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BATSON v. KENTUCKY: CAN THE 'NEW' PEREMPTORY CHALLENGE SURVIVE THE RESURRECTION OF STRAUDER v. WEST VIRGINIA?

It cannot be denied that our jury selection process¹ has lent itself to invidious racial discrimination in the selection of jurors who ultimately decide the black defendant's guilt or innocence.² This practice manifested itself in a line of decisions³, beginning with *Strauder v. West Virginia*⁴. The *Strauder* Court held that excluding qualified *venirepersons*⁵ on the basis of race violated the fourteenth amendment. However, the Supreme Court's refusal in *Swain v. Alabama*⁶ to subject petit jury peremptory challenges⁷ to constitutional scrutiny spawned much criticism from courts⁸ and commentators.⁹ As a result, the Court in *Batson v. Kentucky*¹⁰ decided to re-examine the role the peremptory challenge plays in exacting justice between the State and the accused.

¹The jury selection process consists of several stages. First, a list of eligible jurors is compiled by means of voter registration lists, directories, a key-man system, or other similar methods. From these various pools, a *venire*, or group of potential jurors is randomly selected for service during a particular court term. After excuses for hardship, health, or similar reasons, the *venire* is examined. Saltzburg & Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 MD. L. REV. 337, 339 n.11 (1982) [citing Simon & Marshall, *The Jury System*, in THE RIGHTS OF THE ACCUSED IN LAW AND ACTION, 211, 214-217 (S. Nagel ed. 1972)]. Examination of the jurors is referred to as *voir dire*, a process that enables opposing counsel to determine the impartiality of prospective jurors. During *voir dire*, jurors can be removed through challenges for cause or peremptory challenges. Challenges for cause are exercised on narrow, specific, and provable grounds, while peremptory challenges have traditionally allowed counsel to excuse jurors for any reason, or no reason at all. See Note, *The Defendant's Right to Object to Prosecutorial Misuse of the Peremptory Challenge*, 92 HARV. L. REV. 1770 (1979); J.M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS, 139-175 (1977).

²Comment, *A Case Study of the Peremptory Challenge: A Subtle Strike At Equal Protection and Due Process*, 18 ST. LOUIS U.L.J. 662 (1974) (pointing out the presence of racial discrimination against jurors since Congress passed laws prohibiting racial discrimination in the selection process in 1875); See also *Rose v. Mitchell*, 443 U.S. 545, 558-59 (explaining that racial discrimination as it relates to the administration of justice has been present in the United States since the War Between the States.)

³*Vasquez v. Hillery*, 106 S. Ct. 617 (1986); *Rose v. Mitchell*, 443 U.S. 545 (1979); *Castaneda v. Partida*, 430 U.S. 482 (1977); *Carter v. Jury Com.*, 396 U.S. 320 (1970); *Jones v. Georgia*, 389 U.S. 24 (1967) (*per curiam*); *Whitus v. Georgia*, 385 U.S. 545 (1967); *Hernandez v. Texas*, 347 U.S. 475 (1954); *Avery v. Georgia*, 345 U.S. 559 (1953); *Patton v. Mississippi*, 332 U.S. 463 (1947); *Pierre v. Louisiana*, 306 U.S. 354 (1939); *Hollins v. Oklahoma*, 295 U.S. 394 (1935) (*per curiam*); *Norris v. Alabama*, 294 U.S. 587 (1935); *Neal v. Delaware*, 103 U.S. 370 (1881); *Strauder v. West Virginia*, 100 U.S. 303 (1880).

⁴100 U.S. 303 (1880).

⁵See note 1 *supra* and accompanying text.

⁶380 U.S. 202 (1965).

⁷See note 1 *supra* and accompanying text.

⁸See, e.g., *United States v. Childress*, 715 F.2d 1313 (8th Cir. 1983), *cert. denied*, 464 U.S. 1063 (1984). (Court "reluctantly" held that *Swain* was still good law.)

⁹See generally Brown, McGuire, & Winters, *The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse*, 14 NEW ENG. L. REV. 192 (1978); Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 MICH. L. REV. 1, (1982); Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235 (1968); Comment, *Swain v. Alabama: A Constitutional Blueprint for the Perpetration of the All-White Jury*, 52 VA. L. REV. 1157 (1966); Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 YALE L.J., 1715 (1977); Note, *Deterring the Discriminatory Use of Peremptory Challenges*, 21 AM. CRIM. L. REV. 477 (1984).

¹⁰106 S. Ct. 1712 (1986).

In *Batson*, a black man was convicted of second degree burglary and receipt of stolen goods.¹¹ During voir dire examination of the jurors, the prosecutor peremptorily challenged all four black persons on the venire, and an all-white jury was seated.¹² Defense counsel at trial and throughout the appellate process argued that the removal of the four black venirepersons violated *Batson's* sixth¹³ and fourteenth amendment¹⁴ rights. The Supreme Court of Kentucky affirmed *Batson's* conviction.¹⁵

The Supreme Court reversed the conviction and held that a defendant may establish a prima facie case of purposeful discrimination in the selection of the petit jury.¹⁶ To establish a prima facie case,

[T]he defendant must first show that he is a member of a cognizable racial group¹⁷ and that the prosecutor has exercised peremptory challenges to remove venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, 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."¹⁸ Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.¹⁹

Essentially, the defendant establishes a prima facie case of petit jury discrimination if he shows that peremptory challenges were used to exclude venirepersons of a cognizable racial group of which the defendant is also a member.²⁰ The second "prong" of the test is simply recognition that the peremptory challenge is a vehicle for racial discrimination,²¹ while the third prong allows a defendant to offer any other facts germane to the discrimination issue.²²

Batson's most important aspect is the burden of proof it places on the state

¹¹*Id.* at 1715.

¹²*Id.*

¹³See *Batson*, 106 S. Ct. at 1716 n.4. Petitioner *Batson* argued before the Court that the prosecutor's use of the peremptory challenges violated his sixth and fourteenth amendment right to a trial by an impartial jury. Two state court decisions, *People v. Wheeler*, 22 Cal.3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978), and *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499, cert. denied, 444 U.S. 881 (1979) had carved out sixth amendment limitations on the peremptory challenge. However, the Court expressed no view on petitioner's sixth amendment arguments, and rather decided *Batson* on equal protection grounds. *Id.* at 1716 n.4.

¹⁴See *supra* note 11 and accompanying text.

¹⁵*Batson v. Kentucky*, 106 S. Ct. at 1715.

¹⁶*Batson v. Kentucky*, 106 S. Ct. 1712 (1986).

¹⁷*Id.* at 1723 [citing *Castaneda v. Partida*, 430 U.S. 482 (1977)].

¹⁸*Id.* [quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)].

¹⁹*Id.*

²⁰See *id.*

²¹See *id.*

²²See *id.*

once a defendant establishes a prima facie case. A prosecutor must put forth a "neutral explanation . . . related to the particular case to be tried."²³ An explanation that the challenged jurors would be partial to the defendant because of their shared race²⁴ is insufficient to rebut the defendant's prima facie case. This holding is fundamentally at odds with the nature of the peremptory challenge, one historically requiring no explanation, and exerciseable "without being subject to the court's control."²⁵

A RETREAT FROM *SWAIN*

Batson's significance is better understood when compared to the historical view of peremptory challenges as expressed in *Swain v. Alabama*.²⁶ The Court in *Swain* focused on the efficacy of the flexible peremptory as a means of "eliminat[ing] extremes of impartiality"²⁷ between the state and the accused. Because it allowed trial litigants to reject potential jurors for "real or imagined partiality"²⁸ based on "sudden impressions and unaccountable prejudices,"²⁹ or on grounds of race, religion, nationality, occupation or affiliation, the peremptory striking of blacks *in a particular case* was not violative of equal protection.³⁰ To so hold would emasculate the peremptory, which "must be exercised with full freedom, or it fails of its full purpose."³¹ For these reasons, the Court created a presumption that the prosecutor exercised peremptory challenges properly³² and foreclosed constitutional scrutiny of the reasoning for the challenge.³³

The presumption of propriety was not overcome by showing that the prosecutor challenged black jurors simply because they were black.³⁴ In essence, the Court sanctioned the use of stereotypes in the petit jury selection process.³⁵ Only upon showing that the prosecutor ". . . in case after case, whatever the circumstances, whatever the crime and whoever the defendant or victim may be, is responsible for the removal of [blacks] . . . selected as

²³*Id.*

²⁴*Id.*

²⁵*Swain v. Alabama*, 380 U.S. 202, 220 (1965).

²⁶380 U.S. 202 (1965); See *Batson v. Kentucky*, 106 S.Ct. 1712, 1725 n.25 (1986), where the Court explained that any principles in *Swain v. Alabama*, 380 U.S. 202 (1965) contrary to *Batson* were overruled.

²⁷*Swain v. Alabama*, 380 U.S. 202, 219 (1965).

²⁸*Id.* at 220.

²⁹*Id.* [quoting *Lewis v. United States*, 146 U.S. 370, 376 (1892)].

³⁰*Swain*, 380 U.S. at 202 (emphasis added).

³¹*Id.* at 219 [quoting *Lewis v. United States*, 146 U.S. 370, 378 (1892) (citing 4 W. BLACKSTONE, COMMENTARIES 353)].

³²*Swain*, 380 U.S. at 222.

³³See *id.*

³⁴*Saltzburg and Powers, supra* note 1, at 343.

³⁵See *id.* at 338-42.

qualified jurors . . .”³⁶ would equal protection be violated.³⁷ Essentially, *Swain* required a showing that the prosecutor discriminated against the black defendant in his or her particular case, and in previous cases against other black defendants as well.³⁸ The fact that prosecutors in defendant *Swain*’s county had employed the peremptory since 1953 to exclude blacks from any petit jury was not “systematic” enough to rebut the presumption of prosecutorial validity of the challenge.³⁹

Undoubtedly, the heart of *Swain* was the recognition that the peremptory is the most effective method of identifying and excluding those jurors most strongly biased in favor of the opposition — something the challenge for cause does not allow.⁴⁰ Reliance on the peremptory is at a premium in criminal trials because attorneys have “less than perfect information about the predispositions and hidden biases of prospective jurors.”⁴¹ In such trials monetary considerations preclude use of innovative juror information techniques.⁴² Attorneys are forced to “rely on stereotypes, common sense judgments and even common prejudices in deciding whether a juror with a given age, race, sex, religion, ethnic background, and occupation will act impartially toward a particular defendant.”⁴³ The peremptory has allowed litigants to rely on these considerations and exclude petit jurors accordingly. Not requiring a reason for peremptorily challenging a juror “avoids trafficking in the core of truth in most common stereotypes,” and essentially “allows the covert expression of what we dare not say but know is true more often than not.”⁴⁴ The Supreme Court’s refusal in *Swain*⁴⁵ to impose judicial scrutiny on the peremptory facilitated its salutary effects.

Why, then, did the *Batson* Court find that the peremptory challenge is a jury selection practice that “has been used to discriminate against black jurors?”⁴⁶ A number of factors can be attributed to justify the *Batson* holding.

³⁶*Swain v. Alabama*, 380 U.S. 202, 223 (1965).

³⁷*Id.*

³⁸*See id.*

³⁹*Swain*, 380 U.S. at 224-26.

⁴⁰Challenges for cause are exercised on a showing of actual or implied bias, which renders the juror prejudiced to impartially hear a case. However, if the scope of voir dire is limited, there is little opportunity for counsel to probe for biases that will give rise to a challenge for cause. *See Saltzburg and Powers, supra* note 1 at 339-40. Furthermore, even where counsel exposes juror bias, often times a challenge for cause is overruled, as long as the potential juror states that he or she can put all biases aside for the particular case at hand. *See Babcock, Voir Dire: Preserving “Its Wonderful Power,”* 27 STAN. L. REV. 545, 550 (1975).

⁴¹*Saltzburg and Powers, supra* note 1 at 342.

⁴²*See Okun, Investigation of Jurors by Counsel: Its Impact on the Decisional Process*, 56 GEO. L.J. 839 (1968) for a discussion of various investigative methods and techniques utilized to obtain information about prospective jurors.

⁴³*Saltzburg and Powers, supra* note 1, at 342.

⁴⁴*Babcock, supra* note 40, at 553-54.

⁴⁵380 U.S. 202 (1965).

⁴⁶*Batson v. Kentucky*, 106 S. Ct. 1712, 1724 (1986).

One is simply history. Justice Powell placed much emphasis on the antidiscrimination principles emanating from the "venire cases,"⁴⁷ in which the Court consistently struck down state attempts to systematically exclude blacks from the jury venire.⁴⁸ Such discrimination was held to violate the defendant's right to an impartial jury whether by force of statutes that purposefully excluded members of the black race,⁴⁹ or through facially neutral statutes that were discriminatory in application.⁵⁰ These cases stood for the proposition that racial discrimination in the selection of jurors harms the accused.⁵¹ The majority followed *Strauder v. West Virginia*,⁵² which is characterized as "the most vigorous statement of the antidiscrimination principle to be found in the United States for a full century after emancipation."⁵³ Such a description is warranted by the broad and sweeping language of *Strauder*:

The right to a trial by jury is guaranteed . . . The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected . . . to determine . . . and is the grand bulwark of his liberties⁵⁴ . . . In view of these considerations . . . how can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the state has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is not a denial of equal legal protection?⁵⁵

*Swain*⁵⁶ effectively thwarted *Strauder's*⁵⁷ broad commitment to non-discriminatory jury selection by insulating the peremptory from attack when used at the *petit jury* level.

The *Batson* majority disposed of the *Swain* requirements⁵⁸ and invoked post-*Swain* equal protection principles designed to allow claimants to raise a *prima facie* case of discrimination on an individual basis⁵⁹ rather than show an

⁴⁷See *supra* note 3.

⁴⁸*Id.*

⁴⁹*Strauder v. West Virginia*, 100 U.S. 303 (1880) involved a legislative attempt at such exclusion. It provided as follows: "All white male persons who are twenty-one years of age and who are citizens of this state shall be liable to serve as jurors . . ." *Id.* at 305.

⁵⁰See *Norris v. Alabama*, 294 U.S. 587 (1935).

⁵¹See *Strauder*, 100 U.S. at 308-310.

⁵²100 U.S. 303 (1880).

⁵³Schmidt, *Juries, Jurisdiction and Race Discrimination: The Lost Promise of Strauder v. West Virginia*, 61 TEX. L. REV. 1401, 1414 (1983). The author explains that the Court committed itself in uncompromising terms to the newly freed blacks, *Id.* at 1417, and created not an affirmative right to presence on any jury, but the right not to be discriminatorily excluded from any jury, *Id.* at 1421.

⁵⁴*Strauder*, 100 U.S. at 308 [quoting 4 W. Blackstone, Commentaries, *349].

⁵⁵*Strauder*, 100 U.S. at 309.

⁵⁶380 U.S. 202 (1965).

⁵⁷100 U.S. 303 (1880).

⁵⁸See *supra* note 9, and accompanying text. One author notes that it "strains credence" to attribute the approximate fifteen year absence of blacks in *Swain* from the petit jury on any other factor than racial discrimination. Comment, *supra* note 9, at 1161.

⁵⁹See *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976).

official pattern of racial discrimination. The black defendant need not "make some kind of showing with respect to the prosecutor's conduct and the motives behind it in earlier trials extending over an indefinite period of time, trials in which he was not involved and regarding which his opportunities for gathering evidence [were] severely restricted."⁶⁰ Abrogating the *Swain* requirement alleviated the evidentiary burden of showing that "several must suffer discrimination . . . before [one] . . . could object."⁶¹

The Court then proceeded to re-examine "the conflict between the right to use the peremptory challenge and a defendant's right to be tried by a fair and impartial jury."⁶² In light of *Strauder* and its progeny's firm resolve to remedy racial discrimination, the Court ruled that the Equal Protection Clause compelled the latter.⁶³ "Just as the Equal Protection Clause forbids the States to exclude black persons from the venire . . . it [also] forbids the States to strike black veniremen [from the petit jury] on the assumption that they will be biased in a particular case simply because the defendant is black."⁶⁴ Thus, the Court squarely addressed these views which they failed to do in *Swain*,⁶⁵ for "elementary principles of constitutional law dating from *Marbury v. Madison*⁶⁶ would . . . have required that the peremptory challenge yield to the . . . constitutional right [of equal protection]."⁶⁷ Additionally, *Stilson v. United States*⁶⁸ held that the peremptory challenge is not a right granted under the sixth amendment.⁶⁹

The linchpin of the *Batson* decision is its recognition of a causal connection between use of the peremptory and discrimination against black jurors, a reality which manifested itself in the form of much litigation.⁷⁰ The problem is especially evident where the minority representation venire is less than the number of the prosecutor's peremptory challenges.⁷¹ In such instances, the prosecution can peremptorily exclude all blacks, producing an all-white jury.⁷²

⁶⁰Comment, *supra* note 9, at 1161.

⁶¹*McCray v. New York*, 461 U.S. 961, 965 (1983) (Marshall, J., dissenting from a denial of certiorari).

⁶²Note, *Peremptory Challenge — Systematic Exclusion of Prospective Jurors on the Basis of Race*, 39 Miss. L.J. 157, 158 (1967).

⁶³*See Batson v. Kentucky*, 106 S. Ct. 1712 (1986).

⁶⁴*Id.* at 1723.

⁶⁵380 U.S. 202 (1965).

⁶⁶5 U.S. (1 Cranch) 137 (1803).

⁶⁷Comment, *supra* note 9, at 1164 [citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)]. "If then the courts are to regard the Constitution; and the Constitution is superior to any . . . act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply." *Marbury*, 5 U.S. (1 Cranch) at 178.

⁶⁸250 U.S. 583 (1919).

⁶⁹*Stilson*, 250 U.S. at 586.

⁷⁰*See* J.M. VAN DYKE, *supra* note 1 at 173-174 nn. 83-97 for a list of cases involving the exclusion of blacks through use of the peremptory challenge; *See also* *McCray v. Abrams*, 750 F.2d 1113, 1120 n.2 (2nd Cir. 1984) for a list of federal cases involving same.

⁷¹*See* Note, *Rethinking Limitations on the Peremptory Challenge*, 85 COLUM. L. REV. 1357, 1360 (1985).

APPLICATION OF *BATSON'S* EQUAL PROTECTION ANALYSIS TO AREAS OTHER THAN RACE

Although the central focus of the Court's opinion was its concern over *racially* discriminatory jury selection procedures, there is inherent support in *Batson* for its extension to other groups as well. For example, the Court explains that those on the venire must be "indifferently chosen."⁷³ Their competency as jurors will ultimately turn upon their ability to impartially consider the evidence at trial apart from any considerations of race.⁷⁴ These principles presuppose that sex and national origin are also unrelated to juror capability. The majority points out that "equal protection . . . would be meaningless were we to approve the exclusion of jurors on the basis of . . . assumptions which arise solely from the juror's race."⁷⁵ Read in its broader sense, the *Batson* Court is condemning stereotypic assumptions which flow from group associations; logically, this should include sex and national origin as well.

Along with *Batson's* internal support for this extension to non-racial groups, there is recent federal and state court support for this proposition.

*McCray v. Abrams*⁷⁶, *People v. Wheeler*⁷⁷, and *Commonwealth v. Soares*⁷⁸ have carved out sixth amendment limitations on the peremptory challenge similar to those imposed in *Batson*. The sixth amendment, according to the court in *Taylor v. Louisiana*,⁷⁹ guarantees every criminal defendant the right to a jury *venire* drawn from a representative cross-section of the community in order to ensure that the "broad representative character of the jury . . . be maintained."⁸⁰ *McCray*,⁸¹ *Wheeler*,⁸² and *Soares*⁸³ have extended this requirement so that the *petit jury* is judged by the same standard, a proposition *Taylor* refused to entertain.⁸⁴ To promote a representative cross-section at the *petit jury* level, these courts held that members of an identifiable group could not be peremptorily challenged for mere membership in that group.⁸⁵ Jurors

⁷³*Batson v. Kentucky*, 106 S. Ct. 1712, 1717 (1986).

⁷⁴*Id.* at 1723.

⁷⁵*Id.*

⁷⁶750 F.2d 1113 (2nd Cir. 1984).

⁷⁷22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

⁷⁸377 Mass. 461, 387 N.E.2d 499, *cert denied*, 444 U.S. 881 (1979).

⁷⁹419 U.S. 522 (1975).

⁸⁰*Id.* at 530 (emphasis added).

⁸¹750 F.2d 1113 (2nd Cir. 1984).

⁸²22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

⁸³377 Mass. 461, 387 N.E.2d 499, *cert denied*, 444 U.S. 881 (1979).

⁸⁴419 U.S. 522, 538 (1975). The Court imposed no requirement "that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population," and stated that "[d]efendants are not entitled to a jury of any particular composition . . ." *Id.*

⁸⁵*See McCray v. Abrams*, 750 F.2d 1113 (2nd Cir. 1984); *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978); *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499, *cert denied*, 444 U.S. 881 (1979).

from these groups could be challenged only for a specific bias⁸⁶ or other neutral criteria.⁸⁷ This is similar to the "neutral explanation" requirement set forth in *Batson*.⁸⁸

The inherent difficulty that arises is determining "group cognizability."⁸⁹ The tests formulated for making this determination have permitted group cognizability to encompass religion, age, economic status, race, sex and national origin.⁹⁰ "Additionally, [t]he burden of rebutting a prima facie case [of identifiable group exclusion] becomes problematic if the prosecutor must explain every occurrence of disproportionate cognizable group exclusion."⁹¹

The problems posed could be avoided by extending *Batson* only to those groups traditionally protected under equal protection. Equal protection contemplates a narrower ground for its applicability than does the group cognizability standard. It has evolved to protect mainly those members of a suspect class,⁹² or those members either burdened by an immutable characteristic⁹³ or some semblance of historical discrimination,⁹⁴ it would seemingly exclude religion and economic status or any other group otherwise deemed cognizable.⁹⁵

⁸⁶People v. Wheeler, 22 Cal. 3d 258, 282, 583 P.2d 748, 765, 148 Cal. Rptr. 890, 906 (1978); Commonwealth v. Soares, 377 Mass. 461, 491, 387 N.E.2d 499, 517, cert denied 444 U.S. 881 (1979).

⁸⁷McCray v. Abrams, 750 F.2d 1113, 1132 (2nd Cir. 1984).

⁸⁸106 S. Ct. 1712 (1986). It is submitted that, although the language in *Wheeler*, *Soares*, *McCray*, and *Batson* requiring a reason for the peremptory challenging of black jurors varies, all four decisions are bound by a common thread: they require the prosecution to somehow provide a justification for the exclusion that need not rise to the level of a challenge for cause.

⁸⁹See Note, *supra* note 71 at 1365 n.55. The author cites the three prong test of *Willis v. Zant*, 720 F. 2d 1212 (11th Cir. 1983), cert denied, 467 U.S. 1256 (1984) that requires (1) that the group be defined by some factor or composition, (2) that a basic similarity in attitude or ideas run through the group, and (3) that the community of interest is significant enough to impair the group's ability to be represented if excluded from the jury selection process. Determining whether this test is satisfied would be a question of fact insofar as group cognizability may differ based on time or place.

⁹⁰See Note, *supra* note 72, at 1365.

⁹¹*Rethinking Limitations*, *supra* note 71, at 1369.

⁹²See *Korematsu v. United States*, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . ." and "courts must subject them to the most rigid scrutiny.")

⁹³See *Craig v. Boren*, 429 U.S. 190, 204 (1976) (classifications based on gender must serve important governmental objectives and must be substantially related to achievement of those objectives).

⁹⁴See *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (aliens entitled to equal protection scrutiny because of their status as a discrete and insular minority).

⁹⁵Professor Tribe, in L. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978) highlights the circumstances which give rise to the invocation of strict or intermediate scrutiny under the Equal Protection Clause. Strict scrutiny analysis has been triggered to invalidate governmental action aimed at prejudicing "discrete and insular minorities." *Id.* at 1052 [quoting *United States v. Carolene Products*, 304 U.S. 144, 152-53 n.4 (1938)]. Denial or interference with a "preferred" interest, or the employment of stereotypic or otherwise sensitive classifications has invited the protection of intermediate scrutiny. L. TRIBE, *supra* note 95 at 1090. It is submitted that the aforementioned standards are more stringent than the tests formulated for determining group cognizability. See *supra* note 89, and accompanying text, and would therefore allow for a narrower class of those protected. See also note, *supra* note 71 at 1372-77. One author explains certain factors which support the premise that *Wheeler*, *Soares* and *McCray* have equal protection underpinnings, notwithstanding their application of a sixth amendment limitation on the peremptory challenge. First, all three courts were concerned with vindicating the effects of race discrimination, which has evolved under an equal protection framework. Further, provisions of the California and Massachusetts state constitutional provisions relied

PRACTICAL IMPLICATIONS: A "CATCH-22" SITUATION

Even assuming that *Batson* and lower court precedents provide the foundation for reaching non-racial groups, little equal protection will result if these decisions lack practical application. The Marshall concurrence⁹⁶ and the Burger dissent⁹⁷ both examine *Batson's* practical deficiencies, but from different perspectives.

Marshall's opinion focuses on the practical problems a trial judge will face in determining whether the peremptory was used to serve discriminatory ends.⁹⁸ A less than total peremptory exclusion of blacks, coupled with reasonably specific non-racial criteria for the prosecutor's action, would in all probability not even make out a prima facie case according to Marshall.⁹⁹ Hence, the systematic exclusion of blacks at the petit jury level would continue since the discrimination is held to an "acceptable" level.¹⁰⁰ Furthermore, once a prima facie case is established, the peremptory affords ample opportunity to bury prosecutorial intent to discriminate.¹⁰¹

It is readily apparent from the majority opinion how this scenario could occur. The majority concludes that "the prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose."¹⁰² Thus, prosecutors approaching voir dire with an eye towards discrimination could articulate a series of questions that lay the necessary foundation for exclusion of black jurors based on any non-racial criteria elicited during the examination. *King v. County of Nassau*¹⁰³ is illustrative. In *King*, counsel for a community college defending employment discrimination charges peremptorily challenged the only two blacks on the petit jury panel. Defense counsel argued that "when the two [black] jurors . . . were asked questions . . . they responded . . . in a manner that I found less than open, less than communicative . . . the black jurors were removed physically, emotionally from the white jurors . . . and presented . . . an inability to really objectively deliberate . . ."¹⁰⁴ This argument was held to be sufficient.¹⁰⁵

upon by the *Wheeler* and *Soares* court, respectively, contain strong equal protection language. Note, *supra* note 71.

⁹⁶*Batson v. Kentucky*, 106 S. Ct. 1712, 1726 (1986) (Marshall, J., concurring).

⁹⁷*Id.* at 1731 (Burger, J., dissenting).

⁹⁸*Id.* at 1727-28 (Marshall, J., concurring).

⁹⁹*Id.*

¹⁰⁰*Id.* at 1728.

¹⁰¹*Id.*

¹⁰²*Id.* at 1723.

¹⁰³581 F. Supp. 493 (E.D.N.Y. 1984).

¹⁰⁴*Id.* at 495.

¹⁰⁵*Id.*

The central thrust of Chief Justice Burger's dissent in *Batson*, on the other hand, is that attempting to limit application of the peremptory for any reason is unsound.¹⁰⁶ This view is based on the premise that "[a]nalytically, there is no middle ground: A challenge either has to be explained or it does not."¹⁰⁷ Compelling any type of reason for the peremptory would cause it to collapse into a challenge for cause.¹⁰⁸

Ironically, both Marshall and Burger are correct in their assessment of the majority opinion. The limitation imposed by the peremptory is now "semi-arbitrary."¹⁰⁹ The inherent flaw in the majority opinion is that the peremptory challenge allows too much latitude to circumvent the non-discriminatory selection of jurors.¹¹⁰ As a result, trial judges will be forced to make a subjective determination of whether prosecutorial use of the challenge rises to the level of invidious discrimination.¹¹¹

CONCLUSION

Arguably *Batson's* force, if any, will lie in the deterrent effect it will have upon prosecutors. Presumably, they will now be hesitant to exclude *all* black jurors from the petit jury, thereby allowing for some black representation on the black defendant's jury. However, since *Batson* places much emphasis on a trial judge's ability to identify prosecutorial intent to discriminate, *Batson* lacks the necessary "teeth" required to ensure that black jurors are not excluded on the basis of race. However, *Batson* does stand for two fundamental propositions: First, that the black defendant now enjoys equal protection of the laws throughout the entire jury selection process; and second, that the peremptory challenge has been recognized as a tool of invidious discrimination. Given these two prescripts, *Batson* has arguably laid the necessary foundation for banning the peremptory altogether.¹¹²

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¹⁰⁶ *Batson*, 106 S. Ct. at 1731-42 (Burger, J., Dissenting).

¹⁰⁷ *Id.* at 1739.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235, 287 (1968).

¹¹¹ *Batson*, 106 S. Ct. at 1724 n.22. The note highlights the Court's reliance on the ability of the trial judge during voir dire to discern a prima facie case of discrimination from the interplay between the prosecution and the prospective jurors.

¹¹² *Id.* at 1726 (Marshall, J., concurring).