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TURNER'S ACCEPTANCE OF LIMITED VOIR DIRE RENDERS *BATSON*'S EQUAL PROTECTION A HOLLOW PROMISE

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More than twenty years after major civil rights activism, racism continues to pervade American society. Elections are campaigned for—and won—along racial lines.[1] There is a pronounced return to overt racism on college campuses[2] and among working class youths—witness the Howard Beach incident[3] and the Skinhead phenomena.[4] Troublingly,

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1. In major cities with large black populations, for example, mayoral election campaigns and results often tend to reflect the racial divisiveness, distrust and resentment of the constituency. Mayoral election campaigns over the last few years in Chicago and Philadelphia are examples of the acrimony frequently attendant on campaigns involving both black and white candidates. *See, e.g.*, Harrison, *Daley Easily Wins Race for Chicago Mayor*, L.A. Times, Apr. 5, 1989, pt. 1, at 1, col. 4; Belsie, *In Chicago Mayoral Primary, The Biggest Issue Is Race*, Christian Sci. Monitor, Feb. 19, 1987, at 3; Malcolm, *Chicago Mayoral Race: A Matter of Blacks and Whites*, N.Y. Times, Mar. 28, 1983, A 13, col. 1; *Goode, Rizzo Trade Racism Charges, Complaints*, U.P.I., Nov. 1, 1987, AM cycle (NEXIS, Current library, Papers file).

Even national elections can contain more than a small amount of race-based tension. In the 1988 Presidential campaign, George Bush was criticized for running anti-Dukakis commercials featuring Willie Horton, a black convict who raped a white woman while on furlough from a Massachusetts prison. Critics maintained that Bush's strategy in running the commercials was essentially racist—that he hoped to capitalize on whites' fear of blacks. *See, e.g.*, Cohen, *The Republicans Asked for It*, Wash. Post, Feb. 22, 1989, A 17; A.P., Oct. 24, 1988, PM cycle (NEXIS, Current library, Papers file). Additionally, in early 1989, after David Duke, a former Ku Klux Klan leader, was elected as a Republican member of the Louisiana legislature, the Republican Party was criticized for having fostered in recent years a favorable climate in the South for racist sentiments. *See, e.g.*, Cohen, *supra*.

2. A number of newspaper and magazine articles in the last two years have discussed a resurgence of racism on college campuses throughout the country. This racism has been manifested in a variety of ways, including the establishment of reactionary white student organizations, arson on a black fraternity house, and distribution of student-written literature advancing racist themes. *See, e.g.*, Tifft, *Bigots in the Ivory Tower*, TIME, Jan. 23, 1989, at 56.

3. A great deal of publicity recently surrounded the arrest, trial and conviction of several New York youths for the death of a black youth who was hit by a car as he attempted to escape the white youths. Jury selection became a racially charged issue when counsel for the youths allegedly tried to exclude blacks from the jury. *See, e.g.*, *Two Juries Are Chosen in Howard Beach Trial*, N.Y. Times, June 9, 1988, B 2, col. 6; *12 From Queens Picked for Jury in Black's Death*, *id.*, Oct. 2, 1987, B 2, col. 1; *Race and the Law; Blacks Growing More Skeptical of Courts in Racial Bias Cases*, Christian Sci. Monitor, Sept. 28, 1987, at 3; Fried, *Picking Howard Beach Jury: Sifting Outlooks*, N.Y. Times, Sept. 10, 1987, § 13, at 4, col. 4.

4. A fair amount of media attention has been given to the recent emergence of so-called neo-Nazi or white supremacist organizations, such as the Skinheads. Such groups, often composed of disaffected working class youths, perpetrate intimidation and violence along racial lines. *See, e.g.*, Applebome, *New Report Warns of Alliance of Racist Groups*, N.Y. Times, Feb. 6, 1989, A 11, col. 1; King, *Violent Racism Attracts New Breed: Skinheads*, N.Y. Times, Jan. 1, 1989, § 1, pt. 2, at 35, col.

the criminal justice system reflects the pervasiveness of late twentieth century American racism. Although the judicial system is where racism is least acceptable, systemic considerations have allowed racial discrimination to linger—indeed, in some instances, to proliferate.[5]

One facet of the criminal justice system, jury selection, has been an object of the Supreme Court's examination for more than a century. This concern is highly appropriate, inasmuch as citizen participation on juries is a significant symbol of our democratic tradition.[6] Unfortunately, however, the Court has moved haltingly—sometimes stepping backwards by narrowly interpreting precedent—in its articulation of constitutional and prudential standards for juror selection in criminal trials.

An examination of two Supreme Court opinions recently announced on the same day illustrates the Court's ambivalence with respect to fulfilling a criminal defendant's sixth and fourteenth amendment guarantees during his trial. In *Batson v. Kentucky*,[7] the Supreme Court, reversing its previous position, held that a black defendant can make a prima facie showing of a prosecutor's racially discriminatory exercise of peremptory challenges based solely on the facts of his own case.[8] However, in *Turner v. Murray*,[9] the Court upheld the conviction of a black capital defendant who had been denied specific voir dire inquiry into prospective jurors' racial prejudice.[10] Although Turner's death sentence was vacated, five justices upheld the conviction, reasoning that the trial court's voir dire did not—except for the fact that it was a capital trial in which jurors had discretion in sentencing—deny the defendant his constitutional rights.[11]

This Note will examine some of the major Supreme Court decisions on the ramifications of racial discrimination on jury selection, focusing on peremptory challenges and voir dire. First, the Note will discuss the Court's major equal protection decisions on petit jury selection, particularly its recent decision in *Batson* on the equal protection considerations

1. *See also* Leo, *A Chilling Wave of Racism; From L.A. to Boston, the Skinheads Are on the March*, TIME, Jan. 25, 1988, at 57.

5. For a wide ranging discussion of the disturbing degree of disparate treatment being afforded blacks by the criminal justice system today, see *Developments - Race and the Criminal Process*, 101 HARV. L. REV. 1472 (1988) [hereinafter *Developments*].

6. For a discussion of the jury as a linchpin in our democratic system, see J. VAN DYKE, *A Jury of One's Peers*, in JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 1 (1977).

7. 476 U.S. 79 (1986).

8. *Id.* at 96.

9. 476 U.S. 28 (1986).

10. *Id.* at 37.

11. *Id.* at 37-38.

in a prosecutor's exercise of peremptory challenges. Next, the Note will trace the Court's major decisions on voir dire inquiry into the possible racial or ethnic prejudice of prospective jurors. The Note will then juxtapose the peremptory challenge and voir dire cases.

The juxtaposition of *Batson* and *Turner* illustrates that, despite its repeated affirmation of equal protection and impartial jury doctrines, the Court seems unwilling to enforce broadly the constitutional rights of minority defendants in criminal trials. While *Batson* may stand for enhanced equal protection safeguards for a minority defendant, *Turner* demonstrates the Court's reluctance—in all but the most extreme cases—to mandate voir dire on the specific issue of racial or ethnic prejudice. Further, this juxtaposition of peremptory challenge and voir dire decisions makes clear that under the guise of preserving the discretion of trial judges in the supervision of voir dire and the exercise of peremptory challenges, the Court has failed fully to enforce constitutional guarantees.

This discussion will be followed by a brief consideration of recent, abortive legislative attempts to reform the rule governing voir dire in the federal courts. This discussion provides insight into some of the competing values weighed by the Court in jury selection cases and may partially explain, but ultimately does not justify, the Court's equivocation on the scope of constitutional protections to be provided to minority criminal defendants. This Note concludes with a recommendation that the Supreme Court reconcile its inconsistent messages on the constitutional guarantees to be afforded minority criminal defendants in the selection of jurors for their trials. The critically important role voir dire plays in the exercise of peremptory challenges—both by the defendant and the prosecution—calls for an explicit statement by the Court that voir dire is not to be limited by the vagaries of trial court discretion. Rather, voir dire must be thoroughly exercised in both federal and state court, particularly in trials involving violent, interracial crime.

I. THE COURT'S DELINEATION OF EQUAL PROTECTION IN JURY SELECTION—FROM *STRAUDER* TO *BATSON*

A. Strauder *and its Progeny*

The seminal case interpreting the fourteenth amendment's equal protection ramifications on jury selection was decided in 1880. In *Strauder v. West Virginia*,[12] a black man was convicted of murder by an all white jury. He appealed his conviction on the ground that West Vir-

12. 100 U.S. 303 (1880).

ginia's statutory exclusion of blacks from jury service violated the equal protection clause of the fourteenth amendment.[13] The Court reversed his conviction, construing the fourteenth amendment to "contain a necessary implication of a positive immunity, or right, most valuable to the colored race . . . [which provides an] exemption from legal discriminations [that] imply[ ] inferiority in civil society, [and] lessen[ ] the security of their enjoyment of the rights which others enjoy."[14] The Court reasoned that protection of life and liberty against racial prejudice was a legal right under the fourteenth amendment and that the right to a trial by a jury whose decision was not tainted by racial prejudice was a necessary incident of that right.[15]

Strauder made clear that facially discriminatory jury selection statutes violate the equal protection clause of the fourteenth amendment. However, subsequent discriminatory application of racially neutral jury selection statutes necessitated further Court attention to the contours of equal protection. One year after *Strauder*, in *Neal v. Delaware*,[16] the Court held that Delaware's exclusion of blacks from both the grand and petit juries violated the fourteenth amendment by placing an unconstitutional taint on the "fairness and integrity of the whole proceeding against the prisoner."[17] William Neal, a black accused of rape, was indicted by a white grand jury and convicted by a white petit jury. Although blacks in Delaware voted and could testify at trials, no black had ever been placed on a list from which grand and petit juries were selected.[18] This occurred because the state courts construed a juror qualification statute requiring that members of the jury pool be "sober and judicious" as necessarily excluding blacks.[19] The Court characterized Delaware's exclusion of blacks based on supposed deficient intelligence, experience or moral integrity as "a violent presumption."[20] Accordingly, the Court reversed the lower court's denial of Neal's motion to quash the indictment and panels of jurors.[21]

Despite *Strauder* and *Neal*, racial discrimination in the formulation of jury lists persisted. In 1935, in *Norris v. Alabama*,[22] the Court again considered the exclusion of blacks from jury service based on the jury

13. *Id.* at 304-06.
14. *Id.* at 307-08.
15. *Id.* at 309.
16. 103 U.S. 370 (1881).
17. *Id.* at 396.
18. *Id.* at 381.
19. *Id.* at 388.
20. *Id.* at 397.
21. *Id.* at 398.
22. 294 U.S. 587 (1935).

commissioners' belief that no blacks met Alabama's statutory requirement of honesty, intelligence and sound judgment.[23] The Court said that the black defendant, Clarence Norris, who stood convicted of rape, had made a prima facie showing of longstanding exclusion of qualified blacks from jury service.[24] The defendant had produced uncontradicted testimony that no black had—at least for a generation and possibly ever—served on either a grand jury or a petit jury in the county in which he had been tried and convicted.[25] The Court reversed Norris's conviction, finding that the county's jury board did not adequately rebut the plaintiff's prima facie showing.[26] The Court observed that to accept "the mere general assertions" of the jury commissioners in the face of the defendant's evidence of uniform exclusion of blacks would render the fourteenth amendment "a vain and illusory requirement."[27]

B. Swain v. Alabama: *The Court's Initial Consideration of Peremptory Challenges as a Tool of Discrimination*

Not only were blacks frequently excluded from jury lists, they were often excluded from the petit jury by prosecutors' peremptory challenges.[28] The peremptory challenge, which is provided for in all fifty states and in the federal system, is a method of removing veniremembers from the jury panel.[29] It allows an attorney to exclude, without explana-

23. *Id.* at 598-99.

24. *Id.* at 591.

25. *Id.*

26. *Id.* at 599. A member of the jury board testified that a list of all male citizens, from which blacks were not excluded, was compiled, and that from this list, those meeting statutory qualifications were placed on the jury roll. Other members of the jury board concurred by affidavit. *Id.*

27. *Id.* at 598.

28. J. VAN DYKE, *The Third Stage: Challenges*, in JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS, *supra* note 6, at 150.

29. *See* Note, *Rethinking Limitations on the Peremptory Challenges*, 85 COLUM. L. REV. 1357, 1359-60 (1985). *See also* FED. R. CRIM. P. 24(b), which provides:

> 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 six 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 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.

ILL. REV. STAT. ch. 38, para. 115-4(e) (1977) provides:

> A defendant tried alone shall be allowed 20 peremptory challenges in a capital case, 10 in a case in which the punishment may be imprisonment in the penitentiary, and 5 in all other cases; except that, in a single trial of more than one defendant, each defendant shall be allowed 12 peremptory challenges in a capital case, 6 in a case in which the punishment may be imprisonment in the penitentiary, and 3 in all other cases. If several charges against a defendant or defendants are consolidated for trial, each defendant shall be allowed peremptory challenges upon one charge only, which single charge shall be the charge against that defendant authorizing the greatest maximum penalty. The State shall be allowed the same number of peremptory challenges as all of the defendants.

tion or "cause," a prospective juror whom the attorney, for reasons that may not be legally supportable, suspects may be biased.[30] The peremptory challenge is of early common law origin and was provided for by Congress as early as 1790.[31] Although it fell into disuse in England, the peremptory challenge in America became a means of excluding blacks from petit juries during the latter half of the nineteenth century, and continued well into the first half of the twentieth century.[32] Thus, despite *Strauder*, *Neal* and *Norris*, the peremptory challenge provided an all too effective means of effecting racial discrimination in jury selection through the mid-twentieth century.[33]

This pattern of racial exclusion in jury selection came before the Court in the 1965 case of *Swain v. Alabama*.[34] Robert Swain was a black who had been convicted of rape and sentenced to death by an all white jury. He appealed his conviction, arguing that blacks were underrepresented on grand juries (only two blacks had served on the grand jury that indicted him) and systematically excluded from petit juries by means of peremptory challenges (six blacks had been struck peremptorily in *Swain*), resulting in a denial of equal protection.[35] While asserting that a defendant is not constitutionally entitled to a proportionate number of members of his race on the jury roll, venire or jury, the *Swain* Court held that Alabama's systematic exclusion of blacks in the jury selection process could raise a prima facie case of discrimination.[36] The Court concluded, however, that Robert Swain had not made this showing with his averments of statistical underrepresentation of blacks on grand and petit juries in his county.[37]

The *Swain* Court distinguished *Norris*, where blacks had been totally

30. *See* Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545, 550-51 (1975).

31. The first Congress established that the defendant was entitled to 35 peremptory challenges in trials for treason and 20 in trials for other felonies specified in the 1790 Act as punishable by death. 1 Stat. 119 (1790). In regard to trials for other offenses outside the 1790 statute, both the defendant and the Government were thought to have a right of peremptory challenge, although the source of this right was not wholly clear. *See* Swain v. Alabama, 380 U.S. 202, 214 (1965).

32. J. VAN DYKE, *supra* note 28. *See also* Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 166-67 ("In the United States, as broadened standards of eligibility for jury service manifested democratic faith in the popular administration of justice, the peremptory challenge manifested countervailing doubt, mistrust, and ambivalence.").

33. J. VAN DYKE, *supra* note 28.

34. 380 U.S. 202 (1965).

35. Although the grand jury which had indicted Swain had two blacks on it, no black had served on a petit jury in Swain's county since about 1950, even though petit jury venires typically consisted of six or seven blacks. *Id.* at 205.

36. *Id.* at 208, 224.

37. *Id.* at 206, 209, 224.

excluded from grand and petit jury venire panels.[38] While acknowledging that Alabama's system of jury list compilation was "haphazard" and "imperfect," resulting in underrepresentation of blacks, the *Swain* Court did not find purposeful racial discrimination.[39] More significantly, after a rather lengthy recounting of the history of peremptory challenges in England and America,[40] the Court concluded that the importance of the challenge in a pluralistic society precluded examination of a prosecutor's reasons for exercising such challenges.[41] The Court reasoned that, being predicated on an extensive and probing voir dire, the "function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise."[42] Further, the Court averred that the use of peremptory challenges by both the prosecution and the defense ensured that the scales of justice were evenly balanced.[43]

Although willing to presume prosecutorial integrity in a particular case, the *Swain* Court observed that fourteenth amendment concerns have added significance when a prosecutor "in case after case . . . is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries."[44] Although the Court found that Robert Swain had not demonstrated a constitutional violation, it held that a defendant could successfully raise an equal protection objection to the prosecutor's peremptory challenges by showing—in a more specific and conclusive fashion—a systematic exclusion of blacks over a period of time.[45]

Justice Goldberg dissented on the ground that under the equal protection principle announced in *Strauder*, *Neal* and *Norris*, Robert Swain had in fact shown that the prosecutor had used his peremptory challenges unconstitutionally.[46] Moreover, he argued that, in the context of the era's heightened sensitivity to the persistence of racial discrimina-

38. *Id.* at 206.
39. *Id.* at 209.
40. *Id.* at 212-18.
41. *Id.* at 222.
42. *Id.* at 219.
43. *Id.* at 220.
44. *Id.* at 223.
45. *Id.* at 227.
46. *Id.* at 228-31 (Goldberg, J., dissenting). Chief Justice Warren and Justice Douglas joined in the dissent.

tion,[47] it was "unthinkable" that the Court would countenance any "weaken[ing] or undermin[ing] [of the prohibition of state discrimination on the basis of race] at this late date."[48] Justice Goldberg noted the irony in the majority's approving reference to *Strauder* and its progeny despite a holding that he deemed incompatible with *Strauder*'s equal protection principles.[49] He viewed *Swain* as having presented a prima facie showing of systematic racial exclusion at least as strong as that made in *Norris*.[50] Justice Goldberg also took issue with the majority's distinction between exclusion of blacks from the venire, which had been at issue in *Norris*, and their exclusion from the jury itself, which was at issue in *Swain*.[51] The majority argued that this distinction was significant because while venire selection was carried out entirely by state officers (*i.e.*, jury commissioners), peremptory challenges were exercised by defense counsel as well as the prosecutor.[52] Justice Goldberg responded that the common object of inquiry in all the discriminatory jury selection cases was effective exclusion from jury service, and concluded that the *Swain* holding seriously impaired the authority of *Strauder* and its progeny.[53]

C. Batson v. Kentucky: *The Court's (Mostly Rhetorical) Equal Protection Remedy for Discriminatory Peremptory Challenges*

Twenty-one years later, in the wake of much scholarly criticism of the decision,[54] as well as lower court circumvention of its rule,[55] the Court in *Batson v. Kentucky* effectively overruled *Swain*. James Batson, a black, had been convicted of burglary and receipt of stolen goods by an all white jury. He appealed the conviction on the ground that the prosecutor had peremptorily challenged all four blacks on the venire, thereby denying him his sixth amendment right to an impartial jury and a jury

47. Justice Goldberg referred to the Court's effective overturning of Plessy v. Ferguson, 163 U.S. 537 (1896), in Brown v. Board of Education, 347 U.S. 483 (1954).

48. 380 U.S. at 231.

49. *Id.*

50. *Id.* at 232.

51. *Id.* at 239.

52. *Id.* at 227.

53. *Id.* at 239-41.

54. *See, e.g.*, J. VAN DYKE, *supra* note 28, at 166-67; Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1659 & n.242 (1985); Brown, McGuire & Winters, *The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse*, 14 NEW ENG. L. REV. 192, 196-202 (1978).

55. Several years after the *Swain* decision, the Court in Duncan v. Louisiana, 391 U.S. 145 (1968) extended the sixth amendment to the states through the due process clause of the fourteenth amendment. Additionally, some state courts relied upon their state constitutions in prohibiting discriminatory challenges. The two leading cases are Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979), and People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

representing a fair cross section of the community.[56]

The Supreme Court did not reach these arguments, deciding the case instead on fourteenth amendment equal protection grounds. The Court held that a black criminal defendant can make a prima facie showing of a prosecutor's purposeful racial discrimination in the exercise of peremptory challenges solely on evidence concerning his particular trial.[57] The Court stated that a defendant could make this prima facie showing by demonstrating that: (1) the defendant belongs to a cognizable racial group; (2) the prosecutor exercised peremptory challenges to exclude veniremembers of that group from the jury; and (3) the relevant circumstances give rise to the inference of purposeful discrimination. For example, a black defendant could make this prima facie showing where a prosecutor removes all the black veniremembers without questioning them during voir dire, thereby demonstrating that the prosecutor lacked a legitimate reason for the exercise of those peremptory challenges.[58]

The Court said that after the defendant has made this prima facie showing, the burden shifts to the prosecutor to rebut the defendant's challenge of racial discrimination.[59] This rebuttal must be predicated on racially neutral grounds; the prosecutor cannot rebut by stating that he challenged jurors on the assumption that they would be partial to the defendant because of race or by merely affirming his own good faith in

56. *Batson*, 476 U.S. at 113 (Burger, C.J., dissenting) (quoting Batson's petition for certiorari).

57. *Id.* at 96.

58. *Id.* Because of the difficulty of proving discriminatory intent, the Court had over the years developed a standard by which an alleged victim of discrimination could make a prima facie showing of purposeful discrimination. This prima facie showing in jury selection cases was first articulated by the Court in regard to grand jury selection. *See, e.g.*, Castaneda v. Partida, 430 U.S. 482 (1977) (based on relevant facts, including statistical disparity between county's population of Mexican-Americans (79%) and those called for grand jury service (39%), plaintiff made prima facie case of intentional discrimination); Alexander v. Louisiana, 405 U.S. 625 (1972) (black made prima facie showing of discriminatory grand jury selection where 21% of the population eligible for grand jury service was black but only 5% of the defendant's venire, and none of defendant's grand jurors, was black); Whitus v. Georgia, 385 U.S. 545 (1967) (blacks made prima facie showing of discrimination in selection of grand and petit jury, where measurable black population was 27.1%, but blacks comprised 9.1% of grand jury venire and 7.8% of petit jury venire).

This prima facie showing standard was also an outgrowth of the Court's recognition in other racial discrimination cases that discrimination frequently could be shown by the totality of relevant circumstances. *See* Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (discriminatory intent can be proven by a combination of many kinds of evidence because many factors can enter into an allegedly discriminatory decision; however, when discriminatory purpose is shown to be a motivating factor in a decision, judicial scrutiny is appropriate); Washington v. Davis, 426 U.S. 229 (1976) (black candidates' exclusion more often than whites from police training program because of lower scores on verbal tests insufficient to show equal protection violation; purposeful discrimination must be shown by a totality of relevant facts).

59. *Batson*, 476 U.S. at 97.

individual selection.[60]

In applying this particular analysis, the *Batson* Court weighed the competing interests of prosecutorial discretion and the defendant's constitutional rights. The prosecutor historically has had the latitude to exclude those prospective jurors suspected of latent, or at least unarticulated, bias.[61] But in *Batson*, unlike *Swain*, the Court was more willing to displace prosecutorial discretion because of constitutional demands.[62] Thus, *Batson* seemingly represents a significant shift in the balance between the criminal justice system's procedural devices and institutional demands, on one hand, and the constitutional rights of a minority defendant, on the other. *Batson* therefore, at least ostensibly, represents a return to the clearly articulated equal protection precepts of *Strauder*, *Neal* and *Norris*.

In his concurring opinion in *Batson*, Justice Marshall expressed serious reservations about a trial court's ability to assess accurately a prosecutor's motives. He feared that unconscious as well as conscious racism on the part of the prosecutor or the judge might render illusory *Batson*'s equal protection objectives.[63] Justice Marshall advocated the total abolition of the peremptory challenge as the appropriate response to systemic racism.[64]

60. *Id.* at 97-98.

61. *See supra* note 31. The prosecutor has not *always* had the right to peremptorily challenge, however. In 1305, Parliament, deciding that the Crown's claim of an unlimited number of peremptory challenges led to a jury biased for the prosecution, passed a statute eliminating the Crown's right to peremptorily challenge. Statute of 33 Edw., Stat. 4 (1305). However, the Crown retained the right to ask disfavored prospective jurors to "stand aside." If, as is usually the case, a jury can be selected without recalling those prospective jurors, they are permanently dismissed. Effectively, then, in most cases, asking a prospective juror to "stand aside" is a peremptory challenge.

In the early years of this Nation, some states continued the British practice of "standing aside," and some allowed the prosecution to challenge peremptorily, but most severely restricted the number of peremptory challenges the prosecution was allowed. The statute passed in 1790 by Congress made no mention of the government's right to challenge peremptorily. Gradually, though, as distrust of government waned, the prosecution's exercise of peremptory challenges became common. By 1856, when the Supreme Court held that federal courts should adopt the procedure of the state in which they sat, United States v. Shackleford, 59 U.S. (18 How.) 588 (1856), most states had begun to authorize the prosecution's use of peremptories. By the beginning of the twentieth century, the prosecution's right to challenge peremptorily was firmly established. J. VAN DYKE, *supra* note 28, at 147-50.

62. *See Developments*, *supra* note 5, at 1576. This article provides a thoughtful discussion of the Court's reluctance to apply broadly the antidiscrimination principle embodied by the equal protection clause because of concerns about the autonomy and integrity of criminal justice institutions.

63. *Batson*, 476 U.S. at 106 (Marshall, J., concurring).

64. Justice Marshall maintained that, based on the experience of state courts in jurisdictions that had already adopted a similar evidentiary standard for the evaluation of peremptory challenges, only the most flagrantly discriminatory challenges would satisfy the prima facie showing requirement. *Id.* at 105. Additionally, he asserted that it was all too easy for a prosecutor to manufacture a facially neutral reason for a discriminatory challenge and all too difficult for a judge to discern the prosecutor's true intent. *Id.* Although Justice Marshall's concerns are understandable, the narrow

In his *Batson* dissent, Chief Justice Burger also expressed considerable skepticism regarding the trial court's ability to fulfill *Batson*'s equal protection mandate. He warily commented, "While our trial judges are 'experienced in supervising voir dire,' they have no experience in administering rules like this."[65] In a criticism of the majority's application of traditional equal protection analysis to voir dire, Chief Justice Burger identified *Batson*'s fundamental inconsistency with *Turner*.[66] The voir dire questioning of prospective jurors is often directed at uncovering generalized, stereotypical racial notions that would be condemned on equal protection grounds in other contexts.[67] Consequently, the link that necessarily exists between voir dire and the intelligent exercise of peremptory challenges means that in order to safeguard the sixth amendment right to an unpartial jury, inquiries into biases which are anathema to equal protection principles should sometimes be made.[68]

Herein lies *Batson*'s fundamental flaw. A tragic legacy of our na-

application of challenges for cause in most courts creates a situation where peremptory challenges are necessary when counsel's suspicion of prospective juror bias is strong and probably well founded but legally insufficient for a challenge for cause. See *infra* note 68.

Moreover, one commentator has identified several additional problems with Justice Marshall's proposal. One is the prospect of hung juries in the many jurisdictions that require unanimous verdicts. Another is the inconsistency between criminal cases—to which *Batson* was addressed—and civil cases where the government still is able to exercise peremptory challenges. Also, *Batson* creates an "adversary imbalance" between the prosecution and the defendant, because it applies equal protection scrutiny only to the government's challenges. Pizzi, Batson v. Kentucky: Curing the Disease but Killing the Patient, 1987 SUP. CT. REV. 97, 144-47. Nevertheless, many commentators have joined Justice Marshall's call for the abolition of peremptory challenges. *E.g.*, *Developments*, *supra* note 5, at 1588; Note, *The Continued Use of Discriminatory Peremptory Challenges After* Batson v. Kentucky: *Is the Only Alternative to Eliminate the Peremptory Challenge Itself?* 23 N. ENG. L. REV. 221 (1988); Note, Batson v. Kentucky: *A Half Step in the Right Direction (Racial Discrimination and Peremptory Challenges Under the Heavier Confines of Equal Protection)*, 72 CORNELL L. REV. 1026, 1039-46 (1987). *See also* J. VAN DYKE, *supra* note 28, at 167-68.

65. 476 U.S. at 128 (Burger, C.J., dissenting) (citation omitted). Justice Rehnquist joined Chief Justice Burger in the dissent.

66. Chief Justice Burger suggested the example of an Asian defendant, on trial for the capital murder of a white victim, asking predominantly white prospective jurors whether they harbor racial prejudice against Asians. *Id.* As is pointed out later in this note, *Turner v. Murray* requires this question to be asked of prospective jurors, at least in capital trials where the defendant is accused of an interracial crime yet it is arguably contrary to equal protection doctrine because it implies that biases and other distinctions inhere to different racial groups. For a further development of the inconsistency between *Batson* and *Turner*, see *infra* notes 166-95 and accompanying text.

67. *Batson*, 476 U.S. at 128 & n.9.

68. *Id.* As a number of commentators have noted, much of the need for peremptory challenges stems from the narrow statutory grounds for challenges for cause as well as the trial court's frequent reluctance to grant challenges for cause. Consequently, unless a prospective juror clearly admits to bias that could affect his decisionmaking, an attorney cannot remove the veniremember "for cause." Arguably, then, peremptory challenges are the chief means of obtaining an impartial jury, as guaranteed by the sixth amendment. *See* Saltzburg & Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 MD. L. REV. 337, 355 (1982); Suggs & Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis*, 56 IND. L.J. 245, 246 (1981). *See also* Babcock, *supra* note 30, at 549; Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235, 243-44 (1968).

tion's history of discrimination against blacks and other minorities is stereotypical beliefs: that the group members are, for example, lazy, intellectually and morally inferior, and prone to crime. To ensure the jury's ability to decide a case—especially an emotionally-charged interracial case—solely on the evidence, counsel on both sides exercise challenges. When the reason for excluding the prospective juror is legally sufficient (for example, the prospective juror knows one of the parties or a member of their family and therefore cannot be relied on to decide the case without bias), counsel challenges for cause.[69] But frequently, counsel's suspicion of prospective juror bias is neither confirmed nor removed by the voir dire examination, particularly when the voir dire has been brief, consisting of close-ended questions, such as "Can you be impartial?" It is in those less certain, though troubling, instances of concern regarding possible juror bias that peremptory challenges can play a vital role in furthering the ends of justice.[70]

Batson does not establish procedural guidelines for the trial court's evaluation of the prosecutor's allegedly discriminatory challenges.[71] The Court chose instead to defer to the discretion of trial judges concerning both what procedures should be followed upon a defendant's timely objection to a prosecutor's challenge and whether the prosecutor's challenges create a prima facie case of discrimination.[72] *Batson* has been widely criticized for this lack of specific standard-setting.[73] One major concern is that wide judicial discretion may not adequately advance *Batson*'s equal protection objectives because trial judges may all too easily accept prosecutors' pretextual explanations for discriminatory challenges.[74] Because appellate courts review *Batson* decisions on a deferen-

69. *See supra* note 68. *E.g.*, Ex parte Tucker, 454 So. 2d 552 (Ala. 1984) (the brother of the main prosecution witness); State v. Payne, 167 W. Va. 252, 280 S.E.2d 72 (1981) (a close friend of the prosecutor); State v. Forman, 466 So. 2d 747 (La. Ct. App. 1985) (a friend of the defendant).

70. *See supra* note 68.

71. *Batson*, 476 U.S. at 99.

72. The Court justified this deference to the trial court on the basis of the trial judge's unique ability to evaluate the credibility of the defendant's prima facie showing and the prosecutor's rebuttal, *id.* at 98 & n.21, as well as on the diverse jury selection practices followed in state and federal trial courts. *Id.* at 99 & n.24.

73. *See, e.g.*, Alschuler, *supra* note 32, at 171 (although finding the *Batson* rule cumbersome procedurally, acknowledging that "[i]n essence, the Court's requirement of a prima facie case left lower court judges at large to determine when 'things look bad.' "); Note, Batson v. Kentucky *and the Prosecutorial Peremptory Challenge: Arbitrary and Capricious Equal Protection* 74 VA. L. REV. 811, 817 (1988). *See generally* Pizzi, *supra* note 64.

74. *See* Alschuler, *supra* note 32, at 74 & nn.90-94 (recent case examples of various, quite possibly pretextual explanations for challenges); Serr & Maney, *Racism, Peremptory Challenges and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 J. CRIM. L. & CRIMINOLOGY 1, 60 ("the tests outlined by the reviewing courts, and presumably applied by trial judges, pose virtually no obstacle to anything but blatant discrimination and may actually serve as a jury selection discrimination 'how to' guide"); *see also* Note, *supra* note 73, at 820.

tial standard, a trial judge's acceptance of a pretextual rebuttal may not be subjected to equal protection scrutiny by a reviewing court.[75]

II. THE SUPREME COURT'S EQUIVOCATION ON THE ANTIDISCRIMINATION PROTECTIONS TO BE AFFORDED THROUGH VOIR DIRE

The most problematic post-*Batson* issue arises from the Supreme Court's failure to reinforce its affirmation of the equal protection limits on peremptory challenges with a corresponding degree of support for a probing voir dire. With voir dire, even more than with peremptory challenges, the Court has chosen to defer broadly to the discretion of the trial court.[76]

Like peremptory challenges, voir dire is governed by rule or statute in the federal courts and all fifty states.[77] Rule 24(a) of the Federal Rules of Criminal Procedure[78] is typical of the discretion vested in trial judges in many jurisdictions. Although it allows the judge to permit counsel for both parties to examine the prospective jurors, most federal judges and a great many state judges choose to conduct the questioning themselves.[79]

75. The Court in *Batson* tacitly suggested that appellate review should be deferential when it stated its confidence that trial judges, experienced as they are in supervising voir dire, would be able to decide if circumstances concerning the prosecutor's use of peremptory challenges create a prima facie case of discrimination. *Batson*, 476 U.S. at 97. Even more significantly, the *Batson* Court said that "[s]ince the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." *Id.* at 98 n.21. Accordingly, appellate courts have applied a deferential or "clearly erroneous" standard. *E.g.*, United States v. Lance, 853 F.2d 1177 (5th Cir. 1988); United States v. Lewis, 837 F.2d 415 (9th Cir. 1988). Consequently, a trial judge's acceptance of a possibly pretextual explanation for peremptory challenges is likely to be accepted by an appellate court which does not have veniremember demeanor or other possibly relevant information on which to base its decision. *See also infra* notes 180-81 and accompanying text.

76. *See, e.g.*, *Developments*, *supra* note 5, at 1577 (noting that a trial judge's discretion in the conduct of voir dire is the feature of jury selection that the Court has most valued and sought to preserve); *id.* at 1580 (observing that as a result, the Court has limited the reach of equal protection and due process principles in the voir dire context). *See also* Massaro, *Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C.L. REV. 501, 527 (1986) (noting that despite the value of the peremptory challenge being closely linked to the scope of voir dire, and the Supreme Court's praise for the use of peremptory challenges, it has provided only weak protection for voir dire).

77. *See* Babcock, *supra* note 30, at 548 n.15. *E.g.*, ALASKA R. CRIM. P. 24(a); MICH. R. CRIM. P. 2.511(c).

78. FED. R. CRIM. P. 24(a) provides:

> [T]he court may permit the defendant or the defendant's attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or the defendant's attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

79. A 1977 study indicated that approximately three quarters of federal district judges conduct voir dire without oral participation of counsel. G. BERMANT, CONDUCT OF THE VOIR DIRE EXAMI-

There are two primary reasons for this: first, widespread judicial belief that it is easier to choose an impartial jury with little or no attorney involvement;[80] and second, systemic concerns regarding the additional time and cost involved in lengthy attorney-conducted voir dire.[81]

The Court in *Batson* gave only passing (and dismissive) recognition to the likelihood that administrative concerns might operate at cross purposes with the equal protection mandate *Batson* articulated.[82] Yet in some quarters, there is an acute awareness, despite the systemic burdens attendant on a more liberal exercise of voir dire, that the full implementation of *Batson* may sometimes require a thoroughly probing examination of prospective jurors.[83]

*A. The Pre-*Turner *Development of the Voir Dire Cases*

Beginning in 1931, in *Aldridge v. United States*,[84] the Supreme Court asserted the importance of a thorough examination of prospective jurors, particularly when there is an increased risk of bias because of the interracial nature of the crime. Alfred Aldridge, a black, was convicted of the murder of a white policeman. The trial judge who conducted voir dire was reluctant to infuse the issue of racial prejudice into the proceedings, and refused Aldridge's request that the prospective jurors be questioned on any possible bias they might feel given the interracial nature of the

NATION: PRACTICES AND OPINIONS OF FEDERAL DISTRICT JUDGES 6, 12 (1977). This represented a significant increase from 1970, when 56% of the federal district judges so conducted voir dire. Suggs & Sales, *supra* note 68, at 251. As of 1975, at least twenty state court systems conducted voir dire without the oral participation of counsel. Babcock, *supra* note 30, at 548 n.15. By 1987, attorneys were permitted to conduct voir dire in only approximately forty-four percent of the nation's state courts. *Voir Dire: Hearing on S. 953 and S. 954 Before the Subcomm. on Courts and Administrative Practice of the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. 21 (1987) [hereinafter *Hearing*] (statement of Judah Best, Chairman-Elect of the Litigation Section of the American Bar Association).

80. *See* G. BERMANT, *supra* note 79, at 23.

The most common concern regarding potential abuses of voir dire by attorneys was articulated by the president of the Association of Trial Lawyers who stated that

> [t]rial attorneys are acutely attuned to the nuances of human behavior, which enables them to detect the minutest traces of bias or inability to reach an appropriate decision. *Their main interest, obviously, is to obtain a jury favorable to their clients.* They are completely dedicated to their clients because that is their job.

(emphasis in original).

A team of researchers, including a trial judge, who argued in favor of eliminating oral participation by lawyers in the voir dire examination identified the following factors as common voir dire abuses by lawyers: lengthy, detailed questioning with no specific goal in mind; establishing rapport with the jury; "pre-instructing" veniremen on the facts of the case or the applicable law; and pre-committing a juror to a particular opinion. Levit, Nelson, Ball & Chernick, *Expediting Voir Dire: An Empirical Study*, 44 S. CAL. L. REV. 916, 942-44 (1971).

81. *See infra* notes 206-08 and accompanying text.

82. *Batson*, 476 U.S. at 99.

83. *See infra* notes 209-13 and accompanying text.

84. 283 U.S. 308 (1931).

crime.[85] Aldridge appealed his conviction on the ground that the judge's refusal to inquire into racial prejudice had denied him a fair and impartial jury.[86] The Supreme Court reversed Aldridge's conviction, holding that the defendant had been entitled to the inquiry of the prospective jurors.[87]

The Court rejected the government's argument that voir dire inquiry into racial prejudice would be detrimental to the administration of justice. Chief Justice Hughes stated that

> it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrepute.[88]

Moreover, Chief Justice Hughes referred to the importance of voir dire in discerning the existence of prospective juror bias in respect to races other than black, as well as religious prejudice and "other prejudices of a serious character."[89]

Justice McReynolds, the sole dissenter, espoused the government's losing argument. He saw the defendant's claim as idle and essentially baseless. "Unhappily, the enforcement of our criminal laws is scandalously ineffective. Crimes of violence multiply and punishment walks lamely. Courts ought not to increase the difficulties by magnifying theoretical possibilities."[90] Although Justice McReynolds' position was a lonely one in *Aldridge*, it presaged well the counterargument to a probing voir dire that was to emerge in later years.

After *Aldridge*, the Supreme Court's message seemed clear: a trial judge's refusal to examine prospective jurors on possible racial prejudice against a black defendant could well be considered reversible error. Accordingly, appellate courts reversed convictions in cases where the trial judge had refused a black defendant's request to have the venire panel specifically questioned on racial prejudice. In *United States v. Robinson*,[91] for example, the Court of Appeals for the Seventh Circuit reversed the conviction of a black man accused of unlawfully dispensing and distributing a narcotic drug,[92] because the trial judge had refused Robinson's request for specific questioning of prospective jurors on racial

85. *Id.* at 310.
86. *Id.* at 309.
87. *Id.* at 314.
88. *Id.* at 315.
89. *Id.* at 313.
90. *Id.* at 318 (McReynolds, J., dissenting).
91. 466 F.2d 780 (7th Cir. 1972).
92. *Id.* at 782.

prejudice.[93] Relying on *Aldridge*, the court held that the trial judge's refusal had constituted an abuse of discretion that was reversible error.[94] Similarly, in *United States v. Gore*,[95] the Court of Appeals for the Fourth Circuit reversed a conviction for possession of stolen property because of the trial judge's refusal to examine the jury on racial prejudice.[96] And in *King v. United States*,[97] the Court of Appeals for the District of Columbia Circuit reversed a conviction for assault because the trial court refused to question prospective jurors regarding prejudice they might feel due to the interracial nature of the crime.[98]

Despite the strength and clarity of *Aldridge*'s holding, it had not been expressly based on any specific constitutional provision, but rather on a general notion of fairness.[99] Forty years later, the Court apparently felt the need to rectify this by anchoring voir dire in the Constitution. *Ham v. South Carolina*[100] provided such an opportunity. In *Ham*, the Supreme Court considered a trial judge's refusal to inquire of prospective jurors whether they had possible racial bias that could affect their consideration of the case.[101] Gene Ham was a bearded, black civil rights worker who was convicted of possession of marijuana. Ham defended on the ground that his arrest had been in retaliation for his civil rights activities.[102] On appeal, he argued that the trial judge's failure to examine the jurors concerning racial prejudice had denied him his constitutional rights.[103] The Supreme Court agreed. Citing Chief Justice Hughes' reasoning in *Aldridge* that the "essential demands of fairness" require an inquiry into any possible racial prejudice, the Court reversed Ham's conviction.[104] The Court identified the fourteenth amendment's due process clause as the basis of the "essential demands of fairness" referred to by

93. *Id.* at 781.

94. *Id.* at 782.

95. 435 F.2d 1110 (4th Cir. 1970).

96. The *Gore* trial judge had refused the defense counsel's request for a voir dire question concerning whether the prospective jurors would be prejudiced by the fact that the defendants were black. He thought that such a question would improperly inject a racial issue into the case. *Id.* at 1111.

97. 362 F.2d 968 (D.C. Cir. 1966).

98. Defense counsel had requested that the prospective jurors be questioned concerning whether they would be prejudiced by the fact that the complaining witness was white and the defendants were black. The judge refused, stating "I shall never ask that question. We do not draw any color line in this courtroom." *Id.* at 969.

99. Specifically, Chief Justice Hughes said that the trial judge's exercise of discretion, and the restrictions upon inquiries at the request of counsel were subject to "the essential demands of fairness." *Aldridge*, 283 U.S. at 310.

100. 409 U.S. 524 (1973).

101. *Id.* at 525.

102. *Id.*

103. *Id.*

104. *Id.* at 529.

Chief Justice Hughes in *Aldridge*.[105]

The Court, however, rejected Ham's additional arguments that the lack of voir dire questioning concerning his beard and pretrial publicity surrounding the drug problem had deprived him of his constitutional rights.[106] But in separate concurring opinions, Justices Douglas and Marshall maintained that the trial judge had abused his discretion in refusing to examine the prospective jurors on the issue of prejudice against facial hair.[107] Justice Douglas rhetorically asked, "If the defendant, especially one being prosecuted for the illegal use of drugs, is not allowed even to make the most minimal inquiry to expose such prejudices, can it be expected that he will receive a fair trial?"[108] Justice Marshall maintained that "the right to an impartial jury carries with it the concomitant right to take reasonable steps designed to insure that the jury is impartial. A variety of techniques is available to serve this end, but perhaps the most important of these is the jury challenge."[109] Justice Marshall continued, "Of course, the right to challenge has little meaning if it is unaccompanied by the right to ask relevant questions on *voir dire* upon which the challenge for cause can be predicated."[110]

Despite the Court's statements in *Aldridge* and *Ham*, some trial courts continued to resist probing voir dire. Opponents of a more expansive voir dire trotted out a parade of horribles,[111] especially time consumption in an already lengthy trial process[112] and the potential for abuse by zealous advocates, eager to establish rapport with jurors.[113] But proponents of probing voir dire countered that a "more efficient" judge-conducted voir dire "would reduce jury selection in criminal cases to a wooden process, ritualistic in form, ineffectual in practice, haphazard in result."[114] Further, proponents of attorney-conducted voir dire maintained that any possible attorney abuses in voir dire questioning were

105. *Id.* at 526-27.

106. *Id.* at 527-28.

107. *Id.* at 529-30 (Douglas, J., concurring in part and dissenting in part); *id.* at 530-31 (Marshall, J., concurring in part and dissenting in part).

108. *Id.* at 530 (Douglas, J., concurring in part and dissenting in part).

109. *Id.* at 532 (Marshall, J., concurring in part and dissenting in part) (citations omitted).

110. *Id.*

111. For a fairly representative post-*Ham* judicial opinion discussing the ills of prolonged, attorney-conducted voir dire, see People v. Crowe, 8 Cal. 3d 815, 828, 506 P.2d 193, 202, 106 Cal. Rptr. 369, 375-76 (1973). The court stated:

> We conclude that direct examination by counsel has perverted the purpose of *voir dire*, and transformed the examination of jurors into a contest between counsel for the selection of a jury partial to his cause and for the attainment of rapport with the jurors so selected, a contest which may overshadow the actual trial on the merits.

112. *Id.*

113. *Id.*

114. *Id.* at 834, 506 P.2d at 206, 106 Cal. Rptr. at 382 (Mosk, J., dissenting).

controllable at all times by the judge.[115]

A sharp difference of opinion over the scope of voir dire and the appropriate degree of discretion that should be vested in the trial judge emerged on the Supreme Court as well. Shortly after the Court decided *Ham*, it denied certiorari in *Ross v. Massachusetts*,[116] a case in which the Supreme Judicial Court of Massachusetts had twice upheld the conviction of a black man who had been charged with several violent, interracial crimes.[117] The defendant's appeal had been based on the trial judge's refusal to ask a specific question concerning racial prejudice during voir dire.[118] Justice Marshall dissented from the denial of certiorari.[119] He disagreed with the state court's reasoning that *Ross* was distinguishable from *Ham* because Ross was not likely to be a "special target for racial prejudice,"[120] and thus was not entitled to voir dire questioning of prospective jurors on the specific issue of racial prejudice.[121]

A little more than two years later, the Court indicated that it was indeed retreating from the broad statements of *Aldridge* and *Ham*. In *Ristaino v. Ross*,[122] the Court rejected the application of *Ham* to all cases where juror prejudice might be an issue simply because of the interracial nature of the crime.[123] Stating that "*Ham* did not announce a require-

115. Justice Mosk wrote, "I do not agree that judges are impotent to curb this abuse by methods short of totally eliminating the right of participatory interrogation by counsel." *Id.*, 506 P.2d at 206, 106 Cal. Rptr. at 382. *See also* J. Van Dyke, *supra* note 28, at 165 n.h (a careful judge can guide attorney questioning so as to prevent abuses).

116. 414 U.S. 1080 (1973).

117. This was the petitioner's second petition for certiorari. The Court granted the first petition and remanded the case to the Supreme Judicial Court of Massachusetts, for reconsideration in light of *Ham v. South Carolina*. The Supreme Judicial Court reaffirmed Ross's conviction for armed robbery, assault and battery by means of a dangerous weapon, and assault and battery with intent to murder. *Id.*

118. *Id.* at 1080-81.

119. *Id.* (Marshall, J., dissenting). Justice Brennan joined Justice Marshall in the dissent.

120. *Id.* at 1082.

121. *Id.* Justice Marshall pointed out that *Ham*'s rule was derived from *Aldridge* which, like *Ross*, had involved alleged violence by a black against a white police officer. *Id.* at 1083-85. Justice Marshall found the state court's narrow interpretation of *Ham* as requiring a specific inquiry into racial prejudice only when racial prejudice was inextricably bound up in the facts of the case an utter distortion of the broad principle set forth in *Aldridge*. He asserted that the *Aldridge* Court had not relied on any particular circumstances other than the possibility of prejudice existing among the prospective jurors to justify "the compelling nature of an inquiry into racial prejudice—the principal target of the Fourteenth Amendment." *Id.* Observing that racial prejudice is "a cultural malady that has shaped our history as a nation," *id.* at 1085, Justice Marshall maintained that where a black is accused of an attack on a white policeman, "it would be disingenuous at best to assert that he [Ross] is not apt to be a particular target of racial prejudice." *Id.* Justice Marshall concluded that the Court's denial of certiorari was "to see our decision in *Ham v. South Carolina* stillborn and to write an epitaph for those 'essential demands of fairness' recognized by this Court 40 years ago in *Aldridge*." *Id.*

122. 424 U.S. 589 (1976).

123. *Id.* at 597.

ment of universal applicability,"[124] the Court held that "the demands of due process could be satisfied by [the trial judge's] more generalized but thorough inquiry into the impartiality of the veniremen."[125] The Court did concede, however, that despite the lack of a constitutional mandate to inquire into racial prejudice, "the wiser course generally is to propound appropriate questions designed to identify racial prejudice if requested by the defendant."[126] Further, in a tacit reversal of *Ham*'s statement that *Aldridge* had been grounded in the fourteenth amendment's due process clause, the Court characterized the *Aldridge* holding as having been based not on constitutional principles but on the Supreme Court's supervisory power.[127] In his dissent, Justice Marshall stated, "Today . . . the Court emphatically confirms that the promises inherent in *Ham* and *Aldridge* will not be fulfilled."[128]

Many post-*Ristaino* lower court decisions avoided the Court's limitation of the *Aldridge* and *Ham* rule by basing their holdings on the Supreme Court's supervisory power over federal courts. For example, two years after *Ristaino*, in *United States v. Bowles*,[129] the Court of Appeals for the Eighth Circuit reversed the conviction of a black man who had been convicted of distributing an illegal drug.[130] The court held that the defendant had been denied a fair trial because the trial court refused to inquire specifically into possible racial prejudice among the prospective jurors.[131] Relying on *Aldridge*, the court reasoned that the federal courts were required, based on the Supreme Court's supervisory power, even if not on the Constitution, to conduct a searching voir dire.[132] Accordingly, the court found that, despite the fact that Rule 24(a) vested discretion in trial judges, "it by no means follows that where, as here, the defendant is a Negro, the district judge may with impunity refuse to make appropriate inquiry of the jury panel as to possible racial bias, and then justify such refusal by asserting the exercise of discretion."[133]

Moreover, even in the wake of *Ristaino*, some state appellate courts continued to construe the minority defendant's right to a thorough voir dire against the constitutional backdrop of *Aldridge* and *Ham*, despite the lack of the Supreme Court's supervisory power over state courts. For

124. *Id.* at 596.
125. *Id.* at 598.
126. *Id.* at 597 n.9.
127. *Id.* at 598 n.10.
128. *Id.* at 599 (Marshall, J., dissenting). Justice Brennan joined Justice Marshall in the dissent.
129. 574 F.2d 970 (8th Cir. 1978).
130. *Id.* at 974.
131. *Id.* at 972.
132. *Id.*
133. *Id.*

instance, in *State v. Taylor*,[134] the Supreme Court of Rhode Island vacated the conviction of a black man for breaking and entering with intent to commit larceny because of the trial court's failure to question the venire on racial prejudice.[135] The court reasoned that Rhode Island's voir dire rule, which required trial courts to permit counsel to supplement the trial judge's questioning of jurors with further inquiry, had been violated.[136] The court bolstered its holding by pointing to dicta in *Ristaino* concerning a state's freedom to allow or require questions not constitutionally demanded.[137] Similarly, in *Commonwealth v. Christian*,[138] the Supreme Court of Pennsylvania reversed the murder, rape and burglary conviction of a black because the trial court refused to permit voir dire questioning on beliefs regarding different sex drives between the races.[139] In *Swan v. State*,[140] the Supreme Court of Indiana, although affirming the conviction, asserted the *Aldridge* rule that a defendant is entitled to have prospective jurors asked whether they have any racial prejudice that would prevent a fair and impartial trial.[141] In *Commonwealth v. Futch*,[142] the Supreme Court of Pennsylvania reversed the murder conviction of a black man because he had been denied certain voir dire questions.[143] Like the *Taylor* court, the *Futch* court noted *Ristaino*'s statement that states were free to allow or require questions not required by the Constitution.[144]

Several years after *Ristaino*, in *Rosales-Lopez v. United States*,[145] the Supreme Court further modified its position on voir dire. The Court said that *Aldridge* and *Ristaino*, taken together, implied that the federal trial courts had a nonconstitutional obligation to inquire specifically into prospective juror racial bias whenever a defendant accused of a violent inter-

134. 423 A.2d 1174 (R.I. 1980).

135. *Id.* at 1176.

136. *Id.* at 1175-76.

137. *Id.* at 1175.

138. 480 Pa. 131, 389 A.2d 545 (1978).

139. The court reasoned that the case was racially sensitive because the victim of the rape was an elderly white, the defendant was black and this racial difference was emphasized by the prosecution's trial strategy. *Id.* at 137, 389 A.2d at 548.

140. 268 Ind. 317, 375 N.E.2d 198 (1978).

141. *Id.* at 321, 375 N.E.2d at 200. This case had a very interesting twist to its facts. The court found that the defendant had not been denied fundamental fairness during his trial as a result of his counsel's trial strategy, which included calling the defendant a "nigger" in front of the prospective jurors during voir dire. The defendant had apparently agreed to this strategy in an effort to test prospective juror attitudes toward racial prejudice.

142. 469 Pa. 422, 366 A.2d 246 (1976).

143. In a footnote, the court observed that precedent in the state court upholding voir dire questioning was sound, notwithstanding *Ristaino*, because of its basis in state law. *Id.* at 428 n.4, 366 A.2d at 249 n.4.

144. *Id.*

145. 451 U.S. 182 (1981).

racial crime so requested.[146] The Court instructed that this rule was applicable whenever a "reasonable possibility" existed that racial bias might infect the jury's decisionmaking.[147] The Court noted that violent interracial crimes frequently created such a "reasonable possibility."[148] However, based on the *Rosales-Lopez* facts, in which an individual of Mexican descent had been convicted of smuggling aliens, the Court found that the trial judge had not erred in refusing to question prospective jurors specifically on bias against Mexicans because the issues in the trial did not involve a violent, interracial act or allegations of racial or ethnic bias.[149]

Justice Stevens dissented on the ground that *Aldridge*, as well as the many state court decisions on which *Aldridge* had been based, stated a rule far broader than that articulated by the majority in *Rosales-Lopez*.[150] That early rule, he said, required none of the "special circumstances" (*i.e.*, a violent crime, with defendant and victim of different races) that the Court now required.[151] Justice Stevens also observed that the "overwhelming majority of Federal Circuit Judges who have confronted the question presented in this case have interpreted *Aldridge* as establishing a firm rule entitling a minority defendant to some inquiry of prospective jurors on *voir dire* about possible racial or ethnic prejudice unrelated to the specific facts of the case."[152]

B. Turner v. Murray*: A Further (and Formalistic) Limitation of Voir Dire*

Five years after the *Rosales-Lopez* decision, and, ironically, on the same day it decided *Batson*, the Supreme Court announced its decision in *Turner v. Murray*.[153] After reiterating the limitations imposed in *Ristaino*, the *Turner* Court drew the line on constitutionally mandated voir dire at the capital trials of minority defendants. Willie Lloyd Turner was a black man who had been convicted and sentenced to death in state court for fatally shooting a white during a robbery. Seven justices (six justices joined by Chief Justice Burger concurring in the judgment) agreed in the disposition of the death penalty. The Court vacated the death sentence, reasoning that the trial court had committed reversible

146. *Id.* at 192.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.* at 202 (Stevens, J., dissenting). Justices Brennan and Marshall joined Justice Stevens.
151. *Id.*
152. *Id.* at 201.
153. 476 U.S. 28 (1986).

error by refusing the defendant's request to question prospective jurors specifically on the issue of racial prejudice.[154] The majority held that a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the victim's race and questioned on the issue of racial bias.[155]

However, five of the justices (four justices joined by Chief Justice Burger concurring in the judgment) concluded that there was no need to reverse the conviction, reasoning that "an unacceptable risk" of racial prejudice had existed only during the capital sentence proceeding.[156] The plurality based its distinction on "a unique opportunity for racial prejudice to operate but remain undetected" during a capital sentencing proceeding and the "qualitative difference of death from all other punishments requir[ing] a correspondingly greater degree of scrutiny of the capital sentencing determination."[157] The plurality bolstered its reasoning by stating that the determination of guilt was governed by *Ristaino*: "the mere fact that petitioner is black and his victim white does not constitute a 'special circumstance' of constitutional proportions."[158] Thus the plurality deferred to the discretion of state trial courts in the conduct of voir dire.

Both Justice Brennan and Justice Marshall concurred in vacating the death sentence and dissented from upholding the conviction.[159] They maintained that a defendant has a constitutional right to have a trial judge ask the members of the venire questions concerning possible racial bias whenever a violent interracial crime has been committed.[160] Both Justices Brennan and Marshall asserted the *Aldridge* rule that the risk of racial prejudice tainting a jury's decision outweighs the cost of allowing a defendant to choose to inquire into prospective juror racial bias.[161]

After observing that "[t]he reality of race relations in this country is such that we simply may not presume impartiality,"[162] Justice Brennan drew on the Court's earlier statements in *Ham* and *Rosales-Lopez* to make the point that the sixth amendment right to an impartial jury ne-

154. *Id.* at 36-37.

155. *Id.*

156. *Id.* at 37.

157. *Id.* at 35 (quoting California v. Ramos, 463 U.S. 992, 998-99 (1983)).

158. *Id.* at 33.

159. *Id.* at 38 (Brennan, J., concurring in part and dissenting in part); *id.* at 45 (Marshall, J., concurring in part and dissenting in part).

160. *Id.* at 39 (Brennan, J., concurring in part and dissenting in part); *id.* at 45 (Marshall, J., concurring in part and dissenting in part).

161. *Id.* at 39 (Brennan, J., concurring in part and dissenting in part); *id.* at 45 (Marshall, J., concurring in part and dissenting in part).

162. *Id.* at 39 (Brennan, J., concurring in part and dissenting in part).

cessitates taking reasonable steps to so insure,[163] as well as the corollary that deficient voir dire impairs the defendant's right to exercise peremptory challenges.[164] Justice Marshall referred to the reasoning he had employed in his dissent from denial of certiorari in *Ross v. Massachusetts*, thus indicating his continued frustration with what he saw as the Court's repeated failure to fulfill the promise of constitutional protection in criminal proceedings offered in *Aldridge* and *Ham*.[165]

III. *BATSON* AND *TURNER*: VIEWED TOGETHER, WHAT MESSAGE HAS THE SUPREME COURT SENT?

More than a decade before *Batson* and *Turner*, Justice Mosk of the California Supreme Court was convinced that lack of attorney involvement in voir dire would "severely handicap counsel in exercising peremptory challenges."[166] In his dissent from *People v. Crowe*,[167] Justice Mosk addressed the issue head on: "If counsel is not permitted to rely on his impressions of the veniremen gained from personal interrogation, he will be compelled in exercising peremptory challenges to fall back on his own latent prejudices and biases."[168] Thus, lack of effective voir dire encourages biased exercise of peremptory challenges. Justice Mosk also attacked the notion that a judge's conduct of the questioning elicits a reliably candid juror response: "No well-intentioned but necessarily general inquiry by the court—such as, 'Will you be prejudiced against the defendant because of his race or color?'—is likely to produce anything but a negative response."[169]

It is precisely the risk of prosecutorial discrimination that inheres to voir dire exclusively conducted by a judge that is the basis of the disturbing inconsistency between *Batson* and *Turner*. *Turner*'s upholding of the conviction despite a voir dire devoid of specific questioning on racial prejudice does not square with *Batson*'s easing of the defendant's evidentiary burden regarding discriminatory peremptory challenges. In *Turner*

163. *Id.* at 40 (citing *Ham*, 409 U.S. at 532).

164. *Id.* (citing *Rosales-Lopez*, 451 U.S. at 188).

165. *Id.* at 45 (Marshall, J., concurring in part and dissenting in part).

166. People v. Crowe, 8 Cal. 3d 815, 836, 506 P.2d 193, 208, 106 Cal. Rptr. 369, 384 (1973) (Mosk, J., dissenting).

167. *Id.*

168. *Id.*

169. *Id.* Moreover, as at least one commentator has noted, even the one question concerning racial prejudice that *Turner* held necessary is most likely inadequate in determining prospective juror prejudice. *See* Alschuler, *supra* note 32, at 160 (the *Turner* procedure for determining juror bias is minimally useful in that "[o]ne doubts that Lester Maddox, Orville Faubus, George Wallace, Theodore Bilbo or anyone else would have responded to the proposed question by confessing a bias likely to affect his or her resolution of a capital murder case.").

the Court exhibited a willingness to subordinate and limit its *Batson*-level concern regarding the risk of racial prejudice infecting a criminal trial to a concern about racially biased capital sentencing.

It is *Batson*'s and *Turner*'s *consistency* in deferring to trial judges which explains why it is difficult to square the two cases with equal protection principles. The Court's desire to leave much to the discretion of the trial judge has resulted in the *Turner* holding tacitly allowing limited, judge-conducted voir dire which in many cases in the federal and state systems renders *Batson*'s equal protection statement a hollow promise. *Batson* enhanced a black criminal defendant's opportunity to prevent discriminatory peremptory challenges. However, in an effort not to intrude on a trial judge's conduct of jury selection proceedings, *Batson* failed to establish key procedural safeguards. *Batson* seems premised on active attorney participation in the voir dire. This assumption seems logically consistent with the holding because a probing voir dire facilitates an informed peremptory challenge, indeed it acts as a check on the biased assumptions *Batson* prohibited.[170]

Batson suggested that a trial judge may, among other things, look at the type of questions a prosecutor asked, or did not ask, on voir dire to determine whether "relevant circumstances" raise an inference of purposefully discriminatory peremptory challenges.[171] Indeed, in his concurring opinion, Justice White seems to confirm that attorney involvement in voir dire is the Court's premise. He describes the prosecutor as having had a chance to voir dire the prospective jurors "in most cases."[172]

However, *Batson*'s assumption of active attorney participation in voir dire is unwarranted, based both on the facts of Batson's trial and on courtroom practice in most federal and many state courts today. Trial judge discretion has virtually foreclosed the opportunity for attorney involvement in voir dire in many trials.[173] In Batson's trial, as well as in Turner's, the judge, not the attorneys, conducted voir dire.[174] Consequently, one of the means the *Batson* Court pointed to as a possible indicator of prosecutorial intent—prosecutor interaction with the venire—simply does not exist in a great many trials.

The practical result is that the defendant raising a *Batson* challenge often may not have available to him the evidence of prosecutorial dis-

170. *See* Serr & Maney, *supra* note 74, at 53.
171. *Batson*, 476 U.S. at 97.
172. *Id.* at 101 (White, J., concurring).
173. *See supra* note 79.
174. *Batson*, 476 U.S. at 82-83 & n.2; *Turner*, 476 U.S. at 30-31.

criminatory intent that would satisfy the prima facie showing requirement. This is particularly likely in the less than blatant instances of discrimination, for example, in those instances where the prosecutor has peremptorily challenged only a couple—not all—of the minority veniremembers. In these less than blatant cases, the defendant's lighter evidentiary burden—making a prima facie case based on the facts of his trial alone—is rendered meaningless. Put another way, *Batson*'s equal protection statement, absent attorney conducted voir dire, presents the establishment of a right for which there may effectively be no remedy.[175]

Ironically, in a case denying the retroactive application of *Batson*, the Supreme Court pointed to voir dire as an important alternative source of protection of the defendant's right to an impartial trial. In *Allen v. Hardy*,[176] the Court explained that failure to apply *Batson* retroactively would not create fundamental unfairness to the defendant because a careful voir dire creates a "high probability that the individual jurors seated in a particular case were free from bias."[177] Indeed, in reviewing *Batson* challenges, appellate courts frequently consider—as much as is possible from the available record—the probative quality of the voir dire in evaluating whether discrimination tainted jury selection. For example, in *Government of Virgin Islands v. Forte*,[178] the Court of Appeals for the Third Circuit, citing *Allen v. Hardy*, characterized a careful voir dire as a companion protection—along with the *Batson* rule—of a defendant's right to a neutral factfinder.[179]

But, as the Supreme Court has very recently acknowledged, significant limitations inhere to review of voir dire. In *Gomez v. United States*,[180] the Court overturned a felony conviction on the ground that a

175. Rickie Pearson, the black attorney who (ironically enough) represented Kentucky before the Supreme Court in *Batson*, has questioned how a prosecutor or defense counsel can build a record supporting or refuting a claim of discrimination if the trial court conducts voir dire itself. Stewart, *Supreme Court Report*, 72 A.B.A. J. 68, 69 (July 1, 1986). Pearson has asserted that, as a practical matter, in order to comply with the *Batson* mandate, prosecutors have to conduct voir dire on each juror in order to build a record supporting any subsequent peremptory strike. *Id.* at 70.

For a brief discussion of the likelihood that *Batson* has, ironically, provided prosecutors with one or two "free shot" opportunities to discriminate without having to explain the challenges, see Alschuler, *supra* note 32, at 172-73.

For a related discussion of "rights without remedies" in the equal protection context, see Rice, *The Discriminatory Purpose Standard: A Problem For Minorities In Racial Discrimination Litigation?*, 6 B.C. THIRD WORLD L.J. 1 (1986).

176. 478 U.S. 255 (1986).

177. *Id.* at 259. In fact, the Court said that the *Batson* rule has joined voir dire as a procedure that protects a defendant's interest in a neutral factfinder.

178. 806 F.2d 73 (3d Cir. 1986).

179. *Id.* at 76-77. Interestingly, this case concerned the opposite of the typical *Batson* scenario. The victim of the rape was a black and the defendant was white. The prosecutor had peremptorily challenged whites.

180. 109 S. Ct. 2237 (1989).

federal magistrate's presiding over jury selection had constituted reversible error. In explaining why a district court's review of the magistrate's conduct of voir dire would be inadequate, Justice Stevens, writing for a unanimous court, said:

> Far from an administrative impanelment process, *voir dire* represents jurors' first introduction to the substantive factual and legal issues in a case. To detect prejudices, the examiner—often, in the federal system, the court—must elicit from prospective jurors candid answers about intimate details of their lives. The court further must scrutinize not only spoken words but also gestures and attitudes of all participants to ensure the jury's impartiality. But only words can be preserved for review; no transcript can recapture the atmosphere of the *voir dire*, which may persist throughout the trial.[181]

Further, the Court's confidence, as expressed in *Batson*, that the trial judge's expertise in supervising voir dire will enable the judge to determine if the "relevant circumstances" contribute to the creation of a prima facie case of discrimination[182] seems unfounded. A number of studies indicate that a judge is not nearly as likely as an attorney to uncover prospective juror bias during voir dire.[183] Largely this is because of a judge's relatively greater status as an intimidating authority figure;[184] his or her propensity for asking collective and close-ended (rather than individual and elicitory) questions of the jurors;[185] and his or her considerably lesser familiarity (as compared to trial counsel) with the various factual nuances of the case.[186] If the judge conducts the questioning in a way that does not elicit candid, revealing juror responses, there is only a remote chance of "relevant circumstances" emerging during voir dire

181. *Id.* at 2247 (citations omitted).

182. *Batson*, 476 U.S. at 97.

183. Judges are perceived as having more status, and are thus more intimidating to jurors, than lawyers. *Hearing*, *supra* note 79, at 55 (statement of The Honorable Thomas A. Wiseman, Jr., Chief Judge, U.S. Dist. Court, M.D. Tenn.); Suggs & Sales, *supra* note 68, at 253. An empirical investigation indicated that judges are perceived as holding extremely conservative positions, whereas attorneys are perceived as holding rather liberal opinions. It has been inferred from this finding, as well as from other data (such as experimental prospective jurors changing their answers almost twice as frequently when questioned by a judge as when interviewed by an attorney) that jurors tend to say what they believe a judge wants to hear, rather than what they truly think about an issue. Jones, *Judge- Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor*, 11 L. & HUM. BEHAV. 131, 143 (1987). *See also* J. GUINTHER, THE JURY IN AMERICA 52 (1988).

184. J. GUINTHER, *supra* note 183.

185. One commentator suggests that the general and close-ended nature of judge-conducted voir dire questions may stem in part from the fact that the questions are directed at uncovering reasons to challenge for cause and are set by court rule or by statute and are worded to cover all cases. Note, *Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges*, 27 STAN. L. REV. 1493, 1505 (1975). Additionally, the requirement in many jurisdictions that a prospective juror openly and explicitly admit to prejudice before being excluded for cause (a highly unlikely public display) tends to keep judges' questions general and close-ended. *Id.* at 1506.

186. *Hearing*, *supra* note 79, at 52 (statement of Judge Wiseman).

from which the prosecutor's discriminatory intent in making peremptory challenges can be inferred in those less than blatant instances mentioned above.

Thus, because of the lack of attorney involvement in questioning and the relatively slim possibility that a judge conducting voir dire will elicit candid, and hence probative, responses, the *Batson* Court's confidence in the trial judge's ability to discern prosecutorial discrimination seems unwarranted. Credence is thus lent—though perhaps not for the reason he intended—to Justice Marshall's observation that "trial courts are ill-equipped to second-guess those reasons given by the prosecutor for his peremptory challenges."[187] Justice Marshall's concern was that a trial judge could not discern the motives of a prosecutor who is exercising challenges. But actually the more disturbing prospect emanating from exclusively judge-conducted voir dire is the judge's diminished ability to evaluate the prosecutor's challenges within a context of the prosecutor's interaction with the veniremembers. Further, the prosecutor's "seat-of-the-pants instincts,"[188] which Justice Marshall described as often being "just another term for racial prejudice,"[189] are much more likely to become the basis for peremptory challenges when the voir dire has not afforded the prosecutor a meaningful—or any—opportunity to question jurors. As a result, voir dire questioning conducted exclusively by the judge could increase, rather than reduce, the risk of the prosecutor's peremptory challenges being based on superficial and possibly incorrect assumptions.

The limitations of judge-conducted voir dire in the federal court system were acknowledged in a post-*Batson* case, *United States v. Biaggi*.[190] Although the defendants were found to have made a prima facie case of prosecutorial discrimination against Italian-Americans, the court denied the defendants' motion to set aside their convictions, finding the

187. *Batson*, 476 U.S. at 106 (Marshall, J., concurring).

188. *Id.* (quoting *id.* at 138 (Rehnquist, J., dissenting)).

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

190. 673 F. Supp. 96 (E.D.N.Y. 1987), *aff'd*, 853 F.2d 89 (1988), *cert. denied*, 109 S. Ct. 1312 (1989). The case, interestingly, was also one of the first to consider whether the *Batson* holding was applicable to groups other than blacks.

Further, a year later, in the related case of United States v. Biaggi, No. SSSS 87 Cr. 255 (E.D.N.Y. Nov. 22, 1988) (LEXIS, Genfed library, Dist. file), the trial court held an evidentiary hearing to determine whether the prosecution had exercised peremptory challenges in a discriminatory fashion. The court referred to the "large assortment of handwritten lists and notes" as well as the "hours of cross-examination which [the prosecutor] endured" to explain the challenges made, seemingly bearing out Justice Mosk's prediction that the time "saved" by an abbreviated, cursory voir dire is often later spent, if not in appeal, in a *Batson* evidentiary hearing. *See infra* note 212 and accompanying text.

prosecutorial explanations to have provided a satisfactory rebuttal.[191] But the *Biaggi* court strongly suggested that it might be applying a different (*i.e.*, lower) standard in the scrutiny of a prosecutor's rebuttal when the prosecutor had not had an opportunity to participate in voir dire. "These [peremptory] strikes must all be seen in the context of a federal voir dire. The attorneys do not generally ask the questions. . . . They therefore are forced to rely more on inference and assumptions than would counsel with full data on the venire."[192] The *Biaggi* court thus seemed to indicate that, when a prosecutor has not been provided the opportunity to check (possibly biased) assumptions against prospective juror responses, the court must give the prosecutor the benefit of the doubt when evaluating whether there was discriminatory intent.

Moreover, in *United States v. Sangineto-Miranda*,[193] the Court of Appeals for the Sixth Circuit recently suggested that the degree and type of attorney involvement in voir dire may have a bearing on the appellate court's consideration of a defendant's claim of discriminatory challenges by the prosecutor. "In the instant case, the district court conducted *voir dire* and incorporated questions submitted in advance by both the prosecution and counsel for the defendants. Thus, there was no occasion for 'questions and statements during voir dire examination,' as contemplated by *Batson*."[194] The court rejected the defendant's *Batson* challenge, concluding that the defendant had not presented sufficient indications of prosecutorial discrimination.

The Supreme Court's refusal in *Turner* to reverse the defendant's conviction has disturbing implications regarding the Court's commitment to ensuring that *Batson*'s mandate will be fully realized. It might be argued that the two cases can be reconciled on the ground that *Turner* involved the limitation of a prophylactic procedural rule (*i.e.*, voir dire),[195] while *Batson* involved the affirmation of a constitutional guarantee (*i.e.*, equal protection). However, this argument does not withstand thoughtful analysis. A defendant's rights to a fair trial by an impartial jury and to equal protection under the law are abrogated as much by a judge's superficial examination of the venire as by a prosecutor's biased

191. The prosecutor explained that he had peremptorily challenged the veniremembers because of demeanor (*e.g.*, anger), inappropriately casual dress, and employment or organization affiliation which might tend to arouse sympathy for the defendant, who had been similarly employed and affiliated. 673 F. Supp. at 104-05.

192. *Id.* at 106.

193. 859 F.2d 1501 (6th Cir. 1988).

194. *Id.* at 1520 n.14.

195. In a footnote, the *Turner* plurality somewhat obliquely identified the basis for the bifurcated holding as turning on the question of "what prophylactic rules the Constitution imposes on the States in furtherance of that right [to an impartial jury]." *Turner*, 476 U.S. at 38 n.12.

elimination from the venire of members of the defendant's race. Both James Batson and Willie Lloyd Turner were left vulnerable to an unfair trial because of jury selection procedures that did not adequately take into account the possibility of bias among the jurors who tried them. Whether termed a sixth amendment or a fourteenth amendment right, both defendants argued that racial prejudice may have impermissibly skewed the verdict. Whether the opportunity for a biased decision was claimed to have resulted from cursory voir dire by the judge or discriminatory challenges by the prosecutor, the resulting harm was the same from the defendant's perspective.

IV. SYSTEMIC AND PRUDENTIAL CONCERNS MOTIVATING THE COURT'S ESSENTIALLY IRRECONCILABLE STATEMENTS ON PEREMPTORY CHALLENGES AND VOIR DIRE

Two primary concerns likely motivate the Supreme Court's deference to trial judges which is apparent both in *Batson* and *Turner*: (1) allocation of procedural power in a criminal trial and (2) institutional administrative pressures. These concerns have surfaced in the course of legislative hearings regarding proposed amendments to the Federal Rules of Civil and Criminal Procedure that govern the conduct of voir dire. Senate bills to allow voir dire examination by counsel for each side were introduced in 1981,[196] 1983,[197] 1987,[198] and again in early 1989.[199] The impetus for these bills has been concern regarding the ramifications on the fair administration of justice when a judge exclusively conducts voir dire in an abbreviated and cursory manner.[200] The first three legislative attempts died in committee after lengthy testimony from impassioned spokespersons on both sides.[201]

196. *Hearing on S. 1532 Before the Subcomm. on Courts of the Senate Committee on the Judiciary*, 97th Cong., 1st Sess. (1981).

197. In early 1983, during the first session of the 98th Congress, Senator Heflin introduced bills amending the Federal Rules of Criminal and Civil Procedure governing voir dire to allow thirty minutes of examination by counsel. Hearings were conducted the following year. *See Hearing on S. 386 and S. 677 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. (1984).

198. During the first session of the 100th Congress Senator Heflin again introduced bills amending the federal rules to allow thirty minutes of voir dire. *See Hearing*, *supra* note 79.

199. Senator Heflin yet again introduced bills amending federal court voir dire practice in March 1989. S. 591 and S. 592, 101st Cong., 1st Sess., 135 CONG. REC. S2571 (daily ed. Mar. 15, 1989).

200. *See Hearing*, *supra* note 79.

201. Besides the tension between judges and trial lawyers on the conduct and scope of voir dire, there is tension between the judiciary and the legislature. One commentator, characterizing jury selection as "one of those areas in the twilight between substance and procedure where courts and legislatures often share responsibility for legislative reforms," notes that the Supreme Court has seen many of its proposed rule changes delayed or significantly modified by Congress. Pizzi, *supra* note 64, at 150. This cuts both ways, however. Legislative attempts to mandate attorney participation in

Those who oppose any modification in the rules argue that voir dire is exclusively a method of securing an impartial jury, as opposed to *selecting* a jury.[202] Thus, the proponents of judge-conducted voir dire argue that a zealous advocate's predilection to "shape" the jury in order to extract a favorable verdict is a major justification for the judge retaining control over the examination process.[203]

Further, supporters of judge-conducted voir dire frequently cite dramatic contrasts between the length of time involved in judge-conducted voir dire in the federal courts and that involved in states such as New York and California, which have allowed attorney-conducted voir dire (where it has occasionally taken days) to make the point that attorney involvement will lead to abuses of the judicial system.[204] Consequently, judges cognizant both of an advocate's proclivity to select a jury favorable to his side and of the comparative sluggishness of the American criminal trial process[205] view tight control of the voir dire as a necessary means to the achievement of fair administration of justice.

There is a pronounced administrative concern in the courts today regarding efficient time and caseload management. Recent statistics show that the combined civil and criminal caseload for federal judges rose 133% since 1970 but the number of judges rose only forty-three percent.[206] Some commentators have suggested that administrative and institutional pressures to keep their calendars moving—intensified by the proliferation of litigation since the 1960s and the greatly increased caseload in federal district courts—encourages judges to maintain exclusive control over voir dire.[207] One commentator posited that a judge

voir dire have been ardently fought by judges, partially explaining the lack of success of these bills. See generally the testimony of judges in the legislative hearings for the Senate bills cited *supra* notes 197 and 198.

202. [The lawyer's] questions demonstrate the wisdom of committing to the trial judge the primary responsibility of qualifying and conditioning the jurors to sit in judgment on their fellowmen and the folly of leaving voir dire to the rhetorical vagaries of trial counsel. It must be remembered that the purpose of voir dire is to enable the parties to obtain an impartial jury, not to select jurors.

G. BERMANT, *supra* note 79, at 21 (quoting United States v. Williams, 417 F.2d 630, 631 (10th Cir. 1969)).

203. *See* G. BERMANT, *supra* note 79.

204. *See Hearing on S. 386 and S. 677, supra* note 197, at 265-71 (statement of Stephen S. Trott, Associate Attorney General, U.S. Dept. of Justice).

205. The American trial process is one of the most complicated, expensive and time-consuming in the world—more so, in fact, than that of any European system. Pizzi, *supra* note 64, at 138-39.

206. *Hearing, supra* note 79, at 7-8 (statement of Joe D. Whitley, Deputy Assistant Attorney General, Criminal Division, U.S. Dept. of Justice).

207. *Id.* at 19 (letter of John R. Bolton, Assistant Attorney General, Office of Legislative and Intergovernmental Affairs, U.S. Dept. of Justice).

Indeed, only on June 12, 1989 did the Supreme Court state that it is improper for federal magistrates to preside over jury selection in a felony trial. In Gomez v. United States, 109 S. Ct. 2237

may view each hour he uses conducting voir dire as an hour that will not be spent trying another case.[208] Thus, in these litigious times, a judge mindful of his or her heavy docket and the costs attendant on lengthy voir dire will bring an awareness of the "running meter" to his or her consideration of what is an acceptably thorough voir dire.

However, proponents of attorney involvement in voir dire point out that the dramatic contrasts cited in length of voir dire can be deceptive. Ninety-three percent of all voir dire in federal criminal cases has been estimated to take less than two hours and sixty-five percent of the cases less than than one hour, with an average time of fifty minutes.[209] A study has shown that voir dire was on the average only one minute longer with lawyer participation in criminal cases than when the judge conducted the questioning.[210] Moreover, a judge's ultimate supervisory control over the voir dire process can stem inappropriately long-winded questions and abusive tactics by an attorney during voir dire as in any other part of the trial process.[211] In his *People v. Crowe* dissent, Justice Mosk found myopic and misguided the time and efficiency concerns on which the exclusion of attorneys from the voir dire is often based. "[I]f the court alone interrogates veniremen, taking some questions suggested by counsel and . . . imperiously rejecting others, an issue for appellate review emerges . . . [a] substantial portion of the time saved at trial may thus be expended on appeal."[212]

The proponents of attorney involvement in voir dire have the more realistic, as well as more faithfully constitutional view. In enforcing the equal protection requirement in other areas, such as school desegregation and affirmative action hiring programs, even more significant administrative and societal costs have been assumed, justified by the imperative of affording citizens their constitutional guarantees. And, as one commen-

(1989), the Court stated that magistrates' presiding over jury selection was limited to civil and minor criminal trials. *See supra* notes 180-81 and accompanying text.

208. *See* J. GUINTHER, *supra* note 183. *See also* Van Dyke, *Voir Dire: How Should It Be Conducted to Ensure that Our Juries Are Representative and Impartial?*, 3 HASTINGS CONST. L.Q. 65, 76 (1976). See generally Edwards, *The Rising Work Load and Perceived "Bureaucracy" of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 IOWA L. REV. 871 (1983) and Rubin, *Bureaucratization of the Federal Courts: The Tension Between Justice and Efficiency*, 55 NOTRE DAME L. REV. 648 (1980) for a discussion of how the crisis of overload in the federal courts threatens the integrity of the courts and the quality of justice.

209. G. BERMANT, *supra* note 79, at 13 & n.18.

210. *Id.* at 14 n.20.

211. *See supra* note 115.

212. *Crowe*, 8 Cal. 3d at 840, 506 P.2d at 210-11, 106 Cal. Rptr. at 386 (Mosk, J., dissenting). Justice Mosk is not alone in his belief that time saved initially in abbreviated, superficial voir dire will likely be spent later in appellate review. *See, e.g.*, *Hearing*, *supra* note 79, at 52 (statement of Judge Wiseman).

tator points out, the time and costs that potentially inhere to a reformation of jury selection practices are considerably less—as well as more likely to succeed—than in other areas that have reformed to comply with the equal protection mandate.[213] Certainly in the criminal setting, where liberty, indeed sometimes life, see *Turner*, hangs in the balance, it would seem that the costs attendant on more thorough voir dire are justifiable.

V. THE NEED FOR THE SUPREME COURT TO STATE CLEARLY THE PROPER POST-*BATSON* ROLE OF VOIR DIRE

The Court's decisions in *Ristaino*, *Rosales-Lopez*, and *Turner* have demonstrated a shrinking of the *Aldridge* and *Ham* rule that has troubling ramifications on a minority defendant's constitutional rights at trial. These ramifications are especially disturbing in a social climate where racial and ethnic prejudice is not only pervasive, but indeed seems to be growing.[214] News reports on bigotry on college campuses and the growth of extremist youth groups such as the Skinheads, as well as the Howard Beach incident give alarming, illustrative force to Justices Marshall's and Brennan's argument that the prevalence of racism in late twentieth century America necessarily precludes a limited voir dire premised on a presumption of juror impartiality.

In a thoughtful analysis of *Batson*, the Court of Special Appeals of Maryland[215] suggested that perhaps the Supreme Court issued a deliberately ambiguous opinion because of the problematic nature of racial or ethnic discrimination in jury selection—a grave social problem, the solution to which involves "a course of action [that] is at once logically untenable but sociologically imperative. . . . The Court may then 'buy time' by denying certiorari."[216] The Court has been known to deny certiorari for the express purpose of allowing the state courts to act as "laboratories."[217] When, as in the case of voir dire and peremptory challenges, constitutional issues in the criminal justice system are hanging in the balance, the potential cost of this approach seems impermissibly steep.

213. Kuhn, *supra* note 68, at 328.

214. A number of commentators have recently observed that racism is by no means on the wane—that, indeed, there are troubling indications of its tenacity. *See, e.g.*, Irwin, *Race and the Law: Blacks Growing More Skeptical of Courts in Racial Bias Cases*, Christian Sci. Monitor, Sept. 28, 1987, at 3. California State Assembly Speaker Willie Brown recently was quoted as observing that "Nothing has changed radically in this country since Martin [Luther King Jr.] died in April of 1968." Boston Globe, Jan. 17, 1989, at 10.

215. Chew v. State, 71 Md. App. 681, 527 A.2d 332 (Md. Ct. Spec. App. 1987).

216. *Id.* at 717, 527 A.2d at 350.

217. McCray v. New York, *cert. denied*, 461 U.S. 961, 963 (1983) ("[I]t is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court").

Batson is now more than three years old and the trend continues to move toward judges exclusively conducting voir dire. Rather than leaving so much regarding the scope of voir dire to judicial discretion, the Supreme Court should unambiguously state not only the broad constitutional principles underlying voir dire, but *how* these principles are to be implemented. Despite the Court's understandable desire to afford trial judges sufficient latitude to respond flexibly to diverse trial situations, the current high standard of deference to judicial conduct of voir dire clearly prevents the full realization of *Batson*'s equal protection mandate.

The history of both the enactment of the fourteenth amendment and the host of subsequent civil rights statutes and cases largely has been the history of action having been taken at the highest levels of the national government because of inadequate responsiveness at other levels.[218] So, in that respect, the need for a definitive Supreme Court statement on the contours of voir dire that is coextensive with the *Batson* mandate is consistent with the history of so much of civil rights law.

The justification for the Court modifying its usual posture of deference to trial judges is that criminal trials are constitutionally premised on the notion that both society, as represented by the prosecutor, and the defendant have an opportunity to have justice administered. An integral part of this opportunity is the jury selection process by which the parties satisfy themselves that the case will be tried to adequate finders of fact.[219] Community confidence in the legal system thus requires the Court's explicit recognition that a thorough examination of prospective jurors is as necessary an incident to a fair trial as is the *Batson* statement. In the hierarchy of judicial concerns, as Chief Justice John Marshall pointed

218. *See, e.g.*, H. ABRAHAM, FREEDOM AND THE COURT 393-94 (5th ed. 1988) (it was the judicial branch, with the Supreme Court at its apex, which led the other branches of government in tackling problems of racial injustice in this country, beginning in the late 1940s); OAKES, *The Proper Role of the Federal Courts in Enforcing the Bill of Rights*, in THE EVOLVING CONSTITUTION 169, 191 (N. Dorsen ed. 1987) (*Brown v. Board of Education* teaches that creative methods of remedying rights deprivation is essential to ensure these rights do not become empty promises. "This shoe of judicial activism may pinch many feet, but the other shoe of inaction has already pinched far too many.").

219. At least one commentator has criticized *Turner* as manifesting a systemic pattern of condescension toward jurors in that merely a single voir dire question on racial prejudice is deemed necessary in the capital trial of a minority defendant, while jurors are restricted in so many other ways from actively participating in the goings-on at trial, *e.g.*, not permitted to ask questions, take notes, hear sidebar conferences. *See* Alschuler, *supra* note 32, at 161. While there is indeed much to this claim of systemic inconsistency vis-a-vis the jury's role, concern about patronizing and insulting prospective jurors by questioning them on racial prejudice seems unwarranted given the far greater risk of trying a minority defendant before a panel of jurors whose ability to decide guilt or innocence is tainted by prejudicial notions carried into the courtroom. Jurors probably *should* be given more of an opportunity to participate or at least observe various aspects of the trial process. But denying the defendant the right to have prospective jurors thoroughly questioned because, after all, jurors are kept from so much else at trial, is not a constitutionally permissible alternative.

out in *Marbury v. Madison*,[220] constitutional demands such as these supersede administrative and institutional concerns.

VI. CONCLUSION

Batson v. Kentucky and *Turner v. Murray*, viewed in juxtaposition, reflect a deeply troubling inconsistency in the Supreme Court's approach to criminal trial procedural protection for minority defendants. On the one hand, *Batson* eased the minority defendant's burden in making a prima facie showing of discrimination by the prosecutor in the exercise of peremptory challenges. On the other hand, *Turner*, decided on the same day as *Batson*, upheld a conviction despite a voir dire that excluded questions about racial prejudice in the criminal trial of a black defendant. The two holdings are essentially irreconcilable because a probative voir dire is an essential predicate to the intelligent exercise of peremptory challenges. Thus, without an inquiry into possible racial prejudice among the prospective jurors, a minority defendant's lighter burden in claiming discriminatory challenges is effectively diminished to a significant degree. The Supreme Court should address this inconsistency by issuing an opinion in the near future which acknowledges the essential linkage of a thorough voir dire to the non-discriminatory exercise of peremptory challenges.

220. 5 U.S. (1 Cranch) 137 (1803).