THE PEREMPTORY CHALLENGE: SUBSTANCE WORTH PRESERVING?

TABLE OF CONTENTS

I. INTRODUCTION

The jury system in the United States is considered a fundamental institution of democratic government. Thus, its preservation is judicially protected. Systematically excluding certain people from the jury selection process is harmful not only because it threatens democratic ideals, but because it is detrimental to public confidence in the judicial process. How far the Supreme Court is willing to extend the right to a jury trial guaranteed by the Sixth Amendment and the Equal Protection Clause is a matter of some dispute.

Historically, the peremptory challenge has derived its significance from common law.[1] Its pervasive use in our judicial system is evidence of the widely held belief that the peremptory challenge is an essential part of a trial by an impartial jury.[2] Although the Constitution does not guarantee the right to the peremptory challenge, it has nonetheless been termed "one of the most important of the rights secured to the accused."[3] "A 'peremptory challenge' is an arbitrary and capricious species of challenge to a certain number of jurors without showing any cause."[4] The peremptory challenge has traditionally allowed rejection of a

1. Lewis v. United States, 146 U.S. 370, 376 (1892).
2. *Id.*
3. Pointer v. United States, 151 U.S. 396, 408 (1894).

venireperson for "sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another."[5]

Recently, however, the device once thought to guarantee "not only freedom from any bias against the accused, but also from any prejudice against his prosecution,"[6] has come under attack for allegedly perpetuating racial discrimination in violation of the Equal Protection Clause.[7] The proposition that the challenge is in irreconcilable conflict with the Equal Protection Clause is largely "linked to the suggestion that the ban on jury discrimination must inevitably expand to prohibit not only jury selection based on race, but also jury selection based on religion, national origin, gender, language, disability, age, occupation, political party, and a host of other categories."[8] Although it is uncertain where the line is to be drawn in extending these categories, logic dictates that the more protected categories that are recognized, the more the peremptory challenge will resemble the challenge for cause.[9]

The Supreme Court in *Swain v. Alabama*[10] concluded it could not examine a prosecutor's reasons for exercising his peremptory challenges in a particular case.[11] The Court considered challenges exercised on the basis of race, religion, nationality, and occupation relevant to the outcome of the case.[12] In *Batson v. Kentucky*,[13] however, the Court effectively overruled *Swain*.[14] The Court held a prosecutor's privilege to challenge potential jurors was "subject to the commands of the Equal Protection Clause," which forbids a challenge "solely on account of [the potential jurors'] 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."[15]

This Note will explore the effect of these limitations on the peremptory challenge.[16] This Note will also consider whether these requirements under the Equal Protection Clause will extend beyond race to forbid the exercise of peremptory challenges with regard to other groups such as gender, ethnic origin, religion, and age,[17] and whether the challenge still has any substance worth preserving.[18]

---

4. State v. Thompson, 206 P.2d 1037, 1039 (Ariz. 1949) (citing Watkins v. State, 33 S.E.2d 325 (Ga. 1945)).
5. Lewis v. United States, 146 U.S. at 376.
6. Hayes v. Missouri, 120 U.S. 68, 70 (1887).
7. Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It Anyway?*, 92 COLUM. L. REV. 725, 742 (1992).
8. *Id.* at 761; *see* Batson v. Kentucky, 476 U.S. 79, 124-27 (1986) (Burger, C.J., dissenting).
9. *See* Underwood, *supra* note 7, at 761.
10. Swain v. Alabama, 380 U.S. 202 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986).
11. *Id.* at 222.
12. *Id.* at 220.
13. Batson v. Kentucky, 476 U.S. 79 (1986).
14. *Id.* at 89.
15. *Id.*
16. *See infra* part III.
17. *See infra* part IV.
18. *See infra* part V.

II. OVERVIEW OF THE CURRENT LAW

The Supreme Court has recognized challenges to federal jury selection procedures under two theories: the Fourteenth Amendment right to equal protection and the Sixth Amendment right to an impartial jury.[19] There is an important distinction between the definition of cognizability under the Sixth Amendment and its meaning under the Equal Protection Clause. A violation in the use of peremptory challenges under the fair cross section analysis of the Sixth Amendment can be shown through mere statistical underrepresentation.[20] Under the Equal Protection Clause, however, a discriminatory purpose is required to establish a prima facie case of discrimination.[21]

A. *Sixth Amendment*

In *Strauder v. West Virginia*, the Supreme Court decided racial groups cannot be excluded from the venire from which the jury is selected.[22] The Court established this principal not under the Sixth Amendment, but under the Equal Protection Clause of the Fourteenth Amendment.[23] Although a defendant is not guaranteed a right to a petit jury of any particular make up,[24] the defendant has the right to be tried by a jury selected by nondiscriminatory criteria.[25] A unanimous Court in *Smith v. Texas*[26] stated, "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community."[27] Excluding racial groups from jury selection was "at war with our basic concepts of a democratic society and a representative government."[28] The precedential importance of *Smith v. Texas* is that petit juries must be drawn from venires, panels, and lists that represent a fair cross section of the community.[29] This representative cross section is an essential component of the Sixth Amendment.[30]

The Sixth Amendment gained prominence in jury discrimination law after the Court's opinion in *Duncan v. Louisiana*,[31] which incorporated the Sixth Amendment right of a criminal defendant to a jury trial into the Due Process Clause of the Fourteenth Amendment.[32] After *Duncan*, the jury was considered a

---

19. *See* Duren v. Missouri, 439 U.S. 357, 370-71 (1979) (Rehnquist, J., dissenting).
20. *Id.* at 364.
21. United States v. Biaggi, 673 F. Supp. 96, 100 (E.D.N.Y. 1987), *aff'd*, 853 F.2d 89 (2d Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989).
22. Strauder v. West Virginia, 100 U.S. 303, 309 (1879).
23. *Id.* at 308-09.
24. *Id.* at 305.
25. *Id.* at 308.
26. Smith v. Texas, 311 U.S. 128 (1940).
27. *Id.* at 130.
28. *Id.*
29. Taylor v. Louisiana, 419 U.S. 522, 528 (1975).
30. *Id.*
31. Duncan v. Louisiana, 391 U.S. 145 (1968).
32. *Id.* at 149 (citing U.S. CONST. amend. XIV).

Once a defendant has established a prima facie case of discrimination, the burden shifts to the state to show a significant government interest justifies this infringement of the fair cross section requirement.[58] The justification underlying the Missouri system in *Duren*, exempting women from jury pools, was the important role of women in home and family life.[59] Although the Court recognized that assuring the availability of family members to provide child care was a significant state interest, it held this exemption system was not sufficiently tailored to comply with the Sixth Amendment requirement.[60]

In *Smith v. Texas,*[61] the Court stated: "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community."[62] The Court in *Lockhart v. McCree*[63] disregarded the literal importance of this language by holding the fair cross section requirement applies only to the venire from which the jury is selected, and not to the jury itself.[64] This holding was recently affirmed in *Holland v. Illinois.*[65] Justice Scalia, writing for the majority, stated the Sixth Amendment requirement of a fair cross section on the jury panel "is a means of assuring, not a representative jury (which the Constitution does not demand), but an impartial one (which it does)."[66]

III. SCOPE OF PEREMPTORY CHALLENGES

A. *The Evidentiary Burden Under* Swain v. Alabama

While the Court continued to espouse its belief in the constitutional principles set forth in *Strauder*,[67] the evidentiary burden placed on a defendant seemed virtually insurmountable in light of the Court's early view in *Swain v. Alabama*[68] that "[t]he presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury."[69] In *Swain*, a nineteen-year-old black defendant was convicted by an all-white jury of raping a seventeen-year-old white girl.[70] Eight blacks were on the petit jury venire, but none actually served because two were exempt and six were peremptorily struck by the prosecutor.[71]

---

58. *Id.* at 368; *see* Taylor v. Louisiana, 419 U.S. at 534-35.
59. Duren v. Missouri, 439 U.S. at 369.
60. *Id.* at 370.
61. Smith v. Texas, 311 U.S. 128 (1940).
62. *Id.* at 130.
63. Lockhart v. McCree, 476 U.S. 162 (1986).
64. *Id.* at 173-74.
65. Holland v. Illinois, 493 U.S. 474 (1990).
66. *Id.* at 480.
67. Strauder v. West Virginia, 100 U.S. 303, 308-09 (1879) (holding the state denied a black defendant equal protection of the laws because he was tried before a jury from which members of his race had been purposefully excluded).
68. Swain v. Alabama, 380 U.S. 202 (1965).
69. *Id.* at 222.
70. *Id.* at 231 (Goldberg, J., dissenting).
71. *Id.* at 205.

The defendant in *Swain* argued not only were blacks discriminatorily excluded in his case, but no black had served on a petit jury in a civil or criminal case in Talladega County for fifteen years.[72] He alleged the prosecutors systematically prevented blacks on venires from serving on the jury itself.[73] Despite the fact that no black had served on a petit jury for fifteen years in a county where twenty-six percent of the people eligible for jury service were black,[74] the Court found the defendant did not meet his burden of proof to establish a prima facie case of discrimination.[75]

Although fifteen years was clearly not sufficient to establish systematic exclusion of blacks from the jury, the Court did not define what was required to overcome the presumption of integrity in favor of the prosecutor.[76] The Court gave little guidance:

> [W]hen the prosecutor in a county, in case after case, . . . is responsible for the removal of Negroes who have been selected . . . by the jury commissioners and who have survived challenges for cause, with the result that *no* Negroes *ever* serve on petit juries, the Fourteenth Amendment claim takes on added significance. . . . In these circumstances, . . . it would appear that the purposes of the peremptory challenge are being perverted. If the State has not seen fit to leave a *single* Negro on *any* jury in a criminal case, the presumption protecting the prosecutor may well be overcome.[77]

In the context of this case, the prosecutor's exclusion of all black veniremen in a single case could not establish the proscribed motivation.[78] Moreover, the defendant did not prove the prosecutor participated in peremptorily striking blacks in other cases.[79] *Swain* insulated the peremptory challenge by preserving the peremptory challenge at the expense of limiting the reach of the Equal Protection Clause.[80]

B. Batson v. Kentucky

It was not until *Batson v. Kentucky*[81] that the Court announced it would reexamine the portion of *Swain* that placed the evidentiary burden on a criminal defendant who claimed the state's use of discriminatory peremptory challenges denied him equal protection.[82] The *Batson* Court rejected the *Swain* requirement that the defendant prove prior discrimination and held a defendant may show a prima facie equal protection violation entirely by reference to the prosecution's

---

72. *Id.* at 223.
73. *Id.*
74. *Id.* at 231-32 (Goldberg, J., dissenting).
75. *Id.* at 226.
76. *Id.*
77. *Id.* at 223-24 (emphasis added).
78. *Id.* at 224-25.
79. *Id.*
80. *Id.* at 241-42 (Goldberg, J., dissenting).
81. Batson v. Kentucky, 476 U.S. 79 (1986).
82. *Id.* at 82.

use of peremptory challenges in the defendant's own case.[83] The defendant in *Batson* argued the government's peremptory challenges violated his Sixth Amendment right to an impartial jury trial, intentionally rejecting reliance on the Equal Protection Clause in order to avoid confrontation with *Swain*.[84] The *Batson* Court nevertheless relied on the Equal Protection Clause in holding the defendant had been discriminated against by the prosecutor's use of peremptory challenges.[85]

Batson rejected *Swain*'s limited theory of a discriminatory purpose and held a prosecutor's exclusion of blacks violated the Equal Protection Clause.[86] As in all equal protection cases, the defendant has the burden of proving the state purposefully discriminated.[87] The Court set out the requirements necessary to establish a prima facie case of purposeful discrimination in selection of the petit jury.[88] First, the defendant "must show that he is a member of a cognizable racial group,"[89] and that members of defendant's race have been peremptorily excluded.[90] Second, the defendant can "rely on the fact . . . that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'"[91] "Finally, the defendant must show that these facts and other relevant circumstances raise an inference" that venirepersons were struck from the petit jury because of their race.[92]

The Court attempted to provide guidance to lower courts to determine whether the defendant had satisfied his burden. It stated, "[A] 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination."[93] The Court fell short, however, of defining how many venirepersons constituted a "pattern."[94] One court has held a prosecutor's exclusion of the only two black venirepersons did not constitute a prima facie case of discrimination because the defendants were not black.[95] An Arkansas court found the exclusion of the only minority on the jury panel was sufficient to establish a prima facie case.[96] Other courts have found a prima facie case of

---

83. *Id.* at 96.

84. *Id.* at 83; *see* Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 183 (1989) (noting the reliance on the Sixth Amendment avoided direct confrontation with *Swain*'s Equal Protection analysis).

85. Batson v. Kentucky, 476 U.S. at 84-86, 89.

86. *Id.* at 95-96.

87. *Id.* at 93.

88. *Id.* at 96.

89. *Id.* (citing Castaneda v. Partida, 430 U.S. 482, 494 (1977)).

90. *Id.*

91. *Id.* (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).

92. *Id.*

93. *Id.* at 97.

94. *Id.*

95. United States v. Vaccaro, 816 F.2d 443, 457 (9th Cir. 1987), *cert. denied*, 484 U.S. 914, *and cert. denied*, 484 U.S. 928 (1987).

96. Mitchell v. State, 750 S.W.2d 936, 940 (Ark. 1988), *abrogated by* Colbert v. State, 801 S.W.2d 643 (Ark. 1990).

discrimination will not be implied if a prosecutor did not exclude all black venirepersons from the petit jury by peremptory challenge.[97]

If the defendant makes a prima facie showing of a discriminatory purpose, the burden then shifts to the state to rebut it by showing a neutral justification for challenging black jurors.[98] While the Court is careful to note such an explanation does not have to rise to the level of a challenge for cause, the prosecutor cannot overcome the burden by stating the challenged jurors would be partial to the defendant because they were of the same race.[99]

Trial courts must determine whether the prosecutor has offered "a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenge."[100] Determining the adequacy of a prosecutor's explanation is difficult. For example, one court upheld the government's exclusion of a potential juror because the government claimed the juror avoided eye contact with the prosecutor.[101] Similarly, courts have upheld exclusions based on a venireperson's "posture and demeanor,"[102] "poor attitude in answering voir dire questions,"[103] and disposition that "seemed unfavorable."[104]

Trial courts are assigned the most difficult task of the *Batson* analysis—examining a prosecutor's motives for striking potential jurors. Surprisingly, a prosecutor can easily state facially neutral reasons for removing a venireperson, and it is difficult for the trial court to question those reasons.[105] A particular problem with a trial court's acceptance of subjective demeanor is that it often insulates discriminatory challenges from appellate review. Reviewing courts cannot observe the idiosyncratic behavior and body language of venirepersons, and thus, may often unintentionally ignore illegitimate justifications given by prosecutors. In fact, "[a] judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported."[106] One commentator has summarized *Batson*'s message to prosecutors: "When your quota of free shots is exhausted, you must make up some plausible reasons."[107]

---

97. *See, e.g.*, United States v. Montgomery, 819 F.2d 847, 851 (8th Cir. 1987) ("The fact that the government accepted a jury which included two blacks, when it could have used its remaining peremptory challenges to strike these potential jurors, shows that the government did not attempt to exclude all blacks, or as many blacks as it could, from the jury.") United States v. Dennis, 804 F.2d 1208, 1211 (11th Cir. 1986) (holding no prima facie case of discrimination was proven when the prosecutor struck three black venirepersons but accepted a jury which included two black members), *cert. denied*, 481 U.S. 1037 (1987). *But see* Fleming v. Kemp, 794 F.2d 1478, 1483 (11th Cir. 1986) ("[N]othing in *Batson* compels the . . . conclusion that constitutional guarantees are never abridged if all black jurors but one or two are struck because of their race.").

98. Batson v. Kentucky, 476 U.S. 79, 97 (1986).

99. *Id.*

100. *Id.* at 98 n.20 (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981)).

101. United States v. Cartlidge, 808 F.2d 1064, 1071 (5th Cir. 1987).

102. United States v. Forbes, 816 F.2d 1006, 1010-11 (5th Cir. 1987).

103. United States v. Vaccaro, 816 F.2d 443, 457 (9th Cir. 1987).

104. Rodgers v. State, 725 S.W.2d 477, 480 (Tex. Ct. App. 1987).

105. Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring).

106. *Id.* (Marshall, J., concurring).

107. *See* Alschuler, *supra* note 84, at 176.

C. *Standing*

The *Batson* Court seemed to indicate its holding may be limited to cases of racial discrimination. To establish a prima facie case of discrimination, "the defendant first must show that *he* is a member of a cognizable racial group . . . and that the prosecutor has exercised peremptory challenges to remove from the venire *members of the defendant's race.*"[108] *Batson*'s holding was limited to prohibiting prosecutors from excluding jurors of the same race as the defendant.[109] It left open, however, questions as to whether the prosecutor could exclude jurors of a different race than the defendant, whether civil litigants may exclude jurors on the basis of race, and whether criminal defendants could exclude jurors on the basis of race.

The exclusion of a potential juror from a petit jury can deny a defendant the right to a trial by an impartial jury whether or not the defendant and the juror share the same race.[110] If a prosecutor excludes a prospective juror who is of the same race as the defendant, that defendant's potential success at trial is not substantially greater than if the prosecutor had excluded jurors not of the defendant's race.[111]

1. *Prosecutor's Exclusion of Jurors of Different Race than Defendant*

In *Powers v. Ohio*,[112] the Court resolved one of the issues *Batson* left pending: A criminal defendant may object to the race-based exclusions of jurors affected by peremptory challenges whether or not the defendant and the jurors are of the same race.[113] The Court recognized a criminal defendant has standing to raise a third-party equal protection claim if the prosecution excludes jurors because of their race, provided three criteria are met.[114] First, the defendant must have suffered an injury-in-fact, giving the defendant a sufficiently concrete interest to challenge the exclusion of the juror.[115] Second, "the litigant must have a close relation to the third party."[116] Third, "there must exist some hindrance to the third party's ability to protect his or her own interests."[117]

The Court determined a criminal defendant realizes cognizable injury when the prosecutor uses peremptory challenges to discriminate, and the defendant has an interest in challenging the practice.[118] "'Jury selection is the primary means by which a court may enforce a defendant's right to be tried by a jury free from

---

108. Batson v. Kentucky, 476 U.S. at 96 (citation omitted) (emphasis added).
109. *Id.*
110. *See* Alschuler, *supra* note 84, at 190.
111. *Id.* ("[E]very exercise of a peremptory challenge by a prosecutor is designed to limit the likelihood of the defendant's success at trial.").
112. Powers v. Ohio, 499 U.S. 400 (1991).
113. *Id.* at 416.
114. *Id.* at 410-11.
115. *Id.* at 411 (citing Singleton v. Wulff, 428 U.S. 106, 112 (1976)).
116. *Id.* (citing Singleton v. Wulff, 428 U.S. at 112).
117. *Id.* (citing Singleton v. Wulff, 428 U.S. at 115-16).
118. *Id.*

ethnic, racial, or political prejudice.'"[119] As such, the jury acts as a check on unwieldy power that may be exercised by the state.[120] Secondly, the Court noted voir dire permits a party to "establish a relation, if not a bond of trust, with the jurors" that continues throughout the trial.[121] Both the defendant and the excluded jurors have an interest in eliminating racial discrimination from the trial.[122] Finally, although jurors have the legal right to bring suit on their own behalf,[123] the Court recognized these challenges are infrequent.[124] Because of limited opportunities, difficulties of proof, and financial burdens, excluded jurors are unlikely to seek vindication.[125] The *Powers* Court held the three criteria were satisfied.[126] Thus, *Powers* established that a defendant can challenge the prosecution's use of discriminatory peremptory challenges even if the defendant and the excluded jurors were not of the same race.[127]

2. *Exclusion of Jurors by Civil Litigants*

A year after the *Powers* decision, the Court continued to resolve the unanswered questions left in the aftermath of *Batson*. In *Edmonson v. Leesville Concrete Co.*,[128] the Court held a private litigant in a civil case could not use peremptory challenges to exclude jurors because of their race.[129] The Court employed a state action analysis to determine whether the private litigant's exclusion of prospective jurors resulted in a constitutional violation.[130] Such action may be found "when private parties make extensive use of state procedures with 'the overt, significant assistance of state officials.'"[131] The peremptory challenge could not function without such assistance. For example, the government calls and examines jurors, the party exercising the peremptory challenge denies the juror service on the jury, and the judge enforces the challenge.[132] If the Court enforced a discriminatory challenge, it would in effect condone such behavior.[133]

Moreover, the peremptory challenge involves the performance of a traditional governmental function.[134] "The peremptory challenge is used in selecting an entity that is a quintessential governmental body."[135] When private litigants

---

119. *Id.* at 411-12 (quoting Gomez v. United States, 490 U.S. 858, 873 (1989)).
120. *Id.* at 412.
121. *Id.* at 412-13.
122. *Id.* at 413.
123. *Id.* at 414 (citing Carter v. Jury Comm'n, 396 U.S. 320, 329-30 (1970)).
124. *Id.*
125. *Id.* at 414-15.
126. *Id.* at 415.
127. *Id.*
128. Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991).
129. *Id.* at 616.
130. *Id.* at 620.
131. *Id.* at 622 (quoting Tulsa Professional Collection Serv., Inc. v. Pope, 485 U.S. 478, 486 (1988)).
132. *Id.* at 624.
133. *Id.*
134. *Id.*
135. *Id.*

exercise the peremptory challenge to select jurors, they are performing an important function within the government.[136] Thus, private entities become government actors for the purpose of using peremptory challenges and cannot exclude jurors on account of their race.[137]

3. *Exclusion of Jurors by Criminal Defendants*

The decision prohibiting criminal defendants from engaging in purposeful discrimination based on race finally came in the Court's most recent revisit of *Batson*. In *Georgia v. McCollum*,[138] the Court examined four issues to determine whether defense counsel could exercise racially discriminatory peremptory challenges.[139] First, by permitting exclusion of jurors based on race, the court condones a scheme that "could only undermine the very foundation of our system of justice—our citizens' confidence in it."[140] Second, a criminal defendant's exercise of peremptory challenges was determined to be state action.[141] The Court found the jury system could not function without "overt and significant participation of the government,"[142] and peremptory challenges perform a traditional governmental function in selecting an impartial jury.[143] Third, the Court applied *Powers* in determining whether the state had standing to object to a defendant's discriminatory use of peremptory challenges.[144]

Finally, the Court balanced the rights of a criminal defendant with the harms targeted in *Batson* to determine whether this would preclude an extension of its precedents.[145] The Court echoed its earlier statements that the peremptory challenge is not constitutionally protected, and it could be withheld without impairing the right to a trial by jury.[146] Although the Court did not "believe that this decision [would] undermine the contribution of the peremptory challenge to the administration of justice,"[147] it implied its willingness to combat racial stereotypes at the cost of assuring an impartial jury panel.[148]

The defendant in *McCollum* also argued a prohibition of the discriminatory exercise of peremptory challenges violated his Sixth Amendment right to a trial by jury.[149] The Court dismissed this claim, asserting "the goal of the Sixth Amendment is 'jury impartiality with respect to both contestants.'"[150] *Batson* was based on the premise that a prosecutor cannot exclude a prospective juror on

---

136. *Id.* at 627.
137. *Id.*
138. Georgia v. McCollum, 112 S. Ct. 2348 (1992).
139. *Id.* at 2353.
140. *Id.*
141. *Id.*
142. *Id.* at 2355.
143. *Id.*
144. *Id.* at 2353.
145. *Id.*
146. *Id.* at 2358.
147. *Id.*
148. *Id.* at 2355.
149. *Id.* at 2358.
150. *Id.* (quoting Holland v. Illinois, 493 U.S. 474, 483 (1990)).

the assumption the juror will be partial to a member of the same race.[151] Thus, assuming a member of a particular race will not favor members of the same race, a defendant's right to an impartial jury trial is not affected because the defendant may still strike for any reason other than racial motivation.[152]

Additionally, the defendant argued that denying peremptory strikes based on race violated his Sixth Amendment right to effective assistance of counsel.[153] The defendant explained that in order for his defense counsel to provide the racially neutral explanation required by *Batson*, he would have to disclose confidential communications between the defendant and his counsel.[154] The Court found counsel can usually explain the reasons for the challenge without revealing the defendant's trial strategy.[155] If it was not possible in a given case to provide an explanation without disclosing confidential communications, the Court could arrange to hear the reasons for the challenge in camera.[156] Thus, the Court concluded a criminal defendant was prohibited from exercising discriminatory peremptory challenges.[157]

Determined to ignore a continued group of vocal dissenters, the Court has overturned its ideological priorities since its ruling in *Swain*. The implicit idea underlying *Swain*, that the peremptory challenge as an institution has to be preserved at the cost of racial discrimination, has been disavowed by a majority of the current Court. Justice Blackmun's majority opinion in *McCollum* is illustrative of this shift: "'[I]f race stereotypes are the price for acceptance of a jury panel as fair,' we reaffirm today that such a 'price is too high to meet the standard of the Constitution.'"[158] There is no question the Court is unrelenting in its efforts to eradicate racial discrimination in the procedures used to select a petit jury. The question is to whom that protection will extend.

IV. THE LIMITED EXTENSION OF *BATSON V. KENTUCKY*

The Supreme Court has established who cannot exercise discriminatory peremptory challenges on the basis of race. The question remains to what extent peremptory challenges can be exercised against other distinguishable groups. In his dissent in *Batson*, Chief Justice Burger wrote: "[I]f conventional equal protection principles apply, then presumably defendants could object to exclusions on the basis of not only race, but also sex, . . . age, . . . religious or political affiliation, . . . mental capacity, . . . number of children, . . . living arrangements, . . . and employment in a particular industry, . . . or profession . . . ."[159] The Chief

---

151. Batson v. Kentucky, 476 U.S. 79, 97 (1986).

152. Michael N. Chesney & Gerard T. Gallagher, *State Action and the Peremptory Challenge: Evolution of the Court's Treatment and Implications for* Georgia v. McCollum, 67 NOTRE DAME L. REV. 1049, 1076 (1992).

153. Georgia v. McCollum, 112 S. Ct. 2348, 2358 (1992).

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 2359.

158. *Id.* at 2358 (quoting Edmonson v. Leesville Concrete Co., 500 U.S. 614, 630 (1991)).

159. Batson v. Kentucky, 476 U.S. 79, 124 (1986) (Burger, C.J., dissenting) (citations omitted).

Justice seems to draw the conclusion, one agreed with by Justice Marshall in his concurring opinion in *Batson*,[160] that the requirements established by *Batson* are hopelessly irreconcilable with the Equal Protection Clause.[161]

Those who subscribe to Chief Justice Burger's theory believe a ban on jury discrimination based on race must inevitably prohibit discrimination of nonracial groups.[162] Nonracial exclusion was not an issue before the Court in *Batson* and thus was not addressed.[163] If the Equal Protection analysis is extended, groups classified as suspect would enjoy the same protection.[164] Thus, the ban on discriminatory peremptory challenges will most likely extend to national origin[165] and religion.[166] The ban has recently been extended to gender.[167] Such protection is unlikely to extend to age, occupation, education, or wealth because these are not classified as protected groups.[168]

In *Batson*, the Court explained that in order to establish a prima facie case of purposeful discrimination, the defendant "must show that he is a member of a cognizable racial group."[169] A pre-*Batson* opinion defined a distinctive group as "recognizable," "distinct," and one that has been "singled out for different treatment under the laws, as written or applied."[170] The courts, however, have not uniformly applied this language.

A. *National Origin*

The Court's opinion in *Hernandez v. New York*[171] underscored a desire to analyze jury discrimination cases under the Equal Protection Clause.[172] A Hispanic defendant argued the prosecutor used four peremptory challenges to exclude potential Latino jurors.[173] The prosecutor, asserting his racially neutral explanation of the exclusion, stated he struck the Spanish-speaking veniremen because they were hesitant about whether they could accept the interpreter's

---

160. *Id.* at 107-08 (Marshall, J., dissenting).

161. *Id.* at 124-26 (Burger, C.J., dissenting).

162. *See* Barber v. Ponte, 772 F.2d 982, 999 (1st Cir. 1985) (warning that "blue collar workers, yuppies, Rotarians, Eagle Scouts, and an endless variety of other classifications" could receive protection), *cert. denied*, 475 U.S. 1050 (1986).

163. *See* Alschuler, *supra* note 84, at 180-81.

164. *Id.* at 183.

165. *Id.*; *see* Hernandez v. New York, 500 U.S. 352, 355 (1991) (discussing its application to Latinos); Castaneda v. Partida, 430 U.S. 482, 494-96 (1977) (discussing its application to Mexican-Americans); United States v. Biaggi, 673 F. Supp. 96, 99-102 (E.D.N.Y. 1987) (discussing its application to Italians).

166. *See* United States v. Greer, 939 F.2d 1076, 1085-86 (5th Cir. 1991) (discussing its applications to Jews), *cert. denied*, 113 S. Ct. 1390 (1993).

167. J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1430 (1994); *see infra* text accompanying notes 208 - 220.

168. Barber v. Ponte, 772 F.2d 982, 999 (1st. Cir. 1985).

169. Batson v. Kentucky, 476 U.S. 79, 96 (1986).

170. Castaneda v. Partida, 430 U.S. 482, 494 (1977).

171. Hernandez v. New York, 500 U.S. 352 (1991).

172. *Id.* at 358.

173. *Id.* at 355-56.

translation of a principal witness's testimony.[174] The Supreme Court accepted the prosecution's explanation for striking the jurors, holding the prosecutors complied with equal protection requirements.[175] The challenge will not be considered unconstitutional based solely on its discriminatory impact.[176] Although the prosecutor's action may have had the effect of excluding Hispanics, the Equal Protection Clause is not violated absent a showing of discriminatory intent.[177]

Hernandez is important because it illustrates the Court's unwillingness to permit the expansion of *Batson* to categories other than race.[178] Justice Kennedy, writing for a six-person majority, implied this limitation by suggesting "proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis."[179] The Court also expressed its reluctance to overturn a trial court's findings of fact.[180] The *Batson* Court explained a finding of purposeful discrimination is a factual question to be determined by the trial court and is afforded great deference on appeal.[181] This is largely because such a finding will depend on evaluation of credibility.[182] The trial courts are in the best position to evaluate the prosecutor's state of mind based on demeanor and credibility.[183]

Courts have disagreed as to whether Italian-Americans constitute a cognizable racial group. In *United States v. Sgro*,[184] the First Circuit "assume[d] without deciding that the principles of *Batson* would extend to ethnic as well as racial constituencies."[185] The court found no evidence to support the defendant's contention that Italian-Americans were a distinctive ethnic group.[186] In *United States v. Biaggi*,[187] however, the court concluded the *Batson* Court intended cognizable racial groups to "include a variety of ethnic and ancestral groups subject to intentional discrimination, including Italian-Americans."[188]

In contrast, the First Circuit, in *United States v. Bucci*,[189] explained there was no showing that Italian-Americans were subject to discriminatory treatment.[190] The court reasoned, however, that *Batson's* specific reference to

---

174. *Id.* at 356-57.
175. *Id.* at 361.
176. *Id.* at 359.
177. *Id.* at 360 (citing Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-65 (1977)).
178. *Id.* at 371.
179. *Id.*
180. *Id.* at 372.
181. Batson v. Kentucky, 476 U.S. 79, 98 n.21 (1986) (citing Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985)).
182. *Id.*
183. Hernandez v. New York, 500 U.S. 352, 365 (1991) (citing Wainwright v. Witt, 469 U.S. 412, 428 (1985)).
184. United States v. Sgro, 816 F.2d 30 (1st Cir. 1987), *cert. denied*, 484 U.S. 1063 (1988).
185. *Id.* at 33.
186. *Id.*
187. United States v. Biaggi, 673 F. Supp. 96 (E.D.N.Y. 1987).
188. *Id.* at 102.
189. United States v. Bucci, 839 F.2d 825 (1st Cir.), *cert. denied*, 488 U.S. 844 (1988).
190. *Id.* at 833.

Casteneda[191] implied the *Batson* requirements applied to all ethnic and racial minorities that met the criteria.[192] The *Bucci* court also relied on the definition of an "identifiable" group as set out by the Supreme Court in *Hernandez v. Texas*:

> "Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. . . . When the existence of a distinct class is demonstrated, and it is further shown that the laws . . . single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated."[193]

Because the defendant did not offer a showing as to Italian-Americans, the defendant did not meet the *Batson* requirements.[194]

B. *Religion*

Recently, the Fifth Circuit applied the Supreme Court's interpretation of *Batson* in *Edmonson* to determine defendants could not have used their peremptory challenges to exclude jurors solely on their religious affiliation, even if they had known they were Jewish.[195] The court quoted *Edmonson*, "'[I]f a litigant believes that the prospective juror harbors . . . biases or instincts, they can be explored in a rational way . . . without the use of classifications based on ancestry or skin color.'"[196] The court concluded "*Batson*'s limitations on race, religion, and national-origin-based peremptory challenges" and its requirements that litigants utilizing such challenges provide a race-neutral justification applied in this case.[197] Thus, the defendant was not denied the right to an impartial jury because the trial court refused to require Jewish veniremen to identify themselves.[198]

---

191. *Id.* (citing Batson v. Kentucky, 476 U.S. 79, 96 (1986)) (citations omitted).

> To establish such a case, "the defendant must first show that he is a member of a cognizable racial group . . . and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. . . . [T]he defendant must [then] show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race."

Batson v. Kentucky, 476 U.S. at 96.

192. United States v. Bucci, 839 F.2d at 833.

193. *Id.* (quoting Hernandez v. Texas, 347 U.S. 475, 478 (1954)).

194. *Id.*; *see also* Murchu v. United States, 926 F.2d 50, 55 (1st Cir.) (holding the evidence was insufficient to conclude Irish-Americans were subjected to unequal treatment), *cert. denied*, 112 S. Ct. 99 (1991).

195. United States v. Greer, 939 F.2d 1076, 1085 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 1390 (1993).

196. *Id.* at 1086 (quoting Edmonson v. Leesville Concrete Co., 500 U.S. 614, 631 (1991)).

197. *Id.*

198. *Id.*

The Third Circuit avoided the issue of whether *Batson* extends to religious classifications. In *United States v. Clemmons*,[199] the court determined the religious issue could not properly be considered because it was not raised at the trial court.[200] The *Batson* claim focused on the prosecutor's challenge to venireman Balhadra Das, whom the prosecutor believed was "probably Hindu in religion."[201] The prosecutor explained, "Hindus tend . . . to have feelings a good bit different from ours about all sorts of things."[202] Moreover, the prosecutor excluded Das because he "may have religious beliefs that may affect his thinking."[203] In his concurrence, Judge Higginbotham commented that he found the "prosecutor's assertion fascinating."[204] One wonders whether the [prosecutor] has been equally suspicious of Catholics, Jews, Protestants, Muslims, Jehovah's Witnesses, or evangelical Christian sects because some of 'them' may have different beliefs from some of 'us'."[205] The prosecutor's comments indicate a bias against a venireperson because he believed that person was of a different religious affiliation and that this heritage would prevent him from impartially considering the government's case against the defendant—a proposition that has been rejected by *Batson* and its progeny.[206]

Although the Supreme Court has not specifically addressed whether *Batson* extends to discrimination based on religious affiliation, a synthesis of recent cases seems to indicate religious groups may be protected as well. The Court may attempt to bring various religious groups under the heading of "ancestry," thereby treating religion as "a surrogate for race under the equal protection analysis."[207] If religious affiliation requires strict scrutiny under the Equal Protection Clause, it may be difficult to justify affording protection to a classification based on race, and not one based on religion.

C. *Gender*

Prior to the Supreme Court's decision regarding gender in *J.E.B. v. Alabama* ex rel. *T.B.*[208], the Ninth Circuit held equal protection principles prohibited the prosecution's exercise of peremptory challenges based on a venireperson's gender.[209] Noting the Constitution tolerates classifications based on gender if those classifications are substantially related to an important governmental interest, the court found that striking potential jurors based on gender did not achieve the important government interest of an impartial jury.[210] Nor did

---

199. United States v. Clemmons, 892 F.2d 1153 (3d Cir. 1989), *cert. denied*, 496 U.S. 927 (1990).
200. *Id.* at 1158 n.6.
201. *Id.* at 1156.
202. *Id.*
203. *Id.*
204. *Id.* at 1160 n.2 (Higginbotham, J., concurring).
205. *Id.* (Higginbotham, J., concurring).
206. *See* Batson v. Kentucky, 476 U.S. 79, 89 (1986).
207. Hernandez v. New York, 500 U.S. 352, 371 (1991).
208. J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419 (1994).
209. United States v. De Gross, 913 F.2d 1417, 1421-23 (9th Cir. 1990).
210. *Id.* at 1422.

it substantially relate to any other government interests, such as "public confidence in the judicial system and the absence of community prejudice."[211] The court concluded "[g]ender bears no relationship to an individual's ability to participate on a jury," and further, it is a "stimulant to community prejudice which impedes fair treatment for women."[212]

The Fourth Circuit, however, refused to extend *Batson* beyond racial discrimination. In *United States v. Hamilton*,[213] the government explained it struck potential jurors not because they were black, but because they were female.[214] The court explained *Batson*'s intention was to prohibit the exercise of only peremptory challenges based on race.[215] The court distinguished *Hamilton* from *Taylor v. Louisiana* by stating that *Taylor* held the "systematic exclusion of women from jury panels violated the sixth and fourteenth amendments," while in *Hamilton* there was no claim women were systematically excluded from the venire.[216]

Although the Fourth Circuit had distinguished challenges based on race from those based on gender, the Supreme Court was able to see a connection between the two different challenges. In *J.E.B. v. Alabama* ex rel *T.B.*,[217] the Supreme Court determined *Batson* could be applied to gender because "gender, like race, is an unconstitutional proxy for juror competence and impartiality."[218] The purpose behind *Batson* would be frustrated if jurors were not provided the same protection against gender discrimination.[219] Acknowledging that gender may be used as a pretext for racial discrimination, the Court stated, "[a]llowing parties to remove racial minorities from the jury not because of their race, but because of their gender, contravenes well-established equal protection principles and could effectively insulate racial discrimination from judicial scrutiny."[220] Therefore, potential jurors may not be struck based on gender.

D. *Age*

The Supreme Court has not applied *Batson* to classifications based on age. Various circuits have implied a defendant's objection that a prosecutor has used peremptory challenges to discriminate on the basis of age would not raise a claim

---

211. *Id.*

212. *Id.* at 1423.

213. United States v. Hamilton, 850 F.2d 1038 (4th Cir. 1988), *cert. dismissed*, 489 U.S. 1094 (1989), *and cert. denied*, 493 U.S. 1069 (1990).

214. *Id.* at 1041.

215. *Id.* at 1042-43.

216. *Id.* at 1042 n.3.

217. J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419 (1994). The State of Alabama, on behalf of the mother of a minor child, filed a paternity suit against J.E.B. *Id.* The state used nine out of its ten peremptory challenges to remove all of the potential male jurors, resulting in an all-female jury. *Id.* at 1422.

218. *Id.* at 1430.

219. *Id.*

220. *Id.* The Court considered gender and race to be overlapping categories which may result in a juror being struck based on gender as a pretext for racial discrimination. *Id.* at 1430 & n.18.

under *Batson*. For example, the Third Circuit implied that using peremptory challenges to exclude jurors on account of their age is not prohibited by *Batson*.[221] The prosecutor explained he excluded young, single veniremen because the charge was for narcotics offenses, and the prosecutor believed they would be sympathetic to the defendant.[222] The court held these reasons were "logical in the context of a narcotics prosecution" and reasonably specific to exceed the justifications rejected in *Batson*.[223]

Similarly, the Seventh Circuit accepted a prosecutor's strike based on the age of the venireman.[224] The court recognized that youth had been held to be a sufficiently race-neutral explanation to support the government's use of the peremptory challenge.[225] The Fifth Circuit held the prosecutor articulated non-racial reasons, such as age, hairstyle, and dress in explaining the use of his peremptories to exclude jurors.[226] The court noted age and appearance have been recognized as legitimate reasons for peremptorily striking potential jurors.[227] A comprehensive reading of the cases, acknowledging the fact that classifications based on age only require a rational basis,[228] requires the conclusion that peremptory challenges based on age do not violate the *Batson* rule.

E. *Other Nonracial Groups*

Because states remain free to prescribe relevant qualifications of jurors provided they reflect a cross section of the community,[229] bans on peremptory challenges are unlikely to apply to classifications which are not suspect, such as occupation, education or wealth. In a Title VII case, the Eleventh Circuit upheld the defense counsel's explanation that he struck a school board employee based on his experience that school board employees were pro-labor and pro-employee.[230] In a Fifth Circuit case, the prosecutor struck a pipeline operator in a narcotics prosecution and offered as his justification that marijuana was some-

---

221. United States v. Clemons, 843 F.2d 741, 744-48 (3d Cir.), *cert. denied*, 488 U.S. 835 (1988).

222. *Id.* at 749.

223. *Id.* at 748.

224. United States v. Ferguson, 935 F.2d 862, 865 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 907 (1992).

225. *Id.*

226. United States v. Clemons, 941 F.2d 321, 324-25 (5th Cir. 1991).

227. *Id.* at 325; *see also* United States v. Hoelscher, 914 F.2d 1527, 1540 (8th Cir. 1990) (accepting explanation that juror was too young); United States v. Romero-Reyna, 889 F.2d 559, 560 (5th Cir. 1989) (accepting explanation regarding age); United States v. Terrazas-Carrasco, 861 F.2d 93, 94 (5th Cir. 1988) (holding valid reasons for exclusion from jury include "intuitive assumptions" based on age); Anaya v. Hansen, 781 F.2d 1, 3 (1st Cir. 1986) (stating young adults, those between 18 and 34, do not constitute a cognizable group so that their underrepresentation establishes a violation of the fair cross section requirement).

228. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313-14 (1976).

229. Carter v. Jury Comm'n, 396 U.S. 320, 332-33 (1970).

230. Barfield v. Orange County, 911 F.2d 644, 648 (11th Cir. 1990), *cert. denied*, 500 U.S. 954 (1991).

what prevalent among pipeline operators.[231] The court found this explanation sufficient to comply with *Batson*'s requirements.[232]

In *United States v. Briscoe*,[233] the prosecution feared a social worker who had worked with juvenile delinquents would tend to be sympathetic to young people engaging in criminal activities.[234] The court found the government did not exercise its peremptory challenges based on discriminatory considerations.[235] In ruling the government had provided a legitimate race neutral explanation for its peremptory challenge, the court emphasized *Batson*'s caution that the prosecutor's explanation need not rise to the level of a challenge for cause.[236]

In *Carter v. Jury Commission*,[237] the Court held statutory education requirements did not violate the equal protection right of jurors.[238] Most states require jurors to be United States citizens of a specified minimum age.[239] Some even require potential jurors be intelligent and well-informed.[240] Although there has been relatively little litigation regarding educational discrimination since *Batson*, a pre-*Batson* decision interpreting the Jury Selection Act of 1968 held the less educated were not a cognizable group.[241] The Ninth Circuit explained the less educated "are a diverse group, lacking in distinctive characteristics or attitudes which set them apart from the rest of society. They are of varying economic backgrounds and races, and . . . ages."[242] The court concluded this group could be sufficiently protected by other segments of the population.[243]

Similarly, statistical underrepresentation of people with lower incomes has been held not to violate the Sixth Amendment cross section requirement.[244] In addition, decisions upholding exclusions based on unemployment status seem to indicate strikes based on socioeconomic status are not prohibited.[245]

---

231. United States v. Romero-Reyna, 889 F.2d 559, 560-61 (5th Cir. 1989).

232. *Id.* at 561.

233. United States v. Briscoe, 896 F.2d 1476 (7th Cir.), *cert. denied*, 498 U.S. 863 (1990).

234. *Id.* at 1488.

235. *Id.* at 1487-88.

236. *Id.* at 1487; *see also* Anaya v. Hansen, 781 F.2d 1, 5-8 (1st Cir. 1986) (stating statistical underrepresentation of blue collar workers does not violate Sixth Amendment right to fair cross section).

237. Carter v. Jury Comm'n, 396 U.S. 320 (1970).

238. *Id.* at 332-33.

239. *Id.* at 333.

240. *Id.* (citations omitted).

241. United States v. Potter, 552 F.2d 901, 905 (9th Cir. 1977).

242. *Id.*

243. *Id.*; *see also* Anaya v. Hansen, 781 F.2d 1, 8 (1st Cir. 1986) (holding less educated people are not a cognizable group).

244. Sands v. Cunningham, 617 F. Supp. 1551, 1565 (D.N.H. 1985).

245. *See, e.g.*, Anaya v. Hansen, 781 F.2d at 5-6 (stating blue collar workers do not constitute a distinct group); United States v. Marcano, 508 F. Supp. 462, 469 (D.P.R. 1980) (deciding "persons of the working class or of lower socioeconomic status" are not a cognizable group); Figueroa v. Commonwealth of Puerto Rico, 463 F. Supp. 1212, 1214 (D.P.R. 1979) ("[T]he working class[es] [are] too ambiguous to support any finding of an identifiable class."). *But see* Cuidadanos Unidos de San Juan v. Hidalgo County Grand Jury Comm'rs, 622 F.2d 807, 819 (5th Cir. 1980) (holding "individual's youth or poverty bears no relation to his competency for grand

The precise scope of the requirements of *Batson* remains unresolved. All of these extensions, which are based on personal characteristics not related to the capacity for responsible jury service, are arguably within the logic of *Batson*. Practical considerations, however, prevent protected classifications to extend indefinitely. Although *Batson* addressed only racial discrimination, criminal defendants have attempted to expand its holding to nonracial groups. One message seems to penetrate the Court's opinions: The right of the peremptory challenge necessarily intersects with the right to equal protection. Thus, until the precise reach of *Batson* is determined, lower courts must be guided by prior decisions. Protection should extend to any group exhibiting a history of differential treatment under the laws. This determination seems to imply *Batson*'s limited racial analysis will provide protection to gender and ethnic groups likely to suffer discrimination.

V. WHAT IS TO BECOME OF THE PEREMPTORY CHALLENGE: SUBSTANCE WORTH PRESERVING?

> *Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or well-educated.*[246]

Given this traditional folklore surrounding the jury selection process, *Batson*'s attempts to reconcile the Equal Protection Clause and the peremptory challenge may be a slow, arduous battle. At first glance, these two concepts seem to be diametrically opposed. The Equal Protection Clause prohibits arbitrary classifications of human beings, and peremptory challenges are inherently arbitrary. What remains of the peremptory challenge is directly proportionate to how far *Batson* extends: The more protected categories are recognized, the more the peremptory challenge will resemble the challenge for cause. It seems nonsensical to limit *Batson* to cases of racial discrimination—and the Court has not done so. It has been argued, however, that although *Batson* may have brought "an end to the Supreme Court's formal approval of some racial discrimination by prosecutors," there is no escape from the inevitable conclusion that "[a]pplying the Equal Protection Clause to the jury selection process in the same way that the Court has applied it to other governmental activities would abolish the peremptory challenge altogether."[247] Admittedly, *Batson* is not the perfect solution. Its well-intentioned premise, however, may be sufficiently salvageable to avoid subscribing to the more radical positions proposed.[248]

---

jury service" and exclusion based on poverty violates equal protection right of jurors), *cert. denied*, 450 U.S. 964 (1981).

246. Batson v. Kentucky, 476 U.S. 79, 104 n.3 (1986) (Marshall, J., concurring) (citations omitted).

247. *See* Alschuler, *supra* note 84, at 169.

248. The extreme positions were advocated by Justice Marshall, Batson v. Kentucky, 476 U.S. 79, 105-08 (Marshall, J., concurring) and Chief Justice Burger and Justice Rehnquist, *id.* at 123-24 (Burger, C.J., dissenting), *id.* at 135-37 (Rehnquist, J., dissenting). Justice Marshall argued that only by banning peremptory challenges can discrimination in jury selection be eliminated. *Id.* at 107-08 (Marshall, J., concurring). Chief Justice Burger and Justice Rehnquist argued that race is

There have been various suggestions to amend the *Batson* analysis. Several scholars have proposed "a reduction in the number of peremptory challenges allowed to both the prosecutor and the defendant."[249] Because each allegedly discriminatory challenge constitutes a greater proportion of the prosecutor's available challenges, this reduces "the defendant's burden of proving a prima facie case."[250] While this translates into fewer opportunities to discriminate, it evades *Batson*'s intended purpose—to eradicate racial discrimination in jury selection. One proposed refinement is to "limit[] the number of the prosecutor's challenges to a fraction of the number of minority members on the venire."[251] By proportioning the number of peremptory challenges to the facts in the case, the prosecutor would not be able to create an all-white jury.[252]

If *Batson*'s mandate is "to confront and overcome [a party's] own racism on all levels,"[253] trial courts must more effectively scrutinize an explanation offered to rebut an alleged prima facie case of discrimination. Justice Marshall stated: "*Batson*'s greatest flaw is its implicit assumption that courts are capable of detecting race-based challenges to Afro-American jurors."[254] Recognizing the difficulty in assessing the intent behind peremptory challenges, one commentator suggested evaluating jurors' responses to questions designed to test:

> (a) any inclination a prospective minority juror might have to favor the defendant because of their shared race, (b) any feelings the prospective juror may have against the prosecution of members of her race for the crime charged, and (c) any other case-related basis articulated by the prosecutor on which the prosecutor planned to exercise peremptory challenges.[255]

This approach would obviate subjective, intuitive challenges and eliminate the need for trial judges to determine the sincerity of the offered justification.[256]

The first step toward an effective implementation of *Batson,* however, is a conscious effort by the lower courts to recognize the existence of racial discrimination in jury selection. When considering potentially discriminatory peremptory challenges, courts should apply the heightened scrutiny advocated by an equal protection analysis to groups demonstrating a history of disparate treatment. Courts should also consider statistical and anecdotal information of discrimination and extend *Batson*'s protection to ethnic origin and gender.

Juli Vyverberg

---

an acceptable means by which to determine bias. *Id.* at 123-24 (Burger, C.J., dissenting); *id.* at 135-37 (Rehnquist, J., dissenting).

249. David D. Hopper, *Batson v. Kentucky and the Prosecutorial Peremptory Challenge: Arbitrary and Capricious Equal Protection?*, 74 VA. L. REV. 811, 836 (1988).

250. *Id.* at 836-37.

251. *Id.* at 837.

252. *Id.*

253. Batson v. Kentucky, 476 U.S. 79, 106 (Marshall, J., concurring).

254. Wilkerson v. Texas, 493 U.S. 924, 928 (1989) (Marshall, J., dissenting).

255. Steven A. Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365, 1368-69 (1987).

256. *Id.* at 1369-70.