the petit jury. Kentucky, by providing for an initial voir dire of all prospective jurors and then narrowing the list of prospective jurors to twenty-eight jurors from which the final twelve plus an alternate will be seated, makes the process of comparison shopping much easier for the parties. The parties are aware of the full spectrum of jurors from which the petit jury will be selected and can make their decisions as to which jurors they wish to strike accordingly.

What makes a juror favorable or unfavorable in this process depends on the particular case and the people and issues involved in the trial. A lawyer may believe, for example, that a certain prospective juror will be more (or less) sympathetic to the defendant than other jurors, or may be more (or less) sympathetic to the lawyer's arguments, or may be more (or less) sympathetic to a key prosecution witness, or may even be more (or less) sympathetic to the lawyer himself, and so on. But it is important to see that while there may be some jurors struck whom one of the lawyers believes should have been struck by the trial judge from the jury for cause,[186] most of the jurors struck through peremptory challenges will be struck because one of the lawyers believes that he can obtain a juror who will be easier to persuade of the merits of his side of the case.

A prosecutor will obviously try to get people on the jury who will be easiest to convince of the merits of the prosecution's case while the defense will try to get jurors who are likely to be sympathetic to the defendant or the defendant's plight. In trying to decide which jurors are favorable or unfavorable, if a juror shares

[186]Judges usually will not excuse jurors for cause unless the showing of bias on the part of the prospective juror is blatant. See Kuhn, note 32 *supra*, at 243–44.

a strong group identity with the defendant, that juror will be viewed with concern or suspicion by the prosecution. If the defendant is a Shiite Muslim, a prosecutor will be worried that a prospective juror who shares the same religion might be more sympathetic to the defendant than someone who has no such common religious ground with the defendant. This is not to say that the prosecutor who strikes a Shiite Muslim prior to the trial is making a judgment that the particular juror struck is "biased" or "partial" to the defendant in the sense that the juror could not decide the case on the basis of the evidence presented and the instructions given. Rather the prosecutor does not want to take the risk that the juror's strong religious identity with the defendant will make it harder for the prosecution to convince the juror of the defendant's guilt than would be the case with a juror who does not share an important emotional bond with the defendant.

The same is true for the defense: if the victim of the crime is a Shiite Muslim, the defense attorney may be worried that a juror who shares the victim's religion may be more sympathetic to the plight of the victim (and the prosecution's case) than a juror without a common group affiliation.

Obviously, it is always open to the prosecution or the defense to inquire into possible bias on the part of a prospective juror due to a shared religious heritage, but a number of factors discourage such questioning. In the first place, such an inquiry is not likely to be fruitful. Few people in our society are likely to admit that they cannot fairly decide the merits of the case before them because of a religious, racial, or ethnic bias.[187] Secondly, such an inquiry requires great tact. The lawyer runs the risk of insulting not just the person asked about bias but other prospective jurors as well.[188]

Thirdly, even if one decides to risk such a delicate inquiry, the answers one receives may not resolve the worry about a juror's inclinations and biases. Besides the problem of juror embarrassment at admitting bias, there is the additional worry that a person may want very much to serve on the jury and may give answers that are not candid or truthful in order to achieve that objective: "Experienced litigators know, and empirical studies have substantiated, that it is part of the psychology of the venire for some people to

[187]See Saltzburg and Powers, note 32 *supra*, at 355; Van Dyke, note 8 *supra*, at 163.

[188]Van Dyke, *id.*, at 163.

decide that they want to be on the jury. To that end such people will evade or misconstrue, unconsciously or deliberately, general voir dire questions in order to avoid answering and possibly being struck."[189]

Perhaps a more important reason why voir dire will not satisfy a lawyer's concern over possible bias on the part of prospective jurors is the fact that the bias that a trial lawyer would be concerned about is not just a conscious bias or partiality in favor of one who shares the same religious or ethnic identity but is rather a subconscious predisposition that may influence a juror's reaction to the evidence even where the juror is trying to be scrupulously fair. Because of the subtlety of subconscious influences, most prosecutors (or defense attorneys) would probably be strongly inclined to strike Shiite Muslims from the jury in a situation where the defendant (or the victim) is a Shiite Muslim. It is a traditional function of peremptory challenges to serve as a safety net in order to allow a lawyer to remove jurors whom the lawyer believes may be inclined toward the other side but whom the lawyer cannot show to be biased. Prospective jurors who admit to being prejudiced or biased in favor of one side or the other side will be removed for cause. By contrast, peremptories allow a lawyer to remove a juror who the lawyer believes is either subconsciously biased in favor of the other side and thus will never admit to being biased or a juror who is consciously biased in favor of the other side but who is not being wholly candid in his responses.

When the role of peremptory challenges in the jury selection process is properly understood, one can see that it is not correct for the Court to interpret systematic strikes of prospective jurors because of a shared group identity with the defendant as an assertion that no member of such group "could impartially judge the defendant." Asked on the basis of limited knowledge to rank particular jurors on a panel in terms of their desirability, those who share a strong group identity with the defendant will often be viewed as unfavorable jurors from the prosecution's point of view as compared to jurors who have no strong group identity with the defendant.[190]

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[189]Babcock, Voir Dire: Preserving "It's Wonderful Power," 27 Stan. L. Rev. 545, 547 (1975).

[190]Although the Court in *Batson* focuses on the striking of black jurors when the defendant is also black, blacks and other minorities are likely to be struck in many cases that involve

B. SOCIAL PSYCHOLOGY AND INGROUP BIAS

There is, of course, a broad literature on jury selection and litigators have always tried to categorize citizens so as to give them an edge in selecting a favorable jury. Much of the traditional lawyers' folklore on supposedly desirable jurors for the plaintiff or the defense seems incredible. However, the situation on which *Batson* specifically focuses—the striking of prospective jurors because they share a group identity with the defendant—is one as to which there is a considerable amount of empirical evidence that helps explain why a prosecutor (or a defense attorney) might view a juror who has a common bond with the defendant (or the victim) as risky. The reason that litigators might be worried about a shared group identity is the phenomenon of "ingroup-outgroup bias" that is an accepted tenet of social psychology[191] and is discussed in virtually all basic texts in the field.[192] One such text explains the phenomenon as follows:[193]

> We all tend to evaluate ingroup members more positively than outgroup members, partly because assimilation and contrast lead us to misperceive the degree of similarity that exists within and between groups. Instead of looking for similarities we focus on dissimilarities between the groups. This ingroup-outgroup bias doesn't apply just to ethnic groups. . . . It appears to occur whenever people are categorized.

Ingroup-outgroup bias is explained as the inevitable outcome of a desire to maintain a positive self-image; there thus emerges a

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non-minority defendants, because they are sometimes viewed as being less likely to credit the testimony of the police or as favoring defendants in general. Justice Marshall, in his opinion in *Batson*, noted that an instruction book in a Dallas County prosecutors' office warned that peremptory challenges should be used to eliminate "any member of a minority group." 106 S.Ct. at 1727, quoting from Van Dyke, note 8 *supra*, at 152. See also text at notes 11–12 *supra*. Justice Marshall went on to explain that in 100 felony trials in that county in 1983–84, prosecutors peremptorily struck 405 out of 467 eligible black jurors. 106 S.Ct. at 1727.

[191]A detailed analysis of the experimental literature is contained in Brewer, In-Group Bias in the Minimal Intergroup Situation: A Cognitive-Motivational Analysis, 86 Psychological Bull. 307 (1979).

[192]See, *e.g.*, Baron & Byrne, Social Psychology: Understanding Human Interaction 182–84 (4th ed. 1984); Penrod, Social Psychology 334–35 (2d ed. 1986); Sears, Freedman, & Peplau, Social Psychology 82–83 (5th ed. 1985); Perlman & Cozby, Social Psychology 423–24 (1983); Gergen & Gergen, Social Psychology 139 (2d ed. 1986).

[193]Perlman & Cozby, note 192 *supra*, at 423. See also Gergen & Gergen, note 192 *supra*, at 139.

tendency to emphasize traits of the ingroup that allows members of that group to feel superior to members of the outgroup, with the result that stereotypes of the ingroup tend to be positive and stereotypes of the outgroup negative.[194] So strong is the phenomenon that experimental studies have shown that even where subjects are divided into groups in an arbitrary, trivial, and temporary fashion, having no relationship to any social categories existing outside the experimental setting, the subjects tended to have more positive feelings toward members of their own groups and more negative feeling toward members of the outgroup.[195] These and other studies demonstrate that social categorization per se produces ingroup favoritism.[196]

It is important to emphasize that ingroup bias is a universal phenomenon stemming from the very fact of group identity. But given our history of racial problems and the tension that has existed between races in parts of this country, it may be that ingroup-outgroup bias is more acute between racial groups than is true of some other group affiliations.[197] When one understands the phenomenon of ingroup bias, it is not surprising that an empirical study in mock jury situations concluded that in close cases a white juror is likely to give the benefit of the doubt to a white defendant, but not to a black defendant, and a black juror is more likely to give the benefit of the doubt to a black defendant but not to a white defendant.[198] Perhaps confirming the general experimental conclusion that ingroup favoritism is stronger when a group sees itself as a minority,[199] the same jury study concluded that "black subjects tended to grant the black defendant the benefit of the doubt not only when the evidence is [*sic*] doubtful but even when there was strong evidence against him."[200]

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[194]See Baron & Byrne, note 192 *supra*, at 183; Perlman & Cozby, note 192 *supra*, at 424.

[195]See Penrod, note 192 *supra*, at 334–34; Baron & Byrne, note 192 *supra*, at 183; Perlman & Cozby, note 192 *supra*, at 423–24.

[196]See Penrod, note 192 *supra*, at 334. See Tajfel & Turner, An Interpretive Theory of Intergroup Conflict, in Austin & Worchel, The Social Psychology of Intergroup Relations 38 (1979).

[197]Ingroup favoritism may be especially strong if the ingroup perceives itself to be a minority group. See Gergen & Gergen, note 192 *supra*, at 139; see also Brewer, note 191 *supra*, at 318.

[198]See Ugwuegbu, Racial and Evidential Factors in Juror Attribution of Legal Responsibility, 15 J. Experimental Soc. Psychology 133, 139–41 (1979).

[199]See Penrod, note 192 *supra*, at 334.

[200]See Ugwuegbu, note 198 *supra*, at 141–42. For a complete review of the social science

C. PEREMPTORY CHALLENGES RELATED TO RACE AFTER BATSON

Empirical studies establishing the phenomenon of ingroup bias do not demonstrate either the wisdom or the necessity of our system of peremptory challenges. But they help explain why, in a system where lawyers are supposed to "deselect" unfavorable jurors, a juror's group affiliations, such as his or her age, race, religion, ethnic origin, and neighborhood background, are central to the exercise of peremptory challenges.[201] *Swain* recognized the important role that suspect classifications have always played in peremptory challenges:[202]

> It [the peremptory challenge] is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be. . . . Hence veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in light of the limited knowledge counsel has of them, which may include group affiliations, in the context of the case to be tried.

Swain drew a sharp distinction between the use of race in the selection of the venire and the use of race (and other suspect classifications) as a basis for the exercise of peremptory challenges when exercised for trial-related reasons which the Court upheld as a legitimate basis for the exercise of peremptory challenges.[203]

Although the Court in *Batson* suggested in places that it was simply changing the "evidentiary burden" that *Swain* had placed on defendants if they were to make out a violation of the Equal

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literature, see generally Johnson, Black Innocence and the White Jury, 83 Mich. L. Rev. 1611, 1625–30 (1985).

[201]See, *e.g.*, 1 Lane, note 12 *supra*, §§9.44, 9.45; Perlman, Jury Selection, in National Institute of Trial Advocacy, Master Advocates' Handbook 59, 77–78 (1985); Kestler, Questioning Techniques and Tactics, §3.20, p. 98 (1982).

[202]380 U.S. at 220–21.

[203]The three dissenters in *Swain* did not challenge the propriety of using race for trial-related reasons as part of the peremptory challenge process. Justice Goldberg's dissent argued that the evidence in the case showed that no black had ever served on a petit jury in the county in which *Swain* had been tried and that this evidence of systematic exclusion of blacks from jury service constituted a prima facie case of racial discrimination requiring the state to disprove such discrimination. 380 U.S. at 238–39.

Protection Clause,[204] in fact *Batson* represented an abrupt break with *Swain*. The Court in *Batson* condemned the exercise of peremptory challenges by a prosecutor on the basis of race even if such challenges were exercised for trial-related reasons. The Court explained this change as follows:[205]

> Although a prosecutor ordinarily is entitled to exercise peremptory challenge "for any reason at all, as long as that reason is related to his view concerning the outcome" of the case to be tried, the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.

To understand the implications of *Batson*, consider a case with strong racial overtones. In such a case prior to *Batson*, a prosecutor might have used peremptory challenges to remove many or all jurors of the same race as the defendant because he might assume that these jurors would be more sympathetic to the defendant and more inclined to believe his version of the events. But, after *Batson*, should there be a "pattern" of strikes that appear to be based on race, the prosecutor will have to rebut the inference of discrimination. While the prosecutor's reason "need not rise to the level justifying exercise of a challenge for cause," the Court warned that a prosecutor's "assumption" or "his intuitive judgment" that the jurors will be partial to the defendant because of their shared racial background will not rebut such a claim.[206]

How far beyond a prosecutor's "intuitions" and "assumptions" does the Court mean this restriction on peremptory challenge to extend? Obviously, the Court intends to cover the situation where the prosecutor reflexively strikes jurors solely on the basis of race, perhaps even without extensive voir dire. However, the Court presumably intends its ruling to apply to more complicated uses of race. Assume that the prosecutor has managed to engage one of the new breed of jury selection experts. Such experts view the old folklore about desirable and undesirable jurors as too crude and unsophisticated.[207] Instead, they make use of such social science

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[204]106 S.Ct. at 1714, 1720–21.

[205]*Id.* at 1718–19.

[206]*Id.* at 1723.

[207]"The difficulty with folk wisdom of any kind is that it is too general, too global." 1 Ginger, note 8 *supra*, at §5.2.

tools as community surveys in the jurisdiction where the trial will take place so that the lawyer who is to pick the jury starts with a more sophisticated and accurate picture of the attitudes of different segments of the community. By correlating a subject's answers on the survey with his or her personal characteristics, such as race, religion, marital status, income, occupation, age, and residence, the survey yields a demographic picture of desirable and undesirable jurors in the particular community where the trial will take place.[208]

While this is a more sophisticated (and more expensive[209]) approach to jury selection than simply relying on the trial lawyer's instincts, the difference is one of degree. In the use of social science techniques to aid jury selection, race and other suspect classifications are still important, and in a case with strong racial overtones, race may well be a dominant factor in the demographic picture of desirable and undesirable jurors. For example, in the trial of black militant H. Rap Brown, one of the early cases in which the defense used extensive community surveys to construct a demographic picture of desirable and undesirable jurors, "black people" were listed prominently on the list of the "best jurors for the defense" and "white males over forty-five" were among the "worst jurors for the defense."[210] Presumably, if the prosecution were to use such demographic information to strike, for example, "blacks under thirty" on the basis of a demographic profile suggesting strong resentment toward the prosecution's case among such members of the community, such challenges would be unconstitutional after *Batson*. On the one hand, the prosecutor is not basing his challenges simply on his personal "assumption" that all blacks would "be partial to the defendant because of their shared race," but neither are his challenges neutral as to race and that appears to be what the Court demands, given its heavy reliance on the venire cases.[211]

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[208]*Id.* at §§5.25–5.38; Van Dyke, note 8 *supra*, at 183–89.

[209]Fees for a community survey run about $35 per person polled with experts preferring to survey at least 250 people and preferably 500 to 1,000. See Couric, Jury Sleuths: In Search of the Perfect Panel, 45 Nat'l L.J., July 21, 1986, at 1 col. 1.

[210]See 1 Ginger, note 8 *supra*, §5.37.

[211]The Court relied heavily on McCray v. Abrams, 750 F.2d at 1132, in explaining the burden that it was placing on a prosecutor after a prima facie case of discrimination had been raised. 106 S.Ct. at 1723–24 n.20. *McCray* was very specific—the prosecution can only rebut a prima facie case of discrimination by showing "permissible racially neutral selection criteria" have produced the result in question. 750 F.2d at 1132.

D. CAN IT BE ENFORCED?

In his dissent, Chief Justice Burger quoted a passage from an essay by Professor Barbara Babcock which bluntly but accurately describes the traditional nature of peremptory challenges:[212]

> The peremptory, made without giving any reason, avoids trafficking in the core of truth in most common stereotypes. . . . Common human experience, common sense, psychological studies, and public opinion polls tell us that it is likely that certain classes of people statistically have predispositions that would make them inappropriate jurors for particular kinds of cases. But to allow this knowledge to be expressed in the evaluative terms necessary for challenges for cause would undercut our desire for a society in which all people are judged as individuals and in which each is held reasonable and open to compromise. . . . Instead we have evolved in the peremptory challenge a system that allows the covert expression of what we dare not say but know is true more often than not.

Whether we should have a system that allows challenges on the basis of "what we dare not say but know is true" is an important question, and one on which Justice Marshall challenged the majority in his concurring opinion when he argued that we should constitutionally abolish peremptory challenges.[213] The problem with *Batson* is that it tries to have things both ways—allow the traditional system of peremptory challenges but insist that the state be race neutral in the selection of the petit jury. The result is an enforcement nightmare. In the venire cases, when a prima facie case of discrimination has been shown by the defense, the burden shifts to the state to show that "permissible racially neutral selection criteria" produced the resulting venire.[214] *Batson* sees the selection of the venire and the selection of the petit jury as quite similar and borrows the language and machinery of those cases and applies it to the issue of peremptory challenges. In three different places the Court stated that a prosecutor who is properly challenged to explain his peremptory strikes must articulate "a neutral explanation" in defense of his challenges.[215]

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[212]106 S.Ct. at 1735–36, quoting Babcock, note 189 *supra*, at 553–54.

[213]For a discussion of Justice Marshall's proposal to abolish peremptory challenges, see text starting at note 265 *infra*.

[214]See Alexander v. Louisiana, 405 U.S. 625, 632 (1972).

[215]See 106 S.Ct. at 1723; *ibid.*; *id.* at 1725.

In assembling the venire, we have a good sense of what neutral selection criteria might be. In the world of peremptory challenges, where it is acceptable to challenge jurors based on hunches, body language, pop psychology, political preferences, and economic status, and where lawyers are encouraged to strike jurors on the basis of their subjective feelings and impulses,[216] there is no content to the notion of a "neutral explanation." As Justice Marshall explained in his concurrence,[217]

> [A]ny prosecutor can easily assert facially neutral reasons for striking jurors and trial courts are ill-equipped to second-guess those reasons. How is the court to treat a prosecutor's statement that he struck a juror because the juror had a son about the same age as the defendant, or seemed "uncommunicative," or "never cracked a smile" and "therefore did not possess the sensitivities necessary to realistically look the issues and decide the facts in this case"?

Justice Marshall's concern that the protections erected by *Batson* "may be illusory" was directed not simply at dishonesty on the part of a prosecutor but at "conscious or unconscious racism" which he feared might lead a prosecutor to the conclusion that "a prospective black juror is 'sullen,' or 'distant,' a characterization that would not have come to mind if a white juror had acted identically."[218] He also worried that a "judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported."[219]

The majority's reply to Justice Marshall, that it had "no reason to believe that prosecutors will not fulfill their duty to exercise their challenges only for legitimate reasons,"[220] fails to appreciate the odd and inconsistent world in which *Batson* has placed prosecutors. Prosecutors may strike jurors for any reason they want—their body language, their manner of speech, their sex, their religion, their clothing, their occupation, or their level of education—as long as they don't strike them because of their race. Indeed, they must not

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[216]See, *e.g.*, James and Starr, Selection of a Jury in a Personal Injury Case, in CLE, Inc. of Colorado, Jury Selection—Picking the Winners 50, 58 (1982); Spence, Some Unscholarly Observations on Jury Selection, contained in Nat'l College for Criminal Defense, Jury Selection Techniques 31, 41 (1980).

[217]106 S.Ct. at 1728 (citations omitted).

[218]*Ibid.*

[219]*Ibid.*

[220]*Id.* at 1724 n.22.

strike jurors because of their race, even in a case that has clear racial overtones, where jury experts would fully support their strikes and where the defense is striking jurors systematically on a racial basis.

One of the first appellate decisions to apply *Batson* demonstrates the difficulty that courts face in resolving an equal protection challenge to the prosecutor's use of peremptory challenges. In *Branch v. State*,[221] the prosecutors at the trial of a black defendant charged with murder used six of their seven peremptory challenges to strike six of the seven blacks on the venire. At a hearing challenging the use of the peremptories, the prosecution offered nonracial explanations for each of the six challenges. One juror was challenged because he was a scientist and it was feared that his background would put too much pressure on the prosecution.[222] A second juror was challenged because he was similar in age and appearance to the defendant and he might have had a relationship to a person arrested in an unrelated criminal case several months earlier.[223] The third juror was struck because she had been unemployed and had a kind of "dumbfounded or bewildered look on her face" as if uncertain about what she was supposed to do.[224] The fourth juror was struck because she was a single female about the same age as the defendant and it was feared that she "might feel as though she were a sister . . . and have some pity on the [defendant]."[225] The fifth juror was challenged because it was the prosecutor's general experience that employees of the company where the juror worked had not been attentive as jurors and some employees at the company were being investigated for a variety of crimes.[226] Finally, the sixth juror was struck because he was unkempt in appearance and gruff in manner, which might place him at odds with other jurors.[227] The trial court found that the prosecution's reasons for its strikes were neutral and legitimate and the appellate court affirmed, concluding that the trial court followed *Batson* "with caution and sensitivity."[228]

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[221] ___ So.2d ___ (Ala. Crim. App. 1986).

[222] *Ibid.*

[223] *Ibid.*

[224] *Ibid.*

[225] *Ibid.*

[226] *Ibid.*

[227] *Ibid.*

[228] *Ibid.* On certiorari in *Branch*, the Alabama Supreme Court issued procedures and guidelines to try to help trial courts apply *Batson* and remanded the case to the trial court for reconsideration in light of those guidelines. *Ex parte Branch*, ___ So.2d ___ (Ala. 1987).

Branch suggests that Justice Marshall's predictions about the difficulties of enforcement may turn out to be accurate. Evaluating peremptory challenges is an awkward inquiry for an appellate court and *Batson* conceded that because a trial judge's findings with respect to an equal protection claim "largely will turn on evaluation of credibility, a reviewing court should give those finding great deference."[229] Given the traditional control that trial judges have over voir dire and the fact-specific nature of peremptory challenges in general, it seems safe to predict that there will be significant variation in the application of *Batson* from judge to judge. Some judges will be willing to accept facially neutral explanations, like those offered the trial judge in *Branch*, while other judges will find such explanations unacceptable where the result—the striking of six of seven blacks—seems to suggest that race may have been a factor in the decision to strike those jurors.

At the other end of the spectrum from *Branch*, one can expect cases like those that have arisen in California where the California Supreme Court has had to struggle to make its decision in *Wheeler* work.[230] In *People v. Trevino*,[231] for example, the court reversed the defendant's murder conviction. The majority disagreed with the trial court's conclusion that the prosecutor had satisfactorily explained his reasons for peremptorily challenging certain jurors who had Spanish surnames. In *Trevino*, the majority and the dissent went through the peremptory challenges juror by juror, with the majority sometimes indicating that there were "internal inconsistencies" or a "lack of uniformity" in the district attorney's reasoning.[232] More interesting was the appellate court's outright refusal to accept certain reasons offered by the prosecutor as sufficient. An example of the latter was the appellate court's refusal to accept as proper a challenge based on a juror's body language and mode of answering certain questions: in rejecting the challenge, the court stated that although the prosecutor had provided a "specific reason" for his challenge, this did not satisfy the requirement set out in

[229]106 S.Ct. at 1724 n.21.

[230]See, *e.g.*, People v. Turner, 42 Cal.3d 711, 230 Cal. Rptr. 656, 726 P.2d 102 (1986); People v. Motton, 39 Cal.3d 596, 217 Cal. Rptr. 416, 704 P.2d 176 (1985); People v. Hall, 35 Cal.3d 161, 197 Cal. Rptr. 71, 672 P.2d 854 (1983).

[231]39 Cal.3d 667, 217 Cal. Rptr. 652, 704 P.2d 719 (Cal. 1985).

[232]704 P.2d at 733.

Wheeler that the prosecutor must base his challenge on "specific bias."[233] *Trevino* makes clear what was implicit in *Wheeler:* that the supreme court was in essence cutting back sharply the traditional rules governing peremptory challenges. Only reasons that come very close to establishing the basis for a challenge for cause will be acceptable when there is an inquiry into a peremptory challenge under *Wheeler.*

IV. Batson and Our System of Justice

The systematic use of peremptory challenges to strike jurors on the basis of race threatens public confidence, especially among minorities, in the criminal justice system. At a time when nearly one out of two persons admitted to prisons in this country is black,[234] when there are deep concerns over racial discrimination in the imposition of the death penalty,[235] and when there is serious concern over renewed racial tension in parts of this country, a system that allows prosecutors to begin a trial by removing all or substantially all the racial minorities on the jury panel sends exactly the wrong message to our citizens.

Against this background, one can certainly understand how Justice Marshall, and others, would welcome the majority's opinion as "an historic step" toward eliminating racial discrimination in the use of peremptory challenges while at the same time acknowledging that the remedy *Batson* offers may be "illusory." I reach a different conclusion on that balance: *Batson* is an unfortunate decision with too many weaknesses, even given the serious problem it was attempting to remedy.

A. THE COSTS OF THE DECISION

To begin with, one has to understand *Batson* in the context of a trial system that has been recognized over and over as one of the most elaborate and expensive in the world.[236] Our trial procedure—

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[233]*Id.* at 731–32.

[234]See Langan, Racism on Trial: New Evidence to Explain the Racial Composition of Prisons in the United States, 76 J. Crim. L. & Crim. 666 (1985).

[235]See Greenberg, Against the American System of Capital Punishment, 99 Harv. L. Rev. 1670, 1676 (1986). See also McCleskey v. Kemp, 107 S.Ct. 1756 (1987).

[236]See, *e.g.*, Alschuler, Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases, 99 Harv. L. Rev. 1808, 1824

with its pretrial hearings, sophisticated rules of evidence, and heavy reliance on lay juries—is more complicated, more expensive, and more time-consuming than that of any European system. It is so expensive in fact that we do not use it and can not use it in the vast majority of criminal cases. It is plea bargaining, which is estimated to be responsible for about 90 percent of the convictions in this country,[237] that enables the system to keep going. But even with plea bargaining there are often reports of near breakdowns in the system, especially in state trial courts of limited jurisdiction where minor felonies and misdemeanors are tried. It has been reported that in the New York Criminal Court, which handles minor crimes, such as shoplifting, minor assaults, and minor drug offenses, judges have a caseload of 100 cases a day and only one half of 1 percent of their 200,000 cases can be tried.[238] New York is not alone: the inability of the system to keep up with its volume of cases has frustrated efforts in Los Angeles to enforce tougher drunk driving laws[239] and in the District of Columbia to enforce tougher drug laws.[240]

With respect to the intricacies of our trial procedures, one area that is a particular scandal is voir dire. In New York, where lawyers have traditionally controlled voir dire, one study of eleven counties found that the average voir dire took two days and consumed 40 percent of the trial time.[241] In 20 percent of the cases studied, the voir dire took longer than the trial itself.[242] And it is not unusual for jury selection in some felony trials to take weeks and occasionally even months.[243]

(1986); Langbein, Torture and Plea Bargaining, 46 U. Chi. L. Rev. 3, 11 (1978).

[237]See Cramer, Rossman, & McDonald, The Judicial Role in Plea-Bargaining, in Plea Bargaining 139, 139 (McDonald & Cramer eds. 1980).

[238]Editorial, Cattle Car Justice, New York Times, July 2, 1983, at 20, col. 1. Other jurisdictions have similar problems. See, *e.g.*, Bruske and Kamen, Waiting for Justice, Wash. Post, July 24, 1983, at A1, col. 1.

[239]Banks, Courts Struggle with Logjam of Drunk-Driving Cases, Los Angeles Times, August 5, 1983, §II at 1, col. 1.

[240]Bruske, Plea Bargains Erode Drug Law's Intent, Wash. Post, May 12, 1986, at A1, col. 5.

[241]See Who Should Pick Jurors, Attorneys or the Judge, New York Times, June 13, 1984, §II, at 4, col. 3. See also Justice Accelerates, New York Times, June 15, 1984, at A26, col. 1.

[242]See Who Should Pick Jurors, Attorneys or the Judge, note 241 *supra*.

[243]It has been reported that it took nine months to pick a jury in one California murder trial. See Rohrlich, Nine Months Taken to Seat Murder Jury, Los Angeles Times, February 14, 1984, §I, at 3, col. 6.

Against this background, *Batson v. Kentucky* adds a new level of complexity to voir dire and puts pressure on prosecutors to conduct more extensive questioning of prospective jurors in order to be in a position to explain and defend particular peremptory challenges if necessary. The California Supreme Court, in the wake of *Wheeler*, has warned trial courts that it would be unfair to deny counsel a "significant opportunity to probe under the surface to determine the potential juror's individual attitudes" and leave counsel a "Catch-22 alternative of making his decision on the superficial basis we held impermissible in *Wheeler*, or making it on no basis at all."[244]

The exact cost of the decision in *Batson* in terms of trial time consumed by voir dire and challenges to the prosecutor's use of peremptory challenges is uncertain, partly because the contours of the opinion are so vague and partly because it is uncertain how courts will tackle the enforcement problems. A reform that requires trial judges to sift through challenges to "peremptory" challenges continues the present overemphasis on voir dire. It seems a step in the wrong direction as far as the efficiency of the system is concerned.

The closest the majority opinion comes to the subject of cost or strain on the trial system is a single line in which the Court rejected the state's argument that the decision would create "serious administrative difficulties" by explaining that courts that have adopted similar standards for the review of peremptory challenges by the prosecutor—an apparent reference to California and Massachusetts—"have not experienced serious administrative burdens."[245] In support of this assertion, Justice Powell's opinion cited *People v. Hall*,[246] a California Supreme Court decision, in which, according to Justice Powell, "the California Supreme Court found that there was no evidence to show that procedures implementing its version of this standard . . . were burdensome for trial judges."[247] In fact, this summary of *Hall* is not accurate. The California Supreme Court did not find that there was no evidence that the standard announced under *Wheeler* was burdensome, but rather the court stated that "the People have not produced, or called to our attention, any

[244]People v. Williams, 29 Cal.3d 392, 174 Cal. Rptr. 317, 628 P.2d 869, 875 (1981).

[245]106 S.Ct. at 1724.

[246]35 Cal.3d 161, 197 Cal. Rptr. 71, 672 P.2d 854 (1983).

[247]106 S.Ct. at 1724 n.23.

empirical evidence in support of their criticism of *Wheeler.*"[248] But the reliance on *Hall* is whistling in the dark in any case, because in the two-year period after the Court hinted in *McCray v. Abram* that it might reconsider its stance on peremptory challenges,[249] federal trial judges continued to raise serious doubts about the wisdom and efficacy of requiring judicial scrutiny of peremptory challenges.

In *King v. County of Nassau*,[250] shortly after the federal district court decision in *McCray* was handed down,[251] a federal trial judge in the same district expressed deep concern in a civil case over the impact that overruling *Swain* would have on the trial process. He argued:[252]

> Even assuming the existence of a clear theoretical rule regarding what types of peremptory challenges are legal, enormous difficulties would arise from any attempt to implement such a rule in practice. A great deal of time, effort and expense would be necessary to attempt to determine whether any given peremptory challenge is legal. Any such determination would entail the extremely difficult task of assessing the internal motives of the attorneys. It might also require an inquiry by the Court into the ethnic or religious backgrounds of prospective jurors, thereby promoting the very emphasis on such factors which the rule seeks to avoid. . . . Most important of all, 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. Such a rule will foster hypocrisy and disrespect for our system of justice. Indeed, it is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal. Rather than introduce such a rule, it would be infinitely preferable if the entire system of peremptory challenges were abolished. . . .

Shortly after the Second Circuit issued its opinion in *McCray*,[253] in which it concluded that the exercise of peremptory challenges on the basis of race violated the Sixth Amendment, two federal

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[248]672 P.2d at 859.

[249]See text at notes *63–65 supra.*

[250]581 F. Supp. 493, 501–02 (E.D.N.Y. 1984).

[251]See note *66 supra.*

[252]581 F. Supp. at 501–02.

[253]See text starting at note *67 supra.*

trial judges in the Southern District of New York, in separate habeas corpus opinions involving codefendants in an arson trial, expressed deep concern over *McCray*. Judge Brieant argued that while prosecutorial abuse of peremptory challenges is unfair, "[t]he transactional costs involved in litigating whether the reasons are 'pretextual' will be vast and the reliability of the results uncertain."[254] Several months later, Judge Goettel expressed his opinion that "although well-intentioned, the *McCray* ruling raises innumerable practical difficulties that outweigh its usefulness."[255] Among the concerns Judge Goettel raised, still unanswered after *Batson*, is the very practical question:[256]

> If . . . the prosecutor uses four of his six peremptory challenges against minority jurors and establishes a non-racial reason for two or three of these challenges, must a mistrial be granted because one or two challenges cannot be supported by a claim amounting to quasi-cause?

While the burden of *Batson* will fall heavily on the trial courts, there are obvious appellate costs as well, because there is not a single aspect of *Batson* that is without fundamental ambiguity—the nature of a prima facie case, the nature of a neutral explanation, the proper remedy, and the applicability of *Batson* to other suspect groupings. When one looks closely at the *Batson* opinion and the number of practical and theoretical questions that the opinion leaves unanswered, it was surely an understatement when Justice White acknowledged in his concurrence that "[m]uch litigation will be required to spell out the contours of the Court's Equal Protection holding."[257]

Balanced against the costs *Batson* imposes on the system, one must keep in mind that the decision in *Batson* delivers quite a bit less than it promises. In defense of its decision, the Court in *Batson* reasoned that "public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race."[258] But for all the

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[254]Roman v. Abrams, 608 F. Supp. 629 (S.D.N.Y. 1985), rev'd, 822 F.2d 214 (2d Cir. 1987).

[255]Schreiber v. Salamack, 629 F. Supp. 1433, 1440 (S.D.N.Y. 1985), aff'd, 822 F.2d 214.

[256]619 F. Supp. at 1440.

[257]106 S.Ct. at 1724.

[258]*Id.* at 1724.

effort lower courts will have to put into shaping the uncertain contours of *Batson*, the decision is no more than a modest step in the quest to "ensure that no citizen is disqualified from jury service because of race." In the first place, in those jurisdictions where the venire is unlikely to have more than two or three members of a racial minority, *Batson* may have little or no effect. The equal protection safeguards of *Batson* require as a first step a prima facie case of discrimination. As suggested above, what constitutes a prima facie case is not clear, but as Justice Marshall worried,[259] it seems likely that the use of peremptory challenges by the prosecution to remove one, two, and perhaps even three blacks from the venire will be insulated from scrutiny.

Secondly, *Batson* only applies to situations where the defendant is a member of the cognizable racial group being struck by the prosecution. Thus prosecutors are free to strike blacks or other racial groups of citizens on the basis of race as long as the defendant is not black.[260] This is not an insignificant problem, especially in an urban jurisdiction where there may be tensions between certain minority communities and the police. Justice Marshall in his concurring opinion quoted a Dallas County prosecutors' handbook that urged prosecutors to use peremptories generally "to eliminate any member of a minority group," and the numbers he cites for that county seem to suggest that prosecutors are following this advice.[261] This is consistent with the general trial folklore that views members of minority groups as favorable jurors for plaintiffs in civil cases and unfavorable jurors for the prosecution in criminal cases.[262]

Thirdly, *Batson* deals only with the use of peremptory challenges by prosecutors and says nothing about the use of peremptory challenges by the defense to remove jurors solely on account of race. The majority opinion is careful to "express no views on whether the constitution imposes any limit on the exercise of peremptory

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[259]See text at notes 116–18 *supra*.

[260]This is one consequence of the Court's decision to apply an equal protection analysis to the situation presented in *Batson*. By contrast, *Wheeler*, which relies on a "fair cross section" analysis, is available to any defendant regardless of whether there is a shared racial identity with the jurors struck. See text starting at note 136 *supra*.

[261]Justice Marshall's statistics from Dallas County would seem to suggest that it is not just in cases where the defendant is black that the prosecution is striking black jurors. See note 190 *supra*. See also text at notes 11–12 *supra*.

[262]See text at note 12 *supra*.

challenges by defense counsel."[263] Thus, at least for the time being, systematic exclusion of jurors on the basis of race by the defense continues to be permitted. Finally, even where the equal protection remedy of *Batson* is fully applicable, there are the general problems of enforceability. If *State v. Branch*[264] turns out to be typical of the way *Batson* enforced, the gains in the number of blacks serving on petit juries may not be substantial.

B. JUSTICE MARSHALL'S ALTERNATIVE—THE ABOLITION OF PREMEPTORY CHALLENGES

One of the strongest critics of the remedy imposed by *Batson* is Justice Marshall in his concurring opinion. Instead of imposing on trial courts the difficult task of sorting proper from improper peremptory challenges, Justice Marshall suggested that the Court take a more radical approach. He would have the Court deal with discrimination by completely "banning the use of peremptory challenges by prosecutors and by allowing the States to eliminate the defendant's peremptory as well."[265]

In some respects, the abolition of peremptory challenges would be attractive. In the first place, a system of peremptory challenges that forces attorneys to categorize jurors and evaluate them on the basis of group stereotypes, public opinion polls, hunches, demographic predictions, and matters "we dare not say but know to be true"[266] seems offensive to our notions of the way individual citizens—whether they be prospective jurors or defendants—should be judged. The abolition of peremptory challenges would eliminate the use of social science experts and psychologists in jury selection and it would help counter the impression that it is the composition of the jury and not the evidence presented that is fundamental to the determination of guilt or innocence at trial.[267]

Second, there seems a basic fairness in requiring both the prosecutor and the defense attorney to argue the case to a jury selected

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[263]106 S.Ct. at 1718 n.12.

[264]See text starting at note 221 *supra*.

[265]106 S.Ct. at 1729.

[266]See text at note 212 *supra*.

[267]See Hunt, Putting Juries on the Couch, New York Times, Nov. 28, 1982, §VI, at 70, 82, col. 1 ("Jury selection is one of the most important functions a trial lawyer can perform; some lawyers assert that by the time the jury has been chosen, the case has been decided.")

randomly from the community with only challenges for cause permitted. Our system, which allows peremptory challenges to dominate and distort the jury selection process, ensures that juries rarely reflect a cross section of the community. The prosecution works hard to eliminate anyone who might have reason in his or her background or outlook to sympathize with the defendant or his plight, while the defense seeks to eliminate anyone who might be inclined by background or outlook to judge the defendant's behavior from a more critical perspective or to sympathize with the victim. Given the large number of peremptory challenges available to each side in most jurisdictions—eight for the defense and five for the prosecution in Kentucky,[268] for example—the result is bound to be the elimination of major segments of society from the jury.

Third, the cost to society in terms of trial time devoted to jury selection by our system of peremptory challenges is heavy, and *Batson* will increase those costs. Eliminating peremptory challenges would narrow the scope and duration of voir dire and would eliminate some of the expense involved in assembling the extremely large jury panels that are required to pick a jury in even the most routine cases. Eliminating peremptory challenges would thus enable the system to handle more trials more efficiently. In our system, which has made trial to a jury the exception rather than the rule, an increase in the number of trials that can be provided defendants would not be an insignificant achievement.[269]

While there are obvious benefits to abolishing peremptory challenges, the cost of such a proposal in terms of the reliability of trial process is a difficult question and one which Justice Marshall never addresses. Despite the rhetoric about the desirability of a "cross section of citizens" on juries, the present system is designed to screen out the extremes of the spectrum of jurors at both ends. One consequence of abolishing peremptory challenges may be more hung juries as more diverse jurors are permitted to remain on petit juries. A blend of viewpoints and backgrounds on the jury may sound poetic, but it may be much more difficult for such diversity to yield unanimity. The elimination of peremptory challenges might also increase the risk of false convictions or false acquittals. Peremptory

[268]See Ky. R. Crim. P. 9.30 (1) and (2).

[269]See generally Alschuler, Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System, 50 U. Chi. L. Rev. 931, 1017–20 (1983).

challenges are a hedge against an "unlucky" roll of the jury selection wheel, one which could sometimes result in a jury that is badly distorted so as to favor one side or the other.

Marshall's proposal would leave the prosecutor with only challenges for cause and no other safety net during voir dire. But challenges for cause are usually drafted very narrowly, and it is often extremely difficult to convince a judge to strike a juror for cause unless the showing of bias is blatant.[270] The abolition of peremptory challenges would mean that a prosecutor would be powerless to remove a juror whom the prosecutor correctly believes the trial judge should have removed for cause. And the prosecutor would also be powerless to remove a prospective juror who was strongly biased in favor of the defendant but who gave untruthful answers during voir dire in order to avoid removal for cause. While England has statutorily embraced the concept of nonunanimous verdicts in criminal cases,[271] nonunanimous verdicts are very much the exception in this country[272] and thus the impact that Justice Marshall's extreme proposal might have on jury verdicts should be a serious concern.

Besides being a leap into the unknown, Justice Marshall's resolution of the peremptory challenge problem—a constitutional ban on peremptory challenges exercised by the prosecution—has other problems. In the first place, at least until we have more empirical information about the frequency with which racial discrimination in the exercise of peremptory challenges occurs, a wholesale ban on the exercise of peremptory challenges by prosecutors even in cases where it was clear that race had no bearing on the selection of the jury seems overbroad. Second, at some point it needs to be explained how the Equal Protection Clause demands a ban on the exercise of each and every peremptory challenge exercised by the

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[270]See Saltzburg and Powers, note 32 *supra*, at 355–57.

[271]By statute, juries in England may return a verdict of conviction by a vote of 10-2 after the jury has deliberated for two hours without reaching a unanimous verdict. Criminal Justice Act 1967, ch. 80, §13, now to be found in the Juries Act 1974, ch. 23, §17.

[272]While the Supreme Court has upheld the constitutionality of nonunanimous jury verdicts in criminal cases, Apodaca v. Oregon, 406 U.S. 184 (1972), among the major jurisdictions still requiring unanimous verdicts are California (Cal. Penal Code §§1149, 1163 (West 1985)), New York (N.Y. Crim. Proc. Law §310,80 (1982)), Texas (Tex. Code Crim. Proc. ann. art 37.04 (1981)), New Jersey (N.J. Rev. Stat. 2A:80–82 (1976)), Pennsylvania (Pa. R. Crim. P. 1120 (b)), Illinois (Ill. Ann. Stat. ch. 38 §115-4 (1977), and Massachusetts (Mass. Crim. R. 27 (a)).

state in criminal cases, but apparently allows the state to exercise peremptory challenges freely in civil cases.

Finally, Justice Marshall's position would lead to a very awkward situation in jury selection until such time as legislatures could address the adversary imbalance that would result from his opinion. The reason for this imbalance is that Justice Marshall, although hostile to peremptory challenges exercised by either the prosecution or the defense, would sweep away peremptory challenges under the Equal Protection Clause only for the prosecution and would "allow" legislatures to abolish peremptory challenge for the defense as well. Presumably, Justice Marshall believes that the Equal Protection Clause is a limit only on the state and does not reach actions by the defense.[273] The immediate result of abolishing peremptory challenges for prosecutors only would be to remove the adversary balance that presently exists in the jury selection process until legislatures could address the imbalance. Thus, for example, in a capital case or a major multi-defendant case that goes to trial in the wake of an opinion abolishing the prosecution's peremptory challenges, defense lawyers might have twenty or more peremptory challenges and the prosecution none.

C. LEGISLATIVE REFORM OF THE PEREMPTORY CHALLENGE PROCESS

The majority opinion of Justice Powell and the concurring opinion of Justice Marshall are reminders that the Constitution can be a blunt instrument for delicate procedural reform. These opinions offer those who are interested in reform of the jury selection process two rather unattractive alternatives—either expand the jury selection process by adding another level of factual hearings and complicated legal issues to the already complicated process of selecting a jury, or abolish peremptory challenges for prosecutors in a single constitutional stroke and hope that the cure does not produce serious adverse side effects.

England has taken a different approach in its efforts to control the peremptory challenge process.[274] At early common law the number of peremptory challenges permitted was thirty-five.[275] England

[273]See text starting at note 141 *supra*.

[274]See generally Hughes, English Criminal Justice: Is It Better Than Ours? 26 Ariz. L. Rev. 507, 591–95 (1984).

[275]See Swain v. Alabama, 380 U.S. at 212.

has gradually reduced that number: ten years ago, in response to worries over the ability of defendants to control the ethnic composition of juries,[276] the number of peremptory challenges was dropped from seven to three.[277] One problem with this reduction has been that it has been a one-sided reform, aimed only at defense peremptories because only defendants are permitted to exercise peremptory challenges in England.[278] Instead of having peremptory challenges, the prosecution in England has the ancient common law right to ask individual jurors to "stand aside,"[279] which has no analog in this country. Jurors who are asked to stand aside for the Crown are removed from the jury box as if they have been peremptorily challenged but they remain on the panel from which the jury is selected and could conceivably end up on the jury should all members of the panel be exhausted, which is very unlikely.[280] There is no limit to the number of jurors who may be asked to stand aside, so in effect the English prosecutor has a broader right to challenge jurors than does the defendant.[281] Since there have been no legislative limits placed on the prosecution's traditional power to ask jurors to stand aside, the English reforms of the jury selection process lack balance.

A reduction in the number of peremptory challenges along the lines of the limitation on peremptories enacted in England—except applicable to both the prosecution and the defense—would seem to offer many of the advantages of Justice Marshall's proposal but not nearly as many of the risks. Suppose, for example, that the number of peremptory challenges allowed each side in criminal cases, which presently averages nationally approximately six per side in noncapital offenses,[282] was limited to three or perhaps even two peremptory challenges in such cases. While the Court has always made clear that the peremptory challenge is not protected

[276]See Hughes, note 274 *supra*, 591–92.

[277]Criminal Law Act 1977, ch. 45, §43.

[278]Juries Act 1974, ch. 23 (1) (a).

[279]See Walker, The English Legal System ch. 24, 508–09 (1985).

[280]See *ibid.*

[281]See *ibid.*; East, Jury Packing: A Thing of the Past? 48 Mod. L. Rev. 518, 520 (1985).

[282]Note, The Case for Abolishing Peremptory Challenges in Criminal Trials, 21 Harv. C.R.-C.L. L. Rev. 227, 229 (1986) (national average in noncapital felony cases is 6 for the prosecution and 6.8 for the defense).

by the Constitution,[283] continuing to permit two or three peremptory challenges would be consistent with our strong tradition of allowing each side to have some influence over the selection of the jury that will decide the case. It would also provide protection against the occasional juror who is strongly biased but who is clever enough to avoid being challenged for cause. At the same time, a sharp reduction in the number of peremptories would make it much more difficult for one side to remove systematically all jurors of a certain race, religion, or ethnic background.

The advantage of legislation is its flexibility, and it is certainly not necessary that the number of peremptory challenges be reduced to a number that is equal. Allowing the prosecution two challenges and the defense three, for example, would come closer to the ratios of challenges that presently exist in Kentucky[284] and the federal system[285] in noncapital felony cases. And maybe a sharp reduction in the number of peremptory challenges could be made more attractive if it were coupled with expansion of the categories of challenges for cause or with some limited discretion on the part of the trial judge to grant additional peremptories in cases where there is a very unusual problem of possible prejudice.

A sharp reduction in the number of peremptory challenges would certainly not cure all the problems associated with racially based peremptory challenges. In capital cases, even if the large number of peremptory challenges usually available—currently twenty per side in federal court[286]—were drastically reduced, there would still be problems caused by racially based peremptory challenges. But *Batson* is not a cure-all either. And it would seem much the wiser course to place tight legislative limits on the number of available peremptories in noncapital cases and let peremptories be "peremptory," rather than try to attack the problem of racially based peremptory challenges with an expensive and doubtful constitutional remedy.

But while one hopes that *Batson* might spur interest in legislative reform of the jury selection process, there are reasons to be pes-

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[283]*Batson*, 106 S.Ct. at 1720; *Swain*, 380 U.S. at 212.

[284]See note 84 *supra*.

[285]See Fed. R. Crim. P. 24 (b) (allowing the prosecution six peremptory challenges and the defense ten).

[286]*Ibid.*

simistic about the prospects for bold legislative reforms in the area of peremptory challenges or voir dire in general. In the first place, jury selection is one of those areas in the twilight between substance and procedure where courts and legislatures often share responsibility for legislative reforms, and this can produce tension between these two branches of government. An example is the federal system where the Supreme Court has the authority to make rules of procedure to govern trials in criminal cases, but such rules must then be submitted to Congress, which has the power to modify or even block implementation of such rules.[287] The result over the last fifteen years of this relationship has not been very satisfactory as the Court has seen many of its proposed rule changes delayed or significantly modified by Congress. The uncertain fate that any reform would suffer in Congress hardly encourages bold reforms in a controversial area like jury selection.

An additional and related reason to be pessimistic about the prospects for legislative reform in the area of jury selection is the fact that our trial system has created its own monster in terms of the momentum behind voir dire and peremptory challenges. So strong is the emphasis of the system on jury selection and voir dire that we can expect that any proposal to cut back peremptory challenges or otherwise restrict voir dire would be bitterly fought by trial lawyers. Since England permits no questioning of prospective jurors during the jury selection process,[288] the reduction in the number of peremptory challenges in that country never had to contend with a tradition of aggressive voir dire. But in this country the trial bar can be expected to oppose any restrictions on voir dire. Ten years ago, the Court felt the sting of this lobby when it proposed a change in the federal rules pertaining to peremptory challenges, offercd partly to help eliminate the problems that gave rise to *Batson*, that, among other reforms, would have reduced the number of peremptory challenges in felony cases from six to five for prosecutors and from ten to five for defense attorneys.[289] The reform was vigorously opposed and ultimately rejected by Congress.[290]

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[287]See 18 U.S.C. §3771.

[288]See Hughes, note 274 *supra*, at 592; Walker, note 279 *supra*, at 508.

[289]H.R. Doc. No. 94-464, 94th Cong., 2d Sess. 14 (1976).

[290]See Act of July 30, 1977, Pub. L. No. 95-78 section 2 (c), 91 Stat. 319. See also Note, 92 Harv. L. Rev., note 32 *supra*, at 1774–75.

A more recent legislative battle over voir dire occurred in New York in 1983, when the New York legislature had under consideration a proposal that would have placed some badly needed controls on voir dire.[291] The bill would have modified the New York practice which allows attorneys to control the questioning of jurors and would instead have patterned voir dire on the federal model which empowers the trial judge to conduct the voir dire with discretion to allow questioning by the attorneys.[292] This bill was bitterly fought by the trial bar and was ultimately defeated.[293]

The virtue of *Batson* is that it forces the states to confront a problem that has been smoldering for years, but the cost is the considerable strain that the uncertain contours of the decision place on the system. And when the subject of the reform is a central element of trial procedure, the piecemeal nature of constitutional adjudication whereby the Court decides the issue of race and the constitutionality of the prosecutor's peremptories today, but leaves other issues, such as the applicability of equal protection to other suspect classes or to the defense's use of peremptories, until tomorrow, is very difficult for those who must litigate now.

One way that state courts may avoid some of these uncertainties is for state courts to take control of the issue of peremptory challenges themselves and not wait to see what the Supreme Court does. Forced by *Batson* to confront the issue of discriminatory peremptory challenges, there are early indications that state courts may simply conclude that their Sixth Amendment analogs present, on balance, a more attractive alternative for regulating peremptory challenges than following the Court down the uncertain path of equal protection. In *State v. Gilmore*,[294] a decision by the New Jersey Supreme Court handed down after *Batson*, the court opted for the state Sixth Amendment analog and the rationale of *Wheeler* as the basis for its decision. In its opinion, the court was quite frank in expressing its reluctance to tangle with the uncertainties of *Batson*.

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[291]See text at notes 241–42 *supra*.

[292]See Editorial, Fast, Fair Ways to Pick Juries, New York Times, September 5, 1984, at A22, col. 1; Chambers, Who Should Pick Jurors, Attorneys or the Judge?, New York Times, June 13, 1984, §II, at 4, col. 3.

[293]*Ibid.*

[294]103 N.J. 508, 511 A.2d 1150 (N.J. 1986).

The court emphasized that "*Batson* is not the final word in this area,"[295] and it quoted Justice White's prediction that " '[m]uch litigation will be required to spell out the contours of the Court's Equal Protection holding.' "[296] More recently, Colorado has also used its state constitutional analog to the Sixth Amendment to regulate peremptory challenges.[297]

V. The Open Question: Racially Based Peremptory Challenges Exercised by the Defense

While *Batson* raised only the issue of the prosecutor's racially based peremptory challenges, it was a mistake for the Court not to have given some indication of where it might go on the issue of defense challenges based on race. Judicial restraint has its virtues, but peremptory challenges are adversary weapons: the aggressiveness with which the Court in *Batson* leapt to confront the issue of racially motivated peremptory challenges on the part of the prosecution and hurried to resolve the issue on a theory not even briefed by the parties stands in contrast to the Court's timidity on the issue of racially motivated defense challenges. Among the majority, it is only Justice Marshall who acknowledged the obvious: "The potential for racial prejudice inheres in the defendant's challenge as well."[298]

No doubt the Court was worried about its ability to reach defense peremptories under the Equal Protection Clause because there is an initial state action problem, and, even with state action, the initial step of the *Batson* analysis—that the party raising the equal protection claim be a member of the cognizable racial group being excluded—would have to be modified or abandoned to allow the state to raise an equal protection claim on behalf of those being systematically excluded. But there are a number of reasons for thinking that it is inevitable that restrictions similar to those laid down in *Batson* will be applied to defense peremptories.

In the first place, the central premise of *Batson*—that "public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury

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[295]511 A.2d at 1157.

[296]*Ibid.*, quoting from *Batson*, 106 S.Ct. at 1725.

[297]See People v. Fields, ____ Colo. ____, 732 P.2d 1145 (1987).

[298]106 S.Ct. at 1729.

service because of his race"[299]—mandates that the Court finish the job by assuring that public confidence is not undermined by defense peremptories. In this regard, the Court has to be aware of the fact that defense peremptories are a serious threat to public confidence in the system among minority citizens.

Two of the well publicized cases involving defense peremptories have occurred in Florida. In May of 1980, the acquittal of four white police officers[300] who had been on trial for beating to death a thirty-three-year-old black man who had been arrested for a traffic violation sparked the Miami riots.[301] Contributing to the sense of unfairness in the verdict in the so-called "McDuffie case" (the victim of the beating was named McDuffie) was the fact that even though the case was tried in Tampa, which has a sizable black population, by coordinating their peremptories the white police officers were able to remove every black from the venire with the result that the jury that acquitted them was composed solely of whites.[302] Four years later, the problem arose again in *State v. Alvarez*,[303] when a Hispanic police officer, charged with manslaughter in the death of a young black male, was acquitted by an all-white jury.[304] Again there was broad community concern over peremptory challenges[305] which had permitted the defense to remove the only two blacks remaining on the panel after challenges for cause.[306] Against this

[299]*Id.* at 1724.

[300]See State v. Diggs (No. 79-21601, Fla. Dade Co. Cir. Ct.).

[301]Crewsdon, 2 Die as Blacks in Miami Protest Police Acquittals, New York Times, May 18, 1980, at 24, col. 1. Eventually 3,600 national guardsmen had to be called out to patrol the city, and the United States Attorney General was sent by the President to Miami to help calm the outrage felt by the black community over the acquittals. Crewsdon, Guard Reinforced to Curb Miami Riot; 15 Dead over 3 Days, New York Times, May 20, 1980, at 1, col. 6.

[302]Miami Times, June 23, 1983, at 1, col. 1. See also Andrews v. State, 438 So.2d 480, 482 (Fla. Dist. Ct. App. 1983), rev'd, 459 So.2d 1018 (1984).

[303]No. 83-3972 (Fla. Dade Co. Cir. Ct.).

[304]See Jorgenson, note 9 *supra*, at 579–80 (1984).

[305]See The Challenge, Miami Herald, March 17, 1984, at 32A, col. 1 (calling for reexamination of the use of peremptory challenges by lawyers); Hampton, Abolish Peremptory Challenges, Miami Herald, March 18, 1984, at 2E, col. 3 (calling for abolition of peremptory challenges). See also Oglesby, Challenged: A Jury Of One's Peers, Miami Herald, January 26, at 29A, col. 1; Fisher, Dade Urges State To Help Keep Blacks on Juries, Miami Herald, March 7, 1984, at 2D, col. 1. See generally, Jorgenson, note 9 *supra*, at 567, 579.

[306]There were originally four blacks on the panel, two of whom were removed for cause and the other two were peremptorily challenged by the defense. See Jorgenson, note 9 *supra*, at 579.

background, it is not surprising that when the Florida Supreme Court, in *Neil v. State*,[307] ruled that the use of peremptory challenges "as a scalpel to excise a distinct racial group" violated the state constitutional right to an impartial jury and ordered a new trial for defendant Neil, the court was careful to explain that both the state and the defense would be entitled in the future to challenge the improper use of peremptory challenges.[308]

Neil suggests another reason why the Court will be under tremendous pressure to extend *Batson* to defense peremptories: to a certain extent the issue has already been resolved by state court decisions like *Wheeler*, *Soares*, and *Neil* that have emphasized that their restrictions on peremptories apply equally to the prosecution and the defense.[309] While those are state constitutional decisions under analogs to the Sixth Amendment, the conclusion of those courts—that the state as well as the defense is entitled to an "impartial" jury—seems to dictate a similar approach under the Equal Protection Clause. It would be difficult to explain to citizens in a case like *Alvarez*, where the defendant is Hispanic but the victim is black, that "equal" protection prohibits the prosecution from striking Hispanics on a systematic basis, but it permits the defense to remove all blacks on a systematic basis. In an era when our criminal justice system has been heavily criticized for forgetting that there are victims caught in the battle between the defendant and the state, it would be very surprising were the Court not to extend *Batson* to defense challenges aimed at removing jurors who share a racial identity with the victim.[310] The Court may conclude

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[307]457 S.2d 481, 486 (Fla. 1984).

[308]*Id.* at 487.

[309]In United States v. Leslie, 783 F.2d 541, 565 (5th Cir. 1986), vacated, 107 S.Ct. 1267 (1987), the Fifth Circuit observed that "every jurisdiction which has spoken to the matter, and prohibited prosecution case-specific peremptory challenges on the basis of cognizable group affiliation has held that the defense must likewise be so prohibited." The only exceptions appear to be the federal decisions—*Batson* and McCray v. Abrams, 750 F.2d 1113. The silence of *McCray* on the subject of defense peremptories led one trial judge to protest that such "inequality must lead to abolition or severe reduction of peremptories." See Roman v. Abrams, 608 F.Supp. 629, 630 (S.D.N.Y. 1985), rev'd, 822 F.2d 214 (2d Cir. 1987).

[310]That the prosecution should be restricted in its use of peremptory challenges on the basis of race, but that the defense should have no restrictions on its racially based peremptories, is certainly not without its advocates in the scholarly journals. See, *e.g.*, Massaro, Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images, and Procedures, 64 N.C. L. Rev. 500, 560–63 (1986); Note, 92 Harv. L. Rev., note 32 *supra*, at 1786.

that since the interest being protected by *Batson*, whether asserted by the defendant or the state, is the right of non-party citizens to serve on juries on a nondiscriminatory basis, it is appropriate that the state be allowed to raise that issue on behalf of those non-party citizens.

VI. Conclusion

Batson is in many ways a paradigm of some of the most serious problems that exist within the system. If one wanted to understand how the American trial system for criminal cases came to be the most expensive and time-consuming in the world, it would be difficult to find a better starting point than *Batson*. *Batson* opens up a new vista of delicate hearings and fascinating legal issues[311] that will occupy courts for years to come. In starting down that path with an opinion that gives almost no consideration to the burden it is placing on the system, the Court in *Batson* seems implicitly to be conceding that trials in this country have come to have largely a symbolic importance that dwarfs interest in trials as an efficient and reliable mechanism for the determination of guilt or innocence.

Besides the burdens the majority opinion places on the system, the lack of balance in the opinion should also be a concern. To put forward a landmark opinion on peremptory challenges that talks glowingly about "public respect for the system" and "ensuring that no citizen is disqualified from jury service because of his race," but that omits any statement about racially based defense peremptories, is startling. Presented with a golden opportunity to show some sympathy for victims in a system frequently criticized for insensitivity in this regard, the decision to avoid any discussion of defense peremptories results in an opinion that is one-sided and naive in its analysis of an important adversary weapon.

To be critical of *Batson* is not, of course, to defend the system of peremptory challenges or to deny that it badly needs reform. The

[311]Novel issues are already arising. Recently, the Arizona Court of Appeals ruled that the decision by the prosecution to exercise only four of its six peremptory challenges raised a *Batson* issue because it had the effect of keeping off the jury the only black on the venire, who would have been seated on the jury if the prosecution had used all six of its peremptory challenges. State v. Scholl, Superior Court for Pima County (Bates), ___ Ariz. ___, 743 P.2d 406 (Ct. App. 1987).

present system of peremptory challenges seems unfair to everyone: unfair to the defendant, unfair to the victim, and unfair to the many citizens who are called for jury duty, often at personal inconvenience and at financial sacrifice, but who wind up being struck by one side or the other. But neither the courts nor the legislatures seem very willing to lead the fight for legislative reforms of the peremptory challenge process that would try to balance fairness, efficiency, and reliability. In the case of peremptory challenges, the legislative vacuum results in an equal protection remedy for racially based peremptory challenges which is laid on top of a system that has as its operating premises arbitrariness and group discrimination. Whether this will prove a consistent and effective remedy is doubtful.