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Batson's Invidious Legacy: Discriminatory Juror Exclusion and the Intuitive Peremptory Challenge

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BATSON'S INVIDIOUS LEGACY: DISCRIMINATORY JUROR EXCLUSION AND THE "INTUITIVE" PEREMPTORY CHALLENGE

I
INTRODUCTION

The Fourteenth Amendment guarantees due process and equal protection of the laws to all citizens regardless of race. Consistent with this guarantee, an attorney may not exclude a potential juror from the venire panel based solely upon the juror's race.[1] Such an exclusion violates the constitutional rights of both the litigant and the excluded juror.[2]

Potential jurors, also known as venire persons, may be excluded from a jury through either peremptory challenges or challenges for cause. A peremptory challenge is "[t]he right to challenge a juror without assigning, or being required to assign, a reason for the challenge."[3] It differs from a "challenge for cause," which requires a judicial finding that there is a "narrowly specified, provable and legally cognizable basis of [a juror's] partiality."[4] In most jurisdictions, each party to a civil or criminal action has a specified number

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1 *See infra* notes 72-147 and accompanying text.

2 *See infra* notes 103-04 and accompanying text.

3 BLACK'S LAW DICTIONARY 1136 (6th ed. 1990). *See generally* JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 139-75 (1977). While historically recognized to assume a fair trial, peremptory challenges are not a constitutional right. Batson v. Kentucky, 476 U.S. 79, 91 (1986); Swain v. Alabama, 380 U.S. 202, 219 (1965).

4 *Swain*, 380 U.S. at 220. Challenges for cause are unlimited, but are frequently denied by trial courts because of the difficulty in establishing a juror's bias during voir dire or jury selection. Barbara A. Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545, 549-51 (1975). Babcock also noted that cause challenges could not "effectively screen those who share biases and prejudices common to a racial or ethnic group" unless those jurors admit their biases. *Id.* at 554.

Hopt v. Utah, 120 U.S. 430 (1886), detailed typical reasons that permit an excuse for cause:

> Consanguinity or affinity within the fourth degree to the person alleged to be injured by the offence charged, or on whose complaint the prosecution was instituted, or to the defendant; . . . Standing in the relation of gnardian and ward, attorney and client, master and servant, or landlord and tenant, or being a member of the family of the defendant, or of the person alleged to be injured by the offence charged, or on whose complaint the prosecution was instituted, or in his employment on wages. . . . Having formed or expressed an unqualified opinion or belief that the prisoner is guilty or not guilty of the offence charged.

Id. at 433.

In addition to the traditional grounds listed above, many states recognize untraditional causes for challenge:

of peremptory challenges. In a civil suit in federal court, each party is entitled to three peremptory challenges.[5] In a federal criminal trial, however, the number of peremptory challenges varies with the nature of the offense.[6]

Acknowledging that peremptory challenges can mask racism in the courtroom, the United States Supreme Court requires that both the prosecutor and the defense counsel in a criminal trial offer race-neutral reasons for excluding jurors should either side establish a prima facie case of discrimination in jury selection.[7] The Court has recently applied the same constitutional protection to the discriminatory use of peremptory challenges in civil trials.[8] Although this civil extension of the Fourteenth Amendment suggests that the Court regards the eradication of discrimination from the courtroom as a fundamental constitutional mandate, another recent Supreme Court case signifies a retreat from this notion.[9] Despite the plethora of recent Supreme Court cases on peremptory challenges, the Court has failed to provide lower federal courts with practical guidance for analyzing the various reasons an attorney might submit as "race-neutral."[10]

An attorney's proffered reasons for a peremptory challenge may be divided into those based on "hard-data" and those based on "soft-data." For the purposes of this Note, the term "hard-data" denotes reasons that are based on objectively verifiable juror information supplied through a questionnaire or voir dire. Examples of hard-data about a juror include knowledge of the defendant, nature of employment, level of education, location of residence, prior in-

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> Some statutes also list additional grounds, such as: that he has served as a juror in the preceding year . . . ; that he is or has been engaged in carrying on a business in violation of the law, where the defendant is indicted for a like offense; that he has been indicted within 12 months for a felony or an offense of the same character as that with which the defendant is charged; that he is a party to a suit pending in that court at that term . . . .

STANDARDS RELATING TO TRIAL BY JURY 69 (ABA 1968).

5 28 U.S.C. § 1870 (1988).

6 *See infra* note 30.

7 *See infra* notes 72-147 and accompanying text; *see also infra* note 121.

8 Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077 (1991); *see infra* notes 118-47 and accompanying text. The Court's expansion of equal protection in the peremptory challenge context suggests that voir dire, already a lengthy process, will consume more of the court's resources. An eleven county study in New York, a jurisdiction that retains attorney-conducted voir dire, discovered that voir dire took longer than the trial itself in 20% of the 462 cases studied by the New York Governor's Commission on Administration of Justice. The average voir dire took 12.7 hours, which comprised 40% of the time of the entire case. Marcia Chambers, *Who Should Pick Jurors, Attorneys or Judges?*, N.Y. TIMES, June 13, 1983, at B4.

9 Hernandez v. New York, 111 S. Ct. 1859 (1991) (upholding peremptory challenges allegedly based on juror demeanor and lack of deference to court translator); *see infra* notes 160-89 and accompanying text.

10 *See infra* notes 185-209 and accompanying text.

volvement with the law, or previous participation on a jury.[11] By contrast, the term soft-data denotes reasons that are based on purely subjective information or unverifiable data. The consummate example of a soft-data reason is an attorney's "intuition." Other examples of soft-data include body language, dress, hairstyle, speech dialect, or tone of voice.[12] While hard-data exclusions are often appropriate, soft-data exclusions may permit a lawyer to discriminate against both the opposing party and the venire person.[13]

The central thesis of this Note is that, once a party has established a prima facie case of discrimination in jury selection, the only allowable peremptory challenges are those hard-data exclusions that evince a "substantial nexus" between a juror's statements and the facts of the case.[14] To support this argument, this Note first surveys the history of peremptory challenges from English to United States law, including four important United States Supreme Court peremptory challenge cases.[15] The analysis of these cases shows that eliminating racial discrimination from the courtroom has remained a fundamental constitutional mandate. Second, this Note analyzes seventy-six federal circuit court cases decided since 1986.[16] In only three of these cases did courts fail to accept the attorneys' proffered reasons for peremptory challenges. Third, this Note proposes that federal courts should disallow exclusions based on soft-data reasons. They should also formulate an enforceable and viable test for objective hard-data reasons for exclusion.[17] All lawyers in civil and criminal trials in federal courts would then be required to state and support such a reason only after opposing counsel has established a prima facie case of discriminatory juror exclusion. These proposals would preserve the traditional practice of the peremptory challenge, conform logically to precedent, and assist all federal courts in assessing a suspect peremptory challenge. Criticism of this proposal is also addressed. Finally, this Note applies the proposed hard-data test for peremptory challenges to a recent United States Supreme Court case and to other federal circuit court cases.[18]

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11 *Id.*
12 *Id.*
13 *See infra* note 214 and accompanying text.
14 *See infra* part IV.
15 *See infra* part II.
16 *See infra* part III.B.
17 *See infra* part IV.
18 *See infra* part V.

II
A BRIEF HISTORY OF THE PEREMPTORY CHALLENGE

A. Early English Practice

A defendant in medieval England[19] could exercise thirty-five peremptory challenges in all trials for felonies at common law.[20] Originally, the prosecutor could challenge any number of jurors without cause, which was said to produce "infinite delayes and danger."[21] Because of these problems, the Ordinance for Inquests provided that if "they that sue for the King will challenge any . . . Jurors, they shall assign . . . a Cause certain."[22] Courts construed the statute as allowing the prosecution to direct any juror, after questioning, to "stand aside" until the entire venire panel had been examined and the defendant had exercised his challenges. The Crown had to show cause with respect to jurors recalled only if there was a deficiency of jurors.[23] The settled law of England allows peremptory challenges on both sides.[24]

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19 England was not the first country to allow peremptory challenges. The Roman *Lex Servilia* (B.C. 104) established that each party to an action could propose 100 *judices*. Each side could then reject 50 on the list of the other, and 100 would remain to try the alleged crime. Batson v. Kentucky, 476 U.S. 79, 119 (1986) (Burger, C.J., dissenting) (citing J. PETTINGAL, AN ENQUIRY INTO THE USE AND PRACTICE OF JURIES AMONG THE GREEKS AND ROMANS 115, 135 (1769)).

20 Swain v. Alabama, 380 U.S. 202, 212 (1965). Justice White wrote that:

> It was thought that peremptory challenges were allowed at common law in capital felonies only. Thus Blackstone states: "[I]n criminal cases, or at least in capital ones, there is, *in favorem vitae*, allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all; which is called a *peremptory* challenge: a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous."

Id. at 212 n.9 (quoting 4 BLACKSTONE COMMENTARIES 353 (15th ed. 1809)). Justice White also notes that Blackstone's statement is "not far amiss, since most felonies were generally punishable by death." *Id.* (citing 4 BLACKSTONE COMMENTARIES 98 (15th ed. 1809)).

21 *Id.* at 212-13 (quoting SIR EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 156 (14th ed. 1791)). Justice White notes that "[t]he defendant's right remained unchallenged until 22 Hen. 8, c.14, § 6 (1530); 25 Hen. 8 c.3 (1533), when the number was limited to 20 in all cases except high treason." *Id.* at 213 n.10. *See generally* JOHN PROFFAT, A TREATISE ON TRIAL BY JURY § 156 (1877).

22 *Swain*, 380 U.S. at 213 (quoting 33 Edw. 1, Stat. 4 (1305)).

23 *Id.* at 213. "The number of jurors called was in the discretion of the court and it is reported that the right to stand aside was exercised liberally." *Id.* at 213 n.11 (citing JOHN PROFFAT, A TREATISE ON TRIAL BY JURY § 160 (1877)). "All attempts to limit or abolish the Crown's right were rejected." *Id.* (citing Regina v. Frost, 9 Car. & P. 129 (1839); O'Coigly's Case, 29 How. St. Tr. 1191, 1231; 1 THOMPSON, TRIALS § 49 (2d ed. 1912); BUSCH, LAW AND TACTICS IN JURY TRIALS § 69 (1949)).

24 *Swain*, 380 U.S. at 213. Chief Justice Burger notes that "[i]t remains the law of England today, except the number the defendant may now exercise is seven." *Id.* at 213 n.12. "The actual use of challenges by either side has been rare, for at least a century, but the continued availability of the right is considered important." *Id.* (citing 1 SIR JAMES F. STEPHEN, HISTORY OF CRIMINAL LAW OF ENGLAND 303 (1883); PATRICK B. DEV-

B. Peremptory Challenges in the New World

In the Act of 1790,[25] the United States Congress established that defendants could exercise thirty-five peremptory challenges in trials for treason and twenty in trials for other felonies punishable by death.[26] For offenses not covered by the 1790 Act, both the defendant and the government apparently had the right of peremptory challenge, although the source of this right was not clear.[27] Later, in capital and treason cases, a federal statute allowed the government five peremptory challenges and the defendant twenty.[28] In other cases, when the defendant had a right to ten peremptory challenges, the government was limited to two.[29] Subsequent enactments gave the government and the defendant the same number of challenges in capital crimes. In cases when the crime was punishable by more than one year's imprisonment, however, the government had six challenges and the defendant ten.[30]

LIN, TRIAL BY JURY 29-37 (1956); PENDLETON HOWARD, CRIMINAL JUSTICE IN ENGLAND: A STUDY IN LAW ADMINISTRATION 362-64 (1931)).

25 1 Stat. 99 (1790).

26 *Swain*, 380 U.S. at 214 (citing 1 Stat. 119 (1790)).

27 *Id.*

> The right of challenge was a privilege highly esteemed, and anxiously guarded, at the common law; and it cannot be doubted, but that at the common law, a prisoner is entitled, on a capital charge, to challenge peremptorily, thirty-five of the jurors. If, therefore, the act of congress has substituted no other rule . . . the common law rule must be pursued.

Id. at 214 n.13 (quoting United States v. Johns, 4 U.S. (4 Dall.) 412, 414 (1806)); *see also* United States v. Marchant, 25 U.S. (12 Wheat.) 480 (1827) (asserting that the Crown's power to stand aside was a part of the common law inherited from the English); United States v. Shackleford, 59 U.S. (18 How.) 588 (1856) (holding that federal statutes affording the defendant the right of peremptory challenge did not incorporate the government's right to stand aside but that the government could do this by virtue of the 1840 Act, 5 Stat. 394, empowering the federal courts to adopt the state practice in regard to selection and impaneling of juries).

28 *Swain*, 380 U.S. at 214-15 (citing 13 Stat. 500 (1865)). A few years later Congress extended the defendant's right to ten challenges in all noncapital felony cases, and the government's to three. Congress also extended the right to misdemeanor and civil cases, with each party entitled to three. 17 Stat. 282 (1872).

29 *Swain*, 380 U.S. at 214-15.

30 *Id.* at 215 (citing 36 Stat. 1166 § 287 (1911) (current version at 28 U.S.C. § 1870 (1988)) (providing that where the offense is a capital offense or treason, the defendant is entitled to twenty peremptory challenges and the United States to six; in all other felony trials, the defendant has ten, and the United States has six)); *see also* FED. R. CRIM. P. 24(b):

> If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

C. The United States Supreme Court on Peremptory Challenges

1. Strauder v. West Virginia *(1879)*[31]

The first peremptory challenge case before the United States Supreme Court was not about peremptory challenges per se, but instead concerned a jury selection statute. In *Strauder v. West Virginia*, the Court invalidated a West Virginia statute that completely barred African-Americans from jury service.[32]

Strauder was an African-American who had been indicted, tried, and convicted by an all-white jury in a West Virginia county court.[33] At his trial, Strauder petitioned to remove the case to federal court, moved to quash the venire and to arrest the judgment, and made several other motions protesting the exclusion of African-Americans from the jury.[34] He claimed that the statute limiting jury service to white men violated the Fourteenth Amendment's Equal Protection Clause because it denied him the same privilege white defendants enjoyed—trial before a jury from which one's racial peers had not been excluded.[35] The state court denied all of Strauder's motions.[36]

On writ of error, the United States Supreme Court reversed[37] and declared West Virginia's jury statute unconstitutional.[38] Applying the newly enacted Fourteenth Amendment, the Court asserted that West Virginia's discriminatory jury selection statute was precisely the type of system the Amendment prohibited.[39] The Court decided that, in principle, the Fourteenth Amendment must be con-

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The Court held that the government's right to stand aside survived early statutes giving the government peremptory challenges. Sawyer v. United States, 202 U.S. 150 (1906).

31 100 U.S. 303 (1879). The *Batson* Court later remarked that Strauder "laid the foundation for the Court's unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn." Batson v. Kentucky, 476 U.S. 79, 85 (1986).

32 *Strauder*, 100 U.S. at 310.

33 *Id.* at 304.

34 *Id.* at 304-05.

35 *Id.* at 304.

36 *Id.* at 304-05.

37 *Id.* at 312.

38 *Id.* at 310.

39 *Id.* at 308.

> And how can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is not a denial to him of equal legal protection?

Id. at 309.

strued liberally and that, in practice, the West Virginia statute blatantly discriminated against African-Americans.[40]

Justice Strong's majority opinion laid the doctrinal foundation for all future challenges to discriminatory jury selection procedures.[41] He declared that the "true spirit and meaning"[42] of the Reconstruction Amendments "cannot be understood without keeping in view the history of the times when they were adopted."[43] The Fourteenth Amendment, he wrote, "was designed to assure the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States."[44] The Court asserted that statutes like West Virginia's stimulate "that race prejudice which is an impediment to securing to individuals of the [African-American] race that equal justice which the law aims to secure to all others."[45] Later peremptory challenge cases affirmed Justice Strong's assertion that the Reconstruction Amendments protected the civil rights of African-Americans.[46]

2. Swain v. Alabama *(1965)*[47]

The Court's 1965 decision in *Swain v. Alabama*[48] consciously attempted to reconcile the ancient trial practice of peremptory chal-

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40 *Id.* at 307-09.

41 Strong wrote:

> [T]he law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color[.]

Id. at 307.

42 *Id.* at 306.

43 *Id.*

44 *Id.*

45 *Id.* at 308.

46 *Id.* at 306 (citing The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873)).

47 380 U.S. 202 (1965).

48 Between Strauder v. West Virginia, 100 U.S. 303 (1879), and Swain v. Alabama, 380 U.S. 202 (1965), the Court decided several important jury selection cases, none of which directly addressed peremptory challenges. In Neal v. Delaware, 103 U.S. 370 (1880), the Court invalidated the action of state officers whose job it was to secure jurors in a non-discriminatory fashion. In Carter v. Texas, 177 U.S. 442 (1900), the Court extended equal protection to cases where African-Americans had been excluded from grand juries. In Norris v. Alabama, 294 U.S. 587, 598 (1934), the Court again expanded equal protection to encompass situations where the total exclusion of African-Americans from the venire panel denied African-American defendants the opportunity to have a petit jury that was not tainted by prohibited exclusion. The Court also prevented states from placing restrictions on the number of African-Americans who could sit on a grand jury. Cassell v. Texas, 339 U.S. 282 (1950). Finally, in Hernandez v. Texas, 347 U.S. 475, 480 (1954), the Court coined the phrase "rnle of exclusion" to describe the pattern of proof required to find unlawful discrimination in jury cases. A prima facie case of

lenge with the Fourteenth Amendment.[49] In *Swain*, the Court upheld a prosecutor's peremptory challenges because the defendant failed to provide sufficient evidence of discrimination.[50]

Swain, an African-American, was indicted and convicted of rape in the Circuit Court of Talladega County, Alabama. An all-white jury sentenced him to death.[51] Alleging invidious discrimination, he moved to quash the indictment, to strike the jury venire, and to declare void the petit jury chosen in the case.[52] The motions were denied,[53] and the Alabama Supreme Court affirmed the conviction.[54] The United States Supreme Court granted certiorari[55] to decide whether the defendant's evidence established a prima facie case of invidious discrimination under the Fourteenth Amendment.[56] Swain showed that no African-American had served on a petit jury since 1950, but that an average of six to seven African-Americans had been called for petit jury venires.[57] Affirming the Alabama Supreme Court,[58] the Court held that the evidence was insufficient to establish a prima facie case of discrimination.[59]

Acknowledging that an African-American is not entitled to a jury composed of members of his own race, the Court reiterated the *Strauder* principle that "[j]urymen should be selected as individuals, on the basis of individual qualifications, and not as members of a race."[60] Justice White, writing for the majority, then addressed the defendant's argument that the prosecutor's exercise of peremptory challenges to remove African-Americans from the jury violated the Equal Protection Clause.[61] Stating that the peremptory challenge

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discrimination arose where, in an area of substantial African-American population, no African-Americans were summoned to serve during a significant period of time.

49 The Court surveyed the history of the peremptory challenge from English common law to twentieth-century America. *Swain*, 380 U.S. at 212-22. Stating that the practice "has very old credentials," *id.* at 212, the Court also agreed that "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." *Id.* at 224.

50 *Id.* at 209.

51 *Id.* at 205.

52 *Id.* at 203.

53 *Id.*

54 *Id.*

55 Swain v. Alabama, 377 U.S. 915 (1964).

56 *Swain*, 380 U.S. at 205-06.

57 *Id.* at 205.

58 *Id.* at 228.

59 *Id.* at 206. After considering the defendant's evidence that African-American males constituted 26% of all males in Talladega County but only 10 to 15% of the petit and grand jury venire panels drawn from the jury box since 1953, *id.* at 205, Justice White, writing for the majority, asserted that "[i]t is wholly obvious that Alabama has not totally excluded a racial group from either grand or petit jury panels . . . ." *Id.* at 206.

60 *Id.* at 204 (quoting Cassell v. Texas, 339 U.S. 282, 286 (1950)).

61 *Id.* at 209-22.

had "very old credentials,"[62] White surveyed the history of the practice from medieval English practice to modern American usage. He concluded that the "peremptory challenge is a necessary part of trial by jury."[63] Finally, White observed that if the State of Alabama had exercised its peremptory challenges to exclude African-Americans in "case after case," such evidence might support an inference of an equal protection violation.[64]

The *Swain* Court, however, found the defendant's evidence insufficient to establish such a "case-after-case" inference.[65] The record before the Court did not, "with any acceptable degree of clarity, show when, how often, and under what circumstances the prosecutor alone has been responsible for striking those Negroes who appeared on petit jury panels in Talladega County."[66] In some cases in that county, the defense attorney had also removed African-American jurors from the venire or agreed with the prosecutor that all African-American jurors should be challenged. In sum, the Court held that Swain had failed to show that the prosecutor had systematically challenged African-American venire persons.

To satisfy this test, Swain would have had to investigate several factors over a number of cases: the race of persons tried in the particular jurisdiction; the racial composition of the venire panel and the petit jury; and how both parties exercised their peremptory challenges.[67] The court records in some jurisdictions did not reflect the jurors' race. Often voir dire proceedings were not transcribed. The burden of such an investigation would have been insurmountable.[68]

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62 *Id.* at 212.

63 *Id.* at 219. Despite Justice White's reverence for the peremptory challenge as an intregral part of trial by jury, there is evidence that neither side in a criminal trial actually benefits from being allowed to challenge jurors. *See generally* Hans Zeisel & Shari S. Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491 (1978). The authors studied three groups of jurors: peremptorily struck jurors, randomly selected jurors from the remainder of the venire, and jurors chosen through voir dire. *Id.* at 492, 498. Analysis of the verdicts of these three groups, which heard the same testimony and saw the same exhibits in twelve cases, rebuts the presumption that peremptory challenges have some influence on the verdict, as prosecutors failed to alter verdicts through peremptory challenges and defense counsel performed "only slightly better" than their counterparts. *Id.* at 492, 528.

64 *Swain*, 380 U.S. at 222-24.

65 *Id.* at 223-24.

66 *Id.* at 224.

67 Batson v. Kentucky, 476 U.S. 79, 92 n.17 (1986) (citing United States v. Pearson, 448 F.2d 1207, 1217 (5th Cir. 1971) (holding that testimony and notes of a prosecutor concerning his use of peremptory challenges were insufficient to overcome the presumption that a good faith exercise of peremptory challenges had occurred)).

68 *Id.* (citing People v. Wheeler, 583 P.2d 748, 767-68 (Cal. 1978) (holding that the use of peremptory challenges to remove venire persons on the sole ground of group bias violates the defendant's Sixth Amendment rights)).

Thus, the *Swain* test imposed what was later called a "crippling burden of proof" on a defendant.[69]

Rather than focus on a defendant's burden of proof, the *Swain* Court attempted to balance the Equal Protection Clause with the tradition of the peremptory challenge. The Court reasoned that "[the peremptory challenge] must be exercised with full freedom, or it fails of its full purpose."[70] Yet the Court also recognized that "case after case" racial exclusions would require Fourteenth Amendment protection.[71]

3. Batson v. Kentucky *(1986)*[72]

Twenty-one years later, the Court asserted in *Batson v. Kentucky* that the *Swain* test failed to balance these competing claims adequately.[73] In addition to overruling[74] and criticizing[75] *Swain*, *Batson* established the current three-part test for analyzing a peremptory challenge.[76]

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69 *Id.* at 92. For a list of some of the unsuccessful cases that labored under the *Swain* standard, see James O. Pearson, Jr., Annotation, *Use of Peremptory Challenge to Exclude from Jury Persons Belonging to a Class or Race*, 79 A.L.R.3D 14, 56-73 (1979).

For a list of articles criticizing *Swain*, see Robert W. Rodriquez, 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).

70 *Swain*, 380 U.S. at 219 (quoting Lewis v. United States, 146 U.S. 370, 378 (1892)(holding that not allowing defendant to know whom the prosecution had challenged constituted substantial error)).

71 *See supra* note 64.

72 476 U.S. 79 (1986).

73 *Batson*, 476 U.S. at 92-93.

74 *Id.* at 100 n.25.

75 *Id.* at 92. *Batson* found the *Swain* test to require a "crippling burden of proof." *Id.*; *see* McCray v. Abrams, 750 F.2d 1113, 1120 & n.2 (2d Cir. 1984) (asserting that a state may not use peremptory challenges to exclude African-American and Hispanic jurors on the basis of their group affiliation), *cert. granted and judgment vacated*, 478 U.S. 1001 (1986).

76 *Batson*, 476 U.S. at 96.

Many have criticized the effectiveness of the *Batson* remedy. *See, e.g.*, 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 (1989); Brian J. Serr & Mark Maney, *Racism, Peremptory Challenges and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 J. CRIM. L. & CRIMINOLOGY 1 (1988); David D. Hopper, Note, Batson v. Kentucky *and the Prosecutorial Peremptory Challenge: Arbitrary and Capricious Equal Protection?*, 74 VA. L. REV. 811, 811-41 (1988); Jonathan B. Mintz, Note, Batson v. Kentucky: *A Half Step in the Right Direction (Racial Discrimiuation and Peremptory Challenges Under the Heavier Confines of Equal Protection)*, 72 CORNELL L. REV. 1025 (1987); Rodriguez, *supra* note 69; *Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1581 (1988).

The Batson decision may be a microcosm for the American criminal justice system: "If one wanted to understand how the American trial system for criminal cases came to be the most expensive in the world, it would be difficult to find a better starting point than *Batson*." William T. Pizzi, Batson v. Kentucky, *Curing the Disease but Killing the Patient*, 1987 SUP. CT. REV. 97, 155 (1987).

Batson, an African-American, had been indicted in Kentucky on charges of second-degree burglary and receipt of stolen goods.[77] An all-white jury tried and convicted him in a Kentucky state court.[78] During the trial, the judge conducted voir dire of the venire panel and excused certain jurors for cause.[79] The prosecutor then used his peremptory challenges to strike all four African-Americans from the venire.[80] Before the jury was sworn, the defendant moved to discharge the jury.[81] Batson claimed that the prosecutor's removal of the African-American venire persons violated his rights, under the Sixth and Fourteenth Amendments, to a jury drawn from a cross section of the community. He also asserted that the exclusion violated his rights, under the Fourteenth Amendment, to equal protection under the laws.[82] The trial judge did not expressly rule on Batson's request for a hearing, but he did assert that the parties could use their peremptory challenges to "strike anybody they wanted to."[83] The judge then denied the motion, reasoning that the fair cross-section requirement applies only to the selection of the venire panel and not to the petit jury itself.[84]

On appeal, Batson argued that the prosecutor's use of peremptory challenges violated his right—under the Sixth Amendment of the United States Constitution and under Section Eleven of the Kentucky Constitution—to a jury drawn from a cross section of the community.[85] He also asserted that the prosecutor had engaged in a "pattern" of discriminatory challenges that established an equal protection violation under *Swain*.[86] The Kentucky Supreme Court affirmed the conviction and observed that it had recently relied on *Swain v. Alabama* for the proposition that a defendant who alleges lack of a fair cross section must show that the prosecutor systematically excluded a group of jurors from the venire.[87] The court concluded that Batson had not demonstrated systematic exclusion.[88]

The United States Supreme Court reversed and remanded the case.[89] The Court noted that the Kentucky trial court flatly rejected

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77 *Batson*, 476 U.S. at 82.
78 *Id.* at 83.
79 *Id.* at 82-83.
80 *Id.* at 83.
81 *Id.*
82 *Id.*
83 *Id.*
84 *Id.*
85 *Id.* Batson conceded that *Swain v. Alabama* foreclosed an equal protection claim based solely on the prosecutor's conduct in the instant case. He urged the Kentucky Supreme Court to follow the decisions of other states. *Id.*
86 *Id.* at 83-84.
87 *Id.* at 84.
88 *Id.*
89 *Id.* at 100.

Batson's objection to the prosecutor's removal of all African-Americans on the venire without first requiring the prosecutor to explain his action.[90] The Court held that the Equal Protection Clause forbids the prosecutor from challenging jurors solely because of their race or on the assumption that African-American jurors will be unable to consider impartially the State's case against an African-American defendant.[91]

The Court further held that to establish a prima facie case of purposeful discrimination in the selection of the petit jury, the defendant must satisfy a three-part test.[92] First, the defendant must show that he is a member of a cognizable racial group.[93] Second, the defendant must establish that the prosecutor exercised peremptory challenges to remove members of the defendant's race from the venire panel.[94] Finally, the defendant must produce facts and any other relevant circumstances which raise an inference that the prosecutor used peremptory challenges to exclude the venire persons from the petit jury because of their race.[95] Once the defendant makes a prima facie showing, the burden shifts to the state to offer a race-neutral reason for challenging the African-American jurors.[96] The prosecutor may not rebut a prima facie showing by stating that he challenged the jurors on the assumption that they would be partial to the defendant merely because of their shared race.[97] Nor may the prosecutor simply affirm that he challenged individual jurors in good faith.[98] The prosecutor must provide a race-neutral reason for the challenge that is "clear and reasonably specific."[99]

The Court also reaffirmed the principle announced in *Strauder v. West Virginia*: a state denies an African-American defendant equal protection when it tries the defendant before a jury from which members of the defendant's race have been discriminatorily excluded.[100] The *Batson* Court noted, however, that a defendant has

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90 *Id.*

91 *Id.* at 89.

92 *Id.* at 96.

93 *Id.*

94 *Id.*

> [T]he defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate."

Id. (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953) (holding unconstitutional a state practice of printing names of Caucasian and African-American venire persons on paper of different colors so that African-Americans would never be called)).

95 *Id.* at 96.

96 *Id.* at 97.

97 *Id.*

98 *Id.* at 98.

99 *Id.* at 98 n.20.

100 *Id.* at 85-90.

no affirmative right to a petit jury composed in whole or in part of persons of his own race.[101] The Equal Protection Clause simply guarantees the defendant that the state will not exclude members of the defendant's race from the venire on the basis of race or on the erroneous assumption that members of the defendant's race are not qualified to serve as jurors.[102] By denying a venire person participation in jury service because of race, the state also unconstitutionally discriminates against the excluded juror.[103] Moreover, selection procedures that purposefully exclude African-American jurors from venire panels and juries undermine public confidence in the system of justice.[104]

The Court overruled that portion of *Swain v. Alabama* concerning the defendant's evidentiary burden.[105] The *Swain* Court had held that an African-American defendant could make out a prima facie case of purposeful discrimination by demonstrating that, in case after case, the prosecutor had challenged African-American venire persons.[106] The *Batson* Court held that this evidentiary formulation conflicted with the equal protection standards developed in decisions relating to the selection of the jury venire.[107] Thus, after *Batson*, a defendant may establish a prima facie case of purposeful racial discrimination in the venire panel selection based solely on the facts of that particular defendant's case.[108]

Justice Powell, writing for the majority, asserted that *Strauder v. West Virginia*[109] "laid the foundation for the Court's unceasing efforts to eradicate racial discrimination"[110] from the process of selecting the petit jury, which "has occupied a central position in our system of justice."[111] He affirmed that "[a] person's race simply 'is

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101 *Id.* at 85 n.6.

102 *Id.* at 86.

103 *Id.*

104 *Id.* at 87-88.

105 *Id.* at 100 n.25.

106 Swain v. Alabama, 380 U.S. 202, 222-24 (1965).

107 *Batson*, 476 U.S. at 96 (citing Castaneda v. Partida, 430 U.S. 482, 494-95 (1977) (holding that the defendant may establish a prima facie case of discrimination in jury selection by proving that in the particular jurisdiction members of his race have not been summoned for jury service over an extended period of time); Washington v. Davis, 426 U.S. 229, 241-42 (1976) (holding that circumstantial evidence of disproportionate impact may, for all practical purposes, prove unconstitutional discrimination); Alexander v. Louisiana, 405 U.S. 625, 629-31 (1972) (holding that once the defendant establishes a prima facie case of discrimination in jury selection, the burden shifts to the State to explain adequately the racial exclusion)).

108 *Id.*

109 *Id.* at 85-88.

110 *Id.* at 85.

111 *Id.* at 86.

unrelated to his fitness as a juror.' "[112] Furthermore, "[t]he harm from discriminatory jury selection . . . touch[es] the entire community . . . [and] undermine[s] public confidence in the fairness of our system of justice."[113] In addition, "[d]iscrimination within the judicial system is most pernicious because it is 'a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others.' "[114] Finally, "[i]n view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race."[115]

Thus, the *Batson* decision both established the procedure for challenging the racially motivated exclusion of a juror and affirmed the doctrinal foundation of peremptory challenge analysis. A defendant, armed with *Batson*'s three-part test, can more easily prove purposeful discrimination in the selection of the venire panel. More importantly, the principles in *Batson* assure that the courts will safeguard the defendant's right to a jury selected in a race-neutral fashion.[116] Powell's argument is not simply a technical one that establishes procedures for proper jury selection. His opinion, like Justice Strong's in *Strauder*, firmly locates these procedures in the panoply of a criminal defendant's constitutional rights.[117]

4. Edmonson v. Leesville Concrete Co. *(1991)*[118]

Extending the *Batson* rationale to civil suits, the Court in *Edmonson v. Leesville Concrete Co.* held that a private litigant in a civil case may not use peremptory challenges to exclude jurors because of race.[119] Thus, the decision in *Edmonson*, when combined with the Court's recent holding in *Powers v. Ohio*,[120] stands for the proposi-

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112 *Id.* at 87 (quoting Thiel v. Southern Pac. Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting) (holding that intentional exclusion of persons who work for a daily wage from a jury panel violated federal and state law)).

113 *Id.*

114 *Id.* at 87-88 (quoting Strauder v. West Virginia, 100 U.S. 303, 308 (1879) (brackets in original)).

115 *Id.* at 99.

116 *Id.* at 87-88. One commentator has suggested that "[a]rguably *Batson*'s force, if any, will lie in the deterrence effect it will have upon prosecutors." Brian Wilson, Note, Batson v. Kentucky: *Can the "New" Peremptory Challenge Survive the Resurrection of* Strauder v. West Virginia?, 20 AKRON L. REV. 355, 364 (1986).

117 *Batson*, 476 U.S. at 89-90.

118 111 S. Ct. 2077 (1991).

119 *Id.* at 2080.

120 111 S. Ct. 1364 (1991) (holding that the party objecting to an allegedly race-based peremptory challenge need not be of the same race as the challenged juror).

tion that "*both* sides, in *all* civil jury cases, no matter what their race . . . may lodge racial challenge objections."[121]

Edmonson, an African-American construction worker, sued Leesville Concrete Company in District Court, alleging that Leesville's negligence had injured him in a job-site accident.[122] Edmonson invoked his Seventh Amendment right to a trial by jury.[123] During voir dire, Leesville used two of its three peremptory challenges authorized by statute to remove African-Americans from the venire panel.[124] Edmonson requested that the court require Leesville to articulate a race-neutral explanation for the peremptory strikes.[125] The court refused on the ground that *Batson* did not apply in civil proceedings.[126] The impaneled jury, consisting of eleven whites and one African-American, rendered a verdict for Edmonson, assessing his total damages at $90,000.[127] The jury attributed 80% of the fault to Edmonson's contributory negligence, however, and awarded him only $18,000.[128]

On appeal, a divided panel of the Court of Appeals for the Fifth Circuit reversed, holding that *Batson* applies to a private attorney and that peremptory challenges may not be used in a civil suit for the purpose of excluding jurors on the basis of race.[129] The panel remanded the case to the trial court to consider whether Edmonson had established a prima facie case of racial discrimination under *Bat-*

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121 *Edmonson*, 111 S. Ct. at 2096 (Scalia, J., dissenting). Scalia assumes that *Edmonson* "logically must apply to criminal prosecutions." *Id.* at 2095. He is correct. The Court recently decided that very question. In *Georgia v. McCollum*, the Court held that *Batson* applies to a criminal defendant's use of race-based peremptory challenges. 112 S. Ct. 2348 (1992). Once the state action hurdle is overcome, *Batson* logically applies to all participants in all jury trials. *Id.* at 2359 (Rehnquist, C.J., and Thomas, J., concurring); *see* E. Vaughn Dunnigan, Note, *Discrimination by the Defense: Peremptory Challenges After* Batson v. Kentucky, 88 COLUM L. REV. 355, 365-68 (1988) (arguing that discriminatory peremptory challenges by either side should be disallowed). *But see* Katherine Goldwasser, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 HARV. L. REV. 808, 809-11 (1989) (concluding that *Batson* restrictions on prosecutorial peremptory challenges should not be extended to defendant's use of peremptory challenges).

For step-by-step instructions on how to make a *Batson* challenge in a civil trial, see Erskine D. McIntosh, *The Defense Counsel's Guide to Understanding and Challenging Racially Discriminatory Peremptory Challenges in Connecticut under* Batson v. Kentucky, 11 U. BRIDGEPORT L. REV. 31 (1990); Bradley D. Souders, Thomas v. Diversified Contractors: *Everything the Civil Practitioner Wants to Know About* Batson, *But Is Afraid to Ask*, 13 AM. J. TRIAL ADVOC. 925 (1989).

122 *Edmonson*, 111 S. Ct. at 2080.

123 *Id.* at 2080-81.

124 *Id.* at 2081.

125 *Id.*

126 *Id.*

127 *Id.*

128 *Id.*

129 *Id.*

son.[130] The full court then ordered a rehearing *en banc*. A divided *en banc* panel affirmed the judgment of the district court, holding that a private litigant in a civil suit may exercise peremptory challenges without accountability for alleged racial classifications.[131] The United States Supreme Court reversed and held that *Batson* restrictions on the use of peremptory challenges also apply to civil litigants.[132]

In order to apply the Equal Protection Clause, the Court had to determine first whether Leesville's exercise of peremptory challenges constituted state action.[133] The Court held that such challenges satisfy the two-part state action test.[134] The first part of the test asks "whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority."[135] Peremptory challenges, the Court observed, satisfy the first part of the test[136] because peremptory challenges are permitted only when the government, by statute or decisional law, allows parties to exclude a given number of venire persons who would otherwise satisfy the requirements for jury service.[137]

The second part of the test asks "whether a private litigant in all fairness must be deemed a government actor in the use of peremptory challenges."[138] The Court held that peremptory challenges satisfy the second part of the test[139] because Leesville made extensive use of "government procedures" with the government's "overt, significant assistance."[140] Peremptory challenges, the Court reasoned, have no use outside the jury trial system, which is an elaborate set of statutory provisions that government officials administer.[141] The trial judge, who is a government actor, exercises substantial control over voir dire and effects the final and practical denial of the excluded juror's opportunity to serve on the jury.[142] In addition, the Court asserted that "[t]he peremptory challenge is

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130 *Id.*

131 *Id.*; *see* Edmonson v. Leesville Concrete Co., 895 F.2d 218 (5th Cir. 1990).

132 *Edmonson*, 111 S. Ct. at 2088-89.

133 Standing was also an issue. The Court held that a private civil litigant may raise the equal protection claim of a person whom the opposing party has excluded from jury service on account of race. The civil context satisfies all three requirements for third-party standing. *Id.* at 2087-88.

134 *Id.* at 2082-83; *see* Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).

135 *Lugar*, 457 U.S. at 939.

136 *Edmonson*, 111 S. Ct. at 2083.

137 *Id.* at 2082-83; *see* 28 U.S.C. § 1870 (1988).

138 *Edmonson*, 111 S. Ct. at 2083.

139 *Id.*; *see also Lugar*, 457 U.S. at 941-42.

140 *Edmonson*, 111 S. Ct. at 2084 (citing Tula Professional Collection Servs., Inc. v. Pope, 485 U.S. 478 (1988)).

141 *Id.* at 2084-87.

142 *Id.* at 2084.

used in selecting [the jury,] an entity that is a quintessential governmental body, having no attributes of a private actor."[143] Finally, the Court concluded that the courtroom is a "real expression of the constitutional authority of the government" and "[t]o permit racial exclusion in this official forum compounds the racial insult inherent in judging a citizen by the color of his or her skin."[144]

As in *Batson*, the Court in *Edmonson* identified racial discrimination as both a judicial and a societal problem. Writing for the majority, Justice Kennedy observed that "[i]f our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury."[145] Furthermore, Justice Kennedy asserted that "[r]ace discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality."[146] Finally, Justice Kennedy urged that "the quiet rationality of the courtroom" made it an ideal place to confront "race-based fears."[147]

III

POST-*BATSON* PEREMPTORY CHALLENGES

Concurring in *Batson*, Justice Marshall wrote that post-*Batson* prosecutors are still free to discriminate "provided that they hold that discrimination to an 'acceptable' level."[148] Consequently, a reason for juror exclusion that is grounded largely in speculation rather than in facts uncovered during voir dire permits discriminatory practices to continue.[149] Thus, federal courts after *Batson* face a

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143 *Id.* at 2085.

144 *Id.* at 2087.

145 *Id.* at 2088.

> "[R]acial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts."

Id. (quoting Powers v. Ohio, 111 S. Ct. 1364, 1366 (1991)).

146 *Id.* at 2087.

147 *Id.* at 2088.

148 *Batson*, 476 U.S. at 105.

An example of an "acceptable level" of discrimination is an explanation that appears facially neutral but has a disparate impact on members of the defendant's racial or ethnic group. Such an explanation is "inherently suspect." People v. Hernandez, 552 N.E.2d 621, 627 (N.Y. 1990) (Kaye, J., dissenting) (quoting Brian J. Serr & Mark Maney, *Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 J. CRIM. L. & CRIMINOLOGY 1, 54 (1988)).

149 *See* State v. Slappy, 522 So.2d 18 (Fla. 1988), *cert. denied*, 487 U.S. 1219 (1988) (holding that state's explanation for use of its peremptories to challenge four African-Americans from the venire panel was insufficient); Gamble v. State, 357 S.E.2d 792 (Ga. 1987) (holding that the prosecutor failed to rebut the defendant's prima facie showing of a discriminatory peremptory challenge); State v. Gilmore, 511 A.2d 1150, 1157 (N.J.

practical problem: the *Batson* test permits the exclusion of venire persons for speculative and often discriminatory reasons, such as "intuition," "body language," and "demeanor." Yet fidelity to the Fourteenth Amendment should require the proscription of reasons that are not only facially discriminatory, but are also reasonably likely to be discriminatory, such as "intuition" or "appearance."[150] As this Note will show, the Court's most recent examination of a soft-data peremptory challenge compromises the demands of the Equal Protection Clause as well as the principles articulated over one hundred years ago in *Strauder v. West Virginia*.[151]

In addition to these practical constitutional problems inherent in the *Batson* test, theoretical problems also exist. The decision in *Batson v. Kentucky* represents a profound alteration of the role of the peremptory challenge in a jury trial.[152] Traditionally beyond the scope of judicial scrutiny, the post-*Batson* peremptory challenge is no longer the sole prerogative of an attorney. The decision aggravated the philosophical tension between the "very old credentials"[153] of the peremptory challenge and the dictates of the Constitution. Indeed, one New York State Court of Appeals judge expressed "the very profound difficulties involved in reconciling a

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1986) (holding that the prosecutor's peremptory challenges were improperly based on group bias); *see also* 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 21.3 (Supp. 1989).

Marshall's dissent in *Batson* suggests that racism exists even in prosecutorial intuition:

> [I]t is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal. A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported. . . . [P]rosecutors' peremptories are based on their "seat-of-the-pants instincts" . . . . Yet "seat-of-the-pants instincts" may often be just another term for racial prejudice.

Batson v. Kentucky, 476 U.S. 79, 106 (1986) (citations omitted).

One study recently indicated how racial discrimination can occur even among white persons apparently strongly opposed to racial discrimination. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). Lawrence concluded that "[r]acism continues to be aided and abetted by self-conscious bigots and well-meaning liberals alike." *Id.* at 387.

Professor Johnson's work confirms the prevalence of white jury prejudice against African-American defendants. *See* Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1634-35 (1985) (summarizing a study showing that white students were more likely to convict a black man of rape when the victim was white than when the victim was black).

150 Justice Stevens suggests that there is no bright line dividing discriminatory purpose from impact. Hernandez v. New York, 111 S. Ct. 1859, 1876 & n.1 (1991). That is, disparate impact can sometimes be evidence of discriminatory intent. *Id.* at 1876.

151 *See infra* part III.A.

152 *See infra* note 154.

153 Swain v. Alabama, 380 U.S. 202, 212 (1965).

juror challenge system that is theoretically based on the attorney's inexplicable personal hunch with a constitutional rule that requires attorneys to offer satisfactory 'neutral' explanations for their choices."[154] Nevertheless, the United States Supreme Court recently attempted to reconcile these competing forces in *Hernandez v. New York*.

A. *Hernandez v. New York* (1991)[155]

Less than a week before the Court decided *Edmonson v. Leesville*, the Court evaluated a prosecutor's proffered reasons for a peremptory challenge under a *Batson* analysis. In *Hernandez v. New York*, the Court upheld the prosecutor's exclusion of bilingual Latino venire persons on the ground that the potential jurors would be unable to accept the interpreter's translation of witness testimony.[156]

Prior to trial and after the voir dire examination of sixty-three jurors had been completed and nine jurors had been selected, the defense counsel objected to the prosecutor's use of peremptory challenges in excusing four potential jurors with Latino surnames.[157] Defense counsel moved for a mistrial.[158] Without waiting for a ruling on whether Hernandez had established a prima facie case of discrimination under *Batson*, the prosecutor volunteered his reasons for striking two of the jurors, Munoz and Rivera. According to the prosecutor, each juror had a brother who had been prosecuted by the same District Attorney's office. In the prosecutor's opinion, these jurors could not be fair in the deliberations on the case.[159] The prosecutor further explained that he had challenged the other two jurors, Mikus and Gonzalez, because they had given him a basis to believe, through words and actions, that their Spanish language fluency might hinder their ability to accept the official court interpreter's translation of the testimony of Spanish-speaking witnesses.[160] He explained that they "looked away" from him and responded "with some hesitancy" when asked whether they would follow the official interpreter's version of the testimony.[161] The case was tried with no Latino jurors, and the defendant was convicted.[162]

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154 *See* People v. Hernandez, 552 N.E.2d 621, 625 (N.Y. 1990) (Titone, J., concurring). Many have used this argument as support for the proposition that peremptory challenges should be abolished. *See supra* note 76.

155 111 S. Ct. 1859 (1991).

156 *Id.* at 1873.

157 *Id.* at 1864.

158 *Id.* at 1865.

159 People v. Hernandez, 552 N.E.2d 621, 622 (N.Y. 1990).

160 *Id.*

161 *Hernandez*, 111 S. Ct. at 1864-65.

162 *Id.* at 1865.

The New York Appellate Division and the New York Court of Appeals both affirmed.[163]

The United States Supreme Court granted certiorari[164] to decide whether the prosecutor offered race-neutral reasons for challenging potential Latino jurors and, if so, whether the state court's decision to accept the prosecutor's explanation should be sustained.[165] Writing for a four-member plurality, Justice Kennedy held that the prosecutor did offer a race-neutral basis for his peremptory challenges and that the state court conviction should be affirmed.[166]

The Court applied *Batson*'s three-part test for evaluating an objection to peremptory challenges.[167] Since the prosecutor had offered an explanation for the peremptory challenges,[168] and the trial court had ruled on the ultimate question of intentional discrimination, a prima facie showing of discrimination was unnecessary.[169] The second issue concerned the facial validity of the prosecutor's explanation, which had to be race-neutral to satisfy the *Batson* test.[170] The Court held that while the prosecutor's criterion for exclusion—whether jurors might have difficulty in accepting the translator's rendition of the Spanish-language testimony—might have resulted in the disproportionate removal of prospective Latino jurors, that criterion was not proof of the racially discriminatory intent or purpose that is required to show a violation of the Equal Protection Clause.[171] The Court asserted that it need not address Hernandez's argument that Spanish-speaking ability bears such a close relation to ethnicity that exercising a peremptory challenge on the former ground violates equal protection.[172] The prosecutor explained that the jurors' specific responses and demeanor, and not their language proficiency alone, caused him to doubt their ability to defer to the official translation.[173] The Court stated that although a high percentage of bilingual jurors might hesitate before answering questions like those asked during voir dire and, therefore, would be excluded under the prosecutor's criterion would not cause the crite-

163 *Id.*

164 Hernandez v. New York, 111 S. Ct. 242 (1990).

165 *Hernandez*, 111 S. Ct. at 1864.

166 *Id.* at 1873.

167 *Id.* at 1865-66.

168 *Id.* at 1864-65. The prosecutor stated that he did not think that the venire persons would accept the interpreter's translation of testimony spoken in Spanish. *Id.*

169 *Id.* at 1866.

170 *Id.*

171 *Id.* at 1867-68.

172 *Id.* at 1866-67.

173 *Id.* at 1867.

rion to fail the race-neutrality test.[174] The Court also stated that a decision on the ultimate question of discriminatory intent represents a finding of fact accorded great deference on appeal.[175] Therefore, the trial court did not commit clear error in determining that the prosecutor did not discriminate on the basis of the Latino jurors' ethnicity.[176]

The Court, however, based its decision on an incorrect assumption that was never discussed.[177] The prosecutor did not ask *every potential juror* whether accepting the interpreter's translation would be difficult.[178] The prosecutor only asked the four jurors with Latino surnames about language difficulties.[179] Furthermore, in applying the *Batson* test, the *Hernandez* Court asked only whether the prosecutor's reason evinced a *facially* discriminatory motive.[180] Since no such motive was apparent, the Court upheld the challenges to the jurors.[181]

The impact of *Hernandez v. New York* is two-fold. First, the decision reduces the *Batson* analysis to a superficial check only for the most egregious forms of discrimination. As Justice Marshall wrote in dissent, "[i]f any explanation, no matter how insubstantial and no matter how great its disparate impact, could rebut a prima facie inference of discrimination provided only that the explanation itself was not facially discriminatory, 'the Equal Protection Clause would be but a vain and illusory requirement.' "[182] Since racism toward African-Americans is most often hidden and subjective,[183] the *Hernandez* Court's application of the *Batson* test is little more than an empty gesture toward equal protection.

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174 *Id.*

175 *Id.* at 1868-69. *See also* Batson v. Kentucky, 476 U.S. 79, 98 n.21 (1986).

176 *Hernandez*, 111 S. Ct. at 1871-72.

177 *Id.* at 1867.

> As explained by the prosecutor, the challenges rested neither on the intention to exclude Latino or bilingual jurors, nor on stereotypical assumptions about Latinos or bilinguals. The prosecutor's articulated basis for these challenges divided potential jurors into two classes: those whose conduct during voir dire would persuade him they might have difficulty in accepting the translator's rendition of Spanish-language testimony and those potential jurors who gave no such reason for doubt. Each category would include both Latinos and non-Latinos.

Id.

178 People v. Hernandez, 552 N.E.2d 621, 628 (N.Y. 1990) (Kaye, J., dissenting).

179 *Id.* at 622.

180 *Hernandez*, 111 S. Ct. at 1866-68.

181 *Id.* at 1873.

182 *Id.* at 1876 (Stevens, J., dissenting) (quoting Batson v. Kentucky, 476 U.S. 79, 98 (1986)).

183 This is of course also true for other minorities, but since the peremptory challenge cases have overwhelmingly involved African-Americans, it seems appropriate to focus on that group as the primary target of such discrimination.

Second, the *Hernandez* analysis provides the lower federal courts with little guidance in assessing an attorney's proffered reason for a peremptory challenge, since virtually any reason would satisfy the *Hernandez* application of the *Batson* test.[184] Courts are thus in a difficult position: in a *Batson* challenge, a judge must ask an attorney for a race-neutral explanation, but once the attorney offers such a reason—whether based on intuition or not—the judge must accept it as long as it does not *appear* discriminatory on its face. Federal courts have struggled unsuccessfully to apply this amorphous and confusing test.

B. Federal Courts of Appeals Application of *Batson*

Virtually all federal circuit courts analyzing a *Batson* challenge have encountered problems with the three-part test. A recent computer search[185] revealed that since *Batson*, defendants in seventy-six cases established prima facie instances of discriminatory peremptory challenges, thus requiring a district court judge to evaluate the attorneys' proffered race-neutral reasons for the suspect challenges.[186] Fourteen were reversed on appeal, but in nine of these

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184 *See supra* note 182.

185 WESTLAW search conducted November 20, 1991, and updated in October, 1992. Database: ALLFEDS. Query: 230K33(5.1).

186 United States v. Clemons, 941 F.2d 321 (5th Cir. 1991); United States v. Guerra-Marez, 928 F.2d 665 (5th Cir. 1991); United States v. Valley, 928 F.2d 130 (5th Cir. 1991); United States v. Nichols, 937 F.2d 1257 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 989 (1992); United States v. Ferguson, 935 F.2d 862 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 907 (1992); United States v. Williams, 934 F.2d 847 (7th Cir. 1991); United States v. Miller, 939 F.2d 605 (8th Cir. 1991); Jones v. Jones, 938 F.2d 838 (8th Cir. 1991); Reynolds v. Benefield, 931 F.2d 506 (8th Cir.), *cert. denied*, 111 S. Ct. 2795 (1991); United States v. Sherrills, 929 F.2d 393 (8th Cir. 1991); United States v. Johnson, 941 F.2d 1102 (10th Cir. 1991); Horton v. Zant, 941 F.2d 1449 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 1516 (1992); United States v. Williams, 936 F.2d 1243 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 1279 (1992); United States v. Bennett, 928 F.2d 1548 (11th Cir. 1991); Love v. Jones, 923 F.2d 816 (11th Cir. 1991); United States v. Hendrieth, 922 F.2d 748 (11th Cir. 1991); United States v. Biaggi, 909 F.2d 662 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1102 (1991); United States v. Rudas, 905 F.2d 38 (2d Cir. 1990); United States v. Ruiz, 894 F.2d 501 (2d Cir. 1990); Harrison v. Ryan, 909 F.2d 84 (3d Cir.), *cert. denied sub nom.*, Castille v. Harrison, 111 S. Ct. 568 (1990); United States v. Roberts, 913 F.2d 211 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 2264 (1991); United States v. De La Rosa, 911 F.2d 985 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 2275 (1991); United States v. Peete, 919 F.2d 1168 (6th Cir. 1990); United States v. Briscoe, 896 F.2d 1476 (7th Cir.), *cert. denied sub nom.*, Usman v. U.S., 111 S. Ct. 173 (1990); Walton v. Caspari, 916 F.2d 1352 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1137 (1991); United States v. Matha, 915 F.2d 1220 (8th Cir. 1990); United States v. Hoelscher, 914 F.2d 1527 (8th Cir. 1990), *cert. denied sub nom.*, Guiffrida v. U.S., 111 S. Ct. 971 (1991); United States v. Jackson, 914 F.2d 1050 (8th Cir. 1990); United States v. Thomas, 914 F.2d 139 (8th Cir. 1990); United States v. Hughes, 911 F.2d 113 (8th Cir. 1990); United States v. Johnson, 905 F.2d 222 (8th Cir.), *cert. denied*, 111 S. Ct. 304 (1990); United States v. De Gross, 913 F.2d 1417 (9th Cir. 1990), *rev'd*, 960 F.2d 1433 (1992); United States v. Alcantar, 897 F.2d 436 (9th Cir. 1990); Barfield v. Orange County, 911 F.2d 644 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 2263

cases *Batson* had not yet been decided and are, therefore, irrelevant for this discussion.[187] Of the remaining five cases, two may also be discounted.[188] Thus, in only three of the seventy-six cases have federal circuit courts, applying the *Batson* test, found that the attorney's race-neutral reasons were pretextual, requiring reversal.[189]

(1991); United States v. Alston, 895 F.2d 1362 (11th Cir. 1990); United States v. Mitchell, 877 F.2d 294 (4th Cir. 1989); United States v. Wilson, 884 F.2d 1121 (8th Cir. 1989); United States v. Roan Eagle, 867 F.2d 436 (8th Cir.), *cert. denied*, 490 U.S. 1028 (1989); United States v. Nicholson, 885 F.2d 481 (8th Cir. 1989); United States v. Power, 881 F.2d 733 (9th Cir. 1989); United States v. Chinchilla, 874 F.2d 695 (9th Cir. 1989); United States v. Clemons, 843 F.2d 741 (3rd Cir.), *cert. denied*, 488 U.S. 835 (1988); United States v. Hamilton, 850 F.2d 1038 (4th Cir. 1988), *cert. denied*, 493 U.S. 1069 (1990); United States v. Terrazas-Carrasco, 861 F.2d 93 (5th Cir. 1988); United States v. Tucker, 836 F.2d 334 (7th Cir. 1988), *cert. denied*, 490 U.S. 1105 (1989); United States v. David, 844 F.2d 767 (11th Cir. 1988); United States v. Forbes, 816 F.2d 1006 (5th Cir. 1987); Garrett v. Morris, 815 F.2d 509 (8th Cir.), *cert. denied sub nom.*, Jones v. Garrett, 484 U.S. 898 (1987); United States v. Thompson, 827 F.2d 1254 (9th Cir.), *cert. denied*, 484 U.S. 928 (1987); United States v. Vaccaro, 816 F.2d 443 (9th Cir. 1987); United States v. Brown, 817 F.2d 674 (10th Cir. 1987); United States v. Chalan, 812 F.2d 1302 (10th Cir. 1987).

187 These nine cases applied the *Swain* test at the trial court level: Horton v. Zant, 941 F.2d 1449 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 1516 (1992); Love v. Jones, 923 F.2d 816 (11th Cir. 1991); Harrison v. Ryan, 909 F.2d 84 (3rd Cir.), *cert. denied*, 111 S. Ct. 568 (1990); Walton v. Caspari, 916 F.2d 1352 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1337 (1991); United States v. Wilson, 884 F.2d 1121 (8th Cir. 1989); United States v. Thompson, 827 F.2d 1254 (9th Cir. 1987); Garrett v. Morris, 815 F.2d 509 (8th Cir.), *cert. denied*, 484 U.S. 898 (1987); United States v. Brown, 817 F.2d 674 (10th Cir. 1987); United States v. Chalan, 812 F.2d 1302 (10th Cir. 1987), *cert. denied*, 488 U.S. 983 (1988).

Five cases applied the *Batson* test at the trial court level: Splunge v. Clark, 960 F.2d 705 (7th Cir. 1992); United States v. Bishop, 959 F.2d 820 (9th Cir. 1992); United States v. De Gross, 913 F.2d 1417 (9th Cir. 1990); United States v. Alcantar, 897 F.2d 436 (9th Cir. 1990); United States v. Chinchilla, 874 F.2d 695 (9th Cir. 1989).

188 One of the other two cases was reversed for a defective *Batson* hearing held in camera without defense counsel. United States v. Alcantar, 897 F.2d 436 (9th Cir. 1990). Thus, the court never fully considered the explanations themselves. *Id.* at 440. *See generally* Hopper, *supra* note 76, at 835-36 (ex parte in camera proceedings freeze analysis of *Batson* claims in their infancy); Brett M. Kavanaugh, Note, *Defense Presence and Participation: A Procedural Minimum for* Batson v. Kentucky *Hearings*, 99 YALE L.J. 187 (1989) (arguing that defense should be present during a prosecutor's in camera recitation of a race-neutral explanation).

The remaining case was reversed for the use of gender-based peremptory challenges. United States v. De Gross, 913 F.2d 1417 (9th Cir. 1990). *But see* United States v. Hamilton, 850 F.2d 1038 (4th Cir. 1988) *cert. denied*, 493 U.S. 1069 (1990) (holding that *Batson* analysis does not apply in cases in which gender-based peremptory challenges are used). *See generally*, Jere W. Morehead, *Exploring the Frontiers of* Batson v. Kentucky: *Should the Safeguards of Equal Protection Extend to Gender?*, 14 AM. J. TRIAL ADVOC. 289 (1990) (arguing that *Batson* protection should extend to gender-based challenges); Note, *Beyond* Batson: *Eliminating Gender-Based Peremptory Challenges*, 105 HARV. L. REV. 1920 (1992) (same).

In the remaining three cases, federal courts of appeals reversed district court findings of attorneys' all neutral exercise of peremptory challenges. Splunge v. Clark, 960 F.2d 705 (7th Cir. 1992); United States v. Bishop, 959 F.2d 820 (9th Cir. 1992); United States v. Chinchilla, 874 F.2d 695 (9th Cir. 1989).

189 *Splunge*, 960 F.2d at 705; *Bishop*, 959 F.2d at 820; *Chinchilla*, 874 F.2d at 695. In *Chinchilla*, the prosecutor exercised peremptory challenges to exclude one Hispanic be-

The lawyers' stated reasons for challenges in these seventy-six cases focused consistently on certain qualities of potential jurors: prior involvement with the law, prosecutorial intuition, body language and appearance, employment[190] and residence, knowledge of the defendant, and age.[191] Less popular reasons included the gender, education, or background of the venire person; a non-traditional living arrangement;[192] and the inability to defer to the courtroom translator. There is, however, no consensus among the circuits about the validity of these reasons or how to analyze them.[193]

In some circuits, many of these reasons are pretextual while in others they are unimpeachable.[194] In addition, one circuit holds a

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cause of age, residence, and type of employment. 874 F.2d at 698-99. The court observed that the presence of seated African-Americans jurors weighed against a prima facie case of discrimination. *Id.* at 698 n.4. The court also stated that the prosecutor's reasons for excluding the Hispanic were pretextual, since unchallenged jurors lived in the same area as the stricken juror, and ages of other jurors were not known. *Id.* at 699. Based upon these factors, the court applied the *Batson* test. *Id.* at 697. In *Splunge*, the attorney struck one African-American juror because the State had "feelings . . . that she would not be a good juror." 960 F.2d at 708. In the last case, *Bishop*, 959 F.2d at 822, the prosecutor struck one African-American juror who lived in a low-income housing project. The prosecutor stated that the juror probably thought that the police "pick on black people." *Id.*

190 According to one writer, occupation ranks as "extremely important" in evaluating jurors. ROBERT A. WENKE, THE ART OF SELECTING A JURY 64, 71 (2d ed. 1989). *But see* Spence, *The Dynamics of Identification in Jury Selection or How You Lost Your Last Case Without Even Knowing It: A New Approach to Voir Dire Examination, in* JURY SELECTION TECHNIQUES 60, 68 (G. Cooper ed., 1981) (arguing that a juror's employment may not reveal anything about whether a juror favors the plaintiff or defendant).

Related to occupation is income. One article argues that low income jurors empathize with civil plaintiffs, whereas wealthy jurors favor civil defendants. BILL COLSON ET AL., JURY SELECTION: STRATEGY AND SCIENCE §§ 7.06-.07 (1986).

191 In many cases, the prosecutor states that the combination of several of these traits present in one juror render that juror unsuitable for service. *See, e.g.*, United States v. Williams, 936 F.2d 1243 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 1279 (1992) (prosecutor had convicted an unrelated defendant who lived in the same area as the juror); United States v. Roan Eagle, 867 F.2d 436 (8th Cir.), *cert. denied*, 490 U.S. 1028 (1989) (juror's brother convicted on unrelated case, slovenly appearance, juror present on prior jury that acquitted unrelated defendant); United States v. Chinchilla, 874 F.2d 695 (9th Cir. 1989) (age, residence, and type of employment); United States v. Clemons, 843 F.2d 741 (3rd Cir.), *cert. denied*, 488 U.S. 835 (1988) (age, hairstyle, and dress); United States v. Terrazas-Carrasco, 861 F.2d 93 (5th Cir. 1988) (lack of eye contact, body language, age, same last name as someone previously convicted); United States v. Tucker, 836 F.2d 334 (7th Cir.), *cert. denied*, 488 U.S. 855 (1988) (juror lacked education and business experience).

192 *See, e.g.*, United States v. Nichols, 937 F.2d 1257 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 989 (1992) (illegal cohabitation by juror; another juror was living with her fiance); United States v. Williams, 934 F.2d 847, 849 (7th Cir. 1991) (juror was a young single mother who "might have other concerns").

193 For a good summary of the stances of several circuits, see *Clemons*, 843 F.2d at 746-47.

194 *See supra* note 188 (discussing circuit split on treatment of gender based reasons).

prosecutor's race-neutral reasons pretextual if the prosecutor fails to strike potential jurors who have the same traits or qualities as stricken jurors.[195] In other circuits, such a disparity is not dispositive of the issue.[196] If one or more minority jurors are already seated or if the attorney has not used all of her challenges to strike only minorities, establishing a prima facie case of discriminatory challenges will be more difficult.[197] Some circuits uphold challenges based on vague assurances from the attorney that the background of the venire member is objectionable.[198] In *Garrett v. Morris*,[199] however, the Eighth Circuit held the very same reasons pretextual.[200]

In some cases, federal circuit courts simply misapply the *Batson* test. In *Jones v. Jones*,[201] for example, the Eighth Circuit asserted that the challenge is acceptable as long as the reasons offered are "not frivolous." In addition, the court held that, once the attorney provides reasons for the challenge, the burden of proof reverts to the adverse party to show that the offered reasons are pretextual.[202] *Batson*, however, does not require that the burden of proof revert to the adverse party after the prosecutor offers a race-neutral reason for the challenge.[203] In fact, one court observed that, once a prima facie case is established, a conviction *must* be reversed unless the court finds that the prosecutor's reason qualifies as race-neutral.[204] Another court declared that the reasons need not be "quantifiable,"[205] yet *Batson* clearly requires that the reasons for the challenge be "clear and reasonably specific."[206] Additionally, several courts have asserted that mere intuition may withstand *Batson* analy-

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195 *See Chinchilla*, 874 F.2d at 695; *infra* note 234 and accompanying text.

196 *See* United States v. Clemons, 941 F.2d 321 (5th Cir. 1991); United States v. Valley, 928 F.2d 130 (5th Cir. 1991); United States v. Ferguson, 935 F.2d 862 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 907 (1992); United States v. Bennett, 928 F.2d 1548 (11th Cir. 1991); Barfield v. Orange County, 911 F.2d 644 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 2263 (1991).

197 *See* United States v. Briscoe, 896 F.2d 1476 (7th Cir.), *cert. denied*, 111 S. Ct. 173 (1990). *But see Ferguson*, 935 F.2d at 862 (holding that prima facie case established regardless of fact that prosecutor left one strike unused).

198 A challenge upheld because of an attorney's "intuition" is a challenge upheld for no reason at all. *See supra* notes 191-92. *But see* Polk v. Dixie Indus. Co., 972 F.2d 83 (5th Cir. 1992) (rejecting argument that the lack of eye contact is a pretext for racially discriminatory motives).

199 815 F.2d 509 (8th Cir. 1987), *cert. denied*, 484 U.S. 898 (1987).

200 *Id.* at 514 (rejecting prosecutor's disclaimer of racial motives).

201 938 F.2d 838 (8th Cir. 1991).

202 *Id.* at 843.

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

204 United States v. Matha, 915 F.2d 1220 (8th Cir. 1990).

205 United States v. De La Rosa, 911 F.2d 985, 991 (5th Cir. 1990) *cert. denied*, 111 S. Ct. 2275 (1991).

206 *Batson*, 476 U.S. at 98 n.20 (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981); *see supra* note 99 and accompanying text.

sis.[207] Indeed, in *United States v. Brown*, the Tenth Circuit declared that even reasons "tangentially connected with [the excluded venire person's] race" are permissible.[208]

As the preceding discussion demonstrates, little agreement exists among the circuit courts about how to analyze an attorney's allegedly race-neutral reasons for striking a venire person. These decisions are the unruly progeny of *Batson*, which provided little guidance for courts addressing the issue of whether an attorney's reasons for a peremptory challenge are pretextual or legitimate. Without adequate guidelines, courts reviewing peremptory challenges are unable to examine soft-data reasons, such as intuition or traits closely linked to race, that violate the purpose and spirit of *Batson*. Such soft-data reasons frequently mask an unarticulated fear that prompts a discriminatory peremptory challenge.

The Supreme Court and federal circuit court decisions since *Batson* reveal that all courts have dutifully adopted the three-part test announced in *Batson*. In only three cases since *Batson*, however, have federal appellate courts held invalid lawyers' proffered reasons for exclusion.[209] The disparity in the application of the *Batson* test among the federal circuit courts demonstrates the difficulty of enforcing a standard without a clear perimeter. In addition, some courts respect the tradition of the peremptory challenge more than other courts. The resulting inconsistency among the circuits is unacceptable, since, at the very least, a party's constitutional right to a fair trial should not vary among the circuits.

IV
A MODEST PROPOSAL

As a solution to the problem of the inconsistent application of the *Batson* test, this Note offers three proposals.[210] First, this Note suggests that federal courts, when applying the *Batson* test, should no longer accept reasons for a peremptory challenge that are based on soft-data. Second, this Note proposes that all explanations for peremptory challenges must be based on jurors' written or oral statements made during voir dire or contained in a questionnaire. Judges would then determine whether the statements have a substantial nexus to the facts of the particular case. Third, this Note

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207 United States v. Briscoe, 896 F.2d 1476 (7th Cir.), *cert. denied*, 111 S. Ct. 173 (1990); United States v. Terrazas-Carrasco, 861 F.2d 93 (5th Cir. 1988).

208 817 F.2d 674, 676 (10th Cir. 1987).

209 *See supra* note 189.

210 Other solutions are possible. *See generally* Robert L. Harris, Jr., Note, *Redefining the Harm of Peremptory Challenges*, 32 WM. & MARY L. REV. 1027 (1991) (arguing that venire pools ought to be more inclusive and more representative of the population at large).

argues that attorneys should be required to strike all jurors with the same "unacceptable" characteristic, regardless of race.[211]

A. Eliminating Soft-data Exclusions

Soft-data reasons for peremptory challenges are improper for several reasons. First, such reasons can mask overt and covert discrimination. A prosecutor who assumes that an African-American juror will be sympathetic to an African-American defendant and excuses that juror discriminates against both juror and defendant. When the ostensible reason for such an exclusion is purely subjective (i.e., "body language"), it cannot be analyzed; thus, the discrimination goes unchecked. Nothing prevents a prosecutor from simply lying to the judge. In addition, soft-data reasons allow "an attorney . . . [to] lie to himself in an effort to convince himself that his motives are legal."[212] As Justice Marshall explained, " '[s]eat-of-the-pants instincts' may often be just another term for racial prejudice."[213]

Second, courts cannot effectively analyze reasons based on soft-data. Subjective reasons are simply unimpeachable. Justice Marshall observed that "[a]ny prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons."[214] If he is correct, then the *Batson* test is little more than a test of the prosecutor's creativity. Therefore, it comes as no surprise that in only three cases have federal courts of appeals held invalid prosecutors' stated reasons for peremptory

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211 This is the position of the Ninth Circuit. *See* United States v. Chinchilla, 874 F.2d 695, 698 (9th Cir. 1989).

One judge has suggested requiring a lawyer who strikes any member of a group cognizable under the Equal Protection Clause to explain the strike immediately. *See* United States v. Gordon, 974 F.2d 97, 101 (8th Cir. 1992) (Heaney, J., dissenting); *see also* Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 761-68 (1992) (arguing for a modified *Batson* test that incorporates existing equal protection principles for race, gender, age, and other traits).

212 *Batson*, 476 U.S. at 106 (Marshall, J., concurring) (quoting King v. County of Nassau, 581 F.Supp. 493, 502 (E.D.N.Y. 1984)). "A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is 'sullen,' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically." *Id.*

213 *Id.*

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

> How is the court to treat a prosecutor's statement that he struck a juror because the juror had a son about the same age as [the] defendant, or seemed "uncommunicative," or "never cracked a smile" and, therefore, "did not possess the sensitivities necessary to realistically look at the issues and decide the facts in this case"?

Id. (citations omitted).

challenges.[215] To date, therefore, *Batson* has offered only "vain and illusory" protection in a court of law.[216]

Finally, permitting soft-data exclusions suggests that the Court is not serious about its commitment to the eradication of racism from the courtroom. As the *Strauder-Batson-Edmonson* line of decisions intimate, the Court apparently understands that judgments about a venire person based on intuition, body language, and dialect are often a reflection of racist assumptions.[217] If this were not true, then the *Batson* test serves little purpose. If, however, the purpose of *Batson* is to expose and eradicate racist stereotyping and discrimination in the jury selection process, then soft-data exclusions, which cloak racist peremptory challenges, must be eliminated.

Critics of this first proposal will charge that the elimination of the "instinctive" exclusion of jurors in the *Batson* challenge context represents a radical break from the traditional exercise of the peremptory challenge. The Court, however, already made a profound break with tradition when it decided *Batson v. Kentucky*. By itself, the *Batson* test ensures that peremptory challenges will be subject to judicial scrutiny when the defendant establishes a prima facie case of discrimination in juror exclusion. The challenge is no longer beyond the reach of the Constitution, and it is no longer the "arbitrary and capricious" right that Blackstone celebrated.[218] Therefore, to propose that exclusions based on soft-data are improper represents only a modest extension of *Batson*.

B. Hard-data Reasons for Exclusion and the "Substantial Nexus" Test

This Note's second proposal has two parts. First, the exclusion of a juror should be based on the juror's written or oral statements made during voir dire or in a juror questionnaire. Such statements constitute acceptable hard-data reasons for exclusions. The seventy-six federal circuit court cases decided since *Batson* provide examples of hard-data reasons:

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215 *See supra* note 189.

216 *Batson*, 476 U.S. at 98.

217 These cases suggest that reasons that are "tangentially related to race" are improper. *But see* Hernandez v. New York, 111 S. Ct. 1859 (1991). In that case, the Court required that the prosecutor's explanation itself evidence a discriminatory motive or intent. The confusion in the *Hernandez* case about what sort of standard the reason must meet is yet another reason to get rid of the soft-data exclusion. Unless the prosecutor admits that he is a racist or says something blatantly discriminatory, every reason would pass muster. Surely *Batson*—and the Equal Protection Clause—stand for more than that. *See generally supra* part III.A.

218 *See supra* note 20.

Type and status of employment;[219]
Age;[220]
Marital status;[221]
Location of residence;[222]
Level of education;[223]
Knowledge of the defendant;[224]
Prior jury participation in a criminal trial;[225]
Prior involvement with the law or crime.[226]

These factors provide judges with specific and verifiable reasons for a juror's exclusion and would thus allow them to analyze a peremptory challenge effectively. Judges may add additional hard-data reasons in developing a common law body of acceptable peremptory challenges. Such a body of law is not, however, as important as the requirement that an attorney's reasons for exclusion be based on a juror's verifiable statements made during voir dire or in a juror questionnaire.

Subjective soft-data such as body language, tone of voice, hairstyle, and dress would then no longer be acceptable. By denying an attorney use of intuition as a sufficient reason for an exclusion, the hard-data requirement forces the attorney to articulate an objective reason for the challenge. The requirement also obligates the judge to examine the juror's responses to questions for support of the peremptory challenge, thereby limiting the peremptory challenge to particular facts within the trial judge's actual knowledge.[227]

Second, a judge conducting such an examination should determine whether there is a substantial nexus between the juror's statements during voir dire and the specific facts of the case. This final test for the acceptability of a juror necessitates a judge's active supervision of jury selection. Indeed, the third part of the *Batson* test anticipates such a judicial role.[228] For example, in *United States v. Bishop*, the Ninth Circuit correctly disallowed an attorney's peremptory challenge that was based on the attorney's assumption that a juror's residence in a low-income, predominantly African-American neighborhood would bias the juror.[229] The attorney asserted that

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219 *See supra* notes 190-93 and accompanying text.
220 *See supra* notes 190-93 and accompanying text.
221 *See supra* notes 190-93 and accompanying text.
222 *See supra* notes 190-93 and accompanying text.
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224 *See supra* notes 190-93 and accompanying text.
225 *See supra* notes 190-93 and accompanying text.
226 *See supra* notes 190-93 and accompanying text.
227 It also will help address a judge's conscious or unconscious racism. Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring).
228 *Batson*, 476 U.S. at 98.
229 959 F.2d 820, 825-26 (9th Cir. 1992).

the juror probably believed that the police "pick on" African-Americans and would therefore be biased against the state.[230] Of course, residence in a particular neighborhood could have a substantial nexus with the facts of the case if, for example, the juror lived near the crime scene or the defendant.[231] In *Bishop*, however, there was no such nexus.[232] Thus, the substantial nexus test requires active judicial supervision of a lawyer's peremptory challenges and therefore effectively limits a lawyer's opportunities for improper discrimination.

Critics of this second proposal will charge that the hard-data requirement merely replaces one set of discriminatory reasons with another. In other words, reasons such as "level of education" or location of residence can be used just as discriminatorily as body language or intuition. There are three responses to this criticism. First, the juror statement—on which the attorney's explanation is based—must have a substantial nexus to potential bias. Such a requirement nullifies an explanation based on the group bias argument criticized in *Batson*. Second, the goal of this proposal is not to *eliminate* all discrimination in the judiciary system.[233] Such a quest would be quixotic. Rather this proposal strives to *restrict* the ability of an attorney to discriminate when selecting a jury for trial. The hard-data proposal accomplishes that. Third, the hard-data test forces an attorney to answer the question: "Why am I striking this juror?" This self-questioning may well lead to an examination of the assumptions that one race has about another. An attorney who cannot specifically and objectively answer the question with legitimate factors must accept the juror.

C. The Requirement of "Comparability"

In addition to the adoption of the "hard-data" and "substantial nexus" tests, this Note proposes that the attorney who exercises the suspect exclusion must also challenge all jurors with the same trait or quality, regardless of race. For example, if an African-American

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230 *Id.* at 822.

231 "Residence, as it were, often acts as an ethnic badge." *Id.* at 828. The Court in *Bishop* lists several articles that deal with residence and race. *Id.*

232 *Id.* at 825-26.

233 Because discrimination cannot be otherwise eliminated from the courtroom, some writers advocate the total elimination of peremptory challenges. *See, e.g., Batson*, 476 U.S. at 102-03 (Marshall, J., concurring); VAN DYKE, *supra* note 3, at 167-69; Theodore McMillian & Christopher J. Petrini, Batson v. Kentucky: *A Promise Unfulfilled*, 58 UMKC L. REV. 361 (1990); Brent J. Gurney, Note, *The Case for Abolishing Peremptory Challenges in Criminal Trials*, 21 HARV. C.R.-C.L. L. REV. 227 (1986); Mintz, *supra* note 76, at 1026; Note, *Due Process Limits on Prosecutorial Peremptory Challenges*, 102 HARV. L. REV. 1013 (1989). *But see* Babcock, *supra* note 4, at 553 (approving peremptory challenges because it "avoids trafficking in the core of truth in most common stereotypes").

juror is challenged because of the location of her home, the attorney would be required to challenge all jurors who live in that area. This requirement of comparability is necessary to ensure that hard-data reasons offered against African-American jurors are also used to exclude all jurors with the same traits.[234] Attorneys who know that they must strike all jurors with the same trait will exercise peremptory challenges circumspectly. Such an attorney might be willing to allow minority jurors to be seated whom she would otherwise challenge peremptorily. From the attorney's perspective, it must be better to seat one unfavorable juror than to exclude several favorable jurors.

V
APPLICATION OF THE "HARD DATA"/"SUBSTANTIAL NEXUS" PROPOSAL

Applying the proposal herein described, *Hernandez v. New York*[235] was wrongly decided.[236] In that case, the prosecutor exercised his peremptory challenges to dismiss two venire persons with Latino surnames.[237] The prosecutor stated that he had doubts, based on the jurors' demeanor, that they would defer to the court-appointed translator.[238] The Court upheld the exclusions of these two jurors, asserting that there was no discriminatory intent inherent in the prosecutor's explanation.[239]

If the facts of *Hernandez* were subject to the hard-data proposal, the prosecutor would not have been permitted to rely on the demeanor of the jurors as justification for the challenge. Absent admissions by the jurors that they would not defer to the courtroom translator, no peremptory challenge would have been allowed. Demeanor allegedly indicating a lack of willingness to defer to the official translator constitutes an impermissible soft-data reason.

The other two challenged jurors, excluded because each had brothers whom the District Attorney's Office had prosecuted,[240]

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234 *See* Reynolds v. Benefield, 931 F.2d 506, 512 (8th Cir. 1991) (upholding peremptory challenge of venire person with same surname as someone previously arrested on misdemeanor charge).

235 111 S. Ct. 1859 (1991); *see supra* part III.A.

236 Originally, *Hernandez v. New York* was not a federal case but a New York State case. There is no reason to believe, however, that the United States Supreme Court would have decided the case differently had it arisen in the federal courts. Therefore, the application of the "hard-data" proposal to *Hernandez* is reasonable because it strongly suggests what the Court would do if such a case arose in the federal courts.

237 People v. Hernandez, 552 N.E.2d 621, 622 (N.Y. 1990); *see supra* notes 157-62 and accompanying text.

238 *See supra* notes 157-62 and accompanying text.

239 Hernandez, 111 S. Ct. at 1867-68; *see supra* notes 164-81 and accompanying text.

240 *See supra* note 159 and accompanying text.

were properly challenged. The prosecutor need only show that the juror's statements have a substantial nexus with the facts of the case. Such a showing would not be burdensome when the issue is prior involvement with the prosecutor.[241]

Applying the hard-data proposal to *Hernandez v. New York* provides a more satisfactory decision for several reasons. First, the Court need not involve itself in the tortuous labyrinth of determining prosecutorial "intent."[242] Whether a prosecutor intended to discriminate or not, her reasons must link the juror's statements to the facts of the case. If a link is established the juror is dismissed; if not, the juror remains. Second, as the *Hernandez* Court observed, certain traits bear a close relation to race. For example, striking all jurors who speak a certain language could easily be pretextual.[243] Thus, the question arises whether there is a substantial nexus between language ability and the facts of the case. If the prosecutor did not ask all jurors about their Spanish language fluency, there can be no such nexus. In addition, because a reason such as language fluency is "tangentially connected to race,"[244] *Batson*'s proscription of race-based peremptory challenges would cause the challenge to fail. Thus, bilinguals probably could not be challenged for their dual language proficiency *alone*, regardless of their courtroom demeanor.[245]

At the federal circuit court level, many of the seventy-six cases previously mentioned would also have been decided differently under the hard-data/substantial nexus proposal. Examples abound of jurors excused for soft-data reasons: sitting with arms crossed and appearing hostile;[246] "slovenly" attired;[247] eye contact and body language;[248] facial expressions and lack of strength of convictions;[249] inattentiveness;[250] hairstyle and dress;[251] glared at defen-

241 *See supra* note 226 and accompanying text.
242 *See supra* notes 167-74.
243 *See supra* note 172 and accompanying text.
244 *See supra* notes 172-74 and accompanying text.
245 This Note does not suggest that a judge could not remove a juror whose demeanor in court clearly indicates either strong bias or resentment at being called to serve on a jury. Such a removal would, however, be a challenge for cause and would therefore be subject to a judge's discretion.
246 United States v. Forbes, 816 F.2d 1006 (5th Cir. 1987).
247 United States v. Roan Eagle, 867 F.2d 436, 441 (8th Cir.), *cert. denied*, 490 U.S. 1028 (1989).
248 United States v. Terrazas-Carrasco, 861 F.2d 93 (5th Cir. 1988).
249 United States v. Ruiz, 894 F.2d 501 (2d Cir. 1990).
250 United States v. Rudas, 905 F.2d 38 (2d Cir. 1990).
251 United States v. Clemons, 941 F.2d 321 (5th Cir. 1991).

dant;[252] shabby dress;[253] "background";[254] rubbing and rolling eyes.[255] Absent a hard-data reason for these peremptory challenges and a substantial nexus to the facts of the case, the jurors in the aforementioned examples would not have been excused in the context of a *Batson* challenge. Such an approach avoids the need for an appeal, conserves judicial resources, and preserves the integrity of the jury selection process.

CONCLUSION

When the challenged venire person is a member of a cognizable class under the Equal Protection Clause, reasons for the exercise of a peremptory challenge based on hairstyle, dress, or body language easily conceal an attorney's covert or overt racism. Because these soft-data reasons allow an attorney to discriminate against both the defendant and the excluded juror, soft-data reasons for exclusion should not be permitted in a *Batson* challenge.

The Court should require that an attorney's reason for a peremptory challenge must be an objective hard-data reason that can be verified through a juror's actual statement during jury selection. Forcing an attorney to articulate a hard-data reason would inhibit discriminatory peremptory challenges because the court could better assess the validity of the proffered reason. The substantial nexus test then forces the judge to examine the reason critically. The potential for juror partiality may suffice to exclude the juror when the proffered reason is substantially related to the facts of the case. Finally, the requirement of comparability would encourage an attorney to weigh the benefits of striking a juror of a cognizable class when that attorney would be required to strike all jurors with that particular hard-data trait.

Though these proposals would not eliminate all racism from the courtroom, they represent significant progress from the ineffective and confusing *Batson* test. Eliminating peremptory challenges based on soft-data protects defendants and venire persons from overtly discriminatory peremptory challenges as well as from more subtle and covertly racist peremptory challenges based on intuition and demeanor. Enacting the hard-data proposal and substantial nexus test would also demonstrate that the *Batson* and *Edmonson* Courts' departure from traditional peremptory challenge practice

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252 Barfield v. Orange County, 911 F.2d 644 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 2263 (1991).

253 United States v. Hughes, 911 F.2d 113 (8th Cir. 1990).

254 United States v. Chalan, 812 F.2d 1302, 1314 (10th Cir. 1987), *cert. denied*, 488 U.S. 983 (1988).

255 United States v. Hendrieth, 922 F.2d 748 (11th Cir. 1991).

constitutes more than a vain and illusory commitment to equal protection under the law.

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