

# Batson v. Kentucky: A Half Step in the Right Direction (Racial Discrimination and Peremptory Challenges Under the Heavier Confines of Equal Protection)

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## NOTES

### *BATSON v. KENTUCKY*: A HALF STEP IN THE RIGHT DIRECTION (RACIAL DISCRIMINATION AND PEREMPTORY CHALLENGES UNDER THE HEAVIER CONFINES OF EQUAL PROTECTION)

The jury system has long been recognized as an essential feature of criminal trials.<sup>1</sup> The sixth amendment guarantees the federally accused an “impartial jury”<sup>2</sup> and the fourteenth amendment extends this guarantee to state criminal defendants.<sup>3</sup> Jury selection techniques, as described by Lord Coke, seek to produce jurors who are “indifferent as they stand unsworn.”<sup>4</sup>

Unfortunately, couched within the traditions of these selection techniques lie intractable patterns of invidious discrimination. Specifically, the peremptory challenge to potential jurors is “probably the single most significant means by which . . . prejudice and bias [are] injected into the jury selection system.”<sup>5</sup> This Note discusses the concern surrounding the peremptory challenge, along with the adequacy of the Supreme Court’s latest word on the subject, *Batson v. Kentucky*.<sup>6</sup> After explaining the basics of jury selection, this Note briefly presents the judicial history culminating in the *Batson* decision. The focus then turns to the significant and inherent shortcomings of *Batson*’s remedy for discrimination. Finally, this Note proposes changes in the jury selection system which would make the constitutional safeguards of potential minority jurors and minority defendants (whether based on equal protection or fair cross section guarantees) a workable reality rather than a well meaning but nonetheless illusory promise. Specifically, elimination of the peremptory challenge could produce this reality.

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<sup>1</sup> *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

<sup>2</sup> U.S. CONST. amend. VI.

<sup>3</sup> U.S. CONST. amend. XIV; *Duncan*, 391 U.S. at 149 (“Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment’s guarantee.”).

<sup>4</sup> 1 E. COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* § 155b (19th ed. 1832 & photo reprint 1979).

<sup>5</sup> Imlay, *Federal Jury Reformation: Saving a Democratic Institution*, 6 *LOY. L.A.L. REV.* 247, 270 (1973).

<sup>6</sup> 106 S. Ct. 1712 (1986).

## 1

## THE BASICS OF JURY SELECTION AND THE CONSTITUTION

The selection of the petit jury, the final group chosen to hear a case, begins with the compilation of a "master wheel" of potential jurors in the community using the list of registered voters or the list of actual voters.<sup>7</sup> In recognition of minority underrepresentation on such lists, the Jury Systems Improvement Act of 1978<sup>8</sup> provides that, where necessary to facilitate a fair community cross section, communities should supplement these lists with lists from other sources.<sup>9</sup> From the resulting master list, the court "calls" a group of people for a particular period of time to serve as the "venire." After some are excused for claimed inconveniences,<sup>10</sup> the final stage of jury selection occurs: challenges.<sup>11</sup>

The attorneys trying the case may challenge prospective jurors during voir dire,<sup>12</sup> an often lengthy period of pretrial questioning in the presence of the judge that seeks to establish the jurors' ability to impartially try the case before them. Attorneys may make two types of challenges during this questioning period: "for cause" and peremptory. A "for cause" challenge requires judicial approval<sup>13</sup> and may only be made for reasons provided by statute.<sup>14</sup> A peremptory challenge, on the other hand, is "arbitrary and capricious"<sup>15</sup> and may be made for any reason. Statutes determine the number of peremptory challenges each side may make.<sup>16</sup>

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<sup>7</sup> J. VAN DYKE, *JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS* 85-109 (1977).

<sup>8</sup> 28 U.S.C. §§ 1861-1869 (1982).

<sup>9</sup> 28 U.S.C. § 1863(b)(2) (1982).

<sup>10</sup> J. VAN DYKE, *supra* note 7, at 111-37.

<sup>11</sup> *Id.* at 139-75.

<sup>12</sup> Literally, "to say the truth." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2562 (1981). Also, "to see what is said." J. VAN DYKE, *supra* note 7, at 140.

<sup>13</sup> J. VAN DYKE, *supra* note 7, at 145.

<sup>14</sup> *Id.* at 143. The grounds for such a challenge are generally the same. For example, California law provides:

Particular causes of challenge are of two kinds:

First—For such bias as, when the existence of the facts is ascertained, in judgment of law disqualifies the juror; and which is known in this Code as implied bias.

Second—For the existence of a state of mind on the part of the juror in reference to the case, or to either of the parties, which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party, which is known in this Code as actual bias.

CAL. PENAL CODE § 1073 (West 1985); *see also* CAL. PENAL CODE § 1074 (West 1985); CAL. CIV. PROC. CODE (West Supp. 1987).

<sup>15</sup> 4 W. BLACKSTONE, *COMMENTARIES* \*353, *cited in* *Swain v. Alabama*, 380 U.S. 202, 219 (1965).

<sup>16</sup> In the federal court system, FED. R. CRIM. P. 24(b) applies. Otherwise,

In *Batson v. Kentucky*<sup>17</sup> the Supreme Court sought to limit the use of peremptory challenges by prosecutors<sup>18</sup> (who act on behalf of the state) when they challenge a potential juror "solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant."<sup>19</sup> *Batson* marks a significant departure from the virtually illusory constitutional protection previously afforded blacks in the challenge phase of jury selection.<sup>20</sup>

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The procedure for the exercise of peremptory challenges is often left to the discretion of the trial court, although it is occasionally prescribed by statute. The prevailing state practice has been described as follows:

Twelve veniremen are called and examined, after which the prosecutor exercises such challenges for cause as may appear and then exercises such peremptories as he then desires to use. Anyone excused is immediately replaced in the box, so the prosecutor will tender 12 jurors to the defendant, who likewise exercises challenges for cause and whatever peremptories he then desires to use. Again those excused are immediately replaced, and when he is satisfied the defendant tenders the jury to the prosecutor. This procedure continues until both parties have exhausted their challenges or indicate their satisfaction with the jury.

An alternative procedure is known as a "struck jury":

The size of the panel at [the beginning of the striking procedure] is the sum of the number of jurors to hear the case plus the number of peremptories to be allowed all parties. The parties then proceed to exercise their peremptories, usually alternately or in some similar way which will result in all parties exhausting their challenges at approximately the same time.

Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 YALE L.J. 1715, 1718 n.18 (1977) (brackets in original) (quoting ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY 77, 77-78 (approved draft 1968)).

<sup>17</sup> 106 S. Ct. 1712 (1986).

<sup>18</sup> *Id.* at 1719. In *Imbler v. Pachtman*, 424 U.S. 409 (1976), the Court conclusively established that a prosecutor was a state actor. The *Batson* Court specifically declined to say whether there is a constitutional dimension to a defense attorney's improper use of the peremptory challenge. 106 S. Ct. at 1718 n.12. However, it has been suggested that by virtue of the state granting the peremptory challenge option to the defense attorney in the first place, his or her subsequent use should be construed as "state action" and thus subject to appropriate constitutional scrutiny. Note, *A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process*, 18 ST. LOUIS U.L.J. 662, 665 (1974).

<sup>19</sup> 106 S. Ct. at 1719.

<sup>20</sup> The *Batson* analysis contains several constitutional aspects. As Justice Marshall concluded in his plurality opinion in *Peters v. Kiff*, 407 U.S. 493 (1972), a defendant is denied due process of the law when indicted or tried by a grand or petit jury illegally composed. He emphasized:

When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

## II

THE ROAD TO *BATSON V. KENTUCKY*A. Discrimination and the Peremptory Challenge Before *Batson*

The fourteenth amendment, adopted in 1868, made blacks born and naturalized in the United States "citizens . . . of the state wherein they reside"<sup>21</sup> and required that the states neither abridge their "privileges and immunities" nor deprive them "of life, liberty, or property, without due process of law."<sup>22</sup> The amendment's most comprehensive protection provided that no person can be denied "the equal protection of the laws."<sup>23</sup> Twelve years later the Supreme Court began to use this protection to police the jury selection system. In *Strauder v. West Virginia*<sup>24</sup> the Court held that a state statute limiting jury service to white males violated the fourteenth amendment by excluding blacks.<sup>25</sup> In the following fifty-five years, however, this nondiscrimination directive was rarely enforced.<sup>26</sup> In 1935 the Court in *Norris v. Alabama*<sup>27</sup> found that the defendant had presented a prima facie case of state discrimination despite the contrary "factual" determinations made by the state courts. Testimony showed that no black had ever sat on a grand or petit jury and that potential juror lists included racial designations.<sup>28</sup> A simple statement by the jury commissioners that they did not consider race did

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*Id.* at 503-04. And, as stated in *Ex parte Virginia*, 100 U.S. 339, 348 (1879), a state's purposeful or deliberate denial to Negroes, on account of race, of a role as jurors in the administration of justice violates the equal protection clause.

The *Batson* decision was based on equal protection grounds, 106 S. Ct. at 1718, while leading state cases have reached similar results using the sixth amendment "fair cross section of the community" standards. *See, e.g.*, *People v. Wheeler*, 22 Cal. 3d 258, 285, 583 P.2d 748, 767, 148 Cal. Rptr. 890, 908 (1978) (California constitution's guarantee of jury of representative cross section held to be independent grounds to police discriminatory use of peremptory challenge beyond *Swain's* limited guidelines in building prima facie case); *Commonwealth v. Soares*, 377 Mass. 461, 478, 387 N.E.2d 499, 511 (1979) (same action based on similar guarantee of Massachusetts constitution); *State v. Crespino*, 94 N.M. 486, 488, 612 P.2d 716, 718 (N.M. Ct. App. 1980) (citing *Wheeler* approvingly and indicating willingness to relax prima facie guidelines for case of peremptory challenge discrimination to be built by the facts of present case, contra *Swain*); *State v. Gilmore*, 103 N.J. 508, 530, 511 A.2d 1150, 1167 (1986) (adopting *Wheeler* analysis to protect New Jersey constitutional guarantee of fair cross section of community juries, contra *Swain*); *see also* *State v. Neil*, 457 So. 2d 481, 486 (Fla. 1984) (using the Florida constitutional guarantee of an impartial jury).

<sup>21</sup> U.S. CONST. amend. XIV, § 1.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> 100 U.S. 303 (1879).

<sup>25</sup> Not until 1975 in *Taylor v. Louisiana*, 419 U.S. 522 (1975), did the Court include women in the sweep of constitutional prohibitions against overt discrimination in jury selection.

<sup>26</sup> J. VAN DYKE, *supra* note 7, at 52.

<sup>27</sup> 294 U.S. 587 (1935).

<sup>28</sup> *Id.* at 594.

not satisfactorily rebut this prima facie case.<sup>29</sup>

After *Norris*, jury discrimination cases focused on the requirements of a prima facie case. This inquiry rested on population figures and factors that presented the opportunity to discriminate. The ambiguous determinations that followed<sup>30</sup> called for more explanation. In 1965 the Court answered this call with *Swain v. Alabama*.<sup>31</sup>

In *Swain v. State*<sup>32</sup> the Alabama Supreme Court had affirmed the conviction of Robert Swain, a black man, for the rape of a white girl even though the prosecutor had peremptorily struck the six remaining black veniremen<sup>33</sup> and "no Negro ha[d] actually served on a petit jury [for 15 years]" in Talladega County, Alabama.<sup>34</sup> The all-white jury had sentenced Swain to death.<sup>35</sup>

The Supreme Court's *Swain* decision focused primarily on the rights of potential black jurors, finding that their inclusion in the venire satisfied almost all constitutional concerns. Once the challenge stage of jury selection began, however, blacks were, like the "white, Protestant and Catholic, . . . subject to being challenged without cause."<sup>36</sup> In sweeping deference to the "peremptory challenge system as we know it,"<sup>37</sup> the Court declared:

The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury *or that they were removed because they were Negroes*.<sup>38</sup>

The Court's statement supported the prosecutor's "right" to peremptorily challenge a black venireman solely due to his race, thus defending the discriminatory conclusion that a black cannot impartially try the case of a black defendant.

The Court did, however, indicate that consistent and systematic strikes of black veniremen raised "a different issue";<sup>39</sup> such a pat-

<sup>29</sup> *Id.* at 598.

<sup>30</sup> See, e.g., *Smith v. Texas*, 311 U.S. 128 (1940), and *Thomas v. Texas*, 212 U.S. 278 (1909), where on identical facts in the same county a challenge of prejudice in grand jury selection resulted in opposite results. For further examples and discussion, see *J. VAN DYKE*, *supra* note 7, at 53-62.

<sup>31</sup> 380 U.S. 202 (1965).

<sup>32</sup> 275 Ala. 508, 156 So. 2d 368 (1963), *aff'd*, 380 U.S. 202 (1965).

<sup>33</sup> 380 U.S. at 205. The other two black veniremen were excused for cause. *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 203.

<sup>36</sup> *Id.* at 221.

<sup>37</sup> *Id.* at 222.

<sup>38</sup> *Id.* (emphasis added).

<sup>39</sup> *Id.* at 223.

tern could rise to the level of a prima facie case of a prosecutor denying blacks the right to serve on a jury. The burden placed on a defendant to raise such a prima facie case, however, was staggering:

[W]hen the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries, the Fourteenth Amendment claim takes on added significance. In these circumstances . . . it would *appear* that the purposes of the peremptory challenge are being perverted. If the State has not seen fit to leave a *single* Negro on any jury in a criminal case, the presumption protecting the prosecutor *may well be* overcome.<sup>40</sup>

Despite the uncontested fact that no black had served on a petit jury for fifteen years,<sup>41</sup> the Court held that no prima facie case of discrimination existed because the record did not establish that "the prosecutor alone" was responsible.<sup>42</sup>

In the twenty-one years after *Swain*, only two claims succeeded in establishing a prima facie showing of discrimination.<sup>43</sup>

#### B. *Batson* and the New Prima Facie Case of Discrimination

In *Batson v. Kentucky*<sup>44</sup> the Supreme Court overruled the *Swain* standard for assessing a prima facie case of discrimination in petit jury selection. The Court declared that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable to consider impartially the State's case against

<sup>40</sup> *Id.* at 223-24 (citation omitted) (emphasis added).

<sup>41</sup> See *supra* notes 33-34 and accompanying text.

<sup>42</sup> 380 U.S. at 224. The Court noted that other prosecutors may have contributed to these statistics (although this prosecutor had served since 1953), *id.* at 225, or that defense counsel may have participated as well, *id.* at 227.

<sup>43</sup> *State v. Brown*, 371 So. 2d 751 (La. 1979) (prosecutor's peremptory challenges of all blacks in venire, along with evidence of similar systematic exclusions in past cases held to create prima facie case of discrimination); *State v. Washington*, 375 So. 2d 1162 (La. 1979) (prosecutor's peremptory exclusion of first 12 black veniremen along with an admission that it was his general practice to exclude blacks, without individual questioning, when defendant was black, held to constitute prima facie discrimination). Query whether the Louisiana Supreme Court used an anti-*Swain* gloss in these determinations.

Some other courts have tried various options to get around *Swain*, including the use of the government supervisory power, *United States v. Robinson*, 421 F. Supp. 467 (D. Conn. 1976), the FED. R. CRIM. P. 33 option of granting a new trial "in the interest of justice," *United States v. McDaniels*, 379 F. Supp. 1243 (E.D. La. 1974), and the use of state constitutions as providing protection to its citizens over and above *Swain's*. See *Commonwealth v. Soares*, 377 Mass. 561, 387 N.E.2d 499 (1977); *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

<sup>44</sup> 106 S. Ct. 1712 (1986).

a black defendant."<sup>45</sup>

In *Batson*, an all-white jury convicted a black defendant of second-degree burglary and receipt of stolen goods.<sup>46</sup> The prosecutor used his peremptory challenges to strike all four blacks on the venire.<sup>47</sup> The Supreme Court of Kentucky affirmed the conviction relying on *Swain*.<sup>48</sup> The United States Supreme Court reversed.<sup>49</sup>

Stating that a person's race "simply 'is unrelated to his fitness as a juror,'"<sup>50</sup> the Court insisted that the Constitution requires a searching review of state procedures to stop "all forms of purposeful racial discrimination in selection of jurors."<sup>51</sup> With this emphasis, the Court recognized that "*Swain* has placed on defendants a crippling burden of proof, [and] prosecutors' peremptory challenges are now largely immune from constitutional scrutiny."<sup>52</sup>

The Court established a new standard for assessing whether a defendant has established a prima facie case of discriminatory selection from the venire. "[A] defendant may establish a prima facie case . . . solely on evidence concerning the prosecutor's exercise of peremptory challenges *at the defendant's trial*."<sup>53</sup>

Under *Batson* the defense must prove three elements to overcome the presumption of legally permissible jury selection by the prosecutor. First, the defendant must show that he or she is a member of a cognizable racial group<sup>54</sup> and that the prosecutor exercised peremptory challenges to remove at least one member of the defendant's race from the venire.<sup>55</sup> Next, the Court allows the defendant to "rely on the fact . . . that peremptory challenges constitute a

<sup>45</sup> *Id.* at 1719.

<sup>46</sup> *Id.* at 1715.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 1715-16.

<sup>49</sup> *Id.* at 1716.

<sup>50</sup> *Id.* at 1718 (*quoting* Thiel v. Southern Pac. Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)).

<sup>51</sup> *Id.* at 1718; *see also* Martin v. Texas, 200 U.S. 316, 320-21 (1906) (while evidence of no blacks on the grand or petit jury alone does not constitute proof of discrimination, a defendant has the right not to have persons of his or her race excluded solely because of their race); Neal v. Delaware, 103 U.S. 370, 397 (1880) (purposeful exclusion of blacks from grand and petit juries violates black defendant's constitutional rights).

<sup>52</sup> 106 S. Ct. at 1720-21 (footnote omitted).

<sup>53</sup> *Id.* at 1722-23 (emphasis added). In a later case, Griffith v. Kentucky, 107 S. Ct. 708 (1987), the Court held that *Batson* applied to all cases pending or not yet final.

<sup>54</sup> 106 S. Ct. at 1723. Some courts have held that though the *Batson* protection applies to racial discrimination it does not apply to whites. *See, e.g.*, Pope v. State, 256 Ga. 189, 345 S.E.2d 831 (1986); State v. Wagster, 489 So. 2d 1299 (La. Ct. App. 1986), *cert. denied*, 493 So. 2d 1218 (La. 1986).

<sup>55</sup> 106 S. Ct. at 1723. *Batson* analysis presupposes a properly drawn venire. Litigation based on "master wheel" compilation techniques which either on their face or in their application result in an unrepresentative cross section of the community is beyond the scope of this note.

jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'"<sup>56</sup>

The final element of the prima facie case requires that the defendant show that the above facts "and any other relevant circumstances raise an inference that the prosecutor used [the peremptory challenge] to exclude the veniremen from the petit jury on account of their race."<sup>57</sup> Relevant circumstances include a discernable "pattern" of peremptory strikes and the prosecutor's questions and statements during voir dire questioning.<sup>58</sup> The trial judge then determines whether it is reasonable to infer discrimination. The Court insisted that "trial judges, experienced in supervising *voir dire*, will be able to decide [whether the defendant has established] a prima facie case of discrimination."<sup>59</sup>

After a defendant establishes a prima facie case,<sup>60</sup> the burden shifts to the state to "come forward with a neutral explanation for challenging black jurors."<sup>61</sup> Although the prosecutor's explanations "need not rise to the level justifying exercise of a challenge for cause,"<sup>62</sup> a mere statement by the prosecutor that he "challenged jurors of the defendant's race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race" is insufficient.<sup>63</sup> Nor can the prosecutor simply deny "a discriminatory motive" or affirm "good faith in individual selections."<sup>64</sup> Rather, the prosecutor must give "clear and reasonably specific" explanations for the challenges in question.<sup>65</sup>

The Court formulated no specific remedies for situations where the prosecutor fails to rebut the defendant's prima facie discrimination case. The Court's opinion suggests two options: a court could empanel a new venire and begin the jury selection process again, or it could allow selection of the petit jurors to resume with the ille-

<sup>56</sup> 106 S. Ct. at 1723 (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)).

<sup>57</sup> 106 S. Ct. at 1723.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Although the *Batson* court did not address the issue directly, other courts have interpreted *Batson* to require the defendant's initial objection to be "timely." *Williams v. State*, 712 S.W.2d 835, 840 (Tex. Ct. App. 1986) (proper time for objection was after peremptory strikes but before jury was sworn in); *see also United States v. Erwin*, 793 F.2d 856 (5th Cir. 1986) (objection dismissed as untimely where defendant waited week after peremptory challenges had been made although jury had not been sworn in yet); *Fleming v. Kemp*, 794 F.2d 1478 (11th Cir. 1986) (discussing timeliness in *habeas corpus* context); *Bowden v. Kemp*, 793 F.2d 273 (11th Cir. 1986) (same).

<sup>61</sup> 106 S. Ct. at 1723.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> 106 S. Ct. at 1723-24 n.20 (quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 258 (1981)).

gally challenged jurors reinstated on the venire.<sup>66</sup>

### III

#### THE SHORTCOMINGS OF THE *BATSON* REMEDY

Although the *Batson* decision makes it easier for a defendant to establish a prima facie case of discrimination and thus to shift the burden of rebuttal to the prosecutor, significant barriers to truly effective enforcement remain. Although a defendant may now establish a prima facie case based only on the facts in the trial at hand, the contours of what constitutes a prima facie showing of discrimination remain elusive, imprecise, and difficult to review on appeal. More significantly, the ease with which a prosecutor can rebut a defendant's prima facie case constitutes an important barrier to nondiscrimination in the jury selection system.

##### A. The Inadequacies Inherent in Building a Prima Facie Case

The precise contours of a prima facie showing remain poorly defined. Prima facie showings are relatively fact-specific and subjective. One court allowed the defendant to establish a prima facie case by showing that the prosecutor used his peremptory challenges to remove every member of the defendant's race from the venire.<sup>67</sup> But other courts have held that total exclusion, without more, does not establish a prima facie showing.<sup>68</sup>

Some defendants have offered statistical analyses to aid courts in their determinations. One such approach involves "rate[s] of exclusion"<sup>69</sup> in which the number of peremptory challenges available to the allegedly offending party is divided by the number of members of the venire not challenged for cause. This is the expected rate of exclusion. If the actual rate of exclusion, the number of minority members challenged peremptorily by the allegedly offending party divided by the number of minority group members on the venire not struck for cause, is significantly larger than the expected rate, a presumption of discrimination exists.<sup>70</sup> However, this analy-

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<sup>66</sup> *Id.* at 1724 n.24.

<sup>67</sup> *See, e.g.,* *People v. Clay*, 153 Cal. App. 3d 433, 455, 200 Cal. Rptr. 269, 279 (1984) (prima facie case of discrimination established solely by prosecutor's exclusion of all black veniremen from petit jury).

<sup>68</sup> *See, e.g.,* *People v. Rousseau*, 129 Cal. App. 3d 526, 536-37, 179 Cal. Rptr. 892, 897 (1982) (defendant held not to have established a prima facie case of discrimination by only stating that the prosecutor had peremptorily challenged the only blacks on venire); *Weathersby v. Morris*, 708 F.2d 1493, 1496 (9th Cir. 1983) (*dicta*) (same) (citing *United States v. Greene*, 626 F.2d 75 (8th Cir.), *cert. denied*, 449 U.S. 876 (1980)), *cert. denied*, 464 U.S. 1046 (1984).

<sup>69</sup> Note, *supra* note 16, at 1739 (1977).

<sup>70</sup> For example, if there are 48 jurors on the venire not challenged for cause and the allegedly offending party has six peremptory challenges, the *expected* rate of exclusion

sis still leaves unanswered the question of how great a discrepancy is "significant."<sup>71</sup>

Discrepancies in expected and actual rates of exclusion alone are not always conclusive, even if they are clearly significant. Other factors can contribute to a prima facie showing. The *Batson* court spoke of strike "patterns"<sup>72</sup> and noted that desultory voir dire questioning of an excused minority member of the venire suggested a discriminatory purpose.<sup>73</sup> *People v. Simpson*,<sup>74</sup> a post-*Batson* case decided in New York, suggested that a prosecutor's challenges for cause could provide helpful insight into peremptory challenge motives<sup>75</sup> and might create a "reasonable inference of discrimination." In another case, the prosecutor volunteered reasons for minority exclusions and thus, in the court's view, sacrificed his "presumption of correctness."<sup>76</sup>

Other complicating factors can negate a prima facie showing. For example, a defendant's own complicity in the "skewed membership" of the petit jury can estop a claim of discrimination.<sup>77</sup> In *State v. Moore*,<sup>78</sup> another post-*Batson* case, the first petit jury member selected was black, and the defense later peremptorily struck a black venireman that the prosecutor had accepted.<sup>79</sup> This defeated the defendant's prima facie claim.<sup>80</sup> However, these "complicating" factors do not address the motivation for a prosecutor's peremptory challenges of other minority veniremen, and thus courts should not allow the factors to negate a prima facie case.

More significantly, with their primary emphasis on numbers, prima facie guidelines necessitate that discriminatory challenges be

would be one in eight (6/48) or 12.5%. If that party challenged four of five blacks on the venire peremptorily, the actual rate of exclusion would be 80% (4/5). *Id.* at 1739 n.108.

<sup>71</sup> One professor suggested the following standard: "To suggest that discrimination is at work . . . the discrepancy must be great enough to eliminate chance as a reasonable explanation." Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235, 252 (1968). Kuhn referred to *Hernandez v. Texas*, 347 U.S. 475 (1954), where the Court said: "[I]t taxes our credulity to say that mere chance resulted in there being no member of this class among the over six thousand jurors called [to the venire] in the past 25 years." *Id.* at 482.

<sup>72</sup> 106 S. Ct. at 1723.

<sup>73</sup> *Id.* at 1723.

<sup>74</sup> 121 A.D.2d 881, 504 N.Y.S.2d 115 (1986).

<sup>75</sup> *Id.* at 883 n.1, 504 N.Y.S.2d at 117 n.1.

<sup>76</sup> *Weathersby v. Morris*, 708 F.2d 1493, 1496 (9th Cir. 1983), cert. denied, 464 U.S. 1046 (1984); cf. *United States v. Rabb*, 752 F.2d 1320, 1325 (9th Cir. 1984) (unlike *Weathersby*, district court decision impermissibly requested explanation of challenge before prima facie case had been established).

<sup>77</sup> *Commonwealth v. Whitehead*, 379 Mass. 640, 400 N.E.2d 821, 828 (1980).

<sup>78</sup> 490 So. 2d 556 (La. Ct. App. 1986).

<sup>79</sup> *Id.* at 558-59.

<sup>80</sup> *Id.*

“flagrant.”<sup>81</sup> Therefore, as Justice Marshall pointed out, “Prosecutors are left free to discriminate against blacks in jury selection provided that they hold that discrimination to an ‘acceptable’ level.”<sup>82</sup>

The Court calls upon trial judges to use their own experience and judgment to decide whether a defendant has made a prima facie showing.<sup>83</sup> The morass of contributing and negating factors that a judge may consider results in a more judge-specific than case-specific determination. Consequently, appellate courts are highly deferential to the trial judge’s initial ruling on the existence of a prima facie case.<sup>84</sup>

## B. The Ease of Rebutting a Prima Facie Case

Once a defendant successfully establishes a prima facie case of discrimination in jury selection against a prosecutor, “the burden shifts to the State to come forward with a neutral explanation for challenging black jurors.”<sup>85</sup> The *Batson* Court called for “clear and reasonably specific” explanations,<sup>86</sup> which “need not rise to the level justifying exercise of a challenge for cause.”<sup>87</sup> The Court, attempting to limit the broad range of rebuttal possibilities, declared that neither an avowal of good faith nor a statement of belief that a black potential juror could not be impartial because of his race is a valid explanation.<sup>88</sup> Nevertheless, a prosecutor can so easily rebut a prima facie case that the Court’s equal protection guarantees are illusory.

Some prosecutors do put forward obvious “sham excuses” which can even be detected on appeal. In *People v. Hall*,<sup>89</sup> for example, the prosecutor in a rape case justified his peremptory challenge of a black venireman on the ground that “‘Mr. Robinson never

<sup>81</sup> 106 S. Ct. at 1728 (Marshall, J., concurring).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 1723.

<sup>84</sup> *Id.* at 1724 n.21; see also *People v. Clay*, 153 Cal. App. 3d 433, 456, 200 Cal. Rptr. 269, 279 (1984) (“[W]e must ‘rely on the good judgment of the trial courts to distinguish bona fide reasons . . . from sham excuses . . . .’”) (quoting *People v. Wheeler*, 22 Cal. 3d 258, 282, 583 P.2d 748, 765, 148 Cal. Rptr. 890, 906 (1978)); *Commonwealth v. DiMatteo*, 12 Mass. App. 547, 551-53, 427 N.E.2d 754, 758 (1981) (any support in trial record precludes substituting trial judge’s judgment with appellate judgment), *appeal denied*, 385 Mass. 1101, 440 N.E.2d 1173 (1982). *But see* *People v. Fuller*, 136 Cal. App. 3d 403, 423, 186 Cal. Rptr. 283, 296 (1982) (finding that no independent grounds for peremptory challenges of black veniremen were present thus overruling lower court and holding that prima facie case was established).

<sup>85</sup> *Batson*, 106 S. Ct. at 1723.

<sup>86</sup> *Id.* at 1724 n.20.

<sup>87</sup> *Id.* at 1723.

<sup>88</sup> *Id.*

<sup>89</sup> 35 Cal.3d 161, 672 P.2d 854, 197 Cal. Rptr. 71 (1983).

cracked a smile' ” and was therefore insensitive.<sup>90</sup> Although the trial court accepted this explanation, the Supreme Court of California reversed, with the Chief Justice ridiculing: “Get the word out to black venire persons: they should all be jolly if they wish to sit in judgment of rape cases.’ ”<sup>91</sup> In *People v. Fuller*<sup>92</sup> the prosecutor unsuccessfully rebutted the prima facie case by accusing the defense attorney of discrimination in his own challenges.<sup>93</sup> Again, the trial court was satisfied but the case was reversed on appeal.

As Justice Marshall opined in his *Batson* concurrence, “Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill-equipped to second-guess those reasons.”<sup>94</sup> One court recognized the ease with which a prosecutor could rebut a prima facie showing, but seemingly accepted that possibility stating, “The evidence [offered in rebuttal] may range from the obviously serious to the apparently trivial, from the virtually certain to the highly speculative. For example, a prosecutor may fear bias on the part of one juror . . . because his clothes or hair length suggest an unconventional lifestyle.”<sup>95</sup>

Cases applying a *Batson*-like analysis, primarily in California and Massachusetts, illustrate the disturbing ease with which a prosecutor can defeat a prima facie discrimination case.<sup>96</sup> Acceptable explanations have included “evasive answers,”<sup>97</sup> uncommunicativeness,<sup>98</sup> and that “the juror was wearing a gold earring and the prosecutor did not ‘like his looks.’ ”<sup>99</sup> In another case, the prosecutor conspicuously shifted the supposed grounds for his peremptory challenges

<sup>90</sup> *Id.* at 165, 672 P.2d at 856, 197 Cal. Rptr. at 73 (quoting trial record).

<sup>91</sup> *Id.* at 173, 672 P.2d at 861, 197 Cal. Rptr. at 79 (Bird, C.J., concurring) (quoting *People v. Hall*, 189 Cal. Rptr. 283 (Cal. Ct. App. 1983) (Poché, J., dissenting)).

<sup>92</sup> 136 Cal. App.3d 417, 186 Cal. Rptr. 283 (1982).

<sup>93</sup> *Id.* at 417-18, 186 Cal. Rptr. at 291-93.

<sup>94</sup> 106 S. Ct. at 1728 (Marshall, J., concurring).

<sup>95</sup> *People v. Wheeler*, 22 Cal. 3d 258, 275, 583 P.2d 748, 760, 148 Cal. Rptr. 890, 902 (1978).

<sup>96</sup> One of the first cases applying the *Batson* standards, *State v. Newman*, 491 So. 2d 174 (La. Ct. App. 1986), illustrates the illusory nature of a prima facie discrimination case once the burden shifts to a prosecutor. There, the prosecutor successfully responded:

Each one of the peremptory challenges that I exercised, I do have written down on my sheet of paper a particular reason as to, not as to race, but as to answers to questions that I posed to the potential jurors that made me make my selection, and there was no systematic basis by which I excluded anyone and it was strictly on the questions to the answers [sic] that I posed to them and I exercised the challenges that are given to me under the Code of Criminal Procedure.

*Id.* at 177. This “adequate” explanation seems little better than an avowal of good faith.

<sup>97</sup> *Weathersby v. Morris*, 708 F.2d 1493, 1496 (9th Cir. 1983), cert. denied, 464 U.S. 1046 (1984).

<sup>98</sup> *King v. County of Nassau*, 581 F. Supp. 493, 498-99 (E.D.N.Y. 1984).

<sup>99</sup> *Commonwealth v. Lattimore*, 396 Mass. 446, 448, 486 N.E.2d 723, 725 (1985).

of blacks.<sup>100</sup> He started with "youth," but because he had not challenged youthful whites he supplemented his answer by stating that the challenge was based on the black juror's "demeanor" and a "lot of intangible factors" and "vibrations."<sup>101</sup> The court found that the challenges were not racially motivated.<sup>102</sup>

Appellate review of these cases is extremely limited. As stated in *King v. County of Nassau*,<sup>103</sup> "[A]ny explanation which a Court deems adequate as a matter of law should be treated as having a sufficient basis in fact unless it appears plainly that the explanation is factually incorrect or that it is totally lacking in factual basis."<sup>104</sup>

A subconscious barrier to equal protection also exists in these cases. Prosecutors are under "enormous pressure to lie regarding their motives."<sup>105</sup> In addition, "it is . . . possible that an attorney may lie to himself in an effort to convince himself that his motives are legal."<sup>106</sup> Justice Marshall, in *Batson*, commented:

A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported.<sup>107</sup>

Judicial investigation of a prosecutor's explanation can extend beyond the judge's own gut instinct. A judge can also determine whether a prosecutor's given reasons would have made unexcused white veniremen objectionable. Again, however, a prosecutor can easily find a distinguishing feature (such as a gold earring) or some subjective personality evaluation (such as a uncommunicativeness) that will easily withstand review by the trial judge.

The ambiguities of prima facie showings of discrimination and the ease with which a prosecutor can rebut those showings significantly hinder the enforcement of nondiscriminatory peremptory challenges. These barriers will exist as long as the courts allow essentially arbitrary challenges that "need not rise to the level justifying exercise of a challenge for cause."<sup>108</sup> The only effective way to protect against discriminatory jury challenges is to eliminate peremptory challenges completely.

<sup>100</sup> United States v. Campbell, 766 F.2d 26 (1st Cir. 1985).

<sup>101</sup> *Id.* at 27 (quoting government prosecutor's statements).

<sup>102</sup> *Id.* at 27-28.

<sup>103</sup> 581 F. Supp. 493 (E.D.N.Y. 1984).

<sup>104</sup> *Id.* at 499 (emphasis in original).

<sup>105</sup> *Id.* at 502.

<sup>106</sup> *Id.*

<sup>107</sup> *Batson*, 106 S. Ct. at 1728 (Marshall, J., concurring).

<sup>108</sup> *Id.* at 1723.

## IV

ABOLISHING THE PEREMPTORY CHALLENGE: THE ONLY  
EFFECTIVE REMEDY

In the years preceding *Batson*, jury discrimination claims emphasized establishment of a prima facie case. Indeed, *Batson* is a "historic step"<sup>109</sup> in that regard. But in light of the Court's renewed commitment to eliminate discrimination in jury selection and in recognition of the inherent impediments to policing the peremptory challenge, the time has come to remedy jury selection discrimination completely by abolishing the peremptory challenge altogether.

As the *Batson* Court recognized, "there can be no dispute, . . . peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'"<sup>110</sup> This section explains how the jury selection system can sustain the loss of the peremptory challenge. First, it traces the history of the challenge and discusses the Supreme Court's view of the constitutional implications of eliminating the challenge. Next, it discusses the pervasiveness of jury selection discrimination in light of the Supreme Court's mandate for effective remedial action. Finally, it explores the functions of the peremptory challenge and argues that a slightly liberalized voir dire and challenge for cause can fill most of the gaps left by this proposal, while avoiding the discriminatory pitfalls of current law.

## A. Historical Origins of the Peremptory Challenge

The peremptory challenge is traceable to abusive practices by the Crown.<sup>111</sup> The early English jury consisted of a group of witnesses to the charged crime and served as an inquisitorial device.<sup>112</sup> The Crown sought and selected jurors who possessed the most relevant knowledge, and thus the number of "peremptory challenges" was unlimited.<sup>113</sup> In 1305, however, because the Crown's right was perceived as "mischievous to the subject, tending to infinite delays and danger,"<sup>114</sup> An Ordinance for Inquests<sup>115</sup> removed the

<sup>109</sup> *Id.* at 1726.

<sup>110</sup> *Id.* at 1723 (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)).

<sup>111</sup> Comment, *Swain v. Alabama: A Constitutional Blueprint for the Perpetuation of the All-White Jury*, 52 VA. L. REV. 1157, 1170-71 (1966) (summarizing T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 110-28, 433 (5th ed. 1956)).

<sup>112</sup> See T. PLUCKNETT, *supra* note 111, at 109-113. The original English jury in criminal trials more closely resembled today's grand jury. Royal officers could compel "inhabitants . . . to inform against evil doers to disclose mysterious crimes, and to tell of their suspicions." *Id.* at 112. In essence, these "juries" merely accused individuals but did not determine guilt or innocence. *Id.* at 113. Thus, the Crown's officers "dismissed" from juries those with no knowledge of crimes.

<sup>113</sup> Comment, *supra* note 111, at 1171.

<sup>114</sup> *Id.* (quoting 1 E. COKE, *supra* note 4, § 156b).

Crown's unlimited right to challenge, although still permitting challenges for cause.<sup>116</sup>

The defendant, on the other hand, possessed the statutory right<sup>117</sup> to what is recognizable as the modern peremptory challenge. The defendant's right to challenge was unquestioned and, in the words of the influential eighteenth century legal commentator Sir William Blackstone, was "a provision full of that tenderness and humanity to prisoners for which our English laws are justly famous."<sup>118</sup>

As early as 1682, the courts allowed the Crown a "substitute for the . . . peremptory challenge, the so-called right to 'stand aside.'"<sup>119</sup> The Crown could ask an unlimited number of potential jurors to stand aside without explanation, so long as twelve jurors were chosen before exhaustion of the venire panel.<sup>120</sup> In essence, this right was based on an assumption that cause existed whenever the Crown challenged a juror. On the rare occasions when twelve jurors were not chosen, the Crown was required to show cause for those challenged.<sup>121</sup>

An Ordinance of Inquests<sup>122</sup> marked the English shift from the inquisitorial jury to that of an impartial trier of facts.<sup>123</sup> Even the "stand aside" rights of the Crown were, theoretically, only a delayed challenge for cause. Juries served the same function in the United States. "[T]he right to be tried by a jury of his peers gave [the defendant] an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."<sup>124</sup> Professor Jon Van Dyke set out the initial American system of challenges:

[T]he 1305 statute providing for peremptory challenges by de-

<sup>115</sup> 33 Edw. 1, Stat. 4 (1305), *reprinted in* 1 D. PICKERING, STATUTES AT LARGE 309-10 (1762).

<sup>116</sup> The peremptory challenge has never been restored to the prosecution in England. Comment, *supra* note 111, at 1171.

<sup>117</sup> *Id.*

<sup>118</sup> 4 W. BLACKSTONE, *supra* note 15, at \*353.

<sup>119</sup> Comment, *supra* note 111, at 1171.

<sup>120</sup> *Id.*

<sup>121</sup> Because judicial discretion governed the number of potential jurors called, apparently the venire panel was rarely exhausted before a petit jury was empaneled. For example, in 1699 a prosecutor, asked to "show cause" for the persons he requested to "stand aside," replied: "I do not know in all my practice of this nature, that it was ever put upon the king to shew cause, and I believe some of the king's counsel would say they have not known it done." *Cowper's Case*, 13 How. St. Tr. 1106, 1108 (1699), *quoted in* Merriam, *Right of Prosecution to Stand Jurors Aside*, 14 CENT. L.J. 402, 403 (1882).

<sup>122</sup> 33 Edw. 1 Stat. 4 (1305), *reprinted in* 1 D. PICKERING, *supra* note 115, at 309-10 (1762).

<sup>123</sup> Comment, *supra* note 111, at 1172.

<sup>124</sup> *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

defendants was accepted as a part of the received common law. The prosecution's practice of "standing jurors aside" was, however, more controversial, and substantial popular protest was raised against it. The two most populous states, New York and Virginia both *denied the prosecution any peremptory challenges for most of the nineteenth century*. Some states continued to authorize "standing aside," and some gradually began allowing the prosecution to challenge peremptorily, but . . . limited the number severely.<sup>125</sup>

Although the prosecution gradually came to exercise the peremptory challenge by statutory right, historical origins of the challenge demonstrate that the prosecutor's interest in peremptory challenges does not outweigh the defendant's interest. Furthermore, early in the twentieth century the Supreme Court declared that the challenge had no Constitutional dimensions: "There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges . . . ."<sup>126</sup>

#### B. Pervasiveness of Jury Selection Discrimination

"Misuse of the peremptory challenge to exclude black jurors has become both common and flagrant"<sup>127</sup> declared Justice Marshall in *Batson*. This Note does not explore the truth of this statement in depth: the proof would be both voluminous and sadly intuitive anyway. Justice Marshall gathered corroborative statistics introduced as evidence in several cases and noted open admissions made by prosecutors who routinely strike black jurors.<sup>128</sup> As quoted in a *Texas Observer* newspaper article in 1973, an instruction book used by one Texas county prosecutor's office explicitly advised prosecutors to eliminate "'any member of a minority group'"<sup>129</sup> during selection. In that county the chance of a qualified black sitting on a jury was one-in-ten, compared to one-in-two for a white.<sup>130</sup>

That such purposeful exclusion is unconstitutional has been firmly established.<sup>131</sup> Statutory rights to peremptory challenges, however, are facially neutral and thus not directly unconstitu-

<sup>125</sup> J. VAN DYKE, *supra* note 7, at 148-49 (footnotes omitted) (emphasis added).

<sup>126</sup> *Stilson v. United States*, 250 U.S. 583, 586 (1919). Obviously, this applies equally to defendants.

<sup>127</sup> 106 S. Ct. at 1726 (Marshall, J., concurring). For a comprehensive analysis of discrimination in jury selection, see Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985).

<sup>128</sup> 106 S. Ct. at 1726-27.

<sup>129</sup> J. VAN DYKE, *supra* note 7, at 152 (quoting *Texas Observer*, May 11, 1973, at 9, col. 2).

<sup>130</sup> *Batson*, 106 S. Ct. at 1727 (citing *Dallas Morning News*, March 9, 1986, at 1, col. 1).

<sup>131</sup> See, e.g., *Neal v. Delaware*, 103 U.S. 370 (1881) (holding unconstitutional Delaware's exclusion from juries of persons of African descent). See generally Johnson, *supra* note 127.

tional.<sup>132</sup> However, in light of the Court's renewed commitment to ending the invidious discrimination inherent in peremptory challenges and in recognition that the *Batson* remedy is not comprehensive, the Court must eliminate the peremptory challenge altogether.

In *Swain*, the Court showed great deference to the "nature and operation of the . . . peremptory challenge system as we know it."<sup>133</sup> But, as Justice Goldberg noted in his dissent, "Were it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former."<sup>134</sup> Therefore, "the system, not the Constitution, must be changed."<sup>135</sup>

### C. Implementation Guidelines

Given the discriminatory use of peremptory challenges and the sacrifices compelled by the Constitution, courts must rethink the purposes of jury selection, keeping in mind that "[t]he right to challenge is the right to reject, *not to select* a juror."<sup>136</sup> The challenge for cause, administered under a liberalized voir dire structure, would be sufficient for identifying and rejecting jurors incapable of impartially trying a case. To the extent that some biases remain undetected through vigorous questioning, the "harm" that may result is inherent in the jury system itself—an integral part of the essence of having citizens unschooled in law serving as triers of fact. Moreover, a peremptory challenge is only an educated guess as to the partiality of a juror. Some hunches may be correct, and should be vigorously pursued in voir dire questioning to justify a challenge for cause. Others are based on prejudices, and should be disallowed.

Two simple changes would facilitate effective and nondiscriminatory jury selection. First, judges should make wider use of the "catch-all" challenge for cause included in most statutes.<sup>137</sup> These "catch-all" provisions usually refer to a "state of mind" that will prevent a juror from acting with entire impartiality and without prej-

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<sup>132</sup> See Johnson, *supra* note 127, at 1684.

<sup>133</sup> *Swain*, 380 U.S. at 222.

<sup>134</sup> *Id.* at 244 (Goldberg, J., dissenting) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)). Justice Marshall also cited this passage from *Marbury* in *Batson*, 106 S. Ct. at 1728. Justice Marshall wrote separately to advocate "eliminating peremptory challenges entirely in criminal cases." *Id.*

<sup>135</sup> Kuhn, *supra* note 71, at 295.

<sup>136</sup> *Hayes v. Missouri*, 120 U.S. 68, 71 (1887) (emphasis added).

<sup>137</sup> See, e.g., IND. CODE ANN. § 35-37-1-5 (Burns 1986) ("That he is biased or prejudiced for or against the defendant."); LA. CODE CIV. PROC. ANN. art. 1765 (West 1986) ("When the juror has formed an opinion in the case or is not otherwise impartial."); MASS. ANN. LAWS ch. 234, § 28 (Law. Co-op 1986) (if a juror is "sensible of any bias or prejudice" another juror shall be called instead).

udice to the substantial rights of either party.<sup>138</sup> Second, judges should always allow the attorneys to ask the voir dire questions.<sup>139</sup> This gives each side the best opportunity to uncover biased jurors. Additionally, judges should permit more liberal lines of questioning aimed at eliciting such bias. These suggestions are far from radical, especially in light of the need for some gap filling upon abolition of peremptory challenges, and they will facilitate justified rejections, not selections, of potential jurors.

### 1. *Expanding the Challenge For Cause*

Defendants' attorneys often defend the peremptory challenge on the grounds that it makes a defendant "feel good" about the jury.<sup>140</sup> However, if parties seek to reject biased jurors, rather than select a jury, attorneys' and judges' best efforts to discover unsuitable states of mind will create this "good feeling." To the extent that some "good feelings" about a juror depend upon conscious or unconscious biases, the Constitution compels a sacrifice.

In some situations courts should conclusively presume unsuitability (beyond current presumptions such as relation to the parties and attorneys, for example). For instance, judges should automatically excuse known Ku Klux Klan members<sup>141</sup> and members of the Black Panthers in cases where clear racial or religious conflicts arise between the parties or where the biases of these groups may affect the juror's evaluation of witnesses' testimony. Simply put, a policy of automatic exclusion for cause should apply to members of groups that have made their biases publicly and "doctrinally" known, thereby creating a strong presumption of partiality in appropriate cases.

Parties challenging jurors for cause should do so outside of the presence of the jury. Proponents of the peremptory challenge argue that unsuccessful attempts at securing a challenge for cause biases those jurors against the attorney who tried to excuse them. The peremptory challenge, they argue, allows the attorney to avoid that problem.<sup>142</sup> Challenge motions made away from the jury would also

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<sup>138</sup> See *supra* note 14.

<sup>139</sup> Since 1944, federal judges have exercised exclusive control over voir dire under FED. R. CRIM. P. 24(a). J. VAN DYKE, *supra* note 7, at 164. "A 1970 study of 219 federal judges showed that 53.4 percent questioned jurors by themselves, 31.1 percent allowed attorneys to ask some supplemental questions, 13.2 percent allowed attorneys to ask all the questions, and 2.3 percent authorized the questioning of jurors by a clerk or the attorneys outside the judge's presence." *Id.* at 164, 174 n.108 (citing WORKS OF THE COMMITTEE ON THE OPERATION OF THE JURY SYSTEM OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, THE JURY SYSTEM IN THE FEDERAL COURTS 174 (1973)).

<sup>140</sup> J. VAN DYKE, *supra* note 7, at 168.

<sup>141</sup> See *State v. Logan*, 344 Mo. 351, 126 S.W.2d 256 (1939).

<sup>142</sup> See *supra* note 15.

avoid those problems.

## 2. *Liberalizing Voir Dire*

In contrast to the current trend toward judge-run questioning,<sup>143</sup> attorneys should conduct the voir dire questioning of the venire panel. Although this practice will undoubtedly lengthen the voir dire procedure, fairness and the greater purpose of ending the discrimination created by peremptory challenges outweigh the resulting costs of delay. Although attorneys have been criticized for abusing voir dire privileges by asking inappropriate questions meant to indoctrinate or propagandize potential jurors,<sup>144</sup> the judge can guard against such abuses without taking complete control of the questioning. This leaves attorneys in a better position to lay the groundwork for challenges and to uncover biases they feel are relevant in the case at hand.<sup>145</sup>

Judges should also allow attorneys greater freedom in pursuing lines of questioning. In *Aldridge v. United States*<sup>146</sup> the Supreme Court held that a black man accused of murdering a white man could pursue lines of voir dire questioning designed to establish whether potential jurors were racially prejudiced.<sup>147</sup> Subsequently, however, the Court in *Ristaino v. Ross*<sup>148</sup> limited this right to the specific facts of *Ham v. South Carolina*<sup>149</sup> where the black defendant pursued questions of racial bias due to his well known civil rights activities, claiming as a defense that he was framed on the narcotics charges because of his activism.<sup>150</sup> Thus, the question of whether the need to ask potential jurors about racial prejudices rises "to constitutional dimensions" currently requires a fact-based inquiry.<sup>151</sup>

*Ristaino* should be overruled to facilitate more extensive and effective questioning of the venire. After all, few jurors would respond affirmatively to the standard question put by the judge—"Do you have any biases which would prevent you from serving as an impartial juror?"—if their bias were based on race.<sup>152</sup> Numerous

<sup>143</sup> See generally Tapp, *Debate Continues Over Who Should Conduct Voir Dire*, Chi. Daily L. Bull., June 3, 1985, at 3, col. 2.

<sup>144</sup> *People v. Crowe*, 8 Cal. 3d 815, 825, 506 P.2d 193, 199-200, 106 Cal. Rptr. 369, 375 (1973).

<sup>145</sup> See J. VAN DYKE, *supra* note 7, at 164.

<sup>146</sup> 283 U.S. 308 (1931).

<sup>147</sup> See also *Ham v. South Carolina*, 409 U.S. 524 (1973) (reaffirming the principle of *Aldridge*, 283 U.S. 308).

<sup>148</sup> 424 U.S. 589 (1976).

<sup>149</sup> 409 U.S. 524 (1972).

<sup>150</sup> *Ristaino*, 424 U.S. at 597-98.

<sup>151</sup> *Id.* at 598.

<sup>152</sup> Under these conditions jurors will more likely give the socially acceptable answer rather than admit racial biases. J. VAN DYKE, *supra* note 7, at 168.

examples demonstrate that biases are often elicited only after a lengthy period of questioning.<sup>153</sup> Thus judges should allow attorneys greater leeway when questioning potential jurors for bias.

A final justification of the peremptory challenge rests on the utility of excusing a juror offended by vigorous questioning aimed at

<sup>153</sup> One example:

[MR. GARRY]: Now, it's a fact, is it not, that you already had an opinion before you came here about this case?

[PROSPECTIVE JUROR]: Well, to a certain extent, yes.

Q. All right. Now, is your opinion that you had about this case before you got here such that it would take the tremendous amount of evidence to overcome that opinion?

A. No. It wouldn't. If—what evidence will show, that I will evaluate and see who is right and who is wrong.

Q. It's not a question so much as to who is right and who is wrong. As you sit there, Mr. Strauss, in your opinion, right now while you are sitting there this minute, is Huey P. Newton guilty or not guilty?

A. Well, I don't know for sure whether he shot the officer or not, but the officer is dead.

Q. And by that same standard, just because the officer is dead, you are going to say that Huey Newton did it; is that right?

A. Well, that's got to be proven.

Q. Well, my question is: As you sit there right now, do you believe that Huey Newton shot and killed, stabbed, whatever it was, Officer Frey?

A. I don't know whether he shot him or not. That I can't say.

THE COURT: Mr. Strauss, you see, under our law there is a presumption of innocence to start with. When you start the case the defendant is presumed to be innocent, and it is up to the People, the prosecution, to prove to you beyond a reasonable doubt that the defendant is guilty. Do you understand that?

THE JUROR: Yes.

THE COURT: So, now, not having heard any evidence, you must start with a presumption of innocence. Do you know what I mean by presumption? You must say, 'As far as I know the man is innocent.' Do you understand that?

THE JUROR: Yes.

THE COURT: 'And it is up to the prosecution to prove to me that he is guilty.' Do you understand that?

THE JUROR: Yes.

THE COURT: So, therefore, as it stands right now, do you believe he is guilty before you hear any evidence? . . .

THE JUROR: No.

. . . .

MR. GARRY: Well, do you really believe that as Huey Newton sits here right now next to me, that he is innocent of any wrongdoing of any kind?

A. No. That I don't believe.

. . . .

MR. GARRY: Mr. Strauss, again I ask you that same question which you have answered three times to me now. . . . As Huey Newton sits here next to me now, in your opinion is he absolutely innocent?

A. Yes.

Q. But you don't believe it, do you?

A. No.

THE COURT: Challenge is allowed.

eliciting grounds for a challenge for cause.<sup>154</sup> Although this justification has much merit, a judge can ameliorate the impact of the questioning by emphasizing that the purpose is not to personally offend but rather to secure a fair trial for the parties before the court. In addition, attorneys will just have to make sincere efforts to remain unoffensive in the course of their questioning. All of this is in keeping with the original purpose of the challenges in voir dire: "to reject, not to select."<sup>155</sup>

#### CONCLUSION

The abolition of the peremptory challenge is not a new idea. Rather, the Supreme Court's renewed dedication to eliminating discrimination in the jury selection system in *Batson v. Kentucky* should be seen as a call for a comprehensive remedy, one that effectively overcomes the post-*Swain* years of remedial inactivity. *Batson* takes an important half step toward equal protection, but its specific remedy, facilitation of a prima facie case, is obviated by the easily carried burden that shifts to the state. Only elimination of the peremptory challenge, coupled with expanded challenges for cause and voir dire efficacy, can comprehensively remedy discrimination in jury selection.

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<sup>154</sup> 4 W. BLACKSTONE, *supra* note 15, at \*353.

<sup>155</sup> *Hayes v. Missouri*, 120 U.S. 68, 71 (1877).