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Swain Song of the Racially Discriminatory Use of Peremptory Challenges, The--Sixth and Fourteenth Amendments: Batson v. Kentucky, 106 S. Ct. 1712 (1986)

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SIXTH AND FOURTEENTH AMENDMENTS—THE *SWAIN* SONG OF THE RACIALLY DISCRIMINATORY USE OF PEREMPTORY CHALLENGES

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

I. INTRODUCTION

For over twenty years, since *Swain v. Alabama*,[1] the Supreme Court has permitted prosecutors to use their peremptory challenges in a particular case to exclude members of a racial minority from petit jury service. The Court recently overturned this rule in *Batson v. Kentucky*,[2] holding that whenever a criminal defendant makes a prima facie case of purposeful discrimination, the burden shifts to the prosecutor to explain his challenges on nonracial grounds.[3]

The Court's decision in *Swain* had been subjected to "two decades [of] . . . almost universal and scathing criticism"[4] prior to *Batson*. During that period, many state and federal courts used one of two methods of circumventing *Swain*: several state courts relied on state constitutional grounds to invalidate the discriminatory use of peremptory challenges;[5] panels of the Second and Sixth Circuits reasoned that a number of sixth amendment cases decided subsequent to *Swain* (which addressed equal protection arguments) provide a separate federal constitutional basis for banning the practice.[6]

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1 380 U.S. 202 (1965).

2 106 S. Ct. 1712 (1986).

3 *Id.* at 1725. *See infra*, text accompanying notes 64-68.

4 McCray v. New York, 461 U.S. 961, 964 (1983)(Marshall, J., dissenting from denial of certiorari).

5 People v Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978); State v. Neil, 457 So. 2d 481 (Fla. 1984); Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979); State v. Crespin, 94 N.M. 486, 612 P.2d. 716 (Ct. App. 1980); *but see* People v. Payne, 99 Ill. 2d 135, 457 N.E.2d 1202 (1983).

6 Booker v. Jabe, 775 F.2d 762 (6th Cir. 1985); McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984); *but see* United States v. Leslie, 783 F.2d 541 (5th Cir. 1986)(en banc); United States v. Brown, 770 F.2d 912 (10th Cir.) *cert. granted*, 106 S. Ct. 2275 (1986); United States v. Childress, 715 F.2d 1313 (8th Cir. 1983)(en banc), *cert. denied*, 464 U.S. 1063 (1984); United States v. Whitfield, 715 F.2d 145 (4th Cir. 1983).

While the Court's decision in *Batson* resolves many of the equal protection issues raised by the criticism of *Swain*,[7] it poses a host of new questions. Among the most important are: whether *Batson* should be applied retroactively; whether challenges should be abolished completely;[8] whether the rule in *Batson* should apply to defense counsel as well as prosecutors; and whether the discriminatory use of peremptory challenges violates the sixth amendment as well as the equal protection clause.

This Note reviews the decision in *Swain* and the subsequent efforts of many state and federal courts to avoid the rule which it promulgated. Next, it provides a discussion of the Court's decision in *Batson*. The Note then examines the questions, outlined above, which the Court's decision in *Batson* poses. Finally, the Note concludes that the Court correctly decided *Batson* and recommends that the Court extend its holding to defense counsel as well as prosecutors.

II. THE ROAD TO *BATSON*

The Supreme Court first applied the fourteenth amendment to discriminatory jury selection in *Strauder v. West Virginia*.[9] In that case, the Court invalidated a West Virginia statute which limited both petit and grand jury service to white men.[10] The Court reasoned that such discrimination on the face of a statute "is practically a brand upon them [blacks], affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others."[11]

While the question of statutory exclusion of blacks from jury venires, and thus from petit juries, engenders a relatively simple equal protection analysis, the exclusionary use of peremptory challenges is by no means as straightforward. "[B]oth prosecutors and defense counsel have come to rely on the peremptory to remove jurors they suspect of prejudice. By definition, the peremptory chal-

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[7] Perhaps the most telling of these criticisms challenged *Swain* on the ground that the evidentiary standards of the decision precluded a remedy for the defendant when a prosecutor systematically eliminated members of his race from the petit jury in that particular case. *See* McCray v. New York, 461 U.S. at 963 (Marshall, J., dissenting).

[8] *Batson*, 106 S. Ct. at 1726 (Marshall, J., concurring).

[9] 100 U.S. 303 (1880).

[10] The statute 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. . . ." *Id.* at 305 (quoting Acts of 1872-73, at 103).

[11] 100 U.S. at 308.

lenge does not require an explanation."[12] The Court has long emphasized the importance of the peremptory challenge within the criminal justice system. "Although the Court has held that the peremptory is not a constitutional requirement, it always has been considered one of the most effective means of securing an impartial jury and of satisfying the defendant of that impartiality."[13]

Because the peremptory challenge allows attorneys on both sides such untrammeled discretion, the potential for discriminatory abuse has always existed. The race, religion, or gender of a prospective juror has caused many attorneys to exercise a peremptory challenge on the theory that the prospective juror's race, religion, or gender will dispose him one way or the other toward the defendant. This belief conflicts with the basic objectives underlying the equal protection clause, in that the prosecutor, a representative of the state, consciously discriminates on the basis of race, religion, or gender. The Supreme Court finally resolved this conflict between the fourteenth amendment and the traditions behind the peremptory challenge when it decided *Swain v. Alabama* in 1965.

A. *SWAIN v. ALABAMA*

In *Swain*, an all-white jury convicted the petitioner, a black man, of rape.[14] The jury was selected from a venire drawn from the general population of Talladega County, Alabama. Black males constituted twenty-six percent of all males over twenty-one in the county. Between ten and fifteen percent of the members of the jury panels which produced grand and petit juries had been black during the period between 1953 and 1965.[15] In spite of these statistics, no black had served on a petit jury since approximately 1950. The jury which convicted the petitioner in *Swain* was drawn from a venire containing eight blacks. Two of these jurors were exempt, and the prosecutor struck the other six.[16]

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12 Saltzburg & Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 MD. L. REV. 337, 340 (1982). The peremptory challenge serves as an important component of the jury selection process. After the attorneys have conducted the *voir dire* examination, they may exercise an unlimited number of challenges for cause. In order to remove a juror for cause, however, an attorney must prove actual or implied bias, often an impossible task.

13 *Id.* at 341 (citing Stilson v. United States, 250 U.S. 583, 586 (1919)(footnote omitted)). The Court in *Stilson* refused to interpret the sixth amendment to require that several defendants be treated as a single party for the purpose of exercising their peremptory challenges, because nothing in the Constitution required Congress to grant peremptory challenges in the first place. *Id.*

14 380 U.S. at 203.

15 *Id.* at 205.

16 *Id.*

In Part II of his majority opinion, Justice White provided a long description of the history and value of the peremptory challenge. He found that "[t]he function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise."[17] Justice White concluded:

> With these considerations in mind, we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws. In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause. . . . In light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, we cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case. The presumption in any 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.[18]

Justice White also addressed the petitioner's argument that the prosecutor in Talladega County had systematically excluded blacks from all petit juries, not just the one in petitioner's case. He "agree[d] that this claim raises a different issue and it may well require a different answer."[19] The Court, however, found the claim invalid because the record did not establish a prima facie case of systematic exclusion of blacks in the county.[20] The Court based its finding on the fact that the record did not indicate when blacks had been removed by the prosecution in Talladega County, when the defense had agreed to exclude blacks from the jury, and when blacks were removed for cause. The record thus

> [did] not support an inference that the prosecutor was bent on striking Negroes, regardless of trial related considerations. The fact remains, of course, that there has not been a Negro on a jury in Talladega County since about 1950. But the responsibility of the prosecutor is

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17 *Id.* at 219.

18 *Id.* at 221-22.

19 *Id.* at 223.

20 *Id.* at 224. A prima facie case is established

> when the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries. . . .

Id. at 223.

not illuminated in this record.[21]

The three dissenting Justices disputed the Court's finding that the record did not establish state involvement in the systematic exclusion of blacks from juries in Talladega County. Moreover, they contended that even if the record did not provide positive evidence of state involvement, the very fact that no black had ever served on a petit jury in the county established a prima facie case of unlawful discrimination, shifting the burden to the state to prove a nonracial reason for the exclusion.[22]

More importantly, however, the dissent agreed with the Court's conclusion that the systematic exclusion of blacks from the petit jury in a particular case does not overcome the presumption that the prosecutor did not base the exercise of his challenges on the race of the veniremen. Thus, even if the dissent had prevailed in *Swain*,

> [i]t would not mean . . . that Negroes are entitled to proportionate representation on a jury. . . . Nor would it mean that where systematic exclusion of Negroes from jury service has not been shown, a prosecutor's motives are subject to question or judicial inquiry when he excludes Negroes or any other group from sitting on a jury in a particular case.[23]

Thus, eight of the nine Justices in *Swain* limited a defendant's right to challenge discriminatory selection of a petit jury to cases where he can show that such discrimination had occurred in a series of cases over a period of years.[24]

B. STATE APPROACHES

The Supreme Court of California, in *People v. Wheeler*,[25] became the first state supreme court to rely upon its own state constitution to disallow a criminal conviction when the prosecutor removed all of the blacks from the venire. The California court held that Article I, Section 16 of the California Constitution[26] "includes the right to have that verdict rendered by impartial and unprejudiced jurors."[27] In order to attain the benefits of this right, the court reasoned that the jury must be drawn from a representative cross-section of the

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21 *Id.* at 226.

22 *Id.* at 238 (Goldberg, J., dissenting)(citing Norris v. Alabama, 294 U.S. 587 (1935) and Patton v. Mississippi, 332 U.S. 463 (1947)). Chief Justice Warren and Justice Douglas joined Justice Goldberg's dissent.

23 *Id.* at 245 (Goldberg, J., dissenting)(citation omitted).

24 This view cannot be said to be unanimous because Justice Black concurred without opinion in the result reached by the majority. *Id.* at 228 (Black, J., concurring).

25 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890.

26 "Trial by jury is an inviolate right and shall be secured to all. . . ." CAL. CONST. art. I, § 16.

27 *Wheeler*, 22 Cal. 3d at 265, 583 P.2d at 754, 148 Cal. Rptr. at 895.

community.[28] This right "is guaranteed equally and independently by the Sixth Amendment to the federal Constitution and by article I, section 16 of the California constitution."[29] Finally, the court "conclude[d] that the use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community. . . ."[30]

The Supreme Judicial Court of Massachusetts, in *Commonwealth v. Soares*,[31] followed California's lead. The *Soares* court considered an invitation by counsel for the Commonwealth to incorporate the *Swain* standard into Article 12 of the Massachusetts constitution.[32] Like the California tribunal, the *Soares* court found that the jury must be drawn from a cross-section of the community in order to satisfy the constitutional mandate for an impartial jury.[33] The Massachusetts court concluded "we view art. 12 of the Declaration of Rights as proscribing . . . the use of peremptory challenges to exclude prospective jurors solely by virtue of their membership in, or affiliation with, particular, defined groupings in the community."[34]

The Florida Supreme Court adopted the *Wheeler-Soares* approach to circumvent *Swain*.[35] The Court of Appeals of New Mexico wrote, in dicta, that "improper, systematic exclusion by use of peremptory challenges can be shown . . . under the *Wheeler-Soares* rationale and supported by Article II, Section 14 of the New Mexico Constitution, where the absolute number of challenges in the one case raises the inference of systematic acts by the prosecutor."[36] Additionally, courts in Delaware and New Jersey also followed this

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[28] *Id.* at 265-72, 583 P.2d at 754-58, 148 Cal. Rptr. at 895-99.

[29] *Id.* at 272, 583 P.2d at 758, 148 Cal. Rptr. at 899-900. The court relied heavily upon the United States Supreme Court's similar conclusion concerning the sixth amendment in Taylor v. Louisiana, 419 U.S. 522 (1975).

[30] 22 Cal. 3d at 276-77, 583 P.2d at 761-62, 148 Cal. Rptr. at 902.

[31] 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979).

[32] *Id.* at 469, 387 N.E.2d at 508. Article 12 guarantees all defendants a fair trial by an impartial jury. It provides that "no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land." MASS. CONST. art. 12.

[33] 377 Mass. at 473, 387 N.E.2d at 511-12. This court also relied upon the Supreme Court's decision in Taylor v. Louisiana, 419 U.S. 522 (1975).

[34] 377 Mass. at 477, 387 N.E.2d at 515.

[35] The Supreme Court of Florida held that Article I, section 16 of the Florida Constitution prohibits both the state and the defendant from employing peremptory challenges to exclude prospective jurors on account of race. State v. Neil, 457 So. 2d 481 (Fla. 1984).

[36] State v. Crespin, 94 N.M. 486, 488, 612 P.2d 716, 718 (Ct. App. 1980). The Supreme Court of New Mexico has not spoken on this issue.

approach.[37] Five state courts, however, refused to follow this line of cases, preferring to apply analyses similar to that in *Swain* to the state constitutional provisions at issue.[38]

C. THE SIXTH AMENDMENT APPROACH

As noted above, both the *Wheeler* and *Soares* courts observed that the decision of the United States Supreme Court in *Taylor v. Louisiana*[39] may have precluded *Swain* under the sixth amendment. At least two federal circuits have taken a further step. Both the Second and Sixth Circuits held that while *Swain* precluded the invocation of the fourteenth amendment to overturn convictions in which the prosecution has systematically employed its peremptory challenges against black veniremen in a particular case, the sixth amendment, as interpreted in *Taylor*, mandates such a result.[40]

The Second Circuit adopted the sixth amendment argument in *McCray v. Abrams*.[41] The *McCray* court refused to disregard the

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[37] Riley v. State, 496 A.2d 997 (Del. 1985), *cert. denied*, 106 S. Ct. 3339 (1986); State v. Gilmore, 199 N.J. Super. 558, 489 A.2d 1175 (1985).

[38] State v. Wiley, 144 Ariz. 525, 698 P.2d 1244 (1985)(en banc); People v. Fields, 697 P.2d 749 (Colo. App. 1984)(certiorari granted by Colorado Supreme Court, No. 84 S.C. 382, March 11, 1985); People v. Payne, 99 Ill. 2d 135, 457 N.E.2d 1202 (1983); Hobson v. State, 471 N.E.2d 281 (Ind. 1984); Nevius v. State, 699 P.2d 1053 (Nev. 1985).

[39] 419 U.S. 522 (1975). *See supra* notes 29 & 33.

[40] Booker v. Jabe, 775 F.2d 762 (6th Cir. 1985); McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984). The Supreme Court has never addressed the sixth amendment argument; the *Batson* majority specifically refused to consider it. 106 S. Ct. at 1716 n.4. This Note will defer discussion of court of appeals cases opposed to this view until Section IV.D., which analyzes the sixth amendment considerations with regard to the discriminatory use of peremptory challenges in light of *Batson*. *See infra* text accompanying notes 118-29.

[41] 750 F.2d 1113 (2d Cir. 1984). *McCray* had a long, checkered history in both the New York courts and the federal courts. At trial, the defendant first moved for a mistrial on the ground that the prosecution had excluded black jurors on account of their race. The trial court denied this motion. People v. McCray, 104 Misc. 2d 782, 429 N.Y.S.2d 158 (Sup. Ct. Kings County 1980). The Appellate Division affirmed without opinion. 444 N.Y.S.2d 972 (1981). The New York Court of Appeals also affirmed, resting squarely on the authority of *Swain*. 57 N.Y.2d 543, 549, 443 N.E.2d 915, 919, 457 N.Y.S.2d 441, 445 (1982). McCray then petitioned the United States Supreme Court for a writ of certiorari. The Court's subsequent denial of certiorari was most unusual. Justice Marshall, joined by Justice Brennan, dissented from the denial and called for a reconsideration of *Swain*. McCray v. New York, 461 U.S. 961, 966 (1983)(Marshall, J., dissenting). Even more interestingly, Justice Stevens, joined by Justices Blackmun and Powell, agreed with Justice Marshall that the issue merited reconsideration but concurred in the denial of certiorari in order to allow the lower courts to provide further assistance in its resolution. 461 U.S. at 961-63 (Stevens, J., concurring). McCray next turned to the federal courts, seeking a writ of habeas corpus on the ground that the prosecution's use of its peremptory challenges denied his sixth amendment rights. The district court granted the petition as to the sixth amendment, and further concluded, relying upon the opinions accompanying the denial of McCray's petition for certiorari

Swain Court's reading of the equal protection clause.[42] After reviewing the Supreme Court's analysis of the sixth amendment, the court addressed the argument that the fair cross-section requirement, as delineated in *Taylor*, applied only to the selection of the venire, not to the selection of the petit jury from the venire. The court pointed out that the only reason for the venire's existence is to produce petit juries; therefore, if the sixth amendment requires that the venire be selected from a fair cross-section of the community, "[t]he necessary implication is that the Sixth Amendment guarantees the defendant . . . the chance that the petit jury will be similarly constituted."[43] After observing that *Swain* did not immunize peremptory challenges from sixth amendment scrutiny,[44] the court concluded "that the Sixth Amendment's guarantee of trial by an impartial jury . . . forbids the exercise of such challenges to excuse jurors solely on the basis of their racial affiliation" since such exclusion necessarily precludes completely any possibility that the jury will represent a fair cross-section of the community.[45]

The Sixth Circuit adopted the sixth amendment argument in *Booker v. Jabe*.[46] Like the Second Circuit, the *Booker* court was clearly dissatisfied with *Swain*, but refused to depart from its teaching with regard to the equal protection clause.[47] The court, however, did not end its analysis with the equal protection clause. The court in *Booker* pointed out that the Supreme Court decided *Swain* three years prior to *Duncan v. Louisiana*,[48] which first applied the sixth amendment to state criminal proceedings.[49] The court observed that under current sixth amendment analysis, a jury must be "the product of selection methods that provide a fair possibility for ob-

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by the Supreme Court, that *Swain* was no longer good law with regard to the equal protection clause. McCray v. Abrams, 576 F. Supp. 1244, 1249 (E.D.N.Y. 1983). The state's appeal of this ruling finally brought the case before the Second Circuit. 750 F.2d 1113 (2d Cir. 1984).

42 *McCray*, 750 F.2d at 1123-24.

43 *Id.* at 1128-29.

44 *Id.* at 1130.

45 *Id.* at 1131.

46 775 F.2d 762 (6th Cir. 1985).

47 The court stated:

> Were it within our power to right the manifest error that we believe *Swain* represents, we would hold that the prosecutor's conduct in the present case violated the Equal Protection Clause. . . . [W]e . . . accept that *Swain* is "clear, direct, and unequivocal" in prohibiting an "equal protection challenge to the prosecution's racially discriminatory use of its permeptory challenges solely on the basis of the prosecution's acts in a single case."

Id. at 767 (quoting *McCray*, 750 F.2d at 1124).

48 391 U.S. 145 (1968).

49 *Booker*, 775 F.2d at 767.

taining a representative cross-section of the community."[50] The court concluded "that a prosecutor's systematic use of peremptory challenges to exclude members of a cognizable group from a criminal petit jury offends the Sixth Amendment's protection of the defendant's interest in a fair trial and the public's interest in the integrity of the judicial process. . . ."[51]

III. THE NEW STANDARD: *BATSON V. KENTUCKY*

In *Batson*, an all-white jury convicted the black petitioner of second-degree burglary and the receipt of stolen goods. The racial composition of the jury resulted from the prosecutor's use of his peremptory challenges to exclude from the petit jury all four of the black persons on the venire.[52]

The petitioner appealed his conviction to the Supreme Court of Kentucky, urging the court to follow the decisions of other states, notably California[53] and Massachusetts,[54] "and to hold that such conduct violated his rights under the sixth amendment and Section 11 of the Kentucky Constitution[55] to a jury drawn from a cross-section of the community."[56] The Supreme Court of Kentucky refused to follow *Wheeler* and *Soares*, noting that it had recently reaffirmed its subscription to the *Swain* rule.[57]

A. THE MAJORITY OPINION

Writing for the majority, Justice Powell first reviewed the history of Supreme Court adjudication of the equal protection clause as applied to the selection of juries. He observed that, under *Strauder v. West Virginia*[58] and its progeny, "[p]urposeful racial dis-

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50 *Id.* at 768 (citing Taylor v. Louisiana, 419 U.S. 522 (1975) and Williams v. Florida, 399 U.S. 78 (1970)).

51 *Booker*, 775 F.2d at 772. The court, in dicta, extended this holding to apply to defense counsel on the ground that discriminatory use of the peremptory challenge by defense counsel "could only impair the public's confidence in the integrity and impartiality of the resulting jury." *Id.* *See infra* text accompanying notes 108-17.

52 *Batson*, 106 S. Ct. at 1715.

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

54 Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979).

55 Section 11 provides that "[i]n all criminal prosecutions the accused . . . shall have a speedy public trial by an impartial jury of the vicinage. . . ." KY. CONST. § 11.

56 *Batson*, 106 S. Ct. at 1715. *See supra* text accompanying notes 25-38.

57 *Id.* at 1715-16. *See* Commonwealth v. McFerron, 680 S.W.2d 924, 927 (Ky. 1984). There was "no suggestion that proof was offered or available to establish a *prima facie* case of systematic exclusion of a distinctive group." *Id.* The court rested its holding squarely on *Swain*. *Id.* at 926.

58 100 U.S. 303 (1880).

crimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure."[59] He concluded that this basic principle applies as well to the selection of the petit jury from the venire.[60]

Justice Powell then analyzed *Swain* in terms of the evidentiary burden it established for a defendant seeking to demonstrate the state's discriminatory use of peremptory challenges.[61] He observed that under *Swain* a defendant must prove that the prosecutor trying his case had consistently excluded blacks from petit juries in a number of cases.[62] Justice Powell noted that this standard "has placed on defendants a crippling burden of proof . . . [rendering] prosecutors' peremptory challenges . . . largely immune from constitutional scrutiny."[63]

The Court next reviewed the development of the standards of proof in making a prima facie case of discrimination in the selection of jury venires and ascertained two distinct methods of doing so. Under both methods, the defendant must first prove "that he is a member of a racial group capable of being singled out for differential treatment."[64] Under the first method, the defendant must then show that members of his race have not been included in jury venires over an extended period.[65] The second method requires only that a defendant show "that members of the defendant's race were substantially underrepresented on the venire from which his jury was drawn, and that the venire was selected under a practice providing 'the opportunity for discrimination.' "[66] Thus, Justice Powell recognized that "since the decision in *Swain*, this Court has recognized that a defendant may make a prima facie showing of purposeful discrimination in selection of the venire by relying solely on the facts concerning its selection *in his case*."[67] He concluded that these same standards for establishing a prima facie case should apply with regard to the use of peremptory challenges.[68]

Paralleling the standards used with regard to discriminatory se-

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59 *Batson*, 106 S. Ct. at 1717.

60 *Id.* at 1718-19.

61 *Id.* at 1719-22.

62 *Id.* at 1720.

63 *Id.* at 1720-21 (footnote omitted).

64 *Id.* at 1722 (citing Castenada v. Partida, 430 U.S. 482, 494 (1977)).

65 *Id.*

66 *Id.* (quoting Whitus v. Georgia, 385 U.S. 545, 552 (1967)). Justice Powell also cited *Castenada*, 430 U.S. at 494; Washington v. Davis, 426 U.S. 229, 241 (1976); Alexander v. Louisiana, 405 U.S. 625, 629-31 (1972), for this proposition.

67 106 S. Ct. at 1722 (emphasis in original).

68 *Id.* at 1722-23.

lection of the venire, the Court set out the evidentiary test for a prima facie case of discriminatory use of peremptory challenges.

> To establish such a case, the defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.[69]

The Court pointed out that the determination of whether a defendant raises such an inference depends upon the circumstances surrounding the use of the peremptory challenge and the conduct of the *voir dire* examination. The Court acknowledged that it must rely upon the experience and discretion of trial judges to make this determination on a case-by-case basis.[70]

Justice Powell emphasized, however, that the inquiry does not end when the defendant establishes a prima facie case of discrimination. At that point, the burden shifts to the prosecutor to come forward with a nonracial explanation for the use of his challenges. The Court "emphasize[d] that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause."[71] A prosecutor's explanation that he believed that a juror would favor another member of his own race is insufficient.[72] "Nor may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive. . . ."[73]

Justice Powell concluded his opinion by dismissing the state's arguments that judicial examination of prosecutorial motives during jury selection "will eviscerate the fair trial values served by the peremptory challenge" and "create serious administrative difficulties."[74] He pointed out that the jury system will be strengthened by the elimination of racial discrimination. As for the administrative burden, Justice Powell noted that no such problems had arisen in those states which had already adopted the Court's holding on state

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

70 106 S. Ct. at 1723.

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.* at 1724. The administrative difficulties include the additional responsibility the new standards place on trial judges. *See supra* text accompanying note 70.

constitutional grounds.[75]

B. THE CONCURRING OPINIONS

Justices White and Marshall both filed concurring opinions in *Batson*.[76] Justice White, agreeing with the conclusions of the Court, observed that the continued widespread practice of eliminating blacks from petit juries forced the Court to allow inquiry into prosecutorial motives.[77] He emphasized that the prosecutor must be given the opportunity to provide trial-related reasons for his use of his peremptories.[78] Finally, Justice White made clear that he would not apply *Batson* retroactively.[79]

Justice Marshall also agreed with the Court's conclusions but argued that they should be extended further. He advocated the complete elimination of the system of peremptory challenges as the only way to end racial discrimination in the jury selection process.[80] He supported this suggestion by noting that the system adopted by the Court, already practiced in several states as a matter of state law, had two severe limitations. First, "defendants cannot attack the discriminatory use of peremptory challenges at all unless the challenges are so flagrant as to establish a prima facie case."[81] Moreover, even when a prima facie case is made, prosecutors, Justice Marshall wrote, have no difficulty fabricating a racially neutral explanation.[82] Justice Marshall concluded by stating that he does not agree with suggestions that the challenge be preserved for defendants while being removed from the prosecution on the ground that "[o]ur criminal justice system 'requires not only freedom from any bias against the accused, but also from any prejudice against his

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75 *Id.*

76 Justices Stevens and O'Connor also filed concurring opinions. Justice Stevens addressed arguments in Chief Justice Burger's dissent that the petitioner had not presented the equal protection question in his petition for certiorari and that the question had not been properly briefed and argued. *Id.* at 1729-30 (Stevens, J., concurring). Justice O'Connor's one sentence opinion indicated her acquiescence with the views of both Justice White and Chief Justice Burger that the decision should not be applied retroactively. *Id.* at 1731 (O'Connor, J., concurring). *See infra* text accompanying notes 93-99 for an analysis of the retroactivity issue.

77 *Id.* at 1725 (White, J., concurring). This continued practice apparently caused the shift in Justice White's views from the stance he took as author of the majority opinion in *Swain*.

78 *Id.* (White, J., concurring).

79 *Id.* at 1726 (White, J., concurring)(citing DeStefano v. Woods, 392 U.S. 631 (1968)).

80 *Id.* (Marshall, J., concurring). *See infra* text accompanying notes 100-07 for an analysis of this argument.

81 *Id.* at 1727 (Marshall, J., concurring).

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

prosecution.' "[83]

C. THE DISSENTING OPINIONS

Chief Justice Burger dissented from the Court's holding on the ground that "it is based on a constitutional argument [i.e., equal protection] that the petitioner has *expressly* declined to raise, both in this Court and in the Supreme Court of Kentucky."[84] The Chief Justice also disagreed with the Court's resolution of the equal protection issues, arguing that the majority improperly insisted upon addressing them. He contended that the Court's opinion lacked appropriate deference to the history and tradition of the system of peremptory challenges.[85] He found that *Strauder v. West Virginia*[86] established a vast difference between exclusion from the venire and exclusion from the petit jury itself; the former constitutes societal stigmatization, while the latter merely " 'represents the discrete decision, made by one of two or more opposed *litigants*. . ., that the challenged venireperson will likely be more unfavorable to that litigant in that *particular case* than others on the same venire.' "[87] The Chief Justice also criticized the Court for not applying the conventional equal protection analysis of comparing a classification to the state interests furthered by it.[88] Finally, he agreed with Justices White and O'Connor in their concurring opinions that the Court's decision in *Batson* should not be applied retroactively.[89]

Justice Rehnquist's dissent first reviewed the Court's decision in *Swain*, emphasizing that "[e]ven the . . . dissenters did not take issue with the majority's position that the Equal Protection Clause does not prohibit the State from using its peremptory challenges to exclude blacks based on the assumption or belief that they would be partial to a black defendant."[90] He argued that use of peremptory challenges to strike blacks from petit juries is not "unequal," be-

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83 *Id.* at 1729 (Marshall, J., concurring)(quoting Hayes v. Missouri, 120 U.S. 68, 70 (1887)).

84 *Id.* at 1731 (Burger, C.J., dissenting)(emphasis in original).

85 *Id.* at 1734-36 (Burger, C.J., dissenting).

86 100 U.S. 303 (1880).

87 *Batson*, 106 S. Ct. at 1736 (Burger, C.J., dissenting)(quoting United States v. Leslie, 783 F.2d 541, 554 (5th Cir. 1986))(emphasis in original).

88 *Batson*, 106 S. Ct. at 1737-38 (Burger, C.J., dissenting). Chief Justice Burger argued that the state interest in the system of peremptory challenges is "substantial, if not compelling." *Id.* at 1738 (Burger, C.J., dissenting). Under standard equal protection analysis, the Court applies "most rigid scrutiny" to facially discriminatory state actions, but such actions will nevertheless be upheld if they are deemed necessary to achieve a compelling state objective. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944).

89 *Batson*, 106 S. Ct. at 1741 (Burger, C.J., dissenting).

90 *Id.* at 1744 (Rehnquist, J., dissenting).

cause they may also be used to strike whites, Hispanics, and Asians in cases involving defendants of those races.[91] Justice Rehnquist concluded that the Court's departure from the *Swain* standard is not justified by "anything in the Equal Protection Clause, or any other constitutional provision. . . ."[92]

IV. Issues Raised by the Decision in *Batson*

The Court's withdrawal from the permissive standards of *Swain* raises several new issues with regard to the discriminatory use of peremptory challenges. Foremost among these are: (1) Does the Court's decision in *Batson* apply retroactively to criminal convictions which became final before it was announced?; (2) should the Court go beyond *Batson* and abolish peremptory challenges completely?; (3) should *Batson* apply to defense counsel as well as prosecutors?; and (4) does the discriminatory use of peremptory challenges violate the sixth amendment? This section will examine each of these questions in turn.

A. Does *Batson* apply retroactively?

Four of the nine Justices stated that the *Batson* decision should not be applied retroactively.[93] The Court specifically reached this conclusion, at least with regard to convictions made final prior to the decision in *Batson*, in *Allen v. Hardy*.[94] The Court in *Allen* listed three factors traditionally considered in deciding whether a new constitutional rule of criminal procedure should apply retroactively:

> " '(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.' "[95]

Applying these factors to the rule in *Batson*, the *Allen* Court found that the new standards did not exclusively bear upon the jury's truthfinding function but served multiple objectives. Because

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[91] *Id.* (Rehnquist, J., dissenting).

[92] *Id.* at 1745 (Rehnquist, J., dissenting).

[93] *Id.* at 1726 (White, J., concurring); *id.* at 1731 (O'Connor, J., concurring); and *id.* at 1741 (Burger, C.J., dissenting, joined by Rehnquist, J.).

[94] 106 S. Ct. 2878 (1986). The *Allen* Court, speaking in a per curiam opinion, "express[ed] no view on the question whether our decision in *Batson* should be applied to cases that were pending on direct appeal at the time our decision was announced." *Id.* at 2880 n.1. The Court has since granted certiorari and heard oral argument on two cases presenting this question. Griffith v. Kentucky, 85-5521 and Brown v. United States, 85-5731, both argued October 14, 1986.

[95] *Allen*, 106 S. Ct. at 2880 (quoting Solem v. Stumes, 465 U.S. 638, 643 (1984)(quoting Stovall v. Denno, 388 U.S. 293, 297 (1967))).

it joins other mechanisms designed to ensure neutral factfinding, the Court noted that it could not "say that the new rule has such a fundamental impact on the integrity of factfinding as to compel retroactive application."[96] Moreover, the Court found that *Batson* directly overruled *Swain* and "that prosecutors, trial judges, and appellate courts throughout our state and federal systems justifiably have relied on the standard of *Swain*."[97] This fact also mitigated against retroactive application. Finally, the Court found that retroactive application could create a potentially enormous burden on the administration of justice. Under *Swain*, prosecutors had no cause to develop an explanation for the use of their peremptory challenges. As a result, the evidentiary difficulties on retrial, years after the original conviction, would be mind-boggling.[98] For these reasons, the Court concluded that *Batson* should not apply retroactively.[99]

B. SHOULD PEREMPTORY CHALLENGES BE ABOLISHED COMPLETELY?

Justice Marshall argued in *Batson* that the equal protection clause requires that the system of peremptory challenges be abolished, given the potential for discriminatory abuse which even the new standards of *Batson* cannot completely eradicate.[100] The *Batson* majority specifically rejected this view. The Court did not "think that this historic trial practice, which long has served the selection of an impartial jury, should be abolished because of an apprehension that prosecutors and trial judges will not perform conscientiously their respective duties under the Constitution."[101] Justice Marshall therefore stands alone in his total opposition to the system of peremptory challenges.[102]

Support for the abolition of peremptory challenges appears to be equally sparse among commentators. Even those commentators who have called for total abolition to remedy the problems of abuse have done so with some reservation. One of the most frequently cited articles favoring abolition offered a caveat to its argument, stating that peremptory challenges should be abolished "[u]nless

96 *Allen*, 106 S. Ct. at 2881.
97 *Id.*
98 *Id.*
99 *Id.*
100 *Batson*, 106 S. Ct. at 1726 (Marshall, J., concurring).
101 *Id.* at 1724 n.22.
102 This conclusion is drawn from the remarks of the majority, noted above, and from the fact that both Chief Justice Burger and Justice Rehnquist criticized *Batson* itself as impinging too greatly on the traditional system of peremptory challenges. Clearly, neither would favor its dismantling.

and until courts are equipped with effective means for intervening against discriminatory uses of peremptory challenges. . . ."[103] Moreover, some commentators who have advocated abolition of peremptory challenges have admitted that many good reasons exist for retaining them.[104] Finally, even commentators who have suggested abolition have not offered detailed analyses supporting this suggestion, since its adoption is such "an unlikely event in the real world."[105]

Defenders of the peremptory challenge have forcefully presented cogent reasons for maintaining the practice:

> Peremptory challenges serve to remove those jurors whose neutrality parties suspect, when the parties cannot prove partiality with enough certainty to justify a challenge for cause. In addition, they protect the exercise of the challenge for cause by allowing a party to remove a juror whom he has alienated through extensive voir dire aimed at identifying possible biases. The peremptory also seeks to insure that a party has a good opinion of the jury by allowing him to remove anyone he intuitively dislikes.[106]

For these reasons, the Supreme Court should not abandon the peremptory challenge. The new standards adopted in *Batson* should greatly reduce the potential for discriminatory abuse by requiring prosecutors to justify the use of their peremptory challenges to eliminate all members of a discrete and insular minority from the venire in a particular case. The value of the peremptory challenge as a means of ensuring the selection of a jury satisfactory to both the defendant and the state should preclude its elimination. Even if one accepts Justice Marshall's premise that peremptory challenges are inherently prone to abuse whatever the safeguards, the cost of abolition to both the defendant and the state[107] is too high to justify the

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103 Brown, McGuire, & Winters, *The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse*, 14 NEW ENG. L. REV. 192, 234 (1978).

104 J. VAN DYKE, JURY SELECTION PROCEDURES 167-68 (1977). These reasons include the importance of attaining an impartial jury (especially after a juror has been potentially alienated by an unsuccessful challenge for cause), of both the prosecutor and the defense believing in the impartiality of the jury, and of public perception of jury impartiality.

105 Singer, *Peremptory Holds: A Suggestion (Only Half Specious) of a Solution to the Discriminatory Use of Peremptory Challenges*, 62 U. DET. L. REV. 275, 287 (1978); *see also* Comment, *Curbing Prosecutorial Abuse of Peremptory Challenges—The Available Alternatives*, 3 W. NEW ENG. L. REV. 223, 234-35 (1980).

106 Saltzburg & Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 MD. L. REV. 337, 356; *see also* Note, *McCray v. Abrams: An End to Abuse of the Peremptory Challenge?* 59 ST. JOHN'S L. REV. 603, 614-15 (1985).

107 These costs include the inability to remove jurors whose partiality a party suspects, but cannot prove; the risk of alienating jurors during the voir dire examination; and the general discomfort of arguing before jurors whom the party instinctively dislikes. Saltzburg & Powers, *supra* note 106, at 356.

benefit of eliminating the last vestige of discrimination from jury selection.

C. DOES *BATSON* APPLY TO DEFENSE COUNSEL AS WELL AS PROSECUTORS?

The *Batson* Court "express[ed] no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel."[108] However, many of the lower courts, both federal and state, addressed the issue in their use of the cross-section requirement of the sixth amendment to circumvent *Swain*.

In its analysis, the Sixth Circuit found that defense counsel, like prosecutors, may not use peremptory challenges to eliminate members of a petit jury in a given case.[109] The court pointed out that the sixth amendment guarantees only an impartial jury, not a jury favorable to the defendant's cause. "The spectacle of a defense counsel systematically excusing potential jurors because of their race or other shared group identity while the prosecutor and trial judge were constrained merely to observe, could only impair the public's confidence in the integrity and impartiality of the resulting jury."[110] The court therefore refused to excuse defense counsel from the standards applied to prosecutors.

Both California and Massachusetts extended, in dicta, the prohibition to defense counsel.[111] In *People v. Wheeler*, the California Supreme Court held that "the People no less than individual defendants are entitled to a trial by an impartial jury drawn from a representative cross-section of the community. Furthermore, to hold to the contrary would frustrate other essential functions served by the requirement of cross-sectionalism."[112] Similarly, the Supreme Judicial Court of Massachusetts in *Commonwealth v. Soares* "deem[ed] the Commonwealth equally to be entitled to a representative jury, unimpaired by improper exercise of peremptory challenges by the defense."[113] These holdings add weight to the federal

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108 *Batson*, 106 S. Ct. at 1718 n.12

109 *Booker*, 775 F.2d at 772.

110 *Id.*

111 *See supra* text accompanying notes 25-38.

112 *Wheeler*, 22 Cal. 3d at 382 n.29, 583 P.2d at 765 n.29, 148 Cal. Rptr. at 907 n.29. These "other essential functions" referred to by the court include "legitimating the judgments of the courts, promoting citizen participation in government, and preventing further stigmatizing of minority groups." *Id.* at 267 n.6, 583 P.2d at 755 n.6, 148 Cal. Rptr. at 896 n.6.

113 *Soares*, 377 Mass. at 479 n.35, 387 N.E.2d at 517 n.35. The Florida Supreme Court also "agree[d] with *Wheeler* and *Soares* on this point and [held] that both the state and the defense may challenge the allegedly improper use of peremptories." State v. Neil, 457 So. 2d 481, 487 (Fla. 1984).

rulings on the question, because the state constitutional grounds which formed their basis are similar to the sixth amendment.

The foregoing authorities establish a reciprocal right of prosecutors to challenge the improper use of peremptory challenges by defense counsel under the sixth amendment. It is, however, by no means a foregone conclusion that the Supreme Court will reach such a result in the wake of *Batson*, given that the Court grounded its decision there in the equal protection clause of the fourteenth amendment, not the sixth amendment.

In order to establish a violation of the equal protection clause, one must show that the challenged action is a "state action."[114] The improper use of peremptory challenges by the prosecutor is a state action because the prosecutor embodies and represents the state in a criminal proceeding. The same may not be said, however, with regard to defense counsel. Even when defense counsel is a public defender employed by the state, he "does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding."[115]

The equal protection clause does not prohibit defense counsel from using their peremptory challenges in a discriminatory fashion. Nevertheless, it does not seem possible, "[o]nce the Court has held that *prosecutors* are limited in their use of peremptory challenges, [to] . . . rationally hold that defendants are not."[116] General notions of fairness dictate that defense counsel not be allowed to use discriminatory practices forbidden to prosecutors. Because the equal protection clause does not prevent such a result, in order to prevent it the Court must turn to the sixth amendment. The Court has historically viewed the impartiality of the jury to require that "[b]etween [the defendant] and the state the scales are to be evenly held."[117]

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114 The Civil Rights Cases, 109 U.S. 3, 6 (1883).

115 Polk County v. Dodson, 454 U.S. 312, 325 (1981). The issue in *Dodson* was raised when a defendant convicted of robbery brought an action pursuant to 42 U.S.C. § 1983 to overturn his conviction on the ground that the public defender assigned to his case had not adequately represented him. Thus, the question was whether the public defender had acted "under color of state law" for the purposes of a § 1983 suit. The Supreme Court has held that "[i]n cases under § 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment." United States v. Price, 383 U.S. 787, 794 n.7 (1966). *See also* Briscoe v. Lahue, 460 U.S. 325, 328 n.6 (1983).

116 *Batson*, 106 S. Ct. at 1738 (Burger, C.J., dissenting)(emphasis in original). In fact, "every jurisdiction which has spoken to the matter, and prohibited prosecution case-specific peremptory challenges on the basis of cognizable group affiliation, has held that the defendant must likewise be so prohibited." United States v. Leslie, 783 F.2d 541, 565 (5th Cir. 1986)(en banc).

117 Hayes v. Missouri, 120 U.S. 68, 70 (1887).

Surely, nothing could be so uneven as binding the prosecution to the *Batson* standards while allowing the defense to use his peremptory challenges in a discriminatory manner. In order to extend to defense counsel the requirements set down in *Batson*, the Court must first decide whether the systematic exclusion of minorities from petit juries in particular cases violates the fair cross-section component of the sixth amendment.

D. DOES THE DISCRIMINATORY EXERCISE OF PEREMPTORY CHALLENGES IN A PARTICULAR CASE VIOLATE THE SIXTH AMENDMENT?

As with the question of the applicability of their decision to defense counsel, the *Batson* Court "express[ed] no view on the merits of any of petitioner's Sixth Amendment arguments."[118] Both the state[119] and the federal[120] arguments in favor of applying the fair cross-section requirement of the sixth amendment to the discriminatory use of peremptory challenges were outlined above. The arguments against a sixth amendment rationale supporting the result in *Batson* should ultimately be rejected. The cross-section requirement of the sixth amendment should preclude both prosecutors and defense counsel from exercising their peremptory challenges in a discriminatory manner. The discriminatory use of peremptory challenges precludes the possibility that the jury will represent a fair cross-section of the community, because such use, by design, eliminates a significant segment of the community.[121] The Court's decision in *Batson* under the equal protection clause renders the point moot with regard to prosecutors, but sixth amendment analysis is essential with regard to defense counsel.

Three basic rationales have been offered to support the contention that the fair cross-section requirement does not forbid the exclusionary exercise of peremptory challenges in a particular case:

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118 *Batson*, 106 S. Ct. at 1716 n.4. Justice Marshall, joined by Justice Brennan, earlier spoke favorably of the sixth amendment argument in his dissent to the denial of certiorari in McCray v. New York, 461 U.S. 961 (1983).

119 See *supra* text accompanying notes 25-38 for an examination of state supreme court cases which relied on both state constitutional requirements and the sixth amendment (as interpreted in Taylor v. Louisiana, 419 U.S. 522) to avoid the rule in *Swain*. *See also* 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).

120 See *supra* text accompanying notes 39-51 for a review of the decisions of the Second and Sixth Circuits holding that the fair cross-section requirement of the sixth amendment forbids the use of peremptory challenges in order to exclude minorities from criminal petit juries in particular cases. *See also* Booker v. Jabe, 775 F.2d 762; McCray v. Abrams, 750 F.2d 1113.

121 *See Booker*, 775 F.2d at 770-73; *McCray*, 750 F.2d at 1128.

the "apparent use of fair-cross-section language to mask an equal protection solution; the difficulty in identifying protected groups; and the ramifications to the whole process of subjecting peremptory challenges to judicial scrutiny."[122] The first rationale is valid with regard to cases such as *Wheeler*, *Soares*, *McCray*, and *Booker*.[123] This criticism, however, would not apply to a sixth amendment holding in the wake of *Batson*, because the Court decided *Batson* itself on equal protection grounds. The Court designed the procedures in *Batson* to remedy a violation of the equal protection clause. It is not incompatible for the same action giving rise to equal protection remedies to have also violated the sixth amendment. In such a case, the equal protection violation justifies the equal protection remedies. The same action, as a sixth amendment violation, justifies the application of those remedies to defense counsel under the sixth amendment.[124]

The second criticism focuses on the idea that all peremptory challenges are ultimately based on some group affiliation. For example, "who would deny the right of a defendant accused of embezzlement to . . . challenge a banker, the propriety in a complex antitrust criminal case of a prosecutor's exclusion of a high school dropout, or the right of a plaintiff in an automobile accident case to remove the insurance company employee?"[125] This argument, however, does not recognize that the Court has historically refrained from sliding down slippery slopes of this sort, limiting this rule to groups which are "sufficiently numerous and distinct . . . that if they are systematically eliminated from jury panels, the Sixth Amendment's fair-cross-section requirement cannot be satisfied."[126] Moreover, whatever the validity of this criticism, it applies as much to the rule announced in *Batson* under the equal protection clause as to an extension of the rationale to include the sixth amend-

122 Doyel, *In Search of a Remedy for the Racially Discriminatory Use of Peremptory Challenges*, 38 OKLA. L. REV. 385, 432 (1985). *See also* Comment, *Rethinking Limitations on the Peremptory Challenge*, 85 COLUM. L. REV. 1357, 1368-69 (1985).

123 The remedies in those cases, as in *Batson*, all involved a procedure whereby the defendant could make a prima facie case by showing that members of a definable group had been systematically excluded by the prosecutor. The prosecutor could rebut the presumption created by this prima facie case by showing that racially neutral selection criteria were used. Under traditional sixth amendment analysis, prosecutorial intent is not relevant, so this test clearly sets out an equal protection standard. Doyel, *supra* note 122 at 433-34. *See also* Washington v. Davis, 426 U.S. 229, 241 (1976).

124 It would be inefficient and inequitable to fashion sixth amendment remedies in cases involving defense counsel (because defense counsel is not a state actor and thus can only violate the sixth amendment, not the equal protection clause) while fashioning different, equal protection remedies under *Batson* in cases involving prosecutors.

125 Doyel, *supra* note 122, at 436.

126 Taylor v. Louisiana, 419 U.S. 522, 531 (1975).

ment. Thus, the Court in *Batson* presumably already considered and rejected this criticism.

Finally, the third criticism reflects a concern for the administrative difficulty within the criminal justice system of applying the fair cross-section requirement to the use of peremptory challenges. Again, this criticism applies equally to the rule announced in *Batson*, where the majority explicitly rejected the argument, observing that "[i]n those states applying a version of the evidentiary standard we recognize today, courts have not experienced serious administrative burdens, and the peremptory challenge system has survived."[127]

Thus, the Court's decision in *Batson* apparently precludes the bulk of the criticism directed against application of the fair cross-section requirement of the sixth amendment to the discriminatory exercise of peremptory challenges. This criticism goes more to the practical problems raised by the evidentiary standards announced by the Court than to the constitutional rationale for requiring those standards. Problems, such as the identity of protected groups and the administrative burden on the judicial system, arise whether the new standard is grounded in the fourteenth or sixth amendment. The court of appeals cases attacking the sixth amendment approach confirmed this conclusion by relying almost exclusively upon *Swain*, an equal protection case, in rejecting the sixth amendment argument. They refused to consider the sixth amendment rationale on its own merits, holding that *Swain* precluded its application. As one court concluded:

> [W]e are not convinced that *Taylor* and its sixth amendment analysis have in effect overruled *Swain* and now restrict the government's use of the peremptory challenge to remove black prospective jurors. This does not mean that we entirely disapprove of the . . . analysis, rather we believe that any attack upon the government's use of the peremptory challenge must squarely confront *Swain*. . . . The Supreme Court has not reconsidered *Swain* and until that time, of course, we must follow *Swain*.[128]

With the removal of the roadblock of *Swain*, the argument against a sixth amendment approach to the discriminatory exercise of peremptory challenges in a particular case loses much of its force. The requirement that both the state and the defendant have an opportunity for a trial before a petit jury composed of a fair cross-section of the community is not satisfied if either side may exercise its peremp-

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127 *Batson*, 106 S. Ct. at 1724 (footnote omitted).

128 United States v. Childress, 715 F.2d 1313, 1320 (8th Cir. 1983), *cert. denied*, 464 U.S. 1063 (1984). *See also* United States v. Leslie, 783 F.2d 541 (5th Cir. 1986); United States v. Whitfield, 715 F.2d 145 (4th Cir. (1983)(specifically rejecting sixth amendment analysis on the ground that *Swain* precludes it.)

tory challenges to exclude members of a cognizable group from the jury.[129]

V. CONCLUSION

The Court's decision in *Batson v. Kentucky* fundamentally changed the procedures under which courts address allegations of discriminatory exercise of peremptory challenges. Under the old system, set out in *Swain v. Alabama*, a defendant had to show that the prosecutor used his peremptory challenges to systematically exclude blacks from petit juries in case after case over the course of many years.[130] While the rule in *Swain* theoretically prohibited the use of peremptory challenges against blacks solely on account of their race, the practical effect of the Court's refusal to examine prosecutorial motives in a particular case made the burden of sustaining an allegation of such conduct so heavy that "almost no other defendants in the nearly two decades since the *Swain* decision have met this standard. . . ."[131] The *Batson* decision considerably lightened this burden. Under the new rule, a defendant need only show "that he is the member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race."[132] The defendant may then show that these two facts, in addition to any other relevant circumstances, raise an inference that the prosecutor based the exercise of his peremptory challenges on the race of the veniremen. The prosecutor then has the opportunity to rebut this inference by coming forward with race-neutral reasons for his challenges.[133]

The new evidentiary standards set forth in *Batson* raise several questions. The Court has already answered in the negative the first of those considered in this Note, whether the decision in *Batson* applies retroactively.[134] The Court has also refused, albeit in a footnote, to abolish peremptory challenges altogether.[135] The resolution of the third and fourth issues raised by *Batson* is much less

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129 *McCray*, 750 F.2d at 1128.

130 *Swain*, 380 U.S. at 222. The Court specifically refused to "hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case." *Id.*

131 *McCray*, 750 F.2d at 1120. A search of the cases in which defendants have alleged discriminatory use of peremptory challenges by prosecutors revealed no cases where the defendant met the *Swain* burden.

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

133 *Id.*

134 Allen v. Hardy, 106 S. Ct. 2878. *See supra* text accompanying notes 93-99.

135 *Batson*, 106 S. Ct. at 1724 n.22. A solid majority of commentators support the Court's rejection of an abandonment of the system of peremptory challenges, as advocated by Justice Marshall. *See supra* text accompanying notes 103-06.

certain. The Court has not yet addressed the question of whether the standards set forth in *Batson* should apply to defense counsel as well as prosecutors. While virtually all of the lower courts promulgating standards similar to those adopted in *Batson* have applied them to defense counsel, the Supreme Court cannot so easily reach the same result. These lower courts grounded their decisions in the sixth amendment or in state constitutional provisions similar to it; the *Batson* Court based its holding on the equal protection clause. Any attempt to apply *Batson* to defense counsel faces grave state action problems.[136]

For this reason, the question of whether the sixth amendment also requires the evidentiary standards found by the *Batson* Court under the equal protection clause takes on some importance, despite the fact that the decision in *Batson* seemingly rendered it moot. The basic argument in favor of the application of the sixth amendment emerges from the requirement that juries be drawn from a fair cross-section of the community.[137] Although a "defendant has no right to a petit jury of any particular composition . . ., [the] Sixth Amendment requirement that the venire represent a fair cross section of the community . . . must logically [exist] . . . because it is important that the defendant have the *chance* that the petit jury will be similarly constituted."[138]

All three of the major arguments against this proposition ultimately rest on the authority of *Swain*; *Batson* renders them irrelevant.[139] Thus, the Supreme Court should find a sixth amendment basis for the standards announced in *Batson* under the equal protection clause. Once the Court establishes that basis in the sixth amendment, there can be little doubt that it will apply the procedures of *Batson* to defense counsel in order to protect "the public's confidence in the integrity and impartiality of the . . . jury," clearly an integral element of the sixth amendment.[140] Only at that point will the Court rid the jury selection system of unconstitutional discrimination to the greatest extent possible, while remaining within the confines of the system of peremptory challenges.

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136 *See supra* text accompanying notes 108-17.

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

138 *McCray*, 750 F.2d at 1128 (emphasis added). *See also Booker*, 775 F.2d at 770-71; *supra* text accompanying notes 118-24.

139 *See supra* text accompanying notes 119-25.

140 *Booker*, 775 F.2d at 772.