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Brian J. Serr

Mark Maney

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RACISM, PEREMPTORY CHALLENGES, AND THE DEMOCRATIC JURY: THE JURISPRUDENCE OF A DELICATE BALANCE

BRIAN J. SERR*
MARK MANEY**

> The institution of the jury may be aristocratic or democratic, according to the class from which the jurors are taken; but it always preserves its republican character, in that it places the real direction of society in the hands of the governed, or of a portion of the governed, and not in that of government. . . . The true sanction of political laws is to be found in penal legislation. He who punishes the criminal is therefore the real master of society. Now, the institution of the jury raises the people itself, or at least a class of citizens, to the bench of judges . . . [and] consequently invests the people, or that class of citizens, with the direction of society. . . . In the United States the [jury] system is applied to the whole people. [It applies to] every American citizen [who is] both an eligible and legally qualified voter. The jury system as it is understood in America appears to me to be as direct and as extreme a consequence of the sovereignty of the people as universal suffrage. They are two instruments of equal power. . . .[1]

Alexis de Tocqueville's antebellum description of the American criminal jury as a democratic institution equalled only by universal suffrage[2] was necessarily premised on American society at that time.

* Assistant Professor of Law, Baylor University School of Law. L.L.M., University of Illinois School of Law, 1985; J.D., Washington University—St. Louis, 1984; B.S., Dana College, 1981.
** J.D., Baylor University School of Law, 1987.

1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 282-83 (Knopf 1951)(footnotes omitted).

2 *See also* Carter v. Jury Commission, 396 U.S. 320, 330 (1970)("Whether jury service be deemed a right, privilege, or a duty, the State may no more extend it to some of its citizens and deny it to others on racial grounds than it may invidiously discriminate in the offering and withholding of the elective franchise.").

"Every American citizen" was synonymous with white males.[3] Suffrage and political participation for all white males was, at that time, a progressive democratic ideal and contrasted favorably with the aristocratic republic in England.[4]

After the Civil War, as the government granted civil rights to the emancipated, racism clashed with the concept of extending jury service and suffrage to all citizens. Efforts at preventing the political participation of black persons ranged from the overt to the subtle.[5] Today, racist barriers to suffrage are largely historical. Unfortunately, Tocqueville's second bastion of democracy, the jury, remains a largely racist institution.[6]

The Supreme Court's most recent effort to remove racism from the jury selection system, *Batson v. Kentucky*,[7] follows a line of cases a century old, all attempting the same difficult feat—the creation of a color-blind jury selection system.[8] The task is enormously difficult because racism is, especially in contemporary America, subtle and often unconscious. The protections against racism, therefore, are generally cumbersome and unwieldy, threatening venerable institutions such as the peremptory challenge in *Batson*. Because peremptory challenges inherently accomodate racism by sanctioning unexplained, subjective decisions, combatting racism in jury selection will necessarily threaten time-honored prosecutorial liberties. *Batson*, however, attempted the difficult task of eliminating racial discrimination without sacrificing the historic role of the peremptory challenge.

Now, almost two years after the *Batson* decision, it is time to comment on its success or failure. With racism still pervasive in our society, is it possible to successfully accommodate both the arbitrary peremptory challenge and the ideal of a democratic jury? Has the Supreme Court, in its effort to accommodate both interests, gone too far in a futile attempt to eliminate racism from jury selection, inhibiting only the prosecutor's right to freely select a jury, with no corresponding return in the elimination of racism? Or, has the Supreme Court, fearful of abrogating the role of the peremptory challenge, sanctioned racism in the courtroom? These questions

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[3] Tocqueville chronicled what he viewed as the irreconcilable clash between "three races in the United States"—whites, Indians, and blacks. *See* A. TOCQUEVILLE, *supra* note 1, at 381-484.

[4] *Id.* at 283.

[5] *See infra* notes 9-33 and accompanying text.

[6] *See generally* Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985).

[7] 476 U.S. 79 (1986).

[8] *See infra* notes 9-39 and accompanying text.

can be answered only if one has an understanding of *Batson*'s historical role, its eighteen-month history, and the attempted balance of important interests which shaped its remedy.

I. RACISM AND JURY SELECTION

A. AN HISTORICAL OVERVIEW: SELECTING THE VENIRE

The Supreme Court first addressed racism in jury selection in its 1879 decision of *Strauder v. West Virginia*.[9] The Court declared unconstitutional a West Virginia statute limiting jury service to "white males who are [at least] twenty-one years of age."[10] Exclusion of all black persons from jury service, the Court held, violated the equal protection rights of a black defendant because the "very idea of a jury is a body . . . composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellow associates, [and] persons having the same legal status in society as that which he holds."[11] The Court stated that the equal protection clause established the right to a jury of peers and thus precluded the systematic exclusion from jury service of any race or class of persons.[12] More than one hundred years later, in *Batson v. Kentucky*, the Supreme Court reviewed the history of jury selection and emphasized that it had never questioned the principles announced in *Strauder*.[13] Rather, the Court repeatedly has had to enforce those principles against various attacks.[14]

Because *Strauder* prohibited only direct statutory exclusion of blacks from venires, the Court soon had to review the discretionary aspects of the venire selection process. Those who wished to disenfranchise blacks from the judicial process had begun to use available subjective criteria to effectuate racist exclusion. Unfortunately, such subtle exclusion was inherently more difficult to isolate and address. Therefore, the removal of this subtle barrier to a truly democratic jury required the Court's constant attention in a long line of decisions. In *Neal v. Delaware*,[15] decided two years after *Strauder*, a black

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9 100 U.S. 303 (1879).

10 *Id.* at 305 (citation omitted).

11 *Id.* at 308, *cited in* Batson v. Kentucky, 476 U.S. at 86.

12 *Id.*

13 Batson v. Kentucky, 476 U.S. 79, 89-90 (1986).

14 *See, e.g.*, Vasquez v. Hillery, 106 S. Ct. 617, 622-24 (1986); Rose v. Mitchell, 443 U.S. 545, 550-59 (1979); Casteneda v. Partida, 430 U.S. 482, 492-500 (1977); Alexander v. Louisiana, 405 U.S. 625, 628-29 (1972); Whitus v. Georgia, 385 U.S. 545, 549-50 (1967); Swain v. Alabama, 380 U.S. 202, 205 (1965); Coleman v. Alabama, 377 U.S. 129, 133 (1964); Norris v. Alabama, 294 U.S. 587, 589 (1935); Neal v. Delaware, 103 U.S. 370, 394 (1881).

15 103 U.S. 370 (1881).

man alleged that Delaware's practice of selecting from lists of qualified taxpayers "sober and judicious" persons to serve as venirepersons had, in practice, systematically excluded blacks from venire panels.[16] The Court, in an opinion written by Justice Harlan, found the state's explanation of the exclusion—that few blacks in Delaware were intelligent or moral enough to serve as jurors—a "violent presumption,"[17] especially in light of Delaware's concession that no black had been on a venire in recent memory.[18] This longstanding exclusion of blacks raised a prima facie case of purposeful discrimination, shifting the burden of justifying the total lack of black representation to the state.[19] Not surprisingly, the Court found Delaware's explanation totally inadequate and held that Neal had proved intentional discrimination.[20]

State legislators and courts seemed reluctant to apply the protections outlined in *Strauder* and *Neal*. This resistance forced the Supreme Court to address both the absolute statutory exclusion[21] and discretionary exclusion[22] of blacks from grand juries. In many cases, the Court reviewed purely factual applications of the *Neal* pro-

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16 *Id.* at 372.

17 *Id.* at 397. The Court stated:

> It was, we think, under all the circumstances, a violent presumption which the State court indulged, that such uniform exclusion of that race from juries, during a period of many years, was solely because, in the judgement of those officers, fairly exercised, the black race in Delaware were utterly disqualified, by want of intelligence, experience or moral integrity, to sit on juries.

Id.

The Chief Justice of the Delaware Supreme Court had concluded " 'that none but white men were selected is in nowise remarkable in view of the fact—too notorious to be ignored—that the great body of black men residing in this State are utterly unqualified by want of intelligence, experience, or moral integrity to sit on juries.' " *Id.* at 393-94.

18 *Id.* at 393. The Supreme Court also addressed the issue of the use of subjective means to exclude blacks from the venire in two companion cases to *Strauder*: Ex parte Virginia, 100 U.S. 339 (1879) and Virginia v. Rives, 100 U.S. 313 (1879). These cases, however, focused primarily on the scope of the fourteenth amendment and the power of congress to enforce it.

19 *Neal*, 103 U.S. at 397.

20 *Id.* at 393.

21 Bush v. Kentucky, 107 U.S. 110, 116 (1882).

22 Norris v. Alabama, 294 U.S. 587, 599 (1934); Martin v. Texas, 200 U.S. 316, 319 (1905); Rogers v. Alabama, 192 U.S. 226, 231 (1903); Carter v. Texas, 177 U.S. 442, 447 (1899); Gibson v. Mississippi, 162 U.S. 565, 591-92 (1895). The Court in *Carter* made the oft-quoted statement:

> Whenever by any action of a State, whether through its legislature, through the 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.

Carter, 177 U.S. at 447 (citations omitted).

tections. Thus, in *Norris v. Alabama*,[23] the Court found that the complete lack of minority representation on grand juries over many years established a prima facie case of discrimination.[24] Proof of the exclusion of particularly qualified blacks, including members of school boards, trustees of segregated schools, and property owners, bolstered this finding.[25] The Court reviewed the state's evidence, which consisted largely of a general denial of discrimination, and concluded that the state failed to rebut the strong inference of intentional discrimination raised by the defendant.[26] Importantly, this conclusion directly contradicted the Alabama Supreme Court's own factual determination,[27] demonstrating both the resistance facing the Court and the effort it was willing to make in order to create a democratic jury.

State resistance to the *Strauder* principles, however, was entrenched, necessitating continued federal judicial enforcement of the equal protection principles first announced in 1879.[28] The Supreme Court soon refined its equal protection analysis and extended it beyond patently racist exclusion to include jury selection practices which were indifferent to minority juror participation. For example, in *Hill v. Texas*,[29] the Supreme Court ruled unconstitutional the long-standing practice of allowing jury commissioners to choose jurors from among their personal acquaintances. Apparently, the commissioners were not acquainted with any black persons.[30] There was, however, no indication that the discrimination was intentional.[31] Rather, the Court based its finding of an equal protection violation on the commissioners' lack of "effort to ascertain whether there were . . . members of the colored race qualified to

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23 294 U.S. 587.

24 *Id.* at 591. The Court stated:

> It appeared that no negro had served on any grand or petit jury in that county within the memory of witnesses who had lived there all their lives. Testimony to that effect was given by men whose ages ran from fifty to seventy-six years. . . . The court reporter, who had not missed a session in that county in twenty-five years, and two jury commissioners testified to the same effect.

Id.

25 *Id.*

26 *Id.* at 598. The State's evidence consisted of the testimony of jury commissioners who denied that race was a factor in grand jury selection and asserted that they excluded blacks because blacks lacked the necessary qualifications. *Id.* at 594-95.

27 *Id.* at 595-96.

28 *See, e.g.*, Cassell v. Texas, 339 U.S. 282, 290 (1950); Akins v. Texas, 325 U.S. 398, 403 (1944); Hill v. Texas, 316 U.S. 400, 404 (1942); Smith v. Texas, 311 U.S. 128, 130 (1940).

29 316 U.S. 400 (1942).

30 *Id.* at 403-04.

31 *Id.* at 404.

serve as jurors, and if so who they were."[32] Thus, the decision in *Hill* imposed an affirmative duty to place qualified minorities on venire panels. The Court refused to allow its goal of a jury of peers to be sacrificed through indifference. Later, in *Cassell v. Texas*,[33] the Court enlarged the duty created in *Hill* by striking down tokenism, thereby transforming the goal into total absence of discrimination.

Originally, the goal of a jury of one's peers found support in the equal protection clause and its command to eliminate intentional racial discrimination. By the 1970s, however, the *Strauder* goal had become the benefactor of a completely different constitutional provision—the sixth amendment right to trial by jury and its essential component, the right to have a jury selected from a fair cross-section of the community.[34] As the Court moved away from the equal protection analysis, the fair cross-section requirement evolved into

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[32] *Id.* at 404-06.

[33] 339 U.S. 282, 290 (1949). *See also id.* at 293-95 (Frankfurter, J., concurring).

[34] The command of representativeness and cross-sectionality in venire panels originated in Smith v. Texas, 311 U.S. 128 (1940). The unanimous *Smith* Court declared: "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." *Id.* at 130. To exclude entire racial groups from jury service, the Court continued, "is at war with our basic concepts of a democratic society and a representative government." *Id.* Following *Smith*, a representative jury changed from a goal to a requirement, so that in Taylor v. Louisiana, 419 U.S. 522, 528 (1979), which dealt with exclusion of women from jury service, the Court stated: "[T]he unmistakable impact of this Court's opinions, at least since 1980, Smith v. Texas, and not repudiated by intervening decisions, is that selection of a petit jury from a representative cross-section of the community is an essential component of the Sixth Amendment right to a jury trial." The Court continued:

> The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge. This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large distinctive groups are exluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial.

Id. at 530. *See also* Duren v. Missouri, 439 U.S. 357 (1979); Casteneda v. Partida, 430 U.S. 482 (1977); Turner v. Fouche, 396 U.S. 346 (1970); Whitus v. Georgia, 385 U.S. 545 (1967); Thiel v. Southern Pac. Co., 328 U.S. 217 (1946).

The Court has never prescribed specific venire selection procedures. Taylor v. Louisiana, 419 U.S. 522, 537-38 (1979)("The fair cross-section principle must have much leeway in application. The States remain free to prescribe relevant qualifications of their jurors and to provide reasonable exemptions so long as it may fairly be said that the jury lists are representative of the community.")(citations omitted). The Court's decisions, however, have made random venire selection the common state practice. *See* NATIONAL JURY PROJECT, JURYWORK SYSTEMATIC TECHNIQUE § 5.03(2), at 5-15 to -16 (2d ed. 1986). A federal statute has mandated random venire selection in federal courts since 1968. Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861-74 (1985).

the sole source of protection for the defendant's interest in a jury of peers. Not until *Batson* did the Court revitalize the concept of reaching the goal of a jury of peers by means of the equal protection clause.[35] The Court, however, has applied the sixth amendment fair cross-section requirement only to the venire, and never to the jury itself.[36]

The importance of the democratic jury—a jury of peers—cannot be overstated. Sociological study has substantiated the theoretical basis of the right which dates back to the Magna Carta: the peers of a criminal defendant will better understand and empathize with his feelings, social position, and needs than will those from different backgrounds.[37] Unconstitutional jury selection procedures not only reduce the likelihood of obtaining a jury of one's peers, they also cast doubt on the integrity of the whole judicial process by creating the appearance of bias in individual cases, and, more importantly, by increasing the risk of actual bias.[38] Yet, despite this critical importance, the Supreme Court has never suggested that a defendant has a right to a jury composed in part of persons of defendant's own race. Only a color-blind, rather than a color-conscious, selection process[39] can fully protect the values discussed in *Strauder*. A true jury of peers is, however, certainly a goal of the application of equal protection rights to jury selection procedures; and it is a goal which *Strauder* and its progeny furthered by attempting to eliminate racial discrimination in the selection of the venire.

B. THE PECULIAR PROBLEM OF PEREMPTORY CHALLENGES

Peremptory challenges or strikes—"challenges without cause, without explanation and without judicial scrutiny"[40]—can transform even a representative venire into a white, middle-class jury. Because

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

36 In *Strauder*, the Court limited its inquiry to whether the systematic exclusion of one race violated equal protection, while distinguishing a "right to a grand or petit jury composed in whole or in part of [the defendant's] race or color. . . ." *Strauder*, 100 U.S. at 305. The Court explicitly recognized that a defendant has no right to a "petit jury composed in whole or in part of persons of his own race." *Id. See also Batson*, 476 U.S. at 85.

37 "There is extensive sociological data indicating that peers of a criminal defendant . . . will vote differently from nonpeers, probably because they understand much more about the defendant's . . . feelings, attitudes, and way of life than do jurors from other social strata." 1 A. GINGER, JURY SELECTION IN CIVIL AND CRIMINAL TRIALS § 2.2, at 64 (1984). *See also* Bermant & Shepard, *The Voir Dire Examination, Challenges, and Adversary Advocacy*, in THE TRIAL PROCESS 69-114 (B. Sales ed. 1981); Monahan & Loftus, *The Psychology of the Law*, 33 ANN. REV. PSYCHOLOGY 441 (1982).

38 Peters v. Kiff, 407 U.S. 493, 502-03 (1971).

39 *See supra* note 36.

40 Swain v. Alabama, 380 U.S. 202, 212 (1965).

peremptory challenges allow both the prosecutor and the defendant to strike a prospective juror at whim, they provide ample opportunity to discriminate. A racially discriminatory use of peremptory strikes can render meaningless the protections provided to the venire selection process by *Strauder* and its progeny.

The very nature of the peremptory challenge is at odds with a jury of peers. While a peer jury ideally consists of a body of the defendant's neighbors, associates, and persons sharing a common background and social status,[41] the prosecution's use of peremptory challenges, even under contemporary systematic jury selection techniques, is directed at the removal of those venirepersons who are most likely to share defendant's attitudes, values, and experiences.[42] Therefore, the closer the similarity between a prospective juror and the defendant, the more likely the prosecutor will strike the juror. Traditionally, lawyers based their peremptory strikes on stereotypes and obvious similarities between venirepersons and defendants.[43] "Boots, bellies, and tattoos" are what one DWI defense lawyer looks for in a jury.[44] Today, modern demographic surveys have refined those stereotypes and, arguably, replaced broad stereotypes with known statistical relationships.[45] Still, the key factors in the use of both traditional stereotypes and modern demographics include sex, occupation, age, and, of course, race.[46]

Another factor prevalent in jury selection is the simple gut reaction of an attorney to a particular venireperson. An attorney who for any reason feels uncomfortable with a particular juror, or feels more comfortable with another, is likely to strike the venireperson who causes the discomfort. It is not surprising that the scarcity of minority jurors mirrors the paucity of minority prosecutors. Just as voir dire works on the assumption that defendants and jurors of similar backgrounds are likely to share basic views about life, the same principle applies to a prosecutor's gut reactions to prospective jurors—he is likely to be most comfortable with persons like himself.[47] A white prosecutor's preference for jurors of his own race,

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41 *See id.*

42 National Jury Project, JURYWORK: SYSTEMATIC TECHNIQUES § 11.02 (3)(6)(i), at 11-8 (2d ed. 1986).

43 *Id.* ("For example, most criminal defense lawyers believe that blacks and young people are more favorable to the defense than whites and older people."). Likewise, a few prosecutors share the same prejudice.

44 Timms & McGonigle, *Picking Juries Is An Inexact Science, Lawyers Say*, Dallas Morning News, Mar. 9, 1986, at A29, col. 1.

45 National Jury Project, *supra* note 42, § 11.02 (3)(6)(i), at 11-8.

46 *Id.* at § 11.02(4), at 11-13 to -14.

47 Justice Marshall, in his *Batson* concurrence, stated:

however, is no less racial discrimination than a specific prejudice against blacks. Peremptory exclusion on this basis both reduces minority participation on criminal juries and frustrates the interest of minority defendants in a jury of peers. Though in some cases a prosecutor might wish to strike white, middle-class venirepersons, it is unlikely, due to their majority status, that he could eliminate all persons of this class. Peremptories are likely to effectuate the total exclusion of a class only when the lawyer aims them at minority groups. Thus, in cases involving minorities, the very nature of peremptories conflicts with the *Strauder* goal of a jury of peers, as well as with the vital interest of a minority group in directing society via participation on criminal juries.

The Supreme Court first addressed the inherent tension between peremptory challenges and the goal of a representative jury in *Swain v. Alabama*.[48] The Court evidently approached the dilemma with reluctance, as implied by the opinion's date, 1965, a full eighty-six years after *Strauder*. The conflict between the defendant's right to equal protection and the prosecutor's right to use peremptories appeared irreconcilable, and the Court in *Swain* believed it had to forfeit one or the other. Justice White explained:

> The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control. . . . It is often exercised upon the "sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another," upon a juror's "habits and associations," or upon the feeling that "the bare questioning [of a juror's] indifference may sometimes provoke a resentment." It is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. For the question a prosecutor or defense counsel must decide is not 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. . . . Hence,

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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. As Justice Rehnquist concedes, prosecutors' peremptories are based on their "seat-of-the-pants instinct" as to how particular jurors will vote. Yet, "seat-of-the-pants instincts" may well be just another term for racial prejudice. . . . It is worth remembering that "114 years after the close of the War Between the States and nearly 100 years after *Strauder*, racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole."

Batson, 476 U.S. at 106 (Marshall, J., concurring)(quoting Rose v. Mitchell, 443 U.S. 545, 558-59 (1979)), *quoted in* Vasquez v. Hillery, 106 S. Ct. 617, 627 (1986)(citation omitted).

[48] 380 U.S. 202 (1965).

veniremen are not always judged solely as individuals for the purposes of exercising peremptory challenges. Rather, they are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations, in the context of the case to be tried.

With these considerations in mind, we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws. In the quest of an impartial and qualified jury, Negro and White, Protestant and Catholic, are alike subject to being challenged without cause. To subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge. The challenge, *pro tanto*, would no longer be peremptory, each and every challenge being open to examination, either at the time of the challenge or at a hearing afterward. The prosecutor's judgment underlying each challenge would be subject to scrutiny for reasonableness and sincerity. And a great many uses of the challenge would be banned.[49]

Thus, in *Swain*, the Court found it difficult to balance the use of peremptory strikes with the equal protection principles enunciated in *Strauder*, because, as Justice White explained, to limit or qualify peremptory challenges is to destroy them.[50]

Although Justice White's conclusion may be true, the question then becomes, "Which right must give way—the right to exercise peremptory challenges or the right to enjoy equal protection of the law?"[51] As the dissenting Justices in *Swain* recognized, if it is

necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the fourteenth amendment and the right to challenge peremptorily, the Constitution compels a choice of the former. *Marbury v. Madison* settled beyond a doubt that when a constitutional claim is opposed by a nonconstitutional one, the former must prevail.[52]

The majority in *Swain*, however, was reluctant to eliminate the peremptory challenge because of its long history. Dating from Roman criminal trials,[53] the right survived virtually unquestioned until

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[49] *Id.* at 220-22 (citations and footnotes omitted).

[50] *Id.* at 221-22. " 'For it is, as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose.' " *Id.* at 219 (quoting Lewis v. United States, 146 U.S. 370, 378 (1892)).

[51] Of course, it is the prosecutor's right to peremptorily challenge veniremen that is weighed against the defendant's right to equal protection. Generally, however, it is assumed that if the prosecutor forfeits his right to peremptorily challenge, so must the defendant lose his corresponding right to exercise peremptories. *See* Batson v. Kentucky, 476 U.S. 79, 107-108 (Marshall, J., concurring). This Article, however, does not directly address this issue.

[52] *Swain*, 380 U.S. at 244 (Goldberg, J., dissenting). Justice Goldberg, however, like the *Batson* Court, did not think it necessary to make such an "absolute choice." *Id.*

[53] W. Forsyth, HISTORY OF TRIAL BY JURY 175 (1852), *quoted in Batson*, 476 U.S. at 119 (Burger, C.J., dissenting).

the twentieth century.[54] Peremptory strikes were an integral part of English common law,[55] even though they have rarely been used in the last 100 years in Great Britain.[56] In the United States, Congress established peremptory challenges in the 1790 Act[57] for all felonies punishable by death. Because of the historical credentials of peremptory challenges and the widespread belief that the strikes are a necessary aspect of trial by jury, their exercise is considered one of the accused's most important rights.[58] The Supreme Court has held that denial of a defendant's right to exercise peremptory challenges is per se reversible error without a showing of prejudice,[59] despite the fact that the use of peremptories is not a constitutional right.[60]

The Court, refusing in *Swain* to make an absolute choice between equal protection and peremptory challenges, attempted to balance the two rights, placing only a slight restriction on the government's use of peremptories.[61] Ironically, the *Swain* ruling actually implies that the statutory right takes precedence over the

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54 *Swain*, 380 U.S. at 216.

55 Coke on Littleton 156 (1791), *cited in Swain*, 380 U.S. at 212; 4 W. BLACKSTONE, COMMENTARIES 349 (1899). The Court in *Swain* stated:

> The system of struck juries also has its roots in ancient common-law heritage. Since striking a jury allowed both sides a greater number of challenges and an opportunity to become familiar with the entire venire list, it was deemed an effective means of obtaining more impartial and better qualified jurors. Accordingly, it was used in causes of "great nicety" or "where the sheriff [responsible for the jury list] was suspected of partiality. . . ." It was adopted as a fairer system to the defendant and prosecution and a more efficacious, quicker way to obtain an impartial jury satisfactory to the parties.

Swain, 380 U.S. at 217-18 (quoting 3 Blackstone Commentaries *357).

56 *Swain*, 380 U.S. at 213 n.12.

57 1 Stat. 119 (1790).

58 *Swain*, 380 U.S. at 219 ("The persistence of peremptories and their widespread use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury" and "one of the most important of the rights secured to the accused.")(citations omitted).

59 *Id.* (citing Lewis v. United States, 146 U.S. 370, 376 (1892)); Harrison v. United States, 163 U.S. 140 (1895). *Compare* Gulf, Colo. & Santa Fe R.R. Co. v. Shane, 157 U.S. 348 (1894).

60 *Swain*, 380 U.S. at 219 (citing Stilson v. United States, 250 U.S. 583, 586 (1919)).

61 *Id.* at 223-24. The Court ruled:

> In light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of the jury trial, we cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case. The presumption in any given 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 subject to examination by allegations that in the case at hand all Negroes were removed because they were Negroes. Any other result, we think, would establish a rule wholly at odds with the peremptory challenge system as we know it.

Id.

constitutional right.[62] Thus, in order to establish a successful equal protection challenge to a prosecutor's discriminatory use of peremptories, *Swain* required proof of the continuous and wholesale exclusion of blacks in case after case for reasons wholly unrelated to the case being tried.[63] The defendants in *Swain* could not meet this stringent test,[64] nor could any defendant after *Swain*.[65]

The Court in *Swain* also loosened the equal protection analysis from its *Strauder* foundations. Rather than focusing on the defendant's interest in a jury of his peers, the Court purported to protect only the interest of minority participation in the administration of justice.[66] The ruling in *Swain*, therefore, provided no protection to an individual defendant deprived of a jury of his peers through racially discriminatory strikes. In fact, the opinion sanctioned the use of peremptory challenges on racial grounds in individual cases, precluding only the systematic exclusion of minorities in all cases.[67] As one commentator has argued, "*Swain* itself is worse than useless in protecting the black defendant from racial prejudice, for it affirmatively sanctions the very practice that threatens equal justice: the elimination of black jurors in cases involving black defendants."[68]

C. *BATSON V. KENTUCKY*: BALANCING EQUAL PROTECTION AND THE PEREMPTORY CHALLENGE

Commentators soundly criticized *Swain v. Alabama* because of

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[62] *Id.* at 222.

[63] *Id.* at 233-24. The Court stated:

> [I]t is permissible to insulate from inquiry the removal of Negroes from a particular jury on the assumption that the prosecution is acting on acceptable considerations related to the case he is trying, the particular defendant involved and the particular offense charged. But when the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes . . . with the result that no Negroes even serve on petit juries, the Fourteenth Amendment claim takes on added significance. . . . 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. Such proof might support a reasonable inference that Negroes are excluded from juries for reasons wholly unrelated to the outcome of a particular case on trial and that the peremptory system is being used to deny the Negroes the same right and opportunity to participate in the administration of justice enjoyed by the white population.

Id.

[64] *Id.* The Court held that the record in *Swain* was clearly insufficient to demonstrate how the state had violated the *Swain* rule. This ruling resulted despite the fact that, although blacks had frequently been venireperson, it was undisputed that no black had ever served on a petit jury in Talladega County. *See id.* at 234-35(Goldberg, J., dissenting).

[65] *See* Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1658 (1985).

[66] *Swain*, 380 U.S. at 223-24.

[67] *Id.* at 220. *See supra* note 63.

[68] Johnson, *supra* note 65, at 1666.

the crushing burden it imposed on defendants alleging racially discriminatory jury selection,[69] and its standard soon became outmoded. In 1965, when the Court decided *Swain*, an equal protection claim of minority exclusion from venires required, consistent with *Swain*, exclusion over an extended period of time.[70] Subsequent opinions, though, ruled that a defendant may raise a prima facie case of discrimination in venire selection based upon proof of underrepresentation on a single venire.[71] The *Batson* Court, recognizing this historical transition, rejected the *Swain* standard for proving discriminatory use of peremptory challenges by ruling that a defendant may base an equal protection violation on a prosecutor's use of peremptories *in a single case*.[72]

James Batson, a black man, was indicted for burglary and the receipt of stolen goods. At trial, following voir dire by the court, the prosecutor used his peremptories to strike all four black venirepersons. Batson's jury was all white. When defense counsel moved to discharge the jury before it was sworn, alleging that the prosecutor's removal of all the black venirepersons violated Batson's rights to a cross-sectional jury and equal protection, the trial judge ruled that the parties could use their peremptories to "strike anybody they want to."[73] The all-white jury convicted Batson on all counts.[74]

Although Batson's lawyers originally argued the case to the Supreme Court on fair cross-section grounds, the Court once again

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69 *See, e.g.*, J. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 166-67 (1977); Imlay, *Federal Jury Reformation: Saving a Democratic Institution*, 6 LOY. L.A.L. REV. 247, 268-70 (1973); Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985); Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235, 283-303 (1968); Note, *Rethinking Limitations on the Peremptory Challenge*, 85 COLUM. L. REV. 1357 (1983); Note, *Peremptory Challenge: Systematic Exclusion of Prospective Jurors on the Basis of Race*, 39 MISS. L.J. 157 (1957); Comment, Swain v. Alabama, *A Constitutional Blueprint for the Perpetuation of the All-White Jury*, 52 VA. L. REV. 1157 (1966);.

70 Batson v. Kentucky, 476 U.S. 79, 93-94 (1986).

71 *Id.* at 95.

72 The Court explained:

> [S]ince the decision in *Swain*, this court has recognized that a defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection in *his case*. These decisions are in accordance with the proposition, articulated in *Arlington Heights v. Metropolitan Housing Corp.*, that a "consistent pattern of official racial discrimination" is not "a necessary predicate to a violation of the Equal Protection Clause. A single invidiously discriminatory governmental act" is not "immunized by the absence of such discrimination in the making of other comparable decisions." For evidentiary requirements to dictate that "several must suffer discrimination" before one could object, would be inconsistent with the promise of equal protection to all.

Id. at 95-96 (citations and footnote omitted)(emphasis in original)(quoting *Arlington Heights*, 429 U.S. at 266 n.14).

73 *Id.* at 83.

74 *Id.*

refused to extend that analysis to the jury itself.[75] The obvious alternative was a revitalization of the equal protection analysis begun in *Strauder* but later rendered impotent in *Swain*.[76] Also reemerging in *Batson* was the original goal of eliminating racially discriminatory jury selection in order to create a jury of peers.[77]

The Court reviewed the historical struggle to obtain representative juries, particularly *Swain*'s attempt to accommodate both the prosecutor's right to exercise peremptory challenges free of judicial control and the constitutional prohibition against the racially motivated exclusion of persons from jury service.[78] The majority then rejected the *Swain* standard of proof as inconsistent with its subsequent decisions upholding equal protection challenges to venire selection based on discrimination occurring in a single case.[79] In sharp contrast to *Swain*, the new standard established in *Batson* allows a defendant to establish a prima facie case of racial discrimination in jury selection based solely on the prosecutor's peremptory exclusion of jurors in the defendant's trial.[80]

The *Batson* Court set down a seemingly simple three-part test. First, the defendant must be a member of a cognizable racial group and show that the prosecutor has peremptorily challenged members of the defendant's race.[81] Second, the defendant may rely on the undisputed fact that peremptory challenges permit "those to discriminate who are of a mind to discriminate."[82] Third, the defendant must show that the totality of relevant circumstances raises an inference that the prosecutor used his peremptories to exclude prospective jurors *because* of their race.[83] The second element, clearly present in all cases, is easily joined with the third *Batson* requirement.

Once the defendant makes a prima facie showing of purposeful discrimination, the burden shifts to the state to come forward with a neutral explanation for peremptorily challenging minority jurors. Although this explanation need not rise to the level of a challenge for cause, the prosecutor must articulate a neutral explanation *related to* the particular case. A prosecutor's mere denial of discriminatory motive is not sufficient, nor is any explanation based upon an

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75 *Id.* at 85-86 n.6.
76 *Id.* at 96-98.
77 *Id.*
78 *Id.* at 91-92.
79 *Id.* at 93.
80 *Id.* at 93-96. *Compare Swain*, 380 U.S. at 223.
81 476 U.S. at 96.
82 *Id.* at 96 (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).
83 *Id.*

assumption that blacks, as a group, are either unqualified to serve as jurors or biased in a particular case simply because the defendant is black.[84] After the prosecutor has explained his peremptory strikes, the trial judge must weigh this explanation against the evidence of discrimination to determine if the defense has proven purposeful discrimination.[85]

The Court in *Batson*, as it had done previously in *Swain*, refused to sacrifice the historic role of the peremptory challenge. Unlike the holding in *Swain*, however, the *Batson* ruling promoted the constitutional interest in eliminating racial discrimination in jury selection to a position equivalent to the right to exercise peremptory strikes. This attempt to accommodate two fundamentally conflicting interests necessarily reached a "middle-ground" which was easily subject to criticism from both sides. The two schools of criticism are apparent in the separate opinions of Justice Marshall and Chief Justice Burger. Both strongly criticized the majority opinion—Marshall because it did not go far enough in its efforts to eliminate racially discriminatory jury selection practices, and Burger because it went too far, undercutting the historic role of peremptory challenges.[86]

Justice Marshall, preferring to strike the balance completely in favor of equal protection rights, argued for the total elimination of peremptory challenges as the only means to assure a color-blind jury selection process.[87] He pointed to the experiences of Massachusetts and California, both of which, in response to the ineffectiveness of *Swain*, established proof requirements similar to those in *Batson*. Cases from those jurisdictions illustrate the limits of *Batson*, Justice Marshall argued, because only a flagrant case of discrimination can establish a prima facie case supporting an equal protection challenge.[88] Marshall concluded that requiring a prima facie case

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[84] *Id.* at 97-98. The Court explained: "The core guarantee of equal protection, ensuring citizens that this State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' race." *Id.*

[85] *Id.* at 98. The relevant standard of proof is a preponderance of the evidence.

[86] *See generally id.* at 102-108 (Marshall, J., concurring); *id.* at 112-134 (Burger, C.J., dissenting). *See also id.* at 134-139 (Rehnquist, J., dissenting).

[87] *See id.* at 107 (Marshall, J., concurring).

[88] *Id.* at 105 (Marshall, J., concurring)(citing Commonwealth v. Robinson, 382 Mass. 189, 195, 415 N.E.2d 805, 809-10 (1981)(no prima facie case of discrimination found even though defendant was black, prospective jurors included three blacks and one Puerto Rican, and prosecutor excluded one for cause and struck the remainder peremptorily, thereby producing all white jury); People v. Rousseau, 129 Cal. App. 3d 526, 536-37, 179 Cal. Rptr. 892, 987-98, (1982)(no prima facie case found where prosecutor peremptorily struck the only two blacks on the jury panel)).

actually sanctions tokenism and insulates racial discrimination, provided only that prosecutors hold that discrimination to an "acceptable" level.[89]

Even when a defendant successfully raises an inference of purposeful discrimination, Justice Marshall doubted the ability of a trial judge to assess a prosecutor's motives in striking a particular juror, regardless of whether those motivations were conscious or unconscious. Justice Marshall wrote,

> Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill-equipped to second guess those reasons. How is the court to treat a prosecutor's statement that he struck a juror because the juror had a son about the same age as the defendant, or seemed "uncommunicative," or "never cracked a smile" and, therefore "did not possess the sensitivity necessary to realistically look at the issues and decide the facts in this case?" If such generalized explanations are sufficient to discharge the prosecutor's obligation to justify his strike on nonracial grounds, then, the protection erected by the court today may be illusory.[90]

Justice Marshall's criticism regarding the ease with which a prosecutor may rebut a prima facie case and the difficulty of assessing the possibility of hidden racial motivations must be judged in the light of post-*Batson* jurisprudence. If his concerns are substantiated, then *Batson*, like *Swain*, is wholly inadequate to remedy racially discriminatory jury selection.

While Justice Marshall regarded a prosecutorial explanation as trivial, Chief Justice Burger believed that requiring any explanation would destroy the peremptory challenge. Burger characterized the peremptory strike as "one of the most important of the rights in our justice system,"[91] and, as Justice White explained in the *Swain* majority opinion, an explained peremptory challenge is by definition no longer peremptory.[92] Chief Justice Burger's complaint was, however, more complex than a definitional contradiction. He recognized the inherent conflict between the peremptory challenge and the *Strauder* goal of a jury of peers protected by the equal protection clause.

Chief Justice Burger shed additional light on this conflict. Traditionally, the equal protection clause requires that governmental

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

90 *Id.* at 106 (Marshall, J., concurring)(quoting People v. Hall, 35 Cal.3d 161, 672 P.2d 854 (1983)).

91 *Id.* at 121 (Burger, C.J., dissenting)(citations omitted).

92 *Swain*, 380 U.S. at 222 ("The challenge, *pro tanto*, would no longer be peremptory, each and every challenge being open to examination, either at the time of the challenge or at a hearing afterward.").

discrimination have, at a minimum, a rational basis or "minimum rationality." On the other hand, lawyers often exercise peremptory challenges with no rational basis. Instead, such challenges are the product of hunches and "seat-of-the-pants instincts."[93] Indeed, that is the very essence of a peremptory challenge. Therefore, Burger concluded that an equal protection analysis was simply inconsistent with and inapplicable to the exercise of peremptory strikes.[94]

Moreover, the Chief Justice criticized the *Batson* majority opinion for infusing racial concerns into voir dire by requiring the prosecutor and the defense attorney to build a record containing the racial composition of the jury, the race of the jurors challenged, and, in some cases, the testimony of individual jurors as to their ethnic background.[95] As a result, *Batson* created an entirely different procedure for striking blacks as opposed to striking whites, which will make even the jurors aware of the infusion of racial considerations into voir dire. Chief Justice Burger drew an analogy to the situation prohibited in *Avery v. Georgia*,[96] namely, the use of racially coded tickets for venire selection. In *Avery*, Justice Frankfurter observed that the dangers of a racially influenced system exist whenever the mechanism for jury selection has a component part, such as the procedures outlined by the *Batson* majority, that differentiates between white and black.[97]

Justice Marshall and Chief Justice Burger agreed that there is little compromise between equal protection and peremptory challenges and that the *Batson* middle-ground does little to serve either interest. Their criticisms are, however, primarily speculative in nature, particularly since the Supreme Court delegated to trial courts such wide discretion in the application of its newly promulgated

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93 Justice Rehnquist used this term in his dissenting opinion. *Batson*, 476 U.S. at 138 (Rehnquist, J., dissenting).

94 Chief Justice Burger stated:

> Our system permits two types of challenges: challenges for cause and peremptory challenges. Challenges for cause obviously have to be explained; by definition, peremptory challenges do not. "It is called a peremptory challenge, because the prisoner may challenge peremptorily, on his own dislike, *without showing of any cause.*" Analytically, there is no middle ground: a challenge either has to be explained or it does not. It is readily apparent then, that to permit inquiry into the basis of a peremptory challenge would force "the peremptory challenge [to] collapse into the challenge for cause."

Batson, 476 U.S. at 127 (Burger, C.J., dissenting) (citations omitted)(emphasis in original)(quoting H. JOY, PEREMPTORY CHALLENGES OF JURORS 1 (1844); United States v. Clark, 737 F.2d 679, 682 (7th Cir. 1984)).

95 *Id.* at 129-30 (Burger, C.J., dissenting).

96 345 U.S. 559 (1953), *cited in Batson*, 476 U.S. at 129 (Burger, C.J., dissenting).

97 *Avery*, 345 U.S. at 564, *quoted in Batson*, 476 U.S. at 129 (Burger, C.J., dissenting).

standards. Except for a few exceedingly simple illustrations,[98] the Court provided little guidance as to how to apply its standards, expressing great confidence in trial judges' experience in supervising voir dire. Therefore, only through an examination and critique of the post-*Batson* case law can one determine whether, and to what extent, the Justices critical of the *Batson* holding were correct.

In light of the magnitude of the task facing the Court, it would not be surprising if all the criticisms are valid. Any decision which attempts to accommodate the irreconcilable must either sacrifice one of two competing interests, or partially abrogate both in an attempt to arrive at a point of equilibrium. Inevitably, the absolute proponents of either interest will criticize the balance struck. So, perhaps the ultimate question is not which critics are correct, but instead whether *Batson* is a worthy attempt at balancing equal protection concerns with peremptory jury selection interests, and, if so, how courts may best apply the *Batson* standards to maximize *both* rights.

With this goal in mind, as well as the century-old principles of *Strauder* and the social commentary of Tocqueville, this Article undertakes an analysis and critique of the adolescent growth of the *Batson* standards, demonstrates the practical failure of the *Batson* balance, and suggests a means of bolstering its protections.

II. THE *BATSON* JURISPRUDENCE

A. THE PRIMA FACIE CASE

1. The Requirement of a Timely Objection

The Supreme Court envisioned that a defendant should make a *Batson* motion promptly, at a time when the trial court can easily cure any racial discrimination apparent in the prosecutor's exercise of peremptory strikes.[99] Although the Supreme Court primarily delegated to trial judges the task of formulating specific procedures to implement its decision,[100] the Court directed those judges to consider only "timely" objections to the exercise of peremptory challenges.[101] Implicit in the Court's opinion is that a "timely" objection consists of a *Batson* challenge raised *before* the dismissal of

98 *Batson*, 476 U.S. at 96-98 (providing examples of evidence relevant to the establishment of a prima facie case and examples of clearly insufficient prosecutorial explanations).

99 *Batson*, 476 U.S. at 99-100 n.24.

100 *Id.* at 96-98, 99-100 n.24.

101 *Id.* at 96-99.

the venire.[102]

Both federal and state courts have consistently held that the failure to make a timely objection effectively waives any arguments based on improprieties in jury selection which the defendant might urge pursuant to *Batson*.[103] Although some state courts require only that the defendant raise his *Batson* objection prior to the swearing in of the jury,[104] the better rule requires objection prior to *both* the swearing in of the jury *and* the dismissal of the venire.[105]

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[102] *Id.* at 99-100 n.24. In its discussion of remedies for a successful *Batson* challenge, the Court suggested the following two "appropriate" alternatives: discharging the venire and selecting a new jury from a newly impaneled venire; or reinstating the improperly challenged jurors on the venire. Obviously, each of these remedies presupposes that the objection and the consequent determination of the *Batson* issue occur prior to the dismissal of the venire.

[103] United States v. Forbes, 816 F.2d 1006, 1011 (5th Cir. 1987); United States v. Ratcliff, 806 F.2d 1253, 1256 (5th Cir. 1986); Virgin Islands v. Forte, 806 F.2d 73, 75-76 (3rd Cir. 1986); United States v. Erwin, 793 F.2d 656, 667 (5th Cir. 1986); Bowden v. Kemp, 793 F.2d 273, 275 (11th Cir. 1986); Brown v. State, No. 1, Div. 215, slip op. (Ala. Crim. App. 1987)(LEXIS, States library); Henry v. State, 729 S.W.2d 732, 736-37 (Tex. Crim. App. 1987); State v. Peck, 719 S.W.2d 553, 555 (Tenn. Crim. App. 1986); Swain v. State, 504 So. 2d 347, 349 (Ala. Crim. App. 1986).

The only possible exception is for failure to object timely in trials occurring prior to the Supreme Court's decision in *Batson*. The only federal court expressly speaking on this issue merely assumed without deciding that the defendant's pre-*Batson* failure to object did not foreclose application of *Batson*. U.S. v. Cartlidge, 808 F.2d 1064, 1070 (5th Cir. 1987). Any such assumption, however, is clearly inconsistent with an earlier Fifth Circuit case in which the court specifically refused to inquire into the defendant's *Batson* arguments on appeal because of his failure to interpose a timely objection at trial, even though the trial obviously occurred prior to the *Batson* decision. United States v. Erwin, 793 F.2d 656, 667 (5th Cir. 1986). The Fifth Circuit's ruling in *Erwin* is consistent with other circuits' application of the timely objection rule in appeals of pre-*Batson* trials. *See, e.g.*, Virgin Island v. Forte, 806 F.2d 73, 75-76 (3rd Cir. 1986); Bowden v. Kemp, 793 F.2d 273, 275 (llth Cir. 1986). In fact, the court in *Bowden* specifically addressed this issue, stating that other similarly situated defendants, including Batson himself, had no problem raising the objection in spite of the obvious restraints then placed on defendants by the Supreme Court's 1965 ruling in Swain v. Alabama. *Id.* at 275. Moreover, any possible exception to the timely objection rule for pre-*Batson* trials obviously rests on considerations of notice wholly inapplicable to an issue commanding such widespread attention of defense lawyers. The racially discriminatory use of peremptory challenges has been hotly debated since *Swain*. Certain states have interpreted their constitutions so as to effectively avoid the effects of *Swain*. *See* cases cited in *Batson*, 476 U.S. at 82 n.1. Furthermore, as early as 1983, members of the Supreme Court openly questioned the continuing vitality of *Swain*. Certainly, considerations of notice do not require slackening the timely objection rule, even for trials occurring before the decision in *Batson*.

[104] *See, e.g.*, State v. Peck, 719 S.W.2d 553, 555 (Tenn. Crim. App. 1986). In *Peck*, the court based its decision on a pure "waiver" rationale, ruling that after the jury is impaneled and sworn, the parties have acquiesced in its makeup and will not be permitted to complain. *Id.* Perhaps this rule is in reality no different from that which the federal courts apply, *see infra* note 105, but merely recognizes that judges generally dismiss venires only at or after the time the jury is accepted by the parties and sworn.

[105] *See, e.g.*, United States v. Forbes, 816 F.2d 1006, 1011 (5th Cir. 1987); Virgin Is-

In *United States v. Erwin*,[106] the defendant objected before the jury was impaneled and sworn but a full week after the dismissal of the venire.[107] Recognizing that the timing of the motion to strike the panel rendered any remedy extremely inconvenient, the Fifth Circuit found the motion untimely, especially in view of defendant's failure to offer any justification for the tardiness.[108] Focusing on the most convenient time to remedy discrimination in the exercise of peremptories is consistent with the Supreme Court's discussion of timeliness in *Batson*.[109] Indeed, the most convincing rationale for adopting the *Erwin* view of timeliness is the promotion of the remedies envisioned in *Batson*, thereby avoiding not only the needless reversal of convictions, but unnecessary pre-trial delay as well.[110] Moreover, assuming the defendant establishes a prima facie case of discrimination, the timely objection rule allows the prosecutor to explain his use of peremptories at a time when his reasons are still fresh in his mind.[111]

Just as a *Batson* motion can be untimely late, it can also be premature—before there is evidence sufficient for the trial judge to rule.[112] The evidence most relevant to discrimination is the manner in which the prosecutor questioned jurors and exercised peremptory strikes.[113] Therefore, the best time for the trial judge to properly address the issue of racial discrimination is at the close of voir dire, after the lawyers have exercised all their strikes, but prior to

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lands v. Forte, 806 F.2d 73, 75-76 (3rd Cir. 1986)(requiring defendant to interpose a *Batson* objection during or at the close of voir dire); United States v. Erwin, 793 F.2d 656, 667 (5th Cir. 1986); Henry v. State, 729 S.W.2d 732, 737 (Tex. Crim. App. 1987); Brown v. State, No. 1, Div. 215, slip op. (Ala. Crim. App. 1987)(LEXIS, States library).

106 793 F.2d at 667.

107 *Id.*

108 In light of the nature of the *Batson* objection, it is difficult to conceive of any valid reason for waiting until after the judge dismisses the venire until interposing an objection. All the facts relevant to the establishment of a prima facie case should be apparent to the defendant at the close of voir dire.

109 *See supra* notes 101-102 and accompanying text. The Fifth Circuit explained in *Erwin* that a successful objection would have necessitated summoning a new venire in order to select a new jury and would have greatly delayed the trial. *Erwin*, 793 F.2d at 667.

110 *See* United States v. Forbes, 816 F.2d 1006, 1011 (5th Cir. 1987). After the trial judge dismisses the venire, it is impossible to reseat those members of the jury whom the prosecutor excluded because of their race. The court would have to summon a new venire and begin jury selection anew.

111 *Forbes*, 816 F.2d at 1011; *Forte*, 806 F.2d at 76. The court in *Forte* also noted that requiring an explanation while the prosecutor's recollections are fresh will facilitate meaningful appellate review. *Id.* at 76 & n.1.

112 For example, in Henry v. State, 729 S.W.2d 732, 736 (Tex. Crim. App. 1987), the defense attorney made a motion before voir dire asking the trial judge to foreclose the prosecutor from striking any blacks. Such a motion is certainly premature.

113 *See infra* notes 198-203 and accompanying text.

dismissal of the venire.[114]

2. *The Elements of a Prima Facie Case*

According to *Batson*, two steps are required in order for a defendant to establish a prima facie case of intentional discrimination. First, a defendant must show that he or she is a member of a cognizable racial group, members of which the prosecutor has removed from the venire by the exercise of peremptory challenges. Second, a defendant must raise an inference of intentional discrimination based on the aforementioned removal, the fact that peremptory challenges permit discrimination by those who are of such a mind, and any other relevant circumstances occurring during voir dire.[115]

a. Cognizable Racial Group

The Supreme Court limited its decision in *Batson* to peremptories exercised against venirepersons belonging to the same racial group as the defendant.[116] The courts have faithfully applied this limitation, refusing to find a prima facie case if the defendant belongs to a different race than the jurors peremptorily stricken.[117]

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114 Thus, defense counsel should refrain from making a *Batson* motion—and the judge should refrain from addressing it—each time the prosecutor chooses to strike a potential juror who shares the defendant's race. Not only is such a strike probably insufficient in and of itself to constitute a prima facie case, but in light of the factors which the judge must consider in determining the existence of a prima facie case, the most logical and judicially economical time to address the motion is after the parties have initially settled on a jury. At this time, and not until this time, the trial judge will have before him the necessary information on which to base the prima facie determination.

115 476 U.S. at 96. The Court in *Batson* actually purports to set down a three-part test for establishing a prima facie case. According to the Court, the second element is that the "defendant is entitled to rely on the fact . . . that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' " *Id.* (citing *Avery*, 345 U.S. at 562). It is clear, however, that the second factor is really a non-factor; it exists in every case in which the government has exercised peremptories. At most, it is a fact relevant to whether the defendant has raised an inference of intentional discrimination. Thus, *Batson* is essentially a dual inquiry.

116 476 U.S. at 96-97. In fact, *Batson* was originally argued to the Court on sixth amendment fair cross-section grounds which, if successful, would have allowed *any* defendant to challenge a prosecutor's use of peremptories on the grounds of racial discrimination. The Court's selection of equal protection grounds as the basis for its holding probably reflects a conscious desire to limit the defendants who may use this new jury selection "sword." Moreover, deciding the case on fair cross-section grounds not only would increase the number of defendants who could challenge the prosecutor's use of peremptories but also would open the door to defendants contesting peremptory strikes directed against *any* group, racial or otherwise, which is a distinctive group in the community for fair cross-section purposes.

117 United States v. Vaccaro, 816 F.2d 443, 457 (9th Cir. 1987); Wingo v. Blackburn, 783 F.2d 1046, 1051 (5th Cir. 1986)(refusing, prior to *Batson*, to extend an equal protection challenge to a defendant not belonging to the same race as the jurors peremptorily stricken). *But see* Clark v. City of Bridgeport, 645 F. Supp. 890, 897 (D. Conn.

The question of what is a "cognizable racial group" for *Batson* purposes has not arisen frequently, probably because most of the cases involve black defendants, as in *Batson* itself, or Hispanic defendants, a racial group to whom the courts have extended the *Batson* principles without discussion.[118] At least two federal circuit courts, however, faced with difficult questions concerning defendant's membership in a "cognizable racial group," have formulated tests to resolve the problem.[119]

In *United States v. Dennis*,[120] the defendants argued that they could base a prima facie case of purposeful discrimination on the government's peremptory exclusion of all black *males* from the jury.[121] The jury ultimately included two black females, and the trial court apparently relied upon this factor in refusing to inquire into the prosecutor's reasons for striking three black males.[122] The Eleventh Circuit held that black males, as opposed to blacks generally, do not constitute a "cognizable racial group."[123] The *Dennis* court used the same test applied in *Casteneda v. Partida*,[124] which the Supreme Court cited in *Batson* as authority for the "cognizable racial group" requirement.[125] According to *Casteneda*, a "cognizable racial group" is essentially a recognizable, distinct class which has been

1986)(finding a violation of the Equal Protection Clause when the government, defending a civil rights suit, discriminatorily struck blacks from the jury, even though the plaintiff was white). In *Clark*, the Court based its decision on its inherent supervisory power to protect the rights of the excluded jurors, whose rights, along with those of the defendant, the Court in *Batson* expressly purported to vindicate. 476 U.S. at 87-88. The *Clark* decision, of course, also expands *Batson* by giving the "*Batson*-sword" to a *plaintiff* in a civil rights action against a state.

118 *See* Esquivel v. McCotter, 791 F.2d 350, 351 (5th Cir. 1986)(accepting without inquiry that Hispanics are a cognizable racial group, but rejecting defendants prima facie claim as without support in the record of voir dire); Bueno-Hernandez v. State, 724 P.2d 1132, 1134 (Wyo. 1986)("[I]t is undisputed that appellant is a member of a cognizable racial group."). The most common problem facing Mexican-American defendants in establishing a prima facie case is the creation of a record which indicates that the Spanish-surnamed jurors excluded were, in fact, Mexican-Americans. *See id.* at 1134-35.

It also appears that American Indians are a "cognitive racial group." United States v. Chalan, 812 F.2d 1302, 1314 (10th Cir. 1987).

119 United States v. Sgro, 816 F.2d 30, 33 (1st Cir. 1987); United States v. Dennis, 804 F.2d 1208, 1210 (11th Cir. 1986)(per curiam).

120 804 F.2d 1208 (11th Cir. 1986)(per curiam).

121 *Id.* at 1210.

122 The Eleventh Circuit certainly regarded the presence of the two black women on the jury as an important factor in holding that the defendants failed to establish a prima facie case. *Id.* at 1210-11.

123 *Id.* at 1210.

124 430 U.S. 482 (1977).

125 476 U.S. at 96 (noting *Casteneda*, 430 U.S. at 494).

victimized by past discrimination.[126] Although blacks as a group qualify under the *Casteneda* definition, the defendant in *Dennis* failed to show that black males constitute a recognizable, distinct class which has been discriminated against not simply as *blacks*, but as *black males*.[127]

The First Circuit, in *United States v. Sgro*,[128] articulated a different definition to assess whether Italian-Americans constitute a "cognizable racial group."[129] Borrowing heavily from fair cross-section cases—a questionable tactic in light of *Batson*'s equal protection foundations—the court in *Sgro* strictly defined "cognizable racial group":

> (1) [T]he group must be definable and limited by some clearly identifiable factor, (2) a common thread of attitudes, ideas or experiences must run through the group, and (3) there must exist a community of interests among the members, such that the group's interests cannot be adequately represented if the group is excluded from the jury selection process.[130]

While the court in *Sgro* did not deny cognizable group status to Italian-Americans, it held that the defendant failed to supply evidence, other than conclusory allegations, that Italian-Americans are indeed a cognizable racial group.[131] If nothing else, the opinion in *Sgro* indicates that defendants belonging to racial groups other than black or Hispanic may be required to make a prima facie showing of group cognizability as part of establishing the broader prima facie case of intentional discrimination.[132]

The Eleventh Circuit test applied in *Dennis* is perhaps more defensible than the First Circuit's test in *Sgro* because the former originated in *Casteneda*, a Supreme Court opinion applying an equal protection analysis to a closely related issue—racial discrimination

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126 *Casteneda*, 430 U.S. at 494. *See also Dennis*, 804 F.2d at 1210; Clark v. City of Bridgeport, 645 F. Supp. 890, 897 (D. Conn. 1986).

127 *Dennis*, 804 F.2d at 1210.

128 816 F.2d 30 (lst Cir. 1987).

129 *Id.* at 33.

130 *Id.* The Supreme Court used this test in Duren v. Missouri, 439 U.S. 357, 364 (1979), to determine a "distinct group" for fair cross-section purposes. The *Duren* test logically includes more "groups" within its definition than the *Casteneda* characterization of "cognitive racial group." This is because the Court in *Duren* was attempting to prevent exclusion from jury selection of *any* group which might bring a unique perspective to the jury, thereby making the jury representative of the community. *See Duren*, 439 U.S. at 370. On the other hand, the purpose of the *Casteneda* standard is essentially to define those groups which, because of past discrimination, the law regards as a "suspect class" for purposes of equal protection analysis.

131 *Sgro*, 816 F.2d at 33.

132 *See id.*

in selecting venires.[133] Neither test, however, correctly accords the *Batson* decision its proper scope. Consider the interesting racial turnabout occurring in *Virgin Islands v. Forte*.[134] In a predominately black, Virgin Island community, a white defendant accused of raping a black female college student stood trial before a jury composed entirely of blacks.[135] The government exercised four of its six peremptory strikes to remove all whites from the jury.[136] The Third Circuit did not decide whether whites ever constitute a "cognizable racial group" under *Batson*, basing its decision instead on the defendant's untimely objection to the prosecutor's use of peremptories.[137] Clearly, though, it would violate the spirit of *Batson* to deny the white defendant in *Forte* the opportunity, if timely asserted, to establish a prima facie case of intentional discrimination and require the prosecutor to come forward with a racially-neutral explanation.[138] Although the racial roles were reversed, the defendant in *Forte* found himself in exactly the same situation as the defendant in *Batson*; both were utterly without a jury of peers because of the prosecutor's use of peremptories. If the prosecutor in *Forte* struck the white jurors solely on the basis of race, such discrimination is precisely the harm *Batson* sought to prevent.[139] Whites, therefore, must constitute a "cognizable racial group" at least in certain cases.

A more interesting question, and a correspondingly more difficult one, is whether whites are a "cognizable racial group" even outside the unique trial setting in *Forte*. Again, the rationale underlying the *Batson* decision suggests that no juror, regardless of race, should be removed simply because he happens to share the same race as the defendant.[140] Exclusion of a potential juror simply because he is white is no less racial discrimination than exclusion of a

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133 *See Casteneda*, 430 U.S. at 494. On the other hand, the First Circuit's test, enunciated in *Sgro*, has a fair cross-section foundation. *See supra* note 130.

134 806 F.2d 73 (3rd Cir. 1986).

135 *Id.* at 74-75.

136 *Id.* at 75.

137 *Id. See supra* notes 99-114 and accompanying text for a discussion of the timely objection rule and how it applies to a *Batson* motion.

138 This assertion raises the question of whether it is logical—or proper—that the parameters of the phrase "cognitive racial group" should depend upon the particular facts of a case, such as the location of the trial, the minority status of a certain group in that location, and the respective races of both defendant and victim. Or, on the other hand, is a "cognitive racial group" a "cognitive racial group" for all seasons? *See infra* notes 140-49 and accompanying text.

139 *See Batson*, 476 U.S. at 86-88 (explaining that its holding was designed to promote a jury of peers, minority participation on criminal juries, and the appearance of fairness).

140 *See id.* The Court in *Batson* emphasized not only discrimination against the defendant, but the juror as well, stating: "Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence

juror simply because he is black. Moreover, the Supreme Court in *Batson* never suggested that its holding is limited to cases tried in locales where blacks or Hispanics constitute a minority of the population.[141]

In light of the above conclusions, the definitions of "cognizable racial group" expressed in *Dennis* and *Sgro* are underinclusive. The *Dennis-Casteneda* definition, which essentially describes a "suspect class"—a group which has suffered at the hands of pervasive past racial discrimination—is underinclusive because it does not encompass whites[142] and omits many other ethnic groups.[143] Under the definition used by the First Circuit in *Sgro*, a "cognizable racial group" must share a common thread of attitudes, ideas, or experiences,[144] which hardly describes the melting pot of Caucasians in this country.

Instead of borrowing bright line tests originating from concerns different than those evoked in *Batson*, courts should strive to tailor the definition to the express purpose of *Batson*. If the Supreme Court intended to prevent the racially motivated exercise of peremptory strikes, a prosecutor violates the spirit of *Batson* whenever he strikes a juror simply because that juror shares the same racial or ethnic group as the defendant, no matter what color, race, or ethnicity is involved. It makes little sense to limit the *Batson* remedy only to those groups that qualify as a "cognizable racial group" under tests which are clearly underinclusive in light of the spirit and letter of *Batson*. Courts should construe "cognizable racial group" broadly to include any racial or ethnic group in which membership is readily apparent to prosecutors because of physical appearance, surname, or other factors.[145]

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presented at trial. A person's race simply is unrelated to his fitness as a juror." *Id.* (citations omitted).

Moreover, the Court emphasized that the harm from discriminatory jury selection touches the entire community by undermining public confidence in the fairness of the criminal justice system. *Id.* at 1718.

It is difficult to see any distinction in terms of degrees of harm to defendant, jurors, or the community if the racial roles are reversed, as in *Forte*, or if the group discriminated against happens to hold a majority position in the community.

141 *See generally Batson*, 476 U.S. 79.

142 *See* Clark v. City of Bridgeport, 645 F. Supp. 890, 897 (D. Conn. 1986)(specifically stating that a white person is not a member of any cognizable group victimized by discrimination).

143 Recall the reluctance of the First Circuit in *Sgro* to assume that Italian-Americans are a cognitive racial group in the absence of evidence offered by the defendant tending to show such group status. *See supra* notes 131-32 and accompanying text.

144 *Sgro*, 816 F.2d at 33.

145 This broad test reflects the concern articulated in *Batson* that the jury selection process permits " 'those to discriminate who are of a mind to discriminate.' " 476 U.S.

Certainly, some groups are more likely to suffer the harms *Batson* attempts to remedy, and this broad definition is not meant to obscure the fact that it was the wholesale exclusion of blacks from certain juries that prompted the Court's decision.[146] The broad definition of "cognizable racial group" merely recognizes that the nature of peremptory challenges permits those to discriminate who are of a mind to and makes *any* racial or ethnic group a potential target for discrimination in jury selection. Certainly, the white defendant in *Forte* was a possible target, even though whites generally do not suffer this type of discrimination, particularly in a venue where they constitute the majority. The identity of the relevant racial group or its lack of minority status in a particular area should never preclude a *Batson* challenge if the evidence otherwise raises an inference of intentional racial discrimination. Rather, the particular racial group involved, its minority status, and the general attitude of the community toward this group are factors for a court to consider in deciding whether a defendant has established a prima facie case of intentional discrimination.[147]

Whether racially discriminatory jury selection threatens a member of a particular racial group and requires the implementation of the *Batson* remedy necessarily depends on the facts of each case. Ordinarily, a white defendant's allegations of racial discrimination need to be accompanied by more exacting evidentiary proof than similar allegations by a black defendant in order to raise the relevant inference. On the other hand, the white defendant in *Forte* should not have to make as strong a showing as whites generally.[148] This approach is nothing more than recognition of the fact that some groups generally suffer more from discrimination than others,[149] but in a given set of circumstances, such as existed in *Forte*, the danger of discrimination against whites may be as great as the potential for discrimination in *Batson*. In such a case, *Batson* should clearly apply.

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at 96 (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)). Obviously, this concern exists for any racial or ethnic group whose identity can be discerned by prosecutors either by means of physical appearance, such as blacks, whites, and Hispanics, or surname, such as Italian-Americans, Mexican-Americans, Polish-Americans, and Irish-Americans.

146 This is evident from the Supreme Court's historical discussion of racial discrimination in jury selection. In this country, blacks have suffered the brunt of racial discrimination. *See generally Batson*, 476 U.S. at 96-98.

147 These factors fit nicely into the totality of circumstances test suggested by the Court in *Batson*. 476 U.S. at 96-98.

148 *See supra* notes 134-41 and accompanying text for a discussion of the *Forte* case.

149 Equal protection law reflects this observation in its designation of certain groups as "suspect classes."

In sum, rather than excluding certain groups from the penumbra of *Batson* protection simply because the group is not typically the target of discrimination nor a minority in the particular locale, trial judges should treat the identity of the racial group and its local status only as evidence of whether the defendant has raised an inference of purposeful discrimination. The experience of trial judges in supervising voir dire will allow them to engage in this more exacting and more accurate analysis.[150]

b. Raising the Inference—A Numbers Game?

The Supreme Court in *Batson* did little to clarify the type of evidence which supports an inference of intentional discrimination, preferring to leave that task to trial judges.[151] While stating that trial courts should consider the totality of the relevant circumstances, the Court provided only two vague examples: a "pattern" of strikes against jurors of defendant's racial group, and the prosecutor's conduct during voir dire.[152] The Supreme Court did not expound further on what constitutes a "pattern," and this vague language has led many lower courts to employ a variety of numbers games.[153] These games essentially focus on one or more of the following inquiries: 1) How many members of the defendant's race remain on the jury after the government has exercised all of its peremptories?;[154] 2) How many members of the defendant's race did the prosecutor remove by virtue of her exercise of peremptory strikes?;[155] and 3) Was the prosecutor's overall use of peremptories against members of the relevant racial group substantially propor-

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150 *See Batson*, 476 U.S. at 99 n.22.

151 "We have confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors." *Id.* at 97.

152 *Id.* The Court specifically emphasized that these examples were only "illustrative." Therefore, it is clear that the Supreme Court meant to avoid setting down any bright line rule, preferring to trust the trial court's assessment of all the relevant circumstances. In other words, the presence or absence of any one factor should not be determinative. Whether the defendant has raised an inference of intentional discrimination necessarily depends on the facts and circumstances peculiar to each case.

153 *See, e.g.*, United States v. Montgomery, 819 F.2d 847, 850-51 (8th Cir. 1987); United States v. Forbes, 816 F.2d 1006, 1011 n.7 (5th Cir. 1987); United States v. Vaccaro, 816 F.2d 443, 457 (9th Cir. 1987); United States v. Chalan, 812 F.2d 1302, 1314 (10th Cir. 1987); United States v. Ratcliff, 806 F.2d 1253, 1256 (5th Cir. 1986); Fleming v. Kemp, 794 F.2d 1478, 1483-84 (11th Cir. 1986)(rejecting the use of one "game of numbers" but implictly accepting another).

154 *See, e.g.*, United States v. Montgomery, 819 F.2d 847, 851 (8th Cir. 1987); *Chalan*, 812 F.2d at 1314; United States v. Dennis, 804 F.2d 1208, 1211 (11th Cir. 1986)(per curiam).

155 *See, e.g.*, *Vaccaro*, 816 F.2d at 457; *Ratcliff*, 806 F.2d at 1256.

tionate to the population of that group on the venire?[156] Although these numbers games are factors relevant to the occurrence of discrimination, problems arise when courts attempt to fashion one of these factors into an absolute rule. To analyze these problems, it is necessary to take a closer look at each "game."

i. The First Game: "Solitaire"

This game focuses on whether any members of the defendant's racial group pass the tests of voir dire and sit on the jury. The prosecutorial object of the game is to remove all the blacks except one or two as a showing of good faith. Some courts, eager to play games to avoid inquiry into the prosecutor's underlying motivations, have ruled that leaving a token black on the jury precludes any inference of intentional discrimination, particularly if the prosecutor had peremptory strikes remaining.[157] Accordingly, in *United States v. Montgomery*, the Eighth Circuit stated: "The fact that the government accepted a jury which included two blacks, when it could have used its remaining peremptory challenges to strike these potential jurors, shows that the government did not attempt to exclude all blacks, or as many blacks as it could, from the jury."[158] Based on this fact alone, the court in *Montgomery* ruled that the defendant raised no inference of purposeful discrimination.[159]

The Eighth Circuit's analysis suffers from a major flaw. Simply

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156 *See, e.g.*, *Forbes*, 816 F.2d at 1011 n.7; *Fleming*, 794 F.2d at 1484.

157 *Montgomery*, 819 F.2d at 851; *Dennis*, 804 F.2d at 1211; State v. Peck, 719 S.W.2d 553, 556 (Tenn. Crim. App. 1986). The language in *Peck* and *Montgomery* comes very close to establishing an absolute rule that if any member of the defendant's racial group remains on the jury, the court will not inquire into the prosecutor's use of peremptories. A charitable reading of *Dennis* permits a conclusion that the court regarded token representation as only one factor for the trial judge to consider, although the language certainly indicates that the court deemed it a very significant factor. In any event, later Eleventh Circuit opinions most likely have undercut the impact of *Dennis*. *See infra* notes 160-65 and accompanying text.

158 819 F.2d at 851.

159 *Id.* Because the Eleventh Circuit was reviewing a district court finding that the defendant had raised no inference of discrimination, the deferential standard of review could have influenced the decision in *Montgomery*. The court, however, failed to expressly defer to the trial court, and a plain reading of the opinion indicates that the Eleventh Circuit essentially based its ruling on the fact that the government allowed blacks to sit on the jury which determined the defendant's guilt.

The language used by the court in State v. Peck, 719 S.W.2d 553, 556 (Tenn. Crim. App. 1986), is even more indicative of an absolute rule:

> [T]he prosecuting attorney did not use his peremptory challenges to remove all members of defendant's race from the jury. A black woman was left on the panel and [the] prosecution had one challenge left. Thus, in addition to not making a timely motion, the defendant did not establish a prima facie case of a racially discriminatory purpose.

Id.

by accepting one juror of the defendant's race, a prosecutor insulates all his peremptory strikes from a *Batson* inquiry. In this way, the game of "solitaire" permits all but the most blatant racial discrimination and encourages tokenism.

The Eleventh Circuit expressly rejected this analysis in *Fleming v. Kemp*,[160] ruling that *Batson* may not be rendered inapplicable by a "prosecutorial game of numbers."[161] Later, in *United States v. David*,[162] the court refined its decision in *Fleming*, ruling that striking even one black juror for a racial reason violates the equal protection clause, no matter how many blacks remain on the jury.[163] According to the court, the *Batson* command is to eliminate, not merely minimize, racial discrimination in jury selection.[164] The Eleventh Circuit's conclusions in *Fleming* and *David* are sound, unless one reads *Batson* as protecting a defendant only from the total exclusion of his peers from jury participation. Nothing in *Batson*, however, indicates that its principles should be so narrowly confined. Quite the contrary, the Supreme Court expressly stated in *Batson* that a single discriminatory governmental act is not immunized by the absence of such discrimination in making similar decisions.[165]

ii. The Second Game: "Going, Going, Gone"

This game, closely related to "Solitaire," focuses on the number of the defendant's racial group remaining on the jury after

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160 794 F.2d 1478 (11th Cir. 1986).

161 *Id.* at 1483.

162 803 F.2d 1567 (11th Cir. 1986).

163 *Id.* at 1571. *See also* Keeton v. State, 724 S.W.2d 58, 65 n.5 (Tex. Crim. App. 1987)(construing *Batson* as indicating that "regardless of the number of minority race veniremen that actually serve, the prosecutor may not use peremptory strikes to eliminate *any* potential juror solely on the basis of that person's race")(emphasis in original).

164 *David*, 803 F.2d at 1571. The Eleventh Circuit explained:

> *Batson* rejects the view in *Swain* that the Equal Protection Clause only requires that black citizens not be deprived of jury service by being systematically excluded from petit juries; *Batson* rests on a rationale that blacks are entitled not to be struck for racial reasons, and black defendants are entitled to be tried in a system free of racially exclusionary practices. This represents more than a group entitlement not to be entirely excluded from participation. Rather, under *Batson*, the striking of one juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and even when valid reasons for the striking of some black jurors are shown.

Id.

165 *Batson*, 476 U.S. at 95 (quoting Arlington Heights v. Metro. Hous. Corp., 429 U.S. 252, 266 n.14 (1977)). Of course, this language was used in *Batson* to reject the *Swain* requirement that a prima facie case must include a showing of racial discrimination in case after case. Henceforth, a defendant may establish racial discrimination solely on the facts of his case. *See supra* notes 78-85 and accompanying text. However, the spirit of this language certainly supports the decisions in *Fleming* and *David* that a single racially motivated peremptory challenge violates the equal protection clause.

the government has exercised all of its peremptory strikes. The difference is that this game works to the defendant's advantage. The courts playing the game have found an inference of discrimination whenever a prosecutor strikes from the jury all members of the defendant's racial group.[166] In *United States v. Chalan*,[167] for example, the prosecutor peremptorily struck only one member of the American-Indian defendant's racial group.[168] Nevertheless, the Tenth Circuit ruled that the removal of even one juror constitutes a prima facie case of intentional discrimination if such removal effects a complete exclusion from the jury of the pertinent racial group.[169]

This "automatic" prima facie case is certainly a fiction. The absence of a racial group, without more, does not raise an inference of intentional discrimination any more than the presence of one member of a group defeats the inference. In either case, the presence or absence of the relevant racial group should be only one of the factors which the trial judge should consider.[170] In spite of its fictional status, the *Chalan* rule is commendable because it targets a situation in which intentional discrimination, if it does exist, magnifies the harms *Batson* seeks to avoid.[171] According to *Batson*, racial discrimination in jury selection harms: the defendant, because of his inter-

166 United States v. Chalan, 812 F.2d 1302, 1314 (10th Cir. 1987). *See also* State v. Sandoval, 736 P.2d 501, 505 (N.M. 1987); Commonwealth v. McCormick, 359 Pa. Super. 461, 469, 519 A.2d 442, 446 (1986).

167 812 F.2d 1302.

168 *Id.* at 1314. Although the government used peremptory challenges to remove two American Indians, the trial judge indicated in the record that he would have removed one of these jurors for cause because of language problems had either party so requested. *Id.* at 1312. Thus, the Tenth Circuit treated this case as if the government had peremptorily removed only one American Indian. *See also Sandoval*, 736 P.2d at 505 (state peremptorily challenged only two Hispanics); *McCormick*, 359 Pa. Super. at 468-69, 519 A.2d at 445-46 (three blacks peremptorily removed).

169 *Chalan*, 812 F.2d at 1314.

170 See *infra* notes 198-206 and accompanying text for a discussion suggesting the proper role of "numbers games." The conclusion of this author is that *Batson* does not logically reduce to absolute tests. The nature of the inquiry is fact-based. It necessarily varies from case to case. Thus, the absence of the defendant's racial group members from the jury may raise an inference of intentional discrimination in some cases but not in others. Whether the defendant has raised an inference is going to depend, in all except the most extreme cases, on more factors than any workable "numbers game" can assimilate.

171 This, however, was not the reason for the court's ruling in *Chalan*. Rather, the Tenth Circuit believed that the *risk* of discrimination is itself so substantial in cases of total exclusion that the court should inquire into the government's reasons in every such case. 812 F.2d at 1314. Such reasoning belittles the confidence shown in trial judges by the Supreme Court in *Batson*, for it essentially takes the prima facie issue away from trial judges in any case where members of the pertinent group remain on the jury. This not only underestimates the ability of trial judges to weigh the totality of circumstances, it also completely ignores the role played by other factors.

est in being tried by a jury of his peers; the struck jurors, whose race is unrelated to their fitness for jury service; and the community, because discrimination in jury selection undermines public confidence in the overall fairness of the criminal justice system.[172] These harms are most significant at the same time they are most apparent—when discrimination in jury selection results in a jury completely devoid of members of the defendant's racial group. Thus, because the magnitude of the harm envisioned by *Batson* is greater, courts should be cautious to ensure that no discrimination exists whenever the prosecution peremptorily strikes all prospective jurors of defendant's race.[173] The Tenth Circuit's approach in *Chalan* is merely one way to exercise that additional caution.[174]

iii. The Third Game: "Strike Two, Get One Free"

This game is derived directly from the Supreme Court's language in *Batson* denoting a "pattern" of strikes as one example of evidence "which might give rise to an inference of [intentional] discrimination."[175] Although a "pattern" certainly connotes more than one strike, the Supreme Court used this example only as an illustration. Some courts, however, have construed it literally to preclude any inference of purposeful discrimination when the prosecutor peremptorily strikes only one member of defendant's race.[176] For example, the Ninth Circuit in *United States v. Vaccaro* ruled that

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172 476 U.S. at 85-88.

173 This philosophy is similar to Learned Hand's formula in the landmark torts case, United States v. Carroll Towing Co., 159 F.2d 169 (2nd Cir. 1948). Under the *Carroll* formula (B<PL), persons should take extra precautions to avoid harm whenever the burden of taking those additional precautions (B) is less than the probability of the harm (P) multiplied by the magnitude of the harm (L, meaning "loss"). *Id.* at 173

Though perhaps unintentionally, the rule in *Chalan* reflects this formula. In *Chalan*, L represents the magnitude of the harm caused by racial discrimination in jury selection which is greater when the relevant group is wholly excluded from jury participation. P represents the probability that discrimination has occurred and is essentially a constant in this situation absent other facts and circumstances, which *Chalan* shuns. B represents the burden imposed on prosecutors by making them explain their peremptory challenges even though, technically, no prima facie case exists. The court in *Chalan* concluded that B<PL in this situation primarily because of the *probability* that discrimination has occurred. *See Chalan*, 812 F.2d at 1314. Although the court's rationale is weak, *see supra* note 171, its conclusion that B<PL is supportable because of the role of the factor *Chalan* ignored—L, i.e., the magnitude of harm caused by discrimination when all members of defendant's race have been stricken from the jury.

174 Moreover, this additional caution will come at no great cost to prosecutors, whom the court will simply require to provide a racially neutral reason for the strike, a task which will be familiar to them in light of *Batson*.

175 476 U.S. at 97.

176 United States v. Vaccaro, 816 F.2d 443, 457 (9th Cir. 1987); Fields v. People, 732 P.2d 1145, 1158 n.20 (Colo. 1987).

the striking of even two jurors does not constitute a "pattern."[177] In a similar ruling, the Supreme Court of Colorado expressly stated that "the forbidden use of [discriminatory] peremptory challenges . . . presupposes that the prosecutor peremptorily struck more than one member of a cognizable group."[178]

The problem with playing "One Free Strike," or "Two Free Strikes" in the case of *Vaccaro*, is that it insulates and even encourages racial discrimination, so long as it is limited to one or two jurors.[179] This directly conflicts with the rationale underlying those cases ruling that tokenism does not cure racial discrimination exhibited toward other potential black members of that jury.[180] For example, in *United States v. David*,[181] the Eleventh Circuit ruled that striking even one black juror for a racial reason violates the equal protection clause. The court emphasized that the *Batson* command is to *eliminate*, not merely reduce, racial discrimination in jury selection.[182]

The conflict apparent in the *David* and *Vacarro* decisions reflects the tension between the equal protection clause and the historic role of the peremptory challenge. Requiring the defendant to establish a prima facie case before calling on the prosecutor to explain his peremptory challenges is the only aspect of *Batson* which preserves the peremptory nature of the challenge.[183] Thus, even though striking one juror for racial reasons is a violation of the letter—and the

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177 816 F.2d at 457. Perhaps the opinion in *Vaccaro* can be interpreted to mean that striking two jurors does not, without further proof by the defendant, raise an inference of discrimination. If the only evidence presented by defendant in support of such an inference is that the prosecutor employed a "pattern" of strikes against members of the defendant's race, then a court is certainly justified in ruling that one or two is not a "pattern" and that more evidence is necessary to raise the relevant inference.

The danger of the loose language in *Vaccaro* is that it could be read as insulating some racial discrimination from inquiry. In other words, as long as the prosecutor does not racially discriminate against more than two jurors, he will not have to explain his strikes, and such discrimination will go undetected. Such an interpretation substantiates the fears expressed by Justice Marshall in his concurring opinion in *Batson*. *See supra* notes 87-89 and accompanying text.

178 Fields v. People, 732 P.2d 1145, 1158 n.20 (Colo. 1987)(en banc). The language in *Fields* does not permit the charitable explanation given *Vaccaro*, *supra* note 177.

179 This is the same problem discussed earlier in relation to the numbers game of "solitaire." *See supra* notes 159-65 and accompanying text.

180 *See supra* notes 160-65 and accompanying text for a discussion of these cases.

181 803 F.2d 1567 (11th Cir. 1986).

182 *Id.* at 1571. *Accord* United States v. Gordon, 817 F.2d 1538, 1541 (11th Cir. 1987); Fleming v. Kemp, 794 F.2d 1478, 1473 (11th Cir. 1986); Keeton v. State, 724 S.W.2d 58, 65 n.5 (Tex. Crim. App. 1987).

183 In other words, but for the prima facie case requirement, prosecutors would have to explain every peremptory strike of a black juror, thereby effectively eliminating peremptory challenges of jurors who share the same race as defendant.

spirit—of *Batson*, the fact that the prosecutor has peremptorily struck only one member of defendant's race should not, absent other evidence raising an inference of discrimination, require the prosecutor to come forward with the reasons behind the strike. Otherwise, the *Batson* requirement of a prima facie case will become meaningless.

The Fifth Circuit struck the appropriate balance in *United States v. Ratcliff*,[184] holding that a prima facie case is not established merely because the government challenges a juror whose race is the same as that of the defendant.[185] Instead, according to the court, the defendant must raise an inference that the prosecutor struck the prospective juror because of her race.[186] Implicit in the court's ruling is that the striking of one member of defendant's racial group does not, without more, raise an inference of purposeful discrimination, and the prosecutor should not, therefore, have to explain that strike.

The rationale of *Ratcliff* logically extends to cases where the prosecutor peremptorily strikes more than one member of the defendant's racial group. Three justices of the Supreme Court of Illinois suggested, in *People v. Hooper*,[187] that there is no quantitative formula with which to gauge a prosecutor's use of peremptory challenges. Rather, the number of blacks removed, whether large or small, is one factor for the trial court to consider in exercising the wide discretion envisioned by *Batson*.[188] Certainly this factor is entitled to more weight the greater the number of blacks removed, but as the concurring Justices in *Hooper* correctly recognized, playing an absolute numbers game is neither necessary, in light of the trial courts ability to assess other factors, nor wise.

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184 806 F.2d 1253 (5th Cir. 1986).

185 *Id.* at 1256. The government excluded only one black, a female, with its peremptories.

186 *Id.*

187 118 Ill. 2d 244, 247-49, 506 N.E.2d 1305, 1306-07 (1987) (Ryan, joined by Ward and Moran, J.J., specially concurring). The majority opinion merely remanded a number of cases without comment as to how the trial court should apply the *Batson* standards.

188 *Id.* The specially concurring justices in *Hooper* stated that even the exclusion of a significant number of blacks is insufficient in and of itself to reverse a trial court's determination that the defendant failed to raise an inference of intentional discrimination. *Id.* at 1307. This does not mean that peremptorily challenging a large number of defendant's racial group will never be sufficient, standing alone, to raise the relevant inference. Rather, the opinion reflects the great deference paid to the trial judge in assessing whether the defendant established a prima facie case.

iv. The Fourth Game: "Probability and Statistics"

This game is played with ratios and percentages. The object is to demonstrate a disproportionate use of the prosecutor's peremptories against the relevant racial group by comparing the percentage of the prosecutor's total strikes aimed at that group with the percentage of that group on the venire. For example, in *United States v. Montgomery*,[189] although blacks constituted only fourteen percent of the venire, the government used thirty-three percent of its peremptory strikes (two of six) to remove blacks.[190] The Eighth Circuit, however, ruled that this statistical disparity did not, without more, raise an inference of intentional discrimination.[191] The court expressly noted that *Batson* does not require prosecutors to adhere to any specific mathematical formula when exercising their peremptory strikes.[192] The Eleventh Circuit revealed the proper role of this type of statistical analysis in *Fleming v. Kemp*, where the prosecutor used eight of his ten peremptory challenges (eighty percent) to strike blacks; the percentage of blacks in the venire was approximately twenty percent (ten of fifty-five).[193] While specifically rejecting the use of numbers games as determinative,[194] the court found that statistics of this type are, at a minimum, relevant factors for the trial judge's consideration.[195]

The Fifth Circuit found the *lack* of such a statistical disparity to be a factor militating against an inference of discrimination in *United States v. Forbes*, stating that the black/white ratio on the venire mirrored that of the jury.[196] This statistic, though reflective of the same

189 819 F.2d 847 (8th Cir. 1987).

190 *Id.* at 850.

191 *Id.* at 851. The defendant requested the Eighth Circuit to remand his case so that the trial court could determine whether this proportional disparity established a prima facie case of intentional discrimination. Defendant's initial trial occurred prior to the Supreme Court's decision in *Batson*, but the Supreme Court subsequently ruled that *Batson* applied retroactively to all cases pending on direct appeal. Griffith v. Kentucky, 107 S. Ct. 708 (1987). By rejecting the defendant's request for a remand, the Eighth Circuit necessarily determined, as a matter of law, that the statisical evidence in *Montgomery* was insufficient in and of itself to raise the relevant inference.

192 819 F.2d at 851.

193 794 F.2d 1478, 1484 (11th Cir. 1986).

194 *Id.* at 1483.

195 *Id.* at 1484. *Accord Forbes*, 816 F.2d at 1011 n.7. In *Fleming*, the defendant requested a stay of execution until the Supreme Court decided the retroactivity of *Batson*. In granting the stay, the Eleventh Circuit did not need to rule on the issue of whether the defendant's statistical information established a prima facie case. At the very least, however, the court's opinion indicates that such a statistical showing is relevant to the prima facie case.

196 816 F.2d at 1011 n.7. According to the court, the comparison of the black/white ratio of the venire to that of the jury is relevant to both the raising and rebutting of the *Batson* prima facie case.

concern as the statistical information in *Montgomery*, is perhaps less accurate because it does not account for challenges for cause. In other words, there are reasons other than a discriminatory use of peremptories why the black/white ratio on a jury may not mirror that of the venire.[197] On the other hand, the statistic used in *Fleming* focuses solely on the use of peremptory strikes and is, therefore, more relevant to the question of whether the prosecutor has intentionally discriminated on the basis of race. In all cases, however, the trial judge should use ratios and percentages only as factors bearing on the prima facie determination, and never as a litmus test.

v. The Proper Role of Numbers Games

The *Batson* balance is too delicate, and the factors relevant to the prima facie inference too numerous, to be responsive to any litmus test. As the preceding discussion makes clear, numbers games are relevant to the prima facie determination, but they are not, nor should they be, in and of themselves determinative.[198]

There are two major problems with setting up absolute tests based only on numbers. First, setting down absolute quantifiable standards completely discredits the ability of trial judges to determine the existence of a prima facie case from all the relevant evidence; but, as the *Batson* Court appropriately recognized, it is trial judges who are both present during voir dire and experienced in conducting it.[199] Morever, these "numbers games" ignore many other relevant factors such as: the prosecutor's questions and general conduct during voir dire;[200] any readily apparent reason for the strikes arising from jurors' answers to questions during voir dire;[201]

197 For example, challenges for cause and just plain "luck of the draw" will affect how the percentage of blacks on the venire corresponds to the percentage on the jury.

198 That is not to say that a trial judge may never find a prima facie case of discrimination based on numbers alone. There may be cases in which the sheer number of peremptories exercised against blacks raises an inference of discrimination, and an appellate court should not lightly overturn a trial judge's finding of a prima facie case based on such a blatant use of peremptories.

199 476 U.S. at 97.

200 The Supreme Court specifically listed this a factor in *Batson*. *See id.* at 96. This is one of only two examples provided by the Supreme Court, the other being a "pattern" of strikes exercised against members of defendant's racial group—i.e., the factor which has played such a major role in the lower courts' focus on numbers games.

201 *See* Fields v. People, 732 P.2d 1145, 1157-58 (Colo. 1987)(en banc); People v. Hooper, 118 Ill. 2d 244, 247-48, 506 N.E.2d 1305, 1306 (Ill. 1987)(Ryan, J., specially concurring); Commonwealth v. Gray, 356 S.E.2d 157, 170-71 (Va. 1987). *Compare* United States v. Ratcliff, 806 F.2d 1253, 1256 (5th Cir. 1986); United States v. Matthews, 803 F.2d 325, 332 (7th Cir. 1986); United States v. Hawkins, 781 F.2d 1483, 1487 (11th Cir. 1986).

This extremely important factor is another reason that wide discretion should be

whether it is apparent from voir dire that there are unchallenged white jurors who have backgrounds essentially similar to excluded black jurors;[202] and the historical or habitual striking of blacks.[203]

Second, any absolute test based on numbers insulates a certain amount of discrimination in jury selection unless the standard is so lax as to render the *Batson* prima facie case requirement meaningless. For example, a rule declaring that the peremptory challenge of three blacks constitutes a prima facie case, irrespective of any other factors, would encourage the prosecutor to discriminate on the basis of race at least twice. Setting up a strict numerical standard is equivalent to telling the prosecutor how much racial discrimination the court will accept. On the other hand, setting the standard too low—for example, one peremptory strike of a member of defendant's racial group—will obliterate the role of the prima facie case. Moreover, absolute standards, whether too high or too low, effectively divest trial judges of the broad discretion envisioned in *Batson*. The preceding illustration is very simple, but it reflects the same problems inherent in the use of any absolute test based solely on statistical information.

There is, perhaps, one type of numbers game which a court may justifiably use not just as a factor but as an absolute test. A numerically based standard which is absolute in just one direction avoids some of the aforementioned problems. A "one-way" standard means that if certain numerical evidence reaches a predefined quantum, it automatically raises an inference of intentional discrimination, mandating an inquiry into the motives underlying the prosecutor's use of peremptories. On the other hand, a trial judge is not precluded from finding a prima facie case when the prosecutor stays below the "trigger" level. In this way, courts can avoid the problem of inadvertently creating an "acceptable" level of racial discrimination.[204]

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vested in trial judges. Setting up absolute tests effectively removes this discretion by taking away their ability to assess other relevant factors arising during voir dire.

202 *See Gray*, 356 S.E.2d at 171 ("Significantly, the Commonwealth's Attorney also peremptorily struck two white jurors who, during *voir dire*, expressed similar uncertainty about imposing the death penalty.").

203 *See* United States v. Matthews, 803 F.2d 325, 332 (7th Cir. 1986)("The [District] [C]ourt noted that there was no evidence that the prosecution had maintained a pattern or practice of striking blacks from juries in cases where the defendants are black, and further commented that the Court's personal experience showed the contrary.").

204 Alleviating the problem of insulating "some" racial discrimination can occur only if the "one-way" test works to the defendant's advantage. A numbers game which is "one-way" but instead works to the prosecutor's advantage—such as "solitaire," in which the leaving of one black on the jury automatically precludes a prima facie case—magnifies rather than alleviates the problem of creating a minimally acceptable level of

The courts playing "Going, Going, Gone" are employing this type of "one-way" standard by ruling that the total exclusion from the jury of all members of defendant's racial group automatically raises an inference of purposeful discrimination.[205] These courts, however, have *not* ruled that leaving one member of the relevant group on the jury precludes such an inference. Of course, "one-way" tests, even those working only to the benefit of defendants, still improperly remove discretion from the trial judge, as well as the opportunity for the judge to consider other relevant evidence. Perhaps "one-way" tests recognize that in some special situations, this loss of discretion is justified by either the high probability that discrimination exists or the magnitude of the harm caused if discrimination has, in fact, occurred.[206] In such situations, perhaps a trial judge should exercise an abundance of caution and err on the side of inquiring into the prosecutor's motives.

3. Reviewing the Prima Facie Case

a. The Record on Appeal

If the trial judge expressly decides that the defendant has not established an inference of purposeful discrimination, or implicitly so decides simply by refusing to inquire into the prosecutor's motives,[207]the defendant has the burden of preserving a record sufficient to allow meaningful appellate review.[208] Thus, several courts have effectively placed on the defendant an affirmative duty to ensure that a transcript of voir dire is made.[209] In a Wyoming case,

racial discrimination. For example, in "solitaire," courts will tolerate any amount of racial discrimination short of excluding from the jury *all* members of defendant's racial group. *See supra* notes 157-65 notes accompanying text.

205 *See supra* notes 166-74 and accompanying text.

206 *See supra* notes 171-74 and accompanying text.

207 Of course, if the trial judge *does* inquire into the prosecutor's motives, it is extremely unlikely that the government could ever challenge the judge's decision that defendant successfully established a prima facie case.. Either the reasons provided will be unacceptable to the judge, in which case the judge will institute an immediate remedy, such as reseating the juror or summoning a new venire, or the reason will be acceptable, in which case the appellate court will review the trial court's ultimate determination, rather than its preliminary "prima facie" determination. *See infra* notes 222-27 and accompanying text, discussing the appellate tendency to ignore the reviewing of the prima facie case decision if the prosecutor's explanation of his use of peremptories is on the record.

208 Esquivel v. McCotter, 791 F.2d 350, 351 (5th Cir. 1986); Swain v. State, 504 So. 2d at 350; Clay v. State, 716 S.W.2d 751, 754 (Ark. 1986); People v. Morales, 126 A.D. 836, 836-37, 510 N.Y.S.2d 756, 756-57 (1987); Bueno-Hernandez v. State, 724 P.2d 1132, 1134 (Wyo. 1986).

209 *See Bueno-Hernandez*, 724 P.2d at 1134; *Morales*, 126 A.D.2d at 836-37, 510 N.Y.S.2d at 756-57; *Swain*, 504 So. 2d at 350.

Bueno-Hernandez v. State,[210] the defendant, a Mexican national, argued that the government discriminatorily removed Mexican-Americans from his jury.[211] Although the prosecutor peremptorily struck three potential jurors with Spanish surnames, the Supreme Court of Wyoming ruled that defendant's failure to request that voir dire be recorded resulted in a wholly insufficient record on which to base a finding that those stricken belonged to defendant's racial group.[212] Certainly, an appellate court lacking a transcript of voir dire should never overrule the factual findings of a trial judge who observed voir dire first-hand.[213]

In addition to supplying the appellate court with a transcript of voir dire, the defendant should also make a record of the "numbers" relevant to raising an inference of intentional discrimination. In order to sufficiently review whether the defendant established this inference, appellate courts are requiring the record to contain information regarding the number of defendant's minority group on the venire and the number serving on the actual jury.[214] Again, these are factors readily apparent to the trial judge, and appellate courts may simply defer to the judge's "no prima facie case" finding if defendant fails to put those factors in the record.

b. The Standard of Review

In *Batson*, the Supreme Court specifically refrained from comprehensively listing factors relevant to a finding of purposeful discrimination,[215] entrusting the matter to the nation's trial judges. The Court stated: "We have confidence that trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination. . . ."[216] The Supreme Court's confidence in trial judges suggests that great deference should be accorded to their factual determinations that a defendant has or has not raised an inference of intentional discrimination.[217]

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210 724 P.2d 1132.

211 *Id.* at 1134.

212 *Id.* Such a finding is, of course, necessary to raise an inference of purposeful discrimination. *Batson*, 476 U.S. at 96.

213 *See Bueno-Hernandez*, 724 P.2d at 1134-35; *Swain*, 504 So. 2d at 350.

214 Clay v. State, 716 S.W.2d 751, 754 (Ark. 1986); Lasley v. State, 505 So. 2d 1257, 1262-63 (Ala. Crim. App. 1986).

215 476 U.S. at 96-97.

216 *Id.* at 97.

217 If the trial judge determines that the defendant *has* raised the necessary inference, the "prima facie" issue is unlikely to merit appellate review. In the event that the prosecutor comes forward with acceptable reasons for exercising his peremptory strikes, review will most likely focus only on an assessment of those reasons as they relate to the

Although the circuits have not expressly applied a clearly erroneous standard of review to a trial judge's *initial* finding of an inference of discrimination,[218] appellate courts have reviewed the trial court's *ultimate* determination of whether the defendant has or has not proven intentional discrimination pursuant to this extremely deferential standard.[219] This standard is consistent with the Supreme Court's view in *Batson* that a trial judge's *ultimate* finding regarding intentional discrimination will turn primarily on his evaluation of the neutrality and credibility of the prosecutor's reasons.[220] Whether the defendant has *initially* established a prima facie case likewise turns on an evaluation, peculiarly within the trial judge's expertise, of factors readily apparent to him during voir dire.[221] In light of the Supreme Court's expression of confidence in trial courts to properly determine the existence of a prima facie case, an appellate court should overturn that determination only if it is clearly erroneous.

c. Super Deference

Although appellate courts must give great deference to the trial judge's findings regarding the establishment of a prima facie case and uphold those findings unless clearly erroneous, in many cases courts are not subjecting this initial finding to any meaningful review.[222] Only a finding that the defendant has successfully raised an

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ultimate issue of intentional discrimination. In other words, once the reasons are on the record, it is unlikely that the appellate court will review the trial judge's initial "prima facie" determination. *See infra* notes 222-27 and accompanying text.

218 Perhaps this is due to the appellate court's seeming lack of interest in reviewing the "prima facie case" issue whenever the prosecutor's reasons for exercising the relevant peremptories appear in the record.

219 *See* United States v. Cloyd, 819 F.2d 836, 837-38 (8th Cir. 1987); United States v. Forbes, 816 F.2d 1006, 1010 (5th Cir. 1987); United States v. Love, 815 F.2d 53, 55 (8th Cir. 1987); United States v. Matthews, 803 F.2d 325, 330 (7th Cir. 1986).

220 476 U.S. at 98 n.21.

221 *See* People v. Hooper, 118 Ill. 2d 244, 247-48, 506 N.E.2d 1305, 1306 (1987)(Ryan, J., specially concurring) (recognizing that a judge's refusal to inquire into the motivations underlying the prosecutor's use of peremptory strikes may be due to reasons not readily apparent to those who, unlike the judge, were not present at voir dire).

222 Review of the prima facie case determination occurs primarily when the trial judge has found that the defendant *failed* to raise an inference of discrimination. The following chart exemplifies the various states in which a *Batson* issue reaches the appellate courts for review.

Prima Facie Ruling: Has an inference been raised?	*Ultimate Ruling* (After inquiry into prosecutor's motives) Has purposeful racial discrimination been shown?
1. No	—
2. Yes	No (Motives Valid)
3. Yes	Yes (Motives Invalid)

inference of intentional discrimination requires the prosecutor to reveal the reasons underlying her use of peremptory challenges. Once the prosecutor's reasons appear in the record, however, appellate review has focused exclusively on those reasons, completely ignoring the issue of whether the defendant established a prima facie case in the first place.[223] Thus, in *United States v. Woods*,[224] the Fourth Circuit stated: "[We] may examine [the prosecutor's] reasons under *Batson*, and we may leave for another day the question of whether the defendant made out a prima facie case."[225] At first glance, this approach makes good practical sense, because, as the Fifth Circuit recognized in *United States v. Forbes*,[226] once the trial judge has heard the prosecutor's motives underlying the peremptory strikes and made an ultimate determination of whether those strikes reflect intentional discrimination, appellate review should

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In the third situation, there is no need for appellate review because the defendant has prevailed on his *Batson* motion. The trial judge will impose the remedy before trial in accordance with *Batson*, 476 U.S. at 99-100 n.24., and no harm will befall defendant.

In the second situation, the review will focus on the trial court's ultimate ruling. Therefore, the government receives no meaningful review of the trial judge's initial finding of the relevant inference.

Only in the first situation will the prima facie determination receive meaningful appellate review. Thus, appellate review of the trial judge's initial finding regarding the prima facie case is responsive only to defendants.

223 *See, e.g.*, *Forbes*, 816 F.2d at 1010; Garrett v. Morris, 815 F.2d 509, 511 (8th Cir. 1987); United States v. Woods, 812 F.2d 1483, 1487 (4th Cir. 1987); *Matthews*, 803 F.2d at 332. *See also Bueno-Hernandez*, 724 P.2d at 1135 (assuming that defendant established a prima facie case and reviewing prosecutor's explanation); Branch v. State, No.6 Div. 93, slip op. (Ala. Crim. App. 1986)(LEXIS, States Library)(assuming, like the trial judge, that defendant established a prima facie case, thereby permitting review of prosecutor's explanations).

The Seventh Circuit may have ignored the prima facie case requirement in *Matthews* for good reasons. The trial occurred prior to the *Batson* decision, but *Batson* applied retroactively to the case. Thus, it is not surprising that the trial judge, failing to anticipate the *Batson* procedural requirements, inquired into the prosecutor's motives without first finding that defendant had raised an inference of purposeful discrimination. Because there was no prima facie determination for the court to review and there was an acceptable reason for its absence, the Seventh Circuit was probably correct in ignoring it. Therefore, the precedential value of *Matthews* on this issue is questionable. Or, perhaps *Matthews* represents an exception to this Article's proposal that the appellate courts should actively review the trial court's prima facie case findings.

224 812 F.2d 1483 (4th Cir. 1987).

225 *Id.* at 1487. Ironically, the trial judge in *Woods* found that the defendant failed to raise an inference of intentional discrimination but "allowed" the government to explain its use of peremptories. This, of course, was no favor to the prosecutor as it undercut the peremptory nature of his strikes and subjected his explanation to appellate review, neither of which would have occurred had the trial judge faithfully adhered to the *Batson* procedures. *Accord Forbes*, 816 F.2d at 1008-10. Fortunately for the government, in both *Forbes* and *Woods*, the reviewing court upheld the trial judge's ultimate finding that the defendant had not proved intentional discrimination.

226 816 F.2d 1006 (5th Cir. 1987).

not become bogged down on the issue of whether the defendant made a prima facie showing.[227] It seems petty to require appellate court review of prima facie determinations when the record contains all the evidence necessary to review the ultimate *Batson* question of whether racial discrimination impermissibly influenced the selection of the jury.

Good reasons exist, however, for reviewing the trial court's initial finding of a prima facie case. First and foremost, the absence of meaningful review threatens to render the prima facie case requirement impotent, yet *Batson* expressly mandates that a court should not require the prosecutor to reveal his motives for exercising peremptory strikes unless and until the defendant has raised an inference of intentional discrimination.[228] In this way, *Batson* delicately accommodates competing interests, balancing the historical role of the peremptory challenge against the prevention of racial discrimination in jury selection. The prima facie case requirement is exactly that aspect of *Batson* which protects the peremptory nature of the challenge. Emasculation of the prima facie case tips the Batson balance, interfering with the prosecutor's interest in exercising truly peremptory challenges even in situations where *Batson* expressly left peremptory strikes "unregulated"—when the defendant has failed to raise an inference of intentional discrimination.

Appellate disregard of the prima facie case sends trial judges a message inconsistent with the express language of *Batson*, encouraging apathy toward the prima facie threshold.[229] Suppose the defendant utterly fails to establish a prima facie case based on the prosecutor's conduct during voir dire, but the trial court, disregard-

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227 *Id.* at 1010. The court based its decision in *Forbes* on holdings from Title VII jurisprudence. Title VII jurisprudence, however, does not involve the delicate balancing of rights involved in *Batson* and is, therefore, not persuasive. See *infra* notes 228-35 and accompanying text for a discussion of the "*Batson* balance" as it relates to appellate review of the prima facie case requirement.

228 476 U.S. at 96-97.

229 Indeed, some trial judges have "required" prosecutors to explain their use of peremptories, even after expressly finding that the defendant failed to raise the requisite inference of purposeful discrimination. *See Forbes*, 816 F.2d at 1009; United States v. Woods, 812 F.2d 1483, 1487 (4th Cir. 1987); *Bueno-Hernandez*, 724 P.2d at 1134-35.

Other trial judges have virtually ignored the prima facie case issue by requiring a prosecutorial explanation on little evidence of purposeful discrimination. *See* United States v. Cloyd, 819 F.2d 836, 837 (8th Cir. 1987)(one black excluded); United States v. Love, 815 F.2d 53, 54-55 (8th Cir. 1987)(one black excluded); Minnifield v. State, No.6 Div. 129, slip op. (Ala. Crim. App. 1987) (LEXIS, States library)(three blacks remaining on jury).

Other trial judges have made no prima facie finding, merely assuming for the sake of argument that defendant raised the relevant inference. *See* Branch v. State, No.6 Div. 93, slip op. (Ala. Crim. App. 1986)(LEXIS, States library).

ing *Batson*, inquires into the prosecutor's motives and decides that racial factors did impermissibly influence the prosecutor's exercise of peremptories.[230] The tension is apparent: racial discrimination has occurred, but the discrimination would have gone undetected had the trial judge adhered to the Supreme Court's prima facie case requirement. The resolution is easy if one views *Batson* as an uncompromising attempt to eliminate racially discriminatory jury selection practices at any cost. Such a reading, however, would require a prosecutor to explain every single peremptory challenge of a member of the defendant's racial group, regardless of the absence of any evidence raising an inference of discrimination. Not only would this approach directly contradict the procedures expressly set forth in *Batson*, it would effectively eliminate the peremptory striking of certain jurors in cases involving minority defendants. Moreover, setting up an obviously different procedure for striking blacks than for striking whites actually highlights any racial aspects of the case and calls the prospective jurors' attention to the role race might play in a criminal case, be it jury selection, crediting of testimony, or jury deliberation.[231] It would be a tragic irony if the *Batson* procedures, instead of promoting colorblindness in jury selection specifically, and in criminal trials generally, were perverted, thereby increasing the awareness of race during the course of a criminal trial.

Of course, stringently applying the prima facie case requirement will result in the insulation of some racial discrimination,[232] but if the defendant cannot even raise an inference of discrimination, it is unlikely that he will ultimately prevail. Thus, most of this "insulated" discrimination is nonremediable. Even in cases in which it is remediable, such as the hypothetical illustration in the previous paragraph, the Supreme Court has already struck the bal-

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230 The only difference between this hypothetical illustration and what actually occurred in *Woods* and *Forbes* is that, after expressly finding that no inference of discrimination had been raised, but nevertheless inquiring into the prosecutor's motives, the trial judges in *Woods* and *Forbes* made an ultimate finding of "no discrimination." *See Woods*, 812 F.2d at 1487; *Forbes*, 816 F.2d at 1009.

The situation in this illustration will rarely occur, but it is an example that best reflects the tensions which, as this Article proposes, *Batson* has already resolved.

231 Certainly, the *Batson* procedures already have this effect, but to a much less significant degree provided the prima facie case is allowed to play its proper role. Obliteration of the prima facie case would make this *Batson*-mandated "unequal" treatment of prospective jurors startlingly more obvious to those eventually selected to hear the case.

232 Compare, for example, the insulation of discrimination which would occur if courts reject the use of determinative numbers games in judging whether the defendant has made out a prima facie case. Of course, the adoption of those numbers games would have an even *more* deleterious effect on the "insulation" of discrimination. *See supra* notes 198-206 and accompanying text.

ance in *Batson*: "Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors."[233] Furthermore, the very next sentence in the opinion expresses concern that such an explanation imposes a limitation on "the full peremptory character of the historic challenge."[234] It would be anomalous to conclude that the institution of the peremptory challenge played no role in the Court's careful articulation of the requirements of a prima facie case. A modicum of remediable racial discrimination must go undetected, because the Supreme Court has decided it must, in deference to the interests served by the peremptory challenge.[235] Thus, when employing *Batson* procedures, trial judges should cautiously accord the prima facie case requirement its proper status.

B. THE PROSECUTOR'S EXPLANATION—DISCRIMINATION WITH A THOUSAND DISGUISES?

Once the defendant raises an inference of purposeful discrimination, the burden shifts to the prosecutor to rebut the inference with a racially neutral explanation for peremptorily striking members of defendant's racial group.[236] In practice, however, this is not a difficult burden, as trial judges accept virtually any explanation proffered. This outcome was forecast by Justice Marshall in his concurring opinion in *Batson*: "Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill-equipped to second-guess those reasons."[237] A prosecutor can too easily explain away intentional discrimination with pretextual reasons, thereby upseting *Batson*'s subtle balance between the peremptory nature of the challenge and racial discrimination.[238] Magnifying this danger, trial court findings on this issue turn largely on evaluations

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

234 *Id.*

235 It will, of course, be a rare case in which the defendant can establish purposeful discrimination subsequent to a prosecutor's explanation when, prior thereto, the defendant could not even raise an inference of such discrimination. Therefore, this remediable yet undetected discrimination is a small price to pay for the trial courts' faithful implementation of the *Batson* procedures, which so carefully balance important countervailing interests.

236 *Batson*, 476 U.S. at 97-98. Once the prosecutor has rebutted the inference, the trial court must decide if the defendant has established purposeful discrimination. *Id.* at 98. Thus, the ultimate burden of proving intentional discrimination remains with the defendant. Failure on the part of the prosecutor to come forward with racially neutral motives, however, will result in a finding that the government has not successfully rebutted the inference and that purposeful discrimination has occurred.

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

238 Here, the threat is to the interest in preventing racial discrimination rather than to the peremptory character of the challenge.

of credibility. As such, they are entitled to great deference[239] and will not be overturned unless clearly erroneous.[240]

1. Acceptable Reasons—Prosecutors, Take Your Pick

The list of racially neutral reasons found to successfully rebut an inference of discrimination is quite lengthy. All these reasons can be placed in one of two broad categories: objectively verifiable reasons generally of the same type that lead to challenges for cause on the basis of bias or other grounds; or primarily subjective reasons of the type which lead to peremptory challenges based on unarticulable gut feelings. The latter category merits special concern because it consists of reasons which are both the essence of the peremptory challenge and the most likely pretext for racial discrimination.[241] Nevertheless, both types of explanation are widely accepted by trial judges.

Explanations falling in the first category and deemed valid include: the juror had a close relative recently charged with or convicted of a crime;[242] the juror was previously represented by, or acquainted with, defense counsel;[243] the juror or relatives of the ju-

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239 "Since the trial judge's findings in the context under consideration here largely will turn on an evaluation of credibility, a reviewing court ordinarily should give those findings great deference." *Batson*, 476 U.S. at 98 n.21 (citing Anderson v. Bessemer City, 470 U.S. 564, 575-76 (1985)).

240 *See, e.g.*, United States v. Forbes, 816 F.2d 1006, 1010 (5th Cir. 1987); United States v. Woods, 812 F.2d 1483, 1487 (4th Cir. 1987); United States v. Matthews, 803 F.2d 325, 330 (7th Cir. 1986). *See also* United States v. Love, 815 F.2d 53, 55 (8th Cir. 1987)(trial court's determination that the government had rebutted defendant's prima facie case entitled to great deference).

241 Herein lies the tension between the two competing interests which *Batson* attempts to balance. If the prosecutor has revealed his reasons, defendant has necessarily established a prima facie case, provided the trial judge has correctly applied the *Batson* procedures. Therefore, it makes sense at this stage of the analysis to tilt the balance in favor of purging the jury selection process of racial discrimination. That is, because the prima facie case, which is the aspect of *Batson* that zealously guards the peremptory character of the challenge, has already been established and the inquiry into prosecutorial motives executed, the judge should take a long, hard look at the reasons proffered, questioning the prosecutor if necessary. Intrusion on the peremptory nature of the challenge makes little sense if no benefit in the form of discovering racial discrimination is derived therefrom.

242 United States v. Vaccaro, 816 F.2d 443, 457 (9th Cir. 1987) (juror's brother in prison for a robbery conviction); *Forbes*, 816 F.2d at 1010 (juror's two sons had been in trouble with the law); United States v. Cartlidge, 808 F.2d 1064, 1071 (5th Cir. 1987)(juror's brother had been convicted of robbery); Ricks v. State, No. 6 Div. 45, slip op. (Ala. Crim. App. Feb. 24, 1987)(LEXIS, States library)(juror had nephew charged with robbery); Baynard v. State, 518 A.2d 682, 686 (Del. 1986)(juror's son convicted of murder, but successfully avoided death penalty).

243 United States v. Cartlidge, 808 F.2d 1064, 1070 (5th Cir. 1987)(juror knew defendant's lawyer who had done work for an agency with which juror was associated);

ror were about the same age as the defendant;[244] the juror had past legal problems with the Government;[245] the juror's responses during voir dire indicated a hesitancy to consider relevant evidence or to apply the relevant law;[246] the juror's occupation was too technical to avoid a hypertechnical consideration of the elements of the crime;[247] the juror was familiar with persons or places involved in the case;[248] the juror was young, single, unemployed, or poor;[249]

United States v. Andrade, 788 F.2d 521, 525 (8th Cir. 1986)(juror previously had been represented by one of defense attorneys).

244 *Ricks*, No. 6, Div. 45, slip op. (two jurors were about the same age as the defendant and might identify with him); Minnifield v. State, No. 6, Div. 129 slip op. at (Ala. Crim. App. Feb. 10, 1987)(LEXIS, States library) (two jurors had sons about the same age as defendant; Branch v. State, No. 6, Div. 93, slip op. (Ala. Crim. App. 1986)(LEXIS, States library)(juror was about the same age as defendant and a possible "sister figure").

It is interesting to note that Justice Marshall specifically regarded this motivation for striking a juror as "too-easy" a means of explaining peremptories on non-racial grounds. *Batson*, 476 U.S. at 106 (Marshall, J., concurring).

245 United States v. Ratcliff, 806 F.2d 1253, 1256 (5th Cir. 1986)(juror with prior problems with the Internal Revenue Service excluded from case where defendant was charged with obstruction of IRS proceeding).

246 *Matthews*, 803 F.2d at 331 (juror gave hesitant responses to inquiries regarding her ability to consider admissible government evidence in the form of covertly taped conversations); Baynard v. State, 518 A.2d 682, 685 (Del. 1986)(one juror unreceptive to imposition of death penalty; one juror referred to the alleged murder as an "accident"). *See also* Branch v. State, No. 6, Div. 93, slip op. (Ala. Crim. App. Nov. 12, 1986)(LEXIS, States library)(juror excluded for, among other things, giving much more favorable responses to defense counsel than to prosecutor).

247 People v. Morales, 510 N.Y.S.2d 756 (N.Y. App. Div. 1987) (neglecting to reveal the occupations of the two excluded black jurors); Funches v. State, 518 So.2d 781, 783 (Ala. Crim. App. 1987)(LEXIS, States library)(juror was a teacher, and prosecutor "always strike[s] all teachers"); Branch v. State, No. 6 Div. 93, slip op. (Ala. Crim. App. 1986)(LEXIS, States library)(juror was a scientist, and prosecutor did not want a "scientific application in the decision").

248 United States v. Cloyd, 819 F.2d 836, 837 (8th Cir. 1987)(juror familiar with location the defendant was expected to use as an alibi); United States v. Andrade, 788 F.2d 521, 525 (8th Cir. 1986)(juror lived in same neighborhood as person who was involved in case but who was not charged); Ricks v. State, No. 6 Div. 45, slip op. (Ala. Crim. App. Feb. 24, 1987), *cert. denied*, (Sept. 11, 1987)(LEXIS, States library)(juror "may have known" defendant or defendant's family); State v. Weatherspoon, 719 S.W.2d 304, 307 (Tenn. Crim. App. 1986)(jurors acquainted with people involved in case).

249 United States v. Cartlidge, 808 F.2d 1064, 1070 (5th Cir. 1987)(juror who had severe financial condition excluded because of potential identification with the defendant who was charged with drug distribution); Funches v. States, 518 So.2d 781, 783 (Ala. Crim. App. 1987).

If this reason is acceptable, prosecutors apparently can use it in any case in which the defendant is charged with an economic crime, such as robbery, burglary, or drug distribution. The rationale, though tenuous, appears to be that persons with no job or low income employment will identify with dangerous criminals who share the juror's financial situation. The potential for such reasoning to serve as a pretext for racial discrimination is great. Moreover, this is an especially sensitive area because this motive will certainly have a disproportionate impact on racial minorities whose younger members suffer disproportionately from unemployment. *See infra* notes 293-301 and accom-

the juror had a language problem, was hard of hearing, or had similar perceptual difficulty;[250] and the juror subscribed to a black newspaper which had been very pro-defendant in its coverage of a highly publicized case.[251]

Prosecutorial explanations which are less tangible, less objectively verifiable, more a product of a hunch, and yet are still valid according to this nation's appellate courts include: the juror had a poor attitude;[252] the juror appeared disinterested;[253] the juror seemed unintelligent or "bewildered";[254] the juror seemed hostile toward the prosecutor;[255] the juror avoided eye contact with the

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panying text, discussing proffered peremptory explanations which have a disparate impact on minorities.

250 *Chalan*, 812 F.2d at 1313 (American Indian juror peremptorily stricken because of language problems); Baynard v. State, 518 A.2d 682, 685-86 (Del. 1986)(juror hard of hearing). The Tenth Circuit in *Chalan*, noting that the juror with language problems could have been successfully challenged for cause, treated the situation as if she had been so challenged. 812 F.2d at 1313-14.

251 *Woods*, 812 F.2d at 1485 (juror probably exposed to what prosecutor believed was unfair, inflammatory, and racial pretrial publicity).

252 *Vaccaro*, 816 F.2d at 457 (juror had a poor attitude, according to prosecutor, in answering voir dire questions).

253 *Matthews*, 803 F.2d at 331 (juror showed a "lack of commitment to the importance of this proceeding"); Funches v. States, 518 So.2d 781, 783 (Ala. Crim. App.) (three jurors removed, each partially because of "nonconcern [for] what was going on"); Ricks v. State, No. 6, Div. 45, slip op. (Ala. Crim. App. Feb. 24, 1987), *cert. denied*, (Sept. 11, 1987)(LEXIS, States library)(juror was "inattentive").

254 United States v. Hawkins, 781 F.2d 1483, 1485-86 (11th Cir. 1986)(juror, a manual laborer, was "unsuitable" for complex white collar crime case); Baynard v. State, 518 A.2d 682, 685-86 (Del. 1986)(juror seemed "stupid" and might have difficulty understanding evidence); Branch v. State, No. 6 Div. 93, slip op. (Ala. Crim. App. Nov. 12, 1986)(LEXIS, States library)(juror had "dumb-founded, bewildered" look on her face).

255 *Forbes*, 816 F.2d at 1010-11 (prosecutor sensed that juror felt hostile to being in court because of her posture and demeanor and feared that she might respond adversely to the government simply because the government called her to jury duty); *Matthews*, 803 F.2d at 331 (juror was examining prosecutor in a hostile manner). In *Matthews*, the prosecutor stated for the record:

> My last strike as I mentioned a few moments ago, was Mr. Robinson. I believe that is his name, Declinton Robinson. The reason why I struck him is [admittedly a personal] one. I don't know what is going to happen to me if I put this on the record, but I am going to anyway because the Court needs to know my reasons.
>
> Mr. Declinton was sitting directly to my right, only a space of approximately four feet from me, and both yesterday and today he spent a very great deal of time in examining me in a way which I felt was in the end becoming rather hostile. Now, I realize that this is a subjective judgment, but it was very marked to me, Judge. It was something that I noticed and felt was rude for one thing, and indicated one of two things, either he was going to be very strongly in support of my position or he was going to be very strongly against my position. Under those circumstances I felt that there were other jurors who more fit the profile of a juror that I was looking for.

Id. Clearly, this is exactly the type of easily generated explanation that greatly concerned Justice Marshall. It could easily mask racial discrimination, yet, it exemplifies the essence of the peremptory challenge.

prosecutor;[256] the juror seemed nervous and/or indecisive;[257] the juror may have trouble getting along with other jurors;[258] and the juror was known to be anti-law enforcement from previous experience.[259] From this lengthy list of valid prosecutorial justifications, it is apparent that any thoughtful prosecutor can sufficiently disguise racial discrimination with racially-neutral reasons, unless the trial judge engages in a careful inquiry designed to detect intentional racial discrimination. Meaningful evaluation of the prosecutor's explanation requires employing some of the "tests" applied by courts in those rare cases ruling that the government's explanation of peremptories fell short of rebutting the inference of intentional discrimination.

2. *Running the Gauntlet of Invalidity*

Those few courts which have made an ultimate finding of intentional racial discrimination have done so for one of three basic reasons: the prosecutor's explanation is insufficiently specific;[260] the prosecutor's explanation is not racially neutral;[261]or the prosecutor's explanation is not bona fide but is instead a pretext for racial discrimination.[262] Apparently, then, avoiding these three pitfalls is all the prosecutor need do in order to prevent a finding of intentional discrimination.[263]

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256 United States v. Cartlidge, 808 F.2d 1064, 1071 (5th Cir. 1987). The prosecutor stated for the record during jury selection: "[U]nlike the other jurors selected by the Government, she avoided eye contact with the prosecutor. As a personal preference, eye contact is highly valued as a jury selection technique." *Id.*

257 United States v. Hawkins, 781 F.2d 1483, 1485 (11th Cir. 1986)(juror nervous about making an important decision).

258 Branch v. State, No. 6 Div. 93, slip op. (Ala. Crim. App. Nov. 12, 1986)(LEXIS, States library)(juror appeared to be a gruff debt collector who prosecutor feared might be at odds with others on the jury).

259 Minnifield v. State, No. 6, Div. 129, slip op. (Ala. Crim. App. Feb. 10, 1987)(LEXIS, States library)(juror previously served on a jury which returned a criminally negligent homicide conviction on a murder charge); People v. Morales, 510 N.Y.S.2d 756 (N.Y. App. Div. 1987)(juror considered unfavorable to prosecution based on government's experience with her in prior jury service); *Bueno-Hernandez*, 724 P.2d 1132, 1135 (Wyo. 1986)(Juror "known to our office to be . . . anti-law enforcement.").

260 *Chalan*, 812 F.2d at 1314; Clark v. Bridgeport, 645 F. Supp. 890, 898 (D. Conn. 1986); People v. Turner, 42 Cal. 3d 711, 725, 230 Cal. Rptr. 656, 664, 726 P.2d 102, 110 (1986)(finding prosecutor's reason insufficiently specific pursuant to a state constitutional analysis which was developed prior to *Batson* and which operated in essentially the same manner as the *Batson* procedures).

261 United States v. Brown, 817 F.2d 674, 676 (10th Cir. 1987); Clark v. Bridgeport, 645 F. Supp. 890, 893-94, 898 (D. Conn. 1986).

262 Garrett v. Morris, 815 F.2d 509, 514 (8th Cir. 1987); State v. Gilmore, 103 N.J. 508, 542-43, 511 A.2d 1150, 1168 (1986)(finding prosecutor's explanation "pretextual" under a state constitutional analysis essentially similar to the *Batson* analysis).

263 Unless, because of the prosecutor's conduct or manner of exercising peremptories

a. Specificity

The basis for the requirement that the prosecutor's explanation be "clear and reasonably specific" comes directly from the *Batson* decision.[264] The Court stated that the prosecutor may not rebut the defendant's prima facie case merely by denying the existence of a discriminatory motive or by generally proclaiming good faith.[265] It is not surprising that courts consistently have rejected such general denials.[266]

Explanations which lack sufficient specificity are not limited to the general denials mentioned in *Batson*. In *United States v. Chalan*,[267] the Tenth Circuit ruled that the following explanation was not sufficiently specific: "[B]ased upon his background and other things in his questionnaire, I just elected to strike him."[268] Interestingly, the prosecutor in *Chalan* gave this "explanation" in the course of a pre-*Batson* trial.[269] It is unlikely that any intelligent prosecutor would provide such an insufficient explanation or just a general denial of racial discrimination in cases tried subsequent to *Batson*.[270] The specificity requirement is therefore unlikely to impose a significant barrier to racial discrimination for any but the most dull-witted prosecutor.

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during voir dire, the inference of intentional discrimination is so strong in a particular case that the government's reasons, though apparently valid when considered independently, simply cannot rebut the inference.

264 476 U.S. at 98 n.20.

265 *Id.* at 98. The Court explained: "If these general assertions were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause 'would be but a vain and illusory requirement.' " *Id.* (quoting Norris v. Alabama, 294 U.S. 587, 598 (1935)).

266 *See, e.g.*, Acres v. State, No. 3, Div. 843, slip op. (Ala. Crim. App. Feb. 10, 1987)(LEXIS, States library)(prosecutor claimed that he exercised strikes in good faith and not along racial lines); State v. Sandoval, 736 P.2d 501, 505 (N.M. Ct. App. 1987)(denial of racial motive only); Ricks v. State, No. 6, Div. 45, slip op. (Ala. Crim. App. Feb. 24, 1987)(LEXIS, States library)(with respect to one challenged juror, prosecutor said only: "I do not strike them because of race, Your Honor."); Williams v. State, 507 So. 2d 50, 52-53 (Miss. 1987)(prosecutor merely denied that strikes were motivated by race).

267 812 F.2d 1302 (10th Cir. 1987).

268 *Id.* at 1314.

269 *Id.*

270 All the cases in which the trial court found general denials insufficient, *see* cases cited *supra* note 266, were likewise tried prior to the *Batson* decision.

Perhaps the absence of any decisions finding post-*Batson* explanations insufficiently specific is a reflection of the fact that if such an explanation is offered, the trial judge will reject it, either requiring more information or concluding that the prosecutor has not rebutted the inference of racial discrimination. Either order likely will be unpublished, and, in the latter case, the trial judge will impose a remedy immediately with no interlocutory appeal.

b. Racially Neutral

According to *Batson*, once the defendant establishes a prima facie case, the burden shifts to the state to come forward with a neutral explanation for peremptorily challenging members of defendant's racial group.[271] Certainly, in this context, "neutral" means "racially-neutral."[272] Although a seemingly simple concept, the definition of racially-neutral is amorphous.

The Tenth Circuit in *United States v. Brown*[273] should have had no difficulty deciding that the prosecutor's explanation utterly failed to achieve racial neutrality. The prosecutor explained that he had peremptorily challenged all the blacks because the defense attorney, a black state senator, had a very special appeal to blacks in the community.[274] This explanation is patently racial, and the court, in eventually concluding that the prosecutor impermissibly excluded the jurors, relied on *Batson*'s express language: "[T]he 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 impartially to consider the [prosecutor's] case against a black defendant."[275] Although this *Batson* quote

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

272 There are no published opinions attributing to the term "neutral" any meaning other than "racially-neutral." Moreover, the Supreme Court derived the *Batson* analysis from those earlier Supreme Court cases concerning racial discrimination in venire selection in which "neutral" expressly meant "racially-neutral." *See Batson*, 476 U.S. at 95 (citing Alexander v. Louisiana, 405 U.S. 625, 632 (1972)).

273 817 F.2d 674 (10th Cir. 1987).

274 *Id.* at 675-76. The prosecutor told the trial court:

> It wasn't racist on my part to excuse those particular jurors; but I think, in all candidness [sic], I've tried cases with Mr. Porter before, and I think he's a marvelous opponent. He's very good in everything, and he also had a very special appeal to the black people in the community.
>
> And the one trial that I can think that we had together that actually went to trial, Judge Smith got kind of worn out with Mr. Porter and myself and said, "Men, I'm worn out with you two. I want you to take the first twelve jurors and not excuse anybody," which we did. There were six black and six white jurors on that case. It was a robbery, and it appeared to me an open and shut case. The man was caught there with the purse and the money and everything. We had a hung jury in the case, six to six, along the racial lines.
>
> And so all I'm telling the Court is that I did take into consideration the fact that these people were black and that almost everybody—I would think they [sic] would be an incompetent juror, almost, if they were from this area and didn't know Senator Porter. And I had planned on excusing them if they indicated in any way that they either knew Melvin Porter or knew who he was.

Id.

275 *Id.* at 676 (citing *Batson*, 476 U.S. at 89). *See also*, Clark v. City of Bridgeport, 645 F. Supp. 890, 893-94, 898 (D. Conn. 1986). In *Clark*, the court extended the *Batson* procedures to a *civil* case in which black plaintiffs brought a civil rights action against the local municipal government and the *defendant* municipality exercised its peremptories to strike all the potential black jurors. *Id.* at 895-96. Regardless of whether this extension of *Batson* was appropriate, the case provides an example of the type of motive con-

appears to foreclose the possibility of a contrary ruling in *Brown*, the Tenth Circuit's decision was not quite so simple. The complication arises because of an internal inconsistency in *Batson*. In one place, the Supreme Court merely forbade prosecutors from challenging jurors *solely* on account of race,[276] but elsewhere in the *Batson* opinion, the Court required prosecutors' motives to be racially neutral.[277] Although "racially neutral" implies that race should play no role in a prosecutor's motive for peremptorily challenging jurors, the prohibition of challenges "solely based on race" connotes the existence of acceptable explanations based partly on race.

A closer examination of *Brown* highlights this contradiction. The prosecutor previously had lost what he considered to be an "open and shut" criminal case against a black defendant represented by the same lawyer who was now defending Brown.[278] According to the prosecutor, the jury split 6-6 along racial lines.[279] Thus, although the prosecutor did not strike the blacks for purely race-neutral reasons, he specifically tailored his strikes to the case

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demned in *Batson*. When asked to explain his challenges, the assistant city attorney stated:

> I prefer and thought that my client would get a much fairer trial if I could get people who came from surrounding circumstances and who had no feeling of kinship by race, color or creed. . . . [I]t looks like a pervasive pattern, I can't deny that we did it, I'm not going to sit here and say we did it, you know, but I'm sure if you had twenty more blacks on that panel, we would have had to accept black people. We would have to make a choice of which black people would we—would have given us a better and fairer trial. For example, if I had a black person who lived in Fairfield as compared to a black person who lived in Bridgeport on that panel, I probably would have knocked the black person from Bridgeport off and retained the one from Fairfield. Because the atmosphere that prevails in this city which I know exists, that's it. I have no other defense. I knocked them off. Yes, I did. I used my peremptory challenges, ... But it's so terribly unfair to pick on one segment of the population and tell us, oh, you were pervasive. It was designed. You knocked them all off. . . . I can't give you any other argument. We did it. It's obvious what we did.

Id. at 893 (elipses in original). The assistant city attorney also stated that he thought black jurors would be biased, emphasizing that black plaintiffs were involved. Yet, he made no effort to explore this suspected bias on voir dire. Finally, the city attorney remarked:

> [I]f I had a choice between a white juror and a black juror under the facts of these cases, I'm going to take a white juror. That's what I'm saying. . . . [W]hy should I put my city and my defendants at the mercy of the people in my opinion who make the most civil rights claims, at least in my experience. . . . But I've been honest with your Honor. I told you exactly why I kept those people off the jury.

Id. at 894 (elipses in original).

The *Clark* court had no trouble finding these reasons insufficient to rebut the inference of racial discrimination previously raised. Indeed, the city attorney in *Clark* excluded blacks for the exact reasons specifically condemned in *Batson*.

276 476 U.S. at 89 (emphasis added).

277 *Id.* at 98, 100.

278 *Brown*, 817 F.2d at 675-76.

279 *Id.*

against Brown and did not base them *solely* on the juror's race. Rather, he looked to the juror's race *plus* previous experience with the defense attorney's seeming influence over black jurors. An affinity between defense counsel and juror may in some cases justify a challenge for cause, regardless of the juror's race. If such evidence could, provided it was strong enough, support a challenge for cause, a weaker showing of lawyer-juror affinity should serve as a proper basis for a peremptory challenge. Simply because this "affinity" is a result of, among other things, race, courts should not read *Batson* to forbid a prosecutor the wise use of a peremptory challenge. To do so would, in effect, sanction a juror's racial bias as a means of eliminating prosecutorial racial bias.[280]

The Tenth Circuit found the appropriate solution, ruling in *Brown* that an affinity between a potential juror and defense counsel is a justifiable reason for exercising a peremptory challenge, even though that affinity is linked to race.[281] The prosecutor, however, must bring out facts during voir dire which support such an affinity and not assume that it exists solely because of racial identity.[282] *Batson* expressly condemned an assumption of juror bias based solely on race.[283] The prosecutor in *Brown* failed to inquire into the black juror's potential bias during voir dire, simply assuming from previous experience that all blacks would vote to acquit the defendant because of the mere presence of the defense attorney.[284]

The obvious implication of *Brown* is that "racially neutral" does not and cannot mean absolute racial neutrality. The fact that juror bias is linked to race should not make peremptory exclusion of that

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280 It would be quite anomalous if, in order to prevent racial discrimination, courts construed *Batson* to prevent prosecutors from challenging jurors who are themselves racially biased. The Supreme Court has long recognized that racial bias may be subtle. A peremptory challenge is a means of eliminating those jurors with particular biases and prejudices, racial or otherwise, which may be so subtle as to allow that juror to evade a challenge for cause, yet not so subtle as to have escaped the prosecutor's trained and watchful eye.

281 *Brown*, 817 F.2d at 676. The court stated: "While [*Batson*] interdicts the exercise of peremptory challenges for purely racial reasons, it does not forbid challenges of minority jurors for legitimate reasons tangentially connected with their race." According to the court, specific juror bias is one such legitimate reason. *Id.*

282 *Id.*

283 *Batson*, 476 U.S. at 97-98. The Court stated:

> [The Equal Protection Clause] forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black.... The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' race.

Id. at 97-98.

284 *Brown*, 817 F.2d at 676.

juror "taboo" under *Batson*. On the other hand, allowing a prosecutor to assume juror bias in any case based on broad and often stereotypical assumptions is exactly what the Supreme Court sought to prevent in *Batson*. As the Tenth Circuit held in *Brown*, mere assumptions of race-linked juror bias will not suffice. A prosecutor, intending to exclude jurors because of a race-linked characteristic, should lay a factual predicate during voir dire tending to show specific juror bias.[285] Otherwise, the prosecutor's exclusion of blacks is overinclusive in relation to his "legitimate" motive, especially considering that there is a more precise alternative—attempting to expose that race-linked juror bias during voir dire.[286]

The Fourth Circuit considered a similar non-neutral explanation in *United States v. Woods*,[287] where the prosecutor struck a black juror for race-linked reasons. The defendant in *Woods* was a black pastor in Charleston, South Carolina, who was charged with mail fraud.[288] The charge received strong negative publicity, and the prosecutor was aware of several anti-government articles in the *Charleston Chronicle*, whose subscribers were primarily black. The prosecutor challenged one black juror from Charleston ostensibly because of assumed exposure to what the prosecutor considered racially inflammatory pretrial publicity.[289] Although the juror indicated on voir dire that he had seen some press stories, the prosecutor made no further exploration into the issue of specific juror bias or the juror's news source.[290] Still, the trial judge found that the defendant had not proven any purposeful racial discrimination, and the appellate court upheld the judge's determination.[291]

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285 Of course, such a showing need not amount to the showing necessary to support a challenge for cause.

286 For example, if a black juror is going to acquit a black defendant because of racial affinity, that juror is certainly subject to a challenge for cause. What if, after voir dire, the prosecutor could not establish the juror bias to the extent that it would support a challenge for cause? Must she leave that juror on the panel, even though she honestly feels that the juror will automatically vote for acquittal? *Brown* says "No." 817 F.2d at 676. However, removing blacks because they are black on the assumption that they will be partial is overbroad in relation to the legitimate objective of removing those jurors who may be biased and is a clear violation of *Batson*. The prosecutor should, as *Brown* indicates, try to establish the specific juror bias on voir dire. This procedure is a much less intrusive and more reasonable alternative than challenging a juror solely because of assumptions predicated on juror race.

287 812 F.2d 1483, 1485-86 (4th Cir. 1987).

288 *Id.* at 1484.

289 *Id.*

290 *Id.*

291 *Id.* at 1487. The Fourth Circuit emphasized the deference that appellate courts should give to the trial judge's findings, stating that those findings should not be reversed unless clearly erroneous. The court also considered the fact that three blacks served on the jury, a factor militating against the existence of purposeful discrimination.

The result in *Woods* is clearly inconsistent with *Brown*. The prosecutor in *Woods* assumed, solely because of the juror's race, that he read the *Charleston Chronicle*, which prosecutor characterized as a "black newspaper." This is precisely the type of assumption—based solely on race and unsupported by voir dire testimony—which both *Batson* and *Brown* condemned. The motive, though not "racially-neutral," is legitimate according to *Brown*,[292] but the prosecutor did not make a sufficient effort on voir dire to disclose the suspected "race-linked" juror bias.

Presumably, the validity of race-linked rationales extends beyond those involved in *Woods* and *Brown*. Pursuant to *Brown*, the government may strike a black juror who is biased in favor of a black defendant, so long as the prosecutor does not merely *assume* juror bias from the juror's race but brings out that bias via testimony and demeanor during voir dire. *Batson* attempts to eliminate racial bias, not condone it. Thus, *Batson* does not condemn exclusions based on specific juror bias, but rather the *assumption* that the juror is biased merely because he shares the same race as the defendant. If the juror *is* biased, even if that bias is racially based, he should be subject to a peremptory challenge, provided the prosecutor raises some evidence of that bias during voir dire. This is especially true considering that the court may remove that juror for *cause* if the prosecutor establishes the juror's bias to the trial judge's satisfaction. The implications of the preceding analysis are clear: "Racially-neutral" does not mean "racially-neutral." Virtually any motive, race-linked or otherwise, will suffice to rebut defendant's prima facie case if properly substantiated.

More troubling is an explanation by a prosecutor that is facially neutral but which has a disparate impact on members of defendant's racial group. Examples include peremptory challenges exercised because the juror is unemployed, has a low income, or lacks sufficient education. At least the race-linked motives legitimatized in *Brown* and *Woods* were rationally related to the existence of specific juror bias;[293] but facially neutral explanations having a racially disparate impact often have, at best, a tenuous relationship to specific juror bias.[294] Moreover, these facially neutral reasons provide pros-

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292 *See supra* notes 278-86 and accompanying text.

293 *See* United States v. Brown, 817 F.2d 674 (10th Cir. 1987); United States v. Woods, 812 F.2d 1483 (4th Cir. 1987). *Brown*, of course, unlike *Woods*, requires the prosecutor to bring out evidence of this bias during voir dire. In other words, the prosecutor's means of eliminating biased jurors are overbroad if the prosecutor does not make a searching inquiry into that bias during voir dire.

294 Apparently, the rationale underlying challenges based on unemployment or low income is that a juror might identify with a defendant who shares the same status or

ecutors with a "cover" for racial discrimination, especially if the trial is in a large city where the burden of unemployment, low income, or poor education is likely to fall disproportionately upon minorities. Thus, such facially neutral motives are inherently suspect of serving as a pretext for intentional discrimination.

The New Jersey Supreme Court addressed the problems surrounding a "facially neutral, disparate impact" explanation in *State v. Gilmore*.[295] In *Gilmore*, the government anticipated that certain Baptist ministers from the Newark area, including the defendant's parents, would testify as alibi or character witnesses. After successfully removing all the black jurors, most by means of peremptories, the prosecutor explained that he wanted to eliminate all Baptists from the jury because of suspected bias.[296] Although membership in the Baptist faith is generally racially neutral,[297] certain denominations prevalent in the North are predominately black, and therefore, the exclusion of Baptists from defendant's Newark jury had a disparate impact on blacks.

The *Gilmore* court utilized the same analysis as the Tenth Circuit in *Brown*.[298] Indeed, a motive for exercising peremptories which has a disparate impact on blacks is easily viewed as race-linked, thereby suggesting application of the *Brown* analysis. The "assumption" fatal to the government's case in *Brown* also proved to be the prosecutor's downfall in *Gilmore*, but doubly so. The prosecutor assumed both that all black venirepersons were Baptist and that black Baptists would be biased in favor of the defendant, yet he made no effort to verify these assumptions on voir dire.[299] Thus, although the prosecutor's ultimate motive behind the peremptories—removing jurors with a specific bias—was both "legitimate" and trial-related, his means were overbroad and therefore lacked any *rational* relation to the particular case.[300]

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might even sympathize in a case in which the defendant is charged with an "economic" crime, such as burglary, robbery, theft, or a homicide occurring during the course of one of these crimes. *See* cases cited *supra* note 249.

295 103 N.J. 508, 511 A.2d 1150 (1986). Although *Gilmore* was based on the New Jersey Constitution, the procedures outlined by the court were the same as the *Batson* procedures. *See id.* at 1165-66 (citing *Batson* repeatedly).

296 *Id.* at 1168.

297 This Article does not address the question of whether *Batson* will be, or should be, extended to discrimination on the basis of religion or sex.

298 *Gilmore*, 103 N.J. at 542-43, 511 A.2d at 1168. *See supra* notes 273-86 and accompanying text for a discussion of the Tenth Circuit's decision in *Brown*.

299 *Gilmore*, 103 N.J. at 542-43, 511 A.2d at 1168.

300 *Id.* The court stated:

> Then there is the assistant prosecutor's attempt to justify his exclusion of Blacks as a proxy for exclusion of Baptists, a religious group to whom he assumed Blacks predominately belonged. Admittedly, given the assistant prosecutor's anticipation

Courts can apply a similar analysis to any facially neutral reason having a disparate impact on members of the defendant's minority group. Take, for example, peremptories exercised on the basis of unemployment, low income, or a lack of education. As previously mentioned, these reasons create a special risk of discrimination not only because of the likelihood of disparate impact, but because they easily serve as a pretext for purposeful discrimination. They are far less indicative of specific juror bias than the reasons offered in *Brown*, *Matthews*, and *Gilmore*, and, unlike those somewhat unique explanations, can support peremptory strikes in virtually any criminal case. Therefore, given that the defendant has already established a prima facie case and that there is a special danger that explanations based on juror unemployment, education, or income are pretextual, the trial judge should make a dual inquiry. First, the judge should determine whether the prosecutor's explanation is rationally related to the existence of specific juror bias. Second, the judge should consider whether the prosecutor has inquired into and shown during voir dire the existence or possiblity of some specific bias, even though that showing may be too slight to support a challenge for cause. A sliding scale approach is advisable; the more tenuous the relationship between the alleged motive and specific bias, the greater must be the prosecutor's "showing" of potential bias.[301]

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that defendant's parents and other Baptist ministers from the Newark area would be alibi and/or character witnesses, it may seem that he excluded Blacks and therefore Baptists on the basis of valid trial-related reasons. But these alleged trial-related reasons sweep so broadly as to attenuate their validity, for on these assumptions, the exclusion of any and all Blacks living near Newark would be justifiable. If so, "valid trial-related reasons" would become so broad as to approximate presumed group bias itself, and so in this sense lack any real relation to the particular case on trial—particularly where, as here, the State on voir dire made no attempt to determine, first, whether the black venirepersons were Baptists, and second, whether they would be unduly swayed by the testimony of black Baptist ministers. At this point, we can see that what made the reason seem to the assistant prosecutor a valid trial-related reason in the first place is assumptions about Blacks and Baptists that are quite unflattering, not to say invidiously discriminatory, to both the racial group and the religious group.

The court's decision has foundation in *Batson*, where the Supreme Court expressly required the prosecutor's explanation of his use of peremptories to be "related to the particular case to be tried." *Batson*, 476 U.S. at 98.

301 "Showing" does not mean that the prosecutor must, by some standard of proof, establish specific bias. To so require would convert the peremptory challenge into a challenge for cause. However, the prosecutor must at least inquire into, and bring out facts or opinions on voir dire on which to base a reasonable assumption of juror bias, so that the assumption is not being made on race alone, or on some other overbroad basis which has a disparate impact on blacks.

Because voir dire and the attendant exclusion of jurors has concluded when the *Batson* motion is raised and decided—it is only then that the judge has in front of her all the evidence from which to determine the existence of a prima facie case—the approach adopted in *Brown* and *Gilmore*, and recommended in this Article, places the prosecutor in

In sum, although *Batson*'s requirement that the prosecutor provide a "racially-neutral" explanation does not require absolute racial neutrality, either on the face of the explanation or in its effect, the term is not without meaning. It has evolved into a requirement that the prosecutor's reasons be "legitimate"—that is, rationally related to the existence of specific juror bias or other recognized jury selection concerns.

c. Bona Fide

In addition to being specific and legitimate, the prosecutor's explanation must also be bona fide and not merely a pretext for racial discrimination.[302] This "hurdle" is closely related to the first two because the less "specific" or "legitimate" the explanation (in other words, the less rationally related the explanation is to the outcome of the case or to the existence of juror bias), the greater the likelihood that it is a pretext for racial discrimination. Yet, the "bona fide" requirement is a separate inquiry because the specificity and legitimacy of the prosecutor's stated reasons do not preclude the possibility that those stated reasons are not the true motivation behind his exercise of peremptories.

The possibility of pretext is especially apparent when the prosecutor's explanation is neither objectively verifiable nor directly related to specific juror bias. Examples include explanations based on perceived juror disinterest, bewilderment, nervousness, indecisiveness, hostility, aversion to eye contact, and just plain "poor attitude," all of which courts have deemed capable of rebutting an inference of intentional discrimination. The courts' acceptance of such motives indicates that *Batson* did not destroy the "hunch" challenge.[303] Trial judges should, however, carefully scrutinize per-

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a bit of a quandary. Extensive inquiry during voir dire into specific bias, especially race-linked bias, may actually call attention to the racial issue and may support an inference of intentional discrimination. On the other hand, failure to make such an inquiry on voir dire raises the specter of a finding that the prosecutor exercised his strikes on the basis of an overbroad and impermissible assumption.

This "quandary" is justifiable, however, because of the notion that peremptory challenges are precisely designed to remove those jurors whose suspected biases cannot be established to the extent necessary to support a challenge for cause. Prosecutorial inquiry into the existence of specific bias, rather than merely striking because of broad assumptions based on race, age, or status, actually promotes the accuracy of peremptory challenges. Such inquiry, therefore, is desirable, especially when the "cost" of too little inquiry may be hidden racial discrimination.

302 *See, e.g.*, Garrett v. Morris, 815 F.2d 509, 511 (8th Cir. 1987); *Clark*, 645 F. Supp. at 898; *Gilmore*, 103 N.J. at 542-43, 511 A.2d at 1168; People v. Turner, 42 Cal. 3d 711, 720-21, 230 Cal. Rptr. 656, 661, 726 P.2d 102, 107 (1986).

303 *See Gilmore*, 103 N.J. at 538-39, 511 A.2d at 1166 (noting that "hunch" challenges are viable under the various state constitutional analyses developed prior to *Batson* and

emptories based on "hunches" and "seat-of-the-pants instincts," because such instincts easily disguise the broad assumptions of group bias condemned in *Batson*.[304]

Even explanations which are objectively verifiable are subject to misuse. Peremptories exercised because of age, income, education, or occupation are tenuously related to specific juror bias and are no less subject to pretextual misuse than the aforementioned "hunches." These explanations also deserve close scrutiny by trial judges to ensure that they are bona fide.[305] Under the analysis proposed in this Article to uncover pretext, the nature of the prosecutor's proffered justification should not only determine the level of scrutiny, but should remain a factor in the trial judge's consideration of whether the alleged motive is bona fide or pretextual.

The prosecutor's facially legitimate reason is more likely a pretext for discrimination when he has not evenly applied his "peremptory policy" to blacks and whites alike. In *Garrett v. Morris*,[306] the prosecutor struck all three potential black jurors, allegedly on the grounds that they lacked the background, education, and knowledge necessary to understand scientific evidence the government planned to introduce. Yet two of the three blacks had a high school degree, and the other was only three hours short of a college business degree. Moreover, of the whites remaining on the jury, at least two had never completed high school, and most of the others held only a high school diploma.[307] Not surprisingly, the Eighth Circuit concluded that the prosecutor's explanation was a pretext for purposeful discrimination.[308]

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which ostensibly mirror the *Batson* procedures). In *Gilmore*, the Supreme Court of New Jersey stated: "A prosecutor may act freely on the basis of "hunches" unless and until those acts create a prima facie case of group bias, and even then he may rebut the inference." *Id.* (citing People v. Hall, 35 Cal. 3d 161, 170, 197 Cal. Rptr. 71, 77, 672 P.2d 854, 859 (1983).

304 *See Batson*, 476 U.S. at 106 (Marshall, J., concurring). *See also Gilmore*, 103 N.J. at 538-39, 511 A.2d at 1166.

305 Even reasons *directly* related to specific juror bias and, therefore, related to the outcome of the trial may, in some instances, be pretextual. The nature of the reason is simply one factor which the trial judge should take into account in his determination of whether the prosecutor's explanation is genuine. Moreover, the nature of the reason should determine the trial judge's level of scrutiny for genuineness.

306 815 F.2d 509, 513 (8th Cir. 1987).

307 *Id.* at 513-14.

308 *Id.* at 514. The court stated: "The prosecutor's rationale—the blacks' purported lack of education, background, and knowledge—seems clearly pretextual in light of his decision not to strike white jurors who differed in no significant way."

The court also noted that the black jurors had no difficulty understanding or answering questions on voir dire, and none indicated any partiality toward defendant. Moreover, at least one black woman seemed to have an attitude favorable to the prose-

In *Clark v. City of Bridgeport*,[309] the prosecutor struck a black juror from Bridgeport and explained that he preferred jurors who did not reside in Bridgeport, although a white from Bridgeport remained on the jury. The prosecutor struck another black allegedly because he belonged to an international organization of police chiefs, a characteristic *favorable* to the government.[310] The court ruled that the reasons for the exclusion of the two were pretextual.[311]

The Supreme Court of New Jersey shed further light on the pretext problem in *State v. Gilmore*.[312] The prosecutor in *Gilmore* claimed that he struck three black housewives and two black secretaries because he wanted intellectual types on the jury.[313] Not only did the prosecutor fail to insist upon intellectual achievement by white jurors, but the only issue for the jury to resolve was uncomplicated—identification of the perpetrator.[314] The court concluded that the prosecutor's explanation was not bona fide, emphasizing that there was no "reasonable relevancy" between the jury issue and the prosecutor's preference for jurors of high intellectual achievement.[315]

The court's rationale in *Gilmore* proposes an additional factor relevant to determining whether the prosecutor's proffered motive is a pretext for racial discrimination: Is the motive rationally related to the trial? Logically, the less trial-related the explanation, the more likely that it is a facially neutral reason manufactured to hide the broad race-based assumptions condemned in *Batson*. Yet, courts have rarely found explanations pretextual absent an uneven application to black and white jurors, no matter how tenuous the relationship between the explanations and the trial.[316] This judicial reluctance to find "pretext" is especially troubling when the prosecutor bases his peremptory challenges on one or more of the "hunches" earlier described, such as juror indifference, nervousness, eye contact, and the like. Not only are these hunches the most likely facade for intentional racial discrimination, but the "uneven

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cution. *Id.* All these factors suggested that the prosecutor's proffered reason was pretextual.

309 645 F. Supp. 890, 893 n.3 (D. Conn. 1986).

310 *Id.*

311 *Id.* at 898.

312 103 N.J. 508, 511 A.2d 1150 (1986).

313 *Id.* at 1168.

314 *Id.* The prosecutor admitted that the state had strong case and that the issue to be resolved—identification—was not very complicated.

315 *Id.*

316 Even the conclusion in *Gilmore* was based to a large extent on the racially uneven application of the prosecutor's alleged policy for exercising peremptory strikes. *See id.*

application" test of *Garrett*, *Clark*, and *Gilmore* is totally unresponsive to such a "hunch" challenge. For example, even peremptories exercised on grounds as tenously related to the outcome of the trial as age, low income, and lack of education are *objectively verifiable* in the sense that a judge can identify these characteristics in blacks and whites and decide whether the prosecutor has evenly applied his proferred "peremptory policy" among the races. When the government strikes jurors because of poor attitude or indifference, however, it will be virtually impossible for the judge to determine whether similarly situated whites have been challenged.[317] These "hunches" appear to be the perfect disguise for discrimination.

Since these "hunches" provide an excellent opportunity for discrimination, their relationship to valid trial concerns should be a factor in determining whether the "hunch" is a pretext. Certainly, juror indifference is a valid concern, though perhaps less so than juror bias, but, as in the cases involving race-linked motives, the trial court should require the prosecutor to expose this juror indifference on voir dire, at least to a degree providing the trial court a basis for judging the genuineness of the motive.[318]

In sum, the "obstacles" the courts have set up to screen prosecutorial motives are less obstacles to racial discrimination than they are road maps. The ease with which a prosecutor may articulate motives sufficient to rebut any inference of intentional discrimination belies the magnitude of the problem which led to the Supreme Court's decision in *Batson*. It is noteworthy that of the few published opinions where the prosecutor failed to articulate acceptable reasons, virtually all involved the retroactive application of *Batson* to cases tried prior to the Supreme Court decision.[319] This

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317 Which jurors have a "poor attitude"? Which are hostile? Were there other jurors who exhibited a lack of eye contact during voir dire? It is very unlikely that a trial judge can remember all the idiosyncracies exhibited by the prospective jurors during voir dire, especially when the prosecutor gives his explanation, if at all, subsequent to the questioning of all venirepersons.

318 While juror hostility, indifference, and indecisiveness are valid trial-related concerns, it is apparent that these hunches are less rationally related to trial outcome than, for example, juror bias. Moreover, the hunch is just that—a guess that a particular juror is indecisive, nervous or hostile. Finally, because these characteristics are not easily identifiable in jurors generally, it is difficult to show the disparate application of the prosecutor's rationale. These observations call for some safeguard against the unbridled use of these "hunches" as a pretext for racial discrimination. Requiring a rational relationship between the hunch and the trial, supported by voir dire, is one means available to trial judges to prevent discrimination from going undetected.

319 *See* United States v. Brown, 817 F.2d 674 (10th Cir. 1987); Garrett v. Morris, 815 F.2d 509 (8th Cir. 1987); United States v. Chalan, 812 F.2d 1302 (10th Cir. 1987). *Compare Clark*, 645 F. Supp. 890 (D. Conn. 1986).

In *Clark*, there is perhaps another valid reason why the prosecutor was unable to

indicates that prosecutors selecting juries in awareness of *Batson* are having few problems saying the right things when asked by trial judges to explain their use of peremptories. Moreover, the tests outlined by the reviewing courts, and presumably applied by trial judges, pose virtually no obstacle to anything but blatant discrimination and may actually serve as a jury selection discrimination "how-to" guide.

The consequences of this phenomenon are disturbing. The delicate balance struck by *Batson* between the competing interests of the peremptory character of the challenge and the prevention of racial discrimination in jury selection has been obliterated. Not only has the prima facie case lost its meaning and the challenge its peremptory character, but no corresponding benefits, in the form of curtailing racial discrimination, have been realized. In other words, the courts' implementation of the *Batson* procedures, rather than balancing the two competing interests, has severely infringed upon one interest without advancing the other.

3. Losing Sight of the Forest

The final command of *Batson* is one that the trial judges and reviewing courts have largely ignored. After the prosecutor comes foward with an explanation for peremptorily striking blacks, the Supreme Court directed trial judges to "determine if the defendant has established purposeful discrimination."[320] Articulation of "acceptable" prosecutorial motives, therefore, does not end the *Batson* inquiry. Such an abridged inquiry is inconsistent with the express language of *Batson*. The trial court should proceed to make the ultimate determination of whether the defendant has established intentional discrimination, taking into consideration the relative strength of the prosecutor's explanations. Although there is a spectrum of "acceptable" prosecutorial explanations, some are certainly more acceptable than others—more specific, more neutral, more genuine, or more rationally related to the case being tried. Whether the government has rebutted an inference of intentional discrimination depends not upon the independent "acceptability" of the

articulate acceptable reasons. Although the trial in *Clark* occurred subsequent to *Batson*, it was a civil trial—a civil rights suit brought by blacks against the City of Bridgeport, whose attorney struck all the blacks from the jury. 645 F. Supp. at 891-92. The city attorney was apparently aware of *Batson*, but he made no effort to hide his discriminatory use of peremptories, failing to anticipate the Court's application of *Batson* to a civil case. *Id.* at 892-93, 896. Thus, the situation in *Clark* is not significantly different from that in *Brown*, *Chalan*, and *Garrett* and supports the proposition that any prosecutor aware of *Batson*'s application will have no trouble complying with it.

320 *Batson*, 476 U.S. at 98.

proferred explanations, but rather upon the totality of relevant circumstances, including the strength of the evidence which raised the inference, the credibility of the prosecutor, and the nature of the explanations viewed in their *entirety*. If a prosecutor strikes all the blacks from the jury or otherwise conducts himself on voir dire so as to raise a strong inference of intentional racial discrimination, it should not be sufficient to merely explain each peremptory strike in terms generally, and liberally, found "acceptable" by the courts, such as "he was inattentive"; "she was hostile"; or "two others didn't look me in the eye." Rather, it is the sum quality of all the reasons that is relevant to the ultimate result. Furthermore, a trial court should not disregard the evidence on which it based its initial finding that the defendant established a prima facie case.

Essentially, upon the showing of a prima facie case, trial court implementation of *Batson* procedures requires a two-step inquiry. First, the trial judge should determine whether the prosecutor's proffered reasons are "acceptable" according to the various tests promulgated by the lower courts.[321] If not, the prosecutor's explanation is per se insufficient to rebut the previously raised inference of intentional discrimination, and the defendant wins.[322] Second, provided that each of the prosecutor's explanations is "acceptable," the trial court still must determine whether, considering the totality of the relevant circumstances, the defendant has ultimately proved intentional discrimination. Relevant circumstances include an assessment of the degree of "acceptability" of the prosecutor's explanations viewed in toto,[323] the strength of the evidence supporting

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321 In other words, are the prosecutor's reasons sufficiently specific, trial-related, and bona fide?

322 When the defendant has proven intentional racial discrimination, the trial judge must, of course, employ a remedy. The remedy chosen may depend upon the particular jury selection procedure used by that court. In jurisdictions using the jury box system, where prospective jurors are seated, examined, and challenged or accepted one at a time, the appropriate remedy should be to impanel a fresh venire and start over from scratch. Reseating a previously removed juror is not advisable because that juror may have developed a bias against the lawyer who originally excluded him.

On the other hand, in jurisdictions which use a struck jury system, where the names of all prospective jurors are transcribed on a list, and both parties literally strike as many names as they have peremptories with the result being a jury of the first twelve commonly acceptable veniremen, a court may properly implement the other remedy mentioned in *Batson*, and simply disallow the discriminatory strikes. *See Batson*, 476 U.S. at 99-100 n.24. Because in the struck jury system the judge can decide the *Batson* motion without revealing to any juror whether they have been challenged and by whom, any jurors discriminated against can be seated on the jury without the danger of prejudice against the prosecutor.

323 Trial courts should closely scrutinize those reasons which are the most likely disguise for racial discrimination, such as the "hunch" reasons like "poor attitude," and the reasons having a disparate impact on blacks. *See Clark*, 645 F. Supp. at 897 (stating that

the initial inference of intentional discrimination,[324] the credibility of the prosecutor,[325] the apparent lack of any trial-related benefit derived by engaging in discrimination,[326] and the prosecutor's reputation, or lack thereof, for discriminating in previous trials.[327]

In sum, focusing solely on the prosecutor's proferred explanation, even though "acceptable" under the current tests, is a perversion of the *Batson* procedures. This approach actually facilitates racial discrimination given the apparent ease with which a prosecutor may articulate reasons "acceptable" to courts. If *Batson* is to have any preventive effect at all, courts must more closely scrutinize not only the explanations themselves, but also all the other factors relevant to *Batson*'s ultimate question of whether the defendant has established purposeful discrimination.

III. CONCLUSION

The inescapable first impression drawn from the *Batson* jurisprudence is failure. The Supreme Court's "middle-ground" remedy, which attempted to eliminate discriminatory jury selection while at the same time preserving the common law institution of peremptory challenge, has thus far disserved both interests. Racism can still pervert jury selection, and prosecutorial explanation has bastardized the peremptory challenge. From all indications, courts have uniformly ignored or diluted the prima facie showing, which is the sole *Batson* element preserving the peremptory nature of the challenge. The cost of forfeiting truly peremptory challenges has

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proof of disproportionate impact is a factor bearing on the existence of intentional discrimination).

[324] The "numbers games," which were relevant to the existence of an inference of purposeful discrimination, are also relevant to the trial court's ultimate finding. *See Forbes*, 816 F.2d at 1011 n.7; *Woods*, 812 F.2d at 1487.

[325] *Matthews*, 803 F.2d at 332. The court in *Matthews* stated: "[T]he [trial] court noted that the demeanor of the prosecutor while exercising her peremptory challenges and the time that she took in so doing indicated that she was not simply striking veniremen because they were black but was engaging in a careful process of deliberation based on many factors." *Id.*

[326] *See id.* (suggesting there was no prosecutorial advantage to keeping blacks off the jury because the key witnesses for both sides were black); Ricks v. State, No. 6, Div. 45, slip op. (Ala. Crim. App. Feb. 24, 1987)(LEXIS, States library)(prosecutor argued that his witnesses were black, and opinion implicitly suggests that this factor is at least relevant).

[327] *See Matthews*, 803 F.2d at 332 ("The [trial] court noted that there was no evidence that the prosecution had maintained a pattern or practice of striking blacks from juries in cases where the defendants are black, and further commented that the court's personal experience showed the contrary."). Thus, *Swain*'s pattern of minority exclusion in case after case is no longer necessary to prove an equal protection violation, but it is still a relevant factor.

yielded little corresponding benefit, as a myriad of "acceptable" explanations and excuses cloud any hope of detecting racially based motivations. With the apparent acquiesence of the courts, prosecutors should have little trouble articulating acceptable reasons, whatever their underlying motivation. If the balance struck in *Batson* is inherently counterproductive, the Supreme Court must eventually choose between two competing interests, either eliminating the peremptory challenge, as Justice Marshall suggested, or returning to *Swain v. Alabama*. It is still too early, however, to judge *Batson* a total failure. The interests it attempts to serve are too important. *Batson* may yet survive if the implementing courts, in which the Supreme Court expressed great confidence and vested such wide discretion, are sensitive to its subtle balance and ultimate purposes—creating a jury of peers, ensuring minority participation in the criminal jury's direction of society, and building public confidence in the criminal justice system.

First, trial courts should put teeth into the *Batson* prima facie case requirement. Otherwise, Chief Justice Burger's fears for the peremptory challenge will be substantiated. Courts, therefore, must strictly define "inference." Finding an inference of discrimination and forcing prosecutorial explanation every time a defendant raises a *Batson* challenge upsets the delicate balance by defeating the peremptory nature of the challenge. Such a lax interpretation of "inference" is patently inconsistent with the respective burdens placed on defendant and prosecutor in *Batson*. Upon defendant's raising an inference of intentional discrimination, the burden shifts to the prosecutor to explain the strikes and to rebut that inference. The obvious implication is that a prosecutor who fails to explain his peremptory challenges loses the *Batson* issue—that is, the defendant has proven intentional discrimination. Thus, the *Batson* inference is a rebuttable presumption. The presumption disappears upon an acceptable prosecutorial explanation, and the trial court must then make the ultimate determination of whether the defendant has proven intentional discrimination. The ultimate burden of persuasion remains at all times with the defendant. Therefore, raising an inference does not, and cannot, mean that the defendant is required only to introduce a quantum of evidence sufficient to raise the *Batson* issue. Rather, "inference" suggests evidence upon which a reasonable trier of fact could find intentional discrimination by a preponderance of the evidence. Otherwise, there is no need and, given the importance of the peremptory challenge, no justification for requiring the prosecutor to explain his challenge. This threshold is obvi-

ously much higher than that which the lower courts have so far imposed.

Although the prima facie case requirement protects the peremptory nature of the challenge, it does not serve *Batson*'s primary goal of eliminating racist jury selection. Without scrutiny sufficient to detect racial discrimination, the protection offered by *Batson* is too insignificant to warrant interference with the state's interests in freely exercising peremptories. Courts disserve both of *Batson*'s competing interests if they force prosecutors to explain any strike of a venireperson who shares the defendant's race and then accept virtually any proferred explanation. Yet, the prosecutor's explanation must be the focal point of judicial scrutiny if *Batson*'s protections are to have any meaning at all. Trial courts can best effectuate these protections by utilizing the dual inquiry recommended in this Article. First, do the prosecutor's proffered motives rebut the prima facie case, creating a fact question of purposeful discrimination? Second, if so, after a review of all the evidence, including the facts raising the inference and the sum quality of the prosecutor's explanations, has the defendant ultimately proven purposeful discrimination.

Rebutting the prima facie case involves an independent assessment of each of the prosecutor's explanations: 1) is it specific?; 2) is it rationally related to juror bias or other characteristics affecting juror qualification; and 3) is it bona fide? If each of the prosecutor's explanations passes these requirements, a fact question results. One insufficiently explained strike establishes a case of discrimination. As the *Batson* Court explained, the equal protection clause prohibits discrimination against even a single juror.

A satisfactory rebuttal of the prima facie case does not end the inquiry. After the presumption disappears, there remains the ultimate determination of whether the defendant has proven intentional racial discrimination. In making this ruling, the trial court should carefully consider all relevant circumstances, including the strength of the evidence which initially raised the inference and especially the nature of the prosecutor's explanations *viewed in toto*. This Article outlines three broad categories of prosecutorial explanations: 1) objectively verifiable and *directly* related to specific juror bias or ineffectiveness; 2) objectively verifiable but *tenuously* related to specific juror bias or ineffectiveness; and 3) primarily subjective challenges or "hunches". The more subjective the explanation and the more tenuously related to juror bias or qualification, the more suspect is the prosecutor's entire scheme of jury selection. Thus, in making the ultimate determination of whether the defendant has

proved racial discrimination, the trial court should consider the sum quality of all the prosecutor's proffered explanations. "Hunches" weigh less in the totality of circumstances than do objectively verifiable reasons strongly connected to the existence of specific juror bias. The more jurors that are challenged on "hunches," even "acceptable" hunches, the stronger becomes the defendant's case for a finding of intentional discrimination.

If *Batson* is to work and attain a point of equilibrium which maximizes the competing interests of equal protection, the peremptory challenge, and the democratic jury, its success depends on the trial judges in whom the Supreme Court has vested such wide discretion. At present, *Batson* is not working, but this Article proposes that it can, at least to the degree that any "middle ground" remedy can. Perhaps, however, further jurisprudential experience will show that *Batson*'s attempt at the improbable was actually an attempt at the impossible. If that happens, the Supreme Court will eventually have to sacrifice one of two important interests. For now, it is still too soon to force such a choice. A more exacting effort to implement *Batson*'s subtle balance is required of courts that are sensitive to its history, its competing interests, its express procedures, and its worthy goals.