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Batson v. Kentucky: Peremptory Challenges Redefined

Mitzi Grove Ball

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BATSON V. KENTUCKY: PEREMPTORY CHALLENGES REDEFINED

I. INTRODUCTION

Racial discrimination in the selection of representative juries[1] is an issue that has plagued the courts for over one hundred years. Each step of the jury selection process[2] has been examined and litigated.[3] Attack on the racially discriminatory exercise of peremptory challenges, however, has afforded little relief.[4] Consequently, prosecutorial exercise of peremptory challenges to remove non-white members of the panel often purposefully results in the selection of an all-white jury to determine the guilt or innocence of a non-white defendant.[5] This practice finally prompted the Supreme Court, in *Batson v. Kentucky*,[6] to attempt to create a valid curb on the racial abuse of the use of peremptory challenges.

This article first examines the history of the peremptory challenge, including discussions of the development of both the equal protection/due process analysis[7] and the sixth amendment/fair cross-section

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1. The term "representative jury" indicates that the prospective jurors were summoned in accordance with a racially neutral process. *See* Note, *Peremptory Challenge - Systematic Exclusion of Prospective Jurors on the Basis of Race*, 39 MISS. L.J. 157, 159-60 (1967) [hereinafter *Peremptory Challenges - Systematic Exclusion*](racial neutrality in the jury selection process). Other meanings, however, are given to the term "representative jury;" *see, e.g.*, Note, *Peremptory Challenges and the Meaning of Jury Representation*, 89 YALE L.J. 1177 (1980), (equating a representative jury with a petit jury chosen from an array that contains a representative cross-section of the community); *see also infra* notes 61-111 and accompanying text.

2. The jury selection process includes several stages.

> First, a list of eligible jurors is compiled by means of voter registration lists, directories, a key-man system, or similar methods. From that pool, a venire is randomly selected for service during a particular court term. After excuses for hardship, health, or similar reasons, the venire is examined and challenges are made. The petit jury is selected from those jurors who remain.

Saltzburg & Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 MD. L. REV. 337, 339 n.11 (1982).

3. *See, e.g.*, Alexander v. Louisiana, 405 U.S. 625 (1972); Cassell v. Texas, 339 U.S. 282 (1950); Akins v. Texas, 325 U.S. 398 (1945); Hill v. Texas, 400 U.S. 316 (1942); Carter v. Texas, 177 U.S. 442, 447 (1900) (challenges to discriminatory selection procedures in grand jury selection); Carter v. Jury Comm'n, 396 U.S. 320 (1970); Whitus v. Georgia, 385 U.S. 545 (1967); Norris v. Alabama, 294 U.S. 587 (1935); Strauder v. West Virginia, 100 U.S. 303 (1880) (challenges to discriminatory procedures in selecting the jury venire); Swain v. Alabama, 380 U.S. 202 (1965); Avery v. Georgia, 345 U.S. 559 (1953); Patton v. Mississippi, 332 U.S. 463 (1947); Martin v. Texas, 200 U.S. 316 (1906); Neal v. Delaware, 103 U.S. 370 (1881); *Ex parte* Virginia, 100 U.S. 339 (1880) (challenges to discriminatory procedures in selection of the petit jury).

4. Swain v. Alabama was the first case in which the United States Supreme Court examined a prosecutor's discriminatory use of peremptory challenges. Since that 1964 decision, few defendants have been successful in challenging discriminatory procedures in selecting the jury panel. *See infra* notes 34-36 and 87-111 and accompanying text.

5. *See* Doyel, *In Search of a Remedy for the Racially Discriminatory Use of Peremptory Challenges*, 38 OKLA. L. REV. 385 (1985).

6. 106 S.Ct. 1712 (1986).

7. *See infra* notes 21-60 and accompanying text.

doctrine.[8] Next, it explores the Court's most recent decision in this area, *Batson v. Kentucky*. The article concludes by comparing some implications of the *Batson* decision with the sixth amendment approach to challenging unfair jury selection procedures.

II. BACKGROUND

A. *History of the Peremptory Challenge*

Prior to The Ordinance for Inquests[9] enacted in 1305, the prosecutor had a right in all felony trials to challenge any number of jurors without cause. The defendant was allowed thirty-five peremptory challenges.[10] As a result of the Ordinance for Inquests, the king could challenge no jurors without assigning a cause certain to be tried and approved by the court.[11] Yet the prosecution was not required to assign cause unless, after standing the jurors aside,[12] there remained a deficiency in the number of jurors required. This system became the settled law in England.[13]

Since peremptory challenges by the king were abolished in 1305, today's peremptory challenges by the state are not part of the common law as adopted from England, but rather are statutorily created. In 1856, the United States Supreme Court held that the prosecutor's right to stand jurors aside was not part of the adopted common law, and therefore was applicable in federal courts only if the state in which a federal court sat extended that right to jurors.[14] The defendant's right to peremptory challenges in federal cases was codified in 1790[15] and was finally extended to all federal prosecutors in 1865.[16]

Although there is no constitutional right requiring Congress to grant peremptory challenges to the defendant,[17] the peremptory challenge has been considered "one of the most important of the rights secured to the accused."[18] It provides a way to eliminate those prospective jurors who the lawyer intuitively believes, but cannot prove, will be less than impartial.[19] Thus, while the peremptory challenge itself

8. *See infra* notes 61-111 and accompanying text.
9. 33 Edw. 1, Stat. 4 (1305).
10. *Peremptory Challenges - Systematic Exclusion*, *supra* note 1, at 158 (citing 1 E. COKE, A COMMENTARY UPON LITTLETON, 156(b) (1st Amer. ed. 1853)).
11. 33 Edw. 1, Stat. 4 (1305). The defendant retained the privilege of the peremptory challenge to be used for protection against jurors who appeared to be prejudiced against him and to allow the defendant to remove a juror whom he had offended by an unsuccessful challenge for cause. *See* 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 346-47 (1st ed. 1769).
12. "Standing aside" allowed the prosecution to direct any juror, after voir dire examination, to stand aside until the entire panel had been examined and the defendant had exercised his challenges.
13. Swain v. Alabama, 380 U.S. 202, 213 n.12 (1965).
14. United States v. Shackleford, 59 U.S. 588, 590 (1856).
15. Act of April 30, 1790, ch. 9, § 30, 1 Stat. 119.
16. Act of March 3, 1865, ch. 86, § 2, 13 Stat. 500.
17. Stilson v. United States, 250 U.S. 583, 586 (1919).
18. Pointer v. United States, 151 U.S. 396, 408 (1894).
19. *See generally*, Younger, *Unlawful Peremptory Challenges*, 7 LITIGATION 23 (1980) (dis-

has not been the subject of attack, its discriminatory use to remove prospective jurors on a racial basis has been challenged often over the past century.[20] The question raised is whether there has been a denial of constitutional rights by the exclusion of jurors on a racial basis. The constitutional rights in question are the defendant's fourteenth amendment rights to equal protection of the laws and his sixth amendment right to trial by an impartial jury.

B. *Development of the Equal Protection Analysis*

In 1875, Congress enacted a statute making it a crime to exclude any qualified citizen from a grand or petit jury on the basis of race.[21] The Supreme Court upheld the statute on the grounds that such exclusion would violate the equal protection clause of the fourteenth amendment.[22] In *Strauder v. West Virginia*,[23] the Supreme Court invalidated a West Virginia statute which prohibited blacks from serving as jurors. Basing its decision on the Constitution, the Court stated:

> The Fourteenth Amendment makes no attempt to enumerate the rights it is designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty, or property. Any state action that denies this immunity to a colored man is in conflict with the Constitution.[24]

Twenty years later, the Court elaborated on this principle of prohibited state action in *Carter v. Texas*:[25]

> Whenever by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States.[26]

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cussing the desirability of preserving challenges and approaching reform of the jury selection process with caution).

20. Swain v. Alabama, 380 U.S. 202 (1965); People v. Roxborough, 307 Mich. 575, 12 N.W.2d 466 (1943), *cert. denied*, 323 U.S. 749 (1944); Whitney v. State, 43 Tex. Crim. App. 197, 63 S.W. 879 (1901).

21. Civil Rights Act of 1875, ch. 114, § 4, 18 Stat. 336.

22. *Ex Parte* Virginia, 100 U.S. 339 (1880).

23. 100 U.S. 303 (1880). *Strauder* did not address whether blacks could be excluded from the jury through peremptory challenges, because no blacks had ever been summoned to serve on the venire to be challenged. *Id.* at 310.

24. *Id.* The protection of *Strauder* was extended to Mexican-Americans in Hernandez v. Texas, 347 U.S. 475 (1954).

25. 177 U.S. 442 (1900).

26. *Id.* at 447 (citing Strauder v. West Virginia, 100 U.S. 303 (1880); Neal v. Delaware, 103 U.S. 370, 397 (1880); and Gibson v. Mississippi, 162 U.S. 565 (1896)). In Norris v. Alabama, 294 U.S. 587, 589 (1935), the Supreme Court described this paragraph as "[s]umming up precisely the effect of earlier decisions."

In *Strauder*, the Court recognized that the fourteenth amendment does not require a jury composed in whole or part of persons of the defendant's race.[27] A mixed jury in a particular case is not essential to the equal protection of the laws,[28] but equal protection does guarantee that a defendant be tried by a jury whose members are summoned pursuant to nondiscriminatory criteria.[29]

The core of the equal protection notion was later defined as the idea that jurors "should be selected as individuals, on the basis of individual qualifications, and not as members of a race."[30] The fact that jury competence is an individual matter, rather than a group matter, was felt to be a cornerstone of the jury system. "To disregard [this principle] is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury."[31]

In *Swain v. Alabama*,[32] a black defendant used an equal protection analysis to challenge a prosecutor's exercise of peremptory challenges to obtain an all-white jury. *Swain* is the only United States Supreme Court decision other than *Batson v. Kentucky* to address directly the constitutional validity of the racially discriminatory use of peremptory challenges. A much criticized decision,[33] *Swain* has resulted in the elimination of all but two[34] equal protection challenges to a prosecutor's alleged discriminatory use of peremptories.[35]

Robert Swain, a black man, was indicted, convicted of rape and sentenced to death by an all-white jury. Eight blacks were summoned to the venire, two were exempt and six were peremptorily struck by the prosecutor. No black had served on any other petit jury since approximately 1950.[36] Discussing the function of the peremptory challenge, the Court noted that its use not only eliminated extremes of partiality, but assured that jurors would decide the case on the basis of the evidence placed before them.[37] In upholding the right to unqualified peremptories for both the defendant and the prosecutor, the Court stated "that the sys-

27. *Strauder*, 100 U.S. at 305.

28. *See* Virginia v. Rives, 100 U.S. 313, 335 (1880).

29. *See* Martin v. Texas, 200 U.S. 316, 321 (1906); *Ex Parte* Virginia, 100 U.S. 339, 345 (1880).

30. Cassell v. Texas, 339 U.S. 282, 286 (1950).

31. Thiel v. Southern Pac. Co., 328 U.S. 217, 220 (1946).

32. 380 U.S. 202 (1965).

33. *See, e.g.*, J. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS (1977); Imlay, *Federal Jury Reformation: Saving a Democratic Institution*, 6 LOY. L.A.L. REV. 247, 269-70 (1973); Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 MICH. L. REV. 1, 10-11 (1982); Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 YALE L.J. 1715, 1723-24 & n.36 (1977); Comment, Swain v. Alabama: *A Constitutional Blueprint for the Perpetuation of the All-White Jury*, 52 VA. L. REV. 1157, 1160-75 (1966).

34. *See* State v. Washington, 375 So. 2d 1162 (La. 1979); State v. Brown, 371 So. 2d 751 (La. 1979).

35. "[T]he individual defendant is unlikely to have either the time or the resources to compile and analyze the raw data necessary to [make] a statistical attack on the prosecution's use of peremptory challenges." United States v. Childress, 715 F.2d 1313, 1317 (8th Cir. 1983) (en banc), *cert. denied*, 464 U.S. 1063 (1984).

36. *Swain*, 380 U.S. at 205.

37. *Id.* at 219.

tem should guarantee 'not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.' "[38]

The Court in *Swain* differentiated "challenges for cause," as those defined on a specified basis, from peremptory challenges, those challenges exercised "without a reason stated, without inquiry and without being subject to the court's control."[39] In exercising a peremptory challenge, the attorney does not decide "whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be."[40] Under *Swain*, therefore, jurors could be excused on the basis of their group affiliation, including race, religion, and nationality.[41]

The *Swain* Court held that a prosecutor's use of peremptory challenges in a particular case is immune from constitutional inquiry based on the equal protection clause.[42] The opinion suggested, however, that statistical evidence establishing a pattern of racial bias by a prosecutor in a particular jurisdiction, in case after case, regardless of the circumstances or severity of the crime, may provide sufficient evidence to establish a prima facie fourteenth amendment case.[43] *Swain* foreclosed an equal protection attack on a prosecutor's use of peremptory challenges in a single case and erected an insurmountable burden on the defendant to establish the prosecutor's systematic use of peremptory challenges against blacks over time.[44]

The difficulty of overcoming the *Swain* burden of proof is the result of a combination of many factors. There are no records regarding the race of members of the venire, the nature of the challenges, whether peremptory or for cause, or the party making a particular challenge.[45] Indigent defendants cannot bear the costs of investigation and data development[46] and, since the abuse of peremptory challenges does not appear until the trial begins, little time is afforded to conduct an investigation.[47] This departure from basic equal protection ideas prompted Justice Marshall's campaign for the reconsideration of *Swain*.[48]

38. *Id.* at 220 (quoting Hayes v. Missouri, 120 U.S. 68, 70 (1887)).

39. *Id.* (citing State v. Thompson, 68 Ariz. 386, 202 P.2d 1037 (1949); Lewis v. United States, 146 U.S. 370, 378 (1892)).

40. *Id.* at 220-21 (footnote omitted).

41. *Id.*

42. *Id.* at 221-22.

43. *Id.* at 223. Labeling this burden of proof "Mission Impossible," the Second Circuit noted that almost no other defendant in two decades had successfully met this standard of proof. McCray v. Abrams, 750 F.2d 1113, 1120 (2d Cir. 1984), *cert. granted and judgment vacated*, 106 S.Ct. 3289 (1986).

44. *Swain*, 380 U.S. at 227.

45. Doyel, *supra* note 5, at 405.

46. People v. Wheeler, 22 Cal. 3d 258, 263, 583 P.2d 748, 767, 148 Cal. Rptr. 890, 893 (1978).

47. *Id.*

48. *See* Harris v. Texas, 467 U.S. 1261 (1984) (Marshall, J., dissenting from denial of certiorari); Williams v. Illinois, 466 U.S. 981 (1984) (Marshall, J., dissenting from denial of certiorari); Gilliard v. Mississippi, 464 U.S. 867 (1983) (Marshall, J., dissenting from denial of certiorari); McCray v. New York, 461 U.S. 961, 963-70 (1983) (Marshall, J., dissenting

C. *Further Development of the Equal Protection Analysis as Applied to Jury Venires*

Since *Swain*, the Court has fully articulated the components of a prima facie case for an equal protection challenge to a discriminatory selection of the venire.[49] Justice Blackmun initially set forth these standards in *Castaneda v. Partida*.[50] The first step is to demonstrate that the excluded group is one that is "a recognizable, distinct class, singled out for different treatment under the laws."[51] Second, the defendant[52] must establish that the group is substantially underrepresented.[53]

The essential purpose of the equal protection clause is to prevent governmental discrimination on the basis of race.[54] But the equal protection clause requires that "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."[55] Therefore, underrepresentation alone is not enough to establish a violation of the equal protection clause. Discriminatory intent is also required.[56] Intent may be inferred from the totality of the circumstances in a series of cases or in a single case and may include proof of disproportionate impact[57] coupled with evidence that the venire was selected under a system providing an opportunity for discrimination.[58] Once a prima facie case of discrimination is presented by the defendant, "the burden of proof shifts to the State to rebut the presumption of unconstitutional action by demonstrating that permissible racially neutral selection criteria and procedures have produced the monochromatic result."[59] The development of the equal protection analysis has expanded its application to discrimination in each phase of the jury selection process — the selection of grand juries, jury venires, and finally to the selection of an individual petit jury.

D. *Development of the Sixth Amendment Fair Cross-Section Analysis*

Three years after *Swain*, in *Duncan v. Louisiana*,[60] the Supreme Court imposed upon the states the sixth amendment requirement of jury trials

from denial of certiorari). *See also* Thompson v. United States, 469 U.S. 1024, 1024-27 (1984) (Brennan, J., joined by Marshall, J., dissenting from denial of certiorari).

49. Batson v. Kentucky, 106 S.Ct. 1712, 1721-23 (1986).

50. 430 U.S. 482, 494 (1977). Although *Castaneda* involved discrimination with regard to grand juries, it is based on a jury venire case. *See also* Hernandez v. Texas, 347 U.S. 475 (1954).

51. *Castaneda*, 430 U.S. at 494.

52. As in any equal protection case, the burden is on the defendant "to prove the existence of purposeful discrimination." Whitus v. Georgia, 385 U.S. 545, 550 (1967) (citing Tarrance v. Florida, 188 U.S. 519, 520 (1903)).

53. *Castaneda*, 430 U.S. at 494. Under this rule of exclusion, once underrepresentation is shown, a presumption of discrimination arises. *Id.* at 493.

54. Washington v. Davis, 426 U.S. 229, 239 (1976).

55. *Id.* at 240.

56. *Castaneda*, 430 U.S. at 493.

57. *Washington*, 426 U.S. at 266.

58. Whitus v. Georgia, 385 U.S. at 552.

59. Alexander v. Louisiana, 405 U.S. 625, 632 (1972).

60. 391 U.S. 145 (1968).

in criminal cases.[61] Then, in *Taylor v. Louisiana*,[62] the Court interpreted the sixth amendment to require that the jury venire be selected from a representative cross-section of the community.[63] A procedure granting automatic jury service exemptions to women was invalidated in this case because it fostered misrepresentation by providing jury venires composed almost totally of men.[64]

The foundation for the *Taylor* sixth amendment decision was laid in a series of equal protection cases beginning nearly thirty-five years earlier with *Smith v. Texas*.[65] Reversing a black defendant's state conviction based on a violation of the equal protection clause, the *Smith* Court stated:

> It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government.[66]

In *Glasser v. United States*,[67] the Court entertained the question of whether systematic exclusion from a federal jury venire of all women who were not members of the League of Women Voters would violate the sixth amendment. Although the Court rejected the defendants' argument on the ground of insufficient proof, it reaffirmed the requirement of a representative venire.[68]

Extending the cross-section principle, the Court, in *Thiel v. Southern Pacific Co.*,[69] reversed a civil judgment because the jury process had systematically excluded all daily wage earners. Although the guarantee of an impartial jury did not require that each jury "contain representatives of all the economic, social, religious, racial, political and geographical groups of the community,"[70] the Court held that it does require a venire selected "without systematic and intentional exclusion of any of these groups."[71]

Reaffirming *Thiel* in *Ballard v. United States*,[72] the Supreme Court reversed the convictions of two defendants because women had been intentionally and systematically excluded from the jury venire. Rejecting the view that an all male venire summoned from various groups in the community could be representative, the *Ballard* Court in an oft-quoted[73]

61. *Id.* at 149.
62. 419 U.S. 522 (1975).
63. *Id.* at 528.
64. *Id.* at 527.
65. 311 U.S. 128 (1940).
66. *Id.* at 130, *quoted in* Taylor v. Louisiana, 419 U.S. at 527.
67. 315 U.S. 60 (1942).
68. *Id.* at 86.
69. 328 U.S. 217 (1945).
70. *Id.* at 220.
71. *Id.*
72. 329 U.S. 187 (1946).
73. *See, e.g.*, Taylor v. Louisiana, 419 U.S. at 531-32; Booker v. Jabe, 775 F.2d 762, 769

paragraph stated:

> [I]t is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class. But, if the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence of one on the other is among the imponderables.[74]

The Court went on to say that the injury sustained from the systematic and intentional exclusion of a group is not limited to the defendant but extends "to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts."[75]

In summarizing the collective teachings of the Supreme Court in *Glasser*, *Thiel* and *Ballard*, the Sixth Circuit[76] recently recognized that although these cases were decided prior to *Duncan*, and therefore prior to the application of the sixth amendment to the states, their principles have been adopted and developed by the Court's sixth amendment analysis.[77] These three cases demonstrate the use of the court systems' supervisory powers to mitigate racial discrimination in the jury selection process.

In *Peters v. Kiff*,[78] the United States Supreme Court considered a white defendant's challenge to the systematic exclusion of blacks from jury service.[79] Based on due process grounds, the Court rejected the state's contention that because the defendant himself was not black he was not harmed by the exclusion. Justice Marshall elaborated as follows:

> 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

(6th Cir. 1985), *cert. granted and judgment vacated sub nom.* Michigan v. Booker, 106 S.Ct. 3289 (1986); People v. Wheeler, 583 P.2d at 756. *See also* Doyel, *supra* note 5, at 418-19.

74. *Ballard*, 329 U.S. at 193-94 (footnote omitted).

75. *Id.* at 195.

76. Booker v. Jabe, 775 F.2d 762 (6th Cir. 1985), *cert. granted and judgment vacated sub nom.* Michigan v. Booker, 106 S.Ct. 3289 (1986). The principles of these cases, as presented in *Booker* are: an impartial jury is a product of methods that do not systematically exclude members of a distinct group; competence is an individual characteristic; the violation lies in the exclusionary conduct or policy, not in a bias of a particular jury; and it is the integrity of the system and the public's right to a representative jury that are impaired. *Id.* at 769.

77. *Id.* at 769.

78. 407 U.S. 493 (1972).

79. The Court was unable to entertain the sixth amendment challenge because Destafano v. Woods, 392 U.S. 631 (1968) prohibited the *Duncan* decision from being applied retroactively.

> that may have unsuspected importance in any case that may be presented.[80]

In reviewing the historical progression of the holdings of the series of cases beginning with *Smith*, the *Taylor* cross-section rule explicitly provides that petit juries need not mirror the community, even though no distinctive group may be systematically excluded from jury venires. [81]

Refining the *Taylor* decision, *Duren v. Missouri*[82] delineated the standards for proving a violation of the fair cross-section doctrine with respect to the venire:

> [T]he defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.[83]

Discriminatory purpose or intent need not be demonstrated because it is the disproportionate representation itself which violates the sixth amendment fair cross-section requirement. Once the defendant makes a prima facie showing of underrepresentation, the state bears the burden of showing that a significant state interest is promoted by the underrepresentation.[84]

E. *State Court Development of the Sixth Amendment Analysis*

The *Taylor* holding applied to the representativeness of jury venires, not the composition of the petit jury. Although some commentators contend that the holding of *Taylor* should not be applied to limit distortion of the petit jury by peremptory challenges,[85] others argue that the Court's reasoning compels the rule's extension.[86] Dissatisfied with the barrier presented by *Swain* and tempted by the representative cross-section approach, some courts have been willing to reexamine the validity of racially based peremptory challenges.

Circumventing the *Swain* hurdle, the California Supreme Court ex-

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80. *Peters*, 407 U.S. at 503-04 (footnote omitted). Although *Peters* was based on due process grounds, the *Taylor* Court cited *Peters* for the proposition that to present a claim, a defendant need not be a member of the group excluded from jury service. *Taylor*, 419 U.S. at 526.

81. 419 U.S. at 538.

82. 439 U.S. 357 (1979).

83. *Id.* at 364.

84. *Id.* at 368.

85. *See, e.g.*, Saltzburg & Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 MD. L. REV. 337 (1982); Note, *Rethinking Limitations on the Peremptory Challenge*, 85 COLUM. L. REV. 1357 (1985); Note, *Peremptory Challenges and the Meaning of Jury Representation*, 89 YALE L.J. 1177 (1980).

86. *See, e.g.*, J. Van Dyke, *supra* note 34; Note, People v. Wheeler: *Peremptory Challenge May Not Be Used to Remove Jurors Solely for Group Association*, 58 N.C.L. REV. 152 (1979); Comment, People v. Wheeler, *Peremptory Challenges - A New Interpretation*, 14 NEW ENG. L. REV. 370 (1978).

tended the *Taylor* holding in *People v. Wheeler*,[87] by allowing individual defendants to challenge the prosecution's use of peremptory challenges on a case-by-case basis. The court equated the requirement that venires be representative of a cross-section of the community with the impartiality of a petit jury,[88] the theory being that impartiality is to be achieved through the interaction of varying values and experiences that the jurors bring from their respective groups.[89] To ensure this interaction, the use of peremptory challenges to eliminate specific bias was held permissible, but the court felt that elimination of bias based solely upon group affiliation would thwart the primary purpose of the representative cross-section requirement.[90]

Relying on its state's Declaration of Rights, the Massachusetts court in *Commonwealth v. Soares*[91] followed much the same reasoning as the *Wheeler* court. The *Soares* court adopted the mechanics developed in *Wheeler* to enforce the constitutional guarantee of an impartial jury. To overcome a rebuttable presumption that the peremptories were exercised constitutionally, the Court stated, the challenging party must show "that the persons excluded are members of a cognizable group," coupled with a "strong likelihood that such persons are being challenged because of their group association."[92] Unlike *Wheeler*, *Soares* identified those "discrete groups" which cannot be discriminated against.[93]

Before the 1978 *Wheeler* decision, state courts were unanimous in following the *Swain* principle.[94] Though *Swain* remains the overwhelming majority rule among the states,[95] at least five states[96] and two federal circuit courts of appeals[97] have recognized alternatives to *Swain*. These cases relied at least in part on a representative cross-section analysis under the sixth amendment to guarantee trial by an impartial jury.

87. People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978). The court evaded the conflict with federal law by independently basing its decision on the California Constitution.

88. *Id.* at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902-03.

89. *Id.* at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902.

90. *Id.* at 278, 583 P.2d at 762, 148 Cal. Rptr. at 903.

91. 377 Mass. 461, 387 N.E.2d 499 (1979), *cert. denied*, 444 U.S. 881 (1986).

92. *Wheeler*, 22 Cal. 3d at 280-81, 583 P.2d at 764, 148 Cal. Rptr. at 905-06.

93. *Soares*, 377 Mass. at 461, 387 N.E.2d at 516. Relying on the Massachusetts equal rights amendment, MASS. CONST. art. 1, § 102 (amended 1976), the court limited application of the new rule to groups identified on the basis of sex, race, color, creed or national origin.

94. *See* Annotation, *Use of Peremptory Challenge to Exclude from Jury Persons Belonging to a Class or Race*, 79 A.L.R. 3d 14, 19 (1977).

95. United States v. Leslie, 783 F.2d 541, 551 (5th Cir. 1986), *cert. granted and judgment vacated*, 107 S.Ct. 1267 (1987).

96. People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978); State v. Neil, 457 So. 2d 481 (Fla. 1984); Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499 (1979); State v. Gilmore, 199 N.J. Super. 389, 489 A.2d 1175 (N.J. Super. Ct. App. Div. 1985); State v. Crespin, 94 N.M. 486, 612 P.2d 716 (1980).

97. Booker v. Jabe, 775 F.2d 762 (6th Cir. 1985), *cert. granted and judgment vacated sub nom.* Michigan v. Booker, 106 S.Ct. 3289 (1986); McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984), *cert. granted and judgment vacated*, 106 S.Ct. 3289 (1986).

F. *Sixth Amendment Analysis as Applied in the Federal Courts*

The Second Circuit Court of Appeals was the first circuit to find a sixth amendment alternative to the *Swain* approach. In *McCray v. Abrams*,[98] the court of appeals objectionably followed the equal protection holding of *Swain*, but found that the *Swain* decision did not foreclose a claim brought under the sixth amendment.[99]

The court held that each defendant is to have the right to trial by an impartial jury, which requires each case to be decided on the practices complained of in that very case.[100] Adapting the *Duren* standard to show a prima facie violation with regard to the venire,[101] the Second Circuit provided the following test to be applied to the petit jury:

> [T]he defendant must show that in his case, (1) the group alleged to be excluded is a cognizable group in the community, and (2) there is a substantial likelihood that the challenges leading to this exclusion have been made on the basis of the individual venireperson group affiliation rather than because of any indication of a possible inability to decide the case on the basis of the evidence presented.[102]

The first step is virtually the same as in *Duren*, exchanging the term "distinctive group" for "cognizable group," although no explanation or definition for the term "cognizable group" was provided. *Duren*'s second step, showing that underrepresentation in the venire was unreasonable in relation to the number of such persons in the community,[103] was omitted altogether. Since disproportionate underrepresentation is the crux of the fair cross-section rationale, it is puzzling that the Second Circuit failed to incorporate this step into its test.[104] The second factor of the *McCray* approach resembles the fourteenth amendment analysis more than *Duren*'s sixth amendment "systematic exclusion"[105] requirement.[106] Another parallel to the equal protection principle is that once the burden shifts to the prosecution to rebut the defendant's prima facie case, the state must show that "permissible racially neutral selection criteria and procedures have produced the monochromatic result."[107] This wording was taken directly from equal protection cases.[108]

In *Booker v. Jabe*,[109] the Sixth Circuit adopted the *McCray* test for establishing a prima facie case without questioning its similarity to the

98. 750 F.2d 1113 (2d Cir. 1984).
99. *Id.* at 1124.
100. *Id.* at 1130-31.
101. *See supra* notes 82-84 and accompanying text.
102. *McCray*, 750 F.2d at 1131-32.
103. *Duren*, 439 U.S. at 364.
104. Doyel, *supra* note 5, at 429.
105. *Duren*, 439 U.S. at 364.
106. Doyel, *supra* note 5, at 430.
107. *McCray*, 750 F.2d at 1132 (quoting Castaneda v. Partida, 430 U.S. 482, 494 (1977), (quoting Washington v. Davis, 426 U.S. 229, 241 (1976) (quoting Alexander v. Lousiana, 405 U.S. 625, 632 (1972))).
108. *McCray*, 750 F.2d at 1132. For further discussion see Doyel, *supra* note 5, at 429-35.
109. 775 F.2d 762 (6th Cir. 1985).

fourteenth amendment cases.[110] The court, however, did require that the challenging party show a "systematic" abuse of peremptory challenges before the burden would shift to the opposing party.[111] The sixth amendment challenge may be asserted successfully by either prosecutor or defense counsel when an unjustifiable systematic exclusion occurs.[112]

III. *BATSON V. KENTUCKY*

A. *Facts*

James Kirkland Batson, a black man, was tried and convicted by a Kentucky jury of second degree burglary[113] and receipt of stolen property.[114] At trial, a jury venire was presented and the judge conducted voir dire examination.[115] After voir dire had been completed and jurors were excused for cause, the parties exercised their peremptory challenges.[116] Although the venire included four blacks, the prosecutor used four of his six peremptory challenges[117] to produce an all-white petit jury. Batson timely objected to the state's challenges, moved to discharge the panel and later objected to the swearing of the jury. Citing the sixth and fourteenth amendments, he contended that his rights to an impartial trial by a cross-section of the community and equal protection of the laws had been violated. The trial court overruled Batson's objections, reasoning that the actual composition of the petit jury is not subject to the fair cross-section rule.

On appeal, the petitioner argued that the prosecutor's use of peremptory challenges had deprived him of a jury drawn from a fair cross-section of the community. He conceded that *Swain v. Alabama* foreclosed an equal protection claim based on the use of peremptories in a single case and urged the court to depart from *Swain* and to hold that his sixth amendment rights had been violated.[118] He also asserted that the prosecutor's challenge of all the black veniremen indicated that the challenges had been exercised solely on the basis of race, establishing an

110. *Id.* at 773.

111. *Id.* Both *McCray* and *Booker* have been vacated and remanded for reconsideration in light of *Batson* and *Allen*. *See infra* note 140. After consideration of *Batson* and *Allen*, the Sixth Circuit reinstated its previous opinion of judgment in Booker v. Jabe, 801 F.2d 871 (6th Cir. 1986).

112. 775 F.2d at 772.

113. Batson v. Kentucky, 106 S.Ct. 1712, 1715 (1986).

114. *Id.*

115. *Id.* The trial court may conduct voir dire examination itself or allow counsel to so do. KY. REV. STAT. ANN. § 9.38 (Michie/Bobbs-Merrill 1986-87).

116. Each side is given a list of the qualified jurors equal to the number of jurors to be seated plus the total number of peremptory challenges allowed to all parties. KY. REV. STAT. ANN. §§ 9.36, 9.40 (Michie/Bobbs-Merrill 1986-87).

117. In felony trials the prosecutor is allowed five peremptories plus one extra if an alternate is chosen, and the defense is permitted eight plus the one extra. KY. REV. STAT. ANN. § 9.40 (Michie/Bobbs-Merrill 1986-87).

118. Batson urged the adoption of the decisions in People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978) and Commonwealth v. Soares, 377 Mass. 461, 387 N.E. 2d 499 (1979).

equal protection claim under *Swain*. The Supreme Court of Kentucky rejected his jury discrimination claim and affirmed the petitioner's conviction, declining to depart from the *Swain* rule.[119]

B. *The Supreme Court Opinion*

The Court began its analysis of the defendant's equal protection claim[120] by reiterating the principles announced over one hundred years ago in *Strauder v. West Virginia*.[121] Emphasizing that the *Strauder* principles never have been questioned, the Court explained it was the application of those principles to particular facts that compelled repeated review.[122] Looming in these cases is the question of whether the defendant has sustained his burden of proving purposeful discrimination.[123] The Court provided a thorough discussion of *Swain*[124] and reaffirmed *Swain*'s contention that a "State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause."[125]

Describing the *Swain* burden as "crippling," the Court observed that the states' use of peremptory challenges is largely protected from constitutional review.[126] The Court then delineated its reasons for rejecting the evidentiary standards required by *Swain* to establish a prima facie equal protection violation. Drawing from its decisions following *Swain*, the Court laid a foundation for extending the equal protection analysis previously reserved for examining venire selection violations.[127]

The Court held that purposeful discrimination in petit jury selection may be established based solely on evidence concerning the state's use of peremptories at the defendant's trial.[128] The following conditions were set forth as required elements of a prima facie case of discrimination:

(1) "the defendant must show that he is a member of a cognizable racial group,"[129] and "that the prosecutor has exercised peremptory chal-

119. Petition for Writ of Certiorari to the Supreme Court of Kentucky at 1, James Kirkland Batson v. Commonwealth of Kentucky, No. 84-SC-733-MR (Ky. Dec. 20, 1984).

120. Though Batson pressed his sixth amendment claim, the Court chose to overlook that argument and review the case on equal protection grounds. *See infra* text accompanying notes 141-44.

121. *Batson*, 106 S.Ct. at 1716-19 (citing Strauder v. West Virginia, 100 U.S. 303 (1880)). *See supra* notes 23-24 and accompanying text.

122. *Id.* at 1719.

123. *Id.*

124. *Id.* at 1719-21 (citing Swain v. Alabama, 380 U.S. 202 (1965)). *See supra* notes 33-49 and accompanying text.

125. *Id.* at 1716 (quoting *Swain*, 380 U.S. at 203-04).

126. *Id.* at 1720.

127. *Id.* at 1721-22. *See supra* notes 50-60 and accompanying text.

128. *Id.* at 1722-23.

129. *Id.* at 1723 (citing Castaneda v. Partida, 430 U.S. 482, 494 (1976)). Whether a defendant not a member of the excluded group will be able to assert a fourteenth amendment challenge remains to be determined. *See also* Doyel, *supra* note 5, at 410. *Cf.* Peters v. Kiff, 407 U.S. 493 (1972) (a white has standing to challenge the exclusion of blacks); and

lenges to remove from the venire members of the defendant's race;"[130]
(2) "the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate;' "[131]
(3) "the defendant must show that these facts and other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race."[132]

The Court required that the trial judge consider all relevant circumstances in determining whether the defendant had demonstrated a prima facie case.[133] Once the requisite showing is made, the burden shifts to the prosecution to come forward with racially neutral reasons for excluding non-white veniremen.[134] The Court did not require that the explanation rise to the level of cause, but held that there must be an articulable reason other than the assumption the juror will be biased due to his racial affiliation.[135]

Because the trial court refused to make inquiry into the prosecutor's reasons for his actions, the case was remanded for further proceedings.[136] The Court directed that if racially neutral explanations could not be articulated, the defendant's conviction should be reversed.[137]

C. *Concurring and Dissenting Opinions*

Justice White concurred with the majority, but elected to write separately to express his concern with allowing retroactive application of the Court's decision.[138] Justice O'Connor,[139] concurring, and Chief Justice Burger, dissenting, also advocated foreclosing retroactive application.[140]

Castaneda v. Partida, 430 U.S. 482, 494 (1976) (requiring defendant to show substantial underrepresentation of his race).

130. *Batson*, 106 S.Ct. at 1723. The Court expressed no opinion whether the Constitution imposes any limit on the exercise of peremptories by defense counsel. *Id.* at 1718 n.12.

131. *Id.* at 1723 (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 1725.

137. *Id.*

138. *Id.* at 1726 (White, J., concurring). Justice White founded his argument on DeStefano v. Woods, 392 U.S. 631 (1968) (holding that Duncan v. Louisiana, 391 U.S. 145 (1968), could not be applied retroactively to trials beginning prior to the date of the *Duncan* decision).

139. 106 S.Ct. at 1731 (O'Connor, J., concurring).

140. *Id.* at 1741 (Burger, J., concurring). A 1986 decision, Allen v. Hardy, 106 S.Ct. 2878 (1986) (per curiam) held that the *Batson* decision could not be applied retroactively to collateral review of convictions that became final before the *Batson* opinion was announced. Final means "the judgment of the conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed." *Allen*, 106 S.Ct. at 2880 n.1 (quoting Linkletter v. Walker, 381 U.S. 618, 622 n.5 (1965)). *But see* Griffith v. Kentucky, 107 S.Ct. 708, 714 (1987), holding that *Batson* is to be applied retroactively to all cases pending on direct review or not yet final at the time of the *Batson* decision. *Griffith*

Justice Marshall, concurring, urged the total abolition of peremptory challenges. He opined that the *Batson* decision would not end racial discrimination and that sacrificing the defendant's peremptory challenges would be a small price to pay to achieve the desired result.[141]

Justice Stevens, joined by Justice Brennan, applauded the Court for deciding the case on an equal protection ground.[142] In earlier decisions,[143] Justice Stevens had criticized the Court for entertaining arguments not presented in a defendant's petition for certiorari.[144] Justifying his acceptance of the *Batson* decision, Justice Stevens distinguished it based on the appealing party's reliance on the equal protection issue.

In a weak dissent, Chief Justice Burger offered historical support for keeping the peremptory challenge intact and concluded that a pure equal protection analysis has no application to peremptory challenges exercised in any particular case.[145] Dismissing Justice Stevens' explanation, Justice Burger reasoned that since the equal protection claim was not pressed in either the Kentucky Supreme Court or in the petition to grant certiorari, the Court had improperly entertained the equal protection issue.[146]

Justice Rehnquist felt that the state's use of peremptories to exclude minorities on the assumption they would be more likely to favor the defendant should be upheld.[147] He dissented from the Court's decision to overrule this application of the peremptory challenge. He also argued that the Court offered no support for its decision.[148] Justice Rehnquist continued to rely on the reasoning of the *Swain* decision, and found that the defendant had failed to establish a prima facie case.[149]

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overturned the Court's "clear break exception" described in United States v. Johnson, 457 U.S. 537, 549-50 (1982), that disallowed retroactive application where a new rule is a "clean break" with past precedent. 457 U.S. at 549-50.

141. 106 S.Ct. at 1728-29 (Marshall, J., concurring). Justice Marshall was concerned that the prosecutor can too easily justify his reason for exercising peremptory strikes.

142. *Id.* at 1729-30 (Stevens, J., and Brennan, J., concurring).

143. Colorado v. Connelly, 106 S.Ct. 785 (1986) (memorandum of Brennan, J., joined by Stevens, J.), and New Jersey v. T.L.O, 468 U.S. 1214 (1984) (Stevens, J., dissenting).

144. Although Supreme Court Rule 21.1(a) requires that "[o]nly questions set forth in the petition or fairly included therein will be considered by the Court," SUP. CT. R. 21.1(a), the Court has repeatedly heard cases without briefing or oral argument. *See* Colorado v. Connelly, 106 S.Ct. 785 (1986); Florida v. Meyers, 466 U.S. 380, 386 n.3 (1984) (Stevens, J., dissenting). In New Jersey v. T.L.O., 468 U.S. 1214 (1984), Justice Stevens, dissenting, opined that the adversary process functions most effectively when we rely on the initiative of lawyers, rather than the activism of judges, to fashion the questions for review." 468 U.S. at 1216 (Stevens, J., dissenting).

145. *Batson*, 106 S.Ct. at 1734-41 (Burger, C.J., dissenting).

146. *Id.* at 1731-34. Justice Burger suggested that when the Court granted certiorari it could have at least directed the parties to address the equal protection issue or, following oral argument, directed reargument on the particular question.

147. *Id.* at 1744-45 (Rehnquist, J., dissenting).

148. *Id.* (Rehnquist, J., dissenting).

149. *Id.* at 1745 (Rehnquist, J., dissenting).

IV. ANALYSIS

"Challenges for cause obviously have to be explained; by definition, peremptory challenges do not."[150] In light of the *Batson* decision, the peremptory challenge has been redefined. Never before has the Court advocated inquiry into the prosecutor's basis for exercising a peremptory strike; but, never before has the Court offered a remedy to end racial discrimination in petit jury selection.

The *Batson* Court chose to ignore the defendant's sixth amendment challenge and instead chose to reexamine a longstanding precedent[151] that offered an unworkable and inadequate cure to racial discrimination in jury selection procedures.[152] While *Batson* reaffirmed the principle that a "State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause,"[153] the Court rejected *Swain*'s difficult evidentiary standard regarding whether the defendant had met his burden of proving intentional discrimination by the state.[154] *Batson* adopted new standards, derived from an equal protection analysis, that now afford a defendant the opportunity to establish purposeful discrimination in selection of the petit jury by relying solely on the facts in his case.[155] Although Chief Justice Burger claimed that an unadulterated equal protection analysis could not be applied to jury selection in a particular case,[156] the majority recognized that judicially created procedures must give way if a constitutional provision so demands.[157]

The Court's standards for establishing a prima facie case were adapted from the equal protection rationale as applied to jury venires.[158] Previous decisions indicate that this test has practical appli-

150. *Id.* at 1739 (Burger, C.J., dissenting).

151. Swain v. Alabama, 380 U.S. 202 (1964).

152. The defendant based his argument on the grounds that the prosecutor's conduct violated his rights under the sixth and fourteenth amendments to an impartial jury drawn from a cross-section of the community. The state, however, insisted that the defendant was claiming a denial of equal protection, thereby urging the Court to base its finding on *Swain*. The Court chose to ignore the defendant's argument and agreed with the state that the defendant's claim was based on equal protection principles. The result was a reexamination of *Swain* and a side-stepping of the sixth amendment claim. *Batson*, 106 S.Ct. at 1716 n.4.

Justice Stevens applauded the Court for resolving the issue based on an equal protection analysis although the defendant failed to present an equal protection argument in his brief. Justice Stevens justified the Court's decision on the grounds that the state had relied on these grounds in defending the judgment. *Id.* at 1729-30 (Stevens, J., concurring). Chief Justice Burger stated that review of an equal protection argument is improper because the defendant expressly declined to raise this issue both in the United State Supreme Court and in the Supreme Court of Kentucky. *Id.* at 1731-34 (Burger, J., dissenting).

153. *Batson*, 106 S.Ct. at 1716 (quoting Swain v. Alabama, 380 U.S. 202, 203-04 (1965)).

154. *Id.* at 1720-21. *See supra* notes 33-49 and accompanying text.

155. *Id.* at 1722. *See supra* notes 126-36 and accompanying text.

156. *Id.* at 1737.

157. *Id.* at 1724.

158. *See supra* notes 50-84 and accompanying text.

cability,[159] but its usefulness in the petit jury context will need to be determined. The Court's focus on the elimination of racial discrimination limited the scope of the *Batson* holding and disposed of the problem of defining what constitutes a "suspect" or "cognizable" group.[160] This narrow approach avoids overtaxing the system and stops short of an analysis which could lead to the demise of the peremptory challenge.

Borrowing from *Castaneda v. Partida*,[161] the Court appeared to suggest that a defendant who is not a member of the excluded racial group does not have standing to exert an equal protection challenge to discriminatory jury selection procedures.[162] Members of these groups undoubtedly form the vast majority of potential jurors who are excluded for discriminatory reasons, yet arguably where a prosecutor discriminatorily exercises his peremptory challenges, non-member defendants are entitled to protection as well.[163] As noted in *Batson*, "the ultimate issue is whether the state has discriminated in selecting the defendant's venire."[164] Although *Batson* leaves open the question whether the defendant needs to be a member of the excluded group to raise an equal protection challenge, it is clear that the sixth amendment cross-section theory allows one not a member of the underrepresented class to assert a claim.[165]

In addition to limiting its focus to racial discrimination and limiting standing by excluding non-member defendants, the *Batson* Court adopts standards that make it more difficult for a defendant to prove a prima facie case. Although the defendant is allowed to rely on the fact "that peremptory challenges constitute a jury selection practice that permits

159. *Batson*, 106 S.Ct. at 1724. The California courts have encountered few problems in applying their version of inquiring into a prosecutor's reasons for exercising a strike. *See* People v. Hall, 35 Cal. 3d 161, 672 P.2d 854, 197 Cal. Rptr. 745 (1983).

160. Although discrimination in any form has been a concern of the Court, the major issue of the fourteenth amendment was to end governmental discrimination on account of race. By focusing on racial discrimination alone, and avoiding discussion of sex, religion, nationality or creed as a basis for challenging discrimination, the Court may have limited the potential field of litigation.

161. 430 U.S. 482 (1976).

162. *Batson*, 106 S.Ct. at 1723 (citing Castaneda v. Partida, 430 U.S. at 494); *see* United States v. Leslie, 783 F.2d 541, 552-53 n.17 (5th Cir. 1986) ("[t]he sixth amendment allows one not a member of the underrepresented class to complain, . . . while this result is, or at least was, less clear under the equal protection clause."). *Compare* Castaneda v. Partida, 430 U.S. 482, 494 ("[t]he defendant must show . . . substantial underrepresentation of his race . . . .") *with* Peters v. Kiff, 407 U.S. 493 (1972) (a white has standing to challenge the exclusion of blacks). For a contrary analysis, *see* Comment, Batson v. Kentucky: *Can the "New" Peremptory Challenge Survive the Resurrection of* Strauder v. West Virginia, 20 AKRON L. REV. 355, 361-62 (1986) (*Batson* provides support for extending equal protection to areas other than race).

163. *See* Peters v. Kiff, 407 U.S. 493 (1972); United States v. Perez-Hernandez, 672 F.2d 1380 (11th Cir. 1982) (male hispanic entitled to challenge exclusion of blacks and women from serving as grand jury foreman).

164. *Batson*, 106 S.Ct. at 1723.

165. *Batson* notes that discrimination harms not only the defendant, but also the excluded juror, and undermines public confidence in the fairness of our system. *Id.* at 1718. If a non-member defendant is unable to challenge a discriminatory selection process, the injury inflicted on the juror and the community is not addressed.

'those to discriminate who are of a mind to discriminate,' "[166] *Batson* requires a defendant to show that the facts and circumstances raise an inference that the state has exercised its peremptory challenges to exclude veniremen on account of their race.[167] In contrast, a sixth amendment approach does not require a showing of discrimination because it is the underrepresentation due to systematic exclusion of a group that is the focus of a fair cross-section analysis.[168] In both approaches, once a prima facie case is made out, the burden shifts to the state to come forward with a neutral explanation for challenging the excluded jurors.[169] Such explanation need not rise to the level of a challenge for cause.[170] The Court delineated the standards for assessing and rebutting a prima facie case, however, it failed to provide procedures for the rule's implementation, relying on the state and federal trial courts to develop their own.[171]

The Court's silence as to the defendant's sixth amendment argument leaves unclear the question whether a sixth amendment challenge to racially discriminatory use of peremptories is now foreclosed. Subsequently, however, the Court, resting on *Batson*, chose to vacate and remand for further consideration two cases[172] which challenged the Court to accept the sixth amendment approach. If nothing else, the Court has bided time before this issue will be settled.[173]

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166. *Id.* at 1723 (citing Avery v. Georgia, 345 U.S. 559, 562 (1953)).

167. *Id.*

168. *See supra* notes 82-84.

169. *Batson*, 106 S.Ct. at 1723 (citing McCray v. Abrams, 750 F.2d 1113, 1132 (2d Cir. 1984), *cert. granted and judgment vacated*, 106 S.Ct. 3289 (1986) and Booker v. Jabe, 775 F.2d 762, 773 (6th Cir. 1985), *cert. granted and judgment vacated sub nom.* Michigan v. Booker, 106 S.Ct. 3289 (1986)). Although these two cases are sixth amendment cases, they borrowed the facially neutral explanation criteria directly from an equal protection case, Castaneda v. Partida, 430 U.S. 482, 494 (1977). This prosecutor's burden is not as demanding as *Duren*'s rebuttal burden that the underrepresentation further a significant state interest. Duren v. Missouri, 439 U.S. 357, 369 (1979).

170. *Batson*, 106 S.Ct. at 1723. By inquiring into a prosecutor's reasons for exercising his peremptory challenges, the Court presumes to provide a vehicle for eliminating discrimination in the jury selection process, yet it is doubtful that this alone can substantially curb purposeful discrimination. It very likely will result in a more thoughtful and careful voir dire by the prosecution, coupled with clever notetaking. It is hard to imagine that it would be difficult to espouse racially neutral explanation for exercising multiple peremptory challenges.

171. *Id.* at 1724, 1725-26 (White, J., concurring) ("much litigation will be required to spell out the contours of the Court's Equal Protection holding today . . . ."). For application of the *Batson* rule, see United States v. Davis, 809 F.2d 1194 (6th Cir. 1987); Clay v. State, 290 Ark. 54, 716 S.W.2d 751 (1986); and Bueno-Hernandez v. State, 724 P.2d 1132 (Wyo. 1986).

172. Booker v. Jabe, 775 F.2d 762 (6th Cir. 1985), *cert. granted and judgment vacated sub nom.* Michigan v. Booker, 106 S.Ct. 3289 (1986); McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984), *cert. granted and judgment vacated*, 106 S.Ct. 3289 (1986); *see supra* note 110.

173. The sixth amendment challenge continues to be asserted following the *Batson* decision. *See* Fields v. People, No. 84-SC-382 (Colo. Feb. 17, 1987) (holding that a prosecutor's use of peremptory challenges to systematically exclude Spanish-surnamed persons from a jury violates a defendant's right to trial by an impartial jury guaranteed by the sixth amendment of the United States Constitution and article II, section 16 of the Colorado Constitution; defendant's rights were not violated in this case); *see also* State v. Gilmore, 103 N.J. 508, 511 A.2d 1150 (1986) (holding that the state's exercise of its peremptory

V. CONCLUSION

Batson v. Kentucky provided the Supreme Court with an opportunity to overrule its overbearing decision in *Swain*. As a result, a defendant may now establish a prima facie case of purposeful discrimination in the state's use of peremptory challenges in a single case. There is no justification for the Court's delay in overruling this holding. For over one hundred years the Supreme Court has said that the courts are not to discriminate, but until this decision no viable remedy has been provided. Whether *Batson* relieves racial discrimination remains to be seen. Once the inference of discrimination is raised, creative lawyering may provide the prosecution with a means to rebut the defendant's claim.

Nevertheless, through the *Batson* decision, the Court, by denouncing the exercise of peremptories on racial grounds, has taken a giant step in effectuating a cure. The Court could further emphasize its stand on eliminating racial discrimination by entertaining the sixth amendment challenge and upholding that approach to curbing discriminatory selection procedures.[174] If the approaches that have been developed are not upheld and do not provide the necessary criteria for preventing racial discrimination in jury selection, the result could be the demise of "one of the most important rights secured to the accused,"[175] the peremptory challenge.

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challenges to exclude all black prospective petit jurors violated the defendant's constitutional right to an impartial jury).

174. *See* Note, *The Death Knell of the Insurmountable Burden: Batson v. Kentucky*, 31 ST. LOUIS U.L.J. 473 (1987).

175. Pointer v. United States, 151 U.S. 396, 408 (1894).