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Restricting the Discriminatory Use of Peremptory Challenges

I. INTRODUCTION

Over a century ago in *Strauder v. West Virginia*,¹ the United States Supreme Court declared unconstitutional a state statute which provided that African-Americans could not serve as jurors.² State officials then adopted a more indirect method of keeping African-Americans off juries: peremptory challenges.³ The use of peremptory challenges to exclude African-American jurors has been both common and flagrant over the last 109 years.⁴

Although defendants seldom have been able to compile statistics showing the extent of the discriminatory use of peremptory challenges, the few cases providing statistical analysis are informative.⁵ For example, in 1974, during fifteen criminal cases involving African-American defendants tried in Missouri, prosecutors exercised

1. 100 U.S. 303 (1880).

2. *Id.* at 310.

3. See *Batson v. Kentucky*, 476 U.S. 79, 103 (1986) (Marshall, J., concurring). Prospective jurors can be challenged for bias in two ways: (1) by challenges for cause, on a "narrowly specified, provable and legally cognizable basis of partiality"; and (2) by peremptory challenges, which are made without showing any cause. J. VAN DYKE, *JURY SELECTION PROCEDURES* 139 (1977). Only a limited number of jurors, as specified by statute in each jurisdiction, may be challenged peremptorily. *Id.* at 140. "Peremptory challenges may be used when an attorney suspects a prospective juror of being biased but cannot prove it to the judge according to the guidelines set down for challenges for cause." *Id.* at 146.

Peremptory challenges have been subject to abuse since juries were first used in England. *Id.* at 147. The exercise of peremptory challenges by the prosecution was not always allowed, but has been a source of constant debate. *Id.* The earliest English juries were effectively hand-picked by the King's attorneys. *Id.* If, by chance, an unacceptable person appeared on the jury list, he was easily removed because the Crown had an unlimited number of peremptory challenges. *Id.* In 1305, the English Parliament completely eliminated the Crown's right to exercise peremptory challenges. *Id.* Nevertheless, criminal defendants retained the right to exercise peremptory challenges. *Id.*

In the United States, the defendant's right to peremptory challenges was considered a part of the common law inherited from England; the grant of a similar right to the prosecution was not. Comment, *Swain v. Alabama: A Constitutional Blueprint for the Perpetuation of the All-White Jury*, 52 VA. L. REV. 1157, 1171 (1966). Most states resisted granting prosecutors the right to peremptory challenges. *Id.* at 1171-72. Nevertheless, prosecutors eventually obtained the right to use peremptory challenges by statute over strenuous constitutional objections. *Id.* By approximately 1870, most states allowed the prosecution to use peremptory challenges. *Id.* at 1172.

4. *Batson*, 476 U.S. at 103 (Marshall, J., concurring).

5. *Id.* (Marshall, J., concurring).

their peremptory challenges against eighty-one percent of African-American jurors.⁶ Between 1972 and 1974, in fifty-three criminal cases involving African-American defendants in the Eastern District of Louisiana, federal prosecutors used sixty-nine percent of their peremptory challenges against African-American jurors.⁷ African-Americans constituted less than one-quarter of the veniremen⁸ at that time.⁹ In 1983 and 1984, during 100 felony trials in Dallas County, Texas, prosecutors used peremptory challenges against 405 of the 467 eligible African-American jurors.¹⁰ The probability of a qualified African-American sitting on a jury in that county was one in ten, while the probability of a white sitting on a jury in that county was one in two.¹¹

The Supreme Court has indicated that a State's exercise of peremptory challenges to exclude members of an African-American defendant's race from the petit jury¹² solely because of the jurors' race violates the defendant's rights under the equal protection clause.¹³ Furthermore, an African-American defendant can establish a prima facie case of purposeful discrimination through use of peremptory challenges by offering evidence of the prosecutor's discriminatory exercise of peremptory challenges solely at the defendant's trial.¹⁴ Despite this Supreme Court precedent, prosecutors can shield their use of peremptory challenges from scrutiny by allowing only token representation of members of the defendant's race on the jury hearing the defendant's case.¹⁵ Indeed, merely changing the standards for establishing a prima facie case in this context has not, and will not, stem the discriminatory use of peremptory challenges. Therefore, additional remedial measures are

6. *Id.* (Marshall, J., concurring) (citing *United States v. Carter*, 528 F.2d 844, 848 (8th Cir. 1975), *cert. denied*, 425 U.S. 961 (1976)).

7. *Id.* (citing *United States v. McDaniels*, 379 F. Supp. 1243 (E.D. La. 1974)).

8. A venireman is "[a] member of a panel of jurors." *BLACK'S LAW DICTIONARY* 1395 (5th ed. 1979).

9. *Batson*, 476 U.S. at 103 (Marshall, J., concurring) (citing *United States v. McDaniels*, 379 F. Supp. 1243 (E.D. La. 1974)).

10. *Id.* at 104 (Marshall, J., concurring).

11. *Id.* (Marshall, J., concurring).

12. A petit jury is "[t]he ordinary jury [of twelve persons] for the trial of a civil or criminal action; so called to distinguish it from the grand jury." *BLACK'S LAW DICTIONARY* 768 (5th ed. 1979).

13. *Swain v. Alabama*, 380 U.S. 202, 223-24 (1965), *overruled on other grounds*, *Batson v. Kentucky*, 476 U.S. 79 (1986).

14. *Batson*, 476 U.S. at 96. Previously, an African-American defendant had to show that the State systematically exercised peremptory challenges to exclude African-American jurors on account of race. *Swain*, 380 U.S. at 224. *See infra* note 39 and accompanying text.

15. *See infra* notes 75-77 and accompanying text.

needed in order to eradicate discrimination in the selection of juries.

This Comment will trace the development of the Court's jurisprudence regarding the states' discriminatory use of peremptory challenges.¹⁶ This Comment will then discuss *Batson v. Kentucky*, which established that a defendant may make a prima facie showing of purposeful racial discrimination through use of peremptory challenges by relying solely on the facts concerning the prosecutor's use of peremptory challenges at his trial.¹⁷ After describing the Illinois courts' application of *Batson* and the potential for continued discriminatory use of peremptory challenges under that application, this Comment will consider alternative approaches for eliminating the potential for prosecutors to use peremptory challenges to effect a discriminatory practice originally condemned over a century ago.¹⁸

II. BACKGROUND

A. *The Supreme Court's Position Prior to Batson*

In *Strauder v. West Virginia*,¹⁹ the United States Supreme Court laid the foundation for removing racial discrimination from the jury selection process by declaring unconstitutional a West Virginia statute that explicitly limited the right to serve on a jury to white males.²⁰ The Court recognized that the issue was not whether an African-American defendant is entitled to a "grand or a petit jury composed in whole or in part of persons of his own race or color," but whether "all persons of his race or color may be excluded by law, solely because of their race or color."²¹ The Court concluded that West Virginia denied the African-American defendant equal protection of the laws when trying the defendant before a jury from which the State purposefully had excluded

16. See *infra* notes 19-39 and accompanying text.

17. See *infra* notes 43-57 and accompanying text.

18. See *infra* notes 96-103 and accompanying text.

19. 100 U.S. 303 (1880).

20. *Id.* at 310. The West Virginia law provided that "[a]ll white male persons who are twenty-one years of age and who are citizens of this State shall be liable to serve as jurors, except as herein provided." *Id.* at 305.

The defendant in *Strauder*, an African-American male, was indicted for murder and subsequently convicted by an all-white, all-male jury. *Id.* at 304. On appeal, he asserted that West Virginia's jury selection statute violated the fourteenth amendment of the Constitution. The defendant claimed that because the West Virginia statute limited to white males the right to serve as jurors, he could not have the benefit of all laws and proceedings in West Virginia equal to that enjoyed by white citizens. *Id.*

21. *Id.* at 305.

members of his race.²²

Despite the holding in *Strauder*, African-Americans "rarely appeared on jury lists in the South" during most of the one hundred years following the Civil War.²³ Prosecutors and other governmental officials carried out the exclusion of African-Americans from jury service through less blatant means than the West Virginia statute. These means included: Discretionary selection procedures that allowed jury commissioners to discriminate against African-Americans either through deliberate design or because African-Americans were under-represented in the occupational classes preferred for juror selection;²⁴ selecting jurors from lists of property owners;²⁵ and exclusive reliance on the voter registration list, which under-represented African-Americans.²⁶

When African-Americans were allowed onto the jury venire, the prosecution often used its peremptory challenges to exclude them from serving on the jury.²⁷ This discriminatory pattern of challenges led to an attack on the scope of the prosecution's right to exercise peremptory challenges.²⁸ In 1965, in *Swain v. Alabama*, the Court finally considered whether the prosecutor's historical privilege of peremptory challenges, which prosecutors had exercised free of judicial control, had become a tool for circumventing the constitutional prohibition on exclusion of potential jurors because of race.²⁹

In considering whether the prosecution had used its peremptory challenges in a discriminatory manner, the *Swain* Court indicated that not one African-American had served on a petit jury in Talladega County since 1950.³⁰ In *Swain's* trial, none of the eight Af-

22. *Id.* at 310. The Court acknowledged that the composition of the jury is an essential part of the protection that trial by jury is intended to secure. *Id.* at 308. The West Virginia statute, however, expressly singled out African-Americans and denied them the right to participate in the administration of justice. *Id.* West Virginia's statute also violated the right of African-American defendants to equal protection of the laws because the statute denied them a jury of their peers by excluding their "neighbors, fellows, [and] associates," while those of white defendants were not excluded. *Id.* The statute violated the excluded African-American jurors' "right to exemption from unfriendly legislation against them distinctively as colored, — exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which the others enjoy." *Id.*

23. J. VAN DYKE, *supra* note 3, at 150.

24. *Id.* at 30.

25. *Id.* at 33.

26. *Id.* at 30.

27. *Id.*

28. *Id.* at 150.

29. *Swain v. Alabama*, 380 U.S. 202, 203 (1965).

30. *Id.* at 205. At the time, African-American males over 21 constituted 26% of all

frican-Americans on the venire served on the jury.³¹ Two of them were exempt and the remaining six were peremptorily challenged by the prosecutor.³² The prosecutor, who had served since 1953, stated that "striking is done differently depending on the race of the defendant and the victim of the crime."³³ He testified that he sometimes asked opposing counsel if he wanted African-Americans on the jury. If opposing counsel did not and the prosecutor felt the same way, both counsel would use their challenges to strike all African-American veniremen first.³⁴

Despite these facts, the Supreme Court stated that the record did not establish that the prosecution regularly challenged African-American jurors because of their race.³⁵ The Court refused to consider the matter any further.³⁶ The majority concluded that the defendant had not shown that the prosecution systematically used its peremptory challenges to deny African-Americans the right to participate in the jury system,³⁷ and the Court affirmed Swain's conviction.³⁸

males in Talladega County in that age group. *Id.* Also, the record showed that the prosecution offered African-Americans an opportunity to sit on a petit jury in only one case in the history of the county. *Id.* at 236 (Goldberg, J., dissenting). The prosecution offered an African-American defendant an all African-American jury in a case involving an alleged crime against another African-American. *Id.*

31. *Id.* at 205.

32. *Id.*

33. *Id.* at 225.

34. *Id.* at 225 n.31.

35. *Id.* Justice Goldberg, however, differed:

With all deference, it seems clear to me that the record statement quoted by the Court . . . cuts against rather than in favor of the Court's statement and inference that the general practice was not to exclude Negroes by agreement between the prosecution and defense or by the State acting alone Since it is undisputed that no Negro has ever served on a jury in the history of the county, and a great number of cases have involved Negroes, the only logical conclusion . . . is that in a good many cases Negroes have been excluded by the state prosecutor, either acting alone or as a participant in arranging agreements with the defense.

Id. at 235 (Goldberg, J., dissenting).

36. *Id.* at 225 n.31.

37. *Id.* at 226.

38. *Id.* at 228. The Court stated that:

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

Id. at 222.

An interesting insight into the views of one prosecutor's office was provided in 1973 when a Texas paper reprinted parts of a book prepared and used by the Dallas County District Attorney's Office to train Texas prosecutors:

Moreover, the Court stated that an inference of purposeful discrimination would be raised only if the defendant could show that the prosecutor "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be," excluded potential African-American jurors "with the result that no Negroes ever serve on petit juries."³⁹

A number of lower courts following *Swain* held that a defendant must offer evidence of systematic striking of African-Americans over several cases to establish a violation of the fourteenth amendment.⁴⁰ This line of decisions made proving a case of systematic exclusion extremely difficult for defendants, especially in jurisdictions that did not keep records of each juror's race. Also, as one court pointed out, even where such records are kept, the defendant may have neither the time nor the resources to compile the information.⁴¹ Moreover, jurisdictions may be reluctant to release this information to defendants.⁴²

III. What to look for in a juror.

A. Attitudes

1. You are not looking for a fair juror, but rather a strong, biased and sometimes hypocritical individual who believes that Defendants are different from them in kind, rather than degree.

2. You are not looking for any member of a minority group which may subject him to oppression — they almost always empathize with the accused.

J. VAN DYKE, *supra* note 3, at 152. An earlier jury-selection treatise used in the same county recommended: "Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated." *Batson*, 476 U.S. at 104 n.3 (Marshall, J., concurring) (quoting Dallas Morning News, Mar. 9, 1986, at 29, col. 1).

39. *Swain*, 380 U.S. at 223.

40. See, e.g., *United States v. Jenkins*, 701 F.2d 850, 860 (10th Cir. 1983); *United States v. Boykin*, 679 F.2d 1240, 1245 (8th Cir. 1982); *United States v. Pearson*, 448 F.2d 1207, 1214 (5th Cir. 1971); *Thigpen v. State*, 49 Ala. App. 233, 241, 270 So. 2d 666, 673 (1972); *Jackson v. State*, 245 Ark. 331, 336, 432 S.W.2d 876, 878 (1968); *Johnson v. State*, 9 Md. App. 143, 148-50, 262 A.2d 792, 796-97 (1970); *State v. Shaw*, 284 N.C. 366, 200 S.E.2d 585 (1973).

41. *United States v. Childress*, 715 F.2d 1313, 1317 (8th Cir. 1983), *cert. denied*, 464 U.S. 1063 (1984). One Illinois court stated that:

It is well settled that the responsibility for the proper preservation of the record of proceedings before the trial court rests on a defendant A consideration of a defendant's challenge to the composition of a jury cannot be made without an adequate record of *voir dire* By failing to provide this court with a transcript of the *voir dire*, or some suitable substitute, defendant has failed to meet his burden of proving that the circumstances surrounding the empaneling of the jury led to purposeful discrimination.

People v. Brown, 152 Ill. App. 3d 996, 1002, 505 N.E.2d 397, 400-01 (4th Dist. 1987) (citations omitted).

42. See *United States v. Carter*, 528 F.2d 844, 847 (8th Cir. 1975), *cert. denied*, 425 U.S. 961 (1976) (defendant obtained court order to examine jury records of previous trials).

B. *Batson v. Kentucky*

In *Batson v. Kentucky*, the Supreme Court acknowledged that several lower courts had interpreted *Swain* as holding that proof of repeated striking of African-American veniremen over a number of cases was needed to establish a prima facie case of discrimination under the equal protection clause.⁴³ The Court concluded that this interpretation of *Swain* placed a "crippling burden of proof" on defendants and left a State's use of peremptory challenges immune from constitutional scrutiny.⁴⁴ For these reasons, the Court reexamined the portion of *Swain* concerning the evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of the defendant's race from the petit jury.

In *Batson*, an all-white jury tried an African-American defendant after the prosecutor used his peremptory challenges to strike all four African-Americans on the venire.⁴⁵ *Batson* was convicted of second-degree burglary and receipt of stolen goods.⁴⁶ On appeal to the Supreme Court of Kentucky, *Batson* conceded that *Swain* foreclosed an equal protection claim based only on the prosecutor's conduct in his case.⁴⁷ Instead, *Batson* urged the court to follow decisions of other states⁴⁸ and hold that the prosecutor's use of peremptory challenges violated *Batson's* rights to a jury drawn from a fair cross-section of the community under the sixth amendment to the United States Constitution and the Kentucky Constitution.⁴⁹

43. *Batson*, 476 U.S. at 92.

44. *Id.* at 92-93.

45. *Id.* at 83.

46. *Id.*

47. *Id.*

48. See *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978); *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499, cert. denied, 444 U.S. 881 (1979).

49. *Batson*, 476 U.S. at 83. In 1968, the Supreme Court held that the states are bound by the sixth amendment's requirement of trial "by an impartial jury" in criminal prosecutions. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). As one commentator stated:

The Court has said that an 'impartial' jury must be a representative jury, but it has never laid down an explicit rule on what mathematical standards will govern jury challenges and instead prefers to deal with all the problems raised by this language on a case-by-case basis.

The Court has developed certain guidelines by which to judge jury challenges. In order to challenge successfully a method of jury selection, a litigant must show both (1) that some clearly identifiable group (or 'cognizable class') has been deprived of its fair share of seats on the jury panels, and (2) that this deprivation occurred not by chance but through governmental design at some level, namely, that an 'opportunity to discriminate' exists.

The Supreme Court of Kentucky rejected this argument and affirmed the conviction.⁵⁰ The United States Supreme Court reversed the decision of the Supreme Court of Kentucky, holding that a defendant may make a prima facie showing of purposeful racial discrimination in jury selection by relying solely on the facts concerning his case.⁵¹ The Court indicated that the prosecution's privilege to strike peremptorily potential jurors is subject to the equal protection clause.⁵² The Court then reiterated the principle announced in *Strauder v. West Virginia* that the State denies an African-American defendant equal protection of the laws when it tries him before a jury from which members of his race have been purposefully excluded. Moreover, this principle has never been questioned in any of the Court's subsequent decisions.⁵³

Having discussed the right to be tried by a jury whose members were selected pursuant to nondiscriminatory criteria, the Court then addressed the public policies underlying recognition of this right.⁵⁴ The Court noted that "discriminatory selection procedures make 'juries ready weapons for officials to oppress those accused individuals who by chance are numbered among unpopular or inarticulate minorities.'"⁵⁵ According to the Court, racial discrimination in the selection of jurors harms the excluded jurors in addition to the defendant.⁵⁶ Discriminatory jury selection also undermines public confidence in the fairness of the American justice system.⁵⁷

J. VAN DYKE, *supra* note 3, at 47.

Illinois courts have held that the sixth amendment fair cross-section requirement places no limits on the use of peremptory challenges, and extends only to venires, panels, or lists from which jurors are drawn. *People v. Taylor*, 171 Ill. App. 3d 261, 524 N.E.2d 1216 (1st Dist. 1988). *See also* *Teague v. Lane*, 820 F.2d 832, 843 (7th Cir. 1987).

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

51. *Id.* at 96.

52. *Id.* at 89.

53. *Id.*

54. *Id.* at 87.

55. *Id.* at 86-87 n.8 (quoting *Akins v. Texas*, 325 U.S. 398, 408 (1945) (Murphy, J., dissenting)).

56. *Id.* at 87.

57. *Id.* Chief Justice Burger, joined in dissent by Justice Rehnquist, strongly criticized the Court's analysis of the case. *Id.* at 112 (Burger, C.J., dissenting). According to Burger, the Court dramatically departed from its usual procedure by reaching the equal protection issue despite *Batson's* specific disavowal of any reliance on the equal protection clause. *Id.* (Burger, C.J., dissenting). Moreover, Chief Justice Burger noted that the Court had consistently refused to decide constitutional arguments raised for the first time on review of state court decisions. *Id.* at 113 (Burger, C.J., dissenting).

Burger also criticized the merits of the majority's decision, arguing that permitting "inquiry into the basis for a peremptory challenge would force 'the peremptory challenge [to] collapse into the challenge for cause.'" *Id.* at 127 (Burger, C.J., dissenting) (quoting

III. ILLINOIS COURTS' APPLICATION OF *BATSON*

A. *Establishing a Prima Facie Case*

In *Batson*, the Supreme Court stated that to succeed in an equal protection claim alleging discriminatory jury selection practices, the defendant must first show that he is a member of a "cognizable racial group."⁵⁸ Moreover, the Illinois Supreme Court has read *Batson* as holding that the defendant has standing to object only to the exclusion of veniremen of his own cognizable group.⁵⁹

In *People v. Holland*, the Illinois Supreme Court concluded that a defendant challenging the exclusion of prospective jurors because of their race must show that members of his cognizable group were excluded impermissibly.⁶⁰ The court found that the defendant in *Holland* failed to establish the threshold element of a *Batson* claim because the defendant was white and the excluded jurors were African-American.⁶¹ Lower courts have followed this approach.⁶² According to one author, this approach reflects the rationale that a prospective juror will be biased in the defendant's favor because of

United States v. Clark, 737 F.2d 679, 682 (7th Cir. 1984)). Also, Justice Rehnquist wrote in a separate dissent:

[T]here 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.

Id. at 137-38 (Rehnquist, J., dissenting). Justice Rehnquist also rejected the argument that the equal use of peremptory challenges against members of "majority" and "minority" racial groups has an unequal impact because a given population includes fewer minorities. *Id.* at 138 n.1 (Rehnquist, J., dissenting).

58. *Id.* at 96. The Court cited the definition of a "cognizable group" used in *Castaneda v. Partida*, 430 U.S. 482, 494 (1977), noting that the defendant "must show that he is a member of a racial group capable of being singled out for differential treatment." *Batson*, 476 U.S. at 94. A cognizable group is one that is a "recognizable, distinct class, singled out for different treatment under the laws, as written or as applied." *Castaneda*, 430 U.S. at 494.

59. *People v. Holland*, 121 Ill. 2d 136, 157, 520 N.E.2d 270, 279 (1987), *cert. granted*, 57 U.S.L.W. 3570 (1989).

60. *Id.*

61. *Id.*

62. *See, e.g., People v. Treece*, 159 Ill. App. 3d 397, 409, 511 N.E.2d 1361, 1368 (2d Dist. 1987) (a white defendant does not have standing to assert a *Batson* violation in the State's use of peremptory challenges to exclude African-American prospective jurors); *People v. Zayas*, 159 Ill. App. 3d 554, 560, 510 N.E.2d 1125, 1129 (1st Dist. 1987) (a Latino defendant lacks standing to challenge the partial exclusion of African-Americans from the jury); *People v. Crowder*, 161 Ill. App. 3d 1009, 1013, 515 N.E.2d 783, 786 (1st Dist. 1987) (a male defendant lacks standing to challenge the State's exclusion of women from the jury).

their shared ethnicity.⁶³

Thus, Illinois courts have followed the Supreme Court mandate that once a defendant has shown that he is a member of a cognizable group, the defendant must prove that the prosecutor exercised peremptory challenges to exclude from the jury members of the defendant's cognizable racial group.⁶⁴ The defendant may rely on the fact, "as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" ⁶⁵ Finally, to succeed on his equal protection claim, the defendant must show that the facts and any other relevant circumstances raise an inference that the prosecutor used peremptory challenges to strike potential jurors because of their race.⁶⁶

The determination of what factual circumstances permit a defendant to establish a prima facie claim of racial discrimination has varied among the courts. In *People v. McDonald*,⁶⁷ for example, the Illinois Supreme Court determined that the prosecutor's striking of sixteen African-American veniremen, coupled with the fact that race was their only common characteristic, was a factor in establishing a prima facie case of discrimination.⁶⁸ Other factors that Illinois courts consider include the interracial nature, if any, of the crime,⁶⁹ the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges,⁷⁰ and any disproportionate use of challenges.⁷¹

In *People v. Seals*, the court found that the exclusion of twice as many African-American jurors as white jurors, resulting in only one African-American and one Latino serving on the jury, established a prima facie case of discrimination requiring a neutral ex-

63. See Robinson, *The Peremptory Challenge After Batson: Limits on the Prosecutor or License to Discriminate*, 76 ILL. B.J. 620 (1988).

64. *Batson v. Kentucky*, 476 U.S. 79, 96 (1986).

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

66. *Id.*

67. 125 Ill. 2d 182, 530 N.E.2d 1351 (1988).

68. *Id.* at 197, 530 N.E.2d at 1357.

69. *People v. Andrews*, 172 Ill. App. 3d 394, 526 N.E.2d 628 (1st Dist. 1988) (the race of the defendant and victim are material facts).

70. *People v. Brown*, 152 Ill. App. 3d 996, 505 N.E.2d 397 (4th Dist. 1987); *People v. Buckley*, 168 Ill. App. 3d 405, 522 N.E.2d 86 (2d Dist. 1987).

71. *People v. Seals*, 153 Ill. App. 3d 417, 505 N.E.2d 1107 (1st Dist. 1987). In *People v. Freeman*, 162 Ill. App. 3d 1080, 516 N.E.2d 440 (1st Dist. 1987), the Illinois Appellate Court for the First District concluded that a defendant established a prima facie case of purposeful discrimination under *Batson* by showing that the prosecution used 12 of its 18 peremptory challenges against prospective African-American jurors.

planation from the State or a new trial for the defendant.⁷² A pattern of exclusions in several cases is not required,⁷³ but past peremptory practices of the prosecutor can be presented as evidence that may give rise to an inference of discrimination.⁷⁴

In Illinois, a claim under *Batson* is undermined when the prosecutor has accepted members of the defendant's cognizable group on the jury or the prosecutor has failed to use some peremptory challenges that could have used to exclude more members of the defendant's group.⁷⁵ The rationale is that the government's restraint from excluding all African-Americans, or as many African-Americans as possible, from the jury undercuts any inference of impermissible discrimination.⁷⁶ As one court pointed out, however, the State's exclusion of available African-American jurors with the result that only one or two African-Americans sit on the jury "is no less evil and no less constitutionally prohibited than the same procedure which results in the total exclusion of [African-Americans]."⁷⁷

Unfortunately, Illinois' current view fails to address the problem of how a judge or defendant should deal with token representation of the defendant's group on the jury. The Illinois courts' approach allows a prosecutor to insulate his use of peremptory challenges from scrutiny by allowing one or two members of the defendant's cognizable group to sit on the jury.

B. *Neutral Explanations*

Even if a defendant in Illinois can establish a prima facie case of racial discrimination under *Batson*, the defendant faces additional problems in proving his case. Once the defendant establishes a prima facie case, the burden shifts to the prosecutor to come forward with neutral explanations for challenging the jurors.⁷⁸ The

72. *Seals*, 153 Ill. App. 3d at 423, 505 N.E.2d at 1111.

73. *People v. Daniels*, 164 Ill. App. 3d 138, 517 N.E.2d 626 (5th Dist. 1987).

74. *Id.* at 141, 517 N.E.2d at 628.

75. *See, e.g., People v. Grayson*, 165 Ill. App. 3d 1038, 1044, 520 N.E.2d 901, 905 (1st Dist. 1988) (the defendant failed to establish a prima facie case because the State used only eight of ten peremptory challenges, although the State used six against African-Americans and two against whites, and seated five or six African-Americans). *See also United States v. Dennis*, 804 F.2d 1208, 1211 (11th Cir. 1986) (striking three African-Americans need not be explained when prosecutor accepted two others and did not exercise three remaining peremptory challenges).

76. *Dennis*, 804 F.2d at 1211.

77. *People v. Andrews*, 172 Ill. App. 3d 394, 404, 526 N.E.2d 628, 635 (1st Dist. 1988).

78. *Batson v. Kentucky*, 476 U.S. 79, 97 (1986).

prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause; however, the prosecutor may not rebut a prima facie showing by stating that he challenged the jurors on the assumption that the jurors would be partial to the defendant because of their shared race, or by "affirm[ing] [his] good faith in making individual selections."⁷⁹ Under *Batson*, a neutral explanation offered by the prosecutor in rebuttal must be legitimate, reasonably specific, and related to the prosecutor's view regarding the outcome of the case.⁸⁰

Illinois courts have found a variety of explanations sufficient to rebut a claim of racial discrimination. These explanations include: The prosecutor "was not too happy with [the juror's] demeanor and how he answered the questions";⁸¹ the juror hesitated when asked "whether he would find the defendant guilty if the State proved guilt beyond a reasonable doubt";⁸² the juror was a controller, and the prosecutor believed "that individuals with a propensity for detail and meticulousness, such as controllers or accountants, did not make good jurors in a criminal case";⁸³ and the prosecutor "reasonably may have believed that young, single unemployed persons lack maturity and may have a tendency to identify with a young defendant charged with drug offenses."⁸⁴ Common associations with the defendant is also a neutral explanation.⁸⁵

IV. ANALYSIS

A major point not dealt with directly by any court is what the Supreme Court in *Batson* believed shifting the burden of proof to the prosecutor would accomplish. The prosecutor will invariably deny having any discriminatory intent, and the decisions interpreting and applying *Batson* indicate that a neutral explanation is almost any explanation that the prosecutor gives, as long as it does not mention race or ethnicity.⁸⁶ And, as one court pointed out, "[r]ubber stamp' approval of all nonracial explanations, no matter

79. *Id.* at 97-98 (quoting *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972)).

80. *Id.* at 98 n.20.

81. *People v. Talley*, 152 Ill. App. 3d 971, 987, 504 N.E.2d 1318, 1327 (4th Dist. 1987).

82. *People v. Peters*, 144 Ill. App. 3d 310, 321, 494 N.E.2d 853, 861 (2d Dist. 1986).

83. *Id.*

84. *People v. Taylor*, 171 Ill. App. 3d 261, 269, 524 N.E.2d 1216, 1221 (1st Dist. 1988).

85. *United States v. Woods*, 812 F.2d 1483, 1487 (4th Cir. 1987) (prosecutor's statement that the prospective juror may have attended the defendant's church, where the defendant was an ordained minister, constituted a neutral explanation).

86. See *supra* notes 81-85 and accompanying text.

how whimsical or fanciful, would cripple *Batson's* commitment to" restricting racial discrimination in the jury selection process.⁸⁷

Prosecutors easily can invent facially neutral reasons for removing prospective jurors, and the courts are ill-equipped to assess the legitimacy of the explanations provided.⁸⁸ This potential for abuse, for example, would allow "any prosecutor's office [to] develop a list of 10 or 15 standard reasons for striking a juror: the juror was 'inattentive' or dressed poorly and thus 'did not seem to respect the system of justice.'" ⁸⁹

Batson and other cases also avoided discussing the important problem of how a defendant is to deal with a prosecutor who allows only token representation of African-Americans, Latinos, Native Americans, and Asians on the jury. Under the current approach, prosecutors are free to discriminate in their use of peremptory challenges as long as they hold the discrimination to an "acceptable" level.⁹⁰ Another major problem with the current application of *Batson* is that it is extremely dependent upon the good faith of the judiciary for its success. This is unacceptable. As one author pointed out: "Discrimination bred by prejudice has contributed to widespread mistrust by black people of most of the (white-dominated) institutions of power, and most particularly the agencies of law enforcement."⁹¹ If these fears appear to border on paranoia, consider the role of the American judiciary in upholding institutionalized racism.⁹² For generations, the judiciary refused to

87. *State v. Butler*, 731 S.W.2d 265, 268 (Mo. Ct. App. 1987).

88. *Batson v. Kentucky*, 476 U.S. 79, 106 (1986) (Marshall, J., concurring).

89. *Butler*, 731 S.W.2d at 269 (quoting Stewart, *Court Rules Against Jury Selection Based on Race*, 72 A.B.A. J. 68, 70 (1986)).

90. See *supra* notes 75-77 and accompanying text.

91. *J. VAN DYKE*, *supra* note 3, at 32.

92. See T. CROSS, *THE BLACK POWER IMPERATIVE: RACIAL INEQUALITY AND THE POLITICS OF NONVIOLENCE* 376 (1987). Overall, the law, as interpreted by the Supreme Court, made it permissible officially to degrade African-Americans. R. KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 710-11 (1975).

A brief history of the American Bar Association's relationship with African-American attorneys is illustrative. The American Bar Association ("ABA") was formed in New York in 1878. Littlejohn, *Black Lawyers In Legal History: A Michigan Perspective*, 2 NAT'L B. ASS'N MAG. 8, 17 (1988). From the beginning, the ABA was very conservative and exclusive. *Id.* An explicit policy of excluding African-Americans began in 1911, when the ABA discovered that it had "elected three colored men to membership without knowing their race." *Id.* Although attempts to rescind the memberships of the three men failed, a resolution passed stating "that 'members of the colored race' were never [intended] as ABA members, and [that,] in the future, applicants must disclose their race." *Id.*

The ABA continued to exclude African-Americans until 1943, when the ABA adopted a resolution stating that "[m]embership . . . is not dependent upon race, creed, or color."

punish law enforcement officers for collaborating in the public lynching of African-Americans.⁹³ Many judges tolerated the refusal of southern state's attorneys to prosecute whites who committed violent crimes against African-Americans in the South.⁹⁴ As one commentator stated:

For a century or more, the judiciary consistently gave its stamp of approval to officially segregated schools, buses, libraries, washrooms, and public parks

In the northern states, too, de facto segregation or discrimination in public education, health care and employment was protected by [the federal and state judiciary]. All of the tricks and subterfuges used to politically gerrymander, disenfranchise, and otherwise contain the political rights of blacks in northern states and cities were successful in large measure because they always had the full cooperation of state and federal courts.⁹⁵

Like these earlier situations, Illinois courts have failed to root out discrimination in the jury selection process and to set forth an adequate solution for defendants who prove discrimination. Although no Illinois cases directly address this issue, in two states that constitutionally restrict peremptory challenges against cognizable groups, the trial court must dismiss the entire venire and select a jury from a new venire after a defendant has proven purposeful discrimination in jury selection.⁹⁶ Under California and Massachusetts law, if a court finds that peremptory challenges were predicated on group bias alone, "the court must . . . conclude that the jury as constituted fails to comply with the representative cross-section requirement."⁹⁷ The court must then dismiss the jurors already selected, and quash the remaining venire.⁹⁸ "Upon such [a] dismissal[,] a different venire shall be drawn and the jury

Id. Until 1956, however, the ABA continued to require applicants to designate their race on the application form. *Id.* at 25. The ABA also maintained a special file containing applications from African-Americans and others that needed special attention from the membership department. *Id.* Not until the 1960s did the ABA welcome African-American attorneys as members. *Id.*

93. T. CROSS, *supra* note 92, at 376.

94. *Id.*

95. *Id.* at 376-77.

96. *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978); *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979).

97. *Wheeler*, 22 Cal. 3d at 282, 583 P.2d at 765, 148 Cal. Rptr. at 906; *Soares*, 377 Mass. at 491, 387 N.E.2d at 518.

98. *Wheeler*, 22 Cal. 3d at 282, 583 P.2d at 765, 148 Cal. Rptr. at 906; *Soares*, 377 Mass. at 491, 387 N.E.2d at 518.

selection process may begin anew.”⁹⁹ Thus, the defendant “is entitled to a random draw from [the] entire venire[,] not from a venire that has been partially or totally stripped of members of a cognizable group by the improper use of peremptory challenges.”¹⁰⁰

In their *amici curiae* brief to *Batson*, the NAACP Legal Defense and Educational Fund, the American Jewish Committee, and the American Jewish Congress proposed the following remedy for *Batson* violations: From the point that defense counsel objects to the exclusion of a member of a racial or national origin minority group member, any such member should be replaced by a member of the same group.¹⁰¹ These organizations argued that this remedy would both correct the exclusion of ethnic minorities and leave undisturbed the proper use of peremptory challenges.¹⁰² They stated that “the mere existence of the rule would do much to end any discriminatory practice since prosecutors would know ahead of time that they would be unable, as a practical matter, to use challenges to exclude all Blacks from juries.”¹⁰³

V. CONCLUSION

The implementation of the *Batson* decision by Illinois courts enables the prosecution to engage successfully in all but the most overt and flagrant discriminatory use of peremptory challenges. Implementing the remedy suggested by the NAACP Legal Defense and Educational Fund and other organizations would destroy the incentive for perpetuating a practice that the Court first condemned in *Strauder v. West Virginia* over a century ago. The adoption of this remedy would provide clear guidelines for Illinois courts. Moreover, the adoption of this remedy would promote both the appearance and reality of impartial justice in our courts.

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99. *Wheeler*, 22 Cal. 3d at 282, 583 P.2d at 765, 148 Cal. Rptr. at 906; *Soares*, 377 Mass. at 491, 387 N.E.2d at 518.

100. *Wheeler*, 22 Cal. 3d at 282, 583 P.2d at 765, 148 Cal. Rptr. at 906; *Soares*, 377 Mass. at 491, 387 N.E.2d at 518.

101. Brief for *Amici Curiae*, *Batson v. Kentucky*, 476 U.S. 79 (1986) (No. 84-6263) (LEXIS, Genfed library, Briefs file).

102. *Id.*

103. *Id.*

