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ARTICLES

PEREMPTORY CHALLENGE DISCRIMINATION REVISITED: DO *BATSON* AND *McCLESKEY* RELIEVE OR INTENSIFY THE *SWAIN* PARADOX?*

James S. Bowen**

The Constitution is both color blind and color conscious.

*"How then is this constitutional imperative to be achieved in a society that still bears the ugly scars of decades of racial segregation with all of its discriminations? For it is in this social structure that the problem arises. And it is in this social structure—not that of the hoped for idyllic state when the last vestige of this invidious distinction has gone away—that the constitutional ideal must be made to work."*¹

* * * * *

*"This then is the tyranny of the the majority, that it claims the right not only of making, but of breaking, the laws it has made."*²

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1. *Brooks v. Beto*, 366 F.2d 1, 22-23 (5th Cir. 1966)

2. M. de Tocqueville, 1 *DEMOCRACY IN AMERICA* 261 (1969 ed.)

INTRODUCTION

In *Batson v. Kentucky*,³ the Supreme Court of the United States overruled twenty-one years of precedent and more than a century of tradition that permitted prosecutors to exercise relatively unfettered discretion to create all-white juries to try racial minority defendants. The Court decided that a prima facie case of discriminatory use of peremptory challenges by prosecutors was made where a defendant, a member of a cognizable racial group, established that the prosecutor had systematically eliminated members of the defendant's racial group from the jury in the defendant's case. Since 1965, when the Court decided *Swain v. Alabama*,⁴ prosecutors had been able to bypass *Strauder v. West Virginia*⁵ by using peremptories to exclude Blacks from juries. The paradox which *Swain* generated is thus juxtaposed: how to guarantee to minority defendants a fair and impartial trial by a jury of peers while preserving the state's ability to eliminate minority venire members in cases involving an accused minority person. Put another way, the necessity of the peremptory right in juror selection collides with the proscription against intentional racial exclusion of minorities from juries.

Part I of this Article articulates the nature and extent of racial discrimination against minority defendants in the use of the peremptory challenge. It examines the development of *Swain* and the holding of *Strauder* as essential background for understanding *Batson*. Given that peremptories traditionally have been used to keep minority venirepersons off of juries in cases against minority defendants, this section examines the impact of peremptory usage on the quality of justice for minorities in America's courtrooms. *Strauder*, *Swain*, *Batson*, and *McCleskey* are examined to determine their inherent limitations, their present legacy, and their precedential value.

The centrality of jury impartiality in the arsenal of rights cannot be overemphasized. It is through the jury process that other rights are both recognized and vindicated. The trial serves as both the symbolic and actual means through which lay citizens participate in the process. Their stamp of approval on a particular outcome means its acceptance by a group representative of the people. Vindication of a right comes to a particular Black plaintiff or defendant who finds that the jury system works for him as for Whites — protecting his statutory and constitutional rights. Acceptance of the full citizenship of all Americans means that rights, privileges and immunities are respected and accorded for minority groups as well as the majority. This Article examines what courts have done with the concept of a fair trial by jury: Is impartiality assured? How is racism contained? Do defendants have a right to trial by their peers?

Part II of this Article re-evaluates the various approaches available to minimize jury discrimination. On the basis of this re-examination, several recommendations can be made. Proportional representation based on purposeful inclusion of minority persons could be coupled with a suspect class-equal protection analysis to re-argue before courts the viability of including

3. 476 U.S. 79 (1988) (holding that severe racial disparities in charging and sentencing does not violate either the eighth or fourteenth amendments.).

4. 380 U.S. 202 (1965).

5. 100 U.S. 303 (1880) (holding that Blacks may not be excluded from juries on the basis of race).

racial peers on juries which try minority defendants. Courts may use probability statistics as grounds for refusing to accept a jury from which all Blacks have been excluded. Jury districts may be reconstituted to provide for majority Black juries in majority Black areas. Finally, *Batson* prescribes that jury discrimination can be minimized by shifting to the prosecution a burden to offer reasons other than a racial basis for disqualification of prospective minority jurors. While this burden-shifting has value, peremptories for the prosecution should be eliminated altogether because of their inherently discriminatory use.

Have the disproportionate penalties and uneven treatment of minorities been challenged? If and when they are challenged, what burdens of proof are assigned to complainants in such cases? What standard of proof is required to demonstrate that the jury process involves discrimination, whether in its selection or decision-making? When jury discrimination is found, what constitutional limitations are there on the available alternatives for redress? Part III examines these questions and attempts to answer some of them.

In essence, the answer is that the prosecutorial peremptory challenge must be eliminated because, when used discriminatorily, it violates an accused's right to a fair trial. A defendant's claim to a peremptory challenge right is of higher constitutional moment than the state's claim. The Constitution promises a fair trial to a defendant by a jury of his peers, whereas the state's claim to equal chances for conviction is less time-honored, and is not protected under *any* constitutional reasoning.

Since there is little reason to believe that prosecutors will not misuse their peremptories, even in light of *Batson*, and with a dimming of hope prompted by *McCleskey's* diminution of the constitutional defenses against capital punishment, the prosecutorial discretion shielded by the peremptory should be eliminated. However, the defendant should retain his right to peremptories under a *Batson*-like rule where, when a *prima facie* case is established, the defense would explain its use of peremptory challenges by offering a reason other than race. To be sure, the defendant's right to peremptories would not include a right to exclude potential jurors on the basis of race.

Swain constrained minority defendants in criminal cases by institutionalizing an onerous (perhaps impossible) burden of proof. *Batson* proposes to rectify the problem by a formal mechanism which is incapable of ferreting out the deep and entrenched roots of the problem. Given *McCleskey's* gloss upon the operation of capital punishment in America, hope for recovery from the present setback is problematic; the prospects for a successful resolution of the imbroglio created by *Swain* decrease measurably.

I. THE PROBLEM

A. *Legal Description of the Problem*

Although overruled by *Batson v. Kentucky*⁶ as to its evidentiary burden test, *Swain v. Alabama*⁷ remains a seminal case for understanding jury discrimination. In *Swain*, the criminal defendant alleged that because all Blacks were purposefully excluded from his jury, the fourteenth amendment had been

6. 476 U.S. 79 (1988).

7. 380 U.S. 202 (1965).

violated. The Court found a constitutional mandate of nondiscrimination based on *Strauder v. State of West Virginia*,⁸ *Gibson v. Mississippi*⁹ and *Carter v. Texas*.¹⁰ Although the Constitution does not guarantee to a defendant a jury of his or her race,¹¹ it does preclude the state from excluding jurors based on race. This right of non-exclusion extends to "any identifiable group in the community which may be the subject of prejudice."¹² The burden of proof to establish discrimination is on the person who complains of the alleged discrimination.¹³

In *Swain*, the Court examined the system of challenges to prospective jurors by which Alabama eliminated virtually all Blacks from jury service. In desuetude in England,¹⁴ the peremptory challenge and challenge for cause system has found status as a fundamental element of the system of justice in America, the Court justified the system of challenges as eliminating the extremes of partiality and indicated that this purpose applied to both prosecution and defense.¹⁵ Further, the Court defended the challenging of jurors on the basis of "race, religion, nationality, occupation or affiliations"¹⁶

Batson v. Kentucky

In *Batson*,¹⁷ a Black man was convicted of burglary and receipt of stolen goods by a jury from which all Blacks had been excluded through the use of the prosecutor's peremptory challenges. At trial, defense counsel objected on the grounds that the prosecutor's use of peremptories violated the defendant's sixth amendment guarantee to a jury comprised of a fair cross-section of the community and defendant's rights under the equal protection clause of the fourteenth amendment.¹⁸ The trial court overruled defendant's objections. After conviction, *Batson* appealed to the Kentucky Supreme Court citing *People v. Wheeler*¹⁹ and *Commonwealth v. Soares*²⁰ as precedent. *Batson* argued that the prosecutor at the trial had engaged in a "pattern" of discriminatory challenges sufficient to violate *Swain*.²¹ The Kentucky Supreme Court upheld the conviction.

The United States Supreme Court granted certiorari. Reaffirming *Swain's* principle that deliberate denial of jury service on account of race violates the equal protection clause, Justice Powell for the majority cited an impressive battery of cases to hold that the equal protection clause forbids prosecutors from challenging potential jurors solely on account of race or on

8. 100 U.S. 303 (1880).

9. 162 U.S. 565.

10. 177 U.S. 442.

11. *Swain* 380 U.S. at 203-204.

12. *Id.* at 205.

13. *Id.* at 226.

14. In England, peremptories are of diminished importance because no *voir dire* of potential jurors by judge or attorneys is allowed. Without some knowledge of juror background, counsel can only rely on demeanor or intuition to predict juror orientation — thus making peremptories of little value in selecting a jury. GINGER, JURY SELECTION IN CRIMINAL TRIALS 62 § 2.14 (1975).

15. *Swain*, 380 U.S. at 212.

16. *Swain*, 380 U.S. at 220.

17. *Batson*, 476 U.S. at 82.

18. *Id.* at 83.

19. 22 Cal.3d 258, 148 Cal. Rptr. 890, 583 P.2d 748 (1978).

20. 377 Mass. 461 (1979), 387 N.E.2d 499.

21. *Batson*, 476 U.S. at 84.

the basis that Black jurors, as a group, cannot be impartial in a case against a Black defendant.²² In essence, the Court adhered to the established legal framework: excluding citizens on the basis of race offends the fourteenth amendment, though a defendant does not have a right to a petit jury composed wholly or partially of members of his own race.²³

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, fellows, associates, persons having the same legal status in society as that which he holds.²⁴

Justice Powell further noted that discriminatory jury selection harms not only the defendant but also the potential juror since it denies a fair assessment of his or her abilities without regard to race and destroys public confidence in the fairness of our system of justice.²⁵

The section of *Swain* that was overruled by *Batson* concerned a defendant's burden of proof for showing deliberate discrimination.²⁶ Justice Powell viewed *Swain* as a balance between two rival values: the prosecutor's judicially unfettered peremptory challenges and the prohibition against excluding persons from jury service on account of race.²⁷ Reiteration of the *Swain* burden compelled Powell to characterize it as "crippling".²⁸

In rejecting the immunity which *Swain* had granted prosecutorial exercise of the peremptory privilege, Justice Powell grounded his analysis on principles that had evolved under the equal protection clause since *Swain* and which, in his view, were inconsistent with *Swain*. First, proof of intentional invidious governmental discrimination violates the equal protection clause. Intent may be proved by either direct or circumstantial evidence. Disproportionate impact constitutes one type of circumstantial evidence. Once the defendant makes a prima facie case of discrimination, the burden shifts to the state to explain the racial disproportion.²⁹ The state must show that "permissible racially neutral selection criteria and procedures have produced the monochromatic result".³⁰ Justice Powell referred to various methods and factors that a defendant may show by relying solely on the facts concerning venire selection in his case. These factors might create the necessary inference of racial discrimination. The prosecutor's reasons for disproportionality need not be equivalent to a justification for disqualification for cause but must pro-

22. *Id.* at 89.

23. *Id.* at 85.

24. *Batson* 476 U.S. at 86. (quoting *Strauder*, 100 U.S. at 308). Arguably, a same race juror constitutes a racial peer. This specification means that same race persons may neither be purposefully excluded nor purposely included. However, their inclusion means greater confidence by defendants in the systems fairness.

25. *Id.* at 87.

26. *Batson*, 476 U.S. at 92-93.

27. *Id.* at 91.

28. "As the Court of Appeals for the Fifth Circuit observed, the defendant would have to investigate, over a number of cases, the race of persons tried in the particular jurisdiction, the racial composition of the venire and petit jury, and the manner in which both parties exercised their peremptory challenges. *United States v. Pearson*, 448 F.2d 1207, 1217 (Fifth Circuit 1971). The court believed this burden to be "most difficult" to meet. In jurisdictions where court records do not reflect the jurors' race and where voir dire proceedings are not transcribed, the burden would be insurmountable. (Citations omitted).

29. *Id.*

30. *Id.* (Citations omitted.)

vide a neutral explanation related to the particular case at hand.³¹ Justice Powell concluded that the *Swain* standard must be rejected, but declined to formulate specific procedures for the trial court to follow.³²

Justice White concurred in the opinion, recognizing that peremptories continued to be a widespread device for excluding Black jurors. He stressed the judge's discretion to determine when peremptories were being used discriminatorily and whether or not to require that the prosecution explain such apparent unfairness.³³

Justice Marshall's concurring opinion noted the eloquence and cogency of the majority decision but opined that this necessary step will not end the pernicious misuse of peremptories.³⁴ In his view, only a complete elimination of peremptories will achieve that result. Marshall reviewed the few but instructive cases in which Black defendants have been able to demonstrate the "common and flagrant" use of peremptories to exclude other Blacks from the jury box.³⁵ Justice Marshall also noted, *inter alia*, one case study which showed Blacks having a one-in-ten chance as compared to whites having a one-in-two chance of sitting for a felony trial.³⁶ Though he agreed with the Court's description of the problem, he argued that the suggested remedy was insufficient since prosecutors were left free to discriminate against Blacks in the jury selection process provided that they hold that discrimination to an "acceptable" level.³⁷ The arguments presented by Justice Marshall are telling. The task of assessing prosecutorial explanations of challenged peremptories may itself be insurmountable.³⁸

Even if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels—a challenge I doubt all of them can meet.³⁹

In considering the importance of the peremptory challenge, Justice Marshall argued:

[w]ere it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former.⁴⁰

In other words, Justice Marshall rejected parsing the peremptories. Rather, in the interest of justice, he would ban use of peremptories by the state and the defense alike—given the *constitutional requirement* of fairness to the defense

31. *Id.* at 1723.

32. *Id.*

33. *Id.*

34. *Id.* at 1726.

35. *Id.*

36. *Id.*

37. *Id.* at 1728.

38. *Batson*, 476 U.S. at 1728 (citation omitted).

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 defendant, or seemed "uncommunicative," or "never cracked a smile" and, therefore, "did not possess the sensitivities necessary to realistically look at the issues and decide the facts in this case?" If such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on nonracial grounds, then the protection erected by the Court today may be illusory. (Citations omitted.)

39. *Id.*

40. *Id.* at 1728 (quoting *Swain*, 380 U.S. 244 (Goldberg, J., dissenting)).

and the prudential regard that no disadvantage will result to the prosecution.⁴¹

Chief Justice Burger dissented. After a full airing of the alleged procedural discrepancies,⁴² the Chief Justice attacked the holding on substantive grounds.⁴³ Reiterating the majority's acknowledgement of the "very old credentials" and wide usage of the peremptory challenge, Chief Justice Burger contended that peremptories are essential to the American trial system.⁴⁴ Looking to peremptory usage in classical Greece, ancient Rome, historic England and colonial America, the Chief Justice argued that the right of challenge was dear to prosecutor and defense alike. He affirmed both the necessity of the peremptory right in juror selection and the prohibition of intentional racial exclusion of minority groups from jury venires.⁴⁵ He contended that re-examination of *Swain* or the peremptory challenge was not necessary especially after *Taylor v. Louisiana* in which the Court held that "defendants are not entitled to a jury of any particular composition."⁴⁶ The Chief Justice contended that the majority was acting erroneously in grounding its decision not only on *Strauder*,⁴⁷ but also on other equal protection cases.⁴⁸ He argued that *Strauder's* racial exclusions were fundamentally different from the exclusions alleged in *Batson*. *Strauder* exclusions of minority groups from the venire on a wholesale basis meant that usually the legislature or judiciary had determined a group's members "unfit to try any case."⁴⁹ Such exclusions are "stigmatizing", "discriminatory", inferred "inferiority" and are "racially insulting".⁵⁰ In contrast, exclusion by peremptory "à la" *Batson*, is a discrete tactical decision by litigants in trial as to the "potential partiality in a particular isolated case"⁵¹ of a specific venire person. Chief Justice Burger justified peremptory challenges on the basis of the prosecution's or defense's "limited information

41. *Id.* at 1728-29 (Marshall, J., concurring). Justice Stevens, joined by Justice Brennan in his concurrence, argued that the issue of an equal protection violation was properly before the Court. Justice O'Connor concurred in the opinion and judgment of the majority but noted specially that *Batson* is not to be retroactive.

42. Chief Justice Burger found that the Courts review of the equal protection issue violated "time-honored principle" since the issue was neither presented nor reviewed by the lower court. *Batson*, 476 U.S. at 1732. Where reexamination of a prior Court decision was at issue, Chief Justice Burger asserted that briefing and re-argument on that particular issue (if that question had not already been sufficiently presented) might be appropriate. *Id.* at 1733. "The Court today rejects [this course] of action, choosing instead to reverse a 21-year old, unanimous constitutional holding of this Court on the basis of constitutional arguments expressly disclaimed by petitioner." *Id.* at 1733. The Chief Justice indicated that this course of action violated not only the Court's precedents but also the Court's relevant procedural rule. *Id.* at 1733, citing Rule 21-1(a) of the U.S. Supreme Court. Proponents of this approach did "not cite, and I am not aware of, any case in this Court's nearly 200 year history where the alternative grounds urged by respondent to affirm a judgment were then seized upon to permit petitioner to obtain relief from that very judgment despite petitioner's failure to urge that ground." *Id.* at 1733 (Burger, C.J., dissenting). Nor did it serve, contrary to Justice Steven's suggestion, the Chief Justice reminds, that amici briefed and argued an issue which petitioners did not present. *Id.* at 1734. The proper course would have been to set re-argument and briefing on the *Swain* Equal Protection issue before deciding *Batson* on this ground. *Id.*

43. *Id.* at 1731-32.

44. *Id.*

45. *Id.* at 1736.

46. *Id.* at 1736 (quoting *Taylor v. Louisiana*, 419 U.S. at 538).

47. See *supra* note 8 and accompanying text.

48. *Id.* 1736-37.

49. *Id.* at 1736 (emphasis in original).

50. *Id.*

51. *Id.*

or hunch", "assumption", intuitive "judgment"⁵² and even "on the 'sudden impressions and unaccountable prejudices . . . conceive[d] upon the bare looks and gestures of another' ".⁵³

Chief Justice Burger argued that the majority was not applying equal protection analysis in its scrutiny of the peremptory—given the Court's limitation of its analysis to race.⁵⁴ According to him, under the majority's logic, equal protection analysis should lead to objections "to exclusions on the basis of not only race, but also sex, religious or political affiliation, mental capacity, number of children, living arrangements, and employment in a particular industry."⁵⁵ The Chief Justice explained,

In short, it is quite probable that every peremptory challenge could be objected to on the basis that, because it excluded a venireman who had some characteristic not shared by the remaining members of the venire, it constituted a "classification" subject to equal protection scrutiny. Compounding the difficulties, under conventional equal protection principles some uses of peremptories would be reviewed under "strict scrutiny . . . and sustained only if . . . suitably tailored to serve a compelling state interest,"; others would be reviewed to determine if they were "substantially related to a sufficiently important government interest"; and still others would be reviewed to determine whether they were a "rational means to serve a legitimate end."⁵⁶

Burger concluded that the "curious hybrid"⁵⁷ of equal protection analysis applied in *Batson* was misplaced when applied in a criminal context.⁵⁸ Because a challenge is no longer peremptory where a reason must be proffered for its use, Burger asserted that the majority's new rule served to subvert the entire system of justice.⁵⁹ Further, Burger predicted that the new rule would re-infect jury selection procedure with racial animus by encouraging parties to examine a venire member's racial and national origins.⁶⁰ Moreover, he charged the Court with ignoring "centuries of history" in its new prescription.⁶¹

More thoroughly than either Justice White or Justice O'Connor, Chief Justice Burger articulated his reasons for recommending that the *Batson* rule not be applied retroactively.⁶² Looking to standards announced in *Stovall v. Denno*,⁶³ the Chief Justice argued that the new rule "is not designed to avert the clear danger of convicting the innocent";⁶⁴ that law enforcement entities have strongly relied on the prior rule of law; and that retroactive usage of the

52. *Id.* at 1737.

53. *Id.* (Burger, C.J., dissenting) (citing *Lewis v. United States*, 146 U.S. 370, 376 (1982), quoting 4 W. Blackstone *Commentaries* 353).

54. *Id.*

55. *Id.* (Citations omitted.)

56. *Id.* at 1737-38 (Burger, C.J., dissenting).

57. *Id.* at 1738.

58. *Id.* at 1738-39.

59. *Id.* at 1739-42.

60. *Id.* at 1740.

61. *Id.*

62. *Id.* It may be thought that retroactivity is a separate issue from the central concern here, however, the nexus is the continuing injustice of *Swain*, which is only partially rectified by *Batson*.

63. The criteria guiding resolution of the [retroactivity] question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards. *Stovall v. Dennis* 388 U.S. 293 (1967).

64. *Batson*, 476 U.S. at 1742.

new rule would be extremely difficult, necessitating in many cases a reconstruction of *voir dire* to determine whether the defendant had made a “prima facie showing of invidious intent” irrebuttable by “neutral explanation”⁶⁵ of prosecution.⁶⁶ In conclusion, the Chief Justice likened the dismantling of the peremptory structure of our judicial system to the destruction of an ancient edifice which he believed should not be destroyed since it has served well enough through ancient time and contemporary experience.⁶⁷

Justice Rehnquist, in dissent, began his criticism by asserting that the majority ruled on issues that were not before the Court.⁶⁸ Rather than limiting itself to a consideration of the “evidentiary burden” of *Swain*, Justice Rehnquist charged that the majority rejected the substantive holding of *Swain* without ample consideration or justification.⁶⁹ Justice Rehnquist reviewed the dichotomy of peremptories that he said *Swain* proffered. When Blacks were excluded for reasons not related to the outcome of the given trial, *Swain* held that such exclusion might violate the guarantees of equal protection. However, when potential Black jurors were eliminated because of predicted bias favoring a Black defendant on trial, *Swain* upheld such an exclusion.⁷⁰ Within this second conceptualization, venire members are not judged only as individuals—but may be evaluated and eliminated because of their group affiliations.⁷¹ It is the particular case, the particular defendant and with reference to the particular crime, that such evaluations followed by exclusion of particular venire members is made and justified.⁷² The *Swain* dissenters, Justice Rehnquist reminded, did not take issue with the fact that when no showing of systematic exclusion of Blacks had been made, peremptories could not be challenged.⁷³ According to Justice Rehnquist, the majority had departed from its announced consideration of the *Swain* evidentiary burden and had contradicted the equal protection clause in holding that this clause precluded the exclusion of Black jurors on the basis of the assumption that Black jurors cannot be impartial in cases with Black defendants.⁷⁴

Arguing that the Court offered no analysis or justification for its holding, Justice Rehnquist offered a telling comparison:

In my view, there is simply nothing “unequal” about the State’s using its peremptory challenges to strike blacks from the jury in cases involving black defendants, so long as such challenges are also used to exclude whites in cases involving white defendants, Hispanics in cases involving Hispanic defendants, Asians in cases involving Asian defendants, and so on. This case-specific use of peremptory challenges by the State does not single out blacks, or members of any other race for that matter, for discriminatory treatment. Such use of peremptories is at best based upon seat-of-the-pants instincts, which are undoubtedly crudely stereotypical and may in many cases be hopelessly mistaken. But as long as they are applied across-the-board to jurors of all races and nationalities, I do not see—and the Court most cer-

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 1742-43.

69. *Id.* at 1743.

70. *Id.*

71. *Id.*

72. *Id.* at 1744.

73. *Id.*

74. *Id.*

tainly has not explained—how their use violates the equal protection clause.”⁷⁵

Since neither the sixth amendment’s cross-sectional nor its impartiality requirements were violated and because the equal protection argument was misapplied, Justice Rehnquist attested that the Court had no constitutional basis for its holding.⁷⁶ Further, neither the larger community nor non-defendant Blacks were harmed since they might serve on juries in cases involving non-Black defendants.⁷⁷ Rehnquist would have adhered to the principle set forth in *Swain* and upheld the lower courts decision.⁷⁸

B. *Rationale for Re-examination of the Problem*

“The insidious destruction of the human spirit is the essence of both slavery and the worst aspect of contemporary white racism.”⁷⁹

For many African-Americans, that destruction is exemplified by what they observe as the denial of dignity, liberty and justice on the basis of race which, in their view, remains a part of the American (judicial) system. On the one hand, the discrimination inherent in the contemporary American judicial system is seen as corrigible.⁸⁰ Adherents of this view perceive discrimination as “judicial injustice”,⁸¹ rather than part and parcel of systematic racial oppression. This view holds that the inequalities visited upon minorities are mere flaws in an otherwise sound social fabric. When these flaws are corrected, the judicial process in the United States will begin to approach its ideal.⁸² Another view sees judicial injustice in the United States as systemic and systematic. The judicial system promises “equality under the law”, but this view suggests that because United States injustice is systemic, it cannot be altered without changing the system. For now, Blacks continue to be disproportionately burdened by the system of criminal justice: disproportionately more arrests, more prosecutions, heavier sentences, longer probations, and fewer paroles.⁸³ Almost two decades after Kingman Brewster sparked a controversy on this matter by asking if a Black man could get a fair trial in this country,⁸⁴ the answer remains a resounding “NO!”—of course not. This Article traces out one response to the issue of racism in the American system of justice. This Article may be construed as polemical since it presents arguments supporting

75. *Id.*

76. *Id.* *But cf.* *Holland v. Illinois*, 110 S. Ct. 803 (1990) (Sixth amendment fair cross section requirement does not preclude use of peremptory challenges to exclude cognizable groups.)

77. *Id.*

78. *Id.* Prosecutors’ use of peremptory challenges to exclude prospective jurors on basis of race may be violation of Equal Protection Clause. *See Holland v. Illinois*, *supra* note 76. (Kennedy, J., concurring) (Stevens, J., dissenting). *See also Schreiber v. Salamack*, 54 U.S.L.W. 1073 (2d Cir. 1985).

79. Bell, *Racism in American Courts: Cause for Black Disruption or Despair?*, 61 CALIF. L. REV. 165 (1973) [hereinafter Bell I].

80. *See* R. MERTON & R. NISBET, *CONTEMPORARY SOCIAL PROBLEMS* (1971).

81. Bell I, at 166.

82. 2 PEOPLES COLLEGE PRESS, *INTRODUCTION TO AFRO-AMERICAN STUDIES* (1978). *See* J. Turner, *The Black Community as Colony: An Argument For* (1970) and D. Harris, *The Black Community as Colony: An Argument Against* (1971) in *INTRODUCTION TO AFRO-AMERICAN STUDIES*; H. CRUSE, *THE CRISIS OF THE NEGRO INTELLECTUAL* (1967). CARMICHAEL & HAMILTON, *BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA* (1972).

83. *See* H. Burns, *Can a Black Man Get a Fair Trial in This Country*, N.Y. TIMES MAGAZINE § 6, at 5, July 12, 1970. *See also* Bell I at 166.

84. *Id.*

the pessimistic or perhaps realistic view that this system must be abandoned and a new one constructed. However, most of the suggestions presented here may be incorporated into the present system without fundamentally changing that system.

The Facts and Figures

Social scientists have found that racial myths and fears significantly influence American society.⁸⁵ In fact, this nation's judicial system has found no effective method to eliminate the influence of racial stereotypes and fears from the courtroom or the juryroom.⁸⁶ Juries and judges continue to hold Black defendants to a "less strict standard of conduct when the victim was also Black."⁸⁷

In addition to these attestations of continued racism operative in the judicial system, data from the United States Bureau of Prisons raises the question of whether the death sentence for rape is disproportionately meted out by race.⁸⁸ Robert Doyel's review of Illinois death penalty cases from 1959 to 1983 reveals a disproportionate elimination of minority jurors from jury panels; as much as 80% of juries which have given the death penalty to Black defendants have been all-white or contained one Black.⁸⁹ Further documentation that racial discrimination is strongly linked to assignment of the death penalty in the United States is rendered by a 1987 report of Amnesty

85. See B. BETTELHEIM & M. JANOWITZ, *DYNAMICS OF PREJUDICE* (1950); G. ALLPORT, *THE NATURE OF PREJUDICE* (1954); W. GRIER & P. COBBS, *BLACK RAGE* (1968). See also W. CASH, *THE MIND OF THE SOUTH* (1941); F. FANON, *BLACK SKIN, WHITE MASKS* (1967); I. GOFFMAN, *STIGMA* (1963); A. MEMMI, *THE COLONIZER AND THE COLONIZED* (1965); R. QUINN, J. TABOR & L. K. GORDON, *THE DECISION TO DISCRIMINATE: A STUDY OF EXECUTIVE SELECTION* (1968); U.S. RIOT COMMISSION REPORT; REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968); B. SCHWARTZ & R. DISCH, *WHITE RACISM: ITS HISTORY, PATHOLOGY AND PRACTICE* (1971); R. STAPLES, *THE BLACK FAMILY* (1971); W. Wilson, "The New Black Sociology: Reflections on the 'Insiders' and 'Outsiders' Controversy", in BLACKWELL & JANOWITZ *BLACK SOCIOLOGISTS: HISTORICAL AND CONTEMPORARY PERSPECTIVES* (1974); W. WILSON, *POWER RACISM AND PRIVILEGE* (1973).

86. See H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* (1966). Robert Doyel reviews many cases where Black defendants have been convicted of serious crimes by all-white juries from which Blacks have been excluded through the disproportionate application of peremptory challenges to accomplish the elimination of the racial peers of Black defendants. See Doyel, *In Search of a Remedy for the Racially Discriminatory Use of Peremptory Challenges*, 38 OKLA. L. REV. 1385 (1985).

87. Doyel, *supra* note 86.

88. U.S. Bureau of Prison data provide statistics on the death sentence for rape by race for the years 1930-1966. During this period, Blacks were given the death sentence in 339 cases, Whites in 45, other in 2. Taken alone, this data does not prove that Blacks who were convicted of rape received the death penalty disproportionately to whites, absent a showing that the proportion of Blacks to whites convicted of rape is less than 7.5 to 1. Further, absent showing of how many of the Blacks given death sentences were convicted of the rape of White women, the data say nothing about the fear of the rape of White women by Blacks as a motive force for assessing the death penalty. Further, evidence of the dastardly effects of discriminatory juries is found in general execution statistics. Bell II, *infra* note 144 at 949. "In the years from 1930-1967, 3,859 persons were executed in the United States; over half were nonwhite. Of the 2,036 persons executed in the South during this period, 72 percent were nonwhite." Bell II, *infra* note 144 (quoting U.S. BUREAU OF PRISON, *EXECUTIONS: 1930-1967* 7 (National Prisoners Statistics Bulletin No. 42, 1968)). While these data are not entirely compelling, they do provide further substantiation of the argument that the death penalty is discriminatorily applied—given the caveats mentioned above.

89. See Doyel, *supra* note 86, at 387-88.

International.⁹⁰

[T]here is evidence to suggest that the death penalty continues to be applied in a way which systematically discriminates on racial grounds. . . . Some 48 percent of the nation's death row population in 1985 were blacks or members of other minorities, although they made up only 12 percent of the population. . . ."⁹¹

In Alabama, Georgia, Illinois, Mississippi, North Carolina, South Carolina, and Pennsylvania, the proportion of Blacks on death row was higher than 48 percent.⁹² Disparities according to the race of the offender persist: "[B]lacks who kill whites have been found more likely to be sentenced to death than any other category of offender; whites, on the other hand, have rarely been sentenced to death for killing blacks".⁹³

Additional support that assignment of the death sentence is strongly related to race may be found in the the highly comprehensive Baldus study⁹⁴ which was offered as evidence in *McCleskey v. Kemp*.⁹⁵ McCleskey's proffer of proof that the Georgia capital sentencing scheme was administered in violation of the eighth and fourteenth amendments was based centrally on the Baldus study, which statistically compared the probability of a death sentence as influenced by the victim's race and defendant's race.⁹⁶ Baldus' examination of the combined effects of race-of-defendant and race-of-victim revealed that a death sentence was given in the following proportions: twenty-two percent of cases with Black defendants and white victims; eight percent of cases with white defendants and white victims; one percent of cases with Black defendants and Black victims; three percent of cases with white defendants and Black victims.⁹⁷

Looking further, Baldus examined the relationship between prosecutorial request for the death penalty and race to find that prosecutors sought the death penalty in seventy percent of cases with Black defendants and white victims; thirty-two percent of cases with white defendants and white victims; fifteen percent of cases with Black defendants and Black victims; nineteen percent of cases with white defendants and Black victims.⁹⁸

On the basis of McCleskey's evidence, the Supreme Court wrote "the Baldus study indicates that black defendants, such as McCleskey, who kill white victims have the greatest likelihood of receiving the death penalty".⁹⁹ One of the most significant consequences of the longstanding practice of exclu-

90. Amnesty International, United States of America The Death Penalty (1987) [hereinafter Report of Amnesty International].

91. *Id.* at 54.

92. *Id.*

93. *Id.* at 54-55.

94. The Baldus Study is a very thorough and highly refined statistical study based on murder cases examining data on victim's race, defendant's race, various combinations of such persons' races and other variables. The analysis was done by Professors David C. Baldus, George Woodworth, and Charles Pulanski. See *McCleskey v. Kemp*, 481 U.S. 279, 286, 287 n.5. The evidence takes into account over 400 variables and is based on data concerning 2,484 cases—all of offenders arrested for homicide in Georgia from 1973-1978. See *McCleskey v. Kemp*, 481 U.S. 279, 291 n.7 (Blackmun, J., dissenting).

95. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

sion of Blacks from juries has been that an all-white jury will give a verdict which accords with the standards of the white community. Although the effect of this practice may have initially been unintended and unanticipated, by now the preservation of white community standards and dominance has become purposeful.¹⁰⁰

One might think that jury discrimination is a vestige of the the South. However, examination of several contemporary cases suggest that the practice is very much alive and well. In fact, these cases continue to occur with alarming frequency.¹⁰¹ One recent decision, *People v. McCray*,¹⁰² illustrates the correct perspective on peremptory challenges. In *McCray*, the defendant claimed that the prosecutor had unlawfully used peremptories to exclude jurors based on race, where eight of eleven peremptory challenges had been used to eliminate all Blacks and the only Hispanic prospective jurors. The State argued that defendant's showing under *Swain* was insufficient to establish racial bias on the part of prosecutor. The court held that the defendant's constitutional rights had not been violated and that a prosecutor's motives for striking particular jurors may not be subjected to scrutiny based upon defense's mere assertion of discriminatory selection.¹⁰³

In *McCray v. New York* Judge Gabrielli emphasized that the United States Supreme Court drew "a critical distinction" between saying that a jury pool must be representative and that a jury must be representative.¹⁰⁴ Since peremptories allow a prosecutor to dismiss a venireman without reason, Gabrielli found no reason to convert the peremptory challenge into a system of challenges for cause, which would occur, in the court's view, if reasons must be given before peremptories could be exercised. The court noted that while overt bias might be eliminated, it would be difficult if not impossible to get at covert bias.¹⁰⁵

Both the state and the defense joined in arguing in *McCray* that the New

100. Comment, *Swain v. Alabama: A Constitutional Blue-Print for the Perpetuation of the All-White Jury*, 52 VA. L. REV. 1157 (1966).

101. For example, a March 1989 Lexis search on *Swain v. Alabama* for New York State indicates 37 cases since 1965—about two thirds (25) of them as of 1980 or later. See e.g. *New York v. Crimmins*, 36 N.Y. 2d at 230, 326 N.E. 2d at 787 (1975); *New York v. Goodman*, 92 Misc. 927, 402 N.Y. Supp. 2d 114 (1978); *New York v. Cartagena*, 128 App. Div. 2d 797, 513 N.Y. Supp. 2d 497 (1987).

102. 57 N.Y.2d 542 (1982) (in an appeal by defendant from his conviction for robbery, the New York Court of Appeals affirmed the rulings of the Appellate Division and the Supreme Court denying defendant's motion for a mistrial and dismissal of the verdict on the basis of the prosecutorial abuse of the peremptory challenge). This affirmance occurred despite the fact that the so-called official policy of the Brooklyn District Attorney's Office was not to use peremptories to exclude races. Further, this perspective strongly supports the argument here that mere declarations against racism will not solve the problem.

103. See *McCray*, 57 N.Y.2d at 544 n.1, which indicates that the People joined defendants in the argument against prosecutorial use of peremptory challenges on the basis or race as a matter of state constitutional interpretation. *Id.* at 549-50. The prosecutor argued that, even where all potential jurors called who were minorities had been excluded, no violation of sixth amendment concerns had been established. Further, the state argued that before a *habeas* petition should be granted on the basis of the abuse of sixth amendment guarantees, the state should be given a chance for rebuttal. The Second Circuit held that although defendant made a prima facie case that peremptory challenges had been impermissibly used, the case was remanded for a hearing to allow rebuttal by state. *McCray v. Abrams*, 750 F.2d 1113 (1984), *reh'g denied*, 756 F.2d 277, (2d Cir. 1985) *cert. denied*, 108 S. Ct. 1735 (1988).

104. *McCray*, 57 N.Y.2d at 545, citing *Taylor v. Louisiana*, 419 U.S. 22 (1975).

105. See Saltzburg and Peters, *Peremptory Challenges and the Clash between Impartiality and Group Representation*, 41 MD. L. REV. 337, 359 (1982).

York constitution specifically provided that the criminal trial of an accused must be a "judgment of his peers". The court however, rejected their argument.¹⁰⁶ The court found that the New York constitution's equal protection clause was co-extensive with the federal equal protection clause, which in *Swain*, had been held not to require equal representation of groups on juries.¹⁰⁷ The due process clause of the New York constitution was similarly of no avail to the defendant.¹⁰⁸

The dissent by Judge Meyers, joined by Judge Jones, deserves special scrutiny. Judge Meyers argued that "the use by a prosecutor of peremptory challenges systematically and without apparent reason to exclude all blacks on a panel from the petit jury before which is to be tried a Black defendant charged with robbing a white victim violates the sixth amendment guarantee of a fair trial by an impartial jury."¹⁰⁹ He also indicated that *Swain* was decided exclusively on equal protection grounds and did not address the Sixth Amendment guarantee of an impartial trial as interpreted by *Duncan v. Louisiana*,¹¹⁰ which was decided after *Swain*. Judge Meyers proposed that, in cases where the prosecutor had exercised peremptory challenges to exclude all members of defendant's race and thereby had shown a desire that defendant be tried before a racially imbalanced jury, the prosecutor must be required to offer "reasonable explanations for the various challenges grounded in a reason other than race."¹¹¹ Such a rule would not require the prosecutor to show that the juror was negatively predisposed toward the prosecution or assign a reason for the challenge.¹¹² Judge Meyers wrote, "To hold otherwise is to sanction under the guise of fairness or tradition, or both, deliberate discrimination by a State official. . . . The only other possible explanation for the prosecution's elimination of all blacks from the jury is his mistrust of the ability of Blacks, as a group, to be impartial. But the corollary of this view, in a case like this where the complainant and defendant are of different races, is that whites cannot be trusted either. The result is that defendant, unable to remove whites from the jury, is deprived of an impartial jury."

Judge Fuchsberg filed a separate dissent. He appears to agree with the other dissenters that both jury pool and petit jury should incorporate the cross-sectional representation ideal. However, Judge Fuchsberg did not agree that peremptories might be scrutinized by requiring an explanation.¹¹³

Judge Meyers opined that the United States Supreme Court was not presented with the same issue as appeared in *McCray*—that of alleged jury discrimination in the selection of the petit jury from the jury pool. He suggested that the Court might find differently if *Swain* were decided at the time *McCray* arose.¹¹⁴ Judge Meyers concluded that *Duncan* required a different holding than that reached in *Swain*—a holding similar to the one reached by the Illinois court in *People v. Payne*, where the court decided that the state

106. *McCray*, 57 N.Y. 2d at 549-50.

107. *Id.*

108. *Id.*

109. *Id.* at 511.

110. 391 U.S. 145 (holding that the fourteenth amendment guarantees a right to a jury trial).

111. *McCray*, 57 N.Y. 2d at 545.

112. *Id.*

113. *Id.* at 556. *But see* *Holland v. Illinois*, *supra* note 76.

114. *McCray*, 57 N.Y. 2d at 553.

cannot exclude Blacks from serving as jurors solely because they are Black.¹¹⁵

Thus, *McCray* represented a deeply divided court—a 4-3 decision with vigorous dissents. Two other leading state courts, Massachusetts and California, had proceeded in the opposite direction of *McCray* and *Swain*. The hope that Judge Meyers would be proved right should the United States Supreme Court reconsider the issue of jury discrimination was vindicated in *Batson*. A look at the historical and contemporary usage of peremptories and possible solutions to the problems created will aid understanding the present problem. An advocate's uncontrolled discretion to manipulate jury composition through the use of peremptory challenges for "tactical advantage" in a given case is the primary concern. According to Brent Gurney, very few states award the defendant more peremptory challenges than those given to the prosecution.¹¹⁶ Peremptory challenging of prospective jurors, in theory, should eliminate partiality from juries. In fact,

lawyers have converted this ostensible search for impartial juries into a search for favorable juries. . . . When a prosecutor of a minority defendant, for example, is able to use peremptories to eliminate minorities who are thought to be sympathetic to the defendant, the result is not trial by an impartial jury, but trial by a packed jury."¹¹⁷

Whether Black jurors are omitted because prosecutors purposely keep them off the juries or because of their meager (or "minority") status as a proportion of jury panels, the social reality and the legal consequence is that all-white juries and judges often sentence minority defendants in the absence of minority participation. This effective exclusion of minorities destroys justice and its appearance—undermining both the social control and social integration functions of law and law enforcement. In sum, the necessity of reviewing the use of peremptory challenges after *Batson* is illustrated by the continuing practice of elimination of same-race jurors from juries that try minority defendants. Increasing the ratio of same-race jurors in the trials of these defendants is the focus of the next part, Part II of this Article.

II. POSSIBLE ALTERNATIVE SOLUTIONS

A. Peer Group Ratios

One of the primary flaws in *Swain* is its failure to properly balance the importance of systematic exclusion and non-proportional representation. The Constitution only forbids exclusion of identifiable groups from juries and has not been interpreted to require that juries, like the panels from which they are taken,¹¹⁸ must reflect a cross-section of the population. Some juries inevitably will have no members of particular groups. However, one way to achieve

115. 106 Ill. App. 3d 1034, 1042 (1982). See also *New York v. Thompson*, 79 A.D.2d 87 (2d Dept. 1981) a case reaching a different result, although by a divided and lower court. *Thompson* involved prosecutorial use of peremptory challenges to exclude all Blacks from the jury in a case of criminal possession of stolen property. The defendant was convicted of criminal possession of stolen property in the first degree.

116. Gurney, *The Case for Abolishing Peremptory Challenges in Criminal Trials*, 21 HARV. C.R.-C.L. L. REV. 227, 229 (Winter 1986).

117. *Id.*

118. *Taylor v. Louisiana*, 419 U.S. 522 (1975) (criminal defendants have a constitutional right to a jury selected from a representative cross-section of the community). But cf. *Holland v. Illinois*, *supra* note 76 and accompanying text.

some inclusion of minority groups on juries is through proportional representation. Nonetheless, insurmountable administrative problems may be posed by a proportional representation scheme. More importantly, however, some may believe that proportional representation, likely achieved through purposeful inclusion, may be as offensive to the Constitution as forced exclusion.¹¹⁹ Hence, the dilemma of how to assure historically excluded groups fair representation within the constitutional mandate of non-discrimination remains a fertile issue.

Because of *Swain's* inherent limitations on citizen's rights, several state courts have moved beyond *Swain* in interpreting their own state constitutions—even before *Batson*. For instance, article 1, section 16 of the California constitution was interpreted by the California Supreme Court in *People v. Wheeler* as providing, a right to a jury drawn from a representative cross-section of the community. Under *Wheeler*, the primary factors for consideration in an unlawful racial exclusion include: the probability that exclusion is the product of group identity rather than individualized bias; that the prosecutor has used his challenges exclusively or almost exclusively against members of one group—defendant's racial group; and that the victim is a member of the remaining majority group on the jury.¹²⁰ Demonstrating these factors shifts the burden to the state to explain its exclusions. The California Supreme Court indicated that because *Swain* provided much less protection than California law, *Swain* would not be followed.¹²¹

Similarly in *Commonwealth v. Soares*,¹²² the Massachusetts Supreme Court took an alternative approach to the sixth amendment's guarantee of a fair trial. *Soares* has perhaps best expressed the line of reasoning which explains the injustice of jury discrimination.

Given an unencumbered right to exercise peremptory challenges, one might expect each party to attempt to eliminate members of those groups which are predisposed toward the opposition. However, when the defendant is a minority member, his attempt is doomed to failure. The party identified with the majority can altogether eliminate the minority from the jury, while the defendant is powerless to exclude majority members since their number exceeds that of the peremptory challenges available. The result is a jury in which the subtle group biases of the majority are permitted to operate, while those of the minority have been silenced.¹²³

The *Wheeler-Soares* analysis looks beyond apparent equivalence in the number of peremptory challenges between prosecution and defense; the decisions attempt to ascertain the effects of striking prospective jurors. Emphasizing the right to a fair and impartial trial by a jury of peers, these state courts interpret their state constitutions to bar racial exclusion from juries—whether that exclusion is accomplished by direct or indirect means. With equal cogency, the same analysis could apply to the sixth amendment in the federal Constitution.

Meaningful participation on juries by non-majority groups cannot be had

119. *Id.* at 237-38.

120. *Id.* at 259.

121. *Id.* at 258.

122. 377 Mass. 461 (1979).

123. *People v. McCray*, 57 N.Y.2d 542, 555 (1982) (Meyers, J., dissenting, quoting *Commonwealth v. Soares*, 377 Mass. 461, 487-88 (1979)).

through token numbers. Jury decision-making studies suggest that at least three Blacks in a twelve person jury must be present in order to adequately resist the majority's proclivity to convict. To offset racial prejudice, even larger numbers may be required if studies on jury decision-making, shifting coalitions, majorities and other group dynamics are followed.¹²⁴

White majority control of the jury and panel selection process means that if Whites do select Blacks for jury service, they will only select compliant Blacks.¹²⁵ Such narrow selection may be reinforced by intimidation and violence against Blacks.¹²⁶ To eliminate jury discrimination and its effects, the jury venire process must include enough Blacks to allow a jury not to be controlled by Whites.¹²⁷ Although the question has not been explored explicitly, the Supreme Court equates equal protection with equal opportunity for jury service rather than equal jury service.¹²⁸ However, examination of the probability of Black selection refutes the existence of equality in the opportunity for jury service.

Some circuit courts¹²⁹ have acknowledged that the central question of jury discrimination is whether there are Blacks on juries, not how they are excluded.¹³⁰ Two considerations should inform the Court's view of the constitutional requirements regarding minority representation on juries. First, the absence of Blacks from juries is a denial of the equal protection of the laws.¹³¹ Random selection is a poor device for achieving a purposeful end. Although the equal protection clause may not necessarily mandate a particular result, it does require that the law be applied equally. When courts have found a history of discrimination, or a present discriminatory pattern or practice, the equal protection clause arguably mandates that substantive steps be undertaken to overcome the differences in the treatment of groups caused by courts or society. Without some compelling state interest, the equal protection clause mandates that racial groups not be treated differently. If jury selection procedures are aimed at achieving a cross-section of the population, "randomness", which recurrently yields a non-representative grouping, should be constitutionally suspect. Second, the absence of Blacks on juries which try Black defendants results in an unfair trial. Although trial outcomes may not differ, it is important that the appearance of justice be strengthened. If defendants are to be tried by a jury of their peers, systematic, random or other inadvertent elimination of the group in society most like the defendant is unjust.

It is important that both the number of Blacks on a jury, and the jury selection process not be an exclusively white-controlled process.¹³² This observation does not mean that the prosecutor must be Black, nor does it mean that where the prosecutor is Black that objection to the all-white jury disappears. Rather, the concern is that, when Blacks live in jury districts, they

124. Note, *The Case for Black Juries*, 79 YALE L.J. 531 (1970) [hereinafter *Black Juries*].

125. *Id.* at 536 and nn. 31-32. This observation applies to both juror selection and panel selection.

126. *Id.* at 537 and n. 32.

127. *Id.* at 537.

128. *See id.* at 538-38, 546.

129. *Black Juries*, *supra* note 124, at 546.

130. *Id.*

131. *Id.* at 547.

132. *Id.* at 547-48. Although at first glance this concern may appear to contradict the emphasis on jury participation indicated earlier, the jury selection process is fundamental in its reflection of the political power and efficacy of the racial group in its local environment.

should not be excluded from the juror selection process—whether the exclusion results in their absence from juries generally (a question of numbers and proportions) or from participating in selecting jurors. In other words, control in the selection process is the crucial determinant of meaningful Black participation on juries.¹³³

B. *Panel Selection Devices*

Reconstituting jury districts to assure greater Black representation on juries may be a partial solution for the under-representation of Blacks on juries trying Black defendants. One commentator has proposed that in the North, the jury district or vicinage could be co-terminus with the boundaries of the Black community. Other vicinages could be white. In the South, a requirement that every jury must be proportional to the Black population in the jury district would mean that the composition of most juries could be as high as seventy-five percent Black. The commentator notes that federal jury districts could parallel proposed state jury districts in the North. While in the South, the federal jury districts could parallel county and existing state jury districts.¹³⁴ Since legal problems affecting Black people often arise in the areas in which Blacks reside,¹³⁵ this method would assure that Black litigants in those areas would have representative juries. "By requiring that juries trying civil cases be drawn from the community where the cause of action arose, and in criminal cases where the crime occurred, . . . civil and criminal law for black people would be administered by substantially all-black juries."¹³⁶ For Black defendants accused of crimes outside their communities, this system is of no avail.¹³⁷ This proposal does overcome the "racism-in-reverse" argument that such a system perpetuates racial polarization. It inherently means that the jury selected will be representative of the community in which the crime occurred—whether racially diverse or not.¹³⁸

Some may view this as an extraordinarily radical proposal and question whether it implies some principle of community control. Indeed, one may wonder whether Italians, Jews, Jamaicans, and other ethnic groups all have the same right. In response, it must be noted that this explanation of jury districts asserts that the people in a community in which a crime has been committed retain a right to decide the community standard to be applied. That is, where communities are composed of particular groups, members of that group cannot be excluded from meaningful and numerically significant participation in the jury process.

One important method for selecting jurors is illustrated by the federal Jury Selection and Service Act.¹³⁹ Under this act each federal district is mandated to provide a written plan for the non-discriminatory selection of both

133. *Id.* at 548.

134. *Black Juries*, *supra* note 124, at 548.

135. See Burman, *Black Murder Victims in the City Outnumber White Victims 8 to 1*, N.Y. Times, Aug. 5, 1971 at 1; ALVIN POUISSANT, *WHY BLACKS KILL BLACKS* (1972); JAMES E. BLACKWELL, *THE BLACK COMMUNITY: DIVERSITY AND UNITY* 245 (1975).

136. *Black Juries*, *supra* note 124, at 548.

137. *Id.* at 549.

138. *Id.*

139. Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861-1870 (Supp. 1969-83) [hereinafter Jury Act].

grand jurors and trial jurors which is a fair representation and cross-section of the community. Lists of potential jurors may come from voter registration lists, actual voter lists or other sources. These lists are placed on a master jury wheel from which selections are made¹⁴⁰. Names are selected from the master jury wheel based on these qualifications and placed on the potential jury panel. Selections are then placed in grand jury and trial jury panels.

C. *Probability Analyses*

Probability analysis is another approach which helps to make cognizable jury discrimination. Michael Finkelstein has explained that mathematical probability may be used to supplement a court's intuitive notion of whether the distribution of Blacks on juries is consistent with random selection.¹⁴¹ Put differently, jury selection that is considered random will conform to or nearly conform to a court's own intuitive notion of the range of minority jurors likely to be drawn from a particular panel. Black absence from juries may not be explained as an outcome of random selection and lack of qualification of Blacks. "[A] race [cannot] be proscribed as incompetent for service" on juries.¹⁴² Prospective jurors may be exempted, such as when those for grand jury service who are excused for economic hardship; nonetheless, it may be difficult to determine whether non-discriminatory reasons account for racial underrepresentation or absence on a jury.¹⁴³

At any rate, courts have probably been reluctant to rely on mathematical probability analysis to sustain jury discrimination claims because such knowledge often goes beyond a jurist's training.¹⁴⁴ Prior to *Swain*, convictions were reversed only when total racial exclusion or demonstrable tokenism in jury selection was shown; defendants were still required to present a prima facie case of jury discrimination before the burden shifted to the prosecution to explain the underrepresentation or absence of minorities.¹⁴⁵ In *Swain*, by mandating that the defendant prove that the state is responsible for the exclusion of Blacks through its peremptories, the Court both rejected apparently clear statistical proof of discrimination and eliminated the prosecutorial peremptory challenges as proof of discrimination.¹⁴⁶ *Swain* neither gave explicit directions for standards of proof in discrimination cases nor required that, when all Blacks were peremptorily challenged by the prosecution, that the state show that it had not contributed to jury discrimination through abuse of the peremptory challenge or by other means.¹⁴⁷

After *Swain*, the Fifth Circuit questioned whether substantial disparities were "sufficient to raise an inference of discrimination."¹⁴⁸ However, where

140. Voter representation districts should not be allowed to overrule the more fundamental principle of broad population-based participation. Compelled to a choice between voter representation districts and selection of jurors on the basis of characteristics including a wider spectrum of citizenship participation, the former must yield.

141. Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 HAR. L. REV. 338 (1966).

142. *Brown v. Allen*, 344 U.S. 443, 471 (1953).

143. Finkelstein, *supra* note 141, at 351-352.

144. See BELL, RACE RACISM AND AMERICAN LAW (1973) [hereinafter Bell II].

145. *Id.* at 969.

146. *Id.*

147. *Id.*

148. *Black v. Curb*, 422 F.2d 656 (5th Cir. 1970).

such statistical disparity co-existed with non-compliance with an earlier court order to compile a new jury list based on a cross-section of the population, a prima facie case of discrimination, not overcome by defendant's presentation, was shown.¹⁴⁹ State law was relied upon in *Broadway v. Culpepper*¹⁵⁰ to hold that a grand jury roll based on a voter registration list which was 37% Black in a county with a Black population of 52% was non representative.¹⁵¹ An "intelligent and upright citizens" standard was a sufficiently subjective criterion as to require "very close supervision" of the jury selection methods.¹⁵²

Another approach resolving the question of presenting jury discrimination to the court involves examining different ratios of disparity.¹⁵³ One method suggests comparing the expected rate of exclusion (available peremptory challenges compared against the number of venire members after challenges for cause) to actual rate of exclusion (group members challenged peremptorily compared with the number of venire group members after challenges for cause). If there is a large discrepancy between the actual rate of exclusion and the expected rate of exclusion, one can presume discrimination which the state must then rebut.¹⁵⁴

Racial exclusion from juries was disallowed from the earliest civil rights cases in the post-Civil War period. Those decisions have been successively expanded. The attempt to formulate a prima facie case of invidious discrimination violative of the fourteenth amendment that would shift the burden of proving non-exclusion to the prosecutor may be done in two ways: either through statistical proof of a "substantial disparity" between the number of Blacks chosen for jury duty and the population of Blacks in the judicial district, coupled with some positive indication of discrimination or by showing historical exclusion of Blacks for a period of years.¹⁵⁵ Hence, in various ways, the sixth amendment guarantee of a jury selected from a representative cross-

149. *Id.*

150. 439 F.2d 1253 (5th Cir. 1971).

151. Bell II (1973) at 973, n. 2.

152. Bell II at 973 n. 2. *See also* Salary v. Wilson, 415 F.2d 467 (5th Cir. 1969) noted at Bell II, 973.

153. While peremptory challenges apply only to juror selection, the evidence and evidentiary inferences from probability analysis (applicable perhaps only to panel not jury selection) indicate the milieu in which jury selection must occur. Probability analysis should especially be employed where *Strauder* citizenship rights to jury participation may be affected.

154. Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 YALE L.J. 1736-40 (1977). To combat racial prejudice in the jury box, the *voir dire* has been used to ascertain discrimination attitudes. *Ham v. South Carolina*, 409 U.S. 524 (1973), upheld a Constitutional right to *voir dire* examination of racial attitudes in a marijuana conviction of a Black civil rights worker. The right recognized in *Ham* was relegated to symbolic posture by the subsequent holding in *Ristiano v. Ross* 424 U.S. 589 (1976) (although the trial judge during *voir dire* did not ask any question on race bias, the judge's recognition of the existence of the "problem of skin color" in jury decision-making was sufficient to satisfy the Constitutional requirement that only an impartial jury may be empaneled). *See* BELL, RACE RACISM AND AMERICAN LAW (1980) [hereinafter Bell III]. Once again, the Court has created a right but provided no remedy for its enforcement to victims of historic discrimination. *Ristiano* may be overcome by defense questions. Bell III at 264-5. *See also* Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665 (1987) (constitutional, common-law and statutory rights should enjoy enforcement by the federal courts in appropriate cases).

155. Bell II at 236.

For earlier cases, see Bell II at 236 & n. 1. *See also* *Ex parte Virginia*, 100 U.S. 339 (1880)(unlawful state action found where judge excludes Blacks from state juries); *Strauder v. West Virginia*, 100 U.S. 303 (1880)(state statute excluding Blacks from jury duty held violation of fourteenth amendment).

section of the community may be vindicated. In addition, persons excluded from jury service may challenge discriminatory selection procedures.

D. *Citizenship Suits*¹⁵⁶

Excluded minority citizens can sue alleging denial of their right not to be excluded by virtue of race from jury service. *Carter v. Jury Commission of Green County*¹⁵⁷ and *Turner v. Fouche*¹⁵⁸ were the first affirmative jury challenges to reach the Supreme Court. In *Carter*, a class action suit was brought to enjoin systematic exclusion of Blacks on jury rolls by statute and to require the appointment of Blacks on a nondiscriminatory basis. The Supreme Court found the statute at issue valid on its face and rejected the petition to have the District Court order Black appointments to the jury commission. The order of the District Court that a new jury list be constituted was affirmed.¹⁵⁹ Justice Douglas dissented in part stating that only a bi-racial commission would guarantee nondiscriminatory jury selection.

In *Turner*, a Black student and her father sued on behalf of Black citizens challenging the selection process of juries and school boards. The circuit judge appointed the jury commission, which, in turn, appointed grand juries and school board members.¹⁶⁰ The Supreme Court upheld the District Court's permanent injunction against exclusion of Blacks from the grand jury. The Court also overruled the District Court's holding that the disqualification of 171 of 178 prospective jurors was proper and abolished the freehold requirement¹⁶¹ for school board membership.¹⁶²

These alternatives may serve to alleviate some of the unfairness inherent in current jury selection. However, elimination of prosecutorial peremptories, discussed below, is the only effective solution for this paradox.

III. CONSTITUTIONAL INFLUENCES ON ALTERNATIVE SOLUTIONS

A. *The Historic Setting of Batson*

The analysis of *Batson* cannot begin without an understanding of the historical setting in which it was decided. Cases precedent and pertinent to *Batson* aid in comprehending its posture as it came to the Supreme Court. Hence, a brief examination of this relevant history helps to outline the context in which the Court grappled with some of the issues *Batson* raises.

The Court in *Swain* created an insurmountable barrier in its requirement that a defendant show discriminatory exclusion in a history of cases in the judicial district. It perpetuated and encouraged selective discrimination in that prosecutors could exclude Blacks in cases with racial issues.

156. Although these citizenship suits go to remedy discrimination in jury panels, not individual juries, they are pertinent here because they help to determine the milieu from which petit juries are chosen and in which petit juries operate.

157. 366 U.S. 320 (1970).

158. 396 U.S. 346 (1970).

159. *Carter*, *supra* note 10. Persons excluded from jury service as well as defendants may challenge discriminatory jury selection; here, however, prima facie discrimination was not shown; proportional representation by race, not required.

160. *Turner*, *supra* note 82.

161. A freehold is an estate in land for life, with the right to pass the estate through inheritance.

162. The Supreme Court disagreed with the District Court's assessment, finding a *prima facie* case of discrimination in violation of the fourteenth amendment.

In *United States v. Robinson*, where the prosecutor in the case used all of his peremptory challenges to exclude Blacks and where the defendant was permitted to introduce statistical evidence of prosecutors' use of peremptories to exclude Blacks in prior cases, Judge Newman felt that the pattern of peremptory challenges exercised against prospective Black jurors had become so egregious that he should exercise his supervisory powers to halt it. Blacks had been disproportionately excluded, although perhaps not so systematically as to merit a constitutional violation, consequently the judge granted a new trial "in the interest of justice" under Federal Rules of Criminal Procedure 33.¹⁶³ However, the Second Circuit granted a writ of mandamus overriding Judge Newman's order.¹⁶⁴

*Brooks v. Beto*¹⁶⁵ gives further insight into the problem of jury discrimination under the *Swain* regime. Under earlier precedent prohibiting jury discrimination, a state judge appointed a Black to a jury commission. The commission purposely selected two Blacks for the grand jury which indicted the petitioner, who was subsequently convicted of rape. Declaring that "neither symbolic [token] nor proportional representation is permitted," the court projected that representation should result from "either 'the operation of an honest exercise of relevant judgment or the uncontrolled caprices of chance.'"¹⁶⁶ In other words, an accused may not be indicted or tried by a jury in which persons have been excluded or included because of race.

The essential dilemma is whether the composition of a jury where there is neither racial exclusion nor inclusion can be reconciled with the constitutional obligation that juries reflect a cross-section of the community and that the jury selection agency be aware of significant racial elements in the community that have been historic targets of discrimination.¹⁶⁷ *Brooks* apparently maintains that jury selection must take race into account when this consideration will lessen jury discrimination.¹⁶⁸ Excluding Blacks from jury service affects issues beyond race; it also eliminates various perspectives of the human experience.

Virtually no defendant since *Swain* has been able to meet the burden propounded by *Swain*. This fact underscores the onerous burden that a defendant carries under the standard. The defendant has to obtain information on the prosecution's use of peremptories in other cases. Since the information is possessed by prosecution, perhaps the burden of producing the evidence should be on the state. The *Swain* pronouncement, in affirming decades of Black exclusion from juries, may have been seen as the signal to other courts that the nondiscrimination mandate as to juries is not "constitutionally sacrosanct after all."¹⁶⁹

In this time of rising expectations, the insistence upon strict constitutional compliance in the administration of justice is the fountain upon which all

163. See *United States v. Robinson* 421 F.Supp 467 (D. Conn. 1976).

164. See Bell III, 255, n. 10, reviewing *United States v. Newman*, 549 F.2d 240 (2d Cir. 1977).

165. 366 F.2d 1 (5th Cir. 1966).

166. *Collins v. Walker*, 329 F.2d 100 (5th Cir. 1964), on rehearing, 335 F.2d 417 (1964), cert. denied, 379 U.S. 901.

167. Bell II at 985.

168. Further evidence of the negative effects of Black exclusion from juries may be noted in cases affecting white civil rights workers. *Rabinowitz v. United States*, 366 F.2d 34 (5th Cir. 1966)(conviction of a white Student Non-Violent Coordinating Committee (SNCC) worker tried for perjury before a federal grand jury reversed for lack of cross-section of population).

169. *Swain* Petition for Rehearing at 12.

else rests. Of what use is the right to vote, the right to enjoy public accommodations, the right to a decent education, and the right to employment without discrimination, if a man is sent to jail or to his death by a jury from which a group of citizens is effectively excluded.¹⁷⁰

This formulation remains the essential dilemma after *Batson*, as after *Swain*: can justice be rendered by juries "from which a whole class of citizens is effectively excluded."¹⁷¹ One might argue that the right to peremptory challenge is one of the most fundamental rights of an accused in the common law.¹⁷² The prosecution did not have the right of peremptory at common law. Although the Crown had that right, peremptories were abolished before the Constitutional Convention. Hence, the state may claim no historical right, nor any right based on the common law, to peremptory challenges in jury trials. In some states, the state's right to a peremptory challenge is not valued as highly as the accused's. Rather the accused's right to peremptory challenge is more fundamental because the accused's right is based on his right to a fair trial and an impartial jury.¹⁷³

Theoretically, "the peremptory challenge is exercisable for any reason, including the group associations of prospective jurors."¹⁷⁴ Since the Court has declared that classifications on the basis of race, religion and national origin are arbitrary, invidious and unconstitutional, incorporation of such classifications into trial tactics could be no less unconstitutional. There are numerous documentation of claims that prosecutors excluded Blacks from juries on the basis of race.¹⁷⁵ Some cases indicated that prosecutors admitted such racial exclusion as the *modus operandi* of their jury selection practices—they wanted to exclude from the jury any person having an affiliation which might create identification with or empathy for the defendant.

Although far from perfect, a system wholly comprised of for-cause challenges would eliminate many of the deficiencies of the present system which allows peremptory challenges.¹⁷⁶ Reducing the number of peremptory challenges allowed each side, a device already used in a number of jurisdictions, would help to resolve but would not eliminate the problem of representation from select groups.¹⁷⁷

The court in *Wheeler* based its approach on the cognizability of groups. If groups were cognizable on the basis of race, sex, religion or other prohibited classifications under the fourteenth amendment, then when members in these

170. *Swain* Motion to File Amicus at 14.

171. *Id.* (Emphasis added).

172. *Frazier v. U.S.*, 335 U.S. 497 (1948); *Pointer v. United States*, 151 U.S. 396 (1893); see GINGER, *supra*, n. 14 at 510.

173. See generally GINGER, *supra* n. 14, at 511. *Swain* recognized that the peremptory challenge had been accorded by statute to the government only since 1965. *Swain* at 832-34. Nowhere does the United States Constitution mandate the peremptory challenge. *Id.* at 835 (White, J., concurring). See also *Frazier v. United States*, 335 U.S. 497 (1949); *United States v. Wood*, 299 U.S. 123 (1936); *Stilson v. United States*, 250 U.S. 583 (1919). However, under the sixth amendment, the accused may not be tried by "persons against whom he has conceived a prejudice" whether this feeling is based on real or imagined grounds. See *Leslie* at 547, n. 10 (quoting *United States v. Merchant & Colson*, 25 U.S. (12 Wheat) 480, 482 (1827)).

174. Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 YALE L.J. 1715 (1977).

175. See *id.* at 1715.

176. Gurney, *supra* note 116, at 276.

177. *Id.*

group make challenges they must be explained.¹⁷⁸ The court in *Rubio v. Superior Court of San Joaquin County*¹⁷⁹ used two criteria to determine a group's cognizability: common perspective derived from the life experience of the group and a showing that the perspective of challenged jurors could not be adequately represented by unchallenged others in the jury pool.¹⁸⁰ Brent Gurney found these tests unworkable and ineffective to prevent attorney elimination of minority group members.¹⁸¹ Similar to *Swain*, the *Rubio* criteria are premised on a showing that enough people of a cognizable group have been challenged to amount to an arbitrary challenge on the basis of the group trait. When *Batson* came to the Supreme Court, courts had allowed both the only Black and two of three Blacks to be eliminated; although they have ruled that peremptory challenges of seven Blacks and of twelve of thirteen Blacks crosses the line into impermissibility.¹⁸²

Gurney argued that the cause-only challenges were superior to *Wheeler's* cognizability approach: "the cause system protected all jurors", whereas *Wheeler* protected only potential jurors from the cognizable group; the cause system requires only that judges evaluate a juror's ability to follow instructions, while *Wheeler* requires a judicial inquiry into group cognizability; the cause system would place the burden of proving bias on the challenging side and *Wheeler* recognizes that a juror can be properly eliminated via peremptories if the other side can not prove a prima facie case of bias.

Empanelling an impartial jury was best left to judges; lawyers had their chance and had subverted the selection process to their client's interests instead of toward justice. If both judge and lawyer have input into whether a juror makes it into the jury box, the selection process is likely to be more fair. In sum, the cause-based system better conformed to the sixth amendment assumption that persons from every segment of society are capable of competent, fair service as jury members.

This was the historical legal setting in which the Court decided *Batson*. The importance of that legal history inheres primarily in *Batson's* response to it—*Batson* failed to effectively remedy the problem presented, as Justice Marshall's dissent illustrates.

B. *The Batson Amplification of Swain*

In his dissent, Justice Marshall found that *Batson* represented an important positive step towards the elimination of one of the most pernicious aspects of the criminal justice system—namely, the use of peremptory challenges by prosecutors to create all-white juries to try Black defendants. However, *Batson* represents only the first step toward the rectification of a historic and pervasive practice which has rendered substantial injustice and unfairly wreaked havoc in the lives of Black defendants. Equally important are the negative impressions of the judicial system which arise when convictions are secured through the dubious process of eliminating the defendant's racial peers. This

178. See Gurney, *supra* note 116, at 276.

179. 24 Cal. 2d 93, 593 P.2d 595, 154 Cal. Rptr. 734 (1979).

180. See Gurney, *supra* note 116, at 276.

181. *Id.* at 277-79.

182. *Id.* at 280.

elimination destroys public confidence in the judicial system and destroys the appearance of justice as well.

In *Batson*, the Court changed the insurmountable¹⁸³ evidentiary burden that a criminal defendant bore to one within the framework of comparable equal protection cases. To accomplish this change, *Batson* held that a defendant need not show prosecutorial use of peremptories over a series of cases over a period of time to prove sufficient invidious intent under the equal protection clause, but rather the defendant may show a pattern of prosecutorial use of peremptories in his own case establishing a prima facie case of discrimination. Upon such a showing the burden shifts to the prosecutor to rebut with some non-racial explanation. In ruling that prosecutorial peremptories may be challenged when they appear to be based alone on the venire person's race, the Court has given the relatively disadvantaged defendant a weapon for his arsenal and has taken from the comparatively quasi-omnipotent prosecutor a bazooka-like weapon used formerly to devastate minority defendants' chances of a fair trial. In equalizing the tools brought to the fray, the Court moves substantially to restore the confidence of the public, especially segments of the Black community and the individual defendant, that our justice system can be a fair and impartial system—not one with an inherent, unfair bias structured against Black defendants.

Yet, Justice Marshall's assertion that the attempted elimination of a prosecutor's discriminatory use of peremptories does not remedy the problem is prophetic. Given the varying devices that have been used to ensure that the racial peers of Black defendants are kept off their juries, Justice Marshall is right in anticipating that all too often state officers will continue to attempt to create an imbalance in the racial composition of juries.¹⁸⁴

Chief Justice Burger's Opinion

Chief Justice Burger argued that the test that the Court borrowed from equal protection cases in other contexts will not solve the *Batson* problem; not only will such challenges cease to be peremptory, but the test itself presumes the recognition and transcendence of the state officer's own racism. Only the state can determine if there is a sufficient distinction between their inherent personal biases and the "hunch", "intuition", "assumption" or "limited information" which continues to justify employing a peremptory to eliminate a potential juror from the venire.

Chief Justice Burger suggested a dichotomous approach—distinguishing *Strauder*-type exclusions from *Swain*-type exclusions.¹⁸⁵ This distinction may be significant in Chief Justice Burger's mind. However, it overlooks that whether all or most Blacks are excluded at the front gate (venire selection) or the front porch (jury empanelment), the exclusion remains intact—palpable, derogatory, and invidious. Such a "stigmatizing", "discriminatory", and "in-

183. Among the reasons that the *Swain* burden was insurmountable are 1) that courts commonly maintain no records of venirepersons' race, 2) or whether they were challenged for cause or not, or 3) if challenged, by whom; 4) defendant has the burden of documenting defense role in challenges in previous cases, 5) where defendant's concern is for his own case, not for some unknown, unspecified, possible future defendant. See Doyel *supra* note 86, at 405.

184. *Batson*, 476 U.S. at 1728 (Marshall, J., dissenting). See also Lawrence, *The Id, The Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. at 317 (1987).

185. See 476 U.S. 1736-37 (Burger, C.J., dissenting).

sulting"¹⁸⁶ bar should and does offend the fourteenth amendment. In a fair system where Blacks were excluded because of an inability to impartially examine a case against a same-race defendant, *Swain*-type exclusions might be fair. As it presently operates, the American criminal justice system is not fair; it is not impartial; it is not objective; it is not just. Were the system fair, it would not completely (or nearly completely) exclude racial peers in case-after-case in jurisdiction after jurisdiction, year after year and pronounce the value of the peremptory challenge in preserving "very old credentials" and "time-honored tradition".¹⁸⁷ *Batson* would have rectified this discrepancy if it was followed to its logical conclusion of eliminating peremptories by those who had used them discriminatorily—the state.¹⁸⁸

Further, Chief Justice Burger's attack on the perceived limitation to race in the majority opinion¹⁸⁹ suggests a "domino theory" of peremptories. Because peremptories have been used historically to discriminate against persons on the basis of race says nothing about whether they have also been used to discriminate on the basis of sex, religious or political affiliation, mental capacity, number of children, living arrangements, employment in a particular industry or profession¹⁹⁰—the classifications in traditional equal protection analysis to which Chief Justice Burger says scrutiny of peremptories would also have to be applied. Rather, according to neutral principles, where there has existed historic discrimination against a powerless, discrete and insular group who have been systematically denied access to the political arena, necessary remediation for such discrimination may be appropriate. Hence, to the degree that other groups are like the paradigmatic group of Black victims of discrimination, equal protection analysis mandates an analogous remedy for that discrimination.

Chief Justice Burger warns that the application of equal protection principles and precedent to the discriminatory peremptory challenge area could be devastating. Doyel supports this view in part—arguing that not all of equal protection law should be invoked in the average run of cases, but only that equal protection law developed out of jury selection cases.¹⁹¹ Such relevant precedent would include *Casteneda v. Partida*¹⁹² and *Hernandez v. Texas*.¹⁹³

186. *Id.* at 1736.

187. *See id.* at 1731 and 1734 (Burger, C.J., dissenting).

188. Where a state could show that it had not consistently used peremptories to systematically exclude Black defendants, an argument could be mounted that such a state would not be subject to the prosecutorial peremptories elimination rule.

189. *Batson*, 476 U.S. at 1737. (Burger, C.J., dissenting).

190. *Id.*

191. Doyel, *supra* note 86, at 410-411.

192. 430 U.S. 482 (1977). Relevant to juror selection are the panel selection cases which determine the context in which juror selection occurs. Although the Court proffered a standard requiring a showing of consistent racial exclusion under *Swain*, the Court has indicated by later analysis that *Swain* does not cover entirely the field of jury discrimination. Several cases show the Court grappling to define realistic standards of proof to judge racial exclusion from juries. In *Whitus v. Georgia*, 385 U.S. 545 (1967), a statistical disparity coupled with a finding that jury selection procedures was not racially neutral. In *Casteneda v. Partida*, 430 U.S. 482 (1977), a burglary conviction of a Mexican-American was reversed as the Court rejected the "governing majority" explanation for allowing an unexplained disparity between Mexican-American presence on jury lists and in the population. In *Casteneda*, Justice Marshall pointed out that it was a fallacy to assume that merely because jurors were from one's own racial group, they could not discriminate against a minority defendant. Because a defendant was a member of a "governing majority" (a group with political power and numerical superiority in a local or regional area), did not preclude jurors from his group from absorbing and

Doyel limits the application of the equal protection precedent in the peremptory challenge area to racial discrimination and not to other types of discrimination such as wealth, illegitimacy, gender or the host of distinctive groups identified by the Chief Justice. Doyel finds a principled basis for limiting the equal protection rationale applicable to only race-based peremptory challenges—the history of the fourteenth amendment, its particular concern for Blacks' rights, and the very long record of discriminatory exclusion of Blacks from jury service.

Opinion of Justice White and Justice Marshall

In contrast, Justice White's analysis appears to be inconsistent. Initially he accepts the majority's remedy, although he also recognizes that the remedy is insufficient to solve the problem identified.¹⁹⁴ He acknowledges that the discriminatory use of peremptories is "common and flagrant". Nonetheless, Justice White would allow prosecutors to eliminate Black jurors and justify it *post fact*—by satisfactory trial-related reasons for their exclusions. Further, since Justice White acknowledges that the evidentiary burden of *Swain* is wrong, how can he simultaneously say that the rule overturning *Swain* is not to be applied retroactively? Given the substantive injustice that the old rule rendered, is justice not better served by undoing the pernicious effects it created? Also, given the Court's previous pronouncements as to what constitutes an acceptable peremptory challenge under *Swain*,¹⁹⁵ Justice White leaves the path uncharted indeed by allowing prosecutors to determine instinctively when Blacks are to be excluded. His approach does not avoid the historic elimination of Blacks from juries. In fact, Justice Marshall retorted, "[i]f easily generated explanations are sufficient to discharge the prosecutor's obligations to justify his strikes on non-racial grounds, the protection erected by the Court today may be illusory."¹⁹⁶

Possible disagreement with Justice Marshall comes when he resolves the perceived dilemma between constitutionality of trials and peremptory usage to recommend elimination of peremptories for both prosecution and defense alike.¹⁹⁷ The peremptory was not originally intended to be used equally by both the state and the accused,¹⁹⁸ it was for protection of the accused.¹⁹⁹ The Court has held that the Constitution does not establish a right to prosecutorial peremptory challenges,²⁰⁰ and the peremptory challenges are not of Constitutional moment.²⁰¹

Were it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the four-

retaining racial fears and stereotypes. Blacks could discriminate against Blacks or Chicanos against Chicanos as such jurors dissociated themselves from, and acted negatively and unjustly toward, accused members of their own groups. Bell I at 246-7.

193. 347 U.S. 475 (1954).

194. See *Batson* 476 U.S. at 1725 (White, J., concurring).

195. Such acceptable uses of peremptory challenges include bare looks, untoward gestures, and other non verbal behavior which may be innocuous or ambiguous.

196. *Id.* at 1728 (Marshall, J., concurring).

197. *Id.* at 1728 and 1729.

198. See *supra* notes 172 & 173 and accompanying text.

199. *Id.*

200. *Stilson v. United States*, 250 U.S. 583 (1919).

201. See also Doyel, *supra* note 86, at 397.

teenth amendment and the right to challenge peremptorily, the Constitution compels a choice of the former. *Marbury v. Madison*,²⁰² settled beyond doubt that when a constitutional claim is opposed by a nonconstitutional one, the former must prevail.²⁰³

The accused's right to peremptory challenges has been consistently recognized for centuries. The prosecutor's right has had only intermittent recognition.²⁰⁴ With the presumption of innocence,²⁰⁵ the accused is thought to be placed in a position that equalizes the typically superior arm of the State in adjudging him. If the jury is biased against him, the accused cannot be said to enjoy this presumption.

Justice Rehnquist's Opinion

In the same vein, Justice Rehnquist argued that peremptories are not unconstitutional if applied equally to exclude racial peers in cases involving same-race defendants.²⁰⁶ However, when jurors are peremptorily removed, the prosecutor can eliminate all minority group members where the venire is large enough—when the venire contains a sizeable number of non-minority persons and yet few minority members so that peremptory challenge allows for the complete elimination of minorities and the retention of persons in the majority. Justice Rehnquist simply ignores the reality that peremptory challenges are not applied to non-minorities in the same measure or to the same degree as applied to minorities.²⁰⁷ This myopic view of reality allows the dissenters to maintain a stance of professed equal treatment unsupported by empirical evidence of whether or not the equality which they say exists is there. Due to historic discrimination in this area, there is no reason to accord to prosecutors the benefit of the confidence that the Court attributes to prosecutors simply because of the lack of a better approach.

Looking for a Race Neutral Remedy

Racism must often be attacked through race-conscious remedies;²⁰⁸ often color-blind remedies will not be effective in remediating the problem. Although Chief Justice Burger charges that the *Batson* solution "is likely to

202. 5 U.S. (1 Cranch) 137 (1803).

203. Doyel, *supra* note 86, at 396-97.

204. Doyel, *supra* note 86, at 397.

205. A presumption itself on the wane today. See also B. WRIGHT, BLACK ROBES, WHITE JUSTICE (1987) (Discussing the disappearance of the presumption of innocence in the American criminal justice system).

206. See *Batson*, 476 U.S. at 1744-45 (Rehnquist, J., dissenting). See also Doyel, *supra* note 86, at 387.

207. See *Batson*, 476 U.S. at 1726-27 (Marshall, J., concurring).

208. *Johnson v. Santa Clara County, Transportation Agency* 480 U.S. 616 (1987)(voluntary affirmative action plan of state entity upheld); *U.S. v. Paradise*, 480 U.S. 149 (1987)(state employment discrimination); *Local 28 of the Sheet Metal Workers, Int'l Ass'n and Local 28 Joint Apprenticeship Comm. v. EEOC.*, 478 U.S.421, (1986); *Local No. 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501, (1986)(employment discrimination); *Wygant v. Jackson Board of Education*, 476 U.S. 267, (1986) (employment discrimination); *Fullilove v. Klutznick*, 448 U.S. 448 (1980)(minority set aside in public works program); *United Steelworkers of American, v. Weber*, 443 U.S. 193 (1979)(private voluntary affirmative action program); *University of California Regents v. Bakke*, 438 U.S. 265 (1978)(state university may consider race as a factor in admissions process); *United Jewish Organization of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977)(voting rights); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971)(remediating school segregation).

interject racial matters back into the jury selection process",²⁰⁹ one wonders when racial determinants were ever out of that process. They have not been out since *Strauder*, not since *Swain* and not after *Batson*—if *Batson* as interpreted only truncates prosecutorial discretion on peremptories, rather than eliminating them entirely. Arguing that the *Batson* majority retards the progress of "our country as a 'melting pot'",²¹⁰ Chief Justice Burger accepts *those* social science arguments that assimilation/integration is, or is in the process of becoming, the American way.²¹¹ Pluralism, where the constituent parts of a society work together but maintain largely their cultural identity and apartness, may be accommodated as easily in democratic institutions as assimilation/integration. In either case, demystified perceptions of the social order will *presage* correcting society's problems.

If the peremptory process is founded on the basis of "stereotypic notions" as conceded by the dissent,²¹² when that stereotype is based on grounds proscribed by the fourteenth amendment, the state may not use those grounds for its action. However, such grounds would not preclude the individual acting on his/her own behalf. In concluding, Chief Justice Burger lays much importance on the perception of the system as a just and fair one by the litigating parties and the public.

"how necessary it is that a prisoner (when put to defend his life) should have good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom he has conceived a prejudice even without being able to assign a reason for such dislike."²¹³

What about *Swain* which allowed Black defendants to be tried by all-White juries? How much of a "good opinion" does the average Black defendant have of such a jury? How much of a "good opinion" does the Black public have of being excluded from juries on the basis of race? *Batson* begins the process of rectification of this very pernicious evil in the criminal justice system. Only with the complete elimination of prosecutorial peremptories may both the appearance of justice and the reality of justice be achieved.

C. *The Best Alternative: Elimination of Peremptory Challenges*

Prosecutorial peremptories must be eliminated because that is the only way to assure minority defendants their sixth amendment fair and impartial trial guarantee by a jury of their peers and their fourteenth amendment equal protection from discriminatory prosecutorial practice. Further, defense peremptories should be retained given their necessity to ensure a defendant's sixth amendment right to a fair trial. Justice Marshall's opinion in *Batson* lends some support to this view. He does not, however, agree entirely that defense peremptories necessarily have superior claim to retention over a state's peremptories.

An expanded *voir dire* will allow lawyers to seek out bases for cause and

209. *Batson*, 476 U.S. at 1740 (Burger, C.J., dissenting).

210. *Id.*

211. See N. GLASER AND D. MOYNIHAN, *BEYOND THE MELTING POT* (1970); R. STAPLES, *INTRODUCTION TO BLACK SOCIOLOGY* at 6-7, 127, 139, 251-54, 290, 301 (1976) (comments on assimilation and integration); J.E. BLACKWELL, *THE BLACK COMMUNITY* 110-12, 281-85 (1985).

212. See *Batson*, 476 U.S. at 1737 (Burger, C.J., dissenting).

213. *Batson*, 476 U.S. at 1740, (Burger, C.J., dissenting).

use such bases as grounds of removal. Elimination of peremptory challenges will force lawyers to act as courteous, interested interviewers during *voir dire*, thus eliminating the "provoked antagonism" excuse as a justification for striking a potential juror.²¹⁴ The *voir dire* may serve to educate the prospective jurors, possibly resulting in jurors' greater commitment to democracy and the guarantees of due process. The law guarantees that juries are not partial to either the prosecution or the defense.²¹⁵ The age-old justification for the peremptory as reflecting an advantage to the prosecution would thus be eliminated.²¹⁶

Gurney recommends eliminating peremptory challenges, arguing that exclusive reliance on cause challenges and expanded *voir dire* avoids the defects of the present system. He argues that excluding a race injects bias in the jury process, regardless of whether the group precluded is Blacks or some other ethnic group.²¹⁷ Because the race of jurors affects verdicts, elimination of minorities increases the likelihood of biased verdicts²¹⁸ and reduces public acceptance of jury verdicts that are a product of only a subgroup of the larger community.²¹⁹

Before eliminating peremptory challenges, Gurney suggests that state jurisdictions take several important steps: reduce exemptions from jury service; expand eligibility standards for juries to include cross-representation of the community; end occupational exemptions (including those for lawyers, doctors, ministers) and individual exceptions for escaping jury duty;²²⁰ use random procedures at each point to increase fairness and avoid favoritism in jury venire and jury pool selection; require twelve person juries and unanimity of verdicts to assure that majority persons cannot simply outvote a minority view on juries;²²¹ disallow prospective juror's statements as the only basis for discerning bias;²²² allow expanded and separate *voir dire* for each prospective juror conducted outside the presence of other jurors.²²³ Gurney recognizes that these measures will add some additional cost to system resources including time and money, but believes that fair jury trials are worth the cost.

Since *Batson* was decided in 1986, prosecutors have come to question if they must comply with a no prejudice rule requiring greater impartiality and fairness than before, the defense must also be mandated to comply with the *Batson* principle. Whether defense lawyers may permissibly keep Blacks off the jury through use of peremptory challenges became an important interlocutory and appealable issue in the "Howard Beach" trial.²²⁴ Although *Batson*

214. Gurney, *supra* note 116, at 253-54.

215. See Taylor v. Louisiana, 419 U.S. 522 (1975).

216. *Id.* at 254-55.

217. *Id.* See also Turner v. Murray, 476 U.S. 28 (1986)(on the limits of voir dire to address racial bias). See also Jacobson, *Reducing The Impact of Juror Discrimination in Interracial Crimes: An Analysis of Turner v. Murray*, 5 LAW AND INEQUALITY J. (1987).

218. See Gurney, *supra* note 116, at 233 n.30.

219. *Id.* at 234-35 n.32.

220. *Id.* at 236.

221. *Id.* at 264-66.

222. *Id.* at 266-68.

223. *Id.* at 268-271.

224. See Shipp, *Must a Jury of One's Peers Be a Panel of One's Race*, N.Y. Times, Sept. 20, 1987, at E6, col. 3; People v. Ladone, 545 N.Y.S.2d 4 (1989); (trial of four White teenagers accused of engaging in mob violence against three Black men, resulting in the death of one of them) ["Howard Beach"]; Matter of Ladone v. Demakos, 519 N.Y.S.2d 917 (A.D. 2 Dept. 1987)(writ of prohibition

did not directly address the issue of defense peremptories used to preclude participation of a race in a trial, *Batson's* holding and rationale would appear to apply to defense as well as the prosecutor. Some state courts have already held that their state constitutions precludes the prosecution and defense from using peremptories to exclude racial groups from a jury.²²⁵

One recent lawsuit²²⁶ asks a court to hold that gender, religion, and national origin are illegitimate bases for peremptory juror elimination whether by defense or prosecution. In this suit, six cases (four of them growing out of assault by whites on Blacks) were cited in which Blacks had been deliberately excluded from juries. In addition, legislation to preclude the use of peremptories to exclude venire persons on the basis of race by prosecution and defense alike has been proposed in New York.²²⁷ One analyst has stated that once the state grants the peremptory challenge option to the defense attorney, her subsequent use of it arguably constitutes state action.²²⁸ In contrast, another commentator has suggested that fourteenth amendment equal protection would not bar defendant's race-based use of peremptory challenges; nor would the sixth amendment limit race-based use of peremptories since the right to an impartial jury and the action of striking venirepersons using defense peremptories is the defendant's, not the state's.²²⁹ Although citizens have a constitutional right not to be systematically excluded from juries,²³⁰ defendants

not available, given appeal remedy, to preclude court directives to explain use of peremptories). See also Cerisse Anderson, *Counsel Ordered to Justify Challenges of Black Jurors*, N.Y.L.J. Sept. 22, 1987 at 1; *United States v. Biaggi*, 673 F.Supp. 96 (E.D.N.Y. 1987)(held that although prima facie case of peremptory challenge discrimination against Italian-Americans was established, challenges were exercised on permissible grounds).

225. Shipp, *supra* note 224. Courts in Florida, California, Massachusetts and New York have held that given *Batson's* limitations on the prosecutor, similar limits must be applied to defense. See *Ladone v. Demakos*, N.Y.L.J., September 22, 1987. at 3.

226. Shipp, *supra* note 224. See also *Holtzman v. New York State Supreme Court*, 526 N.Y. Supp. 2d 892 (2d Cir.) (No. 16496); Plaintiffs Brief, *Holtzman v. New York State Supreme Court*, 526 N.Y. Supp. 2d 892 (2d Cir. 1988) (No. 16496).

227. See Amendments to New York's Criminal Procedure Law § 270.25 (prescribes procedure for trial judge to determine whether peremptory challenges had been used discriminatorily). See also Cerisse Anderson, *DA, Lawmakers Ask Action on Bill For Jury Challenges*, N.Y.L.J., February 19, 1988 at 1.

228. See Note, *A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process*, 18 ST. LOUIS U.L.J. 662, 665. See also Note, *Batson v. Kentucky: A Half Step in the Right Direction*, 72 CORNELL L. REV. at 1028 n.18 [Hereinafter Cornell Note].

229. See Zirlin, *Unrestricted Use of Peremptory Challenges by Criminal Defendants and Their Counsel: The Other Side of the One-Color-Jury*, 34 N.Y.L. S. L. REV. See also *Booker v. Jabe*, 775 F.2d 672 (6th Cir. 1985), vacated 106 S.Ct. 3289 (1986), reinstated 801 F.2d 871 (1986) cert. denied 107 S.Ct. 3289 (1986) (held that sixth amendment bars prosecution and defense alike from systematic exclusion of cognizable groups from petit jury service).

230. *Carter v. Jury Commission*, 396 U.S. 320, 329 (1970), (held that persons denied jury service because of status could challenge jury discrimination in criminal cases). *Bell* (1980) at 274-75. By extrapolation, it has been argued that victimized groups have a right to non-discriminatory juries in civil cases. *Id.* Although it is not the focus of this paper to treat the subject in any detail, jury discrimination in a civil case further illustrates the ideas presented here. Although little has been written on the topic, it is worth noting that one objection which could be interposed is that civil litigants are private parties and thus exempt from fourteenth amendment state action limits. Counter to this position one could assert that a court's enforcement of such a procedural decision or of a verdict based thereon is clearly state action, and clearly within the application of the fourteenth amendment. *Shelley v. Kramer*, 334 U.S. 1 (1948), and its progeny strongly support the argument that state action would exist where a court enforced the decision of a discriminatorily selected jury. See also *Bell III* at 276. Elimination of Blacks from civil case juries raises the question of the fundamental right to a fair trial—in a way as importantly, although with consideration of possibly different

have a more fundamental constitutional right to a fair and impartial jury.²³¹ However, a defendant does not have a right to a jury prejudiced in his favor. In sum, a fair and impartial jury may be achieved without the elimination of all Blacks from the petit jury.

D. *The Legacy of Swain and Batson*

This section of the Article explores several arguments related to eliminating peremptories. Although it might be contended that these arguments are separable from the main thesis, it may also be readily recognized that *McCleskey v. Kemp's* rejection of strong statistical evidence of racial disparity in capital sentencing complicates and exacerbates the legal and social problems created by *Batson*. Given my view that *Swain* was wrongly decided, an argument which explores the basis of retroactivity of *Batson* is of a piece with a position that says that *Batson* is a positive but incomplete movement in the right direction to eradicate jury discrimination. *Batson* should be retroactive, to root out discrimination which *Swain* institutionalized. Similarly, the justifiable disruption theme is a logical extension of the view that attention to *Batson* deserves a special place even if this approach will mean some disruption in the system. Though any of these arguments may deserve separate focused attention in another article, a review of *Swain-Batson* and their legacy would be incomplete without considering retroactive application of *Batson*.²³²

Review of the possible retroactivity of *Batson* reveals a split in the circuits. In the Eighth Circuit, a defendant moved to quash the jury panel because of discriminatory use by prosecutors of peremptory challenges.²³³ The Eighth Circuit rule, however, is that *Batson* will not apply retroactively to cases pending on direct appeal.²³⁴ Therefore, appellant was denied his motion to strike on this basis.

In the Eleventh Circuit, the retroactivity of *Batson* arose in *United States v. David*²³⁵ where the Eleventh Circuit held that *Batson* would be applied retroactively to cases pending on direct appeal when *Batson* was announced. In *David*, the government proffered three arguments which it claimed were sufficient to show that the prosecutor's peremptory strikes were not racial. First,

consequences, as in criminal cases. In addition, due process considerations would mandate adjudication before a non-discriminatory jury which represented a cross-section of the community. *See also* Note, *Due Process Limits on Prosecutorial Peremptory Challenges*, 102 HARV. L. REV. 1013 (1989). Posing Kingman Brewster's question in the civil jury context, one is even less sanguine about the possibilities of a fair trial for a Black in America—for although the Constitution precludes the state from action to deprive a person of life, liberty or property without due process, dominant (white) community values tend to place Black property on a lower rung (even) than Black life or liberty. With the beginning of the demise of the *Swain* rule in the criminal area, the logic of the law should not be slow to reveal its application in the civil area as well. *See also* Martin Fox, *Bias Found in Picking Jury for Civil Suit*, N.Y.L.J., Nov. 14, 1988, 1, 9 (N.Y. State supreme court justice disbanding of jury pool from which all Blacks had been excluded and said to be first time *Batson* has been applied in this state to a civil action); Cerrise Andersen, *Judge Prohibits Gender Bias in Picking Jury*, N.Y.L.J. (*Batson* applied to preclude juror exclusion on gender basis in *People v. Irizarry*, — N.Y.— (N.Y.S. Ct. Crim. Pt. 1988); *Edmundson v. Leesville*, 860 F.2d 1308 (circuit follows *Batson* for civil suit). *Accord* *Fludd v. Dykes*, 57 U.S.L.W. 2492 (U.S. Feb. 7, 1989).

231. *See supra* notes 172, 173.

232. *United States v. David*, 803 F.2d 1567, 1568 (11th Cir. 1986) (conviction for conspiracy to possess cocaine with intent to distribute).

233. *United States v. Wilson* No. 85-1546 Slip op. (8th Cir. Nov. 25, 1986).

234. *Id.*

235. *See supra* note 232.

although the government had a peremptory strike available, the prosecution did not strike the third and final Black juror from the panel.²³⁶ Second, venire persons who were former or present federal government or postal service employees were struck—some by prosecutor, others by appellant—would explain the striking of the one Black male venireperson.²³⁷ And third, a Black female venire member was struck because she was pregnant. The government submitted that these reasons constituted non-discriminatory reasons for peremptory challenges, entitling the district court's ruling in favor of these challenges to a presumption of correctness.²³⁸

Although the Court has held that *Batson* is not to be applied retroactively on collateral review of cases decided before *Batson*,²³⁹ *Wilson*, *David* and similar cases present the new question of the rule for cases pending when *Batson* was decided. The United States Supreme Court's resolution of this issue was handed down in two cases: *Griffith v. Kentucky*,²⁴⁰ which held that *Batson* would apply to cases in which convictions had not yet become final on direct appeal as of April 30, 1986; and *Allen v. Hardy*,²⁴¹ which held that *Batson* would not apply retroactively to cases decided before *Batson* was announced. *Allen* is erroneous and denies substantial justice to Black defendants already burdened by an American system of injustice. While it might be difficult to review *voir dire* years after the proceedings, such review should be undertaken where records are available. To replace the *Allen* rule,²⁴² the Court should construct a rule that takes into account both the difficult problems of the administration of criminal justice and the possible denial of substantive justice. To this end, the Court could direct that cases in which the discriminatory use of peremptory challenges was raised could be reviewed collaterally to determine conformity to the *Batson* mandate. In order for cases to fall under this rule, there would necessarily be a record of: a) the jury selection, b) the elimination of jurors by race, c) the role of parties in that elimination and d) the lower court's ruling on the *Batson* issue.²⁴³

Additional analysis indicates the need for reconsideration of some cases. For example, Leslie, a Black man convicted in Louisiana, was tried by a jury from which all Blacks had been excluded by the prosecutor.²⁴⁴ The *Leslie* majority justified this exclusion as within the *Swain* framework.²⁴⁵ Since Part II of *Swain*²⁴⁶ was overruled by *Batson*, the prosecutor in *Leslie* must be called

236. *David*, *supra* note 232 at 1569. Prosecutors struck two venirepersons; defense, three.

237. *Id.*

238. *Id.*

239. *Allen v. Hardy*, 478 U.S. 255 (1986), 106 S.Ct. 2878 (1986).

240. 55 L.W. 4089 (1987).

241. *See supra* note 239.

242. *Id.*

243. *See Harris v. Texas*, 104 S.Ct. 3556-58 (Marshall, J., dissenting from denial of certiorari). *See also Doyel, supra* note 86, at 406 (review of Harris). Further, lower courts have also engrafted an additional procedural timeliness requirement upon *Batson*. *See Cornell Note* 1083, n.60 *citing to William v. State*, 712 S.W.3d 835, 840 (5th Cir. 1986), *United States v. Erwin*, 793 F.2d 856 (5th Cir. 1986), *Fleming v. Kemp*, 794 F.2d 1478 (11th Cir. 1986) and *Bowden v. Kemp*, 793 F.2d 273 (11th Cir. 1986).

244. *United States v. Leslie*, 783 F.2d 541 (5th Cir. 1986) (conviction for conspiring to distribute narcotics and narcotics possession with intent to distribute.)

245. *Leslie*, 783 F.2d at 545.

246. Note that the *Swain* Part III plurality was not joined by Justice Harlan who was in the *Swain* Part II majority. *Swain*, 380 U.S. at 228.

upon to present a legitimate, non-discriminatory reason for excluding all Blacks from the jury panels.²⁴⁷

Leslie takes issue with the observation that "restricting the cross-section requirement to the venire selection process is meaningless, because juries decide cases while venires decide nothing."²⁴⁸ Strongly supportive of arguments made by Chief Justice Burger and Justice Rehnquist in their *Batson* dissents, this critical approach in *Leslie* is fundamentally misplaced because of its focus. Much of this argument was generated by Justice White's seminal observation that "striking any group of otherwise qualified jurors in any given case whether they be Negroes, Catholics, accountants or those with blue eyes"²⁴⁹ was justified under the peremptory challenge system. The *Leslie* majority, like the *Batson* dissents, ignores the extent to which the exercise of the peremptory privilege in historic and contemporary society has meant discriminatory usage to exclude Blacks in case-after-case, decade-after-decade when Blacks defendants were on trial and their victims were white. While it may be nice to think that a discrete decision is made to exclude particular Blacks from particular cases, when it appears that Blacks have been systematically excluded from juries of Black defendants, a constitutional violation is established. Is it the case that Catholics have been excluded from case-after-case over decades in the cases with Catholic defendants and non-Catholic victims? Not only are the religious affiliations of the defendant and victim almost never known, but such affiliations most often are not as obvious as race. Have accountants in case-after-case with accountant defendants and non-accountant victims been peremptorily excluded from juries? And those with blue eyes? The analogy is largely ludicrous. Even if one could show statistically that excluding Catholics, accountants or persons with blue eyes is factual, can it also be shown that these groups have experienced similar *racial* discrimination, disenfranchisement, powerlessness and insularity as Blacks have?

In lower courts, *McCleskey v. Kemp*²⁵⁰ explored the question of the requisite statistical proof for showing that race-of-defendant and race-of-victim reach the level of aggravating factors in sentencing determination.²⁵¹ In *McCleskey*, the defendant was not able to establish that race-of-the-victim or race-of-defendant was strong enough a factor to show a sufficient contribution to a longer sentence.²⁵² Defendant arguably showed a 20% disparity for mid-range cases.²⁵³ The trial judge indicated that there were limited circumstances in which statistical proof could establish intentional race discrimination in capital sentencing.²⁵⁴ Such circumstances existed only where evidence of disproportionate impact was so strong as to permit no inference other than that

247. Six Blacks were excluded peremptorily by prosecution from defendant's pool, leaving no Blacks. One Black was peremptorily excluded from defendant's alternate jury pool, leaving no Blacks. *Leslie*, 783 F.2d at 543.

248. *Leslie*, 783 F.2d at 554. See also *McCray*, 750 F.2d at 1128.

249. *Swain*, 380 U.S. 202 (White, J., concurring). See also *Leslie*, 783 F.2d at 547.

250. 753 F.2d 877 (11th Cir. 1985), *aff'd* 481 U.S. 279 (1987). See also Lecture on *McCleskey v. Kemp*, American Association of Law Schools (AALS), Criminal Justice Section, taped January 9, 1988 (Tape 8001—#105-06).

251. 753 F.2d 877 (11th Cir. 1985).

252. *Id.* at 898.

253. *Id.*

254. *Id.* at 888-89, 892.

the outcome was the product of racially discriminatory purpose.²⁵⁵ On appeal, the Eleventh Circuit held that proof of disparate impact without more is insufficient to invalidate a capital sentencing scheme unless that "evidence compels a conclusion that the system is unprincipled, irrational, arbitrary and capricious so that intentional racial discrimination is being used as a factor in sentencing which permeates the system."²⁵⁶ Given that some imprecision may be tolerated in any discretionary system, Judge Roney's majority opinion for the circuit court panel argues that a showing that, on average, White victim crime is six percent more likely to receive a death sentence than a comparable Black victim crime is insufficient to overcome the presumption that operation of the statute is constitutional.²⁵⁷

Therefore, McCleskey's proffer of proof was rejected even though a disparity in treatment by race was shown since the evidence did not amount to a prima facie case which would shift the burden to the state to show clear constitutional factors to explain the disparity.²⁵⁸

Judge Roney's assertion that differences including "looks, age, personality, education, profession, job, clothes, demeanor, and remorse. . ."²⁵⁹ are quantitative is most bothersome. Given the observation and substantial research²⁶⁰ that suggests how subjective, prejudicial and race-linked many of these factors can be, Judge Roney is certainly mistaken to conclude that a sentencing scheme which uses an undifferentiated assessment of these factors should continue to be held within constitutional parameters.

In the United States Supreme Court, the Georgia capital sentencing scheme was upheld on its face and as applied to McCleskey.²⁶¹ The Court held that McCleskey's statistical evidence was insufficient to establish that any of the state's officials or jurors acted with racially motivated discrimination which would violate the equal protection clause of the fourteenth amendment.²⁶² The Court concluded that "McCleskey must prove that decisionmakers in *his* case acted with discriminatory purpose. [Defendant] offered no evidence specific to his own case that would support an inference that ra-

255. *Id.*

256. *Id.* at 892.

257. *Id.* at 897.

258. *Id.* at 899.

259. *Id.* at 899.

260. See Schulman, Shaver, Colman, Emrich & Christie, *Recipe for a Jury*, PSYCHOLOGY TODAY, May 1973 (analysis of the relationship of juror age, race, religion and sex to predict jury sympathies in context of conspiracy trial); N.S. Marder, *Gender Dynamics and Jury Deliberations*, 96 YALE L.J. 593 (link between gender and jury deliberations explored); MINIMIZING RACISM IN JURY TRIALS (A. Ginger ed. 1969); Wasserstrom, *Racism, Sexism and Preferential Treatment: An Approach To The Topics* 24 UCLA L. REV. 581 (1977); HASTIE, PENROD & PENNINGTON, *INSIDE THE JURY* (1983); Davis, Bray & Holt, *The Empirical Study of Decision Processes in Juries: A Critical Review*, in LAW, JUSTICE AND THE INDIVIDUAL IN SOCIETY: PSYCHOLOGICAL AND LEGAL ISSUES (J. Tapp & F. Levine eds. 1977) (empirical studies on jury deliberations are reviewed); Efram, *The Effect of Physical Appearance on the Judgement of Guilt, Interpersonal Attraction and Severity of Recommended Punishment in a Simulated Jury Task* 8 J. RES. PERSONALITY 45 (1974); Sigall and Ostrove, *Beautiful but Dangerous: Effects on Offender Attractiveness and Nature of the Crime on Juridic Judgment*, 31 J. PERSONALITY & SOC. PSYCHOLOGY 410 (1975) (defendant attractiveness correlated to more lenient treatment if crime unrelated to attractiveness; no difference for males and females). See also Stephen, *Sex Prejudice and Jury Simulation*, 88 J. PSYCHOLOGY 305, 306 (1974) (jurors less likely to convict same-sex defendant).

261. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

262. *Id.*

cial considerations played a part in his sentence."²⁶³ The Court went on to note that the legislature was not shown to have adopted the capital sentencing scheme because of an alleged discriminatory effect.²⁶⁴ The Court further held that the Baldus study, the primary source of McCleskey's data, did not warrant an inference that the state's sentencing system was applied in an arbitrary or capricious manner in violation of the eighth amendment's prohibition of cruel and unusual punishment.²⁶⁵

Justice Brennan dissented, reiterating his view that in all situations, the death penalty amounts to an eighth amendment violation because it is cruel and unusual.²⁶⁶ Moreover, he believed McCleskey's evidence established the presence of a constitutionally intolerable risk that race infected his sentence, especially since that evidence was bolstered by the strongly supportive force of Georgia's historic racism in its criminal justice system.²⁶⁷ Further, the Georgia system was structured to allow racial discrimination to enter into charging and sentencing decisions.²⁶⁸

Between indictment and sentencing, Justice Blackmun reminds in his dissent, the prosecutor is "the quintessential state actor"²⁶⁹ with discretion to go forward from the initial prosecutorial option to pursue a death sentence to the point of the jury's vote for death. The prosecutor may abandon at various points his choice to pursue death. In choosing to enter the post-conviction penalty phase of the trial, the prosecutor takes the step most laden with the potential for turning discretion into discrimination.²⁷⁰

Justice Blackmun recited the Baldus study evidence proffered by McCleskey: a) the evidence included data from the jurisdiction in which McCleskey was tried and convicted; b) the evidence takes account of a significantly large number of independent variables (over 400) and includes a significantly large enough sample (2,484 cases) to assure scientific analysis of a relevant population in all arrests for homicide in Georgia from 1973-78; c) the evidence was calculated with sufficient rigor and detail and evaluated with ample sophistication in a multiple regression framework to allow an inference on the amount of sentencing disparity due to race.²⁷¹

Most importantly, McCleskey established that the race-of-victim factor is nearly as crucial as the statutory aggravating factor of a prior capital conviction record.²⁷² The Court has noted elsewhere that Georgia could not attach "the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as race, religion, or political

263. 481 U.S. 292 (emphasis in original).

264. *Id.* at 298.

265. *Id.* at 308.

266. *Id.* at 320 (Brennan, J., dissenting).

267. *Id.* at 329-332 (Brennan, J., dissenting).

268. *Id.* at 333 (Brennan, J., dissenting).

269. *Id.* at 349 (Blackmun, J., dissenting).

270. The majority also notes "that the Baldus study found that prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims; 32% of the cases involving white defendants and white victims; 15% of the cases involving white defendants and black victims". 481 U.S. 350 n. 3 (Blackmun, J., dissenting, quoting the Court's opinion in *McCleskey*, 481 U.S. 279, (1987)).

271. 481 U.S. at 354 n.7.

272. *Id.* at 355.

affiliation of the defendant."²⁷³ What we have held to be unconstitutional if included in the language of the statute, surely cannot be constitutional because it is a factor characteristic of the system."²⁷⁴

Where prosecutorial or jury discretion may easily become discrimination, the safeguards presently within the system are insufficient to meet the requirements of the Fourteenth Amendment. "In sum, McCleskey has demonstrated a clear pattern of differential treatment according to race that is 'unexplainable on grounds other than race' ".²⁷⁵

To follow *Batson* and its precursors, the burden should shift to the prosecutor to explain this disparate racial effect with the burden on the state to show non-racial, neutral criteria to explain the sentencing discrepancy.²⁷⁶ However, the *McCleskey* majority attempts to distinguish *Batson* as a "quite different" case.²⁷⁷ Nonetheless, Justice Blackmun finds that McCleskey's proof would have satisfied the much higher, even "crippling"²⁷⁸ burden placed on defendants by *Swain*. "McCleskey presented evidence of numerous decisions impermissibly affected by a racial factor over a significant number of cases. The exhaustive evidence . . . certainly demands an inquiry into the prosecutor's actions."²⁷⁹

The majority contends that relief to McCleskey would lead to further constitutional challenges on the basis of discrimination against other ethnic or racial groups and perhaps gender.²⁸⁰ If the equal protection clause leads to that destiny then, as Justice Blackmun intoned, it may mean improvement for the criminal justice system and for society. If the capital sentencing scheme is shored up by the faulty pillars identified, the system will not long stand in any case. The better part of discretion calls for re-evaluating the reasons for reviewing state action that can lead to the death penalty. Assurance of an evenhanded application of justice²⁸¹ is a goal worthy of the ease with which the system may be corrected.²⁸²

Where race impermissibly infects any of a jury's deliberations or decisions, these imperfections²⁸³ are sufficiently weighty to serve attempts at rectification. Given the constitutional imprimatur which the Court has set upon in eliminating the vestiges of racial animus and race discrimination, at least since *Brown v. Board of Education*,²⁸⁴ it is far too late in the day to say that a little racism is innocuous. Yet, that is precisely what *McCleskey* says.

Although several Justices and many judges protest that the resulting disruption from the operation of the *Batson* rule will defeat the efficient operation of the criminal justice system, the anticipated effects have been overstated. Several reasons demonstrate the overestimation of the probable disruption.

273. *Id.* at 355 (citation omitted).

274. *Id.* 355-356.

275. *Id.* at 361, 323 (quoting *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. at 266).

276. 481 U.S. 362 (1987).

277. *Id.* at 363.

278. 481 U.S. 279 (1987).

279. *Id.* at 324-325.

280. *Id.* at 317.

281. *See id.* at 365.

282. *See also id.* at 365.

283. *Id.* at 366 (Stevens, J., dissenting).

284. 347 U.S. 483 (1954).

First, only challenges based on arguable discriminatory grounds may be scrutinized. Further, only when a prima facie case of selection to the petit jury on the basis of race could be established would scrutiny result, thus diminishing the number of cases involved. The *Batson* rule itself means that because race is known to be an improper basis for discriminatory juror selection, selection may be scrutinized and the prosecution is deterred from using peremptories.

The strongest argument in support of the rule that *Batson* subsequently adopted is demystifying the axiom that race is just another characteristic used to evaluate juror partiality and, in this society, may be treated like religion, eye color or occupation, Doyel explains: Even if a Black juror will possibly or probably favor a Black defendant (as the *Swain* majority obviously believed), then it can also be reasonably said that a white juror will possibly or probably favor of a White victim or oppose a Black defendant. . . . Especially when the accused is black, exclusion of a black juror to get a white replacement may well be, and may be intended to be, a substitution of hostile white for the excluded black.²⁸⁵ To "satisfy the appearance of justice", the peremptory challenge should be used to reduce the extremes of partiality and eliminate jurors partial to either party.²⁸⁶

The adversarial system itself forces prosecutors to seek the most conviction-oriented juror he or she can select. This approach is expected given the defendant's proper role of seeking an acquittal-oriented jury.²⁸⁷ That the prosecutor may be attempting only to neutralize use of racial discrimination serves neither the ends nor the appearance of justice.²⁸⁸

Doyel raises the fascinating and seminal question of whether Blacks can be impartial against Black defendants with white victims. In his article, Kuhn²⁸⁹ assumed that Blacks would be sympathetic to other Blacks and whites would be sympathetic to whites—that neither race can be impartial to members of the other race in those situations where same-race persons are defendants and other-race persons are victims. For Kuhn, equal protection is denied when the numerical minority cannot eliminate a proportionate, indeed, equal number of the numerical majority to maintain a balance on the jury.²⁹⁰ Professor Doyel believes that Kuhn's approach is "incorrect, profoundly disrespectful"²⁹¹ in its suggestion that Blacks are incapable of impartiality. Both approaches may have merit for large segments of racial groups. Certainly cases since *Swain* have suggested that all-white juries have done a poor enough job in rendering impartial verdicts for Blacks. Why else would prosecutors

285. Doyel, *supra* note 86, at 401-02.

286. See also Doyel, *supra* note 86, at 391. Kuhn makes the same point as eloquently and with equal heuristic value: "When the prosecutor challenges a Negro in order to get a white juror in his place, he does not eliminate prejudice in exchange for neutrality; he secures a friendly juror in place of a hostile one. In removing Negro jurors in those cases where racial affinity may be important, the state is not playing a neutral role. It is in fact, willy nilly taking advantage of racial divisions to the detriment of the defendant." Doyel *supra* note 86, at 402, quoting Kuhn, *Jury Discrimination: The Next Phase*, 41 CALIF. L. REV. 235, 29091 (1968).

Kuhn is right except where he suggests that the discrimination occurs in a "willy nilly" fashion. On the contrary, the legion of cases suggest the pattern is not willy nilly, but singular, color-conscious and race-specific. Doyel, *supra* note 86.

287. See *supra* note 113.

288. See also Doyel *supra* note 86, at 404.

289. *Id.* at 286.

290. Doyel *supra* note 86, at 408, n. 166.

291. *Id.*

fight so hard to eliminate all Blacks from juries hearing cases against Black defendants? On the other hand, research has indicated that some Blacks may be harder on Black defendants than on defendants in other racial groups.

Some Blacks and some Whites are likely to be incapable of basing their decision on the merits of the testimony and other evidence presented by the parties in the cases. Such jurors should be eliminated from those juries when they cannot act impartially. Jury panels are likely to consist of enough Black, White and other-race persons who can base their conclusions on the relevant, legitimate considerations of trying cases as the interests of justice require.

IV. *Conclusions and Recommendations*

Racism continues to confound both the process and the appearance of criminal justice in the United States. Under *Swain* since a defendant did not have a right to an impartial jury, some state courts looked to state constitutions for assuring a fair and impartial trial. California, Massachusetts and New Mexico were the most progressive states.

Various alternatives have been explored as possible resolutions of the problem of jury discrimination. First, there is the *Swain* standard itself, requiring a showing of systematic exclusion of all Blacks from jury service on a case-by-case basis. The Finkelstein approach of examining the selection mathematically to determine probability and disparity was incorporated in several approaches by different courts and commentators. Also, there is the affirmative citizen suit as in *Carter and Fouche*, in which a minority citizen challenges group exclusion from jury service. Although it was rejected by the Court in *Batson*, there is also the possibility of proportional representation or purposeful inclusion of members of a victimized group. This alternative, a type of affirmative action for jury service, could perhaps be justified if limited to groups which the Court has found a suspect class under equal protection analysis in jury districts where a trial judge has found a history of discrimination related to that group. Reconstituting jury districts to provide Black juries where Blacks are the majority population group suggests a solution to the problem. The *Wheeler-Soares* approach of finding a state constitutional right to trial by a jury of one's peers would be equally effective. Finally, *Batson* incorporated Judge Meyer's proposal that, in those cases which result in the exclusion of all minority persons from the jury, a burden is imposed on the prosecution to offer a non-racial basis for the exclusion.

With *Batson*, the Court has transformed a "crippling" burden of proof to an onerous one. While impossible to succeed under *Swain*, with luck, a defendant might now succeed under *Batson*. However, with the inauspicious²⁹² advent of *McCleskey*, the Court has now effectively shot the defendant in the leg. While lower courts can handle the imposition of the *Batson* burden, minority communities continue chagrined at the lack of a fair trial prospect because of their race. The *Batson-McCleskey* line of cases offers a contradictory perspective: although the Court will remain solicitous of minorities' plights in the criminal justice system, when the composition of the system itself is chal-

292. Observing that the issue remains controversial and the response to it troubling, the *New York Times* in a leading story, on August 9, 1987, noted a surge in executions in the wake of the *McCleskey* decision. P. Applebone, *Louisiana Leads U.S. in a Surge of Executions*, N.Y. TIMES, Aug. 9, 1987.

lenged, the Court will rally to defend the system before responding to its higher duty as the guardian of justice and liberty.

For now, however, the Supreme Court has indicated that the Constitution only precludes purposeful exclusion of identifiable, victimized groups. No assurance is given that a historically excluded group must be represented on the petit jury—even when the defendant is a member of such a group. Only the elimination of prosecutorial peremptories will accomplish this necessary end. Refusal to go this second step means the Court has accorded an empty right—a right of equality of opportunity without a chance of actual equality. When a minority group has chances “equal” to those of the majority group, the probability that the minority will be chosen for the position can never be equal to that of the numerically superior majority. Traditionally, the Court’s response to this disparity is that constitutional rights are individual. But then, so are a person’s chances to go to prison or death.