# *BATSON v. KENTUCKY*: A PROMISE UNFULFILLED

**The Honorable Theodore McMillian***
**Christopher J. Petrini****

## I. INTRODUCTION: DEFINING THE PROBLEM

Good afternoon, ladies and gentlemen. I want to thank "Harmony in a World of Difference" and the UMKC Continuing Legal Education Program for the invitation to address this distinguished group. Harmony in a World of Difference and organizations of its type are important to promoting justice and achieving racial understanding.

I have been asked to discuss the importance and implications of *Batson v. Kentucky*,[1] a 1986 United States Supreme Court case which held that a prosecutor's use of peremptory challenges to exclude potential jurors solely because of their race violates the equal protection clause of the fourteenth amendment.

The importance of a fair, impartial jury in criminal trials cannot be overstated. In my career, I have participated in and observed the criminal trial process as a prosecutor, a defense attorney, a trial judge, a state appellate judge and, during the last eleven years, as a federal appellate judge. I have also personally experienced the indignities and injustice of discrimination and segregation. In *Batson v. Kentucky*, the Supreme Court attempted to accommodate the goals of empaneling an impartial jury and eradicating discrimination in jury selection.

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Judge McMillian was born January 28, 1919, in St. Louis, Missouri. He was educated at Lincoln University (B.S., 1941) and St. Louis University School of Law (J.D., 1949, first in class). Judge McMillian served in the United States Army Signal Corps from 1942 to 1946 where he attained the rank of Lieutenant. He married Minnie E. Foster on December 8, 1941.

Over the years Judge McMillian has served as a faculty member, associate professor or lecturer at the following colleges and universities: St. Louis University Law School (1957 to 1972); University of Missouri at St. Louis (1968 to 1978); Webster College (1977 to 1983); National College of Juvenile Justice at the University of Nevada (1972 to 1978); and National College of State Trial Judges at the University of Nevada at Reno (1964 to 1977).

Judge McMillian is a present member of Phi Beta Kappa and Alpha Sigma Nu, the National Jesuit Honor Society. He has received the Alumni Merit Award from St. Louis University; the Award of Honor in the Jurist Division from the St. Louis Lawyers Association; a Doctor of Humanities from Lincoln University of Jefferson City; a Doctor of Humanities from the University of Missouri at St. Louis; and the Herbert Harley Award from the American Judicature Society.

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1. 476 U.S. 79 (1986).

When a prosecutor is allowed to exercise his peremptory challenges to excuse prospective jurors solely because of their race, several harms result. First, without the broad range of social experiences often found in a racially and ethnically diverse group, juries may be ill-equipped to evaluate the facts presented. For example, a minority defendant may be prejudiced because the all-white jury simply does not understand the defendant's demeanor or the language used in important testimony. Misunderstanding important testimony can create the opportunity for unconscious prejudice.[2]

Secondly, when potential minority jurors are excluded from juries because of their race, those excluded are deprived of their basic democratic right to participate in the community's administration of justice. Along with the right to vote, participation on a jury is one of the most fundamental ways that an individual citizen can participate in democratic processes.[3] Participation on a jury can be an empowering experience, especially for minorities who have been subjected to racial discrimination. One southern black who had grown up under segregation described being called for jury duty as "one of the proudest moments of my life. [W]hen I got my summons . . . . I got a sense of really belonging to the American community."[4] On the other hand, when minorities are excluded from serving on juries, they are stigmatized by the implication that they are not the equal of others who presumably are able or willing to judge a defendant impartially.[5]

Finally, discriminatory use of peremptory challenges undermines the legitimacy of and popular confidence in the fairness of the criminal justice system. Members of the excluded group will see that the law is treating them unequally and may come to believe that it will do likewise in other situations as well.[6] In sum, eradicating discrimination from the jury selection process is a goal of the utmost importance. Fairness to the defendant, inclusion of minority jurors and maintaining the integrity of the criminal justice system all require that discrimination be identified and eradicated.

As will soon be apparent, *Batson v. Kentucky* is only an imperfect remedy. Even if *Batson* were completely successful in eliminating the discriminatory use of peremptory challenges, minorities would still be under-represented in the jury selection process. Discriminatory use of peremptory challenges by prosecutors is certainly not the only way discrimination and under-representation seep into the system. Minorities are often not registered to vote or have no current address and, hence, are not included on master juror lists or cannot be located if they are on such lists. Some local officials still exercise discretion in deciding which jurors to call from the master list, and underrepresentation can

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2. Note, *Developments in the Law: Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1559 (1988).

3. *Id.* at 1561.

4. Broeder, *The Negro in Court*, 1965 DUKE L.J. 19, 26.

5. *Id*; Note, *Discrimination by the Defense: Peremptory Challenges after* Batson v. Kentucky, 88 COLUM. L. REV. 355, 358 (1988).

6. Note, *supra* note 5, at 358.

result from the exercise of this discretion. Moreover, a disproportionate number of minority jurors are excused for cause or hardship. Minorities are also less likely to meet the literacy and citizenship requirements of venire statutes.[7]

Although the jury selection system suffers from discrimination and underrepresentation at virtually every phase, the discriminatory use of peremptory challenges is the single most significant means by which racial prejudice and bias are injected into the jury selection system.[8] Prior to *Batson*, the improper use of peremptory challenges was not merely an academic or theoretical concern. Several studies established that many prosecutors used their peremptory challenges to systematically exclude blacks from sitting on petit juries. In one study, St. Louis prosecutors were found to use peremptory challenges to eliminate seventy-four percent of blacks from the jury pool.[9] In Connecticut, prosecutors struck over fifty-nine percent of potential black jurors in cases involving white defendants and nearly eighty-five percent in cases involving black or Hispanic defendants.[10] Likewise, prosecutors in Cook County, Illinois, were found to eliminate black jurors at more than twice the rate that they excluded white jurors during one month.[11] In the early 1970s, the policy manual for a Texas county prosecutor's office explicitly advised prosecutors to eliminate "any member of a minority group" during jury selection.[12]

## II. SETTING THE STAGE: PRE-*BATSON* CASES

The fourteenth amendment, adopted in 1868, provides that no state can deny "any person within its jurisdiction the equal protection of the laws." Twelve years after its enactment, the Supreme Court began using the fourteenth amendment to police the jury selection system. In *Strauder v. West Virginia*,[13] the Court held that a state statute which limited jury service to white males violated the equal protection rights of a black criminal defendant. The Court found an equal protection violation because a white defendant was entitled to a trial by a jury selected without discrimination against his color, "whereas a black defendant was denied the possibility of being tried by a jury containing even one member of his race."[14]

Although *Strauder* eliminated the most direct methods of excluding

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7. *See generally* Note, *supra* note 2, at 1561-64.

8. Imlay, *Federal Jury Reformation: Saving A Democratic Institution*, 6 LOY. L.A.L. REV. 247, 270 (1973).

9. Note, *supra* note 2, at 1565 n.58 (citing study).

10. *Id.*

11. *Id.*

12. Note, Batson v. Kentucky: *A Half Step in the Right Direction (Racial Discrimination and Peremptory Challenges Under the Heavier Confines of Equal Protection)*, 72 CORNELL L. REV. 1026, 1041 (1987).

13. 100 U.S. 303 (1880).

14. *See* Note, Batson v. Kentucky *and the Prosecutorial Peremptory Challenge: Arbitrary and Capricious Equal Protection?*, 74 VA. L. REV. 811, 812 (1988).

blacks from juries, its narrow holding "did little to protect individual defendants from informal practices designed to produce all-white juries."[15] In *Neal v. Delaware*,[16] the Supreme Court ruled that the equal protection clause prohibits the discriminatory application of racially neutral jury selection statutes. Nevertheless, in the fifty years after *Strauder* and *Neal*, their directives of nondiscrimination were rarely enforced.

In *Norris v. Alabama*,[17] the Supreme Court lessened a defendant's burden of proving purposeful discrimination in racially neutral jury selection systems. The court held that once a defendant establishes a prima facie case of discrimination, the burden shifts to the prosecution to explain the apparent discrimination.[18]

The Supreme Court first addressed the issue of prosecutors' misuse of the peremptory challenge in *Swain v. Alabama*.[19] In order to understand the *Batson* case, one must first understand *Swain*. In *Swain*, an all-white jury in Alabama convicted a black man of raping a white woman and sentenced him to death.[20] One commentator noted that:

> At the time of Swain's trial, black males over the age of 21 constituted 26% of the county's male population, and an average of six to seven blacks appeared in every criminal venire in the county. Despite these figures, no black had served on a petit jury since approximately 1950.[21]

In *Swain*, the prosecutor peremptorily struck the six blacks remaining on the venire.[22]

The United States Supreme Court rejected Swain's claim that the prosecutor's use of peremptory strikes to remove all blacks from the jury constituted an equal protection violation.[23] The Court found that the purpose and function of the peremptory challenge were so essential to the criminal justice system that it should not be subject to the strictures of the equal protection clause.[24] In sweeping deference to the peremptory challenge system, the Court held that:

> The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The 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.[25]

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15. *Id.*
16. 103 U.S. 370 (1881).
17. 294 U.S. 587 (1935).
18. *Id.* at 591.
19. 380 U.S. 202 (1965).
20. *Id.* at 202-03.
21. Note, *supra* note 14, at 813. *See also Swain*, 380 U.S. at 205.
22. *Id.*
23. *Swain*, 380 U.S. at 221-22.
24. *Id.*
25. *Id.* at 222.

The *Swain* decision granted prosecutors *carte blanche* to challenge black jurors solely because of their race, thus legitimating the discriminatory assumption that a black cannot impartially try the case of a black defendant.[26] In any given case, the prosecutor was free to use his peremptory challenges to discriminate on the basis of race.

The *Swain* Court held that a violation of the equal protection clause is established only if the defendant shows that the prosecutor "consistently and systematically" struck blacks from the venire so as to prevent blacks from ever serving on juries.[27] The Court held that the presumption in favor of unrestricted use of the peremptory challenge could be overcome only by showing that:

> [T]he prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or 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 . . . .[28]

The Court proceeded to reject Swain's claim of systematic exclusion despite the fact that no blacks had served on a jury in nearly fifteen years because Swain failed to show that the prosecutor *alone* was responsible for striking all the black venire members.[29]

*Swain v. Alabama* imposed a nearly insurmountable burden on defendants attempting to establish the discriminatory use of peremptory challenges. In the twenty-one years after *Swain*, only two cases succeeded in establishing a prima facie showing of discriminatory use of peremptory challenges by the prosecution.[30]

## III. *BATSON v. KENTUCKY*

The *Swain* decision was roundly condemned by nearly all commentators[31] and by some courts. *Swain* became one of the most criticized Supreme Court decisions of the past two decades because it placed the state's peremptory challenges beyond realistic scrutiny and effectively legitimatized the exclusion of potential jurors for racial reasons alone.[32]

The Supreme Court revisited the peremptory challenge system in *Batson v. Kentucky*. In *Batson*, a black man was charged with second degree burglary and receipt of stolen goods. The prosecutor used four of his five peremptory

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26. Note, *supra* note 12, at 1030.

27. *Swain*, 380 U.S. at 223.

28. *Id.*

29. *Id.* at 224.

30. *See* State v. Brown, 371 So. 2d 751, 754 (La. 1979); State v. Washington, 375 So. 2d 1162, 1164-65 (La. 1979).

31. *See* Comment, Batson v. Kentucky: *Equal Protection, The Fair Cross-Section Requirement, and the Discriminatory Use of Peremptory Challenges*, 37 EMORY L.J. 755, 763 n.50 (1988) (citing a sample of articles criticizing *Swain*).

32. *Id.* at 763.

challenges to strike all four blacks on the venire, leaving an all-white jury. The trial judge dismissed the defendant's motion attacking the prosecutor's challenges on equal protection and sixth amendment grounds, observing that the parties could use their peremptory challenges to "strike anybody they want to."[33] An all-white jury convicted Batson of both counts. The Kentucky Supreme Court affirmed the convictions. The United States Supreme Court granted certiorari and reversed.

The majority opinion, authored by Justice Powell, overruled *Swain v. Alabama*, finding that its requirement of showing a pattern of discriminatory use of peremptory challenges over several cases imposed a "crippling burden of proof" on defendants, effectively immunizing the prosecutor's exercise of peremptory challenges from constitutional scrutiny.[34] The Court replaced the *Swain* test with an evidentiary framework modeled on Title VII which permits defendants to prove "a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of the peremptory challenges at the defendant's trial."[35]

The Court set forth a three part test under which a defendant could establish a prima facie case of discrimination in the exercise of peremptory challenges. First, the defendant must show that he or she "is a member of a cognizable racial group . . . and that the prosecutor . . . exercised peremptory challenges" to remove at least one member of the defendant's own race from the venire.[36] Second, the defendant is allowed to rely on the fact that use of peremptory challenges is "a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' "[37] Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecution used peremptory challenges "to exclude the veniremen from the petit jury on account of their race."[38] In determining whether the defendant has established a prima facie case, the court "should consider all relevant circumstances."[39] For example, a court may consider any pattern of strikes against black jurors in the particular venire at issue. Likewise, "the prosecutor's questions and statements during voir dire" and when "exercising [the peremptory] challenges may support or refute an inference of discriminatory purpose."[40]

Once the defendant establishes a prima facie case, the burden shifts to the government to articulate "a neutral explanation for challenging black jurors."[41] Although the "explanation need not rise to the level justifying . . . a challenge

33. Batson v. Kentucky, 476 U.S. 79, 83 (1986).
34. *Id.* at 92-93.
35. *Id.* at 96.
36. *Id.* (citations omitted).
37. *Id.* (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).
38. *Id.*
39. *Id.*
40. *Id.* at 97.
41. *Id.*

for cause," the reason must be reasonably specific and related to the particular case under consideration.[42] The prosecutor's rebuttal burden is not satisfied by his mere statement that the "challenged jurors of the defendant's race . . . would be partial to the defendant because of their shared race."[43] Nor can the prosecutor rebut a prima facie case by the self-serving denial of a discriminatory motive or by arguing that particular jurors were excluded in good faith.[44] The prosecutor, therefore, must articulate a neutral explanation relating to the particular case to be tried. When all the evidence is in, the court must then decide if the defendant has established purposeful discrimination.[45]

The *Batson* Court explicitly rejected the dubious proposition embraced in *Swain* that a prosecutor could validly challenge potential jurors solely on account of their race or on the invidious assumption that black jurors are unable to impartially consider the government's case against a black defendant.[46] Justice Marshall concurred with the majority opinion and judgment of the Court but wrote separately to argue that peremptory challenges should be eliminated altogether in order to prevent discrimination in jury selection. Although Justice Marshall described the majority opinion as "tak[ing] a historic step toward eliminating the shameful practice of racial discrimination in the selection of juries,"[47] he argued that the *Batson* standard did not go far enough. Marshall argued that the majority's standard was insufficient to combat discrimination because only the most flagrant cases of discrimination would be sufficient to establish a prima facie case.[48] Marshall pointed to cases in Massachusetts and California applying evidentiary standards similar to *Batson* which found that no prima facie case was established when the prosecutor excluded between two and four minority members, even though the exclusion of these venire members resulted in all-white juries.

Justice Marshall also believed that the *Batson* remedy might be rendered illusory because of the difficulties in assessing the prosecutor's motives.[49] Prosecutors could easily assert facially neutral reasons for striking a juror, and courts would be ill-equipped to scrutinize those reasons.[50] Discrimination is further difficult to detect because a prosecutor's unconscious racism may lead him to identify objectionable character traits, dress or demeanor of black jurors that he would not notice or find offensive in a white juror.[51] Marshall argues that the peremptory challenge is not a right of constitutional magnitude and should give way to the supreme objective of eliminating discrimination

42. *Id.* at 98.
43. *Id.* at 97.
44. *Id.* at 98.
45. *Id.*
46. *Id.* at 99.
47. *Id.* at 102-03.
48. *Id.* at 105.
49. *Id.* at 105-06.
50. *Id.*
51. *Id.* at 106.

from jury selection.

Chief Justice Burger and Justice Rehnquist dissented from the Court's holding, arguing that Batson did not properly raise his equal protection claim below.[52] The dissent argues that peremptory challenges are essential to insuring a fair and impartial jury,[53] and that equal protection analysis should not be used to scrutinize the peremptory challenge, which is inherently an arbitrary and capricious right.[54] The dissent also predicts that the defendant's use of the peremptory challenge will be subjected to the *Batson* standard.[55]

## IV. IMPLEMENTATION OF *BATSON* BY THE LOWER COURTS

Although *Batson* goes a long way towards easing the defendant's burden of proving discrimination in the exercise of peremptory challenges, the decision left numerous unresolved questions for the lower courts to grapple with. The lower courts have often come to conflicting—and seemingly irreconcilable—resolutions of several of these questions. A brief review of the lower court's implementation of *Batson* confirms this fact.

First, the *Batson* decision does not attempt to spell out the parameters of the quantum of proof sufficient to establish each element of the prima facie case.[56] One commentator has noted that "[g]iven the Court's nebulous description of the prima facie case, it is not surprising that there are almost as many concepts of sufficient proof of discrimination as there are reviewing courts."[57] The Supreme Court left lower courts to determine which defendants fall within the "cognizable racial group" permitted to bring a *Batson* challenge. For instance, in *Bueno-Hernandez v. State*,[58] the Supreme Court of Wyoming held, without discussion, that a Mexican national was a member of a cognizable racial group for *Batson* purposes, whereas in *United States v. Sgro*,[59] the First Circuit denied a comparable claim, at least in part, because the defendant failed to prove that Italian-Americans constituted a cognizable group.[60] A court's attitude toward *Batson* claims may well determine whether or not a defendant is found to be a member of a cognizable racial group. To insure fairness and consistency, *Batson*'s protection should be extended to any group that has been subjected to an historical pattern of discrimination.[61]

The lower courts have also been left to determine the number of peremptory challenges which must be used to exclude minorities before a prima facie

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52. *Id.* at 112-13.
53. *Id.* at 119.
54. *Id.* at 123.
55. *Id.* at 125-26.
56. *Id.* at 97.
57. Note, *supra* note 14, at 821.
58. 724 P.2d 1132, 1134 (Wyo. 1986), *cert. denied*, 480 U.S. 907 (1987).
59. 816 F.2d 30, 33 (1st Cir. 1987), *cert. denied*, 484 U.S. 1063 (1988).
60. Note, *supra* note 14, at 820.
61. *Id.*

case is established. This issue is particularly troubling when there is no anecdotal or testimonial evidence of prosecutorial discrimination other than the number of minority members removed from the jury. Several courts have refused to find a prima facie case when the prosecutor struck several blacks from the jury but could have removed an even greater number. For instance, one Tennessee appellate court held that a prima facie case was not established because the prosecuting attorney did not use his peremptory challenges to remove *all* members of defendant's race from the jury.[62] On the other hand, the Third, Eighth and Eleventh Circuits have recognized that *Batson* rights can still be violated even if one or two blacks remain on a jury after the prosecutor's exercise of his peremptory challenges.[63]

A related quantum of proof question arises when only a small number of minority members appear on the venire, and the prosecution needs to use only one or two of his peremptory challenges to produce an all-white jury. Several courts, including the Ninth Circuit in *United States v. Vaccaro*,[64] have been reluctant to find that striking a relatively small number of minority members exhibits enough of a "pattern" to establish a prima facie case of discrimination in and of itself. Other courts, including the Tenth and Eighth Circuits, have been more willing to find an equal protection violation even when only one or two minority venire members have been excluded.[65]

In addition to these quantum of proof issues, *Batson* was also ambiguous as to how much the prosecutor's rebuttal explanations should be scrutinized. Ineffective scrutiny of prosecution explanations is the single greatest problem hindering the effective implementation of *Batson*. Just as Justice Marshall predicted in his concurring opinion in *Batson*, courts are having an extremely difficult time distinguishing between legitimate reasons for the use of peremptory challenges and mere excuses or pretexts for discrimination. In particular, three types of suspicious prosecutor explanations for the exercise of peremptory challenges have been accepted by numerous courts.[66] First, several courts have sustained the exercise of peremptory challenges because the venire person *may* have a connection with the case being tried. Although an actual connection to the case is a valid basis for the exercise of a peremptory challenge, such

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62. State v. Peck, 719 S.W.2d 553, 556 (Tenn. Crim. App. 1986).

63. United States v. Johnson, 873 F.2d 1137, 1139-40 (8th Cir. 1989); United States v. Clemons, 843 F.2d 741, 748 (3d Cir.), *cert. denied*, ___ U.S. ___, 109 S. Ct. 97 (1988); Fleming v. Kemp, 794 F.2d 1478, 1483 (11th Cir.), *motion to vacate denied*, 478 U.S. 1002 (1986).

64. 816 F.2d 443, 457 (9th Cir. 1986), *cert. denied*, 484 U.S. 914 (1987).

65. *See* United States v. Battle, 836 F.2d 1084, 1086 (8th Cir. 1987) ("under *Batson*, the striking of a single black juror for racial reasons violates the equal protection clause, even though other black jurors are seated, and even when there are valid reasons for the striking of some black jurors"); United States v. Chalan, 812 F.2d 1302, 1313-14 (10th Cir. 1987), *cert. denied*, ___ U.S. ___, 109 S. Ct. 534 (1988).

66. This helpful analysis of three types of suspicious explanations for the use of peremptory challenges was set forth in Note, *supra* note 14, at 826-29.

a connection may be a pretext for race as the connection becomes more speculative, tangential or attenuated. For example, in *United States v. Woods*,[67] the Fourth Circuit found that a black venire person had been properly challenged at the trial of a black politician for voting fraud because the venire member *may* have been a constituent of the defendant, *may* have heard the defendant preach at a black church and *may* have read inflammatory articles about the case in a "black" newspaper. Speculation of this nature is easily susceptible to abuse and should not satisfy the prosecutor's rebuttal burden.

A second type of explanation which should be scrutinized is when the prosecutor claims that the excluded juror shared some non-racial characteristic with the defendant. Several courts have upheld peremptory challenges of minorities who live in the same neighborhood as or one similar to the defendant[68] or have educational or employment backgrounds similar to the defendant.[69] It is highly unlikely that the only characteristic shared by two minority members will be their shared race.[70] Exclusions of jurors because they share a similar neighborhood, economic status, education, employment or political affiliation with the defendant should be carefully scrutinized. Such shared characteristics may be proxies for race and should not be accepted at face value. One way for trial courts to review such explanations is to examine whether non-minority jurors with backgrounds similar to the defendant were also excluded by the prosecutor. In *Garrett v. Morris*,[71] the Eighth Circuit adopted such an approach when it found that challenges based on "education, experience or background" were invalid when the prosecutor had not been concerned with these factors during voir dire and had not challenged uneducated whites.[72]

A third species of rebuttal explanations which have been improperly accepted by many courts are those based on the mannerisms, conduct or appearance of the juror. Courts have routinely upheld peremptory strikes based on the demeanor or attitude of the venire person.[73] Likewise, courts have routinely accepted peremptory strikes based on observed mannerisms of the potential juror. Some courts give so much deference to demeanor and mannerism explanations that one court upheld the exercise of a peremptory challenge because the potential juror did not make enough eye contact with the prosecutor,[74] whereas another court upheld a challenge because the venire person

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67. 812 F.2d 1483, 1487 (4th Cir. 1987)

68. *See, e.g.*, Taitano v. Commonwealth, 358 S.E.2d 590, 592-93 (Va. Ct. App. 1987).

69. *See, e.g.*, United States v. Cartlidge, 808 F.2d 1064, 1070 (5th Cir. 1987) (juror excluded because of age, marital status and employment).

70. Note, *supra* note 14, at 827.

71. 815 F.2d 509 (8th Cir.), *cert. denied*, 484 U.S. 898 (1987).

72. *Id.* at 513-14. *See also* United States v. Wilson, 853 F.2d 606, 610 (8th Cir.) ("What constitutes a neutral explanation is a question of comparability. Essentially, one must compare the characteristics of the individual which prompted the Government's strike with the characteristics of those not struck by the Government."), *vacated*, 861 F.2d 514 (8th Cir. 1988).

73. *See* Note, *supra* note 14, at 828 n.108 (citing cases).

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

made too much eye contact with the prosecutor.[75] Challenges based on mannerisms or demeanor are also insulated from effective review on appeal because voir dire transcripts obviously do not reflect such nonverbal, unquantifiable facts. At the least, the trial judge should test such explanations by examining whether nonminority jurors demonstrating similar mannerisms or demeanor were also excluded. In sum, the ease with which most prosecutors are able to satisfy their rebuttal burden leads one to believe that the protection erected by the *Batson* decision has been largely illusory.

## V. MISCELLANEOUS ISSUES LEFT UNRESOLVED BY *BATSON*

The *Batson* decision did not address several other issues, some of which I will briefly touch upon. *Batson* did not address whether defense counsel should also be subject to the rule prohibiting the discriminatory exercise of peremptory challenges.[76] Justices Burger, Rehnquist, and Marshall all implied that the *Batson* rule should apply to defense counsel. Pre-*Batson* decisions in state courts adopting a rule prohibiting discrimination in the exercise of peremptory challenges generally applied it to defense counsel as well as prosecutors. At least two commentators have addressed this question—and came to different conclusions—in law review articles,[77] but to date, there has not been significant post-*Batson* case law on this issue.[78] Assuming that the exercise of peremptory challenges by defendants constitutes state action, which is disputable, I believe that the *Batson* rule should be extended to defense counsel. Acts of racial discrimination are wrong whether committed by the prosecutor or the defense. Moreover, it is important that both prosecutor and defense counsel be subject to the same rules in order to ensure symmetry and fairness.

Another question left open by *Batson* is whether it should be extended to civil cases. The Eighth and Eleventh Circuits have recently extended *Batson* to civil cases, holding that equal protection forbids the exercise of peremptory challenges on racial grounds by governmental defendants in a federal civil trial.[79] Both courts found that the protections of the fourteenth amendment and the reach of the *Batson* decision were equally applicable in the civil context. In contrast, the Fifth Circuit sitting *en banc* recently held that *Batson* was not applicable in civil actions between private litigants, reasoning that no

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75. United States v. Mathews, 803 F.2d 325, 331 (7th Cir. 1986), *rev'd on other grounds*, 485 U.S. 58 (1988).

76. Batson v. Kentucky, 476 U.S. 79, 89 n.12 (1986).

77. *Compare* Note, *supra* note 5, at 355 (arguing that *Batson* rule should be extended to defense counsel) *with* Goldwasser, *Limiting A Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 HARV. L. REV. 808 (1987) (arguing that *Batson* should not be applied to defense counsel).

78. However, two federal courts of appeals have recently found that *Batson* applies to peremptory challenges exercised by defense counsel in civil cases, at least where the defendant is a governmental actor. *See infra* note 79 and accompanying text.

79. Reynolds v. City of Little Rock, 893 F.2d 1004, 1008 (8th Cir. 1990); Fludd v. Dykes, 863 F.2d 822, 829 (11th Cir. 1989).

state action was present which would trigger the protections of the fourteenth amendment.[80] As a practical matter, the need to combat discrimination may be just as great in civil cases as it is in criminal cases. For instance, when a plaintiff alleges racial discrimination or other civil rights violations in a civil case against either a governmental or private defendant, the defendant's incentive to discriminate may equal or exceed the prosecutor's temptation to exclude minorities in the criminal context.

*Batson* also left open the issue of the appropriate remedy once it is determined that the prosecutor has discriminated in the exercise of his or her peremptory challenges.[81] The court can either discharge the venire where discrimination occurred and begin anew with a new venire, or jury selection can be resumed with the improperly challenged jurors reinstated on the venire.[82]

Another unresolved question which has spawned considerable litigation is whether the sixth amendment right to an impartial jury affords a basis for challenging the prosecutor's exercise of peremptory challenges.[83] The *Batson* decision was based solely on the fourteenth amendment.[84] In *United States v. Townsley*,[85] a highly divided Eighth Circuit Court of Appeals sitting *en banc* held that neither the equal protection clause nor the sixth amendment provided a basis for affording relief to white defendants challenging the prosecutor's use of peremptory challenges to exclude blacks from the trial jury.[86]

In *Holland v. Illinois*,[87] a recent United States Supreme Court case addressing the scope of the sixth amendment's fair cross-section requirement, a 5-4 majority held that a white criminal defendant had standing under the sixth amendment to challenge the exclusion of blacks from the petit jury, but that the fair cross-section requirement did not prohibit the prosecutor or defendant from exercising peremptory challenges to exclude cognizable racial or other groups from the petit jury.[88] The Court held that the sixth amendment's fair cross-section requirement prohibited the exclusion of cognizable groups from the venire, or jury pool, but not the trial jury itself.[89] However, five justices indicated in dicta that defendants would be entitled to challenge

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80. Edmonson v. Leesville Concrete Co., 895 F.2d 218, 221-22 (5th Cir. 1990)(en banc). *See also* Swapshire v. Baer, 865 F.2d 948, 953-54 (8th Cir. 1989).

81. Batson v. Kentucky, 476 U.S. 79, 99 n.24 (1986).

82. *Id.*

83. *See* Comment, *supra* note 31, at 755 (discussing applicability of sixth amendment fair cross-section requirement to peremptory challenges). The sixth amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an *impartial* jury of the State and district wherein the crime shall have been committed." U.S. CONST. amend VI (emphasis added).

84. *Batson*, 479 U.S. at 85 n.4 89.

85. 856 F.2d 1189 (8th Cir. 1988) (en banc) (6-5 decision).

86. *Id.* at 1191.

87. ___ U.S. ___, 110 S. Ct. 803 (1990).

88. *Id.* at 806.

89. *Id.* at 806-07.

the exclusion of jurors of a different race under the equal protection clause.[90] Writing for the dissent, Justice Marshall noted that "[a]s a majority of this Court has now concluded, a close reading of *Batson* shows that a defendant's race is irrelevant to his standing to raise the equal protection claim recognized in that case."[91] The five justices reasoned that defendants have some fourteenth amendment interest in insuring that members of other races are not excluded from the trial jury, and, more importantly, that such defendants have standing to vindicate the fourteenth amendment rights of the excluded jurors.[92] Therefore, it appears that defendants may challenge the exclusion of jurors of other races on equal protection grounds.

Relying on Justice Kennedy's concurrence and Justice Marshall's dissent in *Holland*, the Eighth Circuit recently held, in *United States v. Prine*, that a defendant's race is irrelevant to his or her standing and that white defendants have standing to challenge the exclusion of a juror of another race on equal protection grounds.[93] *Prine* thus contradicts the Eighth Circuit's 1988 *en banc* decision in *Townsley*, where the Court held that white defendants have no standing to challenge the exclusion of minority jurors.[94] Whether *Prine* correctly anticipates how the Supreme Court will rule on this issue has recently been cast into some doubt.

Prior to the resignation of Justice Brennan, it was clear that there were five votes on the Supreme Court for the proposition that defendants of any race have standing under the equal protection clause to challenge the exclusion of jurors of another race. There is, of course, no way of knowing whether Justice Souter will adopt such a view. One way or another, we should have an answer to this question soon because the Supreme Court has recently granted certiorari in *Powers v. Ohio*,[95] a case which directly presents the question of whether white criminal defendants have the right to challenge the peremptory exclusion of minority jurors on equal protection grounds. A decision in *Powers* will probably be filed sometime in the Spring of 1991.

*Batson* also left open the question of the appropriate type of hearing a court should hold after a defendant objects to the prosecutor's challenges,[96] as well as the issue of whether it should be applied retroactively.

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90. *See id.* at 811-12 (Kennedy, J., concurring); *id.* at 812-14 (Marshall, Brennan and Blackmun, JJ., dissenting); *id.* at 820-22 (Stevens, J., dissenting). The petition in *Holland* challenged the exclusion of the black jurors only under the sixth amendment and not on fourteenth amendment equal protection grounds. *See id.* at 811 n.3; *id.* at 811 (Kennedy, J., concurring); *id.* at 814 (Marshall, Brennan and Blackmun, JJ., dissenting). This proposition may have been diluted with the recent departure of Justice Brennan (eds.).

91. *Id.* at 813 (Marshall, Brennan and Blackmun, JJ., dissenting).

92. *Id.* at 811-12 (Kennedy, J., concurring); *id.* at 812-14 (Marshall, Brennan and Blackmun, JJ., dissenting); *id.* at 820-22 (Stevens, J., dissenting).

93. No. 89-2239, slip. op. at 7 (8th Cir. July 18, 1990).

94. *See supra* notes 85-86 and accompanying text.

95. No. 88-5011, *cert. granted*, 110 S. Ct. 1109 (1990).

96. Batson v. Kentucky, 476 U.S. 79, 99 (1986).

## VI. RECOMMENDATION AND CONCLUSION

Unresolved issues in a Supreme Court decision are not bad in and of themselves. But when technical ambiguities and unresolved questions result in the subversion and weakening of a constitutional right, the Court ought to revisit the issue and set the record straight.

The implementation of *Batson* has shown that the decision does not go far enough. Courts vary widely in their receptiveness to *Batson* claims—evidence establishing a prima facie case in one court is often dismissed as insufficient in another. Prosecutors are often able to satisfy their rebuttal burdens by reciting self-serving, unreviewable explanations that are based on speculation or thinly disguised pretexts for racial discrimination. The Supreme Court has further confused the issue by stating that a prosecutor's *Batson* rebuttal explanation need not rise to the level of a challenge for cause. The problem with this approach is that "[a]nalytically, there is no middle ground: A challenge either has to be explained or it does not."[97] In short, it is simply too difficult to intelligently and accurately review the prosecutor's motives in excluding minority jurors.

In light of *Batson*'s ineffectiveness in combating racial discrimination, I would recommend that the system of peremptory challenges be eliminated altogether. Challenges for cause and voir dire questioning could be liberalized to retain most of the benefits of the peremptory challenge.[98]

Although eliminating peremptory challenges is a serious departure from a long tradition, I believe the circumstances require it. The peremptory challenge system does not rise to a constitutional magnitude and must give way to the constitutional right to be free from racial discrimination. We must also remember that the fundamental purpose of the peremptory challenge is to ensure an impartial jury and fair trial. When peremptory challenges are perverted and transformed into tools of bias and racism, the reasons for peremptory challenges no longer exist, and they should be eliminated. This is where we stand today.

Thank you very much for your time and attention here today.

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97. Comment, *supra* note 31, at 780.

98. *See* Note, *supra* note 12, at 1042-46 (recommending expansion of voir dire and challenges for cause to preserve benefits lost by elimination of peremptory challenge).