THE THREATENED FUTURE OF PEREMPTORY CHALLENGES—*Batson v. Kentucky**

I. INTRODUCTION

The United States Supreme Court has rendered numerous decisions in its effort to eliminate racial discrimination from the selection of juries.[1] In *Strauder v. West Virginia*,[2] an 1879 case, the Supreme Court first considered racial discrimination in jury composition. The Court held in *Strauder* that a black defendant was denied his fourteenth amendment right of equal protection when he was tried before a jury from which members of his race were purposefully excluded by statute.[3]

The next major decision in this area was in 1965, when the Court, in *Swain v. Alabama*,[4] announced a "systematic exclusion" test. The test provided that, to prove a violation of a defendant's right to equal protection, the defendant had the burden of showing that the prosecutor systematically used peremptory challenges over a period of time to exclude blacks from the jury.[5] Lower courts strictly interpreted the *Swain* "systematic exclusion" requirement,[6] and defendants found the burden virtually impossible to satisfy.[7]

Two federal appellate courts responded to the defendant's unwieldy burden by reasoning that the *Swain* rule did not apply to the fair cross-section requirement of the sixth amendment.[8] Other courts declined to adopt this theory and strictly followed the *Swain* requirements.[9]

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[1] The Supreme Court has consistently held that defendants are denied equal protection if they are indicted by a grand jury or tried by a petit jury from which members of their race have been excluded. *See, e.g.*, Hernandez v. Texas, 347 U.S. 475 (1954); Norris v. Alabama, 294 U.S. 587 (1935); Carter v. Texas, 177 U.S. 442 (1900); Neal v. Delaware, 103 U.S. 370 (1880); Strauder v. West Virginia, 100 U.S. 303 (1879).

[2] 100 U.S. 303 (1879).

[3] *Id.* at 310.

[4] 380 U.S. 202 (1965).

[5] *Id.* at 222-24.

[6] *See, e.g.*, United States v. Jenkins, 701 F.2d 850, 859-60 (10th Cir. 1983); United States v. Boykin, 679 F.2d 1240, 1245 (8th Cir. 1982); United States v. Pearson, 448 F.2d 1207, 1213-18 (5th Cir. 1971); Jackson v. State, 245 Ark. 331, 336, 432 S.W.2d 876, 878 (1968); State v. Shaw, 284 N.C. 366, 200 S.E.2d 585 (1973).

[7] *See, e.g.*, McCray v. Abrams, 750 F.2d 1113, 1120 n.2 (2d Cir. 1984).

[8] Brooker v. Jabe, 775 F.2d 762 (6th Cir. 1985); McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984).

[9] *See, e.g.*, United States v. Childress, 715 F.2d 1313, 1318 (8th Cir. 1983) (en banc), *cert. denied*, 464 U.S. 1063 (1984); United States v. Whitfield, 715 F.2d 145, 146-47 (4th Cir. 1983).

In *Batson v. Kentucky*,[10] the Court addressed the discord regarding the requirements for a successful appeal based on the alleged discriminatory use of peremptory challenges. The *Batson* Court modified *Swain* by allowing the defendant to establish a prima facie case of discrimination in the exercise of peremptory challenges without going beyond the facts of his case.[11] This Note will review the Court's decisions in peremptory challenge cases and assess the *Batson* decision with respect to the principles enumerated in earlier cases.

II. HISTORY

A. Discrimination in Jury Selection

Discrimination in petit jury selection may occur during three distinct phases,[12] when: (1) the legislature establishes juror qualifications; (2) qualified individuals are selected for the master jury list; and (3) the petit jury panel (venire) is selected from the master list[13] through the exercise of peremptory challenges.[14]

The first time the Court addressed a jury selection discrimination issue, it struck down a West Virginia law depriving defendants of equal protection in the first phase of the process.[15] In *Strauder v. West Virginia*,[16] the challenged statute provided that "[a]ll white male persons who are twenty-one years of age and who are citizens of this State shall be liable to serve as jurors . . . ."[17] The statute deprived the defendant of equal protection under the fourteenth amendment[18] through its exclusion of black men.[19] States complied with *Strauder* by including black citizens on the list of potential jurors. In some states, however, their names were marked or listed separately so the names of black and white individuals were readily distinguishable.[20] Thus, although *Strauder* remedied discrimination in the first phase, controversy arose when all-white juries were selected as a result of abuse in the second phase.

Responding to abuse in the second phase of the selection process,

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[10] 106 S. Ct. 1712 (1986).

[11] *Id.* at 1723.

[12] *See* Recent Development, *Racial Discrimination in Jury Selection—Limiting the Prosecutor's Right of Peremptory Challenges to Prevent a Systematic Exclusion of Blacks from Criminal Trial Juries*, 41 ALB. L. REV. 623, 624 (1977).

[13] *Id.*

[14] *See id.*

[15] *Strauder*, 100 U.S. at 303.

[16] 100 U.S. 303 (1879).

[17] *Id.* at 305.

[18] *Id.* at 310.

[19] Women were not yet eligible to vote in 1880, so only race became an issue. The statute specified "white" males, thereby excluding blacks. *Id.*

[20] *See, e.g.*, Alexander v. Louisiana, 405 U.S. 625 (1972); Arnold v. North Carolina, 376 U.S. 773 (1964); Avery v. Georgia, 345 U.S. 559 (1953).

the Court noted that the Constitution requires courts to look beyond the statutes to actual procedures used in excluding persons from the venire.[21] The Court found unconstitutional the practice of listing potential jurors by race.[22] As a result, blacks were included in the venire, however, they could still be struck by the prosecutor's exercise of peremptory challenges. Discrimination had, therefore, been effectively banned in the first two stages of jury selection, but it still remained a potential problem in the third.

Prospective jurors may be removed from the venire in the third stage by two types of challenges, which are available to both the prosecution and the defense. The first, challenges "for cause," are used under specified circumstances that indicate the juror would probably be biased.[23] The second, peremptory challenges, have been recognized as an important defense tool,[24] although nothing in the United States Constitution requires Congress or the states to provide for their use.[25] This challenge allows attorneys to eliminate those individuals they believe might be partial, but who are not articulably "biased" for purposes of a "for cause" challenge. The goal of peremptory challenges is to ensure an impartial jury.[26]

Traditionally, peremptory challenges have not required a stated reason or inquiry and were not subject to the court's control.[27] The challenge was exercised "for any reason at all, as long as that reason is related to [the attorney's] view concerning the outcome" of the case.[28] Attorneys were allowed independent discretion because it was often difficult to know or verbalize their belief that an individual may be biased. They were not required to state any reason for exercising the peremptory challenge, therefore, it provided means to discriminate. When systematically used, the peremptory challenge became a tool "capable of obstructing the sixth amendment's guarantee of an impartial jury,"[29] the very problem it was designed to eliminate.[30] Such use also deprived the defendant of equal protection.[31]

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[21] Norris v. Alabama, 294 U.S. 587, 589 (1935); *see also* Hernandez v. Texas, 347 U.S. 475, 478-79 (1954).

[22] *See Alexander*, 405 U.S. at 630; *Arnold*, 376 U.S. at 774; *Avery*, 345 U.S. at 562.

[23] *See* Swain v. Alabama, 380 U.S. 202, 220 (1965).

[24] Pointer v. United States, 151 U.S. 396, 408 (1894).

[25] *See* Stilson v. United States, 250 U.S. 583, 586 (1919); *see also* McCray v. Abrams, 750 F.2d 1113, 1130 (2d Cir. 1984).

[26] An impartial jury is one that reaches its decision based on the evidence, rather than on subjective bias. *Swain*, 380 U.S. at 219.

[27] Hayes v. Missouri, 120 U.S. 68, 70 (1887).

[28] United States v. Robinson, 421 F. Supp. 467, 473 (D. Conn. 1976).

[29] Brooker v. Jabe, 775 F.2d 762, 771 (6th Cir. 1985).

[30] *Id.* In an ideal situation, the peremptory challenge will be exercised by both sides to eliminate those individuals thought to be partial to the other side. The resulting jury will then be composed of the least biased prospective jurors.

[31] *See Swain*, 380 U.S. at 204.

B. The Equal Protection Ban on Discrimination

The Supreme Court attempted to dissuade the discriminatory use of peremptory challenges on equal protection grounds in *Swain v. Alabama*.[32] The Court held that the defense has the burden of proving that the prosecutor's abuse of peremptory challenges violated equal protection.[33] Under *Swain*, the presumption is that "the prosecutor is using the State's challenges to obtain a fair and impartial jury,"[34] and "[t]he presumption is not overcome . . . by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes."[35] The Court, however, noted in *Swain*:

> [W]hen the prosecutor, in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors 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.[36]

These guidelines developed into a strict set of requirements, with the burden on the defense to show long-term, systematic discrimination in the exercise of peremptory challenges.[37] Few defendants were able to prove discrimination under the *Swain* interpretation,[38] therefore, some state courts began to explore ways to circumvent the strict requirements.[39]

C. The Response to Swain

Courts, finding the *Swain* equal protection guidelines burdensome for the defendant, turned to the fair cross-section requirement. Although a defendant is not entitled to have members of his race represented on the grand or petit juries,[40] the sixth amendment entitles a defendant to a jury drawn from a representative cross-section of the community.[41] In *Duncan v. Louisiana*,[42] decided three years after *Swain*, the Court held that the sixth amendment right to a jury

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[33] 380 U.S. 202 (1965).
[33] *See id.* at 226.
[34] *Id.* at 222.
[35] *Id.*
[36] *Id.* at 223.
[37] *See, e.g.*, United States v. Jenkins, 701 F.2d 850, 859-60 (10th Cir. 1983); United States v. Boykin, 679 F.2d 1240, 1245 (8th Cir. 1982).
[38] *See* McCray v. Abrams, 750 F.2d 1113, 1120 n.2 (2d Cir. 1984).
[39] *See, e.g.*, People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978); Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979).
[40] Martin v. Texas, 200 U.S. 316, 317 (1906).
[41] *See* Taylor v. Louisiana, 419 U.S. 522, 528 (1975).
[42] 391 U.S. 145 (1968).

trial is binding on the states through the fourteenth amendment.[43] Seven years later, in *Taylor v. Louisiana*,[44] the Court held that a fair cross-section of the community on venires, panels, or lists from which the petit jury is drawn, is essential under the sixth amendment.[45]

Two federal appellate courts and some state courts found the *Duncan* and *Taylor* decisions helpful in avoiding the strict requirements of *Swain*. These courts held that the use of peremptory challenges to strike black jurors in a particular case violated the sixth amendment.[46] Thus, they were able to avoid the *Swain* standards.

In *McCray v. Abrams*,[47] for example, the Second Circuit Court of Appeals noted that it could not decide the case on equal protection principles, but that *Swain* did not immunize peremptory challenges from all other federal constitutional inquiry.[48] The *McCray* court also pointed out that the sixth amendment right to an impartial jury differs from equal protection because it exists in all criminal prosecutions, and can be violated and successfully challenged on the basis of actions in a particular case.[49] Justices Marshall and Brennan dissented from the Court's denial of certiorari in *McCray* on the basis that *Swain* was decided before the sixth amendment was applied to the states through the fourteenth amendment.[50]

In *Brooker v. Jabe*,[51] the Sixth Circuit Court of Appeals noted that, although it disagreed with *Swain*, it was required to follow the Supreme Court's authority.[52] The court also pointed out, however, that because the sixth amendment was not applicable to the states at the time *Swain* was decided, *Swain* does not exempt peremptory challenges from review under the sixth amendment.[53] The *Brooker* court, concerned about the use of peremptory challenges in the composition of the petit jury, noted that the resulting jury may be biased.[54] An impartial jury guards against the exercise of arbitrary power and maintains public confidence in the fairness of the crimi-

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[43] *Id.* at 149.

[44] 419 U.S. 522 (1975).

[45] *Id.* at 526, 530.

[46] *See, e.g.*, Brooker v. Jabe, 775 F.2d 762 (6th Cir. 1985); McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984). The Supreme Courts of California and Massachusetts paved the way for the *Brooker* and *McCray* decisions by finding that their state constitutions prohibited the use of peremptory challenges to exclude members of racial, ethnic, and religious groups from the jury. *See* People v. Wheeler, 22 Cal. 3d 258, 283, 583 P.2d 748, 766, 148 Cal. Rptr. 890, 907 (1978); Commonwealth v. Soares, 377 Mass. 461, 491, 387 N.E.2d 499, 518, *cert. denied*, 444 U.S. 881 (1979).

[47] 750 F.2d 1113 (2d Cir. 1984).

[48] *Id.* at 1124.

[49] *Id.* at 1130-31.

[50] McCray v. New York, 461 U.S. 961, 967 (1983) (Marshall & Brennan, JJ., dissenting).

[51] 775 F.2d 762 (6th Cir. 1985).

[52] *Id.* at 767.

[53] *Id.* The Court applied the sixth amendment to the states in 1968. *Duncan*, 391 U.S. at 149. *Swain* was decided three years earlier in 1965.

[54] *Brooker*, 775 F.2d at 771.

nal justice system.[55] The *Brooker* court concluded that, "not only the jury list and the members of the venire, but also each individual criminal petit jury must be the product of selection methods that provide a fair possibility for obtaining a representative cross-section of the community."[56]

The California courts also chose to circumvent the *Swain* rule. In *People v. Wheeler*,[57] the California Supreme Court stated that challenging group members because of fear of their bias frustrates the main goal of the fair cross-section requirement.[58] Although the defendant is not entitled to a jury that reflects the proportional racial make-up of society,[59] the defendant is entitled to demand that the state not deliberately and systematically deny members of his race the right to participate as jurors.[60] Excluding group members upsets the demographic balance and frustrates the purpose of the cross-section requirement—"to achieve an overall impartiality by allowing the interaction of the diverse beliefs and values the jurors bring from their group experiences."[61]

The *Brooker* and *Wheeler* courts set forth tests, similar to the one later adopted in *Batson*, under which the court must first presume that both the prosecuting and defense attorneys are exercising the peremptory challenges in a nondiscriminatory manner.[62] The party asserting the improper use of the peremptory challenges must establish a prima facie case that a cognizable community group was excluded. Further, the party must demonstrate a substantial likelihood that the challenges leading to exclusion were made on the basis of the prospective juror's group affiliation, rather than on his ability to decide the case on the basis of evidence presented.[63] Once these have been shown, the burden shifts. If the other party cannot rebut the allegations, the court must declare a mistrial and quash the jury.[64] The *Brooker* and *Wheeler* decisions helped lay the groundwork for *Batson*, although the Supreme Court decided *Batson* on equal protection grounds,[65] not on the issue of the defendant's right to trial by an impartial jury.

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[55] *Id.* at 770.

[56] *Id.* at 770-71.

[57] 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

[58] *Id.* at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902.

[59] Akins v. Texas, 325 U.S. 398, 403 (1945) (quoting Virginia v. Rives, 100 U.S. 313, 322-23 (1880)); *see also* Thomas v. Texas, 212 U.S. 278, 282 (1909).

[60] *See* Alexander v. Louisiana, 405 U.S. 625, 628-29 (1972).

[61] *Wheeler*, 22 Cal. 3d at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902.

[62] *See Brooker*, 775 F.2d at 772; *Wheeler*, 22 Cal. 3d at 278, 583 P.2d at 762, 148 Cal. Rptr. at 904.

[63] *See Brooker*, 775 F.2d at 773; *Wheeler*, 22 Cal. 3d at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905.

[64] *See Brooker*, 775 F.2d at 773; *Wheeler*, 22 Cal. 3d at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905.

[65] *Batson*, 106 S. Ct. at 1716 n.4.

III. *Batson v. Kentucky*

A. Facts and Case History

Batson, a black defendant, was indicted in Kentucky for second-degree burglary and receipt of stolen goods. The prosecutor exercised his peremptory challenges to strike each of the four black persons from the venire, and an all-white jury resulted. The defense moved to discharge the jury before it was sworn on the ground that the removal of the black veniremen violated the defendant's rights to a jury drawn from a fair cross-section of the community under the sixth and fourteenth amendments, and to equal protection under the fourteenth amendment. The trial court denied the motion, reasoning that the cross-section requirement applied only to the selection of the venire and not to the selection of the petit jury.[66]

After being convicted by the jury on both counts, the petitioner urged the Supreme Court of Kentucky to hold that the prosecutor's use of the peremptory challenges violated his right to a jury drawn from a cross-section of the community.[67] The defendant conceded that *Swain* foreclosed an equal protection claim due to the lack of a long "pattern" of discriminatory conduct, but contended that a sufficient "pattern" existed in his case alone.[68] The Supreme Court of Kentucky affirmed the convictions, refusing to adopt the "fair cross-section" decisions of other states.[69] The United States Supreme Court, in an opinion written by Justice Powell, reversed the convictions.[70]

B. United States Supreme Court

The Court's majority announced the rule that, in order to establish an equal protection violation, it is sufficient for the defendant to show that the prosecutor discriminatorily used peremptory challenges in the defendant's particular case.[71] The Court decided the case on equal protection grounds,[72] noting that a state's privilege to strike individual jurors with peremptory challenges is subject to equal protection requirements.[73] The Court declined, however, to

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[66] *Id.* at 1715.

[67] *Id.* He also urged them to find a violation under section 11 of the Kentucky Constitution. *Id.*

[68] *Id.*

[69] *Id.* at 1715-16.

[70] *Id.* at 1725.

[71] *Id.* at 1723.

[72] *Id.* at 1716 n.4. Batson's attorney relied on the sixth amendment, not equal protection. *See id.* at 1731 (Burger, C.J., dissenting).

[73] *Id.* at 1718. In Hill v. Texas, 316 U.S. 400 (1942), the Court noted that the fourteenth amendment protects the defendant throughout the proceedings. *Id.* at 406. That

decide whether the Constitution limits the defense counsel's exercise of peremptory challenges.[74]

Recognizing the lower court interpretations of *Swain*, requiring proof of long-term, systematic exclusion to establish an equal protection violation, the Court reasoned this interpretation placed a "crippling burden of proof" on defendants.[75] The *Batson* rule is designed to relieve this burden. To support its new rule, requiring evidence only from the defendant's case, the Court relied on one of its earlier cases that had found a prima facie case of purposeful discrimination in the composition of the venire from which the jury was drawn.[76] Evidentiary requirements that " 'several must suffer discrimination' before one could object . . . would be inconsistent with the promise of equal protection to all."[77] The Court then listed the facts the defendant must show to establish a prima facie case of purposeful discrimination in the selection of the petit jury.[78]

Under *Batson*, the defendant must first establish he is a "member of a cognizable racial group," and that the prosecutor has exercised peremptory challenges to remove members of the defendant's race from the venire.[79] The Court noted that the defendant may rely on the fact that peremptory challenges permit "those to discriminate who are of a mind to discriminate,"[80] and that proof of systematic exclusion might raise an inference of purposeful discrimination.[81] "Finally, the defendant must show that these facts and any other relevant circumstances [if any] raise an inference that the prosecutor used [the peremptory challenges] to exclude the veniremen from the petit jury on account of their race."[82]

If the defendant establishes a prima facie case, the burden shifts to the state to present a neutral explanation for eliminating the black jurors.[83] The Court stated that the prosecutor's explanation need not be as precise as the justification required for challenges "for cause." It is not enough, however, for the prosecutor to simply state that in his opinion the individuals he excused would have been partial to the defendant because of their race.[84] The Court re-

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includes challenging potential jurors. "[T]he State may not draw up its jury lists pursuant to neutral procedures but then resort to discrimination at 'other stages in the selection process.' " *Batson*, 106 S. Ct. at 1727-28 (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).

[74] *Batson*, 106 S. Ct. at 1718 n.12. This issue was not properly before the Court.

[75] *Id.* at 1720-21.

[76] *Id.* at 1722. *See* Whitus v. Georgia, 385 U.S. 545 (1967); *see also* Castaneda v. Partida, 430 U.S. 482 (1977); Washington v. Davis, 426 U.S. 229 (1976); Alexander v. Louisiana, 405 U.S. 625 (1972).

[77] *Batson*, 106 S. Ct. at 1722 (quoting McCray v. New York, 461 U.S. 961, 965 (1983) (Marshall, J., dissenting)).

[78] *Id.* at 1723.

[79] *Id.*

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

[81] *Id.*

[82] *Id.* The court advised the trial courts to examine all relevant circumstances in deciding whether a defendant has made a sufficient showing. *Id.*

[83] *Id.*

[84] *Id.*

manded the case for further proceedings consistent with its opinion.[85]

Four concurring opinions, in which five justices participated, were filed in *Batson*;[86] two justices dissented.[87] In his concurring opinion, Justice Marshall cited the dissent in *Swain* that stated: "Were it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former."[88] Although he concurred, Justice Marshall would abolish the challenge completely for both the state and the defendant rather than attempt to limit discrimination by specifying rules which people "of a mind to discriminate" can circumvent.[89]

IV. ANALYSIS

The *Batson* decision is consistent with the Court's holding in *Village of Arlington Heights v. Metropolitan Housing Corp.*[90] One of the most important propositions articulated in *Arlington Heights* was that an equal protection violation does not require a consistent pattern of racial discrimination.[91] Rather, a single act is not "immunized by the absence of such discrimination in the making of other comparable decisions."[92]

In meeting the requirements for establishing equal protection violations based on racial discrimination, the first step for the defendant is that he must be a member of a "cognizable racial group," and the prosecutor must have used peremptory challenges to excuse members of that group from his jury.[93] This step is a significant change from the proposition announced in the *Swain* line of cases. The *Swain* Court noted that deliberately denying blacks the right to participate as jurors violated equal protection,[94] yet the decision allowed the prosecutor in any given case to exclude blacks if he thought that they would be partial to the black defendant, even if that belief was based on their shared race.[95] This type of activity

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[85] *Id.* at 1725.

[86] Justices White, Marshall, Stevens, Brennan and O'Connor concurred with the majority opinion.

[87] Chief Justice Burger and Justice Rehnquist dissented.

[88] *Batson*, 106 S. Ct. at 1726, 1728 (Marshall, J., concurring) (quoting *Swain*, 380 U.S. at 244 (Goldberg, J., dissenting)).

[89] *See id.* at 1729.

[90] 429 U.S. 252 (1977).

[91] *Id.* at 266 n.14.

[92] *Id.*

[93] *Batson*, 106 S. Ct. at 1723.

[94] *Swain*, 380 U.S. at 203-04.

[95] *Id.* at 220-22. The *Swain* Court felt that "[t]o 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." *Id.* at

was actually insulated from inquiry because the peremptory challenges exercised in a particular case were presumed valid.[96]

Batson, on the other hand, specifically holds that the prosecutor may not rebut the defendant's prima facie case merely by explaining that he challenged the jurors on his intuition or his assumption that they would be partial to the defendant because of their shared race.[97] "The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the juror's race."[98] Although the Court has altered its position, it downplays this change by stating in the first line of the opinion that it will "reexamine" the *Swain* decision only with respect to the "evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection" by the state's use of the peremptory challenge.[99] The inconsistent aspects of *Swain* are overruled in a footnote.[100] In addition to lessening the defendant's evidentiary burden, the Court abandoned a fundamental principle of peremptory challenges—that they may be exercised without a stated reason.[101] Thus, the Court has severely limited the prosecution's ability to challenge jurors. The prosecutor must now state a reason for peremptory challenges on the record once the defendant makes a prima facie showing that they were based on racial grounds.[102]

The Court provides few guidelines for the adequate responses. The reason stated need not rise to the level of specificity required for challenges "for cause," but the prosecutor may not rebut the discrimination claim by merely stating that he did not have discriminatory motives, or that he used good faith.[103] The Court has opened the door to a grey area. In many situations, prosecutors may have a difficult time justifying their decisions to exercise peremptory challenges. The trial court may have to question them until they give an acceptable explanation. This may prompt some prosecutors to come up with a set of "canned" responses.

Courts will also need to determine the steps to be followed after a defendant's timely objection. The *Batson* Court specifically declined to rule on this issue because of the "variety of jury selection practices followed in our state and federal trial courts."[104] Courts will probably require the prosecutor to come forward on the record with evidence of acceptable reasons.

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[96] *Id.* at 222.

[97] *Batson*, 106 S. Ct. at 1723.

[98] *Id.*

[99] *Id.* at 1714.

[100] *Id.* at 1725 n.25.

[101] *Swain*, 380 U.S. at 220.

[102] *Batson*, 106 S. Ct. at 1723.

[103] *Id.*

[104] *Id.* at 1724 & n.24.

Furthermore, when an individual court finds a violation, it will need to determine whether to dismiss the venire and select a new jury from a new panel, or to disallow the discriminatory challenges and continue with those jurors reinstated.[105]

Judges should require attorneys to exercise peremptory challenges at a side bar. This practice would allow the defense attorney to immediately raise and discuss the issue of discrimination before the court without alerting the potential jurors. If the court finds a prima facie case of discrimination and the prosecutor cannot adequately rebut it, the court could disallow the challenge. This procedure would save time and allow the court to continue with jury selection without being required to select the jury from a new venire.

Batson applies only to race discrimination.[106] It should, however, be extended to other identifiable groups. The Court in *Swain* noted that the "constitutional command forbidding intentional exclusion . . . applies to any identifiable group in the community which may be the subject of prejudice."[107] In *Hernandez v. Texas*,[108] the Court recognized that, because community prejudices change, when the existence of a distinct "class is demonstrated, and it is further shown that the laws, as written or applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated."[109] The California courts, since the *Wheeler* fair cross-section decision, have found Hispanics[110] and black females[111] to constitute cognizable groups. The equal protection clause is still violated if women or members of a religion or some other constitutionally protected class are intentionally excluded.

The limitation on the acceptable grounds for exercising peremptory challenges is fair only if it is to be equally applied to both the prosecution and the defense. "Our criminal justice system 'requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.' "[112] If peremptory challenges continue to be abused, the Court may be forced to eliminate the peremptory challenge in order to protect defendants and society from discrimination. Further, if the peremptory challenge is taken from the prosecution, fairness would mandate that it be taken from the defense. The defendant would ultimately be harmed more than the

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[105] *Id.*

[106] *Id.* at 1723. The Court requires the defendant to show that he is a member of a cognizable *racial* group, not just a cognizable group. *Id.*

[107] *Swain*, 380 U.S. at 205 (citing Hernandez v. Texas, 347 U.S. 475 (1954)).

[108] 347 U.S. 475 (1954).

[109] *Id.* at 478.

[110] *See* People v. Trevino, 39 Cal. 3d 667, 676, 704 P.2d 719, 721, 217 Cal. Rptr. 652, 654 (1985).

[111] *See* People v. Motton, 39 Cal. 3d 596, 605, 704 P.2d 176, 181, 217 Cal. Rptr. 416, 421 (1985).

[112] *Batson*, 106 S. Ct. at 1729 (Marshall, J., concurring) (quoting Hayes v. Missouri, 120 U.S. 68, 70 (1887)).

prosecution. Ironically, the peremptory challenge, designed to ensure a fair cross-section, may need to be entirely abolished to ensure fairness.

The majority opinion did not mention whether the decision should be applied retroactively or prospectively. Of the four concurring opinions, only those of Justices White and O'Connor specifically stated that it should not apply retroactively.[113] Chief Justice Burger, joined by Justice Rehnquist, agreed with this analysis in their joint dissenting opinion.[114] Lower courts quickly became split on the issue of *Batson's* retroactivity.[115] The Supreme Court, in *Allen v. Hardy*,[116] later decided that *Batson* should not be applied retroactively on collateral review of convictions that became final before *Batson* was announced.[117] In that decision, the Court explained that *"Batson* not only overruled the evidentiary standard of *Swain*, it also announced a new standard that significantly changes the burden of proof imposed on both the defense and the prosecution."[118] The Supreme Court then granted certiorari in *Griffith v. Kentucky*[119] and *Brown v. United States*[120] to consider whether *Batson* should be applied retroactively in cases pending on direct appeal.

After discussing the three criteria enumerated in *Solem v. Stumes*,[121] the Court, in *Griffith*, held that *Batson* should be applied retroactively to cases pending on direct review when *Batson* was decided.[122] The retroactive application was not surprising given two recent Supreme Court decisions.

In *Vasquez v. Hillery*,[123] decided three months before *Batson*, the Court held that discrimination in grand jury selection required reversal of a murder conviction entered twenty-three years earlier. Justice Marshall's majority opinion noted that:

> The overriding imperative to eliminate this systematic flaw [discrimination] in the charging process, as well as the difficulty of assessing its effect on any given defendant, requires our continued adherence to a rule of mandatory reversal.[124]

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[113] *Id.* at 1726, 1731.
[114] *Id.* at 1741 (Burger, C.J., dissenting).
[115] *Compare* United States v. David, 803 F.2d 1567 (11th Cir. 1986) (retroactive application) *with* United States v. Wilson, 806 F.2d 171 (8th Cir. 1986) (prospective application). *See also* People v. Johnson, 148 Ill. App. 3d 163, 489 N.E.2d 816 (1986) (retroactive application to cases pending on direct review); State v. Jackson, 317 N.C. 1, 343 S.E.2d 814 (1986) (refusing to apply *Batson* retroactively).
[116] 106 S. Ct. 2878 (1986).
[117] *Id.* at 2880. The Court explained that " '[b]y final we mean where the judgment was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before our decision in' Batson v. Kentucky." *Id.* (quoting Linkletter v. Walker, 381 U.S. 618, 622 n.5 (1965)).
[118] *Id.* at 2881.
[119] 106 S. Ct. 2274 (1986).
[120] 106 S. Ct. 2275 (1986).
[121] 465 U.S. 638 (1984).
[122] 107 S. Ct. 708, 716 (1987).
[123] 106 S. Ct. 617 (1986).
[124] *Id.* at 624.

The *Vasquez* Court reasoned that the rule requiring mandatory reversal was not "unworkable, or otherwise legitimately vulnerable to serious reconsideration."[125] Certainly, discrimination in the composition of the petit jury, which actually decides the guilt of a defendant, is even more intolerable than grand jury discrimination.

Furthermore, in *Shea v. Louisiana*,[126] a 1985 case, the Court found that the application:

> [O]f a new rule of law to cases pending on direct review is necessary in order for the Court to avoid being in the position of a super-legislature, selecting one of several cases before it to use to announce the new rule and then letting all other similarly situated persons be passed by unaffected and unprotected by the new rule.[127]

The Court's decisions in *Griffith v. Kentucky* and *Brown v. United States* promote this theory.

V. CONCLUSION

The *Batson* decision modifies the necessary elements to prove an equal protection violation through the use of peremptory challenges. It also limits the prosecutor's right to make peremptory challenges.

Past abuses of the peremptory challenge have led the Court to this decision. Prosecutors will now be required to justify their exercise of the challenge when the defendant makes the requisite prima facie showing of discrimination. As a result, peremptory challenges in these cases are now similar to challenges "for cause."

Regardless of these rules, those who wish to discriminate will often be able to find the adequate words justifying their actions. Courts now face a period of establishing guidelines to avoid the grey areas that now exist in determining whether violations have occurred. This may require more than simply listening to the prosecutor's stated reasons. Judges will probably need to use "intuition" to determine whether a challenge in a given case was racially motivated. Peremptory challenges were designed to allow attorneys to exercise intuitive judgment—now these judgments rest with the court.

Lower courts will have to clarify the standards regarding the prosecutor's acceptable reasons for striking black jurors once the defendant establishes a prima facie case. Guidelines and rules will need to be clear to avoid potential abuses that may result from the testing of the boundaries. Otherwise, the Court will have to entirely eliminate the peremptory challenge.

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[125] *Id.* at 625.
[126] 105 S. Ct. 1065 (1985).
[127] *Id.* at 1069. *See also* Desist v. United States, 394 U.S. 244 (1969).