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BATSON V. KENTUCKY AND J.E.B. V. ALABAMA EX REL. T.B.: IS THE PEREMPTORY CHALLENGE STILL PREEMINENT?

"Buckley will save his peremptory challenges for the blacks. We know that. We've got to concentrate on white people."

"Women," said Lucien. "Always pick women for criminal trials. They have bigger hearts, bleeding hearts, and they're much more sympathetic. Always go for women."

"Naw," said Harry Rex. "Not in this case. Women don't understand things like taking a gun and blowing people away. You need fathers, young fathers who would want to do the same thing Hailey did. Daddys with little girls."

The right to strike a limited number of jurors for any reason has been a part of the American jury trial since 1790.² Several recent United States Supreme Court decisions, however, have limited the use of the peremptory challenge to a degree.³ Since 1986, peremptory challenges exercised on the basis of a potential juror's race violate the Equal Protection Clause of the Fourteenth Amendment.⁴ Moreover, last Term, in *J.E.B. v. Alabama ex rel. T.B.*, the United States Supreme Court expanded the Equal Protection prohibition against race-based peremptory challenges to include gender.⁵ Prior to *J.E.B.*, attorneys often considered the gender of potential jurors when selecting a jury,⁶ and social scientists debated the role of gender in the outcome of jury deliberations.⁷ The question of whether *J.E.B.* will limit this practice or quiet the debate remains.

¹ JOHN GRISHAM, *A TIME TO KILL* 269 (1989).

² *Swain v. Alabama*, 380 U.S. 202, 214 (1965) (citing 1 Stat. 119 (1790)).

³ *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1421 (1994); *Georgia v. McCollum*, 112 S. Ct. 2348, 2353, 2359 (1992); *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2081 (1991); *Powers v. Ohio*, 111 S. Ct. 1364, 1373 (1991); *Batson v. Kentucky*, 476 U.S. 79, 90 (1986).

⁴ See *infra* notes 8-12.

⁵ 114 S. Ct. at 1421.

⁶ See, e.g., Barbara Allen Babcock, *Jury Service and Community Representation*, in *VERDICT* 463 (Robert E. Litan ed., 1993).

⁷ VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 76 (1986) (majority of studies found no significant differences in way men and women perceive and react to trials; some, however, found women either more defense or prosecution-oriented); REID HASTIE ET AL., *INSIDE THE JURY* 140 (1983) (student and citizen judgments for typical criminal case materials reveal no

In 1986, the United States Supreme Court, in *Batson v. Kentucky*, held that prosecutors' use of race-based peremptory challenges in criminal trials violates the Equal Protection Clause of the Fourteenth Amendment.⁸ Through subsequent decisions, the Court provided for symmetrical application of *Batson* to all parties in civil and criminal trials.⁹ For example, neither defendants nor prosecutors in criminal trials may use peremptory challenges to exclude potential jurors because of their race.¹⁰ Plaintiffs and defendants in civil trials are subject to these standards in their use of peremptory challenges as well.¹¹ The Court also extended standing to defendants of one race to object to peremptory challenges of different race jurors.¹²

A split in both state and federal courts as to whether *Batson* also prohibited gender-based peremptory challenges prompted the Supreme Court to consider the issue last Term in *J.E.B. v. Alabama ex rel. T.B.*¹³ After Alabama courts declined to extend *Batson* to cover gender-based peremptory strikes in a paternity suit, the United States Supreme Court granted certiorari and held that peremptory challenges exercised on the basis of a potential juror's gender violate the Equal Protection Clause.¹⁴ Thus, gender is no longer a valid basis for the exercise of a peremptory challenge.¹⁵

This Note argues that the Court has not provided trial courts much guidance concerning the implementation of the broad dictates

gender-based verdict preferences). Many studies, however, have found females significantly more likely than males to regard the defendant in a rape case as guilty. *Id.* at 140-41. In addition, males participate at higher rates in deliberation than females. *Id.*

⁸ 476 U.S. 79, 90 (1986).

⁹ *Georgia v. McCollum*, 112 S. Ct. 2348, 2353, 2359 (1992); *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2081 (1991); *Powers v. Ohio*, 111 S. Ct. 1364, 1373 (1991). See generally *infra* notes 179-82 and accompanying text.

¹⁰ *McCollum*, 112 S. Ct. at 2353, 2359.

¹¹ *Edmonson*, 111 S. Ct. at 2081.

¹² *Powers*, 111 S. Ct. at 1373.

¹³ 114 S. Ct. at 1422 & n.1. For example, the Fourth, Fifth and Seventh Circuits have refused to extend the protection of the Equal Protection Clause to prohibit the use of gender-based peremptory challenges. *United States v. Broussard*, 987 F.2d 215, 217 (5th Cir. 1993); *United States v. Nichols*, 937 F.2d 1257, 1262 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 990 (1992); *United States v. Hamilton*, 850 F.2d 1038, 1042 (4th Cir. 1988), *cert. denied*, 493 U.S. 1069 (1990). The United States Court of Appeals for the Ninth Circuit held, however, in the 1992 case, *United States v. De Gross*, that the Equal Protection Clause prohibits the use of gender-based peremptory challenges. 960 F.2d 1433, 1438 (9th Cir. 1992) (en banc). The disagreement extends to application in state courts as well. Compare *New York v. Irizarry*, 560 N.Y.S.2d 279, 280 (N.Y. App. Div. 1990) (holding that gender-based peremptory challenges violate Fourteenth Amendment) with *State v. Oliviera*, 534 A.2d 867, 870 (R.I. 1987) (holding that gender-based peremptory challenges do not violate Fourteenth Amendment).

¹⁴ *J.E.B.*, 114 S. Ct. at 1421; see *infra* notes 233-88.

¹⁵ *J.E.B.*, 114 S. Ct. at 1421.

that *Batson* and its progeny require.¹⁶ Courts are left with the relatively unguided duty of determining if counsel has exercised peremptory challenges to strike a potential juror because of the juror's race or gender.¹⁷ Courts have proven ill-equipped to evaluate proffered race-neutral justifications.¹⁸ Federal circuit court decisions have not achieved *Batson*'s goal of ferreting-out race-based peremptory challenges.¹⁹ *J.E.B.*'s extension of *Batson* to cover gender will result in an equally ineffective attempt to eliminate gender as a basis for peremptory strikes.²⁰ Attorneys who seek to eliminate a potential juror because of the juror's gender will merely contrive a facially gender-neutral explanation if necessary.²¹ The Court's continuous chipping away of the peremptory challenge through expansion of the reach of the Equal Protection Clause further complicates this area of law.²² Thus, the time has come for a comprehensive examination of the peremptory challenge system and for the effectuation of global rules of procedure to make the system more effective.

Section I of this Note provides an overview of the jury system. It examines the jury selection process, the history behind the peremptory challenge and the current debate concerning the preservation of the challenge.²³ Section II focuses on the Supreme Court decisions that sought to eliminate peremptory challenges based on race.²⁴ Section III considers the effectiveness of those decisions through an examination of the proffered race-neutral explanations in 113 federal appellate court decisions that have applied *Batson*.²⁵ Finally, Section IV argues that the development of the peremptory challenge system through the evolution of the common law will not provide a comprehensive system for the effective application of *Batson*.²⁶ Thus, the Judicial Conference, under the auspices of the Rules Enabling Act, should face the peremptory challenge head-on by examining the system and recommending new Federal Rules of Criminal and Civil Procedure that would apply guidelines for the use of peremptory challenges in federal court.

¹⁶ See *infra* notes 122-287 and accompanying text; see also *Batson*, 476 U.S. at 99 n.24; *id.* at 130-31 (Burger, C.J., dissenting).

¹⁷ See *Batson*, 476 U.S. at 105-06 (Marshall, J., concurring).

¹⁸ See *infra* notes 288-348 and accompanying text.

¹⁹ See *infra* notes 288-348 and accompanying text.

²⁰ See *infra* notes 349-58 and accompanying text.

²¹ See *infra* notes 349-51 and accompanying text.

²² See *infra* note 352.

²³ See *infra* notes 26-86 and accompanying text.

²⁴ See *infra* notes 87-287 and accompanying text.

²⁵ See *infra* notes 288-348 and accompanying text.

²⁶ See *infra* notes 349-58 and accompanying text.

I. AN OVERVIEW OF THE AMERICAN JURY SYSTEM

A. *Selecting a Jury*

The Constitution guarantees the right to trial by an impartial jury in almost all criminal²⁷ and civil cases.²⁸ Jury selection is one of the most important aspects of a jury trial.²⁹ Many trial lawyers and commentators believe that the composition of the jury will greatly effect the verdict.³⁰

Federal law requires federal trial courts to choose juries at random from a fair cross section of the community in the court's district.³¹ Courts usually determine the pool of potential jurors from voter registration lists.³² Courts derive a list of potential jurors by selecting, at random, a number of people from the total jury pool.³³ These people are notified that they are selected for jury service and are required to complete a juror qualification form.³⁴ The selected persons are either

²⁷ U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes, except Cases of Impeachment, shall be by Jury . . ."); U.S. CONST. amend. VI ("In 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 . . .").

²⁸ U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").

²⁹ Morton Hunt, *Putting Juries on the Couch*, N.Y. Times, Nov. 28, 1982, § VI, at 70, 82 ("Jury selection is one of the most important functions a trial lawyer can perform . . ."); see Hans Zeisel & Shari S. Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in Federal District Court*, 30 STAN. L. REV. 491, 491-92 (1978).

³⁰ Hunt, *supra* note 29, at 70, 82 ("Some lawyers assert that by the time the jury has been chosen, the case has been decided.").

³¹ 28 U.S.C. § 1861 (1988). Section 1861 provides, in relevant part, "all litigants in Federal courts entitled to trial by jury shall have the right to . . . juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. . . ." *Id.*

³² 28 U.S.C. § 1863(b)(2) (1988). Section 1863(b)(2) requires that each plan for selection of jurors shall "specify whether the names of prospective jurors shall be selected from the voter registration lists or the lists of actual voters of the political subdivisions within the district or division . . ." *Id.*

³³ 28 U.S.C. § 1864(a) (1988). This section provides, in pertinent part:

From time to time as directed by the district court, the clerk or a district judge shall publicly draw at random from the master jury wheel the names of as many persons as may be required for jury service. The clerk or jury commission may, upon order of the court, prepare an alphabetical list of the names drawn from the master jury wheel.

Id.

³⁴ 28 U.S.C. § 1864(a). This section provides, in part: "The clerk or jury commission shall mail to every person whose name is drawn from the master wheel a juror qualification form accompanied by instructions to fill out and return the form, duly signed and sworn, to the clerk or jury commission by mail within ten days." *Id.*

qualified, exempted or excused from jury service³⁵ based upon the information provided in the qualification form.³⁶ Qualified individuals, or a smaller random sample, act as the venire—the panel of potential jurors from which the attorneys in a case will impanel a jury.³⁷

The entire venire is subject to an examination by the judge or the attorneys during voir dire.³⁸ Voir dire provides the court and counsel with the opportunity to examine the venire to determine which potential venirepersons should be excused.³⁹ Venirepersons are excused from the venire in two ways.⁴⁰ First, the judge may, upon the court's own initiative or a motion by counsel, exclude venirepersons from the venire on a narrowly specified, provable and legally cognizable basis of partiality.⁴¹ These challenges "for cause" are unlimited in number.⁴²

Second, counsel has a limited number of peremptory challenges that may be exercised against individual venirepersons for almost any reason.⁴³ Traditionally, the peremptory challenge permitted each party to excuse a limited number of venirepersons without explanation.⁴⁴ In

³⁵ 28 U.S.C. § 1863(b)(5)-(6) (specifying grounds for excusing or exempting individuals from service).

³⁶ 28 U.S.C. § 1865(a) (1988). This section provides:

The chief judge of the district, or such other district court judge . . . on his initiative or upon recommendation of the clerk or jury commission, shall determine solely on the basis of information provided on the juror qualification form and other competent evidence whether a person is unqualified for, or exempt, or to be excused from jury service.

Id.

³⁷ Robert L. Harris, Jr., Note, *Redefining the Harm of Peremptory Challenges*, 32 WM. & MARY L. REV. 1027, 1030 (1991).

³⁸ 1 ROBERT S. HUNTER, FEDERAL TRIAL HANDBOOK § 14.7, at 182-83 (3d ed. 1993). The Federal Rules of Civil Procedure and Federal Rules of Criminal Procedure allow the court significant discretion to control the voir dire process. See FED. R. CIV. P. 47(a); FED. R. CRIM. P. 24(a). The court may conduct the voir dire examination itself or may permit the parties to conduct the examination of prospective jurors. FED. R. CIV. P. 47(a); FED. R. CRIM. P. 24(a). If the court conducts the examination, it shall permit the parties to supplement the examination as the court deems proper. FED. R. CIV. P. 47(a); FED. R. CRIM. P. 24(a). A 1977 survey of federal judges showed that 75% of the judges conducted the voir dire, excluding oral participation of counsel. 5 HALE STARR & MARK McCORMICK, JURY SELECTION: AN ATTORNEY'S GUIDE TO JURY LAW AND METHODS § 2.10, at 48 (2d ed. 1993).

³⁹ See 1 HUNTER, *supra* note 38, § 14.13, at 183-89.

⁴⁰ JAMES J. GOBERT & WALTER E. JORDAN, JURY SELECTION, THE LAW, ART AND SCIENCE OF SELECTING A JURY 143 (2d ed. 1990); 1 HUNTER, *supra* note 38, § 14.17, at 191.

⁴¹ 1 HUNTER, *supra* note 38, § 14.17, at 193.

⁴² *Id.*

⁴³ *Id.* at 191-92.

⁴⁴ *Id.* Courts generally allow counsel to exercise peremptory challenges in either of two basic approaches. *Id.* at 192. In the "jury box" system, twelve jurors, chosen by lot, are placed in the jury box. *Id.* The attorneys then, usually alternating between the two parties, exercise their peremptory challenges against jurors in the jury box. *Id.* Each time a juror is struck, a juror is

practice, attorneys use peremptory challenges to eliminate venirepersons whom the attorneys believe will be least favorable to their client's case.⁴⁵

B. *History of the Peremptory Challenge*

The peremptory challenge has an extensive history that spans over two thousand years.⁴⁶ The Romans used it as early as 104 B.C.⁴⁷ Roman law provided that prior to a criminal trial the accuser and accused would propose one hundred *judices*.⁴⁸ Each party then could strike fifty individuals from the other's list so that one hundred would remain to try the alleged crime.⁴⁹

The peremptory challenge was also utilized in the early days of the jury trial in England.⁵⁰ Defendants in all felony trials enjoyed the use of thirty-five peremptory challenges.⁵¹ In contrast, the prosecutor had an unlimited number.⁵² The survival of the peremptory challenge over directives to eradicate it illustrates the strength of the perceived right. Rather than strictly apply the Ordinance for Inquests,⁵³ a statute that attempted to eliminate the prosecution's peremptory challenges,⁵⁴ the courts construed the statute to allow the prosecution to direct any juror after examination to "stand aside" until the entire panel was gone over and the defendant had exercised his challenges; only if there was a deficiency of jurors in the box at that point did the Crown have to

drawn to replace the struck juror in the jury box. *Id.* at 192. This process is completed when both sides use, or waive, their allotted peremptory challenges. *Id.* In a "struck jury" system, in contrast, attorneys exercise peremptory challenges against an entire venire composed of twelve individuals plus a number of individuals equal to the combined number of peremptory challenges allotted to each side. *Id.* Both parties are then permitted to exercise their peremptory challenges against any member of the venire, resulting in a jury of twelve. *Id.* at 192-93.

⁴⁵JEFFREY T. FREDERICK, *THE PSYCHOLOGY OF THE AMERICAN JURY* 43 (1987); GOBERT & JORDAN, *supra* note 40, at 271; SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* 50 (1988); LAWRENCE S. WRIGHTSMAN, ET AL., *IN THE JURY BOX: CONTROVERSIES IN THE COURTROOM* 50 (1987); 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, 168 (1989); H. Lee Sarokin & G. Thomas Munsterman, *Recent Innovations in Civil Jury Trial Procedures*, in *VERDICT* 383 (Robert E. Litan, ed. 1993). Whether attorneys can actually make such predictions is unclear. Zeisel & Diamond, *supra* note 29, at 517 (discussion of results of experiment in United States District Court for Northern District of Illinois).

⁴⁶*Batson v. Kentucky*, 476 U.S. 79, 119 (1986).

⁴⁷*Id.*

⁴⁸*Id.*

⁴⁹*Id.*

⁵⁰*Id.*

⁵¹*Batson*, 476 U.S. at 119.

⁵²*Id.*

⁵³*Swain v. Alabama*, 380 U.S. 202, 213 (1965) (citing 33 Edw. 1, Stat. 4 (1305)).

⁵⁴*See id.* The Ordinance provided that if "they that sue for the King will challenge any . . . Jurors, they shall assign . . . a Cause certain." *Id.* (citing 33 Edw. 1, Stat. 4 (1305)).

show cause in respect to jurors recalled to make up the required number.⁵⁵

The English common law provided the foundation for the use of peremptory challenges in the American jury system.⁵⁶ In 1790, the new United States Congress granted thirty-five peremptories to defendants in treason trials and twenty to defendants in trials for capital felonies specified in the Act of 1790.⁵⁷ The common law extended the right to peremptory challenges to defendants and the Government for crimes not covered by the Act of 1790.⁵⁸ Most states also carried on the tradition of providing litigants with a number of peremptory challenges.⁵⁹ By 1870, most, if not all, states provided both the prosecution and the defense with a number of peremptory challenges.⁶⁰

C. A Controversy: *Is the Peremptory Challenge Worth Saving?*

Although peremptory challenges have withstood the test of time, their continued use raises questions of equity and efficiency.⁶¹ The peremptory challenge system has been both criticized and praised. Critics argue for the elimination of the peremptory challenge from the judicial system altogether.⁶² Proponents, in contrast, argue that peremptory challenges contribute valuably to the judicial system.⁶³

Many commentators condemn the practice of allowing peremptory challenges.⁶⁴ Critics consider the peremptory challenge offensive to our American commitment to individuality because stereotypes,

⁵⁵ *Batson*, 476 U.S. at 119.

⁵⁶ *Swain*, 380 U.S. at 214.

⁵⁷ *Id.*

⁵⁸ *See id.* at 214 & n.13.

⁵⁹ *Id.* at 215.

⁶⁰ *Id.* at 216. See Brent J. Gurney, Note, *The Case for Abolishing Peremptory Challenges in Criminal Trials*, 21 HARV. C.R.-C.L. L. REV. 227, 228-29 n.5 (1986), and Clara L. Meek, Note, *The Use of Peremptory Challenges to Exclude Blacks from Petit Juries in Civil Actions: The Case for Striking Peremptory Strikes*, 4 REV. LITIG. 175, 219 (1984), for a list of the number of peremptory challenges provided by each state in civil and criminal actions.

⁶¹ See Alschuler, *supra* note 45, at 208 (equity); Sarokin & Munsterman, *supra* note 45, at 384 (efficiency).

⁶² E.g., *Batson*, 476 U.S. at 108 (Marshall, J., concurring); Alschuler, *supra* note 45, at 209; Sarokin & Munsterman, *supra* note 45, at 384 (suggesting that abandoning peremptory challenge system should be considered); Carl H. Imlay, *Federal Jury Reformation: Saving a Democratic Institution*, 6 LOY. L.A. L. REV. 247, 269 (1973); Gurney, *supra* note 60, at 230; Meek, *supra* note 60, at 215 (peremptory challenges should be eliminated in civil trials).

⁶³ Babcock, *supra* note 6, at 478-80; Barbara A. Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 SYAN. L. REV. 545, 556 (1975); William T. Pizzi, *Batson v. Kentucky: Curing the Disease But Killing the Patient*, 1987 SUP. CT. REV. 97, 145-46.

⁶⁴ E.g., *Batson*, 476 U.S. at 108 (Marshall, J., concurring); Alschuler, *supra* note 45, at 209; Sarokin & Munsterman, *supra* note 45, at 384; Imlay, *supra* note 62, at 269; Gurney, *supra* note 60, at 230.

hunches and even invidious distinctions provide the essence of peremptory challenges.⁶⁵ A compelling reason for acting on these bases, they argue, is difficult to conceive.⁶⁶ Moreover, the use of peremptory challenges may compromise public confidence in the legal system.⁶⁷ Continued use, some say, promotes the notion that the composition of the jury, not the merits of the case, governs the verdict.⁶⁸ In addition, allowing parties to excuse otherwise fit jurors without justification hampers the perception that juries represent a trial by one's peers or reflect a cross section of the community.⁶⁹

Commentators also make utilitarian arguments that denounce the peremptory challenge as a waste of society's resources.⁷⁰ Peremptory challenges waste valuable resources by excluding otherwise qualified jurors.⁷¹ Further, a retrial based upon improper juror exclusion before the start of the original trial wastes valuable resources.⁷² The most profound expenses, however, are the accumulated administrative costs.⁷³

In contrast, many commentators believe that the peremptory challenge has value and merits retention.⁷⁴ The Supreme Court has called peremptory challenges one of the most important rights secured to an accused individual.⁷⁵ Its extensive history is unquestionable.⁷⁶ The right to trial by jury serves as a safeguard against a corrupt or overzealous

⁶⁵ Pizzi, *supra* note 63, at 144 (discussing proponents' bases for abolishing peremptory challenges); Sarokin & Munsterman, *supra* note 45, at 383; see Alschuler, *supra* note 45, at 199-201.

⁶⁶ Alschuler, *supra* note 45, at 202.

⁶⁷ See Pizzi, *supra* note 63, at 144 (discussing proponents' bases for abolishing peremptory challenges); Sarokin & Munsterman, *supra* note 45, at 384.

⁶⁸ Pizzi, *supra* note 63, at 144.

⁶⁹ Sarokin & Munsterman, *supra* note 45, at 384.

⁷⁰ Pizzi, *supra* note 63, at 145 (discussing proponents' bases for abolishing peremptory challenges); Sarokin & Munsterman, *supra* note 45, at 384.

⁷¹ Pizzi, *supra* note 63, at 145 (discussing proponents' bases for abolishing peremptory challenges); Sarokin & Munsterman, *supra* note 45, at 384.

⁷² Sarokin & Munsterman, *supra* note 45, at 383.

⁷³ *Id.* at 384. Sarokin & Munsterman note:

In federal court, at least sixteen jurors may be called and excused in criminal cases, and at least six in most civil cases. Many more may be challenged in multidefendant cases, both criminal and civil. Multiply that number in every court throughout the country by the number of trials, and the total of those peremptorily challenged and thus excluded from service is staggering. Each prospective juror must spend at least a day in court, be paid the required fee, and lose the equivalent amount of productive work time. This process involves thousands of people and millions of dollars each year.

Id.

⁷⁴ Babcock, *supra* note 6, at 478-80; Babcock, *supra* note 63, at 556; Pizzi, *supra* note 63, at 145-46.

⁷⁵ *Swain v. Alabama*, 380 U.S. 202, 219 (1965).

⁷⁶ See *supra* notes 46-60 and accompanying text for a discussion of the peremptory challenge's extensive history.

prosecutor and against a compliant, biased or eccentric judge.⁷⁷ Peremptories act as a further safeguard by allowing litigants to participate in the selection of the jury.⁷⁸ According to some commentators, the continued existence of the peremptory challenge also encourages effective voir dire questioning because attorneys need not fear antagonizing a juror—the attorney can use a peremptory to exclude such a juror.⁷⁹ Further, pressures on the judiciary to clear an already overburdened docket often force courts to provide limited attention to voir dire questioning.⁸⁰ Restrained scrutiny of potential juror bias heightens the need for peremptory challenges.⁸¹

One commentator has called peremptory challenges a hedge against an unlucky spin of the jury selection wheel that sometimes results in a significantly biased jury.⁸² Eliminating the extremes of a jury also helps to eliminate the occurrence of hung juries.⁸³ Unless a juror admits bias or prejudice during voir dire examination, the court must seek alternative grounds for excusing the individual for cause.⁸⁴

Proponents also argue that peremptories provide the parties, especially criminal defendants, with the feeling that the jury is a fair and impartial panel,⁸⁵ thus promoting the appearance of justice.⁸⁶ The courts seek to assure society and litigants of the fairness of the system through the appearance of justice.⁸⁷ These proponents thus contend that appearances are as important as reality.

II. HOW DID WE GET TO GENDER? THE EQUAL PROTECTION CLAUSE AND PEREMPTORY CHALLENGES

A. Pre-Batson Cases

The United States Supreme Court has affirmed, for over a century, that racial discrimination in jury selection by the state violates the

⁷⁷ *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

⁷⁸ Babcock, *supra* note 6, at 479.

⁷⁹ *Id.*

⁸⁰ Robert G. Morvillo, *Peremptory Challenges and Use of Batson*, N.Y.L.J., Dec. 7, 1993, at 3; see Newton N. Minow & Fred H. Cate, *Who is an Impartial Juror in an Age of Mass Media?*, 40 AM. U. L. REV. 631, 653 (1991).

⁸¹ Morvillo, *supra* note 80, at 3.

⁸² Pizzi, *supra* note 63, at 145–46.

⁸³ *Id.* at 145.

⁸⁴ See *Georgia v. McCollum*, 112 S. Ct. 2348, 2360 (1992) (Thomas, J., concurring); Pizzi, *supra* note 63, at 146.

⁸⁵ Babcock, *supra* note 63, at 552.

⁸⁶ *Swain v. Alabama*, 380 U.S. 200, 219 (1965).

⁸⁷ Babcock, *supra* note 63, at 552.

United States Constitution.⁸⁸ The Court first enunciated this principle in 1880, in *Strauder v. West Virginia*.⁸⁹ The *Strauder* Court construed the Equal Protection Clause of the Fourteenth Amendment to guarantee the right of criminal defendants to trials by juries composed of citizens chosen without regard to race.⁹⁰ *Strauder* was an African American man indicted and convicted for murder.⁹¹ Prior to commencement of the indictment, the defendant moved to remove the case from a West Virginia state court to a United States circuit court.⁹² *Strauder* argued that the trial in West Virginia state court denied him equal protection of the laws because the state prohibited members of his race from sitting on juries.⁹³ The trial court, however, denied the motion.⁹⁴ *Strauder* appealed to the West Virginia Supreme Court, which affirmed the trial court's opinion.⁹⁵ Finally, upon a writ of error, the United States Supreme Court considered the issue.⁹⁶

The Court, holding West Virginia's statutory exclusion of African-Americans from jury service unconstitutional, reasoned that the then newly enacted Fourteenth Amendment required "that the law in the States shall be the same for the black as for the white."⁹⁷ Further, according to the Court, the Fourteenth Amendment was enacted to assure that African-Americans enjoyed civil rights equally with white individuals.⁹⁸ The West Virginia law that prohibited African-Americans from sitting on juries, therefore, violated the Fourteenth Amendment.⁹⁹ The Court concluded that compelling an individual to submit to a trial by a jury drawn from a panel that excluded otherwise qualified African-Americans, merely because of race, amounts to a pellucid denial of equal protection.¹⁰⁰ Thus, after *Strauder*, states could not openly prohibit members of certain races from the array of prospective jurors.¹⁰¹

⁸⁸ See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 89 (1986); *Swain*, 380 U.S. at 203-04; *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880).

⁸⁹ 100 U.S. at 310.

⁹⁰ *Id.*

⁹¹ *Id.* at 304.

⁹² *Id.*

⁹³ *Id.* West Virginia law only allowed white men to sit on juries in state judicial proceedings. *Id.*

⁹⁴ *Strauder*, 100 U.S. at 304.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 307, 310.

⁹⁸ *Id.* at 306.

⁹⁹ *Strauder*, 100 U.S. at 310.

¹⁰⁰ *Id.* at 309.

¹⁰¹ See *id.* at 310. Note that various other means of racial discrimination remained available; for example, peremptory challenges, change of venue, education requirements and freehold requirements. See *id.*

In 1965, eighty-five years after *Strauder*, the United States Supreme Court, in *Swain v. Alabama*, set a stringent burden of proof for litigants seeking to show racially discriminatory use of peremptory challenges.¹⁰² The Court held that the use of peremptory challenges to exclude jurors of a particular race did not violate the Equal Protection Clause *except* upon proof that exclusion of individuals of that race from juries occurred over a number of cases, such that no member of that race ever served on a jury in that district.¹⁰³ Thus, a defendant could not show discriminatory use of peremptory challenges based upon the actions of counsel in the defendant's trial alone.¹⁰⁴

An all-white jury convicted Robert Swain, an African-American defendant, of rape.¹⁰⁵ An Alabama state court sentenced him to death.¹⁰⁶ The defendant unsuccessfully argued that the prosecution's exercise of its peremptory challenges to strike each of the six African-American venirepersons violated the Equal Protection Clause.¹⁰⁷ The Alabama Supreme Court affirmed the conviction.¹⁰⁸ The United States Supreme Court granted certiorari.¹⁰⁹

The Court initially noted that a state's purposeful or deliberate exclusion of African-Americans from participation as jurors violates the Equal Protection Clause.¹¹⁰ Recognizing that defendants are not entitled to a jury containing members of the defendant's race, the Court maintained that jurors must be selected as individuals, on individual characteristics, not as members of a particular race.¹¹¹ Finally, the Court stated that these principles apply to any identifiable group which "may be the subject of prejudice."¹¹²

After surveying the extensive history¹¹³ and function of the peremptory challenge,¹¹⁴ the Court held that the facts of the case did not establish a violation of the Equal Protection Clause.¹¹⁵ The *Swain* Court explained that the quest for an impartial and qualified jury exposes

¹⁰² 380 U.S. 202, 223-24 (1965).

¹⁰³ *Id.*

¹⁰⁴ *See id.*

¹⁰⁵ *Id.* at 203, 205.

¹⁰⁶ *Id.* at 203.

¹⁰⁷ *Swain*, 380 U.S. at 203-05.

¹⁰⁸ *Id.* at 203.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 203-04.

¹¹¹ *Id.*

¹¹² *Swain*, 380 U.S. at 204-05.

¹¹³ *Id.* at 212-19. See *supra* notes 46-60 and accompanying text for a discussion of the history behind the peremptory challenge.

¹¹⁴ *Swain*, 380 U.S. at 219-21. See discussion of proponents of peremptory challenges *supra* notes 74-87 and accompanying text.

¹¹⁵ *Swain*, 380 U.S. at 221.

individuals of all races and religions to the peremptory challenge.¹¹⁶ Subjecting a prosecutor's peremptory challenge to equal protection scrutiny, the Court stated, would alter the essence of peremptory challenges such that they would no longer be peremptory.¹¹⁷ The Court concluded that, in light of the purpose and function of peremptory challenges, the presumption must be that in an individual case a prosecutor used the state's peremptory challenges to obtain a fair and impartial jury.¹¹⁸ The Court did, however, recognize a cause of action when a state systematically, in case after case, used peremptory challenges to exclude members of a particular race from juries, effectively preventing members of that race from ever serving on juries.¹¹⁹ Thus, after *Swain*, a defendant could not show a violation of the Equal Protection Clause due to race-based peremptory strikes in a particular case.¹²⁰ Rather, the Court required evidence of systematic exclusion of a particular race from juries over a number of cases.¹²¹

B. *Batson v. Kentucky*

The burden of proof established in *Swain* proved almost insurmountable for defendants.¹²² In 1986, the Supreme Court, in *Batson v. Kentucky*, rejected the evidentiary formulation developed in *Swain*.¹²³ The *Batson* Court held that the Equal Protection Clause forbids a prosecutor from utilizing a peremptory challenge against a juror solely on account of the juror's race or on the assumption that the juror is not able to impartially consider the case because of the juror's race.¹²⁴

A Kentucky grand jury indicted Mr. *Batson*, an African-American man, on charges of burglary and receipt of stolen goods.¹²⁵ At trial, the judge conducted voir dire examination of the venire and excused certain jurors for cause.¹²⁶ The prosecutor then exercised his peremptory challenges to select an all-white jury by striking the four African-American jurors on the panel.¹²⁷ The defendant moved to discharge

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 221-22.

¹¹⁸ *Id.* at 222.

¹¹⁹ *Id.* at 223-24.

¹²⁰ *See Swain*, 380 U.S. at 223-24.

¹²¹ *See id.*

¹²² *Meek, supra* note 60, at 182 & n.31 (extensive list of cases failing to overcome *Swain* burden, noting only two successful cases).

¹²³ 476 U.S. 79, 92-93 (1986).

¹²⁴ *Id.* at 89.

¹²⁵ *Id.* at 82.

¹²⁶ *Id.*

¹²⁷ *Id.* at 83.

the jury before it was sworn, claiming that the removal of the African-American jurors violated his right to equal protection of the laws under the Fourteenth Amendment.¹²⁸ The defendant requested a hearing on the motion.¹²⁹ The judge, however, denied the motion without a hearing, observing that the parties were entitled to use their peremptory challenges to "strike anybody they want to."¹³⁰ The trial was held and the jury convicted the defendant on both counts.¹³¹ The Supreme Court of Kentucky affirmed the trial court's ruling, rejecting the defendant's argument that the peremptory challenge violated his rights under the Sixth Amendment.¹³²

On appeal, the United States Supreme Court repudiated the *Swain* evidentiary procedure that required a showing of discriminatory striking of African-Americans over a series of cases to demonstrate a violation of the Equal Protection Clause.¹³³ *Batson* established a new procedure for determining when a prosecutor's use of a peremptory challenge violates the Equal Protection Clause of the Fourteenth Amendment.¹³⁴ The Court concluded that a defendant could establish a prima facie case of purposeful discrimination in selection of the petit jury based solely upon evidence gathered during the defendant's trial.¹³⁵ The prima facie case would create an inference that the prosecution exercised its peremptory challenges to exclude a venireperson because of the venireperson's race in violation of the Equal Protection Clause.¹³⁶ To establish a prima facie case, the defendant must show that he or she belongs to a cognizable racial group, that the prosecutor exercised

¹²⁸ *Batson*, 476 U.S. at 83.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 83-84. The Sixth Amendment provides in part 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 . . ." (emphasis added). U.S. CONST. amend. VI. Although *Batson* based his objections on the Sixth Amendment, the United States Supreme Court decided the case based on the Equal Protection Clause of the Fourteenth Amendment. *Batson*, 476 U.S. at 112-13 (Burger, C.J., dissenting). The United States Supreme Court rejected the Sixth Amendment argument in 1990, in *Holland v. Illinois*, holding that the Sixth Amendment "no more forbids the prosecutor to strike jurors on the basis of race than it forbids him to strike them on innumerable other generalized characteristics." 493 U.S. 474, 487 (1990). Thus, after *Holland*, the only cause of action for race-based peremptory strikes recognized by the United States Supreme Court falls under *Batson*. See *id.*

¹³³ *Batson*, 476 U.S. at 92-93.

¹³⁴ *Id.* at 96-98. The Court explained that cases subsequent to *Swain* altered the proper procedure in an equal protection case and therefore warranted an adjustment of the procedure required by *Swain*. See *id.* at 95.

¹³⁵ *Id.* at 96.

¹³⁶ *Id.*

peremptory challenges to remove venirepersons of the defendant's race and that these facts, and "other relevant circumstances," raise an inference that the prosecutor has discriminated purposefully.¹³⁷

The establishment of a *prima facie* case then shifts the burden to the prosecutor to proffer a race-neutral explanation for the peremptory challenge.¹³⁸ The Court emphasized that, although it was limiting the historically silent nature of the peremptory challenge to some degree by requiring the prosecutor to put forth a justification, the justification need not rise to the level required by a "challenge for cause."¹³⁹ The prosecutor must articulate a neutral explanation related to the particular case being tried.¹⁴⁰ Thus, a facial denial of a racial motivation or an affirmation of good faith, without more, would be insufficient.¹⁴¹

The trial court then considers the justification proffered by the prosecution to determine if the defendant has shown that the prosecution impermissibly utilized a peremptory challenge to eliminate a juror based upon race.¹⁴² The Court declined to formulate more specific procedures, however, because of the different jury selection practices used in the various state and federal trial courts.¹⁴³ Thus, the Court left the procedural details for the lower courts to determine.¹⁴⁴

Justice Marshall filed a concurring opinion lauding the decision as "a historic step toward eliminating the shameful practice of racial discrimination in the selection of juries."¹⁴⁵ He did not, however, believe that the decision would actually eliminate such discrimination entirely.¹⁴⁶ Justice Marshall proposed that nothing short of complete elimination of the peremptory challenge would end the racial discrimination that stems from the peremptory challenge process.¹⁴⁷

Justice Marshall argued that the process set out by the Court would not end the discriminatory use of peremptory challenges.¹⁴⁸ First, Justice Marshall argued that the defendants could not attack the prosecutor's use of the peremptory challenges unless the challenges were

¹³⁷ *Id.* The Court did not clarify what other circumstances are relevant. *See id.*

¹³⁸ *Batson*, 476 U.S. at 97.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 98.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Batson*, 476 U.S. at 99 & n.24.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 102 (Marshall, J., concurring).

¹⁴⁶ *Id.* at 102-03 (Marshall, J., concurring).

¹⁴⁷ *Id.* at 103 (Marshall, J., concurring).

¹⁴⁸ *Batson*, 476 U.S. at 102-03 (Marshall, J., concurring).

flagrant enough to establish a prima facie case.¹⁴⁹ According to Justice Marshall, if a jury panel does not include many minority members, then the prosecutor will find it easier to strike those minority members because the court will allow a few strikes before it gets suspicious.¹⁵⁰ Thus, Justice Marshall argued, discrimination is permitted if it is held to an "acceptable" level.¹⁵¹

Second, Justice Marshall maintained that prosecutors may easily advance facially neutral reasons for striking a juror as pretext for discriminatory intent.¹⁵² Trial courts, he argued, are ill-equipped to ferret out true discriminatory intent.¹⁵³ Justice Marshall questioned how a trial court should deal with neutral justifications, such as: "the juror had a son about the same age as [the] defendant"; "[the juror] seemed 'uncommunicative'"; or "[the juror] 'never cracked a smile' and therefore 'did not possess the sensitivities necessary to realistically look at the issues and decide the facts in this case.'"¹⁵⁴ Justice Marshall feared that trial courts would find such easily generated explanations sufficient to discharge the prosecutor's burden, rendering the protections guaranteed by the majority opinion illusory.¹⁵⁵

Third, Justice Marshall also feared that racism would seep into the process through the prosecutor's or judge's subconscious mind.¹⁵⁶ According to Justice Marshall, conscious or unconscious racism may lead the prosecutor to characterize a prospective African-American juror as sullen or distant, a characterization that would not have come to mind if a white juror had acted in the same manner.¹⁵⁷ Racism, Justice Marshall noted, remains a fact of life in society as a whole and in the administration of justice since the Civil War.¹⁵⁸

Stressing the conflict between the Equal Protection Clause and the peremptory challenge system, Justice Marshall concluded that only the complete elimination of the peremptory challenge from the criminal justice system would eradicate the racially discriminatory use of the peremptory challenge.¹⁵⁹ The Constitution guarantees all persons equal

¹⁴⁹ *Id.* at 105 (Marshall, J., concurring).

¹⁵⁰ *See id.* (Marshall, J., concurring).

¹⁵¹ *Id.* (Marshall, J., concurring). Justice Marshall, of course, intended the use of "acceptable" as a quip. *See id.*

¹⁵² *Id.* at 106 (Marshall, J., concurring).

¹⁵³ *Batson*, 476 U.S. at 106 (Marshall, J., concurring).

¹⁵⁴ *Id.* (Marshall, J., concurring).

¹⁵⁵ *Id.* (Marshall, J., concurring).

¹⁵⁶ *Id.* (Marshall, J., concurring).

¹⁵⁷ *Id.* (Marshall, J., concurring).

¹⁵⁸ *Batson*, 476 U.S. at 106-07 (Marshall, J., concurring).

¹⁵⁹ *Id.* at 107 (Marshall, J., concurring).

protection of the laws.¹⁶⁰ Justice Marshall argued, however, that so long as the peremptory challenge exists, the constitutional mandate cannot be fulfilled.¹⁶¹ Justice Marshall concluded that the Court must completely prohibit the use of peremptory challenges because they conflict with the Equal Protection Clause and are not a constitutionally guaranteed right.¹⁶² The constitutional guarantee of equal protection of the laws, he argued, must prevail over statutorily and judicially created rights.¹⁶³

Chief Justice Burger, joined by Justice Rehnquist,¹⁶⁴ filed a dissenting opinion that criticized the majority for setting aside a "procedure which has been part of the common law for many centuries and part of our jury system for nearly 200 years."¹⁶⁵ The peremptory challenge, he noted, has been in use for nearly as long as juries have existed, and performs a valuable function within the system.¹⁶⁶ Further, Chief Justice Burger criticized the majority for limiting peremptory challenges when the very nature of the challenge is based upon limited information, hunches, intuition and stereotypes.¹⁶⁷ Thus, Burger argued, equal protection analysis is simply inapplicable to the inherently capricious nature of the peremptory challenge.¹⁶⁸

The dissenting opinion also criticized the majority for misapplying the Equal Protection Clause, as *Batson* was clearly limited to race.¹⁶⁹ True equal protection analysis would, Burger argued, apply to various other categories including, among others, mental capacity, religious affiliation, living arrangements and age.¹⁷⁰ Burger also believed that

¹⁶⁰ U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."); U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . .").

¹⁶¹ *Batson*, 476 U.S. at 105 (Marshall, J., concurring).

¹⁶² *Id.* at 107-08 (Marshall, J., concurring).

¹⁶³ *Id.* (Marshall, J., concurring).

¹⁶⁴ Justice Rehnquist also filed a separate dissenting opinion, joined by Chief Justice Burger, that generally criticized the majority opinion's dismantling of *Swain*. *Id.* at 134 (Rehnquist, J., dissenting).

¹⁶⁵ *Id.* at 112 (Burger, C.J., dissenting). Chief Justice Burger criticized the majority for deciding the case on Fourteenth Amendment grounds when the Court granted certiorari to decide the case on Sixth Amendment grounds. *Id.* at 112-13 (Burger, C.J., dissenting). The Court "granted certiorari to decide whether petitioner was tried 'in violation of constitutional provisions guaranteeing the defendant an impartial jury and a jury composed of persons representing a fair cross section of the community.'" *Id.* at 112 (Burger, C.J., dissenting) (quoting petition for cert. at i, No. 84-6263 (Feb. 19, 1985)). The Chief Justice then addressed the equal protection issue because the majority decided the case on those grounds. *Id.* at 118 (Burger, C.J., dissenting).

¹⁶⁶ *Batson*, 476 U.S. at 120-21 (Burger, C.J., dissenting).

¹⁶⁷ *Id.* at 123 (Burger, C.J., dissenting).

¹⁶⁸ *Id.* (Burger, C.J., dissenting).

¹⁶⁹ *Id.* at 123-24 (Burger, C.J., dissenting).

¹⁷⁰ *Id.* at 124 (Burger, C.J., dissenting).

the majority had, paradoxically, interjected racial matters into the jury selection process contrary to the thrust of the long line of cases.¹⁷¹ He predicted that attorneys would probe deeply into the racial backgrounds and national origins of potential jurors to build records for prima facie cases and rebuttal.¹⁷² Such probing, Burger noted, may offend some potential jurors.¹⁷³ In addition, according to Chief Justice Burger, it is often difficult to determine or even define one's race.¹⁷⁴ To compound these problems, Burger concluded, the majority "essentially wishes [the] judges well" without much more because of its failure to provide significant guidance to the trial courts that must implement the decision.¹⁷⁵

The *Batson* Court, therefore, held that the Equal Protection Clause forbids a prosecutor from utilizing a peremptory challenge against a venireperson because of the venireperson's race.¹⁷⁶ The Court set out a three-pronged burden-shifting scheme for allegations of impermissible peremptory challenges.¹⁷⁷ This decision rejected the evidentiary formulation developed in *Swain*.¹⁷⁸

C. *Batson's Progeny*

The United States Supreme Court subsequently decided several cases that extended *Batson*, providing symmetry to its application in the courtroom.¹⁷⁹ In a 1991 decision, *Powers v. Ohio*, the Court held that a criminal defendant has standing to raise an equal protection claim on behalf of a potential juror excluded in violation of the Equal Protection Clause even when the defendant and the juror do not share the same race.¹⁸⁰ Several months later, the Court, in *Edmonson v. Lees-*

¹⁷¹ *Batson*, 476 U.S. at 129 (Burger, C.J., dissenting).

¹⁷² *Id.* (Burger, C.J., dissenting).

¹⁷³ *Id.* (Burger, C.J., dissenting).

¹⁷⁴ *Id.* at 130 n.10 (Burger, C.J., dissenting).

¹⁷⁵ *Id.* at 130-31 (Burger, C.J., dissenting).

¹⁷⁶ *Batson*, 476 U.S. at 89.

¹⁷⁷ *Id.* at 96-98.

¹⁷⁸ *Id.* at 92-93.

¹⁷⁹ *Georgia v. McCollum*, 112 S. Ct. 2348, 2353, 2359 (1992); *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2081 (1991); *Powers v. Ohio*, 111 S. Ct. 1364, 1373 (1991).

¹⁸⁰ 111 S. Ct. at 1373. The Court reversed the Ohio Court of Appeals' finding that because he did not share the same race as the struck jurors, the white defendant was not entitled to make out a prima facie case of a violation of the Equal Protection Clause of the Fourteenth Amendment for the race-based removal of seven African-American jurors. *See id.* at 1366, 1374. The Court reasoned that whether the defendant and the challenged juror share the same race is irrelevant. *Id.* at 1373. The Court concluded that extending standing to a criminal defendant to raise the equal protection rights of a juror excluded from service was proper because: (1) the defendant would suffer a cognizable injury; (2) the defendant shared interests with the juror in preventing unconstitutional peremptory strikes; and (3) the juror's ability to protect his or her own interests

ville Concrete Co., extended the *Batson* line to civil trials.¹⁸¹ Finally, in 1992, the Court held, in *Georgia v. McCollum*, that, in addition to prosecutors, the Equal Protection Clause of the Fourteenth Amendment also prohibits criminal defendants from using peremptory challenges to eliminate potential jurors based on the juror's race.¹⁸²

The only United States Supreme Court case to address, in depth, the evidentiary burdens required by *Batson* is the 1991 decision, *Hernandez v. New York*.¹⁸³ The *Hernandez* Court declined to find that peremptory strikes that have a disparate impact on certain racial groups are invalid per se.¹⁸⁴ Rather, the Court held that absent inherent dis-

was hindered. *Id.* at 1370-73. The Court first concluded that the defendant would be injured by the exclusion of a juror based upon the juror's race because the overt discrimination casts doubt over the obligations of all involved with the trial to adhere to the law throughout the trial. *Id.* at 1371-72. The Court explained that because the voir dire is the jury's first introduction to the trial process, any irregularities may taint the entire trial. *Id.* Thus, impropriety in selecting a jury may injure the defendant's opportunity for an unbiased jury because it casts doubt on the integrity of the judicial process and the criminal proceeding at hand. *See id.* Second, the nature of the jury trial establishes a common interest between the jurors and the defendant to eliminate discrimination from the courtroom. *Id.* at 1372. The defendant, as well, is sure to vigorously advocate the excluded juror's rights by virtue of the common interest. *Id.* Finally, the Court found that excluded jurors rarely will bring suit if they are excluded based on their race because, among other things, the juror will rarely possess the incentive to pursue the claim. *Id.* at 1372-73.

¹⁸¹ 111 S. Ct. 2077, 2081, 2088 (1991). Reversing an *en banc* ruling of the United States Court of Appeals for the Fifth Circuit, the Court held that private litigants in civil cases may not use peremptory challenges to exclude jurors on account of their race. *Id.* at 2080, 2081, 2088. Edmonson, a construction worker, sued Leesville Concrete Co. for negligence in the United States District Court for the Western District of Louisiana. *Id.* at 2080. Edmonson claimed that one of Leesville's workers allowed a truck to roll backward, pinning the plaintiff against some construction equipment. *Id.* At trial, defense counsel used two of its three peremptory challenges permitted by 28 U.S.C. § 1870 to remove African-Americans from the potential jury. *Id.* at 2081. Edmonson, also an African-American, requested that the district court require Leesville to articulate a race-neutral explanation for the peremptory strikes of the two African-American jurors. *Id.* The district court, however, rejected the request on the ground that *Batson* does not apply to civil proceedings. *Id.* The jury, composed of one African-American and eleven white jurors, rendered a verdict for Edmonson for damages of only \$18,000. *Id.* A divided *en banc* panel of the United States Court of Appeals for the Fifth Circuit affirmed the district court's ruling concluding that the use of peremptory challenges by private litigants does not constitute state action and, as a result, does not implicate the Fourteenth Amendment. *Id.*

¹⁸² 112 S. Ct. 2348, 2359 (1992). The decision relied on *Edmonson* and *Powers* to support the Court's reasoning. *Id.* at 2354-58. The Court found, as in *Edmonson*, that a private party, namely a criminal defendant, is a state actor. *Id.* at 2354-57. Furthermore, the majority, using the same reasoning as *Powers*, found that the State has standing to object to the discriminatory use of peremptory challenges by a criminal defendant. *Id.* at 2357. The Court also addressed the concern that a criminal defendant's rights overcome the interests served by *Batson*. *Id.* at 2357-58. The Court, however, concluded that the constitutional requirement outlined in *Batson* must necessarily overcome the state-created right to peremptory challenges. *See id.* at 2358. The Court noted that "[i]t is an affront to justice to argue that a fair trial includes the right to discriminate against a group of citizens based upon their race." *Id.*

¹⁸³ 111 S. Ct. 1859, 1866-70 (1991).

¹⁸⁴ *Id.* at 1867.

criminy intent in the proffered justification, facial neutrality alone rebuts a prima facie case of racially discriminatory use of a peremptory challenge.¹⁸⁵ Thus, the Court declined to automatically infer discriminatory intent merely because striking Spanish-speaking jurors may disproportionately impact Latino jurors.¹⁸⁶ The Court concluded that trial courts may accept facially race-neutral explanations regardless of the actual impact upon jurors.¹⁸⁷ Subsequent to *Hernandez*, therefore, a party may rebut a prima facie case of discriminatory use of a peremptory challenge by asserting a facially race-neutral explanation.¹⁸⁸ The trial court may, however, find the explanation inadequate if it determines that discriminatory intent is inherent in the explanation.¹⁸⁹

A New York state trial court convicted the defendant, Hernandez, on two counts of attempted murder and two counts of criminal possession of a weapon for firing several shots at a woman and her mother, hitting one and missing the other.¹⁹⁰ Stray bullets from the defendant's gun also injured two men in a nearby restaurant.¹⁹¹ At trial, after sixty-three potential jurors had been questioned and nine impaneled, defense counsel objected to two of the prosecution's peremptory challenges.¹⁹² The defendant argued that the prosecution used the peremptory challenges to exclude the two jurors on account of their Latino heritage.¹⁹³ The prosecutor, without waiting for a ruling on whether the defendant had adequately made a prima facie case of racial discrimination, argued that he utilized the peremptory challenges because he was uncertain that these jurors could follow the official translation of the testimony of several Spanish-speaking witnesses.¹⁹⁴ He explained that when he asked these Spanish-speaking jurors if they could accept the interpreter's translation of the Spanish-speaking witnesses, "[t]hey each looked away from me and said with some hesitancy that they would try, not that they could, but that they would try to follow the interpreter, and I feel that in a case where the interpreter will be for the main witnesses, they would have an undue impact upon the jury."¹⁹⁵ Further, the prosecutor explained that he would have no motive to exclude the jurors because all the complainants and the

¹⁸⁵ *Id.* at 1866.

¹⁸⁶ *Id.* at 1867.

¹⁸⁷ *Id.*

¹⁸⁸ *Hernandez*, 111 S. Ct. at 1866.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 1864.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Hernandez*, 111 S. Ct. at 1864.

¹⁹⁴ *Id.* at 1864-65.

¹⁹⁵ *Id.* at 1865.

prosecution's civilian witnesses were Hispanic.¹⁹⁶ The court ultimately rejected the defendant's *Batson* claim.¹⁹⁷ On appeal, the New York Supreme Court, Appellate Division, affirmed the trial court's ruling that the prosecution had offered race-neutral explanations for the peremptory strikes sufficient to rebut the defendant's prima facie case.¹⁹⁸ The New York Court of Appeals also affirmed the trial court's ruling.¹⁹⁹

Justice Kennedy wrote the plurality opinion joined by Chief Justice Rehnquist, Justice White and Justice Souter.²⁰⁰ The plurality observed that under *Batson*, a court, when evaluating the neutrality of a prosecutor's proffered explanation, must determine whether the explanation violates the Equal Protection Clause as both a matter of law and of fact.²⁰¹ The plurality stressed that a *Batson* violation requires proof of racially discriminatory intent or purpose.²⁰² The Court refused to infer intent, as a matter of law, from a showing of disproportionate impact on a particular racial group.²⁰³ Thus, a mere showing of a disproportionate impact on a particular racial group is not sufficient to support a finding of an Equal Protection violation.²⁰⁴ The trial court may, however, consider a showing of disproportionate impact as evidence that the proffered race-neutral explanation constitutes a pretext for racial discrimination.²⁰⁵

The plurality reasoned that the prosecutor's explanation constituted a race-neutral justification for his peremptory strikes.²⁰⁶ The Court noted that the challenges neither rested on the intention to exclude Latino or bilingual jurors, nor on stereotypical assumptions about Latinos or bilinguals.²⁰⁷ Rather, the prosecutor sought to eliminate only those whose conduct during voir dire persuaded him that they might have difficulty in accepting the interpreter's translation of the Spanish-language testimony.²⁰⁸ The plurality also noted that this

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Hernandez*, 111 S. Ct. at 1865.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 1864. Justice O'Connor, joined by Justice Scalia, concurred in the judgment in a separate opinion because she believed that the plurality opinion went farther than necessary in order to assess the constitutionality of the prosecutor's asserted justification. *Id.* at 1873 (O'Connor, J., concurring).

²⁰¹ *Id.* at 1866-68.

²⁰² *Id.* at 1866.

²⁰³ *Hernandez*, 111 S. Ct. at 1867.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 1868.

²⁰⁶ *Id.* at 1867.

²⁰⁷ *Id.*

²⁰⁸ *Hernandez*, 111 S. Ct. at 1867.

category of jurors would include both Latinos and non-Latinos.²⁰⁹ Thus, although the prosecutor's criterion may result in a disproportionate removal of Latinos from the jury, disproportionate impact alone does not constitute a per se violation of the Equal Protection Clause.²¹⁰

The trial court retained the duty to determine whether the prosecutor proffered a facially race-neutral explanation rebutting the defendant's prima facie claim of an Equal Protection Clause violation.²¹¹ The trial court could properly consider the disproportionate exclusion of members of a certain race as evidence that the proffered explanation was merely a pretext for racial discrimination.²¹² The trial judge could also consider other factors, such as a refusal to employ valid alternatives to the exclusion of Spanish-speaking jurors.²¹³ The trial court could, for example, determine that a prosecutor's persistence in the desire to exclude Spanish-speaking jurors despite reasonable alternatives, such as a discreet way for jurors to advise the judge of concerns with the translation during the course of the trial, was evidence of pretext.²¹⁴

The plurality observed that the trial court's ruling must receive great deference on appeal because the determination largely turns on an evaluation of the prosecutor's credibility.²¹⁵ The plurality explained that in the typical peremptory challenge inquiry, the decisive question is whether the attorney's race-neutral justification is credible.²¹⁶ Evidence bearing on the issue of the attorney's credibility will rarely extend beyond an evaluation of the attorney's demeanor.²¹⁷ The plurality noted that an evaluation of the state of mind of the attorney based upon demeanor and credibility "lies peculiarly within a trial judge's province."²¹⁸ Thus, the plurality refused to overturn the trial court's finding because the trial court did not commit clear error in choosing to believe the reasons given by the prosecutor.²¹⁹

Justice Stevens, joined by Justice Marshall and Justice Blackmun, dissented.²²⁰ Justice Stevens did not agree that the prosecutor dispelled

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.* at 1868; see also *Batson*, 476 U.S. at 98.

²¹² *Hernandez*, 111 S. Ct. at 1868.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.* at 1869 (quoting *Batson*, 476 U.S. at 98 n.21).

²¹⁶ *Id.*

²¹⁷ *Hernandez*, 111 S. Ct. at 1869.

²¹⁸ *Id.*

²¹⁹ *Id.* at 1873.

²²⁰ *Id.* at 1875 (Stevens, J., dissenting). Justice Blackmun dissented, agreeing with Justice

the inference that he had discriminated against the challenged jurors based on their race.²²¹ Justice Stevens argued that the Court erred by focusing the entire inquiry on the prosecutor's subjective state of mind.²²² He contended that the Court obligated the defendant to generate evidence of the prosecutor's actual subjective intent to discriminate by requiring the prosecutor's explanation to provide additional, direct evidence of discriminatory motive.²²³ He would allow, in contrast to the plurality, a showing of disproportionate impact to stand as evidence that would require a rejection of the facially neutral explanation as a matter of law.²²⁴

Justice Stevens identified three reasons that, when considered together, should have rendered the race-neutral justification insufficient to overcome the prima facie case of race discrimination.²²⁵ First, the justification would inevitably result in a disproportionate impact upon Spanish-speaking jurors and thus was merely a proxy for a discriminatory purpose.²²⁶ Second, less drastic means of dealing with the prosecutor's concerns existed.²²⁷ Finally, if the prosecutor's concern were valid, it could have been properly dealt with as a challenge for cause.²²⁸

The Court has provided extensively for symmetrical application of *Batson* through several decisions following that seminal case.²²⁹ *Batson* now applies to all parties in civil and criminal trials.²³⁰ But for *Hernandez* and a few words in *Batson*, however, the Court has not provided the trial courts with much guidance to implement *Batson's* broad dictates.²³¹

D. *J.E.B. v. Alabama ex rel. T.B.: Gender, Like Race, Is an Unconstitutional Proxy*

The United States Supreme Court, in the 1994 decision *J.E.B. v. Alabama ex rel. T.B.*, extended *Batson* to cover gender, in addition to

Stevens' argument that the prosecutor had not rebutted the defendant's prima facie case. *Id.* (Blackmun, J., dissenting).

²²¹ *Id.* at 1877 (Stevens, J., dissenting).

²²² *Hernandez*, 111 S. Ct. at 1876 (Stevens, J., dissenting).

²²³ *Id.* (Stevens, J., dissenting).

²²⁴ *Id.* at 1877 (Stevens, J., dissenting).

²²⁵ *Id.* at 1876 (Stevens, J., dissenting).

²²⁶ *Id.* at 1877 (Stevens, J., dissenting).

²²⁷ *Hernandez*, 111 S. Ct. at 1877 (Stevens, J., dissenting).

²²⁸ *Id.* (Stevens, J., dissenting).

²²⁹ See *supra* notes 179-182 and accompanying text.

²³⁰ *Id.*

²³¹ See *supra* notes 135-44, 201-18 and accompanying text.

race.²³² The Court held that intentional discrimination on the basis of gender in the exercise of a peremptory challenge violates the Equal Protection Clause.²³³ Thus, the three-pronged analysis established for race, in *Batson*, now applies to peremptory challenges based upon a prospective juror's gender.²³⁴

The State of Alabama filed a complaint in District Court in Jackson County, Alabama, on behalf of a mother named T.B., for paternity and child support against the alleged father, J.E.B.²³⁵ During jury selection, the district court excused two males and one female for cause from a panel that originally consisted of twelve males and twenty-four females.²³⁶ The State subsequently used nine of its ten peremptory challenges to excuse male jurors.²³⁷ Likewise, J.E.B. used all but one of his strikes against female panel members.²³⁸ The remaining jurors were all female.²³⁹ Drawing on the logic and reasoning of *Batson*, J.E.B. objected that the State peremptorily challenged potential jurors solely on the basis of their gender and, thus, violated the Equal Protection Clause of the Fourteenth Amendment.²⁴⁰ The court rejected J.E.B.'s claim and impaneled the all-female jury.²⁴¹ At the conclusion of the trial, the jury found that J.E.B. was the father of T.B.'s child.²⁴² The court ordered him to pay child support.²⁴³ On a post-judgment motion by J.E.B., the court reaffirmed its ruling that *Batson* did not extend to gender-based peremptory challenges.²⁴⁴ The Alabama Court of Civil Appeals affirmed and the Supreme Court of Alabama denied certiorari.²⁴⁵ The United States Supreme Court granted certiorari to settle a split in both state and federal authority.²⁴⁶

Justice Blackmun wrote the majority opinion, joined by Justices Stevens, O'Connor, Souter and Ginsburg.²⁴⁷ The majority opinion initially noted that gender discrimination in the exercise of peremptory challenges is a "relatively recent phenomenon" because many states

²³² *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1421 (1994).

²³³ *Id.*

²³⁴ *Id.* at 1429-30.

²³⁵ *Id.* at 1421.

²³⁶ *Id.*

²³⁷ *J.E.B.*, 114 S. Ct. at 1422.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *J.E.B.*, 114 S. Ct. at 1422.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 1422 & n.1; see *supra* note 13.

²⁴⁷ *J.E.B.*, 114 S. Ct. at 1421.

excluded women from jury service well into the present century.²⁴⁸ Moreover, the majority recounted, many of those states that permitted women to serve erected barriers such as registration requirements and automatic exemptions to deter women from actually serving.²⁴⁹ The Court observed, however, that it has already determined that such barriers are unconstitutional.²⁵⁰

Recognizing that the Court has consistently subjected gender-based classifications to heightened judicial scrutiny, the majority opinion rejected Alabama's argument that it could discriminate on the basis of gender and not race in the selection of the petit jury because gender discrimination has never reached the level of discrimination against African-Americans.²⁵¹ The majority declined to determine whether women or racial minorities have suffered more discrimination by state actors.²⁵² Given that the United States has a long history of gender discrimination, the majority determined that gender-based classifications require "an exceedingly persuasive justification."²⁵³ Thus, the majority determined, "the only question is whether discrimination on the basis of gender in jury selection substantially furthers the State's legitimate interest in achieving a fair and impartial trial."²⁵⁴

The Court concluded that invidious discrimination based on gender or race causes harm to litigants, jurors and the community.²⁵⁵ The risk that race-based or gender-based prejudice motivating the discriminatory selection of jurors will "infect" the judicial proceedings harms the litigants.²⁵⁶ Moreover, the majority explained, wrongful exclusion from participation in the judicial process as jurors harms potential jurors, and the State's role in the perpetuation of invidious stereotypes harms the community.²⁵⁷ Finally, the appearance of state-sanctioned discrimination in the courtroom harms the public's confidence in the judicial system.²⁵⁸

The majority opinion warned that the extension of *Batson* to gender neither implies the elimination of peremptory challenges alto-

²⁴⁸ *Id.* at 1422-23. The exclusion of women from jury service is traced from the English common law "doctrine of *propter defectum sexus*, literally, the 'defect of sex.'" *Id.* at 1423.

²⁴⁹ *Id.* at 1423.

²⁵⁰ *Id.* at 1424.

²⁵¹ *Id.* at 1424-25.

²⁵² *J.E.B.*, 114 S. Ct. at 1425.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 1427.

²⁵⁶ *Id.*

²⁵⁷ *J.E.B.*, 114 S. Ct. at 1427.

²⁵⁸ *Id.*

gether, nor conflicts with a State's legitimate interest in using peremptory challenges to secure fair and impartial juries.²⁵⁹ The majority reasoned that litigants still may remove potential jurors whom the litigants feel are less acceptable than the other venire members.²⁶⁰ Gender, the Court noted, "simply may not serve as a proxy for bias."²⁶¹ Thus, according to the Court, litigants may continue to exclude any class or group normally subject to a rational basis review.²⁶² The Court also noted that absent a showing of pretext, peremptory strikes based upon characteristics disproportionately associated with a particular gender may be appropriate.²⁶³ For example, although challenging all the nurses may disproportionately affect women in the venire and, likewise, challenging all military veterans may disproportionately affect men in the venire, such challenges remain constitutional unless gender-based.²⁶⁴

In addition to joining the majority opinion, Justice O'Connor wrote a concurring opinion to discuss the costs of extending *Batson* to gender.²⁶⁵ O'Connor asserted that extending *Batson* to gender places an additional burden on the state and federal judicial systems,²⁶⁶ pushes the Court a step closer to eliminating the peremptory challenge and decreases the ability of litigants to act on "sometimes accurate gender-based assumptions about juror attitudes."²⁶⁷ Justice O'Connor warned that as the Court adds constitutional restraints, the use of the peremp-

²⁵⁹ *Id.* at 1429.

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *J.E.B.*, 114 S. Ct. at 1429 (citing *Lark v. Jeter*, 486 U.S. 456, 461 (1988); *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439-42 (1985)).

²⁶³ *J.E.B.*, 114 S. Ct. at 1429.

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 1430 (O'Connor, J., concurring). Justice O'Connor also reaffirmed her position that the Equal Protection Clause does not limit the exercise of peremptory challenges by private civil litigants and criminal defendants. *Id.* at 1432-33; see also *Georgia v. McCollum*, 112 S. Ct. 2348, 2361 (1992) (O'Connor, J., dissenting) (criminal defendants); *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2089 (1991) (O'Connor, J., dissenting) (private civil litigants). Keeping with her dissenting opinions in *Edmonson* and *McCollum*, O'Connor argued that the Court should limit *J.E.B.* to the Government's use of gender-based peremptory challenges because private litigants and criminal defendants are not state actors. *J.E.B.*, 114 S. Ct. at 1432-33 (O'Connor, J., concurring); *McCollum*, 112 S. Ct. at 2361 (1992) (O'Connor, J., dissenting) (criminal defendants); *Edmonson*, 111 S. Ct. at 2089 (O'Connor, J., dissenting) (private civil litigants).

²⁶⁶ *J.E.B.*, 114 S. Ct. at 1431. Justice O'Connor observed that *Batson* "mini-hearings" are routine in both state and federal trial courts. *Id.* O'Connor also highlighted the proliferation of *Batson* appeals. *Id.* Thus, she indicated, *J.E.B.* may have a more significant impact than *Batson* because women represent a larger portion of society than do racial minorities. See *id.*

²⁶⁷ *Id.* at 1432.

tory challenge becomes less discretionary and more like a challenge for cause.²⁶⁸

Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, filed a dissenting opinion.²⁶⁹ Initially, Justice Scalia criticized the majority for its discussion of the historical exclusion of women from jury service and the bar.²⁷⁰ He believed the discussion "irrelevant" because the case involved alleged discrimination against male jurors, not women.²⁷¹ Moreover, Scalia noted, neither party contested that gender discrimination is subject to a heightened scrutiny analysis.²⁷²

Justice Scalia also disagreed with the majority's conclusion that peremptory challenges on the basis of any group characteristic subject to heightened scrutiny violate the Equal Protection Clause.²⁷³ He argued that the majority's conclusion is reached only by focusing on individual exercises of the peremptory challenge.²⁷⁴ When the practice is considered in totality, he argued, it is difficult to find a violation of equal protection because all groups are subject to the peremptory challenge.²⁷⁵ He conceded that systematic exclusion of a particular class, such that the "strikes evinced group-based animus and served as a proxy for segregated venire lists," would constitute a violation of equal protection.²⁷⁶ He observed, however, that the litigants in *J.E.B.* exercised their peremptory challenges to assemble a jury favorably disposed to its case, not to discriminate against a particular gender.²⁷⁷

Justice Scalia also criticized the broad effect of the majority's reasoning.²⁷⁸ He argued that the majority's reasoning implies that gender-based strikes do not even meet a rational basis review, placing all peremptory strikes based on group characteristics at risk.²⁷⁹ Thus, he questioned how the majority's standard will develop over time.²⁸⁰

Justice Scalia concluded his dissent by stating that the *Batson* line of cases has inflicted damage upon both the peremptory system and the entire justice system.²⁸¹ The peremptory challenge, he stated, loses

²⁶⁸ *Id.* at 1431.

²⁶⁹ *Id.* at 1436 (Scalia, J., dissenting).

²⁷⁰ *Id.* (Scalia, J., dissenting).

²⁷¹ *J.E.B.*, 114 S. Ct. at 1436 (Scalia, J., dissenting).

²⁷² *Id.* (Scalia, J., dissenting).

²⁷³ *Id.* at 1437 (Scalia, J., dissenting).

²⁷⁴ *Id.* (Scalia, J., dissenting).

²⁷⁵ *Id.* (Scalia, J., dissenting).

²⁷⁶ *J.E.B.*, 114 S. Ct. at 1437 (Scalia, J., dissenting).

²⁷⁷ *Id.* (Scalia, J., dissenting).

²⁷⁸ *Id.* at 1438 (Scalia, J., dissenting).

²⁷⁹ *Id.* (Scalia, J., dissenting).

²⁸⁰ *Id.* (Scalia, J., dissenting).

²⁸¹ *J.E.B.*, 114 S. Ct. at 1438-39.

its "whole character" when one must provide reasons for its use.²⁸² He further posited that not even expanded voir dire could substitute for this loss, although he believes such expansion is now inevitable.²⁸³ Scalia concluded that the burden of lengthy collateral litigation pursuant to *Batson* and its progeny and the lengthening of the voir dire process harm the justice system.²⁸⁴

The *J.E.B.* decision marks the extension of the reasoning and holding of *Batson* to gender.²⁸⁵ The Court held in *J.E.B.* that gender-based peremptory challenges violate the Equal Protection Clause.²⁸⁶ Thus, attorneys may no longer legally exercise a peremptory challenge on the basis of gender.²⁸⁷

III. ILLUSORY PROTECTION?

Batson and its progeny require trial attorneys to justify their use of a peremptory challenge if opposing counsel makes a prima facie case alleging race-based use of the challenge.²⁸⁸ This requirement has, in effect, converted the peremptory challenge into a "quasi-peremptory challenge," at least when the race of the challenged juror may be the basis for the challenge.²⁸⁹ Courts, however, often accept vague or subjective explanations to overcome prima facie cases of race-based peremptory challenges.²⁹⁰ The courts' acceptance of such explanations prompted one commentator to conclude that "with a thorough working knowledge of the decisional law in the area and an attentive eye and ear, experienced trial counsel should be able to readily justify their actions."²⁹¹ Indeed, this seems to be the often unspoken truth governing prohibited peremptory strikes.²⁹² The current application of *Batson*

²⁸² *Id.* at 1438 (Scalia, J., dissenting).

²⁸³ *Id.* (Scalia, J., dissenting).

²⁸⁴ *Id.* at 1439 (Scalia, J., dissenting).

²⁸⁵ *Id.* at 1421.

²⁸⁶ *J.E.B.*, 114 S. Ct. at 1421.

²⁸⁷ *Id.*

²⁸⁸ See *supra* notes 134-44 and accompanying text.

²⁸⁹ Alschuler, *supra* note 45, at 200. Professor Alschuler coined the phrase "quasi-peremptory challenge" to describe a challenge that requires some explanation but neither full justification nor cause. *Id.*

²⁹⁰ See *infra* notes 303-20 and accompanying text. A federal trial handbook lists a 31 point checklist of race-neutral reasons held to justify the use of peremptory challenges in federal appellate courts. 2 HUNTER, *supra* note 38, § 15.21, at 273-75. This list provides a clear example of various race-neutral explanations that federal appellate courts deemed appropriate. *Id.*

²⁹¹ Steven M. Puiszis, *Edmonson v. Leesville Concrete Co.: Will the Peremptory Challenge Survive Its Battle With the Equal Protection Clause?*, 25 J. MARSHALL L. REV. 37, 80 (1991).

²⁹² E.g., SAROKIN & MUNSTERMAN, *supra* note 45, at 383 ("We respectfully submit that [*Batson*] will not end the objectionable practices but will merely compel lawyers to be more creative in finding reasons for excluding potential jurors. The only change will be the improved ingenuity

verifies Justice Marshall's prediction, in his concurring opinion in *Batson*, that attorneys will easily contrive and assert facially race-neutral explanations for striking jurors and that courts will be ill-equipped to second-guess those explanations.²⁹³ Justice Marshall warned that if such explanations satisfy the prosecutor's obligation to explain the peremptory strike on race-neutral grounds, then the protection erected by *Batson* "may be illusory."²⁹⁴

The United States Supreme Court, interpreting the second prong of the *Batson* test in *Hernandez v. New York*, stated that counsel need merely put forth a *facially* race-neutral explanation.²⁹⁵ In the absence of inherently discriminatory intent, the Court held, the proffered explanation is presumed race-neutral.²⁹⁶ Thus, at this point in the analysis, a court may find that the explanation is not adequate as a matter of law.²⁹⁷ It is important to note the distinction between such a finding and the court making a factual determination, under the third prong of the *Batson* analysis, requiring the court to determine that a facially race-neutral explanation does not overcome the *prima facie* case because the court does not believe the proffered explanation.²⁹⁸

Under the third prong of the *Batson* analysis, consideration of an attorney's credibility in proffering a race-neutral explanation is a factual determination made by the trial court.²⁹⁹ In making a determination about the credibility of the attorney's intent, the court must often

of the attorneys who must justify their actions."); Albert W. Alschuler, *The Overweight Schoolteacher From New Jersey and Other Tales: The Peremptory Challenge After Batson*, 25 CRIM. BULL. 57, 61 (1989) ("For prosecutors who seek to evade *Batson's* requirements, the message of the case appears to be this: . . . you must make up some plausible reasons."); John R. Duer, Note, *Batson v. Kentucky: Will "O'Batson" Be Next?*, 12 NAT'L BLACK L.J. 134, 146-47 (1989) ("What *Batson* has fostered is the art of 'creative perjury,' an art which criminal prosecutors are learning to practice with increasing skill."); Mark Curriden, *The Death of the Peremptory Challenge*, A.B.A. J., Jan. 1994, at 62 ("Any lawyer worth his or her salt can come up with a race neutral reason for the strike," quoting an Atlanta criminal defense attorney). Professor Alschuler observes:

Although prosecutors may not discriminate against blacks, they may discriminate against unemployed people, people who fail to maintain eye contact with prosecutors, people who stare at prosecutors, liberals, social workers, people who live in public housing, people who have not finished high school, and others who also happen to be black.

Alschuler, *supra* note 45, at 200.

²⁹³ *Batson*, 476 U.S. at 106 (Marshall, J., dissenting); see *infra* notes 303-48 and accompanying text.

²⁹⁴ *Batson*, 476 U.S. at 106 (Marshall, J., dissenting).

²⁹⁵ *Hernandez*, 111 S. Ct. 1859, 1866 (1991).

²⁹⁶ *Id.*

²⁹⁷ See *id.*

²⁹⁸ See *id.* at 1866-68.

²⁹⁹ See *id.* at 1869.

rely on its impression of the demeanor of the attorney who exercised the challenge.³⁰⁰ Furthermore, on appeal, courts accord great deference to the trial judge's determination.³⁰¹ Thus, a large portion of *Batson* challenges come down to the credibility of the attorney who proffered the explanation rather than the adequacy of the explanation at law.³⁰²

A survey of the federal appellate court decisions reviewing trial courts' evaluations of race-neutral explanations under *Batson* revealed that of 113 cases addressing the issue, the court found the proffered race-neutral explanation sufficient, as a matter of law, in all but five cases.³⁰³ Of the five cases rejecting a proffered race-neu-

³⁰⁰ *Hernandez*, 111 S. Ct. at 1869.

³⁰¹ *Id.*

³⁰² *See id.*

³⁰³ This data was compiled, in part, through a search conducted by the author of this Note on WESTLAW, on March 5, 1994 and updated on September 21, 1994 (Database: ALLFEDS; Query: 230K33(5.15)), and, in part, through a survey published in Joshua E. Swift, Note, *Batson's Invidious Legacy: Discriminatory Juror Exclusion and the "Intuitive" Peremptory Challenge*, 78 CORNELL L. REV. 336, 357-58 nn.185-86 (1993). For a similar survey published subsequent to the completion of this Note, see Michael J. Raphael & Edward J. Ungvarsky, *Excuses, Excuses: Neutral Explanations Under Batson v. Kentucky*, 27 U. MICH. J.L. REF. 229 (1993).

Swift's survey conducted on November 20, 1991, revealed that of 43 cases that evaluated attorneys' proffered race-neutral explanations for suspect peremptory challenges, only three were reversed on appeal. *See Swift, supra*, at 357-58 & nn.185-88. One case was reversed for a defective *Batson* hearing conducted *in camera* without defense counsel. *Id.* at 358 n.188 (citing *United States v. Alcantar*, 897 F.2d 436 (9th Cir. 1990)). Thus, the court never reached the merits of the race-neutral explanation. *Id.* Another case was reversed after the court found that the prosecutor did not provide an adequate race-neutral explanation for striking all of the Latino jurors. *United States v. Chinchilla*, 874 F.2d 695, 699 (9th Cir. 1989). Finally, one case was reversed for the use of gender-based peremptory challenges. *Swift, supra*, at 358, n.188 (citing *United States v. De Gross*, 913 F.2d 1417 (9th Cir. 1990)). Thus, in only one case did an appeals court find a proffered race-neutral explanation invalid.

Although Swift actually discussed 76 cases, footnote 186 only includes the 52 cases decided through September 3, 1991. *See id.* at 357 n.186. This discrepancy appears to be the result of Swift's October 1992 update of his November 20, 1991 WESTLAW search, the outcome of which is not included in footnote 186. *See id.* Swift cites the following 52 cases in footnote 186 [Editors' Note: the following cases appear in reverse chronological order by date of decision]: *United States v. Clemons*, 941 F.2d 321 (5th Cir. 1991); *United States v. Guerra-Marez*, 928 F.2d 665 (5th Cir. 1991); *United States v. Valley*, 928 F.2d 130 (5th Cir. 1991); *United States v. Nichols*, 937 F.2d 1257 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 989 (1992); *United States v. Ferguson*, 935 F.2d 862 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 907 (1992); *United States v. Williams*, 934 F.2d 847 (7th Cir. 1991); *United States v. Miller*, 939 F.2d 605 (8th Cir. 1991); *Jones v. Jones*, 938 F.2d 838 (8th Cir. 1991); *Reynolds v. Benefield*, 931 F.2d 506 (8th Cir.), *cert. denied*, 111 S. Ct. 2795 (1991); *United States v. Sherrills*, 929 F.2d 393 (8th Cir. 1991); *United States v. Johnson*, 941 F.2d 1102 (10th Cir. 1991); *Horton v. Zant*, 941 F.2d 1449 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 1516 (1992); *United States v. Williams*, 936 F.2d 1243 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 1279 (1992); *United States v. Bennett*, 928 F.2d 1548 (11th Cir. 1991); *Love v. Jones*, 923 F.2d 816 (11th Cir. 1991); *United States v. Hendrieth*, 922 F.2d 748 (11th Cir. 1991); *United States v. Biaggi*, 909 F.2d 662 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1102 (1991); *United States v. Rudas*, 905 F.2d 38

(2d Cir. 1990); *United States v. Ruiz*, 894 F.2d 501 (2d Cir. 1990); *Harrison v. Ryan*, 909 F.2d 84 (3d Cir.), *cert. denied sub nom. Castille v. Harrison*, 111 S. Ct. 568 (1990); *United States v. Roberts*, 913 F.2d 211 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 2264 (1991); *United States v. De La Rosa*, 911 F.2d 985 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 2275 (1991); *United States v. Peete*, 919 F.2d 1168 (6th Cir. 1990); *United States v. Briscoe*, 896 F.2d 1476 (7th Cir.), *cert. denied sub nom. Usman v. United States*, 111 S. Ct. 173 (1990); *Walton v. Caspari*, 916 F.2d 1352 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1137 (1991); *United States v. Matha*, 915 F.2d 1220 (8th Cir. 1990); *United States v. Hoelscher*, 914 F.2d 1527 (8th Cir. 1990), *cert. denied sub nom. Guiffrida v. United States*, 111 S. Ct. 971 (1991); *United States v. Jackson*, 914 F.2d 1050 (8th Cir. 1990); *United States v. Thomas*, 914 F.2d 139 (8th Cir. 1990); *United States v. Hughes*, 911 F.2d 113 (8th Cir. 1990); *United States v. Johnson*, 905 F.2d 222 (8th Cir.), *cert. denied*, 111 S. Ct. 304 (1990); *United States v. De Gross*, 913 F.2d 1417 (9th Cir. 1990), *rev'd*, 960 F.2d 1433 (9th Cir. 1992) (en banc); *United States v. Alcantar*, 897 F.2d 436 (9th Cir. 1990); *Barfield v. Orange County*, 911 F.2d 644 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 2263 (1991); *United States v. Alston*, 895 F.2d 1362 (11th Cir. 1990); *United States v. Mitchell*, 877 F.2d 294 (4th Cir. 1989); *United States v. Wilson*, 884 F.2d 1121 (8th Cir. 1989); *United States v. Roan Eagle*, 867 F.2d 436 (8th Cir.), *cert. denied*, 490 U.S. 1028 (1989); *United States v. Nicholson*, 885 F.2d 481 (8th Cir. 1989); *United States v. Power*, 881 F.2d 733 (9th Cir. 1989); *United States v. Chinchilla*, 874 F.2d 695 (9th Cir. 1989); *United States v. Clemons*, 843 F.2d 741 (3d Cir.), *cert. denied*, 488 U.S. 835 (1988); *United States v. Hamilton*, 850 F.2d 1038 (4th Cir. 1988), *cert. denied*, 493 U.S. 1069 (1990); *United States v. Terrazas-Carrasco*, 861 F.2d 93 (5th Cir. 1988); *United States v. Tucker*, 836 F.2d 334 (7th Cir. 1988), *cert. denied*, 490 U.S. 1105 (1989); *United States v. David*, 844 F.2d 767 (11th Cir. 1988); *United States v. Forbes*, 816 F.2d 1006 (5th Cir. 1987); *Garrett v. Morris*, 815 F.2d 509 (8th Cir.), *cert. denied sub nom. Jones v. Garrett*, 484 U.S. 898 (1987); *United States v. Thompson*, 827 F.2d 1254 (9th Cir.), *cert. denied*, 484 U.S. 928 (1987); *United States v. Vaccaro*, 816 F.2d 443 (9th Cir. 1987); *United States v. Brown*, 817 F.2d 674 (10th Cir. 1987); *United States v. Chalan*, 812 F.2d 1302 (10th Cir. 1987).

Of the 52 cases cited by Swift, nine did not apply *Batson* and, thus, are irrelevant. The search conducted by the author of this Note updates Swift's November 21, 1991 search through September 21, 1994. This updated search revealed the following 70 cases [Editors' Note: the following cases appear in reverse chronological order by date of decision]: *United States v. Wallace*, No. 93-3178, 1994 WL 486877 (5th Cir. Sept. 8, 1994); *Hollingsworth v. Burton*, 30 F.3d 109 (11th Cir. 1994); *United States v. Byse*, 28 F.3d 1165 (11th Cir. 1994); *United States v. Diaz*, 26 F.3d 1533 (11th Cir. 1994); *United States v. Johnson*, 28 F.3d 1487 (8th Cir. 1994); *Burks v. Borg*, 27 F.3d 1424 (9th Cir. 1994); *United States v. Scott*, 26 F.3d 1458 (8th Cir. 1994); *Jackson v. City of Little Rock*, 26 F.3d 88 (8th Cir. 1994); *United States v. Atkins*, 25 F.3d 1401, (8th Cir.), *cert. denied*, No. 94-5952, 1994 WL 512738 (U.S. Oct. 17, 1994); *Kelly v. Withrow*, 25 F.3d 363 (6th Cir. 1994); *Elem v. Purkett*, 25 F.3d 679 (8th Cir. 1994); *United States v. Fisher*, 22 F.3d 574 (5th Cir. 1994); *United States v. Ferguson*, 23 F.3d 135 (6th Cir.), *cert. denied sub nom. Shackelford v. United States*, 63 U.S.L.W. 3265 (U.S. Oct. 3, 1994) (No. 94-5426); *United States v. McCoy*, 23 F.3d 216 (9th Cir. 1994); *United States v. Cooper*, 19 F.3d 1154 (7th Cir. 1994); *Pemberthy v. Beyer*, 19 F.3d 857 (3d Cir.), *petition for cert. filed*, No. 94-5869 (U.S. Aug. 4, 1994); *United States v. Munoz*, 15 F.3d 395 (5th Cir.), *cert. denied*, 114 S. Ct. 2149 (1994); *United States v. Clay*, 16 F.3d 892 (8th Cir. 1994); *United States v. Parham*, 16 F.3d 844 (8th Cir. 1994); *Doss v. Frontenac*, 14 F.3d 1313 (8th Cir. 1994); *United States v. McMillon*, 14 F.3d 948 (4th Cir. 1994); *United States v. Gonzalez-Balderas*, 11 F.3d 1218 (5th Cir. 1994); *United States v. Chandler*, 12 F.3d 1427 (7th Cir. 1994); *United States v. Banks*, 10 F.3d 1044 (4th Cir. 1993); *United States v. Joe*, 8 F.3d 1488 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 1236 (1994); *United States v. Marin*, 7 F.3d 679 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 739 (1994); *United States v. Childs*, 5 F.3d 1328 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1385 (1994); *Spencer v. Murray*, 5 F.3d 758 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1208

tral explanation, two were heard in the Ninth Circuit Court of Appeals.³⁰⁴ Of the three remaining cases, one was heard in the Third Circuit Court of Appeals,³⁰⁵ another in the Seventh Circuit Court of Appeals,³⁰⁶ and the last in the Eighth Circuit Court of Appeals.³⁰⁷

In sustaining peremptory challenges, courts have allowed both objective and subjective explanations.³⁰⁸ The circuit courts have largely allowed objective explanations relating to venirepersons such

(1994); *Boyd v. Groose*, 4 F.3d 669 (8th Cir. 1993); *United States v. Johnson*, 4 F.3d 904 (10th Cir. 1993), *cert. denied sub nom.* Nottingham v. United States, 114 S. Ct. 1081 (1994); *United States v. Bynum*, 3 F.3d 769 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1105 (1994); *United States v. Brooks*, 2 F.3d 838 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 1117 (1994); *United States v. Cure*, 996 F.2d 1136 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 1075 (1994); *United States v. Arce*, 997 F.2d 1123 (5th Cir. 1993); *United States v. Changco*, 1 F.3d 837 (9th Cir.), *cert. denied*, 114 S. Ct. 619 (1993); *United States v. Ortiz-Martinez*, 1 F.3d 662 (8th Cir.), *cert. denied sub nom.* Fuentez v. United States, 114 S. Ct. 355 (1993); *United States v. Saget*, 991 F.2d 702 (11th Cir.), *cert. denied sub nom.* Johnson v. United States, 114 S. Ct. 396 (1993); *United States v. Lorenzo*, 995 F.2d 1448 (9th Cir.), *cert. denied*, 114 S. Ct. 225 (1993); *United States v. Uwaezhoke*, 995 F.2d 388 (3d Cir.), *cert. denied*, 114 S. Ct. 920 (1993); *United States v. Pofahl*, 990 F.2d 1456 (5th Cir.), *cert. denied sub nom.* Nunn v. United States, 114 S. Ct. 266, *and sub nom.* White v. United States, 114 S. Ct. 560 (1993); *United States v. Seals*, 987 F.2d 1102 (5th Cir.), *cert. denied*, 114 S. Ct. 155 (1993); *Soler v. Waite*, 989 F.2d 251 (7th Cir. 1993); *Jones v. Ryan*, 987 F.2d 960 (3d Cir. 1993); *United States v. Yankton*, 986 F.2d 1225 (8th Cir. 1993); *United States v. Mojica*, 984 F.2d 1426 (7th Cir.), *cert. denied*, 113 S. Ct. 2433 (1993); *United States v. Campbell*, 980 F.2d 245 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2446 (1993); *United States v. Mixon*, 977 F.2d 921 (5th Cir. 1992); *United States v. Cobb*, 975 F.2d 152 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1397 and 113 S. Ct. 1596 (1993); *United States v. Daly*, 974 F.2d 1215 (9th Cir. 1992); *United States v. Collins*, 972 F.2d 1385 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1812 (1993); *Brown v. Kelly*, 973 F.2d 116 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1060 (1993); *Polk v. Dixie Ins. Co.*, 972 F.2d 83 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 982 (1993); *United States v. Thomas*, 971 F.2d 147 (8th Cir. 1992), *cert. denied*, 114 S. Ct. 122 (1993); *United States v. Swinney*, 970 F.2d 494 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 632 (1992); *United States v. Hughes*, 970 F.2d 227 (7th Cir. 1992); *Hancock v. Hobbs*, 967 F.2d 462 (11th Cir. 1992); *Dunham v. Frank's Nursery & Crafts, Inc.*, 967 F.2d 1121 (7th Cir. 1992); *United States v. Castro-Romero*, 964 F.2d 942 (9th Cir. 1992); *United States v. Payne*, 962 F.2d 1228 (6th Cir.), *cert. denied*, 113 S. Ct. 811 (1992); *United States v. Todd*, 963 F.2d 207 (8th Cir. 1992); *Hopson v. Fredericksen*, 961 F.2d 1374 (8th Cir. 1992); *Splunge v. Clark*, 960 F.2d 705 (7th Cir. 1992); *United States v. Hinojosa*, 958 F.2d 624 (5th Cir. 1992); *United States v. Bishop*, 959 F.2d 820 (9th Cir. 1992); *Williams v. Chrans*, 957 F.2d 487 (7th Cir. 1992); *United States v. Casper*, 956 F.2d 416 (3d Cir. 1992); *Moore v. Keller Indus., Inc.*, 948 F.2d 199 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1945 (1992); *United States v. Day*, 949 F.2d 973 (8th Cir. 1991); *United States v. Alvarado*, 951 F.2d 22 (2d Cir. 1991); *United States v. Fuller*, 942 F.2d 454 (8th Cir.), *cert. denied*, 112 S. Ct. 315 (1991).

³⁰⁴ *Bishop*, 959 F.2d at 826; *United States v. Chinchilla*, 874 F.2d 695, 699 (9th Cir. 1989).

³⁰⁵ *Jones v. Ryan*, 987 F.2d 960, 975 (3d Cir. 1993).

³⁰⁶ *Splunge v. Clark*, 960 F.2d 706, 709 (7th Cir. 1992).

³⁰⁷ *Elem v. Purkett*, 25 F.3d 679, 682 (8th Cir. 1994).

³⁰⁸ See *infra* notes 309-20 and accompanying text.

as employment,³⁰⁹ education,³¹⁰ age,³¹¹ housing,³¹² marital

³⁰⁹ [Editor's Note: the following cases appear in reverse chronological order by date of decision]: *United States v. Wallace*, No. 93-3178, 1994 WL 486877, at *2 (5th Cir., Sept. 8, 1994) (one venireperson employed by local police force, one retired and three others social workers); *Hollingsworth v. Burton*, 30 F.3d 109, 112 (11th Cir. 1994) (not employed at same job for at least five years); *United States v. Byse*, 28 F.3d 1165, 1167 & n.2 (11th Cir. 1994) (one venireperson a teacher and another unemployed); *United States v. Banks*, 10 F.3d 1044, 1049 (4th Cir. 1993) (unemployed); *United States v. Joe*, 8 F.3d 1488, 1499 (10th Cir. 1993) (artist), *cert. denied*, 114 S. Ct. 1236 (1994); *United States v. Johnson*, 4 F.3d 904, 913 (10th Cir. 1993) (school teacher), *cert. denied sub nom.* *Nottingham v. United States*, 114 S. Ct. 1081 (1994); *United States v. Bynum*, 3 F.3d 769, 772 (4th Cir. 1993) (unemployed), *cert. denied*, 114 S. Ct. 1105 (1994); *United States v. Arce*, 997 F.2d 1123, 1127 (5th Cir. 1993) (employed only for short time); *United States v. Lorenzo*, 995 F.2d 1448, 1454 (9th Cir.) (employed at Pearl Harbor shipyard where there was a major fraud prosecution), *cert. denied*, 114 S. Ct. 225 (1993); *United States v. Uwaezhoke*, 995 F.2d 388, 391 (3d Cir. 1993) (postal employee), *cert. denied*, 114 S. Ct. 920 (1994); *United States v. Pofahl*, 990 F.2d 1456, 1466 (5th Cir.) (employment), *cert. denied sub nom.* *Nunn v. United States*, 114 S. Ct. 266 (1993); *United States v. Seals*, 987 F.2d 1102, 1108 (5th Cir.) (worked with mentally-handicapped children), *cert. denied*, 114 S. Ct. 155 (1993); *Soler v. Waite*, 989 F.2d 251, 254 (7th Cir. 1993) (medical background would color ability to consider medical evidence in trial); *United States v. Mixon*, 977 F.2d 921, 923 (5th Cir. 1992) (non-supervisory position); *United States v. Collins*, 972 F.2d 1385, 1402 (5th Cir. 1992) (one venireperson's company under investigation by federal authority and another was speech therapy teacher's aide), *cert. denied*, 113 S. Ct. 1812 (1993); *United States v. Thomas*, 971 F.2d 147, 150 (8th Cir. 1992) (laborer), *cert. denied*, 114 S. Ct. 122 (1993); *United States v. Hughes*, 970 F.2d 227, 231 (7th Cir. 1992) (recently unemployed, however, not seeking new employment); *Hancock v. Hobbs*, 967 F.2d 462, 466 (11th Cir. 1992) (unemployed); *Dunham v. Frank's Nursery & Crafts, Inc.*, 967 F.2d 1121, 1125 (7th Cir. 1992) (hairstylist); *Hopson v. Fredericksen*, 961 F.2d 1374, 1377 (8th Cir. 1992) (unemployed); *United States v. Day*, 949 F.2d 973, 979 (8th Cir. 1991) (one juror worked at hotel whose occupants and employees were focus of numerous criminal investigations and other juror had sporadic employment as teacher).

³¹⁰ *United States v. Byse*, 28 F.3d 1165, 1167 & n.2 (11th Cir. 1994) (uneducated); *United States v. Scott*, 26 F.3d 1458, 1465 (8th Cir. 1994) (trained in naval law); *United States v. Marin*, 7 F.3d 679, 685-87 (7th Cir. 1993) (eighth grade education), *cert. denied*, 114 S. Ct. 739 (1994); *Spencer v. Murray*, 5 F.3d 758, 764 (4th Cir. 1993) (prosecutor concerned about education and literacy of venireperson where venireperson had not heard of highly publicized case), *cert. denied*, 62 U.S.L.W. 3574 (1994); *United States v. Lorenzo*, 995 F.2d 1448, 1454 (9th Cir.) (educational level), *cert. denied*, 114 S. Ct. 225 (1993); *United States v. Mixon*, 977 F.2d 921, 923 (5th Cir. 1992) (same); *United States v. Hinojosa*, 958 F.2d 624, 631 (5th Cir. 1992) (three veniremembers challenged because they had not completed high school).

³¹¹ *United States v. Wallace*, No. 93-3178, 1994 WL 486877, at *2 (5th Cir., Sept. 8, 1994) (seemed "feeble and old"); *United States v. Chandler*, 12 F.3d 1427, 1431 (7th Cir. 1994) (young); *United States v. Joe*, 8 F.3d 1488, 1499 (10th Cir. 1993) (only 25 years old), *cert. denied*, 114 S. Ct. 1236 (1994); *United States v. Bynum*, 3 F.3d 769, 772 (4th Cir. 1993) (young), *cert. denied*, 114 S. Ct. 1105 (1994); *United States v. Lorenzo*, 995 F.2d 1448, 1454 (9th Cir.) (prosecutor preferred people who were "a little older"), *cert. denied*, 114 S. Ct. 225 (1993); *United States v. Mojica*, 984 F.2d 1426, 1451 (7th Cir.) (young), *cert. denied*, 113 S. Ct. 2433 (1993); *United States v. Cobb*, 975 F.2d 152, 155 (5th Cir. 1992) (elderly), *cert. denied*, 113 S. Ct. 1397 (1993); *United States v. Hughes*, 970 F.2d 227, 231 (7th Cir. 1992) (young); *United States v. Day*, 949 F.2d 973, 979 (8th Cir. 1991) (young).

³¹² *Hollingsworth v. Burton*, 30 F.3d 109, 112 (11th Cir. 1994) (one venireperson did not own

status,³¹³ and crimes³¹⁴ or employment of relatives.³¹⁵ The courts have also allowed such subjective explanations as appearance,³¹⁶ language

home for at least five years and another lived near crime scene); *United States v. Atkins*, 25 F.3d 1401, 1405-06 (8th Cir.) (did not reside in community), *cert. denied*, No. 94-5952, 1994 WL 512738 (U.S. Oct. 17, 1994); *United States v. Clay*, 16 F.3d 892, 896 (8th Cir. 1994) (resided in abutting community); *United States v. Chandler*, 12 F.3d 1427, 1431 (7th Cir. 1994) (venireperson resided in same area as defendant); *United States v. Joe*, 8 F.3d 1488, 1499 (10th Cir. 1993) (failed to respond on questionnaire if rented or owned home), *cert. denied*, 114 S. Ct. 1236 (1994); *United States v. Uwaezhoke*, 995 F.2d 388, 391 (3d Cir. 1993) (renter), *cert. denied*, 114 S. Ct. 920 (1994); *United States v. Day*, 949 F.2d 973, 979 (8th Cir. 1991) (renter; showed lack of community attachment); *see also United States v. Banks*, 10 F.3d 1044, 1049 (4th Cir. 1993) (venireperson's relative resided in same area as defendant).

³¹³*United States v. Chandler*, 12 F.3d 1427, 1431 (7th Cir. 1994) (single); *United States v. Bynum*, 3 F.3d 769, 772 (4th Cir. 1993) (single mother), *cert. denied*, 114 S. Ct. 1105 (1994); *United States v. Uwaezhoke*, 995 F.2d 388, 391 (3d Cir. 1993) (single parent), *cert. denied*, 114 S. Ct. 920 (1994); *United States v. Mojica*, 984 F.2d 1426, 1451 (7th Cir.) (desire to exclude young, single people), *cert. denied sub nom. Castaneda v. United States*, 113 S. Ct. 2433 (1993); *United States v. Thomas*, 971 F.2d 147, 150 (8th Cir. 1992) (single), *cert. denied*, 114 S. Ct. 122 (1993); *United States v. Hughes*, 970 F.2d 227, 231 (7th Cir. 1992) (single mother).

³¹⁴*Jackson v. City of Little Rock*, 26 F.3d 88, 90 (8th Cir. 1994) (son incarcerated for drug offense); *United States v. McCoy*, 23 F.3d 216, 217 (9th Cir. 1994) (three children have "problems" with gangs); *United States v. Fisher*, 22 F.3d 574, 577 (5th Cir. 1994) (two family members arrested for drug offenses); *United States v. Brooks*, 2 F.3d 838, 840 (8th Cir. 1993) (relative in jail for drugs), *cert. denied*, 114 S. Ct. 1117 (1994); *United States v. Ortiz-Martinez*, 1 F.3d 662, 672 (8th Cir.) (challenged venireperson testified in case in which her sister had been criminal defendant), *cert. denied sub nom. Fuentes v. United States*, 114 S. Ct. 355 (1993); *United States v. Yankton*, 986 F.2d 1225, 1231 (8th Cir. 1993) (brother being prosecuted for serious crime); *United States v. Hughes*, 970 F.2d 227, 230 (7th Cir. 1992) (cousin served two years in jail for drug and robbery offenses and awaited trial on similar offenses again); *see also United States v. Todd*, 963 F.2d 207, 211 (8th Cir. 1992) (brother once addicted to cocaine).

³¹⁵*United States v. Byse*, 28 F.3d 1165, 1167 & n.2 (11th Cir. 1994) (daughter employed in drug counseling); *United States v. Atkins*, 25 F.3d 1401, 1405-06 (8th Cir.) (daughter employed as low-level government employee), *cert. denied*, 1994 WL 512738 (U.S. Oct. 17, 1994) (No. 94-5952); *United States v. Gonzalez-Balderas*, 11 F.3d 1218, 1222 (5th Cir. 1994) (relatives who were police officers); *Hopson v. Fredericksen*, 961 F.2d 1374, 1377 (8th Cir. 1992) (mother previously worked for organization that assisted public defender's office).

³¹⁶*United States v. Wallace*, No. 93-3178, 1994 WL 486877, at *2 (5th Cir., Sept. 8, 1994) (failed to remove hat); *United States v. Banks*, 10 F.3d 1044, 1049 (4th Cir. 1993) (shabby dress suggested irresponsible attitude towards jury service); *United States v. Lorenzo*, 995 F.2d 1448, 1454 (9th Cir.) (long hair and beard associated with "hippies"), *cert. denied*, 114 S. Ct. 225 (1993); *United States v. Mixon*, 977 F.2d 921, 923 (5th Cir. 1992) (appearance went into the "equation").

skills,³¹⁷ eye contact,³¹⁸ intuition³¹⁹ and inattentiveness.³²⁰

The Ninth Circuit Court of Appeals' reasoning in *United States v. Lorenzo*, in 1993, typifies the way most courts handle a *Batson* claim.³²¹ A grand jury indicted fifteen individuals on seventy-nine counts of various violations arising out of their use of a tax protest method known as the "redemption" scheme.³²² The indictment charged that the defendants conspired to file false documents with the Internal Revenue Service and to impede the administration of justice.³²³ The "redemption" scheme advocated the use of federal income tax forms by an "injured" party as a means of retaliating against those deemed

³¹⁷ [Editor's Note: the following cases appear in reverse chronological order by date of decision]: *Byse*, 28 F.3d at 1167 & n.2 (inarticulate); *Pemberthy v. Beyer*, 19 F.3d 857, 866 (3rd Cir.) (Spanish-speaking venirepersons might not follow official translation of Spanish-language evidence), *petition for cert. filed*, No. 94-5869 (Aug. 4, 1994); *Boyd v. Groose*, 4 F.3d 669, 672 (8th Cir. 1993) (venireperson difficult to understand); *United States v. Arce*, 997 F.2d 1123, 1126 (5th Cir. 1993) (Spanish-speaking venireperson might not follow official translation of Spanish-speaking witnesses); *United States v. Changco*, 1 F.3d 837, 840 (9th Cir.) (Spanish-speaking venireperson spoke English poorly), *cert. denied*, 114 S. Ct. 619 (1993); *United States v. Casper*, 956 F.2d 416, 419 (3d Cir. 1992) (venireperson "inarticulate").

³¹⁸ *United States v. Chandler*, 12 F.3d 1427, 1431 (7th Cir. 1994) (venireperson made eye contact with defendant when asked if he knew defendant); *Polk v. Dixie Ins. Co.*, 972 F.2d 83, 85 (5th Cir. 1992) (eye contact), *cert. denied*, 113 S. Ct. 982 (1993); *United States v. Swinney*, 970 F.2d 494, 496 (8th Cir.) (venireperson's sunglasses prevented eye contact with prosecutor), *cert. denied*, 113 S. Ct. 632 (1992).

³¹⁹ *Brown v. Kelly*, 973 F.2d 116, 120 (2d Cir. 1992) (proffered justification based upon subjective evaluations adequate), *cert. denied*, 113 S. Ct. 1060 (1993); *United States v. Hughes*, 970 F.2d 227, 230-31 (7th Cir. 1992) (approving intuitive assumptions); *United States v. Hinojosa*, 958 F.2d 624, 632 (5th Cir. 1992) ("valid reasons for exclusion may include intuitive assumptions").

³²⁰ *United States v. Johnson*, 28 F.3d 1487, 1493 (8th Cir. 1994) (inattentive or asleep during voir dire); *United States v. Diaz*, 26 F.3d 1533, 1542-43 (11th Cir. 1994) (inattentive); *United States v. Cooper*, 19 F.3d 1154, 1160 (7th Cir. 1994) (bored or disinterested appearance); *United States v. Chandler*, 12 F.3d 1427, 1431 (7th Cir. 1994) (appeared inattentive); *United States v. Johnson*, 4 F.3d 904, 913 (10th Cir. 1993) (inattentive to court's questions during voir dire), *cert. denied sub nom. Nottingham v. United States*, 114 S. Ct. 1081 (1994); *United States v. Changco*, 1 F.3d 837, 840 (9th Cir.) (inattentiveness valid explanation), *cert. denied*, 114 S. Ct. 619 (1993); *United States v. Cure*, 996 F.2d 1136, 1138 (11th Cir. 1993) ("venireperson not paying attention and was reading a book instead of following proceedings"), *cert. denied*, 114 S. Ct. 1075 (1994); *United States v. Lorenzo*, 995 F.2d 1448, 1454 (9th Cir.) (prosecutor preferred attentive venirepersons), *cert. denied*, 114 S. Ct. 225 (1993); *United States v. Pofahl*, 990 F.2d 1456, 1466 (5th Cir.) (inattentiveness valid explanation), *cert. denied sub nom. Nunn v. United States*, 114 S. Ct. 266 (1993); *United States v. Cobb*, 975 F.2d 152, 155 (5th Cir. 1992) (venireperson not paying attention), *cert. denied*, 113 S. Ct. 1397 (1993); *United States v. Collins*, 972 F.2d 1385, 1403 (5th Cir. 1992) (venireperson sleeping); *United States v. Todd*, 963 F.2d 207, 211 (8th Cir. 1992) (venireperson appeared inattentive).

³²¹ *United States v. Lorenzo*, 995 F.2d 1448, 1451 (9th Cir.), *cert. denied*, 114 S. Ct. 225 (1993).

³²² *Id.*

³²³ *Id.*

responsible for wrongs against that person.³²⁴ For example, aggrieved parties utilizing the scheme filed false tax forms seeking tax refunds and claiming payment of compensation to government officials.³²⁵ The participants sought to use the false filings to harass the government officials and hopefully receive payment through tax refunds, although fraudulently induced. The defendants used the "redemption" scheme against a number of state and federal officials, including the Governor of Hawaii, against whom they had grievances primarily based upon perceived violations of native Hawaiian rights.³²⁶

At the trial in the United States District Court for the District of Hawaii, the prosecution used three of its six peremptory challenges to strike three potential jurors with "Hawaiian or Polynesian surnames."³²⁷ The defendants argued that these strikes were racially motivated in violation of the Fourteenth Amendment.³²⁸ The Government, however, articulated explanations for the peremptory strikes which the trial court deemed race-neutral and credible.³²⁹

On appeal, the circuit court upheld the trial court's finding.³³⁰ The Government offered several race-neutral explanations for its strikes.³³¹ It challenged the first juror, Vaifa, a Samoan chieftain, because he had fallen asleep during the voir dire and because he had walked in and out of the voir dire at times when jurors were not supposed to be present.³³² The prosecutor also stated, that he "got the feeling that he was somewhat disoriented . . . and, again, my consistent theme here is I would prefer people who have more attentiveness, a little older and educated."³³³ Declaring the lack of attentiveness a facially race-neutral explanation, the appellate court upheld the strike.³³⁴

The second juror, Akuna, asked to be excused during voir dire on account of hardship because he was the only person in his family who worked and would not receive wages for the period while on jury duty.³³⁵ The trial court considered excusing Akuna; however, in light of the dwindling venire the judge suggested to counsel on several

³²⁴ *Id.*

³²⁵ *Id.* at 1452.

³²⁶ *Lorenzo*, 995 F.2d at 1452.

³²⁷ *Id.* at 1453.

³²⁸ *Id.*

³²⁹ *Id.* at 1454, 1455.

³³⁰ *Id.* at 1455.

³³¹ *Lorenzo*, 995 F.2d at 1454.

³³² *Id.*

³³³ *Id.*

³³⁴ *Id.*

³³⁵ *Id.*

occasions that they consider peremptory challenges for those members who asked to be excused.³³⁶ Thus, the prosecution based its strike on the concern that the juror might hold his loss of pay against the prosecution.³³⁷ The trial court accepted this explanation and the circuit court affirmed.³³⁸

The court scrutinized the challenge of the final juror most closely.³³⁹ The Government challenged Kahoiwai, the third juror, because of a concern about jurors who might question the importance of government in such a politically-charged case.³⁴⁰ The prosecution inferred Kahoiwai's political philosophy from his "long, unkempt" hair and long beard, and "associated his appearance with the counter-culture beliefs of 'hippies.'"³⁴¹ In addition, the prosecutor expressed concern about the juror's level of education and the fact that he was employed at a shipyard where recently a major fraud investigation took place.³⁴² The trial court, disturbed by the prosecution's attitude toward persons with long hair and beards, noted that two of the defendants had beards and another long hair, but concluded that there was nothing in the law to preclude a party from challenging a person with a beard.³⁴³ The circuit court affirmed the trial court's finding, noting that concern that a juror may identify with the defendant for reasons other than those that act as a proxy for race suffice as race-neutral explanations.³⁴⁴

Lorenzo exemplifies the great deference appellate courts pay to a trial court's evaluation of the race-neutrality of *Batson* explanations.³⁴⁵ The appeals court deferred in each instance such that no jurors with Hawaiian or Polynesian surnames made it to the petit jury.³⁴⁶ *Lorenzo* also illustrates trial courts' minimal scrutiny of proffered race-neutral explanations.³⁴⁷ Thus, in most cases the courts' willingness to find various subjective and objective explanations as race-neutral allows attorneys to remove jurors on account of race if the attorney merely proffers a facially race-neutral explanation.³⁴⁸

³³⁶ *Lorenzo*, 995 F.2d at 1454.

³³⁷ *Id.*

³³⁸ *Id.* at 1454, 1455.

³³⁹ *See id.* at 1454.

³⁴⁰ *Id.*

³⁴¹ *Lorenzo*, 995 F.2d at 1454.

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ *See id.* at 1454-55.

³⁴⁶ *Lorenzo*, 995 F.2d at 1454-55.

³⁴⁷ *See id.* at 1454.

³⁴⁸ *See supra* notes 303-20 and accompanying text.

IV. GENDER AND BEYOND

Although the Court extended the *Batson* theory to gender, the *Batson* reality will more likely prevail in practice. Nothing in the *J.E.B.* opinion indicates that courts will not follow the same patterns of application of *Batson* in the sphere of gender. Thus, as a practical matter, the extension to gender will have little or no effect upon the role of gender in jury selection beyond the additional costs of administering the extra equal protection claims.

The *Batson* decision, upon which *J.E.B.* rests, fails to effectively eliminate race as a consideration in the exercise of peremptory challenges.³⁴⁹ Although attorneys may no longer act without justification—in all circumstances—when exercising peremptory strikes, they generally do not have to meet a difficult burden to justify their peremptory challenges. *Batson* effectively requires attorneys who wish to strike a venireperson because of the venireperson's race to find creative explanations for the strike and to seem credible when advancing those explanations. Moreover, many federal circuits do not appear to even require particularly creative race-neutral explanations.³⁵⁰ Explanations based upon the perceptions of an attorney, such as eye contact, attitude, demeanor and appearance, allow such an attorney to exercise racially discriminatory peremptory challenges under the cover of undetectable pretext. Pretext in a *Batson* challenge is largely undetectable because an attorney willing to proffer a pretextual explanation will carefully select criteria that apply to the juror and seem relatively innocuous to the court.

It is doubtful that courts will alter the jurisprudence governing the *Batson* doctrine merely because another protected category, namely gender, has been established. It is equally doubtful that extension to gender will alter the actions of the bar. Attorneys will merely adjust the pool of valid explanations that they utilize. In fact, most attorneys need only make minor alterations in their peremptory challenge strategies to negotiate around *J.E.B.* because the arsenal of acceptable explanations remains so expansive. Attorneys will continue to use objective and subjective race- and gender-neutral explanations based upon age, employment, education, housing, marital status, crimes and employment of relatives, appearance, language skills, eye contact, intuition and inattentiveness. Under the current application of *Batson*, for example, if a hypothetical attorney wishes to strike a Latino venirewoman be-

³⁴⁹ See *supra* notes 303–20 and accompanying text.

³⁵⁰ See *supra* notes 309–20 and accompanying text.

cause of prejudice towards Latinos, the attorney, through minimal creativity, can successfully justify a peremptory challenge with a facially race-neutral explanation in the face of opposing counsel's prima facie case under *Batson*.³⁵¹ A moderately creative attorney may find a facially race-neutral explanation in the venireperson's courtroom demeanor, age, clothing, occupation, language skills or education.

Gender-based peremptory challenges are vulnerable to the same abuse as race-based peremptory challenges. If the same hypothetical attorney wishes to strike the Latino woman based on her gender, the attorney can utilize most or all of the objective and subjective characteristics, described above, as gender-neutral explanations. This attorney will, in anticipation of an equal protection challenge, consider which facially gender-neutral explanations apply to the venirewoman. If the potential juror is a shabby dresser, the attorney may argue that the potential juror's clothing illustrates a lack of respect for the judicial process. In the case of a high school drop-out, the attorney could contend that the complex nature of the facts requires a level of understanding consistent with a high school graduate. The attorney may also attempt to isolate gender-neutral factors that are particular to the venirewoman to weaken the appearance of pretext. The possible fact that she is the only shabby dresser or high school drop-out on the venire diminishes the appearance of pretext. Upon an equal protection-based objection to a peremptory challenge, the attorney will merely assert the prepared gender-neutral explanation. In most instances the court will accept the explanation as it does for most race-based challenges.

As *Batson* is extended to "protect" additional classifications, the peremptory challenge system is diluted because attorneys must justify their peremptory challenges more often. Accordingly, some members of the Court have criticized the Court for the original decision in *Batson* because they believe it started the peremptory challenge down the proverbial slippery slope, spelling the ultimate demise of the peremptory challenge system.³⁵² In contrast, other commentators argue the merits of *Batson* and that the judiciary should enforce *Batson* more effectively.³⁵³ The difficulty with this position is that although the judiciary might make *Batson* slightly more effective through the development of common law doctrine, it cannot properly account for the effect this would have on the jury selection system.

³⁵¹ See *supra* notes 211, 309-20 and accompanying text.

³⁵² See *supra* notes 267-81 and accompanying text.

³⁵³ E.g., Raphael & Ungvarsky, *supra* note 303, at 267-68 (1993); Swift, *supra* note 303, at 361-68.

Adjustments and criticism will not determine the future of the peremptory challenge in the United States. Given *Batson* and *J.E.B.*, it is not outrageous to anticipate that the Court will expand the protective reach of *Batson* and its progeny to protect other classes.³⁵⁴ Indeed, the Court has chipped away at the traditional peremptory challenge for almost a decade.³⁵⁵ Minor adjustments in the implementation of *Batson* will not address the basic survival of the peremptory challenge system. While this system cannot return to its status prior to *Batson*, it can retain its purpose.³⁵⁶

The difficulty of effectively implementing the peremptory challenge in compliance with *Batson*, and now *J.E.B.*, illustrates the need to face the peremptory challenge with reason informed by ample debate. We must decide whether the peremptory challenge system will survive. If it is to survive then we must create a solution that will conform to the requirements of the Equal Protection Clause. If it is not to survive then we must consider whether other methods of excluding biased jurors, such as expanded voir dire questioning, will take its place.

The Judicial Conference, established pursuant to the Rules Enabling Act,³⁵⁷ should undertake an examination of this issue and propose new comprehensive rules for inclusion within both the Federal Rules of Civil and Criminal Procedure.³⁵⁸ The states could then utilize the new rules as examples of how to amend their own laws. The Judicial Conference could analyze and debate the effect *Batson* has on the current jury selection system and then propose adjustments to the system where necessary. Adjustment or alteration of the application of the peremptory challenge system through the development of the

³⁵⁴ See *supra* notes 169–70, 267.

³⁵⁵ See *supra* note 3.

³⁵⁶ See *supra* notes 73–86 and accompanying text.

³⁵⁷ 28 U.S.C. §§ 2071, 2072, 2073(a)(1) (1988).

³⁵⁸

The Federal Rules of Civil [and Criminal Procedure] govern the conduct of civil [and criminal] trials in federal court. Their authority comes from Congress, but, unlike the Judiciary Code [Title 28 of the United States Code], the Rules are not a product of direct congressional legislation. Instead Congress has enacted 28 U.S.C. § 2072 (the Rules Enabling Act), which authorizes the Supreme Court to promulgate rules of procedure.

Although the Rules Enabling Act gives the Supreme Court power to promulgate the Rules, the Justices do not in practice do the actual drafting. That process instead occurs in committees of the Judicial Conference, a supervisory and administrative arm of the federal courts. . . . Judges, practitioners, and scholars are appointed to these advisory committees.

common law will not resolve the problems the courts have encountered in the application of *Batson*. Surely the courts may manipulate the application of the *Batson* three-pronged test. Depending on the leanings of any given judge, however, this will not result in a comprehensive and effective system because results will vary by jurisdiction. An effective solution requires a head-on confrontation with basic policy choices and resolution by new global rules of procedure. These changes are most appropriately dealt with by the Judicial Conference within the Rules Enabling Act framework.

V. CONCLUSION

The peremptory challenge, historically, did not require attorneys to explain the basis for its use during jury selection. Currently, the Court requires an attorney to proffer a race-neutral explanation for a peremptory challenge if opposing counsel has made a prima facie case of racial motivation. This burden-shifting scheme, however, has been ineffective because the courts have accepted most explanations as race-neutral, and attorneys may easily thwart the race-neutral requirement. Moreover, the elimination of gender as a valid justification for the exercise of peremptory challenges will not effectively eliminate peremptory challenges based solely on gender. The Judicial Conference must face basic policy considerations implicated by the peremptory challenge and the *Batson* line of cases head-on or we risk perpetuation of a wasteful and ineffective process.

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