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Moving Closer to Eliminating Discrimination in Jury Selection: A Challenge to the Peremptory

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MOVING CLOSER TO ELIMINATING DISCRIMINATION IN JURY SELECTION: A CHALLENGE TO THE PEREMPTORY*

I. INTRODUCTION

Anyone who believes that prejudice is not present in the United States has only to look at the highly publicized Howard Beach Case in New York.[1] There, twelve white youths participated in a racially motivated attack on three black men.[2] The white youths brutally attacked the three men using their fists, a baseball bat, and a tree limb.[3] One of the victims, Michael Griffith, tried to escape from his attackers by running across a busy highway in Queens, New York.[4] While doing so, an automobile struck and killed him.[5] Three of the white youths were charged with second-degree murder for the death of Michael Griffith.[6]

There are many ways that prejudice can be displayed. The abhorrent actions of the Howard Beach defendants is just one of them.[7] Usually, prejudice is in the more subtle form of discrimination. One form of subtle discrimination is when

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1. People v. Kern, 149 A.D.2d 187, ___ N.E.2d ___, 545 N.Y.S.2d 4 (2d Dep't. 1989). Howard Beach is a predominantly white community in Queens, New York. *See also As Priest Censures Racism as Sin, Howard Beach Deals with Attack*, N.Y. Times, Dec. 22, 1986, at A1, col. 5.

2. *Kern*, 149 A.D.2d at 193-94, ___ N.E.2d ___, 545 N.Y.S.2d at 8-9. *Howard Beach Admission*, Daily News, Apr. 11, 1989, at 21, col. 1.

3. *Kern*, 149 A.D.2d at 201-04, ___ N.E.2d ___, 545 N.Y.S.2d at 13-14. *See also Three Youths Are Held on Murder in Queens Attack*, N.Y. Times, Dec. 23, 1989, at A1, col. 3 [hereinafter *Three Youths*].

4. *Kern*, 149 A.D.2d at 202, ___ N.E.2d ___, 545 N.Y.S.2d at 13. *See also Black Man Dies after Beating By Whites in Queens*, N.Y. Times, Dec. 23, 1986, at A1, col. 2 [hereinafter *Black Man Dies*].

5. *Kern*, 149 A.D.2d at 202, 205, ___ N.E.2d ___, 545 N.Y.S.2d at 13-15. *Black Man Dies, supra* note 4, at A1, col. 4.

6. *Three Youths, supra* note 3.

7. *See, e.g., Three Youths, supra note 3,* at A1, col. 3.

a juror is excluded from jury service because of his race.[8] While this discrimination does not rise to the level of aversion as that of the actions of the Howard Beach defendants, it is, nevertheless, still intolerable and unacceptable in a country whose ideals are premised on the equality of man.[9]

During the Howard Beach trial, a defense attorney for one of the defendants used his peremptory challenges to exclude all the black jurors.[10] The prosecutor argued that *Batson v. Kentucky*,[11] which held that the equal protection clause prohibits a prosecutor from challenging potential jurors solely on account of their race, should be applied to the defense counsel.[12] The issue of whether defense counsel in a criminal case may exclude prospective jurors because of their race was left unresolved by the United States Supreme Court in *Batson*.[13]

In the Howard Beach case, however, the trial court had to resolve this issue in order to continue the trial. The trial court ruled that *Batson* applies to the defense as well as the prosecution.[14] The defendants immediately sought an interlocutory appeal.[15] The intermediate appellate court in New York had an opportunity to render a decisive decision on the applicability of *Batson* to the defense counsel.[16] Instead, the appellate court passed on this issue and dismissed the appeal on procedural grounds.[17] The appellate court stated that the proper procedure was for the defendants to wait until

8. *See generally,* Massaro, *Peremptories or Peers?--Rethinking Sixth Amendment Doctrine, Images and Procedures,* 64 N.C.L. REV. 501, 507 [hereinafter Massaro].

9. *See, e.g.,* U.S. CONST. amend. XIV, § 1.

10. *Counsel Ordered to Justify Challenges of Black Jurors*, N.Y.L.J., Sept. 22, 1987, at 1, col. 3 [hereinafter *Counsel*].

11. 476 U.S. 79 (1986).

12. *Counsel, supra* note 10, at col. 4.

13. *Batson*, 476 U.S. at 89 n.12.

14. Ladone v. Demakos, 33 A.D.2d 435, 435, 519 N.Y.S.2d 417, 418 (2d Dep't 1987).

15. *Id.* at 436.

16. *Ladone*, 133 A.D.2d 435, 519 N.Y.S.2d 417 (2d Dep't 1987).

17. *Id.* at 435, 519 N.Y.S.2d at 417.

there had been a conviction and then bring an appeal.[18] The defendants were subsequently convicted at trial.[19]

This paper will address many of the issues involved when there is discrimination in jury selection procedures. First, it will discuss the background and importance of the jury and peremptory challenge system and the development and importance of the elimination of discrimination in the jury selection process. Next, it will discuss the *Batson* decision; pointing out the decision's weaknesses and offer solutions to some of its problems. Finally, this note will argue for the extension of *Batson* to the defense side and other areas, and /in the alternative, the elimination of the peremptory challenge system.

II. THE JURY SYSTEM AND PEREMPTORY CHALLENGES

A. The Jury System

The jury system is not a recent development in American Jurisprudence.[20] It has been used in the United States since the first beginnings of the country.[21] The right to a jury trial was considered very important to the colonists.[22] Thomas Jefferson wrote that it was the "[o]nly anchor . . . by which a government can be held to the principles of it's [sic] constitution."[23] Despite some minor alterations to the jury

18. *Id.* at 436, ___ N.E.2d at ___, 519 N.Y.S.2d at 419.

19. *People v. Kern*, 149 A.D.2d 187, 207, ___ N.E.2d ___, 545 N.Y.S.2d 4, 16-17 (2d Dep't 1989). *See also A Key Witness Missing in Howard Beach Case*, N.Y. Times, June 7, 1988, at B3, col. 4. The defendants appealed their convictions. This time the intermediate appellate court held that the *Batson* decision applies to the defense as well as to the prosecution.

20. Massaro, *supra* note 8, at 507-08.

21. *Id.* at 504-06.

22. Massaro, *supra* note 8, at 507-08.

23. Letter from Thomas Jefferson to Thomas Paine, July 11, 1789, *reprinted in* T. JEFFERSON, THE PAPERS OF THOMAS JEFFERSON 266, 269 (J. Boyd ed. 1958).

system,[24] it is still used today.

It has been said that "the jury represents democracy in the courtroom."[25] As such, it protects several important values. These values include community preservation, government stability, and the protection of a defendant's interests.[26] The United States Supreme Court has described the jury as an "instrument[ ] of public justice."[27] More specifically, the Supreme Court wrote that the jury provides a "safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[28]

The appearance of a jury's fairness is essential. Otherwise, people will begin to distrust jury verdicts even if a "correct" verdict was reached.[29] An example of what might happen if a jury's verdict is perceived as "unfair" occurred in Miami, Florida. There, riots erupted after several all white juries acquitted police officers charged with the killing of a few black people.[30]

The appearance of a jury's fairness is determined not only by its verdict but also by its visual appearance.[31] Therefore, the procedures used in selecting the jury should strive to produce a jury that will correspond to people's images of a fair jury.[32] One way to enhance the appearance of a jury's fairness is through popular community participation. If all members of the community are able to participate, then public confidence in the verdict would be instilled and the community

24. *See, e.g.*, UTAH CONST. art. 1, § 10 (an eight member jury is used in all criminal trials except capital offense trials); FLA. STAT. ANN. § 913.10 (West 1985) (six jurors are required in all criminal trials except capital offense trials).

25. 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 280-87 (H. Reeve ed. 1945). *See also* Gurney, *The Case for Abolishing Peremptory Challenges in Criminal Trials*, 21 HARV. C.R.-C.L. L. REV. 227 (1986) [hereinafter Gurney].

26. Massaro, *supra* note 8, at 511.

27. Smith v. Texas, 311 U.S. 128, 130 (1940).

28. Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

29. Massaro, *supra* note 8, at 517.

30. *Florida Court Overturns Swain Rule*, Nat'l L.J., Oct. 22, 1984, at 30, col. 1.

31. Massaro, *supra* note 8, at 517.

32. *Id.*

would be more willing to accept the verdict.[33]

B. Peremptory Challenges

There are many ways a jury's composition could be affected. One way is through the use of peremptory challenges. Generally, the peremptory challenge permits an attorney to remove prospective jurors from the venire.[34] The challenge is "exercised without a reason being stated [and] without inquiry."[35] The attorney may be arbitrary, capricious, or even irrational in making his decision on whom to challenge.[36] Attorneys frequently rely on numerous factors in making their decision. Some factors are the demeanor, facial expressions, dress, and gender of the prospective juror.[37] Attorneys also rely on the prospective juror's responses to *voir dire*[38] questions.[39] Consequently, the *voir dire* tends to be extensive and probing.[40]

The use of peremptory challenges has been a "part of the common law for many centuries and part of our jury system for nearly 200 years."[41] The peremptory challenge came "from the common law with the trial by jury."[42] While "[t]here is nothing in the Constitution . . . which requires . . . Congress to grant peremptory challenges to defendants,"[43] and the right to use a peremptory challenge "may be withheld

33. *Id.* at 512.

34. The venire is a panel of jurors summoned to serve as jurors. BLACK'S LAW DICTIONARY 1395 (5th ed. 1979) [hereinafter BLACK'S].

35. Swain v. Alabama, 380 U.S. 202, 220 (1965).

36. Chew v. State, 71 Md. App. 681, 685, 527 A.2d 332, 334 (1987).

37. Massaro, *supra* note 8, at 520.

38. *Voir dire* is the preliminary examination of a prospective juror to determine bias or connection with the case tried. *See* BLACK'S, *supra* note 34, at 1412.

39. Massaro, *supra* note 8, at 520.

40. Swain v. Alabama, 380 U.S. 202, 218-19 (1965).

41. Batson v. Kentucky, 476 U.S. 79, 112 (1986) (Burger, C.J., dissenting).

42. Lewis v. United States, 146 U.S. 370, 376 (1892).

43. Stilson v. United States, 250 U.S. 583, 586 (1919).

altogether,"[44] Congress, nevertheless, decided that peremptory challenges were to be permitted.[45] Currently, in the Federal jurisdiction, if a capital offense is involved, then the government and the defense are each entitled to twenty peremptory challenges.[46] However, if the offense is punishable by one or more years of imprisonment, then the government is entitled to six challenges and the defense ten.[47] On the other hand, if the offense is punishable by less than one year of imprisonment, then both sides are each entitled to three peremptory challenges.[48]

At the state level, the development of peremptory challenges paralleled that of the federal government.[49] By 1870, most states granted peremptory challenges to the prosecutor and the defendant.[50] Today, the number of peremptories allocated to each side varies from state to state.[51] For example, New York[52] allocates a maximum of twenty peremptory challenges to each side, while Vermont[53] allocates six to each side. The total combined number granted to both sides varies from state to state between a high of fifty-two in California,[54] to a low of eight in Virginia.[55] As in the federal jurisdiction, the number of peremptories allocated to the prosecution and the defense is not always equal. For example, Georgia allocates twenty to the defense while only

44. Frazier v. United States, 335 U.S. 497, 505 n.11 (1948).

45. *See* 28 U.S.C. § 1870 (1977) (permits peremptory challenges in civil trials); FED. R. CRIM. P. 24(B) (permits peremptory challenges in criminal trials); Swain v. Alabama, 380 U.S. 202, 214 (1965) (discussing the development of Congressional action in the area of peremptory challenges).

46. FED. R. CRIM. P. 24(b).

47. *Id.*

48. *Id.*

49. *Swain*, 380 U.S. at 215.

50. *Id.* at 216.

51. *See* Gurney, *supra* note 25, at 228 n.5 (where every state peremptory statute is listed).

52. N.Y. CRIM. PROC. LAW § 270.25 (McKinney 1982).

53. VT. R. CR. P. 24(c)(3) (1983).

54. CAL. PENAL CODE § 1070(a) (West 1982 & Supp. 1985).

55. VA. CODE ANN. § 19.2-262 (1983).

granting ten to the prosecution.[56] The average number of peremptories given by all the states is thirteen to the defense and eleven to the prosecution.

There are many arguments for the need of peremptory challenges. The most prominent ones are that 1) they permit the elimination of jurors whom the lawyers fear they may have alienated in *voir dire*;[57] and 2) they can be used to remove prospective jurors who are believed to be biased but who deny any bias on *voir dire*.[58] It is argued that peremptory challenges enable the attorneys to be assured that jurors will decide the case only on the evidence placed before them.[59] In this way, the peremptory challenge system seeks to guarantee "not only freedom from any bias against the accused, but also from any prejudice against his prosecution."[60]

The peremptory challenge is distinguished from the challenge for cause. The challenge for cause permits an attorney to remove a juror for a "narrowly specified, provable and legally cognizable basis of partiality."[61] The peremptory challenge, on the other hand, permits removal for a "real or imagined partiality that is less easily designated or demonstrable."[62] The trial judge has discretion on whether to grant or deny a challenge for cause.[63]

There are two peremptory challenge systems currently in use in the United States: the "struck system" and the "sequential system." Under the "struck system," the number of jurors present during *voir dire* is equal to the size of the petit jury[64] plus the total number of peremptory challenges

56. GA. CODE ANN. § 15-12-165 (1985).

57. Massaro, *supra* note 8, at 527.

58. *Id.*

59. *Id.*

60. Hayes v. Missouri, 120 U.S. 68, 70 (1887).

61. Swain v. Alabama, 380 U.S. 202, 220 (1965).

62. *Id.*

63. *See, e.g.*, 28 U.S.C. § 1870 (1977).

64. The petit jury is distinguished from the grand jury. The petit jury is the one used for trials. The grand jury issues an indictment. *See* BLACK'S, *supra* note 34, at 768.

allocated to each side.[65] After the *voir dire*, both parties use their challenges for cause. Those jurors who have been challenged are replaced with new jurors who are then questioned during *voir dire*. After the process is completed, depending on the jurisdiction, the attorneys will either use all their peremptory challenges at once or alternate their use from one attorney to the other.

Under the "sequential system," the number of jurors to participate in *voir dire* is equal to the size of the petit jury.[66] After each individual is examined, both attorneys use their peremptory and cause challenges. Those jurors that are removed are replaced with new ones. This process continues until all the peremptory and cause challenges have been used and there are enough jurors to form the petit jury.

III. Eliminating Discrimination In The Jury Selection Process As A Whole

The fourteenth amendment provides, in relevant part, that "[N]o state shall . . . deny to *any person* within its jurisdiction the equal protection of the laws."[67] The amendment was proposed by Congress on June 16, 1866[68] and was ratified two years later on July 28, 1868.[69] While the primary purpose of the fourteenth amendment was to benefit the recently freed slaves,[70] the phrase "any person," nevertheless, enables *all* people[71] to benefit from it.

Within twelve years of the fourteenth amendment's ratification, the United States Supreme Court decided a trilogy

65. Gurney, *supra* note 25, at 228.

66. *Id.*

67. U.S. Const. amend. XIV, § 1 (emphasis added).

68. T. Norton, The Constitution Of The United States Its Sources And Its Application 235 (1945) [hereinafter Norton].

69. Chew v. State, 71 Md. App. 681, 684, 527 A.2d 332, 334 (1987).

70. Norton, *supra* note 68 at 244.

71. The benefits of the fourteenth amendment have been extended to corporations. Santa Clara County v. Southern Pac. R.R. Co., 118 U.S. 394 (1886).

of cases[72] that dealt with jury selection procedures. Collectively, these cases established the rule that a black defendant is denied equal protection of the law when a state prevents black people from participating on juries.[73] In *Strauder v. West Virginia*,[74] a state statute that prohibited black people from participating on grand or petit juries was found unconstitutional.[75] In *Virginia v. Rives*,[76] the Court held that when a state's jury commissioner purposely selects only white jurors there is a denial of equal protection.[77] Finally, in *Ex Parte Virginia*,[78] a judge, who was given the power under a state statute to select jurors, was prohibited from discriminating in selecting jurors.[79] The Supreme Court's holdings in these and all other jury selection cases have focused only on preventing exclusion. The Court has never required the inclusion of any group or individual.[80]

Since 1880, several legal theories have been used to prevent discrimination in jury selection procedures. For example, the sixth amendment right to an impartial jury has been used.[81] Also, the Supreme Court has relied on its supervisory power over the federal courts.[82] However, the most commonly used legal theory has been the equal protection clause of the fourteenth amendment.[83]

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72. Strauder v. West Virginia, 100 U.S. 303 (1879); Virginia v. Rives, 100 U.S. 313 (1879); *Ex parte* Virginia, 100 U.S. 339 (1879).

73. *Id.*

74. *Strauder*, 100 U.S. at 303.

75. *Id.* at 310.

76. *Virginia*, 100 U.S. at 313.

77. *Id.* at 322.

78. *Ex Parte* Virginia, 100 U.S. at 339.

79. *Id.* at 348.

80. Massaro, *supra* note 8, at 529.

81. *See, e.g.*, Taylor v. Louisiana, 419 U.S. 522 (1975); Duren v. Missouri, 439 U.S. 357 (1979).

82. *See, e.g.*, Thiel v. Southern Pac. Co., 328 U.S. 217, 225 (1946); Ballard v. United States, 329 U.S. 187, 193 (1946).

83. U.S. CONST. amend. XIV, § 1. *See, e.g.*, Swain v. Alabama, 380 U.S. 202 (1965); Batson v. Kentucky, 476 U.S. 79 (1986).

Generally, for an equal protection claim, two requirements must be met. First, there must be proof of a discriminatory purpose, rather than simply a racially disproportionate impact.[84] Second, there must be "state action."[85] This "state action" requirement is derived from the language of the fourteenth amendment itself.[86] While the fourteenth amendment applies only to states, the due process clause of the fifth amendment imposes the same strictures upon the federal government as the equal protection clause imposes on the states.[87] As a result, the federal government cannot deny equal protection of the laws either.

The Supreme Court has adopted four "tests" to determine the presence of "state action."[88] None of these represents a "bright line test." Consequently, to determine the presence of "state action," a "fact-bound inquiry"[89] is usually required. It is "[o]nly by sifting facts and weighing circumstances"[90] that a determination can be made of whether there is "state action." Clearly, if a state statute requires a state official to do an act, then this would be "state action." However, the presence of "state action" is not always clear. For example, when there is no state mandate, nor a state official involved, then the question becomes more difficult.

84. Washington v. Davis, 426 U.S. 229 (1976).

85. *Id.* at 240.

86. The fourteenth amendment provides that "no state" shall deny equal protection. U.S. CONST. amend. XIV, §1.

87. Bolling v. Sharpe, 347 U.S. 497 (1954).

88. The "Public Function test," Terry v. Adams, 345 U.S. 461, 469-70 (1953); Marsh v. Alabama, 326 U.S. 501, 506-07 (1946). The "State Compulsion test," Adickes v. S.H. Kress & Co., 398 U.S. 144, 170 (1970). The "Nexus test," Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974); Burton v. Wilmington Parking Authority, 365 U.S. 715, 724 (1961). The "Joint Action test," Flagg Bros. v. Brooks, 436 U.S. 149, 157 (1978).

89. Lugar v. Edmondson Oil Co., 457 U.S. 922, 939 (1982).

90. *Burton*, 365 U.S. at 722.

IV. ELIMINATING DISCRIMINATION - IN THE USE OF PEREMPTORY CHALLENGES

The issue of whether there is "state action" and whether there has been a violation of the equal protection clause is present when a prosecutor uses his peremptory challenges in a discriminatory manner. The first United States Supreme Court decision addressing this issue was *Swain v. Alabama*.[91] In *Swain*, a black defendant was indicted for the rape of a seventeen year old white girl.[92] At the trial the prosecutor used his peremptory challenges to remove all six prospective black jurors.[93] The resulting all-white Alabama jury convicted the defendant.[94] The defendant was subsequently sentenced to death.[95]

The Supreme Court in *Swain* reiterated its previously established rule that a state may not purposefully or deliberately deny black people from participating as jurors.[96] However, the Court further stated that a defendant "is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him."[97] The Court held that a defendant must show "the prosecutor's systematic use of peremptory challenges"[98] against black people over a period of time. It was not enough for the defendant to rely on the facts from his particular case. The Court concluded that the defendant failed to meet his burden.[99] The Court declined to hold that the removal of blacks in a particular case would be a denial of equal protection.[100] The Court felt that this would

91. 380 U.S. 202 (1965).
92. Swain v. Alabama, 275 Ala. 508, 509, 156 So. 2d 368, 369 (1963).
93. *Swain*, 380 U.S. at 205.
94. *Id.* at 203.
95. *Id.*
96. *Id.* at 203-04.
97. *Id.* at 208.
98. *Id.* at 227.
99. *Id.* at 226.
100. *Id.* at 222.

"entail a radical change in the nature and operation"[101] of the peremptory challenge and would be "wholly at odds with the peremptory challenge system"[102] as it was then understood.

There was a great deal of criticism in the aftermath of *Swain*. One criticism was that the burden the *Swain* decision placed on the defendant was too great.[103] The subsequent cases adhering to the *Swain* test "indicated the virtual impossibility"[104] of the defendant showing systematic exclusion by the prosecutor. In almost all of these cases, the defendants failed to meet the *Swain* burden.[105]

Another criticism of *Swain* is that the requirement to show systematic exclusion over a period of time does not square with the traditional premise behind the equal protection clause. That is, under the Constitution, *each* individual defendant is guaranteed the right to equal protection of the laws.[106] The argument is that after *Swain*, it would not be until a series of defendants have been deprived of their equal protection rights that a violation could then be shown.[107] The argument continues that the absence of discrimination against past defendants should not defeat the present defendant from proving discrimination in his particular case.[108] In effect, *Swain* allowed a prosecutor to use his peremptory challenges to shape the racial composition of a *particular* jury.[109]

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101. *Id.* at 221-22.

102. *Id.* at 222.

103. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 92 (1986).

104. 2 LAFAVE & ISRAEL, CRIMINAL PROCEDURE § 213.3(d) (1984).

105. Cawley, *People v. Payne and the Prosecution's Peremptory Challenges: Will They Be Preempted?*, 32 DE PAUL L. REV. 399, 403 n.27 (1983) [hereinafter Cawley]. *See, e.g.*, United States v. Carter, 528 F.2d 844 (8th Cir. 1975), *cert. denied*, 425 U.S. 961 (1976); United States v. Danzey, 476 F. Supp. 1065 (E.D.N.Y. 1979), *aff'd mem.*, 620 F.2d 286 (2d Cir. 1980), *cert. denied*, 449 U.S. 878 (1980). The cases in which the defendants have met the *Swain* burden are relatively few in number. *See, e.g.*, State v. Brown, 371 So. 2d 751 (La. 1979); State v. Washington, 375 So. 2d 1162 (La. 1979).

106. *See* U.S. CONST. amend. XIV, § 1.

107. Massaro, *supra* note 8, at 536.

108. *Id.*

109. Cawley, *supra* note 105, at 404 (emphasis added).

An additional criticism of *Swain* is that the Supreme Court acknowledged that racial factors were a legitimate basis for using peremptory challenges.[110] The majority in *Swain* stated that peremptory challenges are:

> frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, [or] nationality . . . of people summoned for jury duty . . . [V]eniremen are not always judged solely as individuals . . . [but] are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations.[111]

It is argued that this rationale accepts the notion that "[a]ll persons who share an attribute, such as the same skin color, will *ipso facto* view matters in the same way, and that minority groups are less able than whites to decide the case solely on the basis of the evidence."[112]

Because of the criticism against the *Swain* decision, many jurisdictions declined to follow it. At least two federal circuits and some state courts declined to follow *Swain*.[113] Usually, the state courts based their decision on state constitutional grounds.[114]

The *Swain* decision did very little to further the goals of eliminating discrimination in the administration of justice as a whole. Indeed, in a different context, the Supreme Court, in 1979, noted that "[r]acial and other forms of discrimination still remain a fact of life, in the administration of justice as in

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110. *Id.*

111. Swain v. Alabama, 380 U.S. 202, 220-21 (1965).

112. McCray v. Abrams, 750 F.2d 1113, 1131 (2d Cir. 1984).

113. *Id.* at 1113; Booker v. Jabe, 775 F.2d 762 (6th Cir. 1985). *See also* People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978); Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499 (1979).

114. *See Wheeler*, 22 Cal. 3d at 258, 583 P.2d at 748, 148 Cal. Rptr. at 890; *Soares*, 377 Mass. at 461, 387 N.E.2d at 499.

our society as a whole. Perhaps today that discrimination takes a form more subtle than before. But it is not less real or pernicious."[115]

Similarly, despite the *Swain* decision, the prosecution's discriminatory use of peremptory challenges continued. For example, from 1972 to 1973, federal prosecutors in Louisiana used their peremptory challenges three times more often against black jurors than would be expected if jurors were randomly removed.[116] Additionally, from 1974 to 1976, federal prosecutors in three Connecticut cities used their peremptory challenges to remove 59.2% of the black jurors from the jury pool in trials involving white defendants.[117] This is compared with 84.8% of the black jurors being removed in trials where the defendant was black or hispanic.[118]

There are also indications that the defense has used peremptory challenges in a discriminatory manner. For example, in 1983, a New Jersey man was charged with the murder of a hispanic boy.[119] The killing was done as part of a game by using a car to get points for "picking off spics and niggers"[120] At the trial, the defendant's attorney used his peremptory challenges to remove all black and hispanic jurors.[121] The all white jury rejected the murder charge and convicted the defendant of the lesser charge of aggravated manslaughter.[122]

The above examples illustrate that a need existed for further evolution towards the elimination of the discriminatory use of peremptory challenges. However, the *Swain* test remained the law under equal protection analysis for

115. Rose v. Mitchell, 443 U.S. 545, 558-59 (1979).
116. Gurney, *supra* note 25, at 232.
117. *Id.*
118. *Id.*
119. *Id.* at 233.
120. *Id.*
121. *Id.*
122. *Id.*

twenty-one years.[123] It was not until 1986, in *Batson v. Kentucky*,[124] when the Supreme Court finally revised the *Swain* test. In *Batson*, a black man was indicted for second-degree burglary.[125] On the first day of trial, the prosecutor used his peremptory challenges to remove all four black people from the venire.[126] The jury was then composed of only white people.[127] The defense attorney objected, arguing that the defendant's sixth amendment right to a jury drawn from a cross section of the community and the defendant's equal protection rights had been violated.[128]

The *Batson* Court initially recognized that the defendant does have a right to a jury selected by non-discriminatory criteria.[129] The Court stated that a prosecutor's use of peremptory challenges is subject to the strictures of the equal protection clause.[130] The Court felt that "[t]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant."[131] The Court recognized three harms that occur when there is discrimination in jury selection. First, there is harm to the defendant "whose life or liberty" the jury is summoned to try.[132] Second, the State unconstitutionally discriminates against the excluded juror when it excludes him because of his race.[133] Finally, the entire community is affected[134]

123. Batson v. Kentucky, 476 U.S. 79 (1986).
124. *Id.*
125. *Id.* at 82.
126. *Id.* at 83.
127. *Id.*
128. *Id.*
129. *Id.* at 85-86.
130. *Id.* at 89.
131. *Id.*
132. *Id.* at 87.
133. *Id.*
134. *Id.*

because discriminatory practices in jury selection "undermine public confidence in the fairness of our system of justice."[135]

The Court rejected the *Swain* test because it "placed on defendants a crippling burden of proof"[136] and thereby allowed the prosecutor's peremptory challenge to be "largely immune from constitutional scrutiny."[137] The Court proceeded to formulate a new test. First, the defendant must show that he is a member of a "cognizable racial group."[138] Then he must show that the prosecutor used his peremptory challenges to remove members of the defendant's race from the venire.[139] The defendant "is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate."[140] Finally, the defendant must show that there is an inference that the prosecutor removed those members on account of their race.[141]

Once the defendant shows these three criteria, the trial judge must decide if the defendant has demonstrated a "prima facie case" of discrimination against black jurors.[142] If the defendant has made a prima facie case, then the burden shifts to the prosecution to give a "neutral explanation"[143] for challenging the black jurors. However, this explanation "need not rise to the level justifying exercise of a challenge for cause."[144] Once the prosecutor gives his explanation, the trial judge must decide if the "defendant has established purposeful

135. *Id.*
136. *Id.* at 92.
137. *Id.* at 92-93.
138. *Id.* at 96.
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.* at 97.
143. *Id.*
144. *Id.*

discrimination."[145]

The Court noted the importance of the peremptory challenge system but nevertheless concluded that its decision would not "undermine the contribution the challenge generally makes to the administration of justice."[146] The Court felt that "[i]n view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race."[147]

Chief Justice Burger developed three main arguments in his dissent. First, he noted that in the past, the Supreme Court has invalidated classifications based on gender, religious or political affiliation, mental capacity, number of children, living arrangements, and employment in a particular industry or profession.[148] The Chief Justice feared that the *Batson* decision would be extended to these other equal protection claims thus subjecting every peremptory challenge to fourteenth amendment scrutiny.[149] His second argument was that the majority's decision, by requiring an explanation, would have the effect of forcing "the peremptory challenge [to] collapse into the challenge for cause."[150] A third argument was that the majority's decision would in effect "[i]nterject racial matters back into the jury selection process, contrary to the general thrust of a long line of Court decisions."[151] He argued that this would happen because attorneys would be forced to inquire into the "racial background and national origin"[152] of the jurors in order for the attorneys to build a record to support their claim of discriminatory use of

145. *Id.* at 98.
146. *Id.* at 98-99.
147. *Id.* at 99.
148. *Id.* at 124 (Burger, C.J., dissenting).
149. *Id.*
150. *Id.* at 127.
151. *Id.* at 129.
152. *Id.*

peremptory challenges.[153]

The majority in *Batson* in effect moved the balancing demarcation line of *Swain* to a more favorable position for the defendant.[154] In *Swain*, the Supreme Court struck the balance more in favor of the free use of peremptory challenges while making the burden on the defendant great.[155] However, in *Batson* the Supreme Court allowed some encroachment into the area of peremptory challenges in order to relieve the defendant of a practically insurmountable burden.[156]

In addition to the *Swain* and *Batson* decisions, the United States Congress has made attempts to make advances towards eliminating discrimination in jury selection procedures. For example, 18 U.S.C. § 243 makes it a federal crime for a state official who is charged with the duty of selecting or summoning jurors to exclude or fail to summon any person because of their race.[157] The statutory provision provides that "[n]o citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude."[158] While this provision grants the federal government the power to prosecute when a prospective juror has been excluded, prosecutions under this section have been rare.[159] Also, this section appears to be limited to the selection of the venire as opposed to the selection of the petit jury.[160]

153. *Id.*

154. *Id.* at 92-96.

155. Swain v. Alabama, 380 U.S. 202, 227 (1965).

156. *Batson*, 476 U.S. at 93-94.

157. 18 U.S.C. § 243 (1979).

158. *Id.*

159. Rose v. Mitchell, 443 U.S. 545, 558 (1979).

160. 18 U.S.C. § 243 discusses officers "charged with [the] duty" of summoning jurors. 18 U.S.C. § 243 (1979). Also, there is currently no case law interpreting § 243 as applying to the discriminatory use of peremptory challenges.

In addition to Section 243, 28 U.S.C. § 1862 provides that "[n]o citizen shall be excluded from service as a grand or petit juror in the district courts of the United States or in the Court of International Trade on account of race, color, religion, sex, national origin, or economic status."[161] Section 1862 was drafted as part of the Jury Selection and Service Act of 1968.[162] The legislative history behind this Act makes clear that Section 1862, like Section 243, applies only to the selection of the venire as opposed to the selection of the petit jury.[163] Consequently, even after the adoption of these statutes, there was still a gap that allowed discrimination to continue in the jury selection process. That is, defendants were still permitted to discriminate in selecting jurors.

Some commentators argue that the relevant part of the Constitution is not the equal protection clause but the sixth amendment.[164] They argue that if black and white defendants are both tried by juries where members of their respective race have been excluded, then the black and white defendants have been treated equally.[165] Consequently, there would then be no violation of the equal protection clause even though people have been excluded because of their race. They conclude that if the prohibition against the discriminatory use of peremptory challenges was based on the sixth amendment, then this would this incongruous result would be eliminated.

The sixth amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury of the State and district wherein the crime shall have been committed."[166] This amendment has been

161. 28 U.S.C. § 1862 (1977).

162. Jury Selection and Service Act of 1968, Pub. L. No. 90-274 § 1862, 82 Stat. 53, 1968 U.S. CODE. CONG. & ADMIN. NEWS 1792.

163. Its purpose is to assure that "all qualified citizens will have the opportunity to be *considered* for jury service." *Id.* (emphasis added). "The proposed bill preserves the traditional right of the parties to challenge a juror for cause or to strike him peremptorily" *Id.* at 1797.

164. *See, e.g.*, Massaro, *supra* note 8, at 503.

165. *Id.* at 536.

166. U.S. CONST. amend. VI.

incorporated into the fourteenth amendment and is, therefore, applicable to the states.[167] The sixth amendment contains the only specific constitutional language relating to the composition of the jury.[168] Some courts have based their decision to prohibit the discriminatory use of peremptory challenges on the sixth amendment.[169] For example, the Second Circuit used the sixth amendment to hold that a defendant may attack a prosecutor's use of peremptory challenges if the defendant can show a "[s]ubstantial likelihood that the challenges . . . have been made on the basis of the individual venire persons' group affiliation."[170] However, there are other courts that have specifically rejected the sixth amendment claim.[171]

While the sixth amendment does not specifically require a venire to be composed from a fair cross section of the community, the Supreme Court, nevertheless, engrafted this requirement onto it in *Taylor v. Louisiana*.[172] In *Taylor*, the issue was "[w]hether the presence of a fair cross section of the community on venires, panels or lists from which petit juries are drawn is essential to the fulfillment of the sixth amendment's guarantee of an impartial jury trial in criminal prosecutions."[173] The Court held that it was.[174] The Court gave two reasons for this "cross section" requirement. First, it helps to form a representative jury which will protect against the "overzealous or mistaken prosecutor"[175] and the "professional or perhaps overconditioned or biased response

167. Duncan v. Louisiana, 391 U.S. 145 (1968).

168. U.S. CONST. amend. VI.

169. *See supra* note 101.

170. McCray v. Abrams, 750 F.2d 1113, 1132 (1984).

171. *See, e.g.*, Grigsby v. Mabry, 758 F.2d 226, 230 (8th Cir. 1985); United States *ex rel.* Palmer v. DeRobertis, 738 F.2d 168, 172 (7th Cir. 1984); Willis v. Zant, 720 F.2d 1212, 1219 n.14 (11th Cir. 1983); United States v. Whitfield, 715 F.2d 145, 146-47 (4th Cir. 1983); Weathersby v. Morris, 708 F.2d 1493, 1497 (9th Cir. 1983).

172. 419 U.S. 522, 528 (1975).

173. *Id.* at 526.

174. *Id.* at 528.

175. *Id.* at 530.

of a judge."[176] Second, this requirement furthers "community participation"[177] which is "critical to public confidence in the fairness of the criminal justice system."[178]

The term "cross section of the community" was explained by the Supreme Court in *Thiel v. Southern Pacific Co*:[179]

> [it] does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups.[180]

While the *Taylor* Court placed the burden on the defendant to prove a sixth amendment violation, the Court never explicitly spelled out what the defendant must show.[181] Subsequent to *Taylor*, the Supreme Court decided *Duren v. Missouri*.[182] There, the Court summarized what a defendant must show in order to prove a violation of the "fair cross section" requirement. He must be able to show:

> 1) that the group alleged to be excluded is a "distinctive" group in the community;
> 2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and

176. *Id.*
177. *Id.*
178. *Id.*
179. 328 U.S. 217 (1946).
180. *Id.* at 220.
181. *Taylor*, 419 U.S. at 522.
182. Duren v. Missouri, 439 U.S. 357 (1979).

> 3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process.[183]

There is a distinction between how a sixth amendment violation is shown and how an equal protection violation under *Batson* is shown. Under the *Taylor-Duren* analysis of the sixth amendment, the emphasis is on the composition of the venire.[184] A showing of purposeful discrimination is irrelevant.[185] Under the *Batson* analysis, the defendant must show that the prosecutor eliminated prospective jurors because of their race.[186] In effect, the defendant must show purposeful discrimination.[187] Because the showing of intent is usually more difficult than merely showing the composition of a jury, the defendant's burden under the *Batson* test is, therefore, more onerous than his burden under the sixth amendment.

There is also a distinction between the scope of the sixth amendment and the scope of the fourteenth amendment. The language of the sixth amendment limits its application to criminal cases,[188] and the right to an impartial jury is only available to the accused.[189] Under the equal protection clause of the fourteenth amendment, there is no such limitation.[190] Consequently, the applicability of the sixth amendment is narrower.

The *Batson* Court could quite easily have based its decision on the sixth amendment. While it is true the Supreme Court made clear in *Taylor* that its "fair cross section" requirement would apply only to jury venires and

183. *Id.* at 364.

184. United States v. Perez-Hernandez, 672 F.2d 1380, 1384 n.5 (11th Cir. 1982).

185. *Id.*

186. *See supra* notes 125-32 and accompanying text.

187. *See supra* note 132 and accompanying text.

188. U.S. CONST. amend. VI.

189. *Id.*

190. *See* U.S. CONST. amend. XIV, § 1.

lists,[191] and not to the petit juries chosen from them,[192] the extension of the *Taylor-Duren* rule to the prosecution's use of peremptory challenges would have been the next logical step. That is, if under the *Taylor-Duren* rule the state cannot systematically exclude black people from the venire, then certainly a state prosecutor should not be able to circumvent this sixth amendment requirement through the use of his peremptory challenges.

In fact, the defendant in *Batson* argued to extend the *Taylor-Duren* rule by holding that the sixth amendment prohibits the prosecutor from using his peremptory challenges "to exclude all or most members of an identifiable class from participation as jurors."[193] The Supreme Court in *Batson* stated that it expressed no view on the merits of the defendant's sixth amendment arguments.[194] Instead, the Court based its decision on the equal protection clause.[195] However, while declining to express any view on the sixth amendment, the Court, in formulating its test, in effect adopted an offshoot of a state court decision based on the sixth amendment.[196] While the Court expressly declined to discuss the sixth amendment, it nevertheless adopted the traditional sixth amendment test that was in use by some state courts at the time.[197]

The Supreme Court must have been aware of the obvious distinction between the equal protection clause and the sixth

191. The Supreme Court stated that the "fair cross section" requirement would apply only to "jury wheels, pools of names, panels or venires from which juries are drawn." Taylor v. Louisiana, 419 U.S. 522, 538 (1975) (Renquist, J., dissenting).

192. The *Taylor* Court stated that it imposed "[n]o requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population." *Id.*

193. Brief for Petitioner at 17, Batson v. Kentucky, 476 U.S. 79 (1986) (No. 84-6263).

194. *Batson*, 476 U.S. at 85 n.4.

195. *Id.* at 89.

196. The *Batson* test is substantially similar to a test used by a California court deciding a sixth amendment type issue. *See* People v. Wheeler, 22 Cal. 3d 258, 280, 282, 583 P.2d 748, 764-65, 148 Cal. Rptr 890, 905-06 (1978). The defendant in *Batson* argued for the use of this test. *See* Brief for Petitioner at 26-30, Batson v. Kentucky, 476 U.S. 79 (1986) (No. 84-6263).

197. Gurney, *supra* note 25, at 241-42.

amendment. Therefore, an argument can be made that the Court's choice to base its decision on the equal protection clause was not just a haphazard decision but an intentional choice between two constitutional clauses that have two different scopes. If the *Batson* decision were based on the sixth amendment, then while the defendant's burden would not be too great, the decision could not be extended to situations other than a defendant in a criminal trial. However, by basing the decision on the equal protection clause, the defendant's burden is slightly tougher, but there is the possibility of extending *Batson* further to other situations. If the Supreme Court was aware of this obvious distinction, and common sense seems to suggest that it must have been, then the Court must have intended or anticipated *Batson* to be extended through its later decisions or those of the lower level courts.

IV. POST BATSON - UNRESOLVED ISSUES; THE NEED FOR FURTHER ANSWERS

The *Batson* decision left a morass of unresolved issues for the lower courts. One issue to be resolved was whether the decision should be applied retroactively or prospectively.[198] In Justice White's concurrence in *Batson*, he opposed applying the test retroactively.[199] This issue was quickly resolved by the Supreme Court in two cases. In *Allen v. Hardy*,[200] the Court held that *Batson* should not be applied retroactively to cases on federal habeas corpus review.[201] However, in *Griffith v. Kentucky*,[202] the Supreme Court held that *Batson* would be applied to cases still pending on direct review or not yet final, as of the date of the

198. *Batson*, 476 U.S. at 102 (White, J., concurring).
199. *Id.*
200. 478 U.S. 255 (1986).
201. *Id.* at 257-58.
202. 479 U.S. 314 (1987).

Batson decision.[203]

Another unresolved issue, perhaps one of the most important ones, is whether all prohibited classifications under the equal protection clause are to be scrutinized by the *Batson* test. In Chief Justice Burger's dissent in *Batson*,[204] he concluded that the majority must not have intended this result. The Chief Justice argued: "[t]hat the Court is not applying conventional Equal Protection analysis is shown by its limitation of its new rule to allegations of impermissible challenge on the 'basis of race'; the Court's opinion clearly contains such a limitation."[205] However, it is not clear how the *Batson* decision can rest on the equal protection clause and not incorporate general equal protection law principles.[206] It would seem odd for the Supreme Court to hold that in the jury selection process, the equal protection clause is available only to black defendants. Consequently, *Batson* must logically be extended beyond being applied to just black defendants.

The *Batson* decision also left unresolved the precise meaning of the phrase "cognizable racial group."[207] There have been many cognizable groups that have alleged peremptory challenge abuses. Some of them include Puerto Ricans, Mexican-Americans, whites, Alaskan natives, and persons with French surnames.[208] Some defendants have even attempted to extend the *Batson* protection to non-racial groups.[209] If the Supreme Court did not intend for *Batson* to

203. *Id.* at 316.

204. Batson v. Kentucky, 476 U.S. 79, 123 (1986) (Burger, C.J., dissenting).

205. *Id.* at 123-24.

206. Chew v. State, 71 Md. App. 681, 710, 527 A.2d 332, 346-47 (1987).

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

208. *See, e.g.*, United States v. Canel, 708 F.2d 894, 898 (3d Cir. 1983), *cert. denied*, 104 S. Ct. 166 (1983) (Puerto Ricans); Cano v. State, 663 S.W.2d 598, 602 (Tex. Crim. App. 1983) (Mexican-Americans); Doepel v. United States, 434 A.2d 449, 457-58 (D.C. 1981) (whites); Mallot v. State, 608 P.2d 737, 750-52 (Alaska 1980) (Alaska natives); Commonwealth v. Gagnon, 16 Mass. App. Ct. 110, 117-21, 449 N.E.2d 686, 690-93 (1983) (people with French surnames).

209. *See, e.g.*, United States v. Cresta, 825 F.2d 538 (1st Cir. 1987) (using young adults as a group); Commonwealth v. Reid, 384 Mass. 247, 254, 424 N.E.2d 495, 500 (1981) (males); Patri v. Percy, 530 F. Supp. 591, 595-96 (E.D. Wis. 1982) (women); People v. Kagan, 101

have such a broad scope, then perhaps as a way of curtailing the scope, *Batson* could be extended to only groups "exhibiting a historical pattern of long-standing suffering from discrimination."[210]

The *Batson* Court declined to formulate any precise procedures to be followed in implementing its test.[211] The Court stated "[i]n light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how best to implement our holding today."[212] Instead the *Batson* Court put the burden on the trial courts to settle the unresolved procedural issues.

One unresolved procedural issue is when would a defendant's objection to a prosecutor's use of peremptory challenges be timely? While the Court never expressly required the objection to be timely, it impliedly required this.[213] However, the Court never defined a timely objection. Some trial courts have quickly resolved this issue, requiring the defendant to object prior to the jury being sworn.[214] This is a prudent requirement. It would seem unreasonable and a waste of time to permit the defense to wait until the end of the trial and then, in the event of a guilty verdict, argue that the jury was unconstitutionally selected.

Another unresolved procedural issue is what should be the extent of the defendant's participation in the *Batson* inquiry? Once the defendant raises the inference of discriminatory challenges, it is unclear whether the defendant should be allowed to participate further. The *Batson* decision

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Misc.2d 274, 420 N.Y.S.2d 987 (Sup. Ct. 1979) (Jewish people).

210. Note, *Batson v. Kentucky and the Prosecutorial Peremptory Challenge: Arbitrary and Capricious Equal Protection?*, 74 VA. L. REV. 811, 820 (1988) [hereinafter Note].

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

212. *Id.* at n.24.

213. *Id.* at 99. The Court declined to formulate a procedure "upon a defendant's *timely* objection." *Id.* (emphasis added).

214. *See, e.g.*, United States v. Forbes, 816 F.2d 1006, 1011 (5th Cir. 1987); State v. Sparks, 257 Ga. 97, 98, 355 S.E.2d 658, 659 (1987); State v. Clay, 85 N.C. App. 477, 479, 355 S.E.2d 510, 512, *appeal denied*, 320 N.C. 634, 360 S.E.2d 96 (1987); State v. Peck, 719 S.W.2d 553, 555 (Tenn. Crim. App. 1986).

does not specifically require that the defendant be permitted to participate further.[215] The main argument for not permitting the defendant to be present while the prosecutor gives his explanation is the fear of disclosing the strategy of the prosecutor's case.[216] Three Circuits have addressed this issue.[217] Two Circuits have upheld the trial court's decision to exclude the defense,[218] while one Circuit held that the defense can be excluded only if there is "some overriding necessity."[219]

However, the defense does play an important role when the prosecutor offers his "neutral explanation." First, the defense can argue the insufficiency of the prosecutor's explanation.[220] Second, the defense attorney's presence would enable a better record to be preserved for appeal.[221] Therefore, limiting the defense's exclusion to only when there is "some overriding necessity" would better serve the goals of the defense.

As for the test itself, it is unclear in three areas. First, there is the problem of what represents a defendant's prima facie case. The Court gave the following general, illustrative examples: "a 'pattern' of strikes against black jurors included in the particular venire"[222] and "the prosecutor's questions and statements during *voire dire* examination and in exercising his challenges."[223] Justice White, in his concurrence, offered a little further guidance by stating that the defense could not establish a prima facie case by merely demonstrating that the prosecution removed "one or more blacks from the jury."[224]

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215. *See generally Batson*, 476 U.S. at 79.

216. United States v. Thompson, 827 F.2d 1254, 1259 (9th Cir. 1987).

217. United States v. Davis, 809 F.2d 1194 (6th Cir. 1987), *cert. denied*, 107 S. Ct. 3234 (1987); *Thompson*, 827 F.2d at 1254; United States v. Tucker, 836 F.2d 334 (7th Cir. 1988).

218. United States v. Davis, 809 F.2d 1194 (6th Cir. 1987), *cert. denied*, 107 S. Ct. 3234 (1987); United States v. Tucker, 836 F.2d 334 (7th Cir. 1988).

219. *Thompson*, 827 F.2d at 1258.

220. *Id.* at 1260.

221. *Id.* at 1261.

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

223. *Id.*

224. *Id.* at 101 (White, J., concurring).

Probably because of this further guidance from Justice White, several courts were reluctant to hold that removing a relatively small number of minority members was enough of a "pattern" to show a prima facie case of discrimination.[225] Some courts refused to find a prima facie case of discrimination when a prosecutor removed several black people from the jury but could have removed an even greater number.[226]

The majority in *Batson* could not have meant that a large number of black people must be excluded before a prima facie case would be shown. If this is what the majority meant, then in some cases the *Batson* decision would be more syntax then substance. That is, in those cases where there may be only one, two, or a relatively small amount of black people on the venire, the prosecutor would only be able to remove a small number of black people. If the majority in Batson did intend to require the defense to show that a large number of black people have been excluded, then in those cases where there are only a few black people on the venire, the defense would have an insurmountable task indeed. A more logical interpretation of *Batson* would be that while the number of excluded black jurors will not always show a prima facie case, a small number of exclusions would not preclude the defense from further showing the presence of a prima facie case.

Because the *Batson* Court offered little guidance of what a prima facie case is, it would not be surprising if there were almost as many concepts of a prima facie case as there are reviewing courts.[227] Perhaps a bright-line test should be developed. One author has suggested the use of a math

225. *See, e.g.*, United States v. Vaccaro, 816 F.2d 443, 457 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 295 (1987); Allen v. State, 726 S.W.2d 636, 639-40 (Tex. Ct. App. 1987); Rijo v. State, 721 S.W.2d 562, 564 (Tex. Ct. App. 1986).

226. *See, e.g.*, Clay v. State, 290 Ark. 54, 60, 716 S.W.2d 751, 754 (1986); State v. Simms, 505 So. 2d 981, 985 (La. Ct. App. 1987); State v. Moore, 490 So. 2d 556, 558-59 (La. Ct. App. 1986); State v. Abbott, 320 N.C. 475, 481, 358 S.E.2d 365, 369 (1987).

227. Note, *supra* note 210, at 821.

formula.[228] Under this formula, the "actual rate of exclusion" is compared with the "expected rate of exclusion" to determine if a prima facie case has been shown.[229] The "actual rate of exclusion" is derived by dividing the total number peremptory challenges the prosecution uses to remove members of the defendant's race by the total number of people on the venire belonging to the defendant's racial group.[230] The quotient of this equation is compared with the "expected rate of exclusion."[231] This "expected rate of exclusion" is derived by dividing the total number of peremptory challenges available to the prosecution by the number of prospective jurors left on the venire after the challenges for cause are used.[232] If the "actual rate" is significantly larger than the "expected rate," then this would indicate a prima facie case of discrimination.[233]

An example might illustrate the usefulness of this formula. Suppose there were 5 black people on the venire and the prosecution removed all 5. Suppose further, that the prosecution was entitled to 20 peremptory challenges and that the number of people remaining on the venire after the challenges for cause was 40. Under the above math formula, the "actual rate" equals 1 while the "expected rate" equals only .5.[234] Because the "actual rate" in the above example is

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228. Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 YALE L.J. 1715, 1738-39 (1977) [hereinafter *Limiting the Peremptory Challenge*]. *See also* Note, *supra* note 208, at 821.

229. *Limiting the Peremptory Challenge*, *supra* note 228, at 1738-39.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id at 1739.*

234. *Id.*

Formula =

$$\frac{\text{\# of minority removed}}{\text{\# of minority on venire}} : \frac{\text{Total \# of per. chall.}}{\text{\# of jurors left after Cause}}$$

$$\frac{5}{5} : \frac{20}{40}$$

significantly larger than the "expected rate,"--that is, 100 percent larger--this would be enough to show a prima facie case.[235]

Another author has proposed using specifically designed *voir dire* questions as a basis for determining whether there has been a discriminatory use of peremptory challenges.[236] These questions would be agreed upon by the judge and both attorneys.[237] They would be designed to elicit:

> a) any inclination a prospective minority juror might have to favor the defendant because of their shared race;
>
> b) any feelings the prospective juror may have against the prosecution of members of her race for the crime charged; and
>
> c) any other case-related basis articulated by the prosecutor on which the prosecutor planned to exercise peremptory challenges.[238]

While the math formula suggestion would eliminate the guess work involved in deciding whether there is a prima facie case, it is unlikely that many courts will adopt such a method. The judicial system has been hesitant in allowing math formulas to supplant the decision making process of the judges.[239] The second suggestion, though less accurate, would probably be more palatable to the judicial system and would certainly aid the attorneys and the trial judge in ferreting out

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1 : .5

Id.

235. *Id.*

236. Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365, 1468-69 (1987). *See also* Note, *supra* note 210, at 838.

237. Note, *supra* note 210, at 838.

238. *Id.* at 811.

239. *But see, e.g.*, United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947) (Judge Learned Hand using a math formula to determine negligence); American Hospital Supply Corp. v. Hospital Products Ltd., 780 F.2d 589 (7th Cir. 1986) (Circuit Judge Posner using a math formula to determine if preliminary injunction should be issued).

discriminatory purpose.

The second area the test is unclear in is the type of "neutral explanation" by the prosecution that will be sufficient. The only guidance the *Batson* Court offered was that the prosecution's explanation "need not rise to the level justifying exercise of a challenge for cause"[240] but that it must be "related to the particular case to be tried."[241] Therefore, if a prosecutor had a legitimate purpose for removing a juror, the prosecutor could still remove that juror even though he had an underlying discriminatory purpose. However, what precise level the explanation need rise to was never resolved.

Also, it is quite possible that the prosecutor's "neutral explanation" might contain "mixed motives"-that is, a discriminatory purpose and a legitimate purpose. This is because the *Batson* Court stated that the "Equal Protection Clause forbids the prosecutor to challenge potential jurors *solely* on account of their race."[242] Therefore, if a prosecutor had a legitimate purpose for removing a juror, the prosecutor could still remove that juror even though he had an underlying discriminatory purpose. However, it is unlikely that this mixed-motive problem will ever be resolved because if a prosecutor has a legitimate and discriminatory purpose, he will most likely voice only the legitimate purpose and keep the discriminatory purpose to himself. By requiring a prosecutor to give a neutral explanation, the effect of *Batson* will be to suppress a prosecutor's racial motives to beneath the surface. Consequently, the *Batson* decision, in this instance, does not eliminate the discriminatory motives; it just suppresses them. This problem illustrates an underlying problem and criticism of the *Batson* decision.[243] If *Batson* wanted to achieve its goal of eliminating discriminatory

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

241. *Id.* at 98.

242. *Id.* at 89 (emphasis added).

243. *Id.* at 105-07 (Marshall, J., concurring) (peremptory challenges should be eliminated in criminal cases). *See also* Note, *supra* note 210, at 826-30.

purpose in jury selection, it fails in this area.

A final area in which the *Batson* test is unclear is what should be the remedy if the trial court determines there has been an equal protection violation? In a footnote, the *Batson* Court stated that it "make[s] no attempt to instruct the[] courts how best to implement [its] holding."[244] Because of this, Chief Justice Burger argued in his dissent:

> [T]hat leaves roughly 7000 general jurisdiction state trial judges and approximately 500 federal trial judges at large to find their way through the morass the court creates today. The Court essentially wishes these judges well as they begin the difficult enterprise of sorting out the implications of the Court's newly created 'right.'[245]

The majority did suggest two possible remedies: the trial court could "discharge the venire and select a new jury from a panel not previously associated with the case,"[246] or the trial court could "[d]isallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire."[247] However, the majority stated that it expressed no view on which might be more appropriate.[248]

The first suggestion is inefficient while still allowing the harm to the excluded jurors to go unrectified. The second suggestion is more judicially economical while at the same time undoing the unconstitutional exclusion.

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244. *Id.* at 99 n.24.

245. *Id.* at 131 (Burger, C.J., dissenting).

246. *Id.* at 99 n.24.

247. *Id.*

248. *Id.*

VI. EXTENSION OF BATSON

In *Batson*, the Court declared that it "express[ed] no view[] on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel."[249] Consequently, it is currently the rule in the federal jurisdiction and all but a few states, that a defense attorney may use his peremptory challenges in a discriminatory manner.[250]

While the Court "express[ed] no view"[251] on the applicability of its decision to the defense, it did state that "[p]ublic respect for our criminal justice system and the rule of law will be strengthened if we ensure that *no* citizen is disqualified from jury service because of his race."[252] Certainly, if "public respect" is harmed when the prosecution removes a juror because of his race, isn't that same "public respect" harmed when the defense does so? It makes no difference to the community which side does the discriminating. The bottom line is that a juror was discriminated against because of his race. Therefore, while the Court expressly declined to comment on the extension of Batson to the defense, its dicta implies that it must.

Additionally, the Court recognized that there was a harm to the "excluded juror" when the prosecution discriminated.[253] Certainly, it doesn't matter to the excluded juror who discriminated against him. To the excluded juror, he was denied the privilege of serving his country, state, and community, simply because of his race. Therefore, the "excluded juror" is no less "harmed" when the defense discriminates against him or when the prosecution does.

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249. *Id.* at 89 n.12.

250. Note, *Discrimination by the Defense: Peremptory Challenges after Batson v. Kentucky*, 88 COLUM. L. REV. 355, 355 n.2 (citing People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978); Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499 (1979); and State v. Neil, 457 So. 2d 481, 486 (Fla. 1984)).

251. *Batson*, 476 U.S. at 89 n.12.

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

253. *Id.* at 87.

Finally, it was said long ago that when black people are separated "from others of similar age and qualifications solely because of their race . . . a feeling of inferiority as to their status in the community" is generated.[254] This is true no matter which side of the adversarial table does the discriminating. The effect is that the striking of jurors because of their race implies that they are incapable of sitting as jurors and deciding a case solely on the basis of the evidence presented. Not only is this notion unsupported by any factual study, it should not be countenanced by a society whose justice is blind.

The only argument against extending *Batson* to the defense is that there may be no "state action." As was discussed earlier, there must be "state action" for there to be an equal protection violation.[255] However, while the presence of "state action" may not be readily identifiable when the defense uses its peremptory challenges, it is nevertheless, present.

The use of peremptory challenges is currently provided for by statute in every state.[256] Because the right to use peremptory challenges is not constitutionally mandated,[257] the defense utilizes a *state* created right whenever it uses a peremptory challenge. This *state* created right is used in a *state* court, and its use is regulated by a *state* judge. Because the action by state courts is regarded as action by the state within the meaning of the fourteenth amendment,[258] the equal protection clause is violated when the defense uses a peremptory challenge to exclude a juror because of his race. Therefore, *Batson* should be extended to the defense.

If *Batson* should be extended to the defense side of criminal trials, then it should also be extended to civil trials

254. Brown v. Board of Education, 347 U.S. 483, 494 (1955).

255. *See supra* note 85 and accompanying text.

256. *See* Gurney, *supra* note 25, at 228 n.5 (citing every state statute).

257. Stilson v. United States, 250 U.S. 583, 586 (1919).

258. Shelly v Kraemer, 334 U.S. 1, 14 (1948).

as well. While it is true the *Batson* decision involved the use of peremptory challenges in a criminal trial, there is no reason to limit its application to criminal trials. The same considerations that were discussed above, apply with equal force for applying *Batson* to civil trials.

VII. Moving Forward

As the preceding discussion illustrates, the *Batson* test created new problems and left some old ones unresolved. Admittedly, the Supreme Court may have been hesitant to radically change a trial procedure that has been used in this country for over 200 years.[259] However, if these problems prove to be too troublesome, then perhaps further steps should be taken.

A possible further step would be to reduce the number of peremptory challenges allocated to each attorney. In fact, in 1976, the Supreme Court made this suggestion.[260] The Court proposed an amendment to Rule 24(b) of the Federal Rules of Criminal Procedure.[261] This amendment would have reduced the number of peremptory challenges to twelve for both sides in capital offenses and five for both sides in felony offenses.[262] However, Congress rejected this amendment.[263]

While a mere reduction in the total number of peremptory challenges would decrease the number of unconstitutionally excluded jurors, the attorney would still be able to unconstitutionally discriminate. Only the frequency of his constitutional violations would decrease. One author has suggested that the number of peremptory challenges given to an attorney be equal to only a fraction of the amount of

259. Batson v. Kentucky, 476 U.S. 79, 112 (1986) (Burger, C.J., dissenting).

260. H.R. Doc. No. 464, 94th Cong., 2d Sess. (1976).

261. *Id.*

262. *Id.*

263. Act of July 30, 1977, Pub. L. No. 95-78, § 2(c), 91 Stat. 319, 320 (1977).

minorities on the venire.[264] This suggestion would have more of an impact on the elimination of discriminatory peremptory challenges. This is because if an attorney realizes that it is impossible for him to remove all the minority members, he might be less willing to violate the *Batson* rule.[265] The drawback to this fractional reduction is that it focuses attention on the race of the prospective jurors; the precise evil that *Batson* tried to eliminate.

Perhaps a "punitive reduction" would be an appropriate alternative to a fractional reduction.[266] If a trial judge determines that an attorney has violated the *Batson* rule, then the judge could order a reduction in the number of peremptories available to the attorney. In this way, the attorney would have fewer peremptories available when he is in front of the venire for the second time. For example, if an attorney begins a trial with ten peremptory challenges and the judge determines that the attorney violated *Batson*, the judge could reduce the attorney's peremptories to five. This suggestion is premised on a deterrent rationale. If an attorney realizes he runs the risk of having fewer peremptory challenges as his opponent, he will most likely refrain from taking the risk of violating *Batson*.

Reducing the number of peremptory challenges, however, does not completely eliminate the problem. Therefore, if *Batson* does prove to be unworkable the next step will be to totally eliminate the peremptory challenge system. Justice Marshall is of a similar view. In his concurrence in *Batson*, he argued that the majority did not go far enough. He advocated for the total elimination of peremptory challenges in the criminal justice system.[267] The majority rejected this proposition and stated that peremptories should not be

264. Note, *supra* note 210, at 837.

265. *Id.*

266. *Limiting the Peremptory Challenge*, *supra* note 228 at 1740. *See also* Note, *supra* note 210, at 837.

267. Batson v. Kentucky, 476 U.S. 79, 103 (1986) (Marshall, C.J., concurring).

"abolished [simply] because of an apprehension that prosecutors and trial judges will not perform conscientiously their respective duties under the Constitution."[268] But, if it is possible to conduct a trial with only the use of four peremptory challenges per side,[269] then how much more burdensome would it be to conduct a trial without any peremptory challenges. Since "there is nothing in the Constitution"[270] which requires the peremptory challenge system, then in the event that *Batson* does prove to be unworkable, the next step would be to eliminate this "crude and uncertain device."[271] Additionally, if it is true that the peremptory challenge system "permits those to discriminate who are of a mind to discriminate"[272] then the total elimination of peremptory challenges would move closer to the goal of eliminating discrimination in the jury selection process.

There are those who favor only eliminating the prosecution's use of peremptory challenges.[273] However, this approach is unreasonable. If the scales between the state and the defendant "are to be evenly held,"[274] then this proposal would be unacceptable to American jurisprudence. Additionally, if the possibility of peremptory challenge abuse is so great on the prosecution side, certainly is it just as great on the defense side. Consequently, if one side of the trial system is precluded from using peremptory challenges, then both sides should be.

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268. *Id.* at 99 n.22.

269. *See* VA. CODE ANN. § 19.2-262 (1983).

270. Stilson v. United States, 250 U.S. 583, 586 (1919).

271. Massaro, *supra* note 8, at 561.

272. *Batson*, 476 U.S. at 96 (citing Avery v. Georgia, 345 U.S. 559, 562 (1953)).

273. *See, e.g.*, Massaro, *supra* note 8.

274. Hayes v. Missouri, 120 U.S. 68, 70 (1887).

VIII. CONCLUSION

Unfortunately, there will probably be more Howard Beach incidents in the future. Undoubtedly, discrimination will most likely continue in this society for quite some time. However, we are not powerless to fight discrimination. While it is improbable to suggest that significant advances can be made over night, advances can be made with the hope that some day the Howard Beach incidents never occur again.

This note has addressed one small area where discrimination can be fought; the selection of jurors. Specifically, this note focused on the discriminatory use of peremptory challenges. As demonstrated by the *Swain* and *Batson* decisions, the Supreme Court seeks to eliminate discrimination in the jury selection process. Prior to these two decisions, the prosecution could use its peremptory challenges in an unfettered manner. Subsequent to *Batson*, however, this power was eliminated. Nevertheless, a large crevasse still goes unbridged. The defense is still permitted to discriminate in the jury selection process. This has allowed an anomaly to form in the law; we won't let a party enter the courts and use the judicial process to enforce a racially restrictive real estate covenant,[275] yet we will allow a party to use that same judicial process to exclude a juror solely on account of his race.

The Supreme Court must address this issue. It is only then, after a second Supreme Court decision, that this unacceptable crevasse will be closed universally. When the Supreme Court decided *Batson*, it should have made the leap to the elimination of the discriminatory use of peremptory challenges in one bound. Instead, the Supreme Court has deferred to a later date or to the lower level courts to make that second leap. Perhaps the Supreme Court was unaware that it is imprudent "to attempt to leap a chasm in two

275. Shelley v. Kraemer, 334 U.S. 1 (1948).

bounds."[276]

While the *Batson* decision does make significant advancements down the road to discrimination free jury selection, its one-sided application and unclear test makes it similar to an automobile with its two right tires deflated and its steering column removed. In order for *Batson* to be used as an effective vehicle for fighting discrimination, the Court has to repair the tires and correct the steering. The Court can do this by applying *Batson* to the defense and by providing a clearer test. If these "repairs" prove to be ineffective, then it will be necessary to abandon *Batson* as a vehicle and use a new vehicle free of the unnecessary weight of the peremptory challenge system.

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276. Rubin, *Does Law Matter? A Judge's Response to the Critical Legal Studies Movement*, 37 J. LEGAL EDUC. 307, 308 (1987) (quoting Benjamin Disraeli, the first Earl of Beaconsfield from 1804-81).