Western New England Law Review

Volume 15 *15 (1993)*
Issue 2

Article 5

1-1-1993

CONSTITUTIONAL LAW—HERNANDEZ v. NEW YORK: DID THE SUPREME COURT INTEND TO OVERRULE BATSON'S STANDARD OF "RACIALLY NEUTRAL"?

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CONSTITUTIONAL LAW—*HERNANDEZ V. NEW YORK*: DID THE SUPREME COURT INTEND TO OVERRULE *BATSON'S* STANDARD OF "RACIALLY NEUTRAL"?

INTRODUCTION

The use of peremptory challenges in jury trials dates back to the early days of English common law, which allowed a defendant on trial for a felony to challenge thirty-five jurors and the prosecutor to challenge an unlimited number of jurors peremptorily.[1] However, because the prosecutor's unlimited number of peremptory challenges resulted in infinite delays, the procedure was changed by statute, The Ordinance for Inquests, which required a prosecutor to assign a "[c]ause certain" for challenging jurors.[2] Nevertheless, the widely-held belief that a proper jury trial required peremptory challenges on both sides prevailed, and the statute was construed to allow the prosecutor to "stand aside" any juror after examination until the entire panel had been examined and the defendant had exercised his or her challenges.[3] This system carried over into the American jury system, which provided both sides with the right to utilize such challenges. Today, despite much criticism by commentators[4] the peremptory challenge system continues.[5]

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1. Swain v. Alabama, 380 U.S. 202, 212-13 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986).

2. *Id.* at 213 (citing The Ordinance for Inquests, 1305, 33 Edw. 1, stat. 4 (Eng.)). Challenges for cause allow rejection of jurors on a "narrowly specified, provable and legally cognizable basis of partiality." *Id.* at 220. Peremptory challenges, on the other hand, allow rejection of a juror for a "real or imagined partiality." *Id.*

3. *Id.* at 213. In Batson v. Kentucky, 476 U.S. 79 (1986), dissenting Chief Justice Burger explained that

> [p]eremptory challenges have long been viewed as a means to achieve an impartial jury that will be sympathetic toward neither an accused nor witnesses for the State on the basis of some shared factor of race, religion, occupation, or other characteristic. . . . [T]he peremptory challenge is "essential to the fairness of trial by jury."

Id. at 125 (Burger, C.J., dissenting).

4. *See infra* note 33.

5. *Swain*, 380 U.S. at 216-17; *see* FED. R. CRIM. P. 24(b). Rule 24(b) of the Federal Rules of Criminal Procedure provides as follows:

> (b) Peremptory Challenges. If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to [six] peremptory challenges and the defendant or defendants jointly to 10 peremptory

The major criticism that commentators have directed at the peremptory challenge system is that it has been used to exclude potential jurors on the basis of race, and therefore it perpetuates racial discrimination.[6] A discriminatory result is objectionable for several reasons. First, it violates the defendant's right under the Equal Protection Clause[7] to trial by an impartial jury by "eliminating a particular group's experiences and perspectives from the interaction on the jury panel."[8] Second, denial of the opportunity to serve as a juror may be perceived by the excluded juror as a badge of inferiority.[9] Third, the use of peremptory challenges as a vehicle to discriminate on the basis of race erodes public confidence in our judicial system.[10]

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challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to [three] peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

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

6. *See, e.g.*, Note, *Due Process Limits on Prosecutorial Peremptory Challenges*, 102 HARV. L. REV. 1013 (1989) [hereinafter *Due Process Limits*]; Robert M. O'Connell, Note, *The Elimination of Racism from Jury Selection: Challenging the Peremptory Challenge*, 32 B.C. L. REV. 433 (1991).

7. Section one of the Fourteenth Amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

8. *Due Process Limits*, *supra* note 6, at 1016. In Batson v. Kentucky, 476 U.S. 79 (1986), the Supreme Court stressed that an impartially chosen jury is a precondition to Fourteenth Amendment protection: "The petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge. Those on the venire must be 'indifferently chosen,' to secure the defendant's right under the Fourteenth Amendment." *Id.* at 86-87 (citation omitted) (footnote omitted).

9. *Batson*, 476 U.S. at 87. In *Batson*, the Court recognized that "[c]ompetence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial." *Id.* Thus, exclusions based solely on race reflect a belief that a particular racial group is unqualified to serve as jurors. *Id.*

10. *Id.* Race-based jury selection compromises public confidence in the judicial system in at least two respects. First, "[t]he courts jeopardize their moral authority as chief enforcer of antidiscrimination norms, unless they impose the same requirements on themselves." Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 749 (1992). Second, the use of unconstitutional jury selection procedures "cast[s] doubt on the integrity of the whole judicial process by creating the appearance of bias in individual cases." Brian J. Serr & Mark Maney, *Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 J. CRIM. L. & CRIMINOLOGY 1, 62 (1988). Specifically, "[p]eople may believe

The Supreme Court recognized this potential for abuse and held in *Batson v. Kentucky* that a prosecutor's use of peremptory challenges was subject to judicial review in *Batson v. Kentucky*.[11] *Batson* involved a prosecutor's use of peremptory challenges to strike all African-American potential jurors from the jury venire. In *Batson*, the Court devised a three-pronged test for evaluating a defendant's claim that a prosecutor had exercised peremptory challenges in a manner repugnant to the Fourteenth Amendment.[12]

First, the defendant must make a prima facie case of discrimination.[13] Upon such a prima facie showing, the prosecutor must provide a racially neutral explanation for exercising the objectionable strikes.[14] The trial court then has the duty to determine if the defendant has established purposeful discrimination.[15] Because of the variety of jury selection practices followed in state and federal trial courts, however, the Supreme Court deferred to those lower courts the task of formulating procedures for best implementing its decision.[16] The lower courts had great difficulty implementing the decision,[17] and the Supreme Court has recently had to revisit *Batson* on an almost regular basis to resolve several of its unanswered questions.[18] One such issue was

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that an all-white jury will be biased against a black defendant, or biased in favor of a white defendant accused of a crime against a black victim." Underwood, *supra* at 748.

In the latest and most tragic example, riots erupted in Los Angeles, California on April 29, 1992, after a virtually all-white, suburban jury that included no African-American jurors, acquitted four white police officers of the videotaped beating of African-American motorist Rodney King. This national tragedy resulted in at least 54 deaths and an estimated $1 billion in property damage.

11. 476 U.S. 79, 95 (1986).

12. *Id.* at 96-98. See *infra* text accompanying notes 59-69 for a discussion of *Batson's* three-pronged test.

13. *Id.* at 93-94.

14. *Id.* at 98.

15. *Id.*

16. *Id.* at 99 n.24.

17. *See* Paul H. Schwartz, Comment, *Equal Protection in Jury Selection? The Implementation of* Batson v. Kentucky *in North Carolina*, 69 N.C. L. REV. 1533, 1535 (1991).

18. One commentator suggested that *Batson* left seven unanswered questions: (1) What constitutes a prima facie case of discrimination? (2) What qualifies as a racially neutral explanation? (3) How should a court remedy improper exclusion? (4) Should representation of the targeted group on the jury nullify the prima facie inference of discrimination? (5) Is discrimination on non-racial bases allowed? (6) Does the defendant have standing to object to discrimination against prospective jurors of a race other than his own? (7) Is racial discrimination in the use of peremptory challenges by defense permissible? Brett M. Kavanaugh, Note, *Defense Presence and Participation: A Procedural Minimum for* Batson v. Kentucky *Hearings*, 99 YALE L.J. 187, 188 n.14 (1989) (citing Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153 (1989)).

Recently the Supreme Court has addressed several of *Batson's* unresolved issues. In

what, under *Batson*, constitutes a "racially neutral" explanation for exercising a peremptory challenge. Under the *Batson* test, once the defendant has raised an inference of discrimination, the burden shifts to the prosecutor to proffer a racially neutral explanation for the manner in which the challenges were exercised.[19] The Court's "racially neutral" standard, however, proved to be an intangible one. Thus, in May of 1991, in *Hernandez v. New York* [20] the Supreme Court reexamined the second prong of the *Batson* test and held that "[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral"[21] at the second prong of the inquiry.

Part I of this Note discusses the seminal Supreme Court peremptory challenge cases[22] and the evolution of the *Batson* framework for evaluating claims of jury discrimination through the use of peremp-

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Holland v. Illinois, 493 U.S. 474 (1990), the Court addressed the issue of whether a defendant has a Sixth Amendment right to challenge a prosecutor's use of peremptory challenges on the basis of race. The Court rejected the application of a Sixth Amendment fair cross section analysis to the use of peremptory challenges, stating that it found no support for such in the text of the Sixth Amendment and that to do so would undermine rather than further the Amendment's objectives. *Id.* at 476-77.

In Powers v. Ohio, 111 S. Ct. 1364 (1991), the Court addressed the issue of whether a defendant has standing to object to the discrimination against jurors of a race other than his own. At trial, the Caucasian defendant objected to the prosecutor's use of peremptory challenges to strike two African-American venirepersons on Sixth Amendment fair cross section and Fourteenth Amendment equal protection grounds. While the Supreme Court rejected Powers' Sixth Amendment claim based on its holding in *Holland v. Illinois*, it held that Powers had standing to raise a third-party Fourteenth Amendment equal protection challenge to the exclusion of African-Americans from his jury. *Id.* at 1372-74. The Court reasoned that "[b]oth the excluded juror and the criminal defendant have a common interest in eliminating racial discrimination from the courtroom." *Id.* at 1372.

In Georgia v. McCollum, 112 S. Ct. 2348 (1992), the Court addressed the issue of whether *Batson* extends to discriminatory challenges made by a defendant. The Court held that the Fourteenth Amendment prohibits a criminal defendant from engaging in invidious discrimination through the use of peremptory challenges. *Id.* at 2359.

Moreover, in Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077 (1991), the Court held that *Batson* applies in civil proceedings, and thus a private litigant in a civil action may not use peremptory challenges to exclude venirepersons on the basis of race. *Id.* at 2088-89.

Finally, in Hernandez v. New York, 111 S. Ct. 1859 (1991), the Court examined the issue of what qualifies as a racially neutral explanation. The Court held that a racially neutral explanation at the second prong of the *Batson* test is a facially neutral explanation. *Id.* at 1868. See *infra* part II for a discussion of the Supreme Court's holding in *Hernandez*.

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

20. 111 S. Ct. 1859 (1991).

21. *Id.* at 1866.

22. Batson v. Kentucky, 476 U.S. 79 (1986); Swain v. Alabama, 380 U.S. 202 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986).

tory challenges. Part II discusses the Supreme Court's recent plurality decision in *Hernandez v. New York*,[23] which held that a prosecutor's explanation, that he peremptorily struck two bilingual Hispanic-American jurors because he doubted their ability to defer to the official translations of testimony, was racially neutral as a matter of law.[24] Part III analyzes the split among the lower courts regarding the proper interpretation and application of the Supreme Court's holding in *Hernandez*, and concludes that the decision should be read to clarify rather than overrule the standard set forth in *Batson*.[25]

I. EVOLUTION OF PEREMPTORY CHALLENGE DISCRIMINATION CASE LAW

While discrimination in the jury system was prevalent in the 19th century, even then the United States Supreme Court had slowly begun to chip away at the practice of excluding African-Americans from jury service on the basis of race. In *Strauder v. West Virginia*,[26] decided in 1880, the Supreme Court first recognized the right of a criminal defendant to be tried by a jury from which members of his race had not been purposefully and systematically excluded. In *Strauder*, the Supreme Court struck down a statute that qualified only Caucasians for jury duty.[27] The Court held that denial of participation to African-Americans as jurors on the basis of race contravened the central purposes of the Fourteenth Amendment.[28] In the 20th century, the Court continued to confront invidious racial discrimination against African-Americans in jury selection procedures,[29] and eventually extended this protection to other racial minorities.[30] In *Swain v. Alabama*[31] and *Batson v. Kentucky*,[32] the Supreme Court confronted jury discrimination again, this time in the realm of the peremptory chal-

23. 111 S. Ct. 1859 (1991).

24. *Id.* at 1866-67.

25. *See infra* part III.C.

26. 100 U.S. 303 (1880).

27. *Id.* at 310.

28. *Id.* at 308. The Court stated that "[t]he very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine." *Id.*

29. *See, e.g.*, Avery v. Georgia, 345 U.S. 559 (1953); Cassell v. Texas, 339 U.S. 282 (1950); Akins v. Texas, 325 U.S. 398 (1945); Hill v. Texas, 316 U.S. 400 (1942); Smith v. Texas, 311 U.S. 128 (1940); Norris v. Alabama, 294 U.S. 587 (1935); *see also* Carter v. Texas, 177 U.S. 442 (1900); Gibson v. Mississippi, 162 U.S. 565 (1896).

30. *See, e.g.*, Hernandez v. Texas, 347 U.S. 475 (1954) (forbidding exclusion of any identifiable group in the community which may be the subject of prejudice).

31. 380 U.S. 202 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986).

32. 476 U.S. 79 (1986).

lenge system. However, both decisions were met with considerable criticism by those who viewed them as seriously flawed.[33]

A. Swain v. Alabama[34]

In *Swain*,[35] the Supreme Court declined to apply Fourteenth Amendment scrutiny to a prosecutor's exercise of peremptory challenges of individual jurors in any particular case.[36] Rather, the Court strongly emphasized the long-standing historical notion that peremptory challenges are necessary to secure an impartial jury,[37] and established a presumption that a prosecutor has used the challenges to "obtain a fair and impartial jury."[38] The Court postulated that subjecting a prosecutor's challenge in any particular case to the con-

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33. *See, e.g.*, Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 169 (1989) (stating that *Batson* imposes substantial economic and human costs while yielding only limited gains); Note, *Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1582 (1988) (noting that racism still pervades the criminal justice system and modification of the peremptory challenge standard under *Batson* does not ensure that a prosecutor will exercise challenges in a race-neutral manner); Gary L. Geeslin, Note, *Peremptory Challenge—Systematic Exclusion of Prospective Jurors on the Basis of Race*, 39 MISS. L.J. 157, 164 (1967) (recognizing a need for more ascertainable standards for constitutional limitations on peremptory challenges); Roger S. Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235, 327-28 (1968) (noting that the constitutional rule prohibiting discrimination in jury selection "has been acknowledged in theory, but with little practical consequence"); Jonathan B. Mintz, Note, Batson v. Kentucky: *A Half Step in the Right Direction*, 72 CORNELL L. REV. 1026, 1039 (1987) (noting that the *Batson* remedy is not comprehensive and advocating total abolishment of peremptory challenges); Serr & Maney, *supra* note 10, at 62 (calling the *Batson* decision a failure).

34. 380 U.S. 202 (1965), *overruled by* Batson v. Kentucky, 475 U.S. 79 (1986).

35. *Id.* at 221-22. Swain, an African-American man, was indicted and convicted of rape in Alabama and sentenced to death. *Id.* at 203. At trial, the defense moved to quash the indictment, to strike the trial jury venire, and to void the petit jury chosen based on discrimination in the selection of jurors. *Id.* Evidence showed that while African-American males over age 21 constituted 26% of all males in the county in that age group, only 10% to 15% of the grand and petit jury panels drawn from the jury box had been African-American. *Id.* at 205. There were two African-Americans on the grand jury that indicted Swain. *Id.* However, no African-American had served on a petit jury since approximately 1950. *Id.* There were eight African-Americans on the petit jury venire, but none served: two were exempted and six were struck by the prosecutor. *Id.* Nevertheless, the Court found the record insufficient to establish a prima facie case of discrimination. *Id.* at 227-28.

36. *Id.* at 221-22. The court stated, "[W]e cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his [or her] challenges in any given case." *Id.* at 222. "To subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge." *Id.* at 221-22.

37. *Id.* at 219 ("The persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury.").

38. *Id.* at 222.

straints of the Equal Protection Clause would so fundamentally alter the nature and operation of the peremptory challenge system that it would fail to achieve its full purpose.[39]

Despite its reluctance to alter the character of the peremptory challenge, the *Swain* Court imposed a slight restriction on its use. Pursuant to the Equal Protection Clause, the Court prohibited racially-based exclusion of persons from jury service in those cases where the defendant could overcome the presumption of validity for prosecutorial action by demonstrating that the prosecutor systematically, "in case after case,"[40] excluded minority venirepersons.[41] The Court noted that an equal protection claim takes on added significance when, "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim [was], [the prosecutor was] responsible for the removal of [African-Americans] who [had] been selected as qualified jurors."[42]

Following the Supreme Court's decision in *Swain*, lower courts implementing that decision interpreted the above language as a requirement that a defendant must prove that a particular prosecutor used peremptory challenges to strike African-American jurors in a number of cases sufficient to suggest systematic exclusion as a precondition to the court's finding of an Equal Protection Clause violation.[43] The practical difficulties in meeting such a burden of proof[44] effectively resulted in prosecutorial immunity from constitutional scrutiny of peremptory challenges.[45] This result prompted the Supreme Court

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39. *Id.* at 219-22 ("For it is . . . an arbitrary and capricious right . . . [which] must be exercised with full freedom, or it fails of its full purpose.") (quoting Lewis v. United States, 146 U.S. 370, 378 (1892)); *see supra* note 3 and accompanying text.

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

41. *Id.* at 223-24.

42. *Id.* at 223.

43. *See, e.g.*, United States v. Jenkins, 701 F.2d 850, 859-60 (10th Cir. 1983); United States v. Boykin, 679 F.2d 1240, 1245 (8th Cir. 1982); United States v. Pearson, 448 F.2d 1207, 1213-18 (5th Cir. 1971); Thigpen v. State, 270 So.2d 666, 673 (Ala. Crim. App. 1972); Jackson v. State, 432 S.W.2d 876, 878 (Ark. 1968); Johnson v. State, 262 A.2d 792, 796-97 (Md. Ct. Spec. App. 1970); State v. Johnson, 311 A.2d 389, 390 (N.J. Super. Ct. App. Div. 1973); State v. Shaw, 200 S.E.2d 585, 587-88 (N.C. 1973).

44. The Court of Appeals for the Fifth Circuit noted that the defendant would have to investigate, over a number of cases, the races of persons tried in the particular jurisdiction, the racial composition of the venire and petit jury, and the manner in which both parties exercised their peremptory challenges. *Pearson*, 448 F.2d at 1217. Consequently, such a burden would become insurmountable in jurisdictions where the court records do not reveal the juror's race and voir dire proceedings are not recorded. People v. Wheeler, 583 P.2d 748, 767-68 (Cal. 1978).

45. Batson v. Kentucky, 476 U.S. 79, 92-93 (1986). Some courts interpreted *Swain* to immunize the prosecution's use of peremptory challenges from judicial scrutiny. *See, e.g.*, United States v. Childress, 715 F.2d 1313, 1320 (8th Cir. 1983) (en banc), *cert. denied*,

to reexamine the issue of the evidentiary burdens required to establish a violation of the Equal Protection Clause in *Batson v. Kentucky*.[46]

B. Batson v. Kentucky

In *Batson*, the Supreme Court reaffirmed the constitutional prohibition of invidious racial discrimination in jury selection[47] and formulated a new standard of proof for establishing racial discrimination through the use of peremptory challenges.[48] Batson, an African-American man, was indicted in Kentucky on charges of second degree burglary and receipt of stolen goods. At trial, the judge conducted a voir dire examination of the jury venire, excused certain jurors for cause, and then permitted the parties to exercise peremptory challenges.[49] The prosecutor used peremptory challenges to strike all four African-Americans on the venire, resulting in the selection of an all-white jury. When counsel for the defendant moved to discharge the jury on the ground that the prosecutor's use of peremptory challenges was violative of the Sixth[50] and Fourteenth Amendments, the judge remarked "that the parties were entitled to use their peremptory challenges to 'strike anybody they want[ed] to.' "[51] The defense's motion was denied, and an all-white jury convicted Batson.[52] The Supreme Court of Kentucky affirmed the conviction.[53]

On certiorari, the United States Supreme Court reversed the por-

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464 U.S. 1063 (1984); United States v. Whitfield, 715 F.2d 145, 147 (4th Cir. 1983); United States v. Jenkins, 701 F.2d 850, 859-60 (10th Cir. 1983); United States v. Durham, 587 F.2d 799, 801 (5th Cir. 1979).

Other courts, dissatisfied with *Swain's* result, employed a Sixth Amendment analysis to circumvent the *Swain* evidentiary burden. *See, e.g.*, Booker v. Jabe, 775 F.2d 762, 767-71 (6th Cir. 1985), *vacated*, 478 U.S. 1001 (1986), *cert. denied*, 479 U.S. 1046 (1987); McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984), *vacated and remanded for reconsideration in light of Batson*, 478 U.S. 1001 (1986). See *infra* note 50 for a discussion of the Supreme Court's rejection of the application of the Sixth Amendment to the selection of petit juries.

46. 476 U.S. 79 (1986).

47. *Id.* at 87.

48. *Id.* at 93.

49. *Id.* at 82-83.

50. The Sixth Amendment to the Constitution of the United States provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. CONST. amend. VI.

Recently, in Holland v. Illinois, 493 U.S. 474 (1990), the Supreme Court held that while the Sixth Amendment requires that the venire from which the jury is chosen represent a fair cross section of the community, it does not operate to prohibit the exclusion of cognizable racial groups from the petit jury through the use of peremptory challenges. *Id.*

51. *Batson*, 476 U.S. at 83.

52. *Id.*

53. *Id.* at 84.

tion of *Swain*[54] that required a defendant to establish that a particular prosecutor systematically used peremptory challenges to remove African-American jurors.[55] Instead, the Court followed its more recent decisions embodying the general equal protection principle that a consistent pattern of official discrimination is not a prerequisite to finding a violation of the Equal Protection Clause.[56] The Court thus eased a defendant's burden of proof, requiring only that he or she demonstrate that the manner in which the prosecutor exercised his or her challenges in the defendant's own case indicated purposeful discrimination.[57] The Court noted that, in determining whether a defendant has met this burden, "a court must undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.' "[58]

Accordingly, the Court set out a three-pronged test for evaluating a claim that peremptory challenges have been used improperly: (1) the defendant must make a prima facie case of discrimination, (2) the burden shifts to the prosecutor to come forward with a racially neutral explanation, and (3) the trial court must determine whether the defendant has met his or her burden.[59] Under the first prong, to establish a prima facie case of purposeful discrimination under *Batson*, the defendant must show that he or she is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove members of defendant's race.[60] The defendant is entitled to rely on the fact that the practice of peremptory challenges allows "those to discriminate who are of a mind to discriminate."[61] In addition, the defendant must show that these facts, in combination with any other relevant circumstances, raise an inference of discrimination.[62]

Under the second prong, once the defendant has made the requisite showing, the burden shifts to the State to come forward with a

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54. Swain v. Alabama, 380 U.S. 202 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986).

55. *Batson*, 476 U.S. at 80.

56. *See, e.g.*, Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-65 (1977); City of Richmond v. United States, 422 U.S. 358, 378 (1975).

57. *Batson*, 476 U.S. at 93.

58. *Id.* (quoting *Arlington Heights*, 429 U.S. at 266).

59. *Id.* at 93-98.

60. *Id.* at 98. However, the Supreme Court's recent decisions in Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077 (1991), and Powers v. Ohio, 111 S. Ct. 1364 (1991), have implicitly eliminated the requirements that a defendant belong to a cognizable racial group and that he share the race of the excluded juror. *See supra* note 18.

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

62. *Id.*

racially neutral explanation for the juror's exclusion.[63] While the State's explanation need not rise to the level of a challenge for cause,[64] the prosecutor may not rebut the inference of discrimination by mere assertions of good faith.[65] Nor can the prosecutor rebut the defendant's prima facie case by stating that the jurors were challenged on the assumption that they would be partial to the defendant because of their shared race.[66] The Court feared that finding such general assertions sufficient to rebut the defendant's prima facie case would leave the Equal Protection Clause " 'but a vain and illusory requirement.' "[67] Because of this concern, the Court required that a prosecutor "articulate a neutral explanation related to the particular case to be tried."[68] Finally, under the third prong, the trial court must determine whether the defendant has established purposeful discrimination.[69]

Through this burden shifting system, the Court attempted to strike the difficult balance between maintaining the traditional character of the peremptory challenge and reducing its susceptibility to abuse.[70] The Court, however, was unpersuaded by the State's suggestion that its decision would create administrative difficulties,[71] and declined to fully delineate the equal protection constraints on the use of peremptories and to formulate particular procedures to be followed in implementing its decision.[72]

Not surprisingly, the lack of delineation of any standards governing the application of *Batson* left the lower courts with many unanswered questions and without much guidance in handling *Batson* claims.[73] The resulting ambiguity is especially problematic with respect to the second prong of the analysis, which requires a court to

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63. *Id.* at 97.

64. *Id.* For the standard governing challenges for cause, see *supra* note 2.

65. *Id.* at 98 (quoting Alexander v. Louisiana, 405 U.S. 625, 632 (1972)).

66. *Id.* at 97.

67. *Id.* at 98 (quoting Norris v. Alabama, 294 U.S. 587, 598 (1935)).

68. *Id.* at 98 & n.20 (stating that the "prosecutor must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges") (quoting Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981)).

69. *Id.* at 98.

70. *Id.* at 99 n.22. Justice Burger suggested that the Court had a different motive: "The Court never applies [a] conventional equal protection framework to the claims at hand, perhaps to avoid acknowledging that the state interest involved here has historically been regarded by this Court as substantial, if not compelling." *Id.* at 125 (Burger, C.J., dissenting).

71. *Id.* at 99.

72. *Id.* at 99 n.24.

73. Regarding the lack of such guidance, Chief Justice Burger protested in his dissenting opinion that "a 'clear and reasonably specific' explanation of 'legitimate reasons' for

assess the racial neutrality of a prosecutor's proffered explanation. Indeed, under *Batson*, "racially neutral" has meant many different things to many different courts.[74]

The Supreme Court recognized the need to provide greater clarity for lower courts in implementing the second prong of *Batson*, and thus

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exercising the challenge will be difficult to distinguish from a challenge for cause." *Batson*, 476 U.S. at 127 (Burger, C.J., dissenting).

74. For example, in State v. Butler, 731 S.W.2d 265 (Mo. Ct. App. 1987), the prosecutor used a peremptory challenge to remove a nurse from the jury because it was the prosecutor's "experience that nurses were compassionate and thus inclined to feel sorry for defendants." *Id.* at 272. The *Butler* court held that this explanation was insufficient under *Batson*, stating that the prosecutor's prior experience was not a reason "related to the case to be tried." *Id.*

Reaching the opposite result, the court in Tompkins v. State, 774 S.W.2d 195 (Tex. Crim. App. 1987) (en banc), *cert. granted*, 486 U.S. 1004 (1988), *aff'd*, 490 U.S. 754 (1989), declined to review the sufficiency of the prosecutor's explanations for striking 13 African-American venirepersons, including a postal worker who was struck because the prosecutor "had not had very good luck with postal employees." *Id.* at 205. The *Tompkins* court stated that *Batson* explicitly provides that a "prosecuting attorney is free to exercise his [or her] peremptory [challenges], provided that they are non-race related." *Id.*

In addition, other lower courts were divided on the issue of how to assess the racial neutrality of a prosecutor's explanation for striking a venireperson where another venireperson exhibiting the same characteristic was empaneled. Some of the courts that addressed this issue held that it was an issue of "comparability." Under this view, the court was to "compare the characteristics of the individual which prompted the Government's strike with the characteristics of those not struck by the Government. In order to have a neutral explanation, the characteristics of the struck individual cannot be present in those white panel members not struck." United States v. Wilson, 853 F.2d 606, 610 (8th Cir.), *vacated*, 861 F.2d 514 (8th Cir. 1988); *see, e.g.*, Walton v. Caspari, 916 F.2d 1352, 1361 (8th Cir. 1990) (holding it improper to exclude an African-American juror where the prosecutor's reasons were not consistently applied to white jurors); United States v. Chinchilla, 874 F.2d 695, 698 (9th Cir. 1989) (rejecting the prosecutor's explanation that a juror was struck because of his residence where another unchallenged juror resided in the same town); United States v. Thompson, 827 F.2d 1254, 1260 (9th Cir. 1987) (noting that a stated reason for challenging a juror may indicate pretext or bad faith where others similarly situated were allowed to serve).

Other courts have rejected this view and have held that a prosecutor's explanation does not fail the second prong of *Batson* solely because an unchallenged juror exhibited the same characteristic as that for which the minority juror was stricken. *See, e.g.*, United States v. Bennett, 928 F.2d 1548, 1551 (11th Cir. 1991) (holding that prior family involvement with drug charges was a racially neutral reason for striking two African-American venirepersons notwithstanding the fact that an unchallenged white juror exhibited the same characteristic); United States v. Alston, 895 F.2d 1362 (11th Cir. 1990) (stating that comparing attributes may be useful in assessing whether or not an explanation is pretextual, but it is not determinative). These courts have rejected a "comparability" approach on the grounds that the attributes relied upon by the prosecutor in striking potential jurors are not always easily compared and such comparisons often require a difficult determination of the degree to which the prospective juror exhibits the particular attribute. *Bennett*, 928 F.2d at 1552; *Alston*, 895 F.2d at 1367 n.5.

the Court granted certiorari in *Hernandez v. New York* [75] to review the sufficiency of the prosecutor's explanation for excluding Spanish/English bilingual jurors in a case against a Hispanic defendant.

II. *HERNANDEZ V. NEW YORK* [76]

Hernandez, a Hispanic-American, was convicted on two counts of attempted murder and two counts of criminal possession of a weapon, arising out of an incident in which he had fired several shots at a young woman friend and her mother.[77] After the voir dire examination of sixty-three potential jurors was completed, and nine jurors were empaneled, the defense counsel objected to the prosecutor's use of four peremptory challenges to exclude all potential jurors with Hispanic surnames.[78] The prosecutor, without waiting for a ruling on whether the defendant had established a prima facie case of racial discrimination, volunteered that he had challenged the jurors in question[79] because he doubted their ability to accept the official court translation of the testimony of the Spanish-speaking witnesses.[80] Specifically, the prosecutor explained that when he asked each juror whether or not he or she could accept the interpreter as the final arbiter of what was said, each juror looked away and said with hesitancy, not that he or she could, but that he or she would try to follow the interpreter.[81] In addition, the prosecutor expressed a lack of knowledge as to which jurors were Hispanic and argued that the fact that

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75. 498 U.S. 894 (1990), *aff'd*, 111 S. Ct. 1859 (1991).

76. 111 S. Ct. 1859 (1991).

77. *Id.* at 1864.

78. The prosecutor challenged the only three potential jurors with definite Hispanic surnames. However, the ethnicity of one of the challenged bilingual jurors was uncertain. *Id.* at 1865. *Hernandez* did not address whether this showing alone was sufficient to establish a prima facie case of discrimination. Instead, the Court held that "[o]nce a prosecutor has offered a race-neutral explanation and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." *Id.* at 1866.

At least one lower court has suggested that such a showing would not be sufficient to establish a prima facie case. Mejia v. State, 599 A.2d 1207 (Md. Ct. Spec. App. 1992). In *Mejia*, the Maryland Court of Appeals warned that surname alone tells little: "Did Rita Casini, for instance, cease to be Hispanic on the day she assumed the name Rita Hayworth? Did Lucille Ball, on the other hand, become Hispanic whenever she travelled as 'Mrs. Desi Arnaz?' " *Id.* at 1214. The court went on to suggest that "[u]nless tightly restrained, *Batson v. Kentucky* could easily denigrate into an ethnic parlor game," *id.* at 1215 (italics added), called " 'Who is What and How Do We Know It?' " *Id.* at 1208.

79. Hernandez pressed his *Batson* claim only with respect to the two Spanish-speaking potential jurors. The other two potential jurors had brothers who had been prosecuted by the same district attorney's office. *Hernandez*, 111 S. Ct. at 1864.

80. *Id.* at 1864-65.

81. *Id.* at 1865.

the victims and all of the key witnesses for the government were Hispanic-Americans undercut any possibility of a motive on the government's part to exclude this group from the jury.[82]

The trial court accepted the prosecutor's reasoning and denied the defendant's mistrial motion.[83] The case was tried with no Hispanic-Americans on the jury, and the defendant was convicted. The Supreme Court Appellate Division affirmed the conviction,[84] as did the Court of Appeals of New York.[85] In a plurality decision,[86] the United States Supreme Court affirmed the New York state courts' holdings that the prosecutor did not use peremptory challenges in a manner violative of the Equal Protection Clause.[87]

A. *The Supreme Court's Decision* [88]

1. Justice Kennedy's Plurality Opinion[89]

In a decision affirming the state appellate courts, Justice Kennedy, joined by three others,[90] reiterated the fundamental principle that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause,"[91] and stated that a neutral explanation for the purposes of the second prong of the *Batson* test "means an explanation based on something other than the race of

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82. *Id.* at 1864-65; *see also* United States v. Mathews, 803 F.2d 325, 332 (7th Cir. 1986) (holding that the fact that key witnesses for both sides were African-American undercut the prosecutor's motive to strike African-American potential jurors based on race), *rev'd on other grounds*, 485 U.S. 58 (1988).

83. *Hernandez*, 111 S. Ct. at 1865.

84. People v. Hernandez, 528 N.Y.S.2d 625 (N.Y. App. Div. 1988), *aff'd*, 552 N.E.2d 621 (N.Y.), *cert. granted*, 498 U.S. 894 (1990), *aff'd*, 111 S. Ct. 1859 (1991).

85. People v. Hernandez, 552 N.E.2d 621 (N.Y.), *cert. granted*, 498 U.S. 894 (1990), *aff'd*, 111 S. Ct. 1859 (1991).

86. Justice Kennedy, joined by Chief Justice Rehnquist, Justice Souter, and Justice White, delivered the opinion of the court (hereinafter referred to as the "plurality" or "Kennedy" opinion). *Hernandez*, 111 S. Ct. at 1864. Justice O'Connor, with whom Justice Scalia joined, filed a concurring opinion. *Id.* at 1873 (O'Connor, J., concurring). Justice Stevens, joined by Justice Marshall, filed a dissenting opinion. *Id.* at 1875 (Stevens, J., dissenting). Justice Blackmun filed a statement of dissent, agreeing with Part II of Justice Stevens' dissenting opinion. *Id.* at 1875 (Blackmun, J., dissenting).

87. *Id.* at 1873.

88. Hernandez v. New York, 111 S. Ct. 1859 (1991).

89. *Id.* at 1864.

90. *See supra* note 86.

91. *Hernandez*, 111 S. Ct. at 1866 (quoting Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-65 (1977)); *see* Washington v. Davis, 426 U.S. 229, 242 (1976) ("Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.").

the juror."[92] As such, Justice Kennedy concluded that "the facial validity of the prosecutor's explanation"[93] is the pivotal issue under the second prong of the *Batson* test: "whether, assuming the proffered reasons [to be true], the challenges violate the Equal Protection Clause as a matter of law."[94] Specifically, Justice Kennedy found that an explanation does not violate the Equal Protection Clause per se unless it is inherent in the explanation that the prosecutor acted " 'because of,' not merely 'in spite of' " the prospective juror's race.[95]

Justice Kennedy then addressed the issue of whether an explanation resulting in disproportionate removal of jurors of a particular racial group, standing alone, constituted a per se violation of the Equal Protection Clause.[96] Justice Kennedy concluded that assuming, arguendo, it could be established that a high percentage of bilingual jurors would have responded similarly to the prosecutor's questions, and thus would have been excluded under the prosecutor's criteria, that fact alone would not have caused the explanation to fail the race-neutrality test.[97] Justice Kennedy noted that "[a]n argument relating to the impact of a classification does not alone show its purpose"[98] and, therefore, is not conclusive at the second prong of the *Batson* inquiry, which merely requires the prosecutor to articulate a race-neutral explanation for striking jurors.[99] Justice Kennedy opined that such dis-

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92. *Hernandez*, 111 S. Ct. at 1866. See *supra* text accompanying notes 63-68 for an explanation of the *Batson* standard of "racially neutral."

93. *Id.*

94. *Id.*

95. *Id.* (quoting Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)); *see* McClesky v. Kemp, 481 U.S. 279, 297-99 (1987).

96. The Court did not reach the issue of whether Spanish language ability bears such a close relation to ethnicity that a peremptory challenge on that ground would violate the Equal Protection Clause. Justice Kennedy noted that the Court need not address this issue since the prosecutor did not rely on that criterion alone. *Hernandez*, 111 S. Ct. at 1867. Instead, the prosecutor explained that the jurors' specific responses and demeanor during voir dire prompted the strikes. However, the defendant urged that notwithstanding the prosecutor's focus on the individual responses of the jurors, the prosecutor's explanation had the effect of a purely language-based reason because "[a]ny honest bilingual juror would have answered the prosecutor in the exact same way." *Id.* (alteration in original).

97. *Hernandez*, 111 S. Ct. at 1867.

98. *Id.*

99. *Id.* (stating that "disproportionate impact does not turn the prosecutor's actions into a per se violation of the Equal Protection Clause").

It is a well-settled principle of equal protection law that disparate impact alone does not establish a discriminatory purpose and is thus not per se unconstitutional. *See* Washington v. Davis, 426 U.S. 229 (1972); Jefferson v. Hackney, 406 U.S. 535 (1972); Wright v. Rockefeller, 376 U.S. 52 (1964); Akins v. Texas, 325 U.S. 398 (1945); Strauder v. West Virginia, 100 U.S. 303 (1880); *cf.* Yick Wo v. Hopkins, 118 U.S. 356 (1886) (holding that the administration of a facially neutral statute directed so exclusively against a particular class of people constitutes denial of equal protection of the laws).

parate impact may be evidence of a prosecutor's motive and, as such, should be given appropriate weight in a court's ultimate factual finding of discriminatory intent in the third prong of a *Batson* analysis.[100]

Justice Kennedy found the prosecutor's explanation to be racially neutral on its face as a matter of law under the second prong of the *Batson* test.[101] He then reviewed the state court's decision to accept the prosecutor's explanation under the third prong of the *Batson* test.[102] Justice Kennedy concluded that "[t]he trial court took a permissible view of the evidence in crediting the prosecutor's explanation,"[103] and thus the court's decision was not clearly erroneous.[104] However, the Justice warned that the Court's holding "[did] not imply that [the] exclusion of bilinguals from jury service is wise, or even that it is constitutional in all cases."[105] In fact, Justice Kennedy went so far as to suggest that "for certain ethnic groups and in some communities, . . . proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis."[106]

2. Justice O'Connor's Concurring Opinion[107]

Justice O'Connor filed a concurring opinion on behalf of herself and Justice Scalia.[108] Justice O'Connor agreed with Justice Kennedy's conclusion that the trial court's finding that the prosecutor had no discriminatory intent was not clearly erroneous.[109] Justice O'Connor also embraced Justice Kennedy's holding that an explanation does not violate the Equal Protection Clause solely because it has a racially disproportionate impact, although such an effect may be evidence of intentional discrimination.[110] In fact, Justice O'Connor agreed so emphatically with the latter that she took occasion to reiterate the

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100. *Hernandez*, 111 S. Ct. at 1867.

101. *Id.* However, there is some support in case law for the proposition that language discrimination violates the Equal Protection Clause. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923) (holding that a state statute forbidding the teaching of any language other than English to any child who has not passed the eighth grade was violative of the Fourteenth Amendment); Gutierrez v. DeDubovay, 838 F.2d 1031 (9th Cir. 1988) (affirming the issuance of a preliminary injunction enjoining the enforcement of an employer's English-only rule which forbade employees to speak any language other than English except when acting as translators in their employment capacity).

102. *See supra* text accompanying note 69.

103. *Hernandez*, 111 S. Ct. at 1872.

104. *Id.* at 1873.

105. *Id.* at 1872.

106. *Id.* at 1872-73.

107. *Id.* at 1873 (O'Connor, J., concurring).

108. *Id.*

109. *Id.*

110. *Id.* at 1874-75.

dangers of a rule establishing an Equal Protection Clause violation upon a finding of mere disparate impact.[111] First, she maintained that such a rule would be over-inclusive and, as a result, could potentially "invalidate [] 'a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.' "[112] Second, she observed that such a rule with respect to the use of peremptory challenges presents the "risk of turning *voir dire* into a full-blown disparate impact trial, with statistical evidence and expert testimony on the discriminatory effect of any particular nonracial classification."[113] Third, Justice O'Connor asserted that such a procedure would not only be contrary "to the nature and purpose of the peremptory challenge,"[114] but also would create "unacceptable delays in the trial process."[115]

For these reasons, Justice O'Connor concluded, like Justice Kennedy, that a racially neutral explanation at the second *Batson* prong is an explanation based on something other than the juror's race. Justice O'Connor stated that a peremptory strike would constitute a *Batson* violation only if the prosecutor struck a potential juror because of the juror's race—whether solely on account of his or her race or on the assumption that jurors of a given race, as a group, would be unable to impartially consider the case.[116]

Justice O'Connor wrote a separate opinion, however, because she opposed the scope of the plurality's constitutional inquiry. Justice O'Connor believed that Justice Kennedy went further than necessary "in assessing the constitutionality of the prosecutor's explanation."[117] Specifically, Justice O'Connor objected to Justice Kennedy's suggestion that, in certain instances, proficiency in a particular language should be treated as a proxy for race under an equal protection analysis.[118] In Justice O'Connor's opinion, "*Batson* does requires not that

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111. *Id.* at 1874.

112. *Id.* (quoting Washington v. Davis, 426 U.S. 229, 248 (1976)).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* (quoting Batson v. Kentucky, 476 U.S. 79, 89 (1986)).

117. *Id.* at 1873.

118. *Id.* at 1872-73. Justice O'Connor stated,

> In this case, the prosecutor's asserted justification for striking certain Hispanic jurors was his uncertainty about the jurors' ability to accept the official translation of trial testimony. If this truly was the purpose of the strikes, they were not strikes because of race, and therefore did not violate the Equal Protection Clause under *Batson*. They may have acted like strikes based on race, but they were *not* based on race. No matter how closely tied or significantly correlated to race the

the justification be unrelated to race,"[119] but merely that "the prosecutor's reason for striking a juror not be the juror's race."[120]

3. Justice Stevens' Dissent[121]

Justice Stevens filed a dissenting opinion[122] advocating an alternative allocation of the burdens of proof for determining the racial neutrality of an explanation for exercising a peremptory challenge. Justice Stevens stated that, "[b]y definition, . . . a prima facie case is one that is established by the requisite proof of invidious discriminatory intent."[123] Therefore, he reasoned, in the absence of an explanation from the prosecutor "sufficient to rebut [a] prima facie case,"[124] the defendant has established a violation of the Equal Protection Clause—without having to present "additional evidence of racial animus."[125] More specifically, Justice Stevens argued that under the Kennedy/O'Connor standard, a defendant's prima facie inference of discrimination could stand and establish a violation of the Equal Protection Clause only if the prosecutor's explanation showed discriminatory intent on its face (for any facially neutral explanation would rebut the inference of discrimination).[126] In other words, Justice Stevens criticized the Kennedy/O'Connor standard on the ground that, by requiring the prosecutor's explanation itself to provide direct evidence of discriminatory intent, the Kennedy/O'Connor standard erroneously imposes a heightened burden of proof not required under *Batson*.[127] Instead, Justice Stevens concluded that *Batson* properly held that a prosecutor's explanation must identify " 'legitimate reasons' that are 'related to the particular case to be tried' and sufficiently persuasive 'to rebu[t] a defendant's prima facie case.' "[128]

Applying this standard to the facts of *Hernandez*, Justice Stevens stated that he would find the prosecutor's explanation insufficient, as a

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> explanation . . . may be, the strike does not implicate the Equal Protection Clause unless it is based on race.

Id. at 1874 (citation omitted).

119. *Id.*

120. *Id.*

121. *Id.* at 1875.

122. Justice Stevens was joined by Justice Marshall, and joined in part by Justice Blackmun. *Hernandez*, 111 S. Ct. at 1875 (Stevens, J., dissenting).

123. *Id.* at 1875.

124. *Id.*

125. *Id.*

126. *Id.* at 1876.

127. *Id.*

128. *Id.* at 1875 (Stevens, J., dissenting) (alteration in original) (quoting Batson v. Kentucky, 476 U.S. 79, 98 & n.20 (1986)).

matter of law, to rebut the prima facie case of discrimination for three reasons. First, the justification would result in a "disproportionate disqualification of Spanish-speaking venirepersons."[129] Therefore, because disparate impact is itself evidence of discriminatory purpose, an explanation producing a disparate impact could not rebut the prima facie case. Second, Justice Stevens maintained that since the prosecutor's concern could have been accommodated by less drastic means,[130] such an explanation could not have qualified as a legitimate reason—for it was not in fact " 'related to the particular case to be tried.' "[131] Finally, Justice Stevens maintained that the prosecutor's concern about the jurors' inability to follow the translation of testimony was not valid and substantiated; for if it were, it would have supported a challenge for cause.[132]

In sum, Justice Stevens concluded that, in jury selection challenges, the requisite invidious intent is established once the defendant makes out a prima facie case of discrimination.[133] Justice Stevens asserted that "[b]y requiring that the prosecutor's explanation itself provide additional, direct evidence of discriminatory motive, the Court has imposed . . . [a] heightened quantum of proof" demanded neither by *Batson*, nor by other equal protection holdings.[134]

III. THE IMPLICATIONS OF *HERNANDEZ V. NEW YORK*

Much like its decision in *Batson*,[135] the United States Supreme Court's decision in *Hernandez v. New York* [136] is an attempt to strike the proper balance between the competing interests of the Equal Protection Clause and the peremptory challenge system. The difficulty of formulating a workable *Batson* framework is a function of these competing interests, which the Court seeks to balance. By definition, the peremptory challenge is "one exercised without a reason stated, without inquiry and without being subject to the court's control."[137] On

129. *Id.* at 1877.

130. Justice Stevens maintained that Spanish-speaking jurors could have been permitted to address the judge in a discreet way with any concerns regarding the translation during the course of the trial. *Hernandez*, 111 S. Ct. at 1877 (Stevens, J., dissenting). However, such an alternative was never suggested at trial. *Id.* at 1868.

131. *Id.* at 1875 (quoting *Batson*, 476 U.S. at 98).

132. *Id.* at 1877.

133. *Id.* at 1876. See *supra* note 2 for the standard governing challenges for cause.

134. *Id.*

135. Batson v. Kentucky, 476 U.S. 79 (1986). See *supra* part I.B for a discussion of *Batson*.

136. 111 S. Ct. 1859 (1991).

137. Swain v. Alabama, 380 U.S. 202, 220 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986).

the one hand, if a rigorous standard of racial neutrality is employed, the historical nature and purpose of the peremptory challenge system would be "altered significantly."[138] If, on the other hand, the Court mandates merely a superficial inquiry into the racial neutrality of an explanation, *Batson* will arguably afford little or no protection against discrimination by prosecutors.[139] This problem is exacerbated by the inherent difficulty in determining a prosecutor's subjective motivation and the ease with which a prosecutor can generate a facially neutral explanation.[140]

The holding of *Hernandez* is consistent with *Swain* [141] and *Batson* to the extent that it continues to prohibit peremptory challenges based on the assumption that a particular racial group as a whole is unqualified to serve as jurors, or that prospective jurors will be biased in favor of a defendant because of shared race, and other assumptions arising solely from the juror's race.[142] The *Hernandez* decision, unfortunately, also resembles *Batson* in its failure to answer at least one critical question, which leaves ambiguous the proper standard of "racially neutral" against which to assess the sufficiency of an explanation for exercising a peremptory strike. The courts that have had occasion to interpret and implement the *Hernandez* decision have already divided over the issue of whether *Hernandez's* facially neutral standard implicitly discards the standard enunciated in *Batson*—that an explanation must be clear, reasonably specific, and related to the case to be tried.

Of the courts that have interpreted the *Hernandez* holding to date, several have applied the *Hernandez* standard in conjunction with the *Batson* standard,[143] others have determined that the *Hernandez* standard overrules the *Batson* standard,[144] and still others have adopted one approach or the other without directly addressing the

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138. Alan Raphael, *Discriminatory Jury Selection: Lower Court Implementation of* Batson v. Kentucky, 25 WILLAMETTE L. REV. 293, 294 (1989); *see supra* note 3.

139. Raphael, *supra* note 138, at 294.

140. In *Batson v. Kentucky*, Justice Marshall expressed a concern that "[a]ny prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons." 476 U.S. 79, 106 (1986) (Marshall, J., concurring).

141. Swain v. Alabama, 380 U.S. 202 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986). See *supra* part I.A for a discussion of *Swain*.

142. *See Batson*, 476 U.S. at 85-86; *Swain*, 380 U.S. at 223-24.

143. *See, e.g.*, United States v. Bishop, 959 F.2d 820 (9th Cir. 1992); United States v. Clemons, 941 F.2d 321 (5th Cir. 1991); State v. Boston, 823 P.2d 1323 (Ariz. Ct. App. 1991); People v. Fauntleroy, 586 N.E.2d 292 (Ill. App. Ct. 1991); People v. McArthur, 577 N.Y.S.2d 490 (N.Y. App. Div. 1991).

144. *See, e.g.*, State v. Medina, 836 P.2d 997 (Ariz. Ct. App. 1992); State v. Green, 409 S.E.2d 785 (S.C. 1991), *cert. denied*, 112 S. Ct. 1566 (1992).

issue.[145]

A. *A Survey of Courts Reading* Hernandez *in Conjunction with* Batson

Recently, in *United States v. Bishop*,[146] the United States Court of Appeals for the Ninth Circuit held that, notwithstanding the sincerity of a prosecutor's explanation, his or her explanation is not sufficient to satisfy *Batson* where it is not related to the case to be tried. The court held that without such a nexus " 'a discriminatory intent is inherent in the prosecutor's explanation' " and thus forbidden by *Hernandez*.[147]

In *Bishop*, the defendant was charged with trafficking narcotics and assaulting a federal officer.[148] During jury selection, defense counsel objected to the peremptory challenge of an African-American juror. The prosecutor then volunteered that he struck the juror because she lived in Compton[149] and he "felt that an eligibility worker in Compton [was] likely to take the side of those who [were] having a tough time, aren't upper middle class, and probably believes that police in Compton . . . pick on black people."[150] When the defense counsel offered evidence showing that a high percentage of Compton's residents were African-American, the prosecutor argued that the high correlation between residence in Compton and race, like the correlation between language proficiency and ethnicity in *Hernandez*, was immaterial to the ultimate determination of the racial neutrality of his

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145. *See, e.g.*, Moore v. Keller Indust., Inc., 948 F.2d 199 (5th Cir. 1991) (applying *Hernandez* standard), *cert. denied*, 112 S. Ct. 1945 (1992); United States v. Johnson, 941 F.2d 1102 (10th Cir. 1991) (same); Wylie v. Vaughn, 773 F. Supp. 775 (E.D. Pa. 1991) (applying *Batson* standard); People v. Cannon, 592 N.E.2d 168 (Ill. App. Ct. 1992) (applying *Batson* standard with no mention of *Hernandez*); People v. Boston, 586 N.E.2d 326 (Ill. App. Ct. 1991) (applying *Hernandez* facially neutral standard); People v. Finley, 584 N.E.2d 276, 283 (Ill. App. Ct. 1991) (stating that an explanation is sufficient if it is clear, reasonably specific, and nonracial); State v. Spears, 821 S.W.2d 537 (Mo. Ct. App. 1991) (applying *Hernandez* facially neutral standard); State v. Thomas, 407 S.E.2d 141 (N.C. 1991) (citing *Hernandez* for other propositions, but applying *Batson* standard); State v. Davidson, 479 N.W.2d 181 (Wis. Ct. App. 1991) (applying *Hernandez* standard).

146. 959 F.2d 820 (9th Cir. 1992).

147. *Id.* at 827 (quoting Hernandez v. New York, 111 S. Ct. 1859, 1866 (1991)).

148. *Id.* at 822.

149. Compton is an area in South Central Los Angeles, California. *Bishop*, 959 F.2d at 822.

150. *Id.* The prosecutor argued that he did not challenge the juror because she was an African-American, but rather because she lived in Compton, "a poor, violent community whose residents are likely to be 'anesthetized to such violence' and 'more likely to believe that the police use excessive force.' " *Id.* at 825. The prosecutor also suggested that part of his reason for striking the juror was that the juror's husband was also an eligibility worker and that the juror was approximately the same age as the defendant's mother. *Id.* at 822.

proffered explanation.[151]

The court rejected the prosecutor's interpretation of *Hernandez*, noting that he had offered only a partial reading of the holding. The *Bishop* court pointed out that in the *Hernandez* decision, Justice Kennedy expressly stated that it would have been a different case had the prosecutor relied solely on the race-correlated criterion.[152] The *Bishop* court found that, unlike the prosecutor's explanation in *Hernandez*, there was no nexus between the juror's characteristic and the juror's possible approach to the trial.[153] The court called this difference between the explanations offered in *Bishop* and *Hernandez* "the difference between a reason—whether valid or not—and a racial stereotype. It is the difference between a criterion having a discriminatory racial impact, and one acting as a discriminatory racial proxy. It is, in short, the difference between what the Constitution permits, and what it does not."[154]

The Court of Appeals of Arizona reached the same result as the *Bishop* court in *State v. Boston* [155] by a slightly different analysis. In *Boston*, the defendant was charged with and convicted of possession of narcotics.[156] On appeal, the defendant argued that the trial court's decision to accept the prosecutor's explanation that he struck a Hispanic juror because the juror had only a ninth-grade education was an abuse of discretion.[157]

The *Boston* court agreed, and held that the prosecutor's explanation "failed to rebut the defendant's prima facie case of discrimination."[158] In its analysis, the *Boston* court focused on the Supreme

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151. *Id.* at 825. Presumably, the prosecutor relied on Justice O'Connor's opinion for the proposition that if an explanation is based on something other than race, "[n]o matter how closely tied or significantly correlated to race the explanation for a peremptory strike may be, the strike does not implicate the Equal Protection Clause unless it is based on race." Hernandez v. New York, 111 S. Ct. 1859, 1874 (1991) (O'Connor, J., concurring).

152. *Bishop*, 959 F.2d at 825 (citing *Hernandez*, 111 S. Ct. at 1872-73); *see supra* text accompanying notes 105-06.

153. *Bishop*, 959 F.2d at 825. The court found that the prosecutor's proffered reasons were "generic reasons, group-based presuppositions applicable in all criminal trials to residents of poor, predominantly black neighborhoods . . .[, which] amounted to little more than the assumption that one who lives in an area heavily populated by poor black people could not fairly try a black defendant." *Id.*

154. *Id.* at 826. The court noted that it was not holding that residence could never constitute a legitimate reason for exercising a peremptory challenge and explained that such a challenge would be legitimate "[w]here residence is utilized as a link connecting a specific juror to the facts of the case." *Id.*

155. 823 P.2d 1323 (Ariz. Ct. App. 1991).

156. *Id.* at 1324.

157. *Id.*

158. *Id.* at 1325.

Court's decision in *Batson*. The court interpreted *Batson* as imposing a two-fold requirement at the second prong: first, that the explanation be racially neutral; and second, that the explanation be related to the particular case to be tried.[159] Presumably, under this court's analysis, the facially neutral standard of *Hernandez* spoke only to the racial neutrality requirement of the second prong of the *Batson* test, while the nexus requirement of that prong remained intact.[160]

The *Boston* court found that the prosecutor's reason for striking the only Hispanic member of the panel was racially neutral on its face, thus satisfying the first requirement of the second prong.[161] However, the court found that the explanation failed the second requirement of the second prong of *Batson* for want of a nexus between the juror's limited education and the particular facts of the case, thus failing to rebut the defendant's prima facie case.[162]

Among the courts that have rejected the nexus requirement is the Second Division of the Court of Appeals of Arizona. In *State v. Medina*,[163] the Second Division of the Court of Appeals of Arizona expressly rejected *Boston's* holding, wherein the First Division of the Court of Appeals of Arizona required that a prosecutor's explanation for striking a juror be related to the particular case to be tried in addition to the requirement that it be racially neutral.[164] Unable to over-

159. *Id.* at 1324-25 (citing Batson v. Kentucky, 476 U.S. 79, 97 (1986)).

160. See *supra* text accompanying note 68 and *infra* note 169 for the language in *Batson* requiring a nexus between the prosecutor's explanation for exercising a peremptory challenge and the case to be tried.

161. *Boston*, 823 P.2d at 1325.

162. *Id.* Like the *Bishop* court, the *Boston* court emphasized that it was not holding that a lack of education could never be a legitimate reason for exercising a peremptory challenge. *Id.*; *see supra* note 154. The court acknowledged that in some instances it may be desirable to have well-educated jurors. *Boston*, 823 P.2d at 1325; *see, e.g.*, United States v. Tucker, 773 F.2d 136 (7th Cir. 1985) (prosecution for wire fraud involving a series of complicated commodities transactions).

163. 836 P.2d 997 (Ariz. Ct. App. 1992).

164. *Id.* at 1000. The Second Division of the Court of Appeals of Arizona first addressed the nexus issue in dicta. *See* State v. Batista, No. 2 CA-CR 91-0367, 1992 WL 10649 (Ariz. Ct. App. Jan. 23, 1992). In *Batista*, the defendant was charged with and convicted of several different counts of sexual assault. *Id.* at *1. On appeal, the defendant argued that the trial court committed clear error in accepting as racially neutral the prosecutor's reason for challenging a Hispanic juror. *Id.* at *2. The prosecutor gave the juror's age, occupation, and single marital status as his explanation for striking the juror. *Id.* at *3. Although the court found that the defendant had failed to establish a prima facie case of discrimination, it considered the sufficiency of the prosecutor's explanation. The court stated that while *Batson* requires that the given explanation be related to the case at hand, the *Boston* decision went beyond the mandate of *Batson* in so far as *Boston* "entails an obligation to justify the relationship." *Id.* The court rejected *Boston*, calling it "at variance with the direction recently taken by the United States Supreme Court in *Hernandez v. New York*." *Id.* (quoting Hernandez v. New York, 111 S. Ct. 1859, 1866 (1991)).

rule the First Division's holding in *Boston*, the Second Division distinguished *Medina* on its facts.

B. *A Survey of Courts Holding that the* Hernandez *Standard Overrules* Batson

In *State v. Medina*,[165] the defendant was charged with several drug-related offenses and felony murder. The prosecutor explained that he peremptorily challenged four Hispanic jurors because he "[did not] like school teachers, young people, and city employees on [his] juries."[166] The court distinguished *Medina* from *Boston* on the ground that the prosecutor's explanations in *Medina* did not appear to have any disparate impact on minorities, unlike the challenge exercised in *Boston*, which was based on the juror's limited education.[167] The court rejected the *Boston* decision's nexus requirement, stating that it "decline[d] to follow *Boston's* reliance on a passing comment in *Batson*."[168] The court suggested that it "neither underst[ood] how to apply [the case relation requirement] nor . . . how [it] derives from the equal protection analysis underlying *Batson*."[169] However, the court instead seems to have been motivated by its concern that such a requirement would in effect collapse the peremptory challenge into a challenge for cause.[170]

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165. 836 P.2d 997 (Ariz. Ct. App. 1992).

166. *Id.* at 1000.

167. *Id.*

168. *Id.* (italics added). The "passing comment" in *Batson* to which the Arizona Court of Appeals refers appears in several places in the *Batson* decision. Justice Powell explained that even under *Swain* "it was impermissible for a prosecutor to use his challenges to exclude [African-Americans] from the jury *'for reasons wholly unrelated to the outcome of the particular case on trial.'*" Batson v. Kentucky, 476 U.S. 79, 91 (1986) (emphasis added) (quoting Swain v. Alabama, 380 U.S. 202, 224 (1965)). Then, after discussing the types of explanations that would not be deemed neutral, Justice Powell again reiterated that "[t]he prosecutor . . . must articulate a neutral explanation *related to the particular case to be tried*." *Id.* at 98 (emphasis added). Indeed, Justice Powell thought this language important enough to include an explanatory footnote. *Id.* at 98 n.20. In Justice White's concurring opinion he stated that if required to proffer an explanation, "the prosecutor, who in most cases has had a chance to *voir dire* the prospective jurors will have an opportunity to give *trial-related reasons for his strikes*." *Id.* at 101-02 (White, J., concurring) (second emphasis added).

Contrary to what the *Medina* court suggested, it is generally accepted that the *Batson* standard requires a prosecutor to proffer an explanation that is "clear and reasonably specific," "legitimate," and "related to the particular case to be tried." *See, e.g.*, Hernandez v. New York, 111 S. Ct. 1859, 1875 (1991) (Stevens, J., dissenting) (quoting *Batson*, 476 U.S. at 98 & n.20).

169. *Medina*, 836 P.2d at 1000.

170. *See id.* The court stated,

While the *Boston* court makes a persuasive case that the reason stated for the

Similarly, in *State v. Green*,[171] the Supreme Court of South Carolina rejected a nexus requirement under the *Hernandez* standard.[172] In *Green*, the defendant was charged with possession of crack cocaine with intent to distribute.[173] The prosecutor struck two African-American jurors on the ground that they were unemployed.[174] On appeal, the defendant argued that the prosecutor's reason was insufficient under *Batson* because it was not a reason related to the case to be tried.[175] The court held that "the fact that [a prosecutor's] explanation is not related to the case to be tried does not render it insufficient as a matter of law" at the second prong of the *Batson* test.[176] In reaching this conclusion, the court stated that although *Hernandez* had not addressed the issue directly, the *Green* court found "guidance in the general precepts announced therein."[177] The court found no "inherent discriminatory intent in the [prosecutor's] explanation [that] he struck the jurors in question because they were unemployed."[178] Thus, the court deemed the explanation to be racially neutral.[179] As further justification for its decision, the court reasoned that an explanation unrelated to the facts of the case may nevertheless reflect a prosecutor's "valid concern with a juror's sense of social duty or the life experience he or she brings to the case."[180]

The problem, however, is that a literal construction of the *Hernandez* standard, without consideration of the Court's intent, disregards the objectives underlying the *Batson* scheme.

> strike there was not necessarily related to the fitness of the juror to serve, that is always true of the reasons underlying a peremptory challenge. They are based on ugly generalizations more probably false than true. If a necessary relation to fitness is required, a challenge for cause ought to be sustained. And, if such a relationship is necessary, the rule concerning peremptory challenges would be effectively eviscerated.

Id.

171. 409 S.E.2d 785 (S.C. 1991), *cert. denied*, 112 S. Ct. 1566 (1992).

172. *Id.* at 787.

173. *Id.* at 786.

174. *Id.*

175. *Id.* at 786-87.

176. *Id.* at 787.

177. *Id.* The *Green* court focused on the language in *Hernandez* which provided that " '[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race-neutral.' " *Id.* (quoting Hernandez v. New York, 111 S. Ct. 1859, 1866 (1991)).

178. *Id.*

179. *Id.*

180. *Id.* at 788.

C. *The Case for Requiring a Nexus Between a Prosecutor's Explanation and the Case to be Tried*

There are compelling arguments that the Supreme Court did not intend to overrule *Batson's* standard of racial neutrality, and compelling justifications for requiring a nexus between the prosecutor's stated reason and the particular case to be tried. Perhaps the most appropriate place to begin such an examination is with the *Hernandez* decision itself. At first glance, it may appear that by failing to employ the language of *Batson's* nexus requirement, the Supreme Court intended the *Hernandez* facially neutral standard to overrule that portion of *Batson*. Upon further consideration, however, this supposition is not so clear.

In *Hernandez*, the prosecutor explained that he struck two bilingual jurors because he was uncertain, based on the jurors' response during voir dire, that the jurors would be able to accept an official translator's interpretation of testimony of Spanish-speaking witnesses.[181] The Court stated that "[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral."[182] However, it did not address the question of the explanation's relatedness to the case to be tried because it was not an issue in the case.[183] The prosecutor's explanation for challenging the jurors did bear a direct relationship to the particular case to be tried: "a translator was to be used at trial to translate into English the testimony of [Spanish-speaking] witnesses."[184] Nowhere in the Court's opinion did the majority suggest that the prosecutor's explanation need not be related to the case to be tried.[185] It seems unlikely that the Court would intend by its silence to discard a principle that has been central to its holdings ever since the Court first addressed the issue of discriminatory use of peremptory challenges in *Swain v. Alabama*.[186] Instead, it would appear that the Court merely intended to

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181. Hernandez v. New York, 111 S. Ct. 1859, 1864-65 (1991).

182. *Id.* at 1866.

183. *See* State v. Green, 409 S.E.2d 785, 788 (S.C. 1991) (Toal, J., dissenting), *cert. denied*, 112 S. Ct. 1566 (1992).

184. Winfield v. Commonwealth, 421 S.E.2d 468, 470 (Va. App. 1992).

185. *Green*, 409 S.E.2d at 788 (Toal, J., dissenting).

186. 380 U.S. 202 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986). Although the *Swain* Court required a nearly impossible burden for establishing a prima facie case of discrimination and found that it had not been met in that case, the Court employed language suggesting that acceptable reasons for striking a minority juror would be related to the case to be tried:

> We have decided that it is permissible to insulate from inquiry the removal of [African-Americans] from a particular jury on the assumption that the prosecutor

clarify the "racially neutral" standard enunciated in *Batson*,[187] leaving the nexus requirement intact. The *Hernandez* Court simply did not address the issue of the requirement of a nexus between the prosecutor's explanation for exercising a peremptory challenge and the case to be tried because it had been met.

Furthermore, since *Hernandez* reaffirmed the Supreme Court's adherence to the principles of *Batson*,[188] the *Hernandez* decision should be construed in a manner not antagonistic to those ideals. To abandon the requirement that an explanation be related to the particular facts of the case to be tried would "seriously jeopardize the application of the principles of *Batson*."[189] An explanation not related to the case is not a valid explanation for striking a juror at all, but rather a characterization of the venireperson who has been struck.[190] The danger is that a prosecutor can easily devise one or more characterizations that would apply to the minority venireperson struck but not to any of the other venirepersons.[191] As such, a rational nexus between the prosecutor's explanation and the case to be tried becomes a critical factor in assessing a prosecutor's explanation.[192] The nexus requirement is a necessary, objective litmus test of the "legitimacy" of the prosecutor's reason for exercising his peremptory challenges.

To further illustrate this point, it is useful to categorize the types

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is acting on *acceptable considerations related to the case he [or she] is trying, the particular defendant involved and the particular crime charged*. But when the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of [African-Americans] . . . the Fourteenth Amendment claim takes on added significance. In these circumstances, giving even the widest leeway to the operation of *irrational but trial-related suspicions and antagonisms*, it would appear that the purposes of the peremptory challenge are being perverted . . . . Such proof might support a reasonable inference that [African-Americans] are excluded from juries *for reasons wholly unrelated to the outcome of the particular case on trial* . . . .

. . . .

[The record before us does] not support an inference that the prosecutor was bent on striking [African-Americans], regardless of *trial-related considerations*.

Id. at 223-26 (emphasis added) (footnote omitted) (citations omitted).

187. It is revealing that in overruling *Swain's* evidentiary formulation in its opinion in *Batson* the Supreme Court explicitly stated, "[W]e reject this evidentiary formulation." Batson v. Kentucky, 476 U.S. 79, 93 (1986).

188. *See* Hernandez v. New York, 111 S. Ct. 1859, 1864 (1991) (stating that if the prosecutor "exercised peremptory challenges to exclude [Hispanics] from the jury by reason of their ethnicity . . . [the] strikes would violate the Equal Protection Clause as interpreted by our decision in *Batson v. Kentucky*").

189. *Green*, 409 S.E.2d at 789 (Toal, J., dissenting).

190. *Id*.

191. *Id*.

192. *Id*.

of explanations that a prosecutor might give for exercising a peremptory challenge and to place those explanations on a continuum of "permissibility" under the principles of *Batson*. Generally, the explanations given by prosecutors for exercising peremptory challenges can be divided into three groups.[193] The first category may be regarded as an "imperfect challenge for cause."[194] This type of challenge may arise, for instance, when a juror has acknowledged a bias, and then upon urging by the judge or defense counsel agrees to set aside his or her bias.[195] In other words, the juror has provided and then retracted grounds for a challenge for cause.[196] Ordinarily, a prosecutor, unconvinced of the juror's change of heart, would continue to doubt the juror's impartiality. Unable to prove the juror's bias as a challenge for cause, the prosecutor would exercise a peremptory challenge to remove the juror from the jury.[197] This type of challenge is certainly permissible under *Batson*, which permits peremptory challenges based on a perceived bias that does not rise to the level of a challenge for cause.[198] Such a peremptory challenge is related to the facts of the case to be tried by definition, because it is based on the failed challenge for cause, which required the prosecutor to initially assert a legally cognizable basis of partiality.[199] Moreover, because a legally cognizable bias, even if not sufficiently provable to satisfy a challenge for cause, is a rational reason for exercising a peremptory challenge, it is both less suspect and less susceptible to abuse.

The second category of explanations for peremptory challenges is also a type of imperfect challenge for cause.[200] Here, however, the perceived bias is not based on any actual bias of the potential juror. Instead, the prosecutor may believe the juror to be biased because he or she is a member of a particular group that seems to contain a disproportionately large number of people with a particular bias.[201] For

193. Underwood, *supra* note 10, at 762-64.

194. *Id.* at 762.

195. *Id.*

196. *Id.*

197. *Id.*; *see, e.g.*, United States v. Roberts, 916 F.2d 1352 (5th Cir. 1990). In *Roberts*, the prosecutor peremptorily challenged an African-American juror who stated that he would not consider tape recordings as evidence in a criminal case, even if lawfully obtained. Although the juror recanted during a sidebar conference, the prosecutor asserted that the juror was merely in awe of the defense counsel and answered the sidebar questions in submissive deference to him. The court held that the prosecutor's explanation was sufficient. *Id.*

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

199. *See supra* note 2.

200. Underwood, *supra* note 10, at 762.

201. *Id.*

example, the prosecutor may suppose that schoolteachers tend to be more liberal[202] or social workers too sympathetic and thus less likely to convict.[203] Although such an explanation would not support a challenge for cause, a prosecutor may wish to exercise a peremptory challenge on that basis.[204]

Although the first category of explanations is permissible under *Batson*, whether an explanation based on a group bias is permissible under *Batson* is less clear.[205] If one accepts the premise that the Supreme Court's reason, in *Batson*, for upholding the use of peremptory challenges in general was the Court's belief that they promote jury impartiality,[206] then the answer to the above question is clear: the

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202. For example, in People v. Harris, 544 N.E.2d 357 (Ill. 1989), *cert. denied*, 494 U.S. 1018 (1990), at the *Batson* hearing on remand, the prosecutor explained that he excluded a particular minority venireperson because he was a teacher, and that he generally excused schoolteachers. The prosecutor stated that "teachers tend to be sympathetic, to give individuals the benefit of the doubt, and to go beyond the law and other restrictions placed upon them when they serve as jurors." People v. Cannon, 592 N.E.2d 168, 174 (Ill. App. Ct. 1992) (discussing *Harris*, 544 N.E.2d at 381).

203. Underwood, *supra* note 10, at 762-63.

204. *Id.*; *see, e.g.*, *Harris*, 544 N.E.2d at 381.

205. At least one commentator has suggested that *Batson's* requirement that a prosecutor's explanation for striking a juror be related to the particular case to be tried might have been meant to preclude prosecutors from using such general assertions based on group biases. Alschuler, *supra* note 27, at 173 n.83; *see also* Thiel v. Southern Pac. Co., 328 U.S. 217 (1946) (stating that jury competence is an individual rather than a group or class matter); People v. Cannon, 592 N.E.2d 168, 173 (Ill. App. Ct. 1992) ("The wholesale exclusion of venirepersons based on classifications, albeit race-neutral classifications, without trial specific reasons, is forbidden. The United States Supreme Court condemned that practice over 40 years ago.") (citing *Thiel*, 328 U.S. at 220); *see* People v. Lovelady, 582 N.E.2d 1217 (Ill. App. Ct. 1991).

Another commentator, however, has suggested that "[t]he validity of this kind of challenge depends on what groups are protected by the ban on jury discrimination." Underwood, *supra* note 10, at 763. That commentator correctly points out that if a particular group, such as an occupational group, is not protected under the Equal Protection Clause, then generalizations about jurors based on their membership in that group are also not prohibited by *Batson*. *Id.*; *see* Wylie v. Vaughn, 773 F. Supp. 775 (E.D. Pa. 1991) (holding that prosecutor who always strikes unemployed venirepersons, presumably regardless of race, did not violate *Batson*).

The response, however, is that the real danger is the possibility that such explanations are disingenuous. A party's admission that it has excluded jurors on the basis of membership in a non-cognizable group is an admission of bias against that group, and lends support to the inference that the challenged jurors were in fact excluded because they were members of a cognizable group. New Jersey v. Zavala, 611 A.2d 1169, 1172 (N.J. Super. Ct. Law Div. 1992). Thus, "although age, economic status and occupation are not cognizable groups *per se*, jury selection based on group bias is constitutionally impermissible because it offends the constitutional guarantee of a fair and impartial trial." *Id.* (citations omitted).

206. The Court stated, "[w]hile the Constitution does not confer a right to peremptory challenges, those challenges traditionally have been viewed as one means of assuring the selection of a qualified and unbiased jury." Batson v. Kentucky, 476 U.S. 79, 91 (1986) (citations omitted).

existence or non-existence of a rational nexus between the classification and the case to be tried is determinative. The justification that peremptory challenges promote jury impartiality cannot sustain a peremptory challenge based on a classification that is not rationally related to the facts of the case to be tried. It is inconceivable that such a peremptory challenge, which has little to do with the particular venireperson's possible partiality, would promote the impartiality of the jury.

Moreover, there is a real danger that explanations based on a venireperson's membership in a particular group are disingenuous, or mere surrogates for race. Requiring a nexus between the venireperson's membership in a group and the case to be tried provides an objective means by which to test the "legitimacy" of the prosecutor's proffered explanation.

The Court of Appeals for the Ninth Circuit in *Bishop* seems to have had this same concern.[207] The court seemed especially troubled by the fact that the prosecutor's reasons were group-based and potentially applicable in all criminal trials to residents of poor, predominantly black communities. The court required a "nexus between the juror's characteristic . . . and [his or her] possible approach to the trial,"[208] and rejected the prosecutor's explanation that he struck the juror because she was an eligibility worker who lived in Compton and he felt that "an eligibility worker 'in Compton [was] likely to take the side of those who [were] having a tough time, aren't upper-middle class, and probably believes that police in Compton pick on black people.' "[209] The court stated that

> [w]hat matters is not *whether* but *how* residence is used. Where residence is utilized as a link connecting a specific juror to the facts of the case, a prosecutor's explanation based on residence could rebut the prima facie showing. A trial judge need not believe the explanation to be wise; she need only believe it to be non-pretextual.[210]

In other words, because the prosecutor's explanation was not rational, in the factual context of the case, and thus provided no objective evidence of a non-discriminatory intent, it was insufficient to rebut the defendant's prima facie case of discrimination.

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207. United States v. Bishop, 959 F.2d 820 (9th Cir. 1992).

208. *Id.* at 824.

209. *Id.* at 822. See *supra* notes 124-32 and accompanying text for a discussion of *Bishop*.

210. *Id.* at 826.

The Arizona Court of Appeals rejected the prosecutor's explanation for the same reason in *State v. Boston*.[211] The court rejected the prosecutor's explanation that he exercised a peremptory challenge based on the juror's limited education because the prosecutor failed to show why an education beyond the ninth grade was of significance in that particular case, which involved a prosecution for the possession of narcotics.[212] Similarly, in *Buck v. Commonwealth*,[213] where defendant was charged with possession of cocaine, the court rejected the prosecutor's explanation that he struck the venireperson, in part, because of his Petersburg address. The court stated that even assuming arguendo that the venireperson had a Petersburg mailing address,[214] "the prosecutor provided no rational or non-racial explanation for his assertion that a person who lives in the county and has a Petersburg mailing address is tolerant of drug use."[215]

Finally, the third category of explanations for peremptory challenges are those based on unexplainable whim or irrational reasons.[216] These explanations, by definition, are not related to the case to be tried. Again, if one accepts the premise that the purpose of peremptory challenges is to secure a more qualified and unbiased jury, this type of peremptory challenge is clearly unjustifiable. In addition to the three categories identified above there are some explanations that, because they seem rational, would tend to provide sufficient objective evidence of the prosecutor's intent. For example, prosecutors routinely strike jurors who have been convicted of a crime or who have family members that have been convicted.[217] It seems rational to believe that these jurors would have an anti-prosecution bias and that the prosecutor would want to strike them on this basis. In those cases where the prosecutor's inference about a particular juror's characteristic and his or her possible approach to the trial is rational, there seems to be little danger that the explanation is disingenuous. The defendant may, of course, still show that the explanation is pretextual under the third prong of *Batson*.[218]

In sum, peremptory challenges exercised as a result of a failed

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211. 823 P.2d 1323 (Ariz. Ct. App. 1991). See *supra* notes 133-39 and accompanying text for a discussion of *Boston*.

212. *Id.* at 1325.

213. 415 S.E.2d 229 (Va. Ct. App. 1992).

214. In fact, the venireperson had a Richmond mailing address. *Id.* at 232.

215. *Id.* at 232-33.

216. Underwood, *supra* note 10, at 763.

217. *See, e.g.*, People v. Powell, 586 N.E.2d 589 (Ill. App. Ct. 1991) (excusing African-American juror whose ex-husband had a murder charge pending against him).

218. *See supra* text accompanying note 69.

challenge for cause are necessarily related to the case to be tried, and present no difficulty under a *Batson* analysis. On the other hand, peremptories based on perceived group biases are susceptible to abuse, and can be justified only when rational and related to the particular case to be tried. Finally, irrational peremptories exercised on the whim of the prosecutor in no way contribute to the empanelment of an unbiased jury, and thus cannot be justified under the Equal Protection Clause.

CONCLUSION

In *Hernandez*,[219] the Supreme Court established that a prosecutor's explanation must be facially neutral. However, because it was not before the Court, the Court did not reach the issue of whether a prosecutor's explanation must be related to the particular case to be tried. Indeed, there is nothing in the Court's holding that seems to suggest that the Court intended to discard this principle which has been incorporated in its previous holdings on this issue in *Swain v. Alabama*[220] and *Batson v. Kentucky*.[221] Thus, the *Hernandez* facially neutral standard should be construed to clarify, rather than overrule, *Batson*. To do otherwise would offend both the spirit and the letter of the *Batson* decision. Moreover, without the requirement of a nexus between the prosecutor's explanation for exercising a peremptory challenge and the case to be tried, the Court's decision in *Hernandez* would no doubt leave the Equal Protection Clause "but a vain and illusory requirement."[222]

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219. Hernandez v. New York, 111 S. Ct. 1859 (1991).

220. 380 U.S. 202 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986). See *supra* notes 168 and 186 for a discussion of the language in *Batson* and *Swain* supporting a requirement of trial-related reasons for challenging jurors.

221. 476 U.S. 79 (1986).

222. Norris v. Alabama, 294 U.S. 587, 598 (1935).