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Equal Protection in Jury Selection - the Implementation of Batson v. Kentucky in North Carolina

Paul H. Schwartz

COMMENT

Equal Protection in Jury Selection? The Implementation of *Batson v. Kentucky* in North Carolina

We look to the jury box as to a sacred shrine, the place where human justice holds the scales to measure out the dues of man.[1]

For most of the twentieth century, all states have permitted prosecutors to exercise peremptory challenges[2]—the removal of prospective jurors from the venire "without cause, without explanation and without judicial scrutiny."[3] Since 1868, however, the fourteenth amendment[4] has forbidden states to discriminate against racial and other protected groups without constitutionally sufficient reasons for treating those groups differently.[5] The conflict between these two features of the American justice system is inescapable.[6] By exercising peremptory challenges, the prosecutor can exclude entire groups of individuals from the jury without having to provide any, let alone constitutionally sufficient, justifications. The equal protection clause of the fourteenth amendment, to the contrary, requires that government officials adequately explain actions directed against

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1. Brief of Defendant-Appellant at 19, Byers v. Boice Hardwood Co., 201 N.C. 75, 159 S.E. 3 (1931) (No. 651).

2. Although the peremptory challenge is centuries old and embedded in the Anglo-American judicial process, the government's right to exercise peremptory challenges was not firmly established until the beginning of the twentieth century. *See* J. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 150 (1977); Brown, McGuire & Winters, *The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse*, 14 NEW ENG. L. REV. 192, 195 (1978); *infra* notes 26-45 and accompanying text.

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

4. The equal protection clause of the fourteenth amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

5. *See, e.g.*, J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 14.2, at 525 (3d ed. 1986) (equal protection clause ensures that government does not make arbitrary classifications); Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 365 (1949) (classifications made by government must be reasonably related to the purpose of the law). The equal protection clause originally was intended to protect black persons from discrimination. Strauder v. West Virginia, 100 U.S. 303, 306 (1879). Since then, the Supreme Court has held that the fourteenth amendment also applies to nonracial classifications, although the level of its protection varies with the classification. *See, e.g.*, Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 446 (1985) (mental capacity); Craig v. Boren, 429 U.S. 190, 204 (1976) (gender); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976) (age); Dandridge v. Williams, 397 U.S. 471, 483-87 (1970) (number of children); Williamson v. Lee Optical Co., 348 U.S. 483, 488-89 (1955) (profession).

6. Jurists and commentators also have argued that the peremptory challenge conflicts with other constitutional provisions. Some have contended that the prosecutor's peremptory removal of specific groups from the jury violates the defendant's sixth amendment right to a jury drawn from a fair cross-section of the community. *See, e.g.*, McCray v. Abrams, 750 F.2d 1113, 1131 (2d Cir. 1984); Massaro, *Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C.L. REV. 501, 541-63 (1986). In 1990, however, the Supreme Court rejected this contention. *See* Holland v. Illinois, 110 S. Ct. 803, 807-11 (1990). At least one commentator has argued that because peremptory challenges are exercised arbitrarily and capriciously, prosecutorial peremptory challenges deprive defendants of their fifth and fourteenth amendment rights to due process of law. *See* Note, *Due Process Limits on Prosecutorial Peremptory Challenges*, 102 HARV. L. REV. 1013, 1024-33 (1989).

members of protected groups. "The Equal Protection Clause says in essence, 'When the government treats people differently, it has to have a reason.' The peremptory challenge says in essence, 'No, it doesn't.' "[7]

Nevertheless, both the equal protection clause and the peremptory challenge exist to secure fundamental rights. The equal protection clause aims to protect the fundamental human right to freedom from invidious discrimination. The peremptory challenge seeks to ensure the right to an impartial jury.[8] Consequently, in spite of the ever-present tension between the equal protection clause and the peremptory challenge, the United States Supreme Court has searched for ways to guarantee equal protection to protected groups while preserving the State's right to exercise peremptory challenges. In the landmark case of *Batson v. Kentucky*,[9] decided in 1986, the Court embarked on its most recent attempt to reconcile the arbitrary nature of the peremptory challenge with the dictates of the equal protection clause. Five years later, the question arises whether lower courts charged with implementing *Batson* have made progress toward the Court's Solomonic goal of ending the discriminatory use of peremptory challenges without abolishing the peremptory challenge entirely. This Comment explores that question as it applies to the appellate courts of North Carolina.

The clash between the peremptory challenge and the equal protection clause is the latest battle in a conflict that racial and ethnic minorities and the states have been waging since the ratification of the fourteenth amendment: the fight over how far the equal protection clause reaches to protect minorities against unconstitutionally motivated exclusion from jury service by the State.[10] At first, states attempted to preclude minorities from being called to jury service altogether.[11] After minorities won the right to be included on jury lists, prosecutors began to use peremptory challenges to bar minority persons from sitting on juries.[12] In 1986 the *Batson* Court recognized that the problem of racially motivated peremptory challenges had become widespread.[13] The Court, however, refused to address the problem by abolishing the peremptory challenge altogether.[14] Instead, the Court attempted to provide defendants with an effective means of proving discrimination. Under *Batson*, the prosecutor must come forward with race-neutral reasons for her peremptory challenges once the de-

7. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 203 (1989).

8. The sixth amendment provides, in part, that "[i]n all criminal proceedings, the accused shall enjoy the right to a . . . trial, by an impartial jury." U.S. CONST. amend. VI.

9. 476 U.S. 79 (1986).

10. *See, e.g.*, Carter v. Jury Comm'n, 396 U.S. 320, 327 (1970) (substantial underrepresentation of minorities on jury lists); Avery v. Georgia, 345 U.S. 559, 561 (1953) (discriminatory formation of jury lists); Neal v. Delaware, 103 U.S. 370, 387-88 (1880) (jury service limited to qualified voters; black persons not qualified to vote); Strauder v. West Virginia, 100 U.S. 303, 305 (1879) (per se statutory prohibition of jury service by black persons).

11. *Neal*, 103 U.S. at 387; *Strauder*, 100 U.S. at 305.

12. J. VAN DYKE, *supra* note 2, at 150; Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235, 283 (1968).

13. *Batson*, 476 U.S. at 101 (White, J., concurring).

14. *Id.* at 99 n.22.

fendant makes a threshold showing of an inference of discrimination.[15] The Court left to state and lower federal courts the task of fleshing out the evidentiary framework—determining what evidence gives rise to an inference of discrimination and what proffered reasons rebut such an inference. In effect, having prescribed the relevant constitutional rules, the *Batson* majority challenged the lower courts to take racial prejudice out of jury selection.

Several critics, most notably Justice Marshall, have charged that under *Batson* the lower courts will be unable to end prosecutorial discrimination. Only by prohibiting peremptory challenges entirely, they claim, can minorities be assured freedom from discrimination in jury selection.[16] Though these critics ultimately may be correct that *Batson* cannot achieve its own goals and that a more drastic solution is appropriate, such a conclusion is impossible to reach at this point. Rather than use the decision as a blueprint for eliminating discriminatory jury selection practices, some lower courts have tried to minimize the decision's impact on the operation of the peremptory challenge. As a result, these courts have required defendants to meet unduly high standards of prima facie proof.[17] When defendants have been able to satisfy these standards, the courts routinely have accepted prosecutors' explanations as sufficient to rebut the prima facie case.[18] In sum, lower courts have failed to implement fully the spirit, and in some cases the letter, of *Batson*. Until they do, the debate will continue whether aggressive application of *Batson* might solve the problem of jury selection discrimination without resort to abolition of the peremptory challenge.

Illustrative of the incomplete implementation of *Batson* is the North Carolina experience. Neither the North Carolina Supreme Court nor the North Carolina Court of Appeals ever has held for a defendant on the merits of a *Batson* claim.[19] In part, this result is attributable to the courts' misapprehension of the operation of the *Batson* prima facie evidentiary system.[20] In part, it also arises from the courts' undue deference to the findings of trial courts.[21] As a result of these misapplications of *Batson*, North Carolina has yet to contribute meaningfully to the debate over the decision's continuing validity, much less to achieve its nondiscrimination goal.

This Comment begins with a brief review of the common-law origin and theoretical functions of the peremptory challenge, its introduction into the American judicial system, and its reception by the legislature and courts of

15. *Id.* at 96-97.

16. *E.g.*, *id.* at 102-05 (Marshall, J., concurring); Chew v. State, 71 Md. App. 681, 717, 527 A.2d 332, 350 (1987); Commonwealth v. Hardcastle, 519 Pa. 236, 261-64, 546 A.2d 1101, 1113-14 (1988) (Nix, C.J., dissenting), *cert. denied*, 110 S. Ct. 1169 (1990); Note, Batson v. Kentucky: *A Half Step in the Right Direction (Racial Discrimination and Peremptory Challenges Under the Heavier Confines of Equal Protection)*, 72 CORNELL L. REV. 1026, 1039 (1987).

17. *See infra* notes 159-201 and accompanying text.

18. *See infra* notes 235-56 and accompanying text.

19. In one case, the supreme court found a procedural error and remanded the proceedings to the trial court for an evidentiary hearing on *Batson* issues. *See* State v. Green, 324 N.C. 238, 240-41, 376 S.E.2d 727, 728 (1989).

20. *See infra* notes 159-89 and accompanying text.

21. *See infra* notes 276-83 and accompanying text.

North Carolina.[22] Next, the Comment discusses the constitutional background of *Batson* and reviews the *Batson* decision, paying particular attention to the Court's goals and to the issues it left to state and lower federal courts.[23] The Comment then examines the North Carolina appellate courts' implementation of *Batson* and shows that the courts have been true to neither the letter nor the spirit of the decision. The Comment suggests doctrinal revisions that are better suited to achieving *Batson*'s goals.[24] Many of these recommended procedures and standards derive from the implementation of *Batson* in other states. The Comment concludes that the North Carolina courts' unduly constrictive view of *Batson* has rendered the decision ineffective in North Carolina. Therefore, revisions are necessary to guarantee North Carolina criminal defendants and potential jurors equal protection of the laws.[25]

I. HISTORICAL BACKGROUND: THE ORIGIN AND DEVELOPMENT OF THE PEREMPTORY CHALLENGE

The peremptory challenge has long been a part of the Anglo-American judicial process, although the degree to which it has been approved and employed has varied.[26] It developed during the twelfth century, when the English jury was transformed "from a body of fact knowers to one of fact finders."[27] The new fact-finding system required jurors to determine the facts based not on personal favoritism, but on evidence presented in court.[28] The peremptory challenge evolved as one safeguard[29] of jury impartiality.[30]

In theory, peremptory challenges promote impartiality in three ways. First, attorneys may use them to remove prospective jurors with suspected, but unprovable, prejudice or bias.[31] Second, peremptory challenges facilitate the exer-

22. *See infra* notes 26-54 and accompanying text.

23. *See infra* notes 55-144 and accompanying text.

24. *See infra* notes 202-18, 261-74, 292, 313-16 and accompanying texts.

25. *See infra* text accompanying note 340.

26. Brown, McGuire & Winters, *supra* note 2, at 193; *see* Swain v. Alabama, 380 U.S. 202, 212-13 (1965).

27. Gobert, *The Peremptory Challenge—An Obituary*, 1989 CRIM. L. REV. 528, 528; *see* J. VAN DYKE, *supra* note 2, at 2. Originally, jurors were chosen because they had some knowledge of the facts and the parties. Gobert, *supra*, at 528. During the reign of Henry II (1154-89), the Crown began to impanel men who had knowledge of the case to decide whether a suspect should be charged. J. VAN DYKE, *supra* note 2, at 2. This system, analogous to the modern grand jury, employed the first juries of fact-finders and provided the foundation for the modern jury. *Id.* at 2-3.

28. Gobert, *supra* note 27, at 528.

29. In addition to the peremptory challenge, two practices designed to promote impartial juries developed. First, jurors were selected only from among those citizens thought capable of deciding cases fairly and objectively. *Id.* Professor Alschuler has noted that these persons were an elite group of propertied men. Alschuler, *supra* note 7, at 164-65. Second, the challenge for cause evolved whereby the parties could remove from the panel an unlimited number of jurors with demonstrable bias. Gobert, *supra* note 27, at 528. To this day, to exercise a challenge for cause attorneys must "assign cause" for the challenge; they must explain their reasons for believing the juror is partial and the judge must agree. J. VAN DYKE, *supra* note 2, at 139-41.

30. Gobert, *supra* note 27, at 528.

31. *See* Swain v. Alabama, 380 U.S. 202, 219 (1965); J. VAN DYKE, *supra* note 2, at 146; Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 STAN. L. REV. 545, 551 (1975). Moreover, the peremptory challenge permits counsel to remove these jurors without embarrassing them

cise of challenges for cause, which are themselves designed to remove biased potential jurors.[32] Third, the challenges foster the appearance of impartiality, since the parties may dismiss without explanation jurors they perceive to be biased, whether or not the potential jurors are in fact biased.[33]

Originally the Crown enjoyed an unlimited number of peremptory challenges.[34] In 1305, recognizing that this practice produced juries that were biased in favor of the prosecution, Parliament abolished the right of prosecutors to exercise peremptory challenges.[35] It still, however, viewed peremptory challenges as necessary for defendants; accordingly, defendants retained the right to remove jurors peremptorily.[36] Despite Parliament's command that prosecutors challenge potential jurors only for cause, the English courts soon construed the 1305 statute to reinstate, in effect, the prosecutor's right to exercise peremptory challenges.[37] The courts permitted the prosecutor to "stand aside" prospective jurors and postpone assigning cause for his challenges.[38] The prosecutor had to assign cause only if too few jurors remained to constitute a jury after the defendant exercised his challenges.[39] Since this contingency rarely occurred, the Crown effectively enjoyed the right to exercise peremptory challenges.[40]

Although early American courts and legislatures readily accepted the defendant's right to exercise peremptory challenges as part of the common law, the prosecutor's right was more uncertain.[41] Some states permitted prosecutorial peremptory challenges, but severely limited them in number.[42] Other states did not allow prosecutors to exercise peremptory challenges at all.[43] It was not until

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with public accusations of bias or with public revelation of their prejudices. Babcock, *supra*, at 553-54; *see* Gobert, *supra* note 27, at 529-30.

32. An attorney often can uncover the prejudices of a prospective juror necessary to justify a challenge for cause only by asking the juror probing and personal questions; the availability of peremptory challenges alleviates the attorney's fear of incurring a juror's hostility during this questioning, because the attorney knows that if he alienates a juror, he may strike the juror peremptorily. Thus, the availability of the peremptory challenge prevents a chilling effect on the voir dire questioning that facilitates the challenge for cause. *Swain*, 380 U.S. at 219-20; Babcock, *supra* note 31, at 554-55.

33. This satisfies Justice Frankfurter's maxim that "justice must satisfy the appearance of justice." Offutt v. United States, 348 U.S. 11, 14 (1954). By furthering the litigants' belief in the system's impartiality, peremptory challenges also promote confidence in and respect for the criminal justice system. *See* Babcock, *supra* note 31, at 552; Gobert, *supra* note 27, at 529.

34. J. VAN DYKE, *supra* note 2, at 147; Brown, McGuire & Winters, *supra* note 2, at 194; Massaro, *supra* note 6, at 525. The defendant was permitted thirty-five peremptory strikes. 4 W. BLACKSTONE, COMMENTARIES *354.

35. The Ordinance of Inquests, 33 Edw., ch. 4 (1305). Furthermore, the unlimited number of prosecutorial peremptory challenges subjected trials to substantial delays. *See* COKE ON LITTLETON 156 (14th ed. 1791), *quoted in Swain*, 380 U.S. at 213.

36. *See* J. VAN DYKE, *supra* note 2, at 147; Brown, McGuire & Winters, *supra* note 2, at 194.

37. *See Swain*, 380 U.S. at 213; J. VAN DYKE, *supra* note 2, at 148; Brown, McGuire & Winters, *supra* note 2, at 194.

38. *Swain*, 380 U.S. at 213; J. VAN DYKE, *supra* note 2, at 148.

39. *Swain*, 380 U.S. at 213; J. VAN DYKE, *supra* note 2, at 148.

40. J. VAN DYKE, *supra* note 2, at 148.

41. *Id.*; Brown, McGuire & Winters, *supra* note 2, at 194; Massaro, *supra* note 6, at 525.

42. *See* J. VAN DYKE, *supra* note 2, at 149. As late as 1856, the Supreme Court held that prosecutors in federal court had no common-law right to engage in the practice of "standing aside." United States v. Shackleford, 59 U.S. (18 How.) 588, 590 (1856).

43. The two most populous original states, New York and Virginia, did not allow prosecutors

1870 that peremptory challenges for the prosecution became "the rule rather than the exception."[44] By 1900 "the government's right to exercise peremptory challenges was firmly established."[45]

North Carolina was among the first American jurisdictions officially to recognize the defendant's right to exercise peremptory challenges, the prosecutor's right to "stand aside" prospective jurors, and the prosecutor's right to exercise peremptory challenges.[46] In 1777 the North Carolina General Assembly codified common-law practice by granting capital defendants thirty-five peremptory challenges.[47] Then, in 1829, the North Carolina Supreme Court formally approved the practice of "standing aside."[48] Most dramatically, in 1827 the North Carolina General Assembly broke with five centuries of English practice and became one of the first state legislatures to allow prosecutors to exercise peremptory challenges.[49]

At first the North Carolina prosecutor's privilege existed only in capital cases and was limited to four peremptory strikes,[50] in sharp contrast to the defendant's thirty-five peremptory challenges.[51] Throughout the twentieth century, the North Carolina General Assembly periodically revised the number of peremptory challenges exercisable by defendants and by the State, narrowing the gap between the two sides.[52] Finally, in 1977 the general assembly granted the

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to exercise peremptory challenges in felony cases until 1858 and 1919 respectively. *See* Act of April 17, 1858, ch. 332, § 1, 1858 N.Y. Laws 557 (current version at N.Y. CRIM. PROC. LAW § 270.25 (McKinney 1982)); VA. CODE ANN. § 4898 (1919) (statutory revision pursuant to Act of March 8, 1918, ch. 108, 1918 Va. Acts 211) (current version at VA. CODE ANN. § 19.2-262 (1990).

44. J. VAN DYKE, *supra* note 2, at 150; *see* Brown, McGuire & Winters, *supra* note 2, at 195.

45. J. VAN DYKE, *supra* note 2, at 150; *see* Brown, McGuire & Winters, *supra* note 2, at 195. Several developments account for the eventual acceptance of prosecutorial peremptory challenges. By the mid-nineteenth century, the mistrust of government that characterized the Revolutionary period gave way to greater acceptance of state power. J. VAN DYKE, *supra* note 2, at 150. Moreover, in light of the growing heterogeneity in many American cities, the Supreme Court determined that the government had a legitimate interest in exercising peremptory challenges to keep certain "elements" off juries. *See* Hayes v. Missouri, 120 U.S. 68, 70-71 (1887). Eventually the Court found the right to exercise peremptory challenges to be inherent in the right to jury trial. *See* Lewis v. United States, 146 U.S. 370, 376 (1892); Babcock, *supra* note 31, at 556.

46. *See* State v. Benton, 19 N.C. (2 Dev. & Bat.) 196, 204 (1836) (practice of standing aside "has . . . prevailed in the courts of this state"); J. VAN DYKE, *supra* note 2, at 148-49, 171 n.47.

47. Act of Nov. 15, 1777, ch. 2, § 94, J. IREDELL, LAWS OF THE STATE OF NORTH CAROLINA 317 (1791) (current version at N.C. GEN. STAT. § 15A-1217(a)(1) (1988)); *see also* State v. Arthur, 13 N.C. (2 Dev.) 217, 220 (1829) (purpose of peremptory challenge is to ensure that the prisoner has a jury "free from all objection"). The general assembly later extended the right to exercise peremptory challenges to defendants not on trial for their lives. Act of Nov. 16, 1801, ch. 592, § 1, 2 H. POTTER, LAWS OF THE STATE OF NORTH CAROLINA 953 (1821).

48. *Arthur*, 13 N.C. (2 Dev.) at 219.

49. Act of Nov. 19, 1827, ch. 10, 1827 N.C. Sess. Laws 15 (current version at N.C. GEN. STAT. § 15A-1217 (1988)). Only four states authorized their governments to exercise peremptory challenges earlier than North Carolina: Delaware (1782), Pennsylvania (1813), Tennessee (1821), and Georgia (1822). J. VAN DYKE, *supra* note 2, at 171 n.57.

50. 1827 N.C. Sess. Laws 15.

51. *Id.* In addition, the prosecutor had to exercise all of his peremptory challenges before he tendered the prospective jurors to the defendant. *Id.*

52. *See, e.g.*, Act of Feb. 26, 1907, ch. 415, § 1, 1907 N.C. Sess. Laws 608 (current version at N.C. GEN. STAT. § 15A-1217(b)(2) (1988)) (allowing the State two peremptory challenges per defendant in noncapital cases); Act of March 1, 1913, ch. 31, §§ 3, 4, 1913 N.C. Sess. Laws 55, 56 (current version at N.C. GEN. STAT. § 15A-1217 (1988)) (reducing defendants' peremptory challenges to twelve in capital cases and four in noncapital cases); Act of May 11, 1935, ch. 475, §§ 2, 3,

State the same number of peremptory challenges as the defendant.[53] In equalizing the number of peremptory challenges allowed, the general assembly brought North Carolina practice in line with that of most states.[54] Unfortunately, during the same period in which North Carolina prosecutors received this increased power to exercise peremptory challenges, prosecutors around the country began to use their peremptory challenges to deny racial minorities the opportunity to serve on juries.

II. CONSTITUTIONAL BACKGROUND: FROM *STRAUDER* TO *SWAIN*

In the wake of the Civil War, the American people ratified three constitutional amendments whose common purpose was to secure equal rights for newly freed black citizens.[55] The second of these, the fourteenth amendment, prohibits the states from denying any person "equal protection of the laws."[56] One of the earliest United States Supreme Court decisions construing the equal protection clause did so in the context of jury selection.

In *Strauder v. West Virginia*[57] a black man had been charged with murder.[58] At the time, West Virginia law authorized only white males to serve as jurors.[59] A state court rejected Strauder's claim that the statute denied him equal protection of the laws; he was convicted by an all-white jury and his ap-

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1935 N.C. Sess. Laws 834, 835 (current version at N.C. GEN. STAT. § 15A-1217 (1988)) (increasing defendants' peremptory challenges from 12 to 14 in capital cases and from four to six in noncapital cases; increasing State's peremptory challenges from four to six in capital cases and from two to four for each defendant in noncapital cases); Act of March 11, 1971, ch. 75, § 1, 1971 N.C. Sess. Laws 56 (codified as amended at N.C. GEN. STAT. § 9-21(b) (1971)) (current version at N.C. GEN. STAT. § 15A-1217(a)(2) (1988)) (increasing State's peremptory challenges to nine in capital cases). The general assembly abolished the practice of "standing aside" in 1913. Act of March 1, 1913, ch. 31, § 4, 1913 N.C. Sess. Laws 55, 56 (current version at N.C. GEN. STAT. § 15A-1217 (1988)); *see* State v. Ashburn, 187 N.C. 717, 720-21, 122 S.E. 833, 834 (1924).

53. Act of June 23, 1977, ch. 711, § 1, 1977 N.C. Sess. Laws 853, 858 (codified at N.C. GEN. STAT. § 15A-1217 (1988)). In capital cases today each defendant is entitled to 14 peremptory challenges and the State is entitled to 14 challenges per defendant; in noncapital cases, each defendant may exercise six peremptory challenges and the State may exercise six challenges per defendant. In selecting alternate jurors, each party may use any unused challenges plus one peremptory challenge for each alternate juror to be selected. *Id.*

54. *See* N.C. GEN. STAT. § 15A-1217 official commentary (1988). One possible explanation for North Carolina's early acceptance of peremptory challenges for both parties in criminal cases is the state's apparent tradition of allowing attorneys freedom in selecting juries. North Carolina trial judges generally allow attorneys wide latitude in questioning jurors during the jury selection process. R. PRICE, NORTH CAROLINA CRIMINAL TRIAL PRACTICE § 18-11, at 289 (1980); *see also* 2 G. WILSON, NORTH CAROLINA CIVIL PROCEDURE § 47-3, at 121 (1989) ("trial judge must grant sufficient leeway . . . so that counsel can develop meaningful information"). Prior to 1977, attorneys often were able to see the jury list, thus enabling them to shape the jury selection by altering their strategy appropriately. DeMent, *Jury Selection and the Criminal Jury Trial in Superior Court*, in NORTH CAROLINA ACADEMY OF TRIAL LAWYERS, PERSUASION AND THE ART OF ADVOCACY & CRIMINAL PROCEDURE—TRIAL AND APPEAL: NEW G.S. 15A, § 5, at 1 (1978). Indeed, in 1978, seminar material from the North Carolina Academy of Trial Lawyers claimed that "control of jury selection by the litigants is the rule." *Id.* at 4.

55. *See* Strauder v. West Virginia, 100 U.S. 303, 306 (1879); Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71 (1872).

56. The equal protection clause provides in part that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

57. 100 U.S. 303 (1879).

58. *Id.* at 304.

59. *Id.* at 305.

peal eventually reached the Supreme Court.[60]

The Supreme Court agreed with Strauder that the West Virginia statute contravened the equal protection clause. The Court explained that the purpose of the equal protection clause is to end racial discrimination by state governments.[61] It found that the West Virginia statute discriminated against black persons in two ways. First, the statute denied black defendants equal protection by providing that they were to be tried by juries from which members of their race had been purposely excluded, while entitling whites to juries selected from persons of their own race.[62] The Court held that although no defendant has a right to a jury consisting of members of his race,[63] a state may not summarily deprive anyone of that possibility.[64] Second, the statute denied black prospective jurors equal protection by refusing them the privilege of participating equally in the administration of justice.[65] *Strauder* thus became a powerful precedent proscribing racial discrimination in jury selection.

Strauder was the first shot fired in a more than one-hundred-year war over the extent of the equal protection clause's reach in regulating jury selection practices. Throughout the century following *Strauder*, the Court consistently reaffirmed the case's fundamental pronouncement outlawing jury selection procedures that discriminate against racial minorities.[66] Moreover, the Court extended *Strauder*, which had involved a facially discriminatory statute, by forbidding the states from applying facially neutral statutes in a discriminatory manner[67] and by prohibiting purposeful, substantial underrepresentation of mi-

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60. *Id.* at 304.

61. *Id.* at 306-07, 310. The Court wrote:

> What is [the meaning of the fourteenth amendment] but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether [black] or white, shall stand equal before the laws of the States, and, in regard to the [black] race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color?

Id. at 307. During the past 100 years, the Court has expanded this interpretation so that the equal protection clause now protects against governmental discrimination on grounds other than race, although the protection exists to different extents depending upon the identity of the protected group. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 5, at §§ 14.11-.25; L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 16-23 to -31 (2d ed. 1988).

62. *Strauder*, 100 U.S. at 309.

63. *Id.*; *accord* Virginia v. Rives, 100 U.S. 313, 322-23 (1879) (companion case to *Strauder*; mere fact that black defendant was convicted by all-white jury did not warrant reversal when defendant made no showing of racial discrimination); *cf.* Taylor v. Louisiana, 419 U.S. 522, 538 (1975) (defendant not entitled to a jury of any particular composition).

64. *See Strauder*, 100 U.S. at 309.

65. *See id.* at 308. The Court explained:

> The very fact that [black] people are singled out and expressly denied by a statute all right to participation in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, 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.

Id.

66. *See, e.g.*, Castaneda v. Partida, 430 U.S. 482, 492-93 (1977); Carter v. Jury Comm'n, 396 U.S. 320, 329 (1970); Whitus v. Georgia, 385 U.S. 545, 549-50 (1967); Avery v. Georgia, 345 U.S. 559, 561 (1953); Norris v. Alabama, 294 U.S. 587, 589 (1935).

67. Hernandez v. Texas, 347 U.S. 475, 478-79 (1954); *see Avery*, 345 U.S. at 562-63 (although

norities on jury lists.[68]

Prior to 1965 the Court's equal protection-jury selection cases were limited to claims of discrimination in the formation of jury pools.[69] As the Court struck down states' discriminatory practices in this area and black persons finally were included on jury lists, however, prosecutors found other ways to prevent black persons from sitting on juries.[70] One method prosecutors used was exercising peremptory challenges at trial to strike black potential jurors from the venire.[71] The Court addressed the constitutionality of this practice for the first time in *Swain v. Alabama*.[72]

Swain, a black man, was charged with rape.[73] At trial he moved to strike the venire and to declare void the all-white jury, contending that both had been chosen in a discriminatory manner. Specifically, Swain claimed that the prosecutor had exercised his peremptory challenges unlawfully against all of the black persons on the venire.[74] The trial court denied Swain's motions and the Alabama Supreme Court affirmed his conviction and death sentence.[75]

The United States Supreme Court first dismissed Swain's argument that the State intentionally excluded black persons from the jury pool.[76] The Court then considered his claim that the prosecutor had exercised peremptory challenges purposely to exclude all black persons from the jury in violation of the equal protection clause. In its analysis, the Court recognized the inherent tension between peremptory challenges and the fourteenth amendment. It acknowledged, on the one hand, that settled constitutional principles prohibiting racially discriminatory state jury selection practices apply not only to discrimination in selecting persons for jury service, but also to discrimination in selecting the jurors in a particular case.[77] On the other hand, the Court noted that peremptory challenges historically have been thought to facilitate the selection of fair and impartial juries—both in fact and as perceived by the parties.[78] The Court con-

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statute was facially neutral, State used different color record cards to identify black persons and to make it easier for jury commissioners to avoid selecting blacks for jury service); *Norris*, 294 U.S. at 589-91 (despite statute permitting black persons to serve as jurors, no black person ever was called to jury service); Neal v. Delaware, 103 U.S. 370, 371-73, 394 (1881) (finding equal protection violation when statute authorized only qualified voters to be jurors and state law prohibited black persons from voting).

68. *Castaneda*, 430 U.S. at 493; *see Whitus*, 385 U.S. at 550-51.

69. *See, e.g., Hernandez*, 347 U.S. at 478-79; *Avery*, 345 U.S. at 561; Patton v. Mississippi, 332 U.S. 463, 464 (1947); *Norris*, 294 U.S. at 590-93.

70. J. VAN DYKE, *supra* note 2, at 150; Kuhn, *supra* note 12, at 283.

71. J. VAN DYKE, *supra* note 2, at 150; Kuhn, *supra* note 12, at 283.

72. 380 U.S. 202 (1965).

73. *Id.* at 203.

74. *See id.* at 203, 205-06, 209-10.

75. *Id.* at 203.

76. *Id.* at 209. The Court noted that eight black persons had been on the venire and that Swain failed otherwise to prove purposeful discrimination. *Id.* at 205-09.

77. *See id.* at 224 (holding that the peremptory challenge may not be used to deny black persons the right and opportunity to participate in the administration of justice that white persons enjoy).

78. *Id.* at 212-20. The sixth amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury." U.S. CONST. amend. VI. For a discussion of the history of the peremptory challenge and its adoption into the American legal sys-

cluded that challenging black prospective jurors on account of race does not necessarily violate the equal protection clause.[79] Peremptory challenges, the Court reasoned, are necessarily discretionary. To remove all jurors they believe are biased, litigants must be permitted to exercise peremptory challenges on the basis of prospective jurors' looks, gestures, habits, and group affiliations.[80] This principle holds true particularly in light of the limited knowledge litigants normally have about prospective jurors.[81] Moreover, the Court explained, since all persons are equally subject to being challenged peremptorily, black prospective jurors are disadvantaged by peremptory challenges no more than white prospective jurors.[82] The Court presumed that prosecutors use peremptory challenges to obtain impartial juries, not because of racial animus.[83] Accordingly, it held that a defendant can never prove an equal protection violation solely from the prosecutor's peremptory challenges in his case.[84] To give meaning to *Strauder* and its progeny, however, the Court added that a defendant may prove an equal protection violation by showing that the "prosecutor . . . in case after case, whatever the circumstances, whatever the crime and whoever the defendant or victim may be, is responsible for" peremptorily striking all qualified black persons.[85] Such evidence would show that the prosecutor challenged members of the defendant's race not to ensure an impartial jury, but rather to deny them categorically and unconstitutionally the opportunity to serve as jurors.[86]

Swain's standard for proving a fourteenth amendment violation—systematic discrimination by the prosecutor over many cases—soon proved almost impossible for defendants to satisfy. In the twenty years following *Swain*, virtually no defendants successfully challenged prosecutors' uses of peremptory challenges.[87] The continuing practice of prosecutors peremptorily striking all or most blacks caused the Supreme Court in 1986 to re-examine, in *Batson*, the *Swain* standard of proof.

III. *BATSON V. KENTUCKY*

A. The Batson Opinions

James Kirkland Batson, a black man, was charged with second-degree burglary and receipt of stolen goods.[88] On the first day of his trial in a Kentucky circuit court, the judge excused a number of jurors for cause and then permitted

tem, see *supra* notes 26-54 and accompanying text. For a discussion of how, in theory, the peremptory challenge facilitates the selection of impartial jurors, see *supra* notes 31-33 and accompanying text.

79. *Swain*, 380 U.S. at 221.

80. *See id.* at 220-21.

81. *Id.*

82. *See id.* at 221.

83. *Id.* at 222.

84. *See id.*

85. *Id.* at 223.

86. *Id.* at 224.

87. *See* McCray v. Abrams, 750 F.2d 1113, 1118 (2d Cir. 1984) ("*Swain* has led most courts to reject all constitutional challenges to the prosecutor's alleged discriminatory use of peremptories.").

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

the attorneys to exercise peremptory challenges.[89] The prosecutor used his peremptory challenges to strike all four black persons on the venire.[90] Batson's counsel objected to the prosecutor's actions and moved to discharge the jury.[91] He argued that striking the black persons violated Batson's sixth and fourteenth amendment rights to a jury drawn from a fair cross-section of the community[92] and his fourteenth amendment right to equal protection of the laws.[93] The trial court denied the motion, and Batson was convicted by the all-white jury.[94] The Kentucky Supreme Court affirmed.[95] Relying on *Swain*, the court found that Batson had neither alleged nor proved the prosecutor's systematic exclusion of black persons.[96] The United States Supreme Court granted certiorari and reversed Batson's conviction.[97]

Justice Powell wrote for a seven-justice majority. Once again, the Court reaffirmed the basic constitutional principle that the State may not engage in racial discrimination when selecting juries.[98] "The harm from discriminatory jury selection," Justice Powell remarked, "extends . . . to touch the entire community" by undermining public confidence in the fairness of the judicial system.[99] The Court then overruled *Swain's* holding that a defendant can prove unconstitutional discrimination only by showing systematic discrimination over time.[100] The Court explained that the equal protection clause proscribes not only those peremptory challenges that are motivated by racial animus, but also those that are based on the patently erroneous assumption that members of the defendant's race as a group are biased.[101] This holding was a stark departure from *Swain*, which had held expressly that group affiliations are constitutionally proper bases for peremptory challenges.[102] Moreover, the *Batson* Court recog-

89. *Id.* at 82-83.

90. *Id.* at 83.

91. *Id.*

92. The sixth amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. amend. VI. It is applicable to the states through the fourteenth amendment. *See* Duncan v. Louisiana, 391 U.S. 145, 149 (1968). The Supreme Court has construed this clause to guarantee the defendant a jury drawn from a fair cross-section of the community. Taylor v. Louisiana, 419 U.S. 522, 528 (1975).

93. *Batson*, 476 U.S. at 83.

94. *Id.*

95. *Id.* at 84.

96. *Id.* Batson did not press his equal protection claim in the Kentucky Supreme Court, apparently conceding that he could not meet the *Swain* standard of systematic exclusion of blacks over time. In analyzing Batson's sixth amendment claim, however, the Kentucky Supreme Court held that the *Swain* standard also applied when the defendant alleged a fair cross-section violation as a result of the prosecutor's peremptory challenges. *Id.* at 83-84.

97. *Id.* at 84.

98. *Id.* Batson never raised an equal protection claim in the Supreme Court. Rather, he relied solely on the sixth amendment right to a jury drawn from a fair cross-section of the community. Nevertheless, the majority declined to address the sixth amendment claim and reversed Batson's conviction exclusively on equal protection grounds. This action spurred a vehement dissent from Chief Justice Burger. *See id.* at 112-18 (Burger, C.J., dissenting).

99. *Id.* at 87.

100. *Id.* at 92-93.

101. *See id.* at 86.

102. *See* Swain v. Alabama, 380 U.S. 202, 221 (1965); *supra* notes 79-83 and accompanying text.

nized that *Swain*'s requirement of systematic discrimination over time saddled defendants with a "crippling burden of proof"[103] while leaving prosecutors' peremptory challenges "largely immune from constitutional scrutiny."[104] The Court held that defendants may prove equal protection violations from the peremptory challenges exercised in their cases alone.[105]

Justice Powell then announced the particular manner in which defendants may prove discrimination.[106] Initially, the defendant must establish a prima facie case of purposeful discrimination.[107] The prima facie case has three elements. First, the defendant must be a member of a cognizable racial group and the prosecutor must have exercised peremptory challenges against members of that group.[108] Next, the defendant is entitled to rely on the fact that peremptory challenges "permit[] 'those to discriminate who are of a mind to discriminate.' "[109] Last, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used peremptory challenges to remove prospective jurors on account of race.[110] Once the defendant establishes a prima facie case, the burden shifts to the prosecutor to come forward with "clear and reasonably specific" race-neutral reasons for the peremptory challenges under attack.[111] This explanation need not rise to a level that would justify a challenge for cause, but it must be more than an assertion of good faith.[112] The defendant bears the ultimate burden of persuasion on the issue of the prosecutor's purposeful discrimination.[113]

The *Batson* Court instructed that this burden-shifting evidentiary system would operate in the same manner as the evidentiary system used in "disparate treatment" employment discrimination cases under Title VII[114] of the Civil Rights Act of 1964.[115] Justice Powell already had explained the purpose of such

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

104. *Id.* at 93-94.

105. *Id.* at 95-98; *see id.* at 100-01 (White, J., concurring). Because the Court believed that the peremptory challenge makes an important contribution to the justice system, however, it expressly declined to abolish the challenge. *Id.* at 98-99 & n.22.

106. In formulating the standard of proof, the Court was guided by the general principle that governmental action alleged to be discriminatory must be traced to a racially discriminatory purpose. This requirement emerged from the Court's landmark equal protection cases of the 1970s. *See id.* at 93 (quoting Washington v. Davis, 426 U.S. 229, 240 (1976)).

107. *See id.*

108. *Id.* at 96 (citing Castaneda v. Partida, 430 U.S. 482, 494 (1977)). Since 1986, the Court has retreated from the position that the defendant and the challenged juror must be of the same race. In 1991, the Court held that a white defendant has standing to allocate peremptory challenges exercised against members of other, constitutionally recognizable racial groups. Powers v. Ohio, 111 S. Ct. 1364, 1370, 1373 (1991).

109. *Batson*, 476 U.S. at 96 (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).

110. *Id.*

111. *Id.* at 97-98 & n.20 (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981)).

112. *Id.* at 97-98. A prosecutor may not claim simply that in her intuitive judgment the challenged jurors would be partial to the defendant because of their shared race. *Id.* at 97.

113. *Id.* at 94 n.18. Since the trial court's findings will turn largely on credibility evaluations, the Court held, appellate courts should give those findings great deference. *Id.* at 98 n.21; *see infra* notes 277-83 and accompanying text.

114. Civil Rights Act of 1964, tit. VII, 42 U.S.C. §§ 2000e to 2000e-17 (1988).

115. *Batson*, 476 U.S. at 94 n.18 (citing United States Postal Serv. Bd. of Governors v. Aikens,

a system in *Texas Department of Community Affairs v. Burdine*:[116] it "serves to bring the litigants and the court expeditiously and fairly to [the] ultimate question"[117] whether the party in question engaged in illegal discrimination. At issue in discrimination cases is alleged improper intent or motivation. A person's intent is difficult to prove by objective evidence.[118] Furthermore, the alleged discriminating party naturally has superior access to proof of his own reasons for the questioned conduct. By shifting the burden of coming forward to the party whose actions are at issue once the complaining party provides threshold prima facie evidence, the burden-shifting system provides persons alleging discrimination with "the kind of detailed discovery that would make it possible for them to prove illicit intent."[119] To effectuate this discovery purpose, *Burdine* explicitly held that "[t]he burden of establishing a prima facie case . . . is not onerous."[120] Likewise, therefore, the prima facie burden under *Batson* is not burdensome.[121]

Justice White, the author of *Swain*, concurred in the decision to overrule *Swain*.[122] That case, he explained, had been a warning that removing black persons on the assumption that they could not judge black defendants fairly would contravene the equal protection clause.[123] Since discriminatory peremptory challenges remained widespread despite this warning, Justice White argued that defendants, in appropriate cases, should have an opportunity to inquire into prosecutors' reasons for challenging black potential jurors.[124]

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460 U.S. 711, 714-15 (1983); *see* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-56 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973)). Numerous lower courts have interpreted *Batson* as relying on the Court's Title VII cases to explain the operation of the burden-shifting rules. *See, e.g.*, People v. Harris, 129 Ill. 2d 123, 177, 184, 544 N.E.2d 357, 381, 384 (1989), *cert. denied*, 110 S. Ct. 1323 (1990); Stanley v. State, 313 Md. 50, 60, 542 A.2d 1267, 1271-72 (1988); Chisolm v. State, 529 So. 2d 635, 637 (Miss. 1988); State v. Antwine, 743 S.W.2d 51, 63 (Mo. 1987) (en banc), *cert. denied*, 486 U.S. 1017 (1988); State v. Porter, 326 N.C. 489, 497-98, 391 S.E.2d 144, 150 (1990).

116. 450 U.S. 248 (1981).

117. *Id.* at 253.

118. *See* Trans World Airlines v. Thurston, 469 U.S. 111, 121 (1985) (shifting burdens of proof under Title VII designed to assure that " 'plaintiff [has] his day in court despite the unavailability of direct evidence' " of discriminatory intent (quoting Loeb v. Textron, Inc., 600 F.2d 1003, 1014 (1st Cir. 1979))); 2 A. LARSON & L. LARSON, EMPLOYMENT DISCRIMINATION § 50.10, at 10-6 (1990) (employers are "too sophisticated to profess their prejudices on paper or before witnesses"); Blumoff & Lewis, *The Reagan Court and Title VII: A Common-Law Outlook on a Statutory Task*, 69 N.C.L. REV. 1, 9 (1990) (direct evidence of discriminatory intent is often unavailable).

119. Bartholet, *Proof of Discriminatory Intent Under Title VII*: United States Postal Service Board of Governors v. Aikens, 70 CALIF. L. REV. 1201, 1206 (1982); *see also* 2 A. LARSON & L. LARSON, *supra* note 118, § 50.10, at 10-5 (prima facie case may be established from objective evidence); E. CLEARY, MCCORMICK ON EVIDENCE § 343, at 968 (3d ed. 1984) (one reason for having burden-shifting presumptions is simple fairness, including situations in which opposing party has superior means of access to proof).

120. *Burdine*, 450 U.S. at 253; *accord*, Patterson v. McLean Credit Union, 491 U.S. 164, 186 (1989).

121. Stanley v. State, 313 Md. App. 50, 71, 542 A.2d 1267, 1277 (1988), *cert. denied*, 322 Md. 240, 587 A.2d 247 (1991); Blume, *Racial Discrimination in the State's Use of Peremptory Challenges: The Application of the United States Supreme Court's Decision in* Batson v. Kentucky *in South Carolina*, 40 S.C.L. REV. 299, 330 (1989).

122. *Batson*, 476 U.S. at 101 (White, J., concurring).

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

124. *See id.* (White, J., concurring).

Justice Marshall's concurrence was not nearly as approving of the majority opinion as Justice White's. Although he did characterize the Court's opinion as an "historic step toward eliminating the shameful practice of racial discrimination in the selection of juries,"[125] Justice Marshall opined that *Batson*'s new standard of proof would not bring about the end of discrimination.[126] He feared that prosecutors easily could evade *Batson* by proffering pretextual, facially nonracial explanations that the courts could not second-guess.[127] Stressing that the peremptory challenge is not of constitutional magnitude, Justice Marshall argued that the peremptory challenge should be banned entirely.[128]

In a dissenting opinion joined by Justice Rehnquist, Chief Justice Burger also predicted that *Batson* would not eradicate discrimination in jury selection.[129] The Chief Justice came to the opposite conclusion from Justice Marshall, however, asserting that the peremptory challenge is essential to assure the appearance of justice.[130] He argued that since all groups are subject to the peremptory challenge in a given case, striking jurors because of group affiliation does not violate the equal protection clause in the particular case.[131] The Chief Justice thus would have reaffirmed *Swain* and upheld Batson's conviction.[132]

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125. *Id.* at 102 (Marshall, J., concurring).

126. *Id.* at 102-05 (Marshall, J., concurring) (predicting that all but the most flagrant violations of the rule would remain unassailable).

127. *Id.* at 105-06 (Marshall, J., concurring).

128. *Id.* at 108 (Marshall, J., concurring). In addition to the concurring opinions by Justices White and Marshall, Justice O'Connor wrote to argue that the decision should not be applied retroactively, *see id.* at 111 (O'Connor, J., concurring), and Justice Stevens wrote to justify the Court's decision to resolve the case on equal protection grounds, even though Batson had not argued that issue before the Court, *see id.* at 108-11 (Stevens, J., concurring).

129. The Chief Justice had several other criticisms of the majority's analysis and holding. He doubted that prosecutors exercising peremptory challenges could meet the burden of providing neutral explanations for their action. *Batson*, 476 U.S. at 129 (Burger, C.J., dissenting). He also was skeptical that prosecutors could offer explanations somewhere between that required for a peremptory challenge (no explanation) and that required for a challenge for cause; permitting any 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 United States v. Clark, 737 F.2d 679, 682 (7th Cir. 1984)).

130. *Id.* at 120 (Burger, C.J., dissenting).

131. *Id.* at 122-23 (Burger, C.J., dissenting).

132. *Id.* at 118-31 (Burger, C.J., dissenting). In a separate dissenting opinion joined by Chief Justice Burger, Justice Rehnquist asserted the importance of the peremptory challenge as a part of the system of trial by jury. He added that "[t]he use of group affiliations, such as age, race, or occupation . . . based on the assumption or belief that members of one group are more likely to favor defendants who belong to the same group, has long been accepted as a legitimate basis for the State's exercise of peremptory challenges." *Id.* at 138 (Rehnquist, J., dissenting). Justice Rehnquist's argument that members of the defendant's race may be assumed to be biased in favor of the defendant, however, even if true, cuts two ways. Consider, for example, the common case with a black defendant and a white victim and prosecutor. Justice Rehnquist's theory states that black members of the jury may be biased for the defendant. Consequently, the prosecutor should be permitted to remove those black jurors peremptorily. Justice Rehnquist's argument necessarily implies, however, that white persons may be assumed to be biased in favor of whites. It follows that the white jurors may be assumed to be biased in favor of the victim and prosecutor, and against the defendant. Since in most cases more white persons will be on the venire than black persons, the defendant will not be able to remove as great a percentage of the whites as the prosecutor will be able to remove of the blacks, and the result will not be an impartial jury, but rather one in which the "subtle group biases of the majority . . . operate, while those of the minority [are] silenced." Commonwealth v. Soares, 377 Mass. 461, 488, 387 N.E.2d 499, 516, *cert. denied*, 444 U.S. 881 (1979); Kuhn, *supra* note 12, at

B. Undecided Issues

Batson struck a new balance in the ongoing conflict between the equal protection clause and the peremptory challenge. It made clear that, despite normally being exercised in an arbitrary and capricious manner, the peremptory challenge is subject to the strictures of the fourteenth amendment.[133] As a federal appeals court later remarked, the case's core principle is that " 'a defendant [has] the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria.' "[134] More specifically, *Batson* sought to provide a more effective means than *Swain* of ensuring that members of racial minorities are not excluded from juries on account of race.[135]

The Court expressly refused, however, to specify the implementation of the *Batson* evidentiary scheme.[136] Instead, it assigned to state and lower federal

290-91. Even if Justice Rehnquist's assumption were true, therefore, it would operate in favor of restrictions on the right to exercise peremptory challenges on the basis of race.

133. In a footnote, Justice Powell wrote: "The standard we adopt . . . is designed to ensure that a State does not use peremptory challenges to strike any black juror because of . . . race." *Batson*, 476 U.S. at 99 n.22. At least one commentator has criticized the *Batson* Court for seeking "to manifest its symbolic opposition to racial discrimination while doing as little as possible to alter the peremptory challenge." Alschuler, *supra* note 7, at 199. While it is possible that the subjective intention of the *Batson* majority was simply to oppose racial discrimination symbolically, courts must take the Supreme Court at its word when implementing the decision.

134. United States v. David, 803 F.2d 1567, 1570 (11th Cir. 1986) (quoting *Batson*, 476 U.S. at 85-86). The court noted that *Batson*'s command is to eliminate, not merely minimize, racial discrimination in jury selection. *Id.* at 1571.

135. Commonwealth v. McCormick, 359 Pa. Super. 461, 474, 519 A.2d 442, 449 (1986).

136. *Batson*, 476 U.S. at 99 & n.24. In addition to implementation issues, *Batson* left unanswered a panoply of questions regarding the scope of its application. For example, the decision did not address whether the use of peremptory challenges against minorities may be attacked as a violation of the sixth amendment right to a jury drawn from a fair cross-section of the community. *Batson*, 476 U.S. at 84 n.4. Four years later, however, the Court held that the sixth amendment does not forbid prosecutors from striking jurors on account of race. Holland v. Illinois, 110 S. Ct. 803, 811 (1990).

The Court also left unanswered what constitutes a "cognizable group" entitled to *Batson* protection. Lower courts have held that Hispanics are one such group. *See, e.g.*, State v. Sandoval, 105 N.M. 696, 700, 736 P.2d 501, 505 (Ct. App. 1987); State v. Ramos, 574 A.2d 1213, 1216 (R.I. 1990); State v. Cantu, 750 P.2d 591, 596 (Utah 1988). Native Americans are another. *See, e.g.*, United States v. Roan Eagle, 867 F.2d 436, 441 (8th Cir.), *cert. denied*, 490 U.S. 1028 (1989); United States v. Chalan, 812 F.2d 1302, 1314 (10th Cir. 1987); State v. Porter, 326 N.C. 489, 499, 391 S.E.2d 144, 151 (1990). The courts have split, however, on whether women constitute a cognizable *Batson* group. *Compare* United States v. De Gross, 913 F.2d 1417, 1422 (9th Cir. 1990) (prohibiting peremptory challenges on the basis of gender) *with* State v. Oliviera, 534 A.2d 867, 870 (R.I. 1987) (women not a cognizable group). *See also* People v. Blunt, 162 A.D.2d 86, 88-89, 561 N.Y.S.2d 90, 92 (1990) (state constitution's equal protection clause prohibits peremptory challenges on basis of gender); Sagawa, Batson v. Kentucky: *Will It Keep Women on the Jury?*, 3 BERKELEY WOMEN'S L.J. 14, 37-44 (1987-88) (arguing that *Batson* proscribes exclusion of women through peremptory challenges).

The question whether white persons may assert *Batson* claims has arisen in two contexts. One issue is whether white defendants have standing to challenge the striking of black prospective jurors. *Batson*'s language suggests that white persons have no such standing, since one of the elements of the *Batson* prima facie case is that members of the defendant's race were struck. *Batson*, 476 U.S. at 96. In 1991, however, the Court held that the defendant's race is irrelevant to the issue of standing to raise an equal protection claim. Powers v. Ohio, 111 S. Ct. 1364, 1370, 1373 (1991). The second issue regarding the standing of white defendants is whether they may attack peremptory challenges exercised against white jurors on account of race. The few courts that have addressed this question have answered it in the affirmative. *See* Government of Virgin Islands v. Forte, 865 F.2d 59, 64 (3d Cir. 1989); State v. Smith, 515 So. 2d 149, 150 (Ala. Crim. App. 1987) (dictum).

A hotly debated issue left unanswered by *Batson* is whether the defendant is precluded by the

courts[137] the task of determining what evidence gives rise to a prima facie inference of discrimination and what prosecutorial explanations rebut a prima facie case.[138] In effect, having laid down the relevant constitutional guidelines, the Court challenged the lower courts to eradicate discriminatory jury selection practices.

One of the major side effects of *Batson*'s evidentiary standard is that it fundamentally changes the prosecutorial peremptory challenge. By definition, peremptory challenges require no explanation. Thus, when prosecutors must give reasons for their peremptory challenges, those challenges are no longer peremptory. Lower courts implementing *Batson* can handle this consequence in several ways. They can require a low threshold showing by the defendant to raise a prima facie inference of discrimination, in which case prosecutors will have to explain their challenges more often. They also can scrutinize prosecutors' rebuttal explanations closely, causing more prosecutorial challenges to be found unconstitutional. Although the attack on discrimination might be successful, the effect would be to sacrifice the peremptory challenge's peremptory nature. Alternatively, the courts can require a high level of prima facie proof and not scrutinize prosecutors' proffered reasons so closely. Although this approach would protect the peremptory challenge from serious intrusion, it might render *Batson* no more effective than *Swain* in rooting out discrimination. One answer to this apparent dilemma lies in the purpose of *Batson*: the Court specifically stated that it intended to ensure that no state strikes any juror because of race.[139] Arguably, therefore, lower courts should construe any doubt in favor of combating discrimination, even at the expense of the peremptory challenge. By technically permitting the implementing courts to operate within this range of options, *Batson*'s language gives these courts considerable power to define the extent to which the discriminatory use of peremptory challenges and the peremptory chal-

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Constitution from exercising peremptory challenges on the basis of race. In his *Batson* dissent, Chief Justice Burger contended that " '[b]etween [the defendant] and the state the scales are to be evenly held.' " 476 U.S. at 126 (Burger, C.J., dissenting) (quoting Hayes v. Missouri, 120 U.S. 68, 70 (1887)). Thus, *Batson* also should apply to the defendant's discriminatory use of peremptory challenges. *Id.* at 125-26 (Burger, C.J., dissenting); *see also* Alschuler, *supra* note 7, at 197-98 (defendants' peremptory challenges are "state actions" subject to the strictures of the fourteenth amendment); Note, *Discrimination by the Defense: Peremptory Challenges After* Batson v. Kentucky, 88 COLUM. L. REV. 355, 365-68 (1988) (prosecutors should have third-party standing to assert rights of jurors excluded by defendants). In 1990 New York became the first state to prohibit racially motivated peremptory challenges by the defendant. *See* People v. Kern, 75 N.Y.2d 638, 650, 554 N.E.2d 1235, 1241, 555 N.Y.S.2d 647, 653, *cert. denied*, 111 S. Ct. 77 (1990). Some commentators have argued, however, that the defendant's use of peremptory challenges is not a "state action" subject to the strictures of the fourteenth amendment. Goldwasser, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 HARV. L. REV. 808, 838 (1989); *see* Note, *Defendant's Discriminatory Use of the Peremptory Challenge After* Batson v. Kentucky, 62 ST. JOHN'S L. REV. 46, 57 (1987).

137. Although the equal protection clause by its terms applies only to actions of state governments, the right to equal protection, and thus *Batson*, applies to actions of the federal government through the fifth amendment. United States v. Horsley, 864 F.2d 1543, 1544 n.2 (11th Cir. 1989) (citing Johnson v. Robison, 415 U.S. 361, 364 n.4 (1974)).

138. *Batson*, 476 U.S. at 99 & n.24. The Court cited the "variety of jury selection practices" in state and federal trial courts as its reason for not dictating how to implement the decision. *Id.* at 99 n.24.

139. *Id.* at 97.

lenge itself survive. In short, the lower courts have become laboratories experimenting with whether and how the equal protection clause and the peremptory challenge can coexist in the American judicial system.

Several critics have echoed Justice Marshall's opinion that the peremptory challenge and the equal protection clause cannot coexist and have called for the abolition of peremptory challenges as the only effective way of ending discriminatory jury selection.[140] They have noted that "a prosecutor can easily assert facially neutral reasons for striking a juror," thus rendering *Batson*'s constitutional protections illusory.[141] Before a sufficient number of lower courts apply *Batson* rigorously, however, it would be premature to toss out the decision and, with it, the eight-hundred-year old peremptory challenge.[142] As is evident from North Carolina's experience, some states have failed to implement *Batson* aggressively, instead adopting an unduly constricted view of the decision.[143] As a result, the jury remains out on *Batson*, while defendants and prospective jurors continue to suffer the invidious effects of racially discriminatory jury selection practices.[144]

IV. THE IMPLEMENTATION OF *BATSON* IN NORTH CAROLINA

In his concurring opinion, Justice White predicted that "[m]uch litigation [would] be required to spell out the contours of the Court's equal protection holding."[145] In the five years since *Batson*, state and federal courts have heard literally hundreds of *Batson* claims. Nevertheless, no consensus has emerged on how best to implement the decision. As a result, *Batson*'s impact has varied from state to state. In North Carolina, neither the supreme court nor the court of appeals ever has found a prosecutor guilty of violating *Batson*.[146] This section examines how North Carolina has implemented the decision and considers why no North Carolina defendant has won a *Batson* claim.

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140. *See* Chew v. State, 71 Md. App. 681, 717, 527 A.2d 332, 350 (1987); Commonwealth v. Hardcastle, 519 Pa. 236, 261-64, 546 A.2d 1101, 1113-14 (1988) (Nix, C.J., dissenting), *cert. denied*, 110 S. Ct. 1169 (1990); Note, *supra* note 16, at 1039; *see also* Brown, McGuire & Winters, *supra* note 2, at 234 (prosecutor's peremptory challenges should be abolished); Massaro, *supra* note 6, at 560-63 (same); Note, *The Use of Peremptory Challenges to Exclude Blacks from Petit Juries in Civil Actions: The Case for Striking Peremptory Strikes*, 4 REV. OF LITIGATION 175, 212-13, 215 (1984) [hereinafter Note, *The Case for Striking Peremptory Strikes*] (peremptory challenges should be abolished in civil cases).

141. *Batson*, 476 U.S. at 106 (Marshall, J., concurring); *see Hardcastle*, 519 Pa. at 261, 546 A.2d at 1113 (Nix, C.J., dissenting); Note, *supra* note 16, at 1036-38.

142. *See* Note, Batson v. Kentucky *and the Prosecutorial Peremptory Challenge: Arbitrary and Capricious Equal Protection?*, 74 VA. L. REV. 811, 818 (1988).

143. *See* Blume, *supra* note 121, at 300 (unduly restrictive view of *Batson* adopted in South Carolina).

144. In his concurring opinion, Justice Marshall scolded that "[m]isuse of the peremptory challenge to exclude black jurors has become both common and flagrant." *Batson*, 476 U.S. at 103 (Marshall, J., concurring).

145. *Id.* at 102 (White, J., concurring).

146. *See supra* note 19 and accompanying text.

A. The Prima Facie Case

Batson set forth the three elements of the prima facie case. The prosecutor must have peremptorily challenged members of a cognizable racial group. Second, the defendant may rely on the fact that the peremptory challenge is a device susceptible to being used in a discriminatory manner. Third, the defendant must show that these facts and "other relevant circumstances" raise an inference of discrimination.[147] The North Carolina Supreme Court and the North Carolina Court of Appeals have dealt almost exclusively with the third element, and thus this question: What facts and circumstances raise an inference of purposeful discrimination?[148]

The North Carolina appellate courts have identified several circumstances that are relevant to this prima facie inquiry. Some of these circumstances tend to support an inference of discrimination. They include a pattern of peremptory challenges against black persons, use of a disproportionate number of challenges against black persons, questions and remarks by the prosecutor during voir dire that suggest racial animus, and the prominence of racial issues in the case.[149] Other circumstances the courts have recognized, in contrast, tend to refute an allegation of discrimination. Those circumstances include the acceptance rate of minority jurors by the State[150] and the ultimate racial composition of the jury.[151]

Only once, however, has a North Carolina appellate court found the circumstances of a case sufficient to raise a prima facie inference of discrimina-

147. *Batson*, 476 U.S. at 96; *see supra* notes 107-10 and accompanying text.

148. The North Carolina courts have not focused on the first element of the prima facie case because only a few cases have considered *Batson* when the defendant was not black. *See* State v. Porter, 326 N.C. 489, 499, 391 S.E.2d 144, 151 (1990) (Native Americans are racial group cognizable for *Batson* purposes); State v. Agudelo, 89 N.C. App. 640, 647-48, 366 S.E.2d 921, 925-26 (denying Hispanic defendant's *Batson* claim without deciding whether Hispanics are cognizable group), *disc. rev. denied*, 323 N.C. 176, 373 S.E.2d 115 (1988). The courts have not addressed the second "element" of the prima facie case because it is merely a proposition upon which the defendant may rely when attempting to show discrimination. It is not a fact to be established, and thus has generated no litigation.

149. *See* State v. Smith, 328 N.C. 99, 121, 400 S.E.2d 712, 724 (1991); State v. Porter, 326 N.C. 489, 498, 391 S.E.2d 144, 150-51 (1990); State v. Crandell, 322 N.C. 487, 502, 369 S.E.2d 579, 588 (1988); State v. Jackson, 322 N.C. 251, 255, 368 S.E.2d 838, 840 (1988), *cert. denied*, 490 U.S. 1110 (1989); State v. Robbins, 319 N.C. 465, 490-91, 356 S.E.2d 279, 294-95, *cert. denied*, 484 U.S. 918 (1987).

150. *Smith*, 328 N.C. at 121, 400 S.E.2d at 724. Prior to *Smith* the North Carolina Supreme Court had held, in effect, that any time the State's acceptance rate of black potential jurors was 40% or greater, then no prima facie inference of discrimination arose. *See* State v. Allen, 323 N.C. 208, 219, 372 S.E.2d 855, 862 (1988) (prosecutor accepted 41% of black prospective jurors), *vacated on other grounds*, 110 S. Ct. 1463 (1990); *Crandell*, 322 N.C. at 502, 369 S.E.2d at 588 (prosecutor accepted 50% of black prospective jurors); State v. Abbott, 320 N.C. 475, 481-82, 358 S.E.2d 365, 369-70 (1987) (prosecutor accepted 40% of black prospective jurors); State v. Belton, 318 N.C. 141, 159, 347 S.E.2d 755, 766 (1986) (prosecutor accepted 50% of black prospective jurors). This rule was inconsistent with *Batson* because it permitted prosecutors to strike peremptorily up to 60% of the minorities tendered virtually without fear of *Batson* consequences. Thus, by recognizing that the acceptance rate of minorities by the State is relevant to, but not dispositive of, the prima facie inquiry, the *Smith* decision brought North Carolina practice in line with the dictates of the *Batson* Court.

151. *Porter*, 326 N.C. at 500, 391 S.E.2d at 152; *Belton*, 318 N.C. at 159, 347 S.E.2d at 766; *see infra* note 159.

tion.[152] In *State v. Smith*,[153] decided in 1991, the prosecutor struck twelve out of the twenty-one black prospective jurors tendered to him.[154] He used his first three peremptory challenges, six of his first seven, and twelve out of a total of fifteen exercised, to remove black persons.[155] In addition, the case, which involved an interracial killing, was so polluted with racial emotions that its venue had been changed to another county.[156] Most significantly, the prosecutor's remarks during jury selection suggested strongly that his peremptory challenges were racially motivated. The district attorney complained that the defendant had struck several white prospective jurors and then stated:

> I submit to the Court that the State, the victim in this case is also entitled to a fair representation of those jurors who are seated there. The victim is white, they ought to have a fair representation as to the number of black/white jurors that are on there, and at the rate that we're going, we'll have—if it's any wish apparently of the defendant, we'll have nine—nine/three or worse.[157]

The court held that the pattern of discrimination, the exercise of a disproportionate percentage of the State's challenges against black persons, the racially-charged nature of the case, and the prosecutor's race-conscious remarks together established a prima facie inference of discrimination.[158]

The North Carolina appellate courts have found only this one blatant prima facie case to have been established in the five years since *Batson*, primarily because they have misapplied the *Batson* rule by taking into account the voir dire responses of challenged jurors when evaluating the strength of the prima facie inference.[159] *State v. Robbins*[160] illustrates this misapplication. In *Robbins* a

152. In some cases, trial courts have found that the defendant made out a prima facie case. *See infra* note 224.

153. 328 N.C. 99, 400 S.E.2d 712 (1991).

154. *Id.* at 121, 400 S.E.2d at 724.

155. *Id.* at 123, 400 S.E.2d at 725.

156. *Id.* at 122, 400 S.E.2d at 725.

157. *Id.*

158. *Id.* at 123, 400 S.E.2d at 725. The court then found that the prosecutor adequately rebutted the prima facie case, and thus was not guilty of a *Batson* violation. *Id.* at 126-27, 400 S.E.2d at 727-28.

159. Another way in which the North Carolina Supreme Court has misapplied the *Batson* prima facie case is by holding that the racial composition of the impaneled jury mirroring the racial composition of the county in which the trial took place is relevant evidence refuting an allegation of discrimination. *See* State v. Belton, 318 N.C. 141, 159, 347 S.E.2d 755, 766 (1986); *see also Smith*, 328 N.C. at 124, 400 S.E.2d at 726 (ultimate racial makeup of jury relevant to determination that *Batson* not violated); State v. Porter, 326 N.C. 489, 500, 391 S.E.2d 144, 152 (1990) (fact that jury mirrored racial composition of county is relevant to determination that *Batson* not violated). The relationship between the racial composition of the jury and the racial composition of the county is relevant only to the question whether the defendant was tried by a jury made up of a cross-section of the community. The right to a jury drawn from a fair cross-section of the community is guaranteed by the sixth amendment. *See* Taylor v. Louisiana, 419 U.S. 522, 528 (1975). *Batson*, however, is grounded solely on the fourteenth amendment equal protection clause, which prohibits *any* discriminatory peremptory challenge regardless of the racial composition of the eventual jury. Indeed, the Supreme Court has held that the racial composition of the jury is irrelevant to *Batson*. *See* Alvarado v. United States, 110 S. Ct. 2995, 2996 (1990) (per curiam) (reversing decision of court of appeals, which had denied *Batson* claim on ground that the jury chosen satisfied the sixth amendment fair cross-section concept).

160. 319 N.C. 465, 356 S.E.2d 279, *cert. denied*, 484 U.S. 918 (1987).

black man was charged with first degree murder, robbery with a firearm, and kidnapping.[161] Of the seventy-six potential jurors questioned during voir dire, twenty-one were black.[162] The state challenged ten of the black persons for cause because of their unequivocal opposition to the death penalty,[163] and the trial court excused two blacks on its own motion.[164] The prosecutor then exercised peremptory challenges against seven of the nine remaining black prospective jurors.[165] An all-white jury convicted Robbins and sentenced him to death.[166]

On appeal, the North Carolina Supreme Court rejected Robbins's contention that the prosecutor's striking seven black potential jurors established a prima facie inference of discrimination. The court first emphasized that judges must consider "all relevant circumstances" when determining whether prima facie cases exist.[167] The fact that the jury was composed entirely of white persons, the court held, did not necessarily imply discrimination.[168] Moreover, the court noted that the prosecutor had examined all potential jurors in the same manner; nothing in his questions or statements indicated a discriminatory motive.[169] Most significantly, however, the court relied on facts that the challenged jurors themselves had revealed in response to voir dire questioning: three of them had reservations about their ability to impose the death penalty; one was related to some of the defense witnesses; and two had been exposed to some pretrial publicity.[170] The court found that these facts dispelled any possible inference that the prosecutor struck the prospective jurors because of their race.[171]

Considering the challenged jurors' voir dire responses when deciding whether a prima facie inference of discrimination exists has been a common practice of the North Carolina appellate courts. In every such case, the courts

161. *Id.* at 481, 356 S.E.2d at 289.

162. *Id.* at 491-92, 356 S.E.2d at 295.

163. The racial implications of jury selection are magnified in capital cases for two reasons. First, studies have shown that race is an important factor in the imposition of the death penalty; black defendants who kill white victims have the greatest likelihood of being sentenced to death. *See* McCleskey v. Kemp, 481 U.S. 279, 286-87 (1987). Second, statistically, black persons oppose capital punishment more often than do whites. *See* THE DEATH PENALTY IN AMERICA 85 (H. Bedau 3d ed. 1982); Goldberg, *Toward Expansion of* Witherspoon: *Capital Scruples, Jury Bias, and Use of Psychological Data to Raise Presumptions in the Law*, 5 HARV. C.R.-C.L. L. REV. 53, 62 (1970). As a results, blacks are at a greater risk of being removed for cause on those grounds. *See* Darden v. Wainwright, 477 U.S. 168, 175 (1986) (absolute moral opposition to death penalty valid grounds for challenge for cause in capital case); Lockhart v. McCree, 476 U.S. 162, 173 (1986) (same).

164. *Robbins*, 319 N.C. at 492, 356 S.E.2d at 295.

165. *Id.* The defendant peremptorily challenged one black potential juror; the other black person sat as an alternate juror in the case. *Id.*

166. *Id.* at 491, 356 S.E.2d at 295.

167. *Id.* at 489, 356 S.E.2d at 293 (quoting *Batson*, 476 U.S. at 96-97).

168. *Id.* at 494-95, 356 S.E.2d at 297.

169. *Id.* at 493-94, 356 S.E.2d at 296.

170. *See id.* The courts cited similar voir dire responses in rejecting prima facie cases in State v. Davis, 325 N.C. 607, 619, 386 S.E.2d 418, 424 (1989) (potential juror held reservations about imposing death penalty), *cert. denied*, 110 S. Ct. 2587 (1990); State v. Aytche, 98 N.C. App. 358, 365, 391 S.E.2d 43, 47 (1990) (potential juror previously convicted of manslaughter); and State v. Batts, 93 N.C. App. 404, 409, 378 S.E.2d 211, 213 (1989) (potential juror knew members of defendant's family and attended school with defendant's brother).

171. *Robbins*, 319 N.C. at 494, 356 S.E.2d at 296.

have held that the facts disclosed by the jurors refuted any possible inference of prosecutorial discrimination. Thus, for example, no inference of discrimination has arisen when voir dire questioning revealed that the challenged black jurors previously had been convicted for nonsupport and writing bad checks;[172] that the potential juror had served on a jury within the previous four years;[173] that she had worked with youth who had drug and alcohol problems;[174] that she had a "hard look on her face";[175] and, in a case in which the defendant was twenty years old, that the juror had three grown children.[176]

By factoring in the challenged jurors' voir dire responses, North Carolina courts have confused facts that are relevant only to the prosecutor's rebuttal with facts that are relevant to the prima facie case. For example, in determining whether an inference of discrimination arose in *Robbins*, the court took into account statements by one challenged juror who had said she was related to some of the defense witnesses, two who had said they had been exposed to pretrial publicity, and one who had expressed reservations about imposing the death penalty.[177] These are not circumstances surrounding the disputed peremptory challenges, but are merely possible reasons why the prosecutor might have challenged the jurors. The distinction between the circumstances surrounding the prosecutor's peremptory challenges and the prosecutor's possible reasons for those challenges is crucial because, according to *Batson*, courts are supposed to consider only the circumstances surrounding the challenges at the prima facie stage; the prosecutor is supposed to proffer her reasons for the challenges once the defendant has established a prima facie case.[178]

The circumstances surrounding the prosecutor's peremptory challenges consist of the prosecutor's handling of the jury selection, and the conditions that characterize the jury selection and the case itself. Specifically, they include the manner in which the prosecutor questioned prospective jurors, the racial composition of the jury, the pattern of the prosecutor's peremptory challenges, and the

172. *Batts*, 93 N.C. App. at 409, 378 S.E.2d at 213.

173. *Davis*, 325 N.C. at 619, 386 S.E.2d at 424.

174. *Id.*

175. State v. Melvin, 99 N.C. App. 16, 30, 392 S.E.2d 740, 748 (1990).

176. *Davis*, 325 N.C. at 619, 386 S.E.2d at 424.

177. State v. Robbins, 319 N.C. 465, 492, 356 S.E.2d 279, 295, *cert. denied*, 484 U.S. 918 (1987); *see supra* notes 170-71 and accompanying text.

178. In Tolbert v. State, 315 Md. 13, 553 A.2d 228 (1989), the Maryland Court of Appeals stated: "What reasons a prosecutor may advance for his challenges are not relevant to a prima facie showing *vel non*. It is the 'circumstances' concerning the prosecutor's use of peremptory challenges which may create a prima facie case of discrimination against black jurors . . . ." *Id.* at 18, 533 A.2d at 230. *See also* People v. Trevino, 39 Cal. 3d 667, 692 n.26, 704 P.2d 719, 733 n.26, 217 Cal. Rptr. 652, 666 n.26 (1985) (en banc) ("It is neither the function nor the duty of the trial courts, or the appellate courts on review, to speculate as to prosecutorial motivation . . . ."); People v. Harris, 129 Ill. 2d 123, 184, 544 N.E.2d 357, 384 (1989) ("court should not presume, or infer from the facts of the case, that an unarticulated neutral explanation exists"), *cert. denied*, 110 S. Ct. 1323 (1990); Raphael, *Discriminatory Jury Selection: Lower Court Implementation of* Batson v. Kentucky, 25 WILLAMETTE L. REV. 293, 315 (1989) ("Most courts consider the prosecutor's reasons for challenges only after a *prima facie* case has been established."). This is not to say that prosecutors' possible reasons for exercising the questioned peremptory challenges are irrelevant to whether the prosecutors violated *Batson*; indeed, *Batson* violations ultimately turn on the prosecutors' motivation for striking the prospective jurors. Rather, the argument is merely that such reasons are irrelevant to determining whether a prima facie case of *Batson* discrimination exists.

racial overtones of the case.[179] The potential reasons for the prosecutor's challenges, in contrast, are the substantive statements that prospective jurors reveal during voir dire, and any characteristics of the prospective jurors that might cause the prosecutor to strike the jurors.[180] They might include, for example, the fact that the juror previously had been a criminal defendant or that the juror is related to the defendant.

A hypothetical situation illustrates further the distinction between "circumstances" and "reasons." Suppose ten black prospective jurors are on the venire. Assume further that nothing in the prosecutor's questions or statements during jury selection suggests racial animus; the prosecutor, however, exercises peremptory challenges against all ten black jurors. These events and conditions are the circumstances surrounding the prosecutor's peremptory challenges. The prosecutor's apparently evenhanded conduct during the voir dire is a circumstance weighing against an inference of discrimination; contrarily, the overwhelming pattern of challenges against black jurors is a circumstance weighing in favor of an inference of discrimination. If the trial judge finds an inference of discrimination, under *Batson* the prosecutor then must show that the peremptory challenges were not racially motivated. To do that, the prosecutor might explain that she removed the jurors not because of their race, but because, in response to voir dire questioning, the jurors indicated that they were related to the defendant, had reservations about the death penalty, had been exposed to pretrial publicity, or the like. These responses would be the prosecutor's reasons for the challenges.

Taking into account at the prima facie stage what would normally be the prosecutor's rebuttal reasons is contrary to the letter of *Batson* and seriously compromises *Batson*'s ability to provide defendants with an effective means of proving discrimination. The language of *Batson* specifically commands that prosecutors provide legitimate reasons for their peremptory challenges once defendants establish a prima facie case.[181] If the lower courts consider prosecutors' potential reasons before the prosecutors state those reasons themselves, this command becomes meaningless.

More importantly, taking prosecutors' anticipated reasons into account at the prima facie stage prevents the proper functioning of the *Batson* prima facie case.[182] As noted above, *Batson*'s burden-shifting evidentiary system requires

179. The "relevant circumstances" that the *Robbins* court listed as examples all fit this description. *See Robbins*, 319 N.C. at 490-91, 356 S.E.2d at 294-95 (pattern of strikes against blacks; striking of disproportionate number of blacks; questions and remarks by prosecutor; fact that victim and defendant are of different races; racial issues bound up with the conduct of the trial). For a listing of other "circumstances," see *infra* notes 190-201 and accompanying text.

180. *See infra* notes 235-51 and accompanying text. Indeed, the purpose of questioning jurors is to alert the attorneys to facts that might cause the attorneys to challenge the juror.

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

182. The term "prima facie case" has several connotations. In one sense, it is the burden on the party asserting a claim or affirmative defense to produce enough evidence to permit the jury to decide the issue. 9 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2494, at 379 (Chadbourne rev. 1981). The standard of proof for this type of prima facie case is evidence sufficient to permit a reasonable juror to find the material facts asserted. E. CLEARY, *supra* note 119, § 338, at 953. In another context, "prima facie case" denotes the establishment of a rebuttable presumption

that prosecutors explain their allegedly discriminatory actions upon a mere threshold showing by the defendant. It does not require the defendant to establish her prima facie case with evidence of actual discriminatory intent on the prosecutor's part.[183] The purpose of this system is to provide the defendant with the hard-to-obtain information she needs to prove a discriminatory prosecutor's illicit intent.[184] To effectuate this purpose, the prima facie burden is not onerous.[185] In fact, a Pennsylvania court has held expressly that "in a close case it is prudent for a court to err on the side of finding a prima facie case and requiring a neutral explanation."[186] The North Carolina courts' practice of considering prosecutors' potential rebuttal explanations at the prima facie stage is inconsistent with this type of prima facie case in several respects. Most obviously, it makes establishing prima facie cases much more difficult than if the court does not take those facts into account. The potential reasons for prosecutors' peremptory challenges are facts that necessarily weigh against an inference of discrimination. Accordingly, when courts consider those facts at the prima facie stage, defendants must produce more affirmative evidence of discrimination to overcome the suggestion of nondiscrimination that the possible reasons evoke.[187] Furthermore, *Batson* proscribes all peremptory challenges that are actually racially motivated—not merely those for which no possible legitimate explanation exists. When a court rejects a prima facie case on the basis of the prosecutor's potential reasons for the disputed challenges, however, the court upholds the prosecutor's peremptory challenges based not on what actually motivated the prosecutor, but on what the court believes the prosecutor reasonably could have (and indeed would have) asserted as the reasons for the challenges, had he been asked. No one knows whether the prosecutor would have offered those, or any, credible reasons for the challenges in question.[188] Finally, even if

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that requires the opposing party to come forward with some answer to the prima facie case. 9 J. WIGMORE, *supra*, § 2494, at 379. "Prima facie case" in the *Batson* context is the latter type. *Cf.* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 n.7 (1981) ("prima facie case" in Title VII cases denotes rebuttable presumption).

183. *See supra* notes 107-21 and accompanying text.

184. *See supra* notes 116-19 and accompanying text.

185. *See, e.g.*, United States v. Chalan, 812 F.2d 1302, 1314 (10th Cir. 1987) (striking single juror may be sufficient); State v. Slappy, 522 So. 2d 18, 22 (Fla.) (any doubt whether defendant has met his initial burden should be resolved in his favor), *cert. denied*, 487 U.S. 1219 (1988); Stanley v. State, 313 Md. App. 50, 71, 542 A.2d 1267, 1277 (1988) (*Batson* prima facie showing threshold is "not an extremely high one—not an onerous burden to establish"), *cert. denied*, 322 Md. 240, 587 A.2d 247 (1991); *see also* Blume, *supra* note 121, at 330 (prima facie case may be established on minimal evidence in order to allow reasonable inquiry into defendant's claims). The lower prima facie threshold does not materially disadvantage the prosecutor, because the weaker prima facie case presumably is easier to rebut. *See* Gamble v. State, 257 Ga. 325, 327, 357 S.E.2d 792, 795 (1987).

186. Commonwealth v. Jackson, 386 Pa. Super. 29, 52, 562 A.2d 338, 349 (1989), *appeal denied*, 525 Pa. 631, 578 A.2d 926 (1990).

187. This result is antithetical to the burden-shifting evidentiary system employed in *Batson*, which specifically recognizes and attempts to compensate for objective evidence of discriminatory intentions being difficult to obtain. *See* 2 A. LARSON & L. LARSON, *supra* note 118, § 50.10, at 10-6 ("Employers are . . . too sophisticated to profess their prejudices on paper or before witnesses."); E. CLEARY, *supra* note 119, § 343, at 968 (burden-shifting presumptions may be used when opposing party has superior access to the proof).

188. For example, it is possible that, if required to explain their peremptory challenges, prosecutors who strike jurors on account of race would not say that the juror had been exposed to pretrial publicity or was connected somehow to the defendant. Rather, the prosecutor might offer some

the prosecutor would have proffered the facts revealed during the voir dire as the reasons for the peremptory challenges, considering those "reasons" without requiring the prosecutor to state them deprives the trial court of the opportunity to evaluate the prosecutor's credibility.[189] Thus, courts cannot possibly evaluate whether the facts revealed by the challenged jurors genuinely motivated the prosecutor's peremptory challenges or whether the prosecutor would have asserted them merely as pretexts for discrimination.

Numerous circumstances are relevant to the question whether an inference of discrimination exists, but do not constitute possible reasons for disputed peremptory challenges. The North Carolina Supreme Court already has recognized many of them.[190] These circumstances include the disproportionate removal of minorities;[191] the nature of the crime;[192] the presence of racial issues in the case;[193] disparate treatment of prospective jurors who are similar in all relevant respects except race;[194] and whether the prosecutor failed to question minority jurors, questioned them only perfunctorily, or questioned them differently from nonminorities.[195] Not all of the circumstances that are relevant to the inference of discrimination tend to prove discrimination, however. The manner in which the prosecutor conducts jury selection, for instance, is a circumstance that may weigh against an inference of discrimination.[196]

Illustrative of circumstances that tend to negate an inference of discrimination is *State v. Davis*.[197] In *Davis* the potential jurors entered the courtroom separately for voir dire and the attorneys examined each one individually.[198] As a result, the prosecutor did not know how many minority persons were on the

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other explanation that more plainly would be a pretext for discrimination. Under North Carolina practice this situation is not likely to get past the prima facie stage; the trial judge would be permitted to assume incorrectly that the prosecutor struck the juror because of the exposure to pretrial publicity or the connection to the defendant and not because of race.

189. This practice is inconsistent with *Batson*, which noted that "the trial judge's findings . . . largely will turn on evaluation of credibility." *Batson*, 476 U.S. at 98 n.21.

190. *See supra* note 149 and accompanying text.

191. *See, e.g., Ex parte* Branch, 526 So. 2d 609, 622 (Ala. 1987); Commonwealth v. Soares, 377 Mass. 461, 490, 387 N.E.2d 499, 517, *cert. denied*, 444 U.S. 881 (1979); State v. Robbins, 319 N.C. 465, 490-91, 356 S.E.2d 279, 294, *cert. denied*, 484 U.S. 918 (1987).

192. United States v. Clemons, 843 F.2d 741, 748 (3d Cir.), *cert. denied*, 488 U.S. 835 (1988).

193. *Id.* (race of the defendant and the victim are relevant circumstances).

194. United States v. Horsley, 864 F.2d 1543, 1546 (11th Cir. 1989); *Branch*, 526 So. 2d at 623.

195. *Branch*, 526 So. 2d at 623; People v. Wheeler, 22 Cal. 3d 258, 282, 583 P.2d 748, 764, 148 Cal. Rptr. 890, 906 (1978); Slappy v. State, 503 So. 2d 350, 355 (Fla. Dist. Ct. App. 1987), *aff'd*, 522 So. 2d 18 (Fla.), *cert. denied*, 487 U.S. 1219 (1988).

Other examples of circumstances relevant to the prima facie case include the following: the fact that the only characteristic the challenged jurors shared was race, *see Wheeler*, 22 Cal. 3d at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905; Jackson v. Commonwealth, 8 Va. App. 176, 184, 380 S.E.2d 1, 5, *aff'd on rehearing*, 9 Va. App. 169, 384 S.E.2d 343 (1989) (en banc); Note, *supra* note 142, at 824; and the fact that the challenged jurors had characteristics or a background ordinarily thought favorable to the prosecution, such as having been a crime victim or a police officer, *see* People v. Turner, 42 Cal. 3d 711, 719, 726 P.2d 102, 106, 230 Cal. Rptr. 656, 660 (1986).

196. *See supra* note 150 and accompanying text.

197. 325 N.C. 607, 386 S.E.2d 418 (1989), *cert. denied*, 110 S. Ct. 2587 (1990).

198. *Id.* at 620, 386 S.E.2d at 424. Under North Carolina jury selection procedures, the trial judge in a capital case may permit prospective jurors to be sequestered before and after selection. N.C. GEN. STAT. § 15A-1214(j) (1988); R. PRICE, *supra* note 54, § 18-4, at 283.

venire, or whether the next persons called would be minorities.[199] Three of the first four jurors seated were black.[200] Because the prosecutor accepted the three black jurors at the beginning of the selection process when he did not know how many blacks remained in the jury pool, the North Carolina Supreme Court found that the circumstances suggested that the black persons the prosecutor did remove peremptorily were not struck on account of their race.[201] The court properly found no prima facie case, because the circumstances surrounding the prosecutor's peremptory challenges substantially refuted the defendant's claim of discrimination. By considering only prima facie stage circumstances such as these, and not possible explanations for the prosecutor's peremptory challenges, the courts can adhere to *Batson*'s letter and subserve, rather than subvert, the purposes of the *Batson* prima facie case.

Given that the North Carolina courts should not consider the prosecutor's potential reasons for disputed peremptory challenges at the prima facie stage, the question remains: What circumstances are sufficient to raise a prima facie inference of discrimination? Ordinarily, courts will weigh the totality of the relevant circumstances to determine if a prima facie inference exists. The North Carolina courts, however, reasonably can promote *Batson*'s goal of easing the evidentiary burden on defendants trying to prove discrimination by focusing on one question in particular: whether prosecutors exercised peremptory challenges disproportionately against minority prospective jurors. In *Smith* and *Robbins* the supreme court acknowledged that disproportionate strikes against minorities were relevant to a prima facie inference of discrimination.[202] Like most appellate courts, however, the North Carolina Supreme Court has not indicated how trial courts should determine disproportionate effect, and how much weight the trial courts should give it when evaluating the prima facie case.

An excellent illustration of the application of a disproportionate effects test is the Massachusetts case of *Commonwealth v. Soares*.[203] In *Soares* the prosecutor exercised peremptory challenges against thirty-two white prospective jurors, thirty-four percent of the white persons available.[204] The prosecutor challenged

199. *Davis*, 325 N.C. at 620, 386 S.E.2d at 424.

200. *Id.*

201. *Id.*

202. State v. Robbins, 319 N.C. 465, 490, 356 S.E.2d 279, 294, *cert. denied*, 484 U.S. 918 (1987); *accord* United States v. Johnson, 873 F.2d 1137, 1140 (8th Cir. 1989), *cert. denied*, 111 S. Ct. 304 (1990); *Ex parte* Branch, 526 So. 2d 609, 623 (Ala. 1987); Ward v. State, 293 Ark. 88, 92, 733 S.W.2d 728, 730 (1987); Commonwealth v. Jackson, 386 Pa. Super. 29, 49 n.5, 562 A.2d 338, 348 n.5 (1989), *appeal denied*, 525 Pa. 631, 578 A.2d 926 (1990); Williams v. State, 712 S.W.2d 835, 841 (Tex. Crim. App. 1986).

203. 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979). Massachusetts was one of a handful of states that, prior to *Batson*, had prohibited the discriminatory use of peremptory challenges on state constitutional grounds. The evidentiary methodology these states employed to prove state constitutional violations was substantially the same as that employed in *Batson*. *See id.* at 486-88, 387 N.E.2d at 516-17; People v. Wheeler, 22 Cal. 3d 258, 276-78, 583 P.2d 748, 761-63, 148 Cal. Rptr. 890, 903-04 (1978); State v. Neil, 457 So. 2d 481, 486 (Fla. 1984); State v. Crespin, 94 N.M. 486, 488, 612 P.2d 716, 718 (Ct. App. 1980); People v. Thompson, 79 A.D.2d 87, 106-10, 435 N.Y.S.2d 739, 752-55 (1981).

204. *Soares*, 377 Mass. at 473 & n.7, 387 N.E.2d at 508 & n.7.

only twelve black prospective jurors.[205] Because only thirteen black persons were available on the venire, however, this number amounted to ninety-two percent of the available blacks.[206] Thus, although the prosecutor struck more than two-and-one-half times as many whites as blacks (thirty-two as compared to twelve), the impact of the peremptory challenges was two-and-one-half times as great upon the black prospective jurors as upon the whites (ninety-two percent removed as compared to thirty-four percent removed). The court held that the prosecutor's use of peremptory challenges had a disproportionate impact on the black potential jurors.[207] It concluded that the disparity suggested a possible discriminatory motivation and thus justified an inquiry into the prosecutor's reasons for his challenges.[208]

The *Soares* test, comparing the percentage of minorities removed, with the percentage of nonminorities removed, is useful for many reasons. First, it is highly relevant; whether the prosecutor uses peremptory challenges to remove a significantly greater percentage of minorities than nonminorities has a direct logical bearing on the strength of an inference that race motivated the use of those challenges. Second, it possesses a built-in control against the danger of pure statistics carrying too much weight in the prima facie determination. If the disparity between the percentages of blacks and whites challenged is striking, then statistics will play a greater role; if the disparity is small, statistics will have little probative value on the issue of discrimination.[209] Third, the test can be applied in every case. Consequently, it reduces the possibility of arbitrary decisions, since the supreme court routinely may impose it as a limitation on the trial court's otherwise nearly unfettered discretion to decide what circumstances are relevant to the prima facie case. Fourth, it is an objective test. As a result, it is amenable to appellate review.[210] Fifth, it helps guard against discriminatory prosecutors who leave a few minority jurors on the jury to insulate their other, race-based strikes.[211] Most important, the disproportionate effects test comports with the purpose and function of the *Batson* prima facie case. The test is not onerous. It permits the defendant and the court to draw preliminary inferences of discrimination from the information available to the defendant. It thus facilitates the exposure of the prosecutor's illicit motives by providing enough evidence to justify requiring the prosecutor to explain her reasons for the dis-

205. *Id.* at 473, 387 N.E.2d at 508.

206. *Id.*

207. *Id.* at 490, 387 N.E.2d at 517.

208. *Id.*; *see also* Gamble v. State, 257 Ga. 325, 326, 357 S.E.2d 792, 794 (1987) (disparity of 23.8 percentage points between proportion of blacks on jury panel and proportion of blacks on jury sufficient to show discriminatory effect).

209. Some courts have noted the significance of statistics in jury selection discrimination cases. *See* Aldridge v. State, 258 Ga. 75, 78-79, 365 S.E.2d 111, 114 (1988); *cf.* McCleskey v. Kemp, 481 U.S. 279, 294-95 (1987) (dictum) (statistics have greater role in jury selection discrimination cases than in cases regarding the discriminatory impact of the death penalty).

210. *See infra* note 292 and accompanying text.

211. Racially motivated prosecutors who strike a number of minority jurors but leave one or two on the jury will not necessarily be insulated from *Batson* because the percentage of minority jurors struck will be high.

puted peremptory challenges.[212]

The most difficult aspect of the disproportionate effects test is determining what degree of disparity gives rise to a prima facie inference of discrimination. *Batson* implied that disproportionate effect, like any other relevant circumstance, would be just one factor in the prima facie inquiry; the required degree of disparity, therefore, ordinarily should depend on the other circumstances surrounding the peremptory challenges in dispute. To bring about *Batson*'s goals more effectively, however, the North Carolina Supreme Court should determine a threshold disparity above which a prima facie case automatically is established. A threshold figure recognizes that when prosecutors strike minorities at a certain substantially greater rate than they strike whites, the risk of an unconstitutional motive is substantial enough to further the inquiry by having the prosecutors explain their challenges, regardless of the absence of other evidence of discrimination.

Support for a per se disproportionate effects criterion comes from three states—Connecticut, Missouri, and South Carolina. Each of these states has adopted *Batson* procedures whereby the prosecutor must explain her peremptory challenges any time the defendant raises a *Batson* claim and demonstrates that he belongs to a cognizable group from which persons were challenged peremptorily.[213] These procedures avoid difficult case-by-case evaluations of the circumstances and ensure consistency.[214] More importantly, they advance the inquiry into the prosecutor's motivations.[215] Although these procedures are not required by *Batson*,[216] they further the purposes of the *Batson* prima facie case

212. *See supra* notes 114-21 and accompanying text; *see also* Note, *supra* note 142, at 823 ("[B]oth the prosecution and the defendant are likely to have better access to evidence on the issue of intent" if the *Batson* claim is heard at trial rather than after appellate review.).

213. *See* State v. Holloway, 209 Conn. 636, 645-46, 553 A.2d 166, 171-72, *cert. denied*, 490 U.S. 1071 (1989); State v. Antwine, 743 S.W.2d 51, 64 (Mo. 1987) (en banc), *cert. denied*, 486 U.S. 1017 (1988); State v. Jones, 293 S.C. 54, 57-58, 358 S.E.2d 701, 703 (1987). *But see* United States v. Montgomery, 819 F.2d 847, 851 (8th Cir. 1987) (*Batson* does not require specific mathematical formula); State v. Slappy, 522 So. 2d 18, 21 (Fla.) (rejecting bright-line test), *cert. denied*, 487 U.S. 1219 (1988); Jackson v. Commonwealth, 8 Va. App. 176, 183, 380 S.E.2d 1, 4 (same), *aff'd on rehearing*, 9 Va. App. 169, 384 S.E.2d 343 (1989) (en banc). In *Holloway* and *Jones* the courts simply held that to promote the goals of *Batson* more effectively trial courts should require the prosecutor to explain her peremptory strikes whenever the defendant is a member of a cognizable racial group and the prosecutor exercises peremptory challenges to remove members of that racial group. *See Holloway*, 209 Conn. at 646, 553 A.2d at 171-72; *Jones*, 293 S.C. at 57, 358 S.E.2d at 703. In *Antwine* the court noted that, as a practical matter, determining whether an inference of discrimination exists requires the court to consider the prosecutor's explanation of the manner in which she employed her challenges. Therefore, the court directed trial judges to consider the prosecutor's explanation as part of the process of determining whether a defendant has established a prima facie case. *Antwine*, 743 S.W.2d at 64. Although this method confuses the separate questions of the prima facie case and the prosecutor's rebuttal, it has the effect of requiring a prosecutorial explanation whenever the defendant raises a *Batson* issue.

214. *Jones*, 293 S.C. at 57, 358 S.E.2d at 703.

215. As the Connecticut Supreme Court wrote: "[B]ecause [the *Batson*] issue is of such vital importance to our real and perceived adherence to the rule of law . . . in all . . . cases in which the defendant asserts a *Batson* claim, we deem it appropriate for the state to provide . . . a . . . response consistent with the explanatory mandate of *Batson*." *Holloway*, 209 Conn. at 645-46, 553 A.2d at 171-72.

216. *Batson* mentioned that a " 'pattern' of strikes against black jurors" was merely illustrative of the circumstances that courts could consider when evaluating the prima facie case. *Batson*, 476 U.S. at 97.

by providing defendants with a practical way to get to the next stage of the evidentiary scheme. While these procedures suffer from the drawback of permitting defendants to hunt for *Batson* claims without providing any evidence of discrimination other than the fact that the prosecutor struck members of their race,[217] the North Carolina courts can modify them to avoid this problem. By requiring that there be a specified degree of disproportionate effect before a prima facie case arises, the North Carolina courts can take advantage of the benefits of these procedures while avoiding their flaws. The self-executing nature of this approach would advance the inquiry into the prosecutor's motives and promote consistency. The requirement of a significant disparity, however, would make it difficult for the defendant to fish for *Batson* claims. Therefore, the North Carolina courts should hold that a prima facie case of *Batson* discrimination is established whenever the prosecutor strikes minorities at a rate a specific number of times greater than the rate at which he strikes whites.[218] When the prosecutor strikes minorities at a rate lower than the threshold comparison figure, the percentage of minorities struck would be just one relevant circumstance considered.

B. The Prosecutor's Rebuttal

Once the defendant raises a prima facie inference of discrimination, the burden shifts to the prosecutor to come forward with race-neutral explanations for the disputed peremptory challenges.[219] Assessing prosecutors' explanations is arguably the most difficult aspect of *Batson* for the courts,[220] given the ease with which prosecutors can offer facially neutral reasons for their peremptory challenges.[221] Because attorneys normally may exercise peremptory challenges for any reason, the peremptory challenge is "uniquely suited to masking discriminatory motives."[222] *Batson*'s success at this stage, therefore, depends largely on courts adequately scrutinizing prosecutors' proffered reasons to determine whether those reasons are genuine or merely pretexts for discrimination.[223]

The North Carolina Supreme Court has defined the role of the trial courts in evaluating prosecutors' rebuttals.[224] The trial court must " 'satisfy itself that

217. *See* Note, *supra* note 142, at 823.

218. *See* Williams v. State, 712 S.W.2d 835, 841 (Tex. Crim. App. 1986) (striking disproportionate number of minority persons so as to render minority representation on the jury impotent can be enough to make out a prima facie showing).

219. *Batson*, 476 U.S. at 97; State v. Porter, 326 N.C. 489, 497, 391 S.E.2d 144, 150 (1990).

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

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

222. State v. Slappy, 522 So. 2d 18, 20 (Fla.), *cert. denied*, 487 U.S. 1219 (1988); *see Batson*, 476 U.S. at 96 (peremptory challenge permits those who want to discriminate to do so).

223. *See* Raphael, *supra* note 178, at 318 (" 'Rubber stamp' approval of all nonracial explanations . . . would cripple *Batson*'s commitment . . . .") (quoting State v. Butler, 731 S.W.2d 265, 268 (Mo. Ct. App. 1987); Gamble v. State, 257 Ga. 325, 327, 357 S.E.2d 792, 794 (1987)).

224. The North Carolina appellate courts have reached the issue of the prosecutor's rebuttal in several ways. In some cases, the trial court found that the defendant established a prima facie case. *See* State v. Jackson, 322 N.C. 251, 253, 368 S.E.2d 838, 839 (1988), *cert. denied*, 490 U.S. 1110 (1989); State v. Sanders, 95 N.C. App. 494, 498, 383 S.E.2d 409, 412, *disc. rev. denied*, 325 N.C. 712, 388 S.E.2d 470 (1989); State v. Cannon, 92 N.C. App. 246, 252, 374 S.E.2d 604, 608 (1988), *rev'd on other grounds*, 326 N.C. 37, 387 S.E.2d 450 (1990). In one case the prosecutor waived argument on

the explanation is genuine' " by undertaking a " 'sincere and reasoned attempt to evaluate [it].' "[225] This inquiry requires appraising both the race-neutrality of the explanation and the prosecutor's credibility in proffering the explanation. The court "should take great care to assure that [the prosecutor's] reasons are bona fide and not simply 'sham excuses belatedly contrived.' "[226] Trial judges' determinations should reflect the circumstances of the case, their knowledge of trial techniques, and their observations of the way in which the prosecutor conducted jury selection.[227] Finally, the court should consider the offered explanation in light of the strength of the prima facie case.[228]

The North Carolina courts also have identified factors specifically for assessing the genuineness of prosecutors' explanations. Trial courts should consider the susceptibility of the case to racial discrimination and should make note of the races of the defendant, the victim, and key witnesses.[229] The ultimate racial composition of the jury is also relevant, though not dispositive.[230] In addition, trial courts should factor in whether the prosecutor appeared to deliberate carefully before exercising the peremptory challenges in question.[231] Last, trial courts should evaluate the given reasons themselves.[232] These factors are similar to those recognized in other states.[233] The supreme court has made

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whether a prima facie case existed and explained the reasons for his challenges. *See* State v. Porter, 326 N.C. 489, 499, 391 S.E.2d 144, 151 (1990). In another case the trial court assumed, without deciding, that the prima facie case was established, and then considered the prosecutor's explanation. *See* State v. McNeill, 326 N.C. 712, 719, 392 S.E.2d 78, 82 (1990). Finally, in a few cases the prosecutors explained their challenges, notwithstanding that the trial court did not find that the defendants had established prima facie cases. *See* State v. McNeil, 99 N.C. App. 235, 241, 393 S.E.2d 123, 126 (1990) (although not required, State articulated the reasons for its peremptory challenges); State v. Aytche, 98 N.C. App. 358, 365, 391 S.E.2d 43, 47 (1990) (prosecutor explained challenges when asked to do so by the defendant); State v. Attmore, 92 N.C. App. 385, 397, 374 S.E.2d 649, 657 (1988) (court requested, but did not require, that the prosecutor explain peremptory challenges because of vague possibility of future *Batson* claim), *disc. rev. denied*, 324 N.C. 248, 377 S.E.2d 757 (1989). Since in all of these cases the prosecutors proffered explanations for their peremptory strikes, the sole issue before the appellate courts was the sufficiency of those explanations. In addition, in one case the supreme court found that the defendant established a prima facie case, and thus proceeded to consider the prosecutor's reasons for the disputed peremptory challenges. State v. Smith, 328 N.C. 99, 124, 400 S.E.2d 712, 726 (1991).

225. *Sanders*, 95 N.C. App. at 499, 383 S.E.2d at 412-13 (quoting People v. Hall, 35 Cal. 3d 161, 167, 672 P.2d 854, 858, 197 Cal. Rptr. 71, 75 (1983)).

226. *Id.* at 500, 383 S.E.2d at 413 (quoting *Jackson*, 322 N.C. at 260, 368 S.E.2d at 843 (Frye, J., concurring)).

227. *Id.* at 499, 383 S.E.2d at 413; *see Porter*, 326 N.C. at 498, 391 S.E.2d at 151.

228. *Porter*, 326 N.C. at 498-99, 391 S.E.2d at 151.

229. *Id.* at 498, 391 S.E.2d at 150-51.

230. State v. Smith, 328 N.C. 99, 124, 400 S.E.2d 712, 726 (1991). For a criticism of the court's holding that the racial makeup of the defendant's jury is relevant to *Batson*, see *supra* note 159.

231. *Porter*, 326 N.C. at 498, 391 S.E.2d at 151. Deliberation may tend to show that the prosecutor did not have a predetermined intention to strike minorities, but instead made an individualized decision to strike the juror based on the juror's overall characteristics.

232. *Id.*

233. Other states have also recognized several other factors central to evaluation of the sufficiency of the prosecutor's rebuttal, including whether the prosecutor failed to strike white persons who had the same characteristics as the challenged minority jurors, *see* People v. Hall, 35 Cal. 3d 161, 168, 672 P.2d 854, 858, 197 Cal. Rptr. 71, 76 (1983) ("strongly suggestive of bias"); Slappy v. State, 503 So. 2d 350, 355 (Fla. Dist. Ct. App. 1987), *aff'd*, 522 So. 2d 18 (Fla.), *cert. denied*, 487 U.S. 1219 (1988), and whether the proffered reasons were vague and inherently subjective and the prosecutor failed to probe sufficiently to determine if the juror was actually biased. *See* People v. Turner, 42 Cal. 3d 711, 727, 726 P.2d 102, 111-12, 230 Cal. Rptr. 656, 665-66 (1986) (good faith of

clear, however, that no one determinant necessarily demonstrates pretext: "[r]arely will a single factor control the decision-making process."[234]

In applying these guidelines, the North Carolina appellate courts have always found the prosecutor's explanations adequate to rebut the prima facie case. Two cases, *State v. Jackson*[235] and *State v. Porter*,[236] aptly illustrate the variety of reasons that the courts have held sufficient. In *Jackson* the prosecutors had to justify four peremptory challenges exercised against black persons.[237] They first explained generally that the State had certain criteria for selecting jurors: stability, pro-government orientation, steady employment, ties to the community, and "a mind-set . . . that would . . . pay more attention to the needs of law enforcement than the fine points of individual rights."[238] They then revealed the reasons for striking each of the four black prospective jurors. Two of the jurors were unemployed.[239] One of these jurors had "answered [the prosecutors] hesitantly and . . . appeared indifferent or hostile about . . . being a member of a jury or indifferent or hostile to [the prosecutors]."[240] The other had been a student counselor at Shaw University; the prosecutors felt that her background and demeanor indicated that she was "too liberal."[241] The third black prospective juror was a law student at the University of North Carolina and had been taught by professors of "somewhat liberal views."[242] The fourth juror had a son of approximately the same age as the defendant; although the juror also had a daughter the same age as the victim, the prosecutors feared that she would identify with the defendant and not the prosecution.[243] The supreme court held that the prosecutors' stated criteria for choosing a jury were legitimate and approved the prosecutor's explanations.[244]

In *Porter* the state peremptorily challenged ten Native Americans.[245] The

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prosecutor required follow-up question that quickly would have clarified the matter); People v. Harris, 129 Ill. 2d 123, 188, 544 N.E.2d 357, 386 (1989) (courts should assess the extent of State's efforts to discover the unknown information), *cert. denied*, 110 S. Ct. 1323 (1990).

234. *Porter*, 326 N.C. at 501, 391 S.E.2d at 152; *see* State v. Jackson, 322 N.C. 251, 257, 368 S.E.2d 838, 841 (1988) (recognizing that nonchallenged white persons had same characteristics as challenged black persons, but noting that additional factors distinguished them), *cert. denied*, 490 U.S. 1110 (1989).

235. 322 N.C. 251, 368 S.E.2d 838 (1988), *cert. denied*, 490 U.S. 1110 (1989).

236. 326 N.C. 489, 391 S.E.2d 144 (1990).

237. *Jackson*, 322 N.C. at 252-53, 368 S.E.2d at 839.

238. *Id.* at 253, 368 S.E.2d at 840. In a concurring opinion, however, Justice Frye warned against the danger of abuse of such stated criteria or "profiles." *Id.* at 260, 368 S.E.2d at 843 (Frye, J., concurring).

239. *Id.* at 253, 368 S.E.2d at 839; *see also* State v. Sanders, 95 N.C. App. 494, 501, 383 S.E.2d 409, 414 (juror had worked three jobs in previous ten months), *disc. rev. denied*, 325 N.C. 712, 388 S.E.2d 470 (1989).

240. *Jackson*, 322 N.C. at 253, 368 S.E.2d at 839; *see also* State v. Smith, 328 N.C. 99, 125, 400 S.E.2d 712, 727 (1991) (jurors appeared "nervous" and "uncertain"); State v. McNeil, 99 N.C. App. 235, 241, 393 S.E.2d 123, 126 (1990) (juror seemed "unsure of himself"); *Sanders*, 95 N.C. App. at 501, 383 S.E.2d at 414 (juror had "headstrong and overbearing personality").

241. *Jackson*, 322 N.C. at 253, 368 S.E.2d at 839.

242. *Id.*

243. *Id.*; *see also Smith*, 328 N.C. at 125, 400 S.E.2d at 726 (jurors had sons of approximately the defendant's age).

244. *Jackson*, 322 N.C. at 256-57, 368 S.E.2d at 841.

245. State v. Porter, 326 N.C. 489, 499, 391 S.E.2d 144, 151 (1990).

prosecutor proffered reasons for each challenge. Many of the challenged jurors knew one or both of the defense attorneys.[246] Several of the prospective jurors previously had been prosecuted for driving while intoxicated.[247] The employment histories of others reflected unemployment or irregular employment.[248] Two seemed to believe that racism was present in the case.[249] One prospective juror "made constant eye contact with defense counsel, had majored in sociology, and read Rolling Stone magazine."[250] On appeal, the supreme court affirmed the trial court's acceptance of these reasons as legitimate nonracial criteria for challenging the Native Americans.[251]

The wide range of explanations that the North Carolina courts have found sufficient to rebut a prima facie case illustrates the difficulties courts face in applying this part of the *Batson* evidentiary system. Prosecutors easily can proffer facially neutral reasons for their peremptory challenges. All of the reasons the prosecutors asserted in *Jackson* and *Porter* are facially race-neutral and thus technically proper under *Batson*.[252] Many of them, however, are completely subjective and difficult to disprove. The *Jackson* court, for instance, accepted the explanation that a challenged juror "appeared indifferent or hostile;"[253] similarly, the *Porter* court found sufficient the explanation that the challenged juror "made constant eye contact with defense counsel."[254] Furthermore, several of the reasons that the courts have accepted appear nonracial, but actually may be a proxy for race. In *Jackson* the prosecutor excused one prospective juror because she had been a student counselor at Shaw University—a black university. In *Porter* the court accepted the prosecutors' assertions that several of the black prospective jurors had histories of unemployment or unsteady employment; the unemployment rate for black persons in North Carolina is more than twice that

246. The challenged prospective jurors were acquainted with the defendant's lawyers as a result of prior representation, being schoolmates, being a student of one of the lawyers, being related by marriage, or being social acquaintances. *Id.* at 499, 391 S.E.2d at 151; *see also Smith*, 328 N.C. at 125, 400 S.E.2d at 727 (juror had "earlier association" with defense counsel); State v. McNeill, 326 N.C. 712, 719, 392 S.E.2d 78, 82 (1990) (juror knew defendant, though had not seen him in five years); State v. McNeil, 99 N.C. App. 235, 241, 393 S.E.2d 123, 126 (1990) (juror knew proposed defense witness); State v. Cannon, 92 N.C. App. 246, 252-53, 374 S.E.2d 604, 608 (1988) (five of six challenged jurors connected to defendant, defendant's family, or a state witness), *rev'd on other grounds*, 326 N.C. 37, 387 S.E.2d 450 (1990).

247. *Porter*, 326 N.C. at 499, 391 S.E.2d at 151; *see also Smith*, 328 N.C. at 125, 400 S.E.2d at 727 (State's victim-witness coordinator thought juror had a nephew "in trouble with drugs"); *McNeil*, 99 N.C. App. at 241, 393 S.E.2d at 126 (jurors had prior convictions for driving under the influence, had been falsely accused of crime, or had relatives on probation); State v. Aytche, 98 N.C. App. 358, 365, 391 S.E.2d 43, 47 (1990) (juror previously convicted of manslaughter); *Cannon*, 92 N.C. App. at 253, 374 S.E.2d at 608 (juror recently fined for traffic violation, although claimed to be innocent).

248. *Porter*, 326 N.C. at 499, 391 S.E.2d at 151.

249. *Id.* at 500, 391 S.E.2d at 152.

250. *Id.* This potential juror also previously had been a witness for the defendant's attorney in a different case. *Id.*

251. *Id.*

252. *See Batson*, 476 U.S. at 97.

253. State v. Jackson, 322 N.C. 251, 253, 368 S.E.2d 838, 839 (1988), *cert. denied*, 490 U.S. 1110 (1989).

254. *Porter*, 326 N.C. at 500, 391 S.E.2d at 152.

for white persons.[255] As Justice Marshall warned: "If such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on nonracial grounds, then the protection erected by the Court . . . may be illusory,"[256] because only the most flagrant and explicit *Batson* violations would be caught.

The courts implementing *Batson* thus face this question: Which party should bear the burden of overcoming the difficulty of evaluating the genuineness of prosecutors' explanations? The courts generally have two choices. On the one hand, the courts can put this burden on defendants and accept all facially nonracial explanations. On the other hand, they can put the burden on prosecutors and reject certain facially neutral reasons that are particularly susceptible to abuse as pretexts. Accepting all facially nonracial explanations is supported by the literal language of *Batson*, which requires only that prosecutors proffer "neutral explanation[s]."[257] This approach also would minimize the intrusion on the prosecutor's right to exercise peremptory challenges, since all peremptory challenges for which the prosecutor can offer a neutral explanation—effectively most of them—would be acceptable. This tactic, however, would facilitate prosecutorial efforts to hide discriminatory motives and evade *Batson*'s constitutional proscription. Rejecting certain facially neutral reasons, alternatively, better effects *Batson*'s ultimate purpose of eradicating racially motivated peremptory challenges. It would snare more racially motivated peremptory challenges and have a greater deterrent effect on future discriminatory challenges. This alternative, however, would seriously intrude on the prosecutorial peremptory challenge. Courts nationwide have responded differently to this apparent quandary.[258]

Batson implicitly furnishes an answer to the dilemma: the State should bear the burden of *Batson*'s inherent weaknesses and courts should be slow to accept prosecutorial explanations for which there is a high risk of abuse, even though such an approach threatens the traditional, capricious nature of the peremptory challenge. First, by creating a system that requires prosecutors to explain their

255. According to recent statistics from the U.S. Department of Labor, the unemployment rate for blacks in North Carolina in 1989 was 6.3% while the unemployment rate for North Carolina whites was only 2.8%. U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, NORTH CAROLINA UNEMPLOYMENT IN 1989 (Press Release, May 11, 1990).

256. *Batson*, 476 U.S. at 106 (Marshall, J., concurring).

257. *Id.* at 97.

258. *Compare* United States v. Forbes, 816 F.2d 1006, 1010-11 (5th Cir. 1987) (intuitive nonracial reasons are sufficient); United States v. Allen, 666 F. Supp. 847, 853 (E.D. Va. 1987) (same), *aff'd sub nom.* United States v. Harrell, 847 F.2d 138 (4th Cir.), *cert. denied*, 488 U.S. 944 (1988); People v. Young, 128 Ill. 2d 1, 20, 538 N.E.2d 453, 457 (1989) (juror's demeanor acceptable basis for peremptory challenge), *cert. denied*, 110 S. Ct. 3290 (1990); State v. Manuel, 517 So. 2d 374, 376 (La. Ct. App. 1987) (same) *and Porter*, 326 N.C. at 500, 391 S.E.2d at 152 (failure to make eye contact with prosecutor and excessive eye contact with defense counsel acceptable reasons for peremptory challenge) *with* United States v. Clemons, 843 F.2d 741, 745 (3d Cir.) ("intuitive judgment" not sufficient), *cert. denied*, 488 U.S. 835 (1988); United States v. Chalan, 812 F.2d 1302, 1314 (10th Cir. 1987) (explanation that State struck juror "based upon his background and other things in his questionnaire" insufficient); State v. Slappy, 522 So. 2d 18, 23-24 (Fla.) (must be support in the record for the reasons given), *cert. denied*, 487 U.S. 1219 (1988) *and* Commonwealth v. Jackson, 386 Pa. Super. 29, 55, 562 A.2d 338, 350 (1989) (abuse of discretion to accept explanation not supported by record), *appeal denied*, 525 Pa. 631, 578 A.2d 926 (1990).

peremptory challenges, *Batson* expressly sanctions intrusion on the traditional arbitrary use of peremptory challenges. Furthermore, the *Batson* decision was rooted in the equal protection clause of the fourteenth amendment; its primary goal of ending discriminatory jury selection practices, unlike the peremptory challenge, is thus of constitutional magnitude.[259] Most importantly, the *Batson* Court specifically noted that the purpose of the evidentiary system it set forth is "to ensure that a state does not use peremptory challenges to strike *any* black juror because of his race."[260] The Court itself thus stressed the predominance of the nondiscrimination purpose of the decision. In short, the purpose and constitutional basis of *Batson* require that lower courts do more than satisfy themselves that prosecutorial explanations are race neutral; rather, they must scrutinize the explanations closely to ensure in a practical way that the explanations are not pretexts. This is not because these explanations are technically improper under *Batson*, but because they are peculiarly susceptible to being abused by prosecutors. The North Carolina courts, which in the past have readily accepted even highly subjective prosecutorial explanations, therefore should revise their approach to conform with this view, which is more in accordance with *Batson*'s spirit and purpose.

A reasonable, practical way to implement this closer scrutiny is to require prosecutors to support their peremptory challenges with other on-the-record reasons whenever their stated explanations involve a substantial risk of being pretextual.[261] Several types of prosecutorial explanations are so susceptible to abuse that heightened scrutiny of this sort is warranted. One such type involves reasons that may be proxies for racial animus.[262] Professor Raphael has noted, for example, that because a substantial percentage of black persons live in areas of high crime or in segregated areas, explanations based upon the challenged juror's connection with such areas easily may mask underlying discrimination.[263] Likewise, reasons that apply disproportionately to minorities, such as unemployment, or previous study at a predominately black university, may be facially neutral substitutes for race-based reasons.[264] The second type of prosecutorial explanation justifying greater scrutiny includes reasons that apply equally to white prospective jurors whom the prosecutor did not strike.[265] The North Carolina Supreme Court already has recognized that disparate treatment

259. *See Batson*, 476 U.S. at 108 (Marshall, J., concurring) (quoting Frazier v. United States, 335 U.S. 497, 505 n.11 (1948); United States v. Wood, 299 U.S. 123, 145 (1936); and Stilson v. United States, 250 U.S. 583, 586 (1919)).

260. *Batson*, 476 U.S. at 99 n.22 (emphasis added); *see also* United States v. David, 803 F.2d 1567, 1571 (11th Cir. 1986) (*Batson*'s command is "to eliminate, not merely to minimize, racial discrimination in jury selection.").

261. *See* Blume, *supra* note 121, at 332 ("[C]ourts should be extremely reluctant to accept general and vague reasons for striking a juror, such as the juror was 'sullen,' 'distant,' or 'looked mean.' ").

262. *See* State v. Jackson, 322 N.C. 251, 260, 368 S.E.2d 838, 843 (1988) (Frye, J., concurring) (court must remain alert to colloquial euphemisms for prejudice), *cert. denied*, 490 U.S. 1110 (1989); Alschuler, *supra* note 7, at 175; Raphael, *supra* note 178, at 322.

263. Raphael, *supra* note 178, at 322.

264. *See supra* text accompanying notes 241, 248.

265. *See, e.g.*, People v. Hall, 35 Cal. 3d 161, 168, 672 P.2d 854, 858, 197 Cal. Rptr. 71, 76 (1983) (disparate treatment "strongly suggestive of bias"); Raphael, *supra* note 178, at 323 ("Courts

of white and minority jurors is a factor for evaluating pretext.[266] The third and most important type of prosecutorial explanation that involves a substantial danger of being used as a pretext is the vague and highly subjective explanation.[267] This type of explanation is the most difficult for the trial judge and defendant to verify because the substance of the explanation does not appear in the record and thus is impossible to review on appeal.[268] Hence, they are the explanations most susceptible to prosecutorial chicanery. Whenever prosecutors submit one of these types of explanations, the court should not find the explanation sufficient unless there are some other reasons for the peremptory challenge that are observable from the record.

Several courts, including those in Florida and Pennsylvania, require that at least some evidence appear in the record to support the prosecutor's explanations.[269] Furthermore, some authority calls for requiring objective justifications for prosecutors' usually discretionary actions when a danger exists that the prosecutors acted unconstitutionally. Prosecutors normally have discretion to decide what charges to bring against a suspect. When a prosecutor adds charges against a defendant who has successfully appealed his conviction, however, a danger arises that the prosecutor does so in retaliation for the defendant having taken the appeal.[270] Such conduct, if so motivated, would violate the defendant's right to due process of law.[271] Because the prosecutor's motives are com-

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are most likely to reject a prosecutor's explanations . . . when the prosecutor failed to challenge other jurors who were not of defendant's race yet who shared the same characteristic . . . .").

266. State v. Porter, 326 N.C. 489, 501, 391 S.E.2d 144, 152 (1990). The court qualified this acknowledgement, however, by noting that prosecutors rarely exercise peremptory challenges on the basis of one reason alone. *Id.* Of course, the court was correct in asserting that multiple reasons often underlie peremptory challenges. Nevertheless, disparate treatment is so suggestive of racial motivation that it warrants greater scrutiny.

267. State v. Smith, 328 N.C. 99, 125, 400 S.E.2d 712, 727 (1991); State v. Jackson, 322 N.C. 251, 253, 368 S.E.2d 838, 839 (1988), *cert. denied*, 490 U.S. 1110 (1989); *see supra* notes 252-56 and accompanying text.

268. In *Smith* the supreme court held that "nervousness or uncertainty in response to counsel's questions may be a proper basis for a peremptory challenge." *Smith*, 328 N.C. at 126, 400 S.E.2d at 727. The court then found that "the record supports the . . . conclusion that the reasons given by the district attorney were not pretextual." *Id.* The court thus suggested that the appellate courts can adequately evaluate the prosecutor's bona fides in proffering vague and subjective explanations. How the record can support a finding that a juror was "nervous" or "uncertain" absent a direct statement in the record to that effect, however, is unclear.

269. *See* State v. Slappy, 522 So. 2d 18, 23-24 (Fla.) (must be support in the record for the reasons given to ensure "procedural regularity and racial neutrality"), *cert. denied*, 487 U.S. 1219 (1988); Commonwealth v. Jackson, 386 Pa. Super. 29, 55, 562 A.2d 338, 350 (1989) (abuse of discretion to accept explanation not supported by the record), *appeal denied*, 525 Pa. 631, 578 A.2d 926 (1990). Similarly, several courts have found subjective explanations alone to be insufficient to rebut a prima facie case. *See, e.g.*, United States v. Horsley, 864 F.2d 1543, 1546 (11th Cir. 1989) ("I just got a feeling about him" held insufficient); United States v. Clemons, 843 F.2d 741, 745 (3d Cir.) (prosecutor's intuitive judgment held insufficient), *cert. denied*, 488 U.S. 835 (1988); Ward v. State, 293 Ark. 88, 93-94, 733 S.W.2d 728, 730 (1987) (insufficient to claim that challenged juror seemed "noncommittal"); *Ex parte* Branch, 526 So. 2d 609, 623 (Ala. 1987) ("[I]ntuitive judgment or suspicion by the prosecutor is insufficient to rebut the presumption of discrimination."); State v. Antwine, 743 S.W.2d 51, 65 (Mo. 1987) (en banc) (facially neutral explanations alone held insufficient), *cert. denied*, 486 U.S. 1017 (1988); State v. Tomlin, 299 S.C. 294, 298-99, 384 S.E.2d 707, 710 (1989) (claim that challenged juror was "extremely sluggish" held insufficient).

270. Blackledge v. Perry, 417 U.S. 21, 28 (1974). In addition, defendants might be unconstitutionally deterred from exercising their right to appeal. *Id.*

271. United States v. Goodwin, 457 U.S. 368, 375-76 (1982).

plex and difficult to prove, the court in these circumstances may presume "prosecutorial vindictiveness."[272] When this presumption arises, the prosecutor must provide objective, on-the-record evidence supporting the decision to add the new charges.[273] Although the decision to bring charges normally is discretionary, the danger of unconstitutionally motivated prosecutorial conduct justifies these limitations on the prosecutor's discretion.[274] Similarly, when a prima facie inference of discrimination arises in the *Batson* context, the court should require the prosecutor to give at least some objective, verifiable reason for the questioned peremptory challenges. Although prosecutors ordinarily may exercise peremptory challenges for any reason, the danger that the prosecutor's explanations will be pretextual warrants limiting prosecutors' discretion.

C. *Procedural Issues*

In addition to determining what evidence gives rise to a prima facie inference of discrimination and what prosecutorial explanations rebut such an inference, the *Batson* Court assigned to the lower courts the task of formulating procedures for litigating *Batson* claims.[275] The North Carolina courts' holdings regarding procedural issues parallel their holdings involving the prima facie case and the prosecutor's rebuttal. In the area of harmless error, for example, as with the prima facie case, the North Carolina courts have misapprehended *Batson*'s theoretical underpinnings and, accordingly, have imposed undue burdens on defendants. In the areas of appellate review and cross-examination of the prosecutor, as with the prosecutor's rebuttal, the courts have construed *Batson*'s language so narrowly that they have failed to promote *Batson*'s fundamental purpose. In sum, the courts have erected procedural barriers that conflict with *Batson*'s goal of providing defendants with a more effective means of proving discrimination.

1. Appellate Review

When formulating a standard of appellate review of trial court findings in *Batson* cases, the courts face yet another contradiction inherent in *Batson* situations: the trust reposed in prosecutors and trial judges by appellate courts sometimes conflicts with the realities of racial politics. For example, while the *Batson* Court observed in a footnote that judges and prosecutors would not fail to perform their constitutional duties under *Batson*,[276] the decision itself is a recognition that government officials sometimes engage in unconstitutional discrimination. As a result, the degree to which the appellate courts should yield to the findings of the trial courts is questionable.

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272. *Id.* at 373.

273. *Id.* at 374.

274. *See id.* at 376; *Perry*, 417 U.S. at 28.

275. *See Batson*, 476 U.S. at 99 ("We decline . . . to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges.").

276. *Id.* at 99 n.22.

In *State v. Jackson*[277] the North Carolina Supreme Court held that because a trial court's findings depend on credibility determinations, those findings must be given "great deference" on appeal.[278] Trial judges must make specific findings of fact,[279] and those findings are conclusive on appeal, provided they are supported by the evidence.[280] In reviewing *Batson* cases, the supreme court and court of appeals have been true to this standard. In numerous cases, the courts explicitly have noted that deference to the trial court commanded their decision to deny defendants *Batson* relief.[281] The courts routinely have declined to strike down even highly subjective rebuttal explanations on appeal, upholding all facially nonracial explanations.[282] The courts have been reluctant to give much weight to objective indicators of discrimination, such as disparate treatment of minority and white prospective jurors. Instead, they have relied on the general proposition that prosecutors rarely exercise peremptory challenges for single reasons and have deferred to the trial courts' overall evaluations of the circumstances.[283] This extremely deferential approach almost certainly has contributed to the fact that no North Carolina defendant has won a *Batson* claim on the merits in the appellate courts.

While the appellate courts must accord the trial court's findings some deference, excessive deference has two related undesirable effects. First, it effectively "insulates the trial court's determinations from meaningful appellate review."[284] Second, it sends to prosecutors the message that they may exercise peremptory challenges on account of race without fear of exposure by the appellate courts.[285] Because the second effect in particular is contrary to *Batson*'s fundamental purpose, meaningful appellate review is essential to *Batson*'s success.[286]

277. 322 N.C. 251, 368 S.E.2d 838 (1988), *cert. denied*, 490 U.S. 1110 (1989); *see supra* notes 235, 237-44 and accompanying text.

278. *Jackson*, 322 N.C. at 255, 368 S.E.2d at 840 (citing *Batson*, 476 U.S. at 98 n.21); *see* State v. Porter, 326 N.C. 489, 498, 391 S.E.2d 144, 150 (1990); State v. Allen, 323 N.C. 208, 219, 372 S.E.2d 855, 861-62 (1988). Other states have set forth similar standards of review. *See* Gamble v. State, 257 Ga. 325, 327, 357 S.E.2d 792, 794 (1987); People v. Harris, 129 Ill. 2d 123, 175, 544 N.E.2d 357, 380 (1989), *cert. denied*, 110 S. Ct. 1323 (1990); State v. Antwine, 743 S.W.2d 51, 66 (Mo. 1987) (en banc), *cert. denied*, 486 U.S. 1017 (1988); Jackson v. Commonwealth, 8 Va. App. 176, 184, 380 S.E.2d 1, 5, *aff'd on rehearing*, 9 Va. App. 169, 384 S.E.2d 343 (1989) (en banc).

279. State v. Sanders, 95 N.C. App. 494, 500, 383 S.E.2d 409, 413, *disc. rev. denied*, 325 N.C. 712, 388 S.E.2d 470 (1989).

280. *Id.*

281. State v. Gray, 322 N.C. 457, 459-60, 368 S.E.2d 627, 629 (1988); State v. McNeil, 99 N.C. App. 235, 241, 393 S.E.2d 123, 126 (1990); State v. Robinson, 97 N.C. App. 597, 600, 601, 389 S.E.2d 417, 419, 420, *dismissal allowed and review denied*, 326 N.C. 804, 393 S.E.2d 904 (1990); State v. Batts, 93 N.C. App. 404, 410, 378 S.E.2d 211, 214 (1989); State v. Cannon, 92 N.C. App. 246, 253, 374 S.E.2d 604, 608 (1988), *rev'd on other grounds*, 326 N.C. 37, 387 S.E.2d 450 (1990). In fact, the *Jackson* court noted: "We might not have reached the same result as the superior court but giving, as we must, deference to its findings, we hold it was not error to deny the defendant's motion for mistrial." *Jackson*, 322 N.C. at 257, 368 S.E.2d at 841.

282. *See supra* notes 235-56 and accompanying text.

283. *See, e.g.*, State v. Porter, 326 N.C. 489, 501, 391 S.E.2d 144, 152-53 (1990).

284. Blume, *supra* note 121, at 328.

285. *Id.* at 329. Conversely, if prosecutors know that the appellate courts will review their actions carefully, they are less likely to engage in discriminatory conduct in the first place.

286. Curiously, in *Batson*, Justice Powell seemed to suggest that there is little danger of prosecutors exercising peremptory challenges for discriminatory reasons. In justifying his rejection of Justice Marshall's suggestion that the peremptory challenge be abolished, Justice Powell wrote that no

Several reasons justify more aggressive appellate review of *Batson* claims. First, because of their own unconscious racism, trial judges simply may not be aware of racial discrimination during jury selection.[287] In addition, although the *Batson* Court expressed confidence in the ability of trial judges to recognize *Batson* claims,[288] the ultimate responsibility within each state for vindicating rights under the equal protection clause lies with the state supreme court. Furthermore, as with prosecutors' rebuttal explanations,[289] the ease with which prosecutors can put forth pretextual but facially neutral explanations necessitates appellate intervention. Most important, appellate courts have a greater duty to scrutinize trial court findings when constitutional rights are at stake.[290] As the Maryland Court of Appeals held in the *Batson* context: "When a claim is based upon a violation of a constitutional right it is [the appellate court's] obligation to make an independent constitutional appraisal from the entire record."[291] Therefore, the North Carolina appellate courts should scrutinize *Batson* claims much more closely than in the past. To scrutinize these claims without merely substituting their judgments on credibility issues for those of the trial judges, the supreme court and court of appeals should place greater emphasis on objective

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reason supports the belief that prosecutors will shirk their duty to exercise peremptory challenges legitimately. *Batson*, 476 U.S. at 99 n.22. If that were the case, there might be little need for deterrence. The fact that *Batson* was necessary, however, together with the large number of *Batson* challenges brought, is evidence that some prosecutors do exercise peremptories on account of race. Indeed, Justice White commented that the practice is widespread. *Id.* at 101 (White, J., concurring). Thus, aggressive appellate review to deter prosecutors' unconstitutional uses of peremptory challenges is appropriate.

287. *Id.* at 106 (Marshall, J., concurring) ("A judge's own conscious or unconscious racism may lead him to accept . . . an explanation as well supported."); Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1026-36 (1988). Professor Johnson asserts that many judicial actions and inactions are colored by judges' own unconscious racism. She contends that this undetected racism results in a "blindspot" that causes judges to fail to recognize their own or other persons' actions as racially connected. She cites three reasons for the fact that unconscious racism is at present ignored in the reasoning of court decisions involving race and criminal procedure: (1) the mistaken belief that racism is equivalent to white supremacism, (2) the fear that there would be no limiting principle, and (3) denial. *Id.* at 1027-31. *See generally* Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 328-44 (1987) (discussing relationship between the unconscious and racially discriminatory practices).

288. *See Batson*, 476 U.S. at 99 n.22; *id.* at 101 (White, J., concurring) (Court puts "considerable trust" in the trial judge).

289. *See supra* notes 252-68 and accompanying text.

290. *See* Bose Corp. v. Consumers Union, Inc., 466 U.S. 485, 513-14 (1984) (although questions of fact are normally entitled to deferential appellate review, "actual malice" in constitutional defamation case is subject to independent appellate review because its determination affects first amendment rights).

291. Tolbert v. State, 315 Md. 13, 24, 553 A.2d 228, 232 (1989) (quoting Harris v. State, 303 Md. 685, 697, 496 A.2d 1074, 1080 (1985)); *see* Commonwealth v. Jackson, 386 Pa. Super. 29, 55, 562 A.2d 338, 350 (1989) (trial court's discretion is not unlimited), *appeal denied*, 525 Pa. 631, 578 A.2d 926 (1990).

In addition, the role of the state appellate courts in protecting defendants' rights under *Batson* may be amplified in light of the Supreme Court's decision in Wainwright v. Witt, 469 U.S. 412 (1985). In *Wainwright* the Court addressed the question whether federal courts, on petitions for habeas corpus relief, may review state court findings on whether a juror was challenged properly for cause under Witherspoon v. Illinois, 391 U.S. 510 (1968), on account of bias stemming from the juror's opposition to the death penalty. The Court held that the propriety of the challenge for cause is a "factual issue" entitled to a presumption of correctness, because the determination depends largely on credibility findings. *Wainwright*, 469 U.S. at 428. Since credibility determinations also are central to *Batson* inquiries, the scope of federal habeas corpus review may be limited in this context as well. Consequently, the states must aggressively promote *Batson*'s goals.

criteria. If objective evidence[292] suggests discrimination, or if the prosecutor's reasons for challenging the jurors are completely subjective, the courts should find a *Batson* error on appeal. Just as with the prosecutor's rebuttal, this focus on observable, on-the-record criteria does not mean that less easily observable criteria are irrelevant to the question of whether the prosecutor has exercised peremptory challenges in a discriminatory manner. Rather, it is an attempt to promote the goals of *Batson* more effectively by providing a reasonable, practical way of reviewing *Batson* cases.

A threshold requirement for meaningful appellate review is an adequate record.[293] This record must include the number of black and white persons on the venire, the race of each prospective juror examined, and a transcript of the voir dire.[294] In North Carolina, defendants appealing from the denial of a *Batson* claim have the burden of providing an adequate record from which to determine whether the prosecutor challenged jurors improperly at trial.[295]

In the five years since *Batson*, North Carolina defendants consistently have failed to meet their burden of providing an adequate record for appeal. On many occasions, the appellate courts pointedly noted these failures in denying defendants' *Batson* claims.[296] These flaws can be eliminated easily, however, because North Carolina law currently enables defendants to perfect adequate appellate records. The jury selection statute permits transcription of the jury selection proceedings upon the defendant's request.[297] Thus, at the beginning of all cases in which *Batson* may be an issue, defendants can invoke their statutory right to have the voir dire transcribed. Slightly more problematic is the issue of preserving for the record the race of each prospective juror. The supreme court wisely noted in *State v. Mitchell*[298] that the practice of simply having the court reporter record the race of each potential juror is prone to error because race is

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292. Objective criteria include, for example, a disproportionate number of peremptory challenges exercised against minorities or disparate treatment of minority and white prospective jurors with similar pertinent characteristics.

293. *See, e.g.*, State v. Holloway, 209 Conn. 636, 644, 553 A.2d 166, 172, *cert. denied*, 490 U.S. 1071 (1989); Aldridge v. State, 258 Ga. 75, 77, 365 S.E.2d 111, 113 (1988); *Jackson*, 386 Pa. Super. at 52, 562 A.2d at 349; Note, *supra* note 142, at 825 ("All of the possible evidence that may bear on the defendant's prima facie showing depends on the creation of an adequate record [for appeal].").

294. *See* Stanley v. State, 313 Md. 50, 70 n.11, 542 A.2d 1267, 1277 n.11 (1988). Although a record consisting solely of the race of the persons struck and of the persons who served on the jury could "marginally suffice[]" for review, a transcript is necessary as a practical matter to facilitate appellate courts' meaningful evaluations of the trial court's findings. State v. Sanders, 95 N.C. App. 494, 499, 383 S.E.2d 409, 412, *disc. rev. denied*, 325 N.C. 712, 388 S.E.2d 470 (1989).

295. *See* State v. Mitchell, 321 N.C. 650, 654, 365 S.E.2d 554, 556 (1988). The mere statements of counsel on appeal regarding what transpired at trial will not suffice. *Id.*

296. *See* State v. Payne, 327 N.C. 194, 199-200, 394 S.E.2d 158, 160-61 (1990), *cert. denied*, 111 S. Ct. 977 (1991); State v. McNeill, 326 N.C. 712, 718-19, 392 S.E.2d 78, 82 (1990); State v. Aytche, 98 N.C. App. 358, 364, 391 S.E.2d 43, 47 (1990); State v. Robinson, 97 N.C. App. 597, 601, 389 S.E.2d 417, 420, *disc. rev. denied*, 326 N.C. 804, 393 S.E.2d 904 (1990); *Sanders*, 95 N.C. App. at 499, 383 S.E.2d at 412; State v. Cannon, 92 N.C. App. 246, 251, 374 S.E.2d 604, 607 (1988), *rev'd on other grounds*, 326 N.C. 37, 387 S.E.2d 450 (1990).

297. In capital cases, a record of the voir dire is required by statute. N.C. GEN. STAT. § 15A-1241(a)(1) (1988). In noncapital cases, the jury selection must be recorded if defense counsel so requests. *Id.* § 15A-1241(b); R. PRICE, *supra* note 54, § 18-3.

298. 321 N.C. 650, 365 S.E.2d 554 (1988).

not always obvious.[299] In response to the problem of how to preserve the record, however, *Mitchell* provides that a defendant who believes a prospective juror is of a particular race may so inform the trial court and ensure that the information is placed on the record.[300] For defendants to have to question prospective jurors about their race during voir dire to determine officially the race of prospective jurors, however, is unfair. Such questions might insult the juror and convey to the jury the impression that the defendant intends to make race an issue in the trial. Hence, the defendant would have a Hobson's choice: preserving the record and risking alienating the jury, or not preserving the record at all. Upon the defendant's pretrial request, therefore, the trial judge should inquire about each prospective juror's race. Under this practice, the race of the potential juror becomes a routine piece of requested information no different from the juror's address; as such, it is less likely to insult the juror. Moreover, because the judge asks the questions, defense counsel will not antagonize the jury. The North Carolina Supreme Court has hinted that such a method would be permissible,[301] but the court should go further and formally adopt it.

2. Examination of the Prosecutor

Another procedural issue that has arisen in North Carolina *Batson* claims is whether defendants may cross-examine prosecutors regarding their rebuttal explanations.[302] In *State v. Jackson* the supreme court held that defendants have no such right.[303] The court feared that the disruption to the trial would outweigh any good that could be achieved by the prosecutor's testimony.[304] Moreover, the court was confident that trial judges would be able to pass on prosecutors' credibility without the aid of cross-examination.[305] The *Jackson* court did hold, however, that once prosecutors advance their reasons for the peremptory challenges in question, defendants may offer additional evidence to strengthen the inference of purposeful discrimination or to expose the prosecu-

299. *Id.* at 655-56, 365 S.E.2d at 557. Moreover, the court reporter's guess for the race of the potential juror is essentially a racial judgment based solely on appearance, and thus is susceptible to the same stereotypes that underlie race-based peremptory challenges.

300. *Id.* at 656, 365 S.E.2d at 557. If there is any question about the juror's race, the trial court may question the juror to determine it. *Id.*; *see also* State v. Payne, 327 N.C. 194, 199-200, 394 S.E.2d 158, 160-61 (1990) (suggesting that prior to trial defendant ask that the trial judge ask prospective jurors to state their race for the record during initial questioning).

301. In *Payne*, the court wrote: "The trial court noted . . . that had the defendant made his motion prior to jury selection, the court would have had each prospective juror state his or her race during the court's initial questioning. This would have . . . preserved an adequate record for appellate review." 327 N.C. at 199-200, 394 S.E.2d at 160; *see also* State v. Attmore, 92 N.C. App. 385, 397, 374 S.E.2d 649, 657 (1988) (trial judge noted race and sex of each person examined during voir dire), *disc. rev. denied*, 324 N.C. 248, 377 S.E.2d 757 (1989).

302. *See* Note, *Defense Presence and Participation: A Procedural Minimum for* Batson v. Kentucky *Hearings*, 99 YALE L.J. 187, 205-06 (1989) [hereinafter Note, *Defense Presence and Participation*]; *see also* Note, *supra* note 142, at 832-36 (discussing advantages and disadvantages of adversarial *Batson* hearings).

303. State v. Jackson, 322 N.C. 251, 258, 368 S.E.2d 838, 840 (1988), *cert. denied*, 490 U.S. 1110 (1989).

304. *Id.*; *see also* Note, *Defense Presence and Participation*, *supra* note 302, at 205 (administrative burden would result from adversarial *Batson* hearings).

305. *Jackson*, 322 N.C. at 258, 368 S.E.2d at 842.

tors' proffered reasons as mere pretexts for discrimination.[306]

In light of the purposes of *Batson*, the court underestimated the importance of examining the prosecutor and thus unduly restricted the defendant's ability to expose unconstitutional discrimination.[307] The trial judge's evaluation of credibility is the most important trial-level determination in any *Batson* inquiry.[308] Prosecutors easily can assert nonracial reasons for striking any juror; thus, the primary issue for the court is whether those reasons are genuine or pretextual.[309] Evaluating the credibility of prosecutors in *Batson* cases, however, is not a simple matter. Because of unconscious racism, trial judges may not recognize racial discrimination.[310] Furthermore, many of the reasons that prosecutors advance are subjective and vague.[311] Some of these reasons involve subtle actions by the prospective juror; others involve no objective indicia at all.[312] Trial judges are unlikely to observe these claimed grounds for the alleged discriminatory peremptory challenges unless they search for them. Therefore, the trial judge must have an adequate opportunity to evaluate the prosecutor's sincerity when the prosecutor explains her peremptory challenges.

For more than two centuries the belief that "no safeguard for testing the value of human statements is comparable to that furnished by cross-examination" has pervaded Anglo-American law.[313] In light of the centrality of the credibility issue to the *Batson* inquiry and the inherent difficulty of evaluating the prosecutor's credibility, the North Carolina Supreme Court should permit defendants to examine the prosecutors once the prosecutors have explained their

306. *See id.* (finding "no reason why the defendant could not have offered evidence to strengthen his case after the State had made its showing"); *see also* State v. Porter, 326 N.C. 489, 497, 391 S.E.2d 144, 150 (1990) (expressly holding that after State advances its reasons for the disputed challenges defendant has right of surrebuttal to show that those reasons are pretextual); State v. Green, 324 N.C. 238, 240-41, 376 S.E.2d 727, 728 (1989) (same).

307. The Illinois Supreme Court has stated that because the prosecutor, an officer of the court, is under a high professional obligation to speak truthfully, no need for cross-examination arises. People v. Young, 128 Ill. 2d 1, 24-25, 538 N.E.2d 453, 459 (1989), *cert. denied*, 110 S. Ct. 3290 (1990). This argument is unpersuasive. Prosecutors are also under a high obligation to obey the fourteenth amendment, to follow the dictates of the United States Supreme Court, and not to exercise peremptory challenges on account of race. The need for *Batson* shows that some prosecutors, like other lawyers, breach their professional obligations. Furthermore, some prosecutors simply are unaware of the racial underpinnings of their actions. *See Batson*, 476 U.S. at 106 (Marshall, J., concurring) (unconscious racism may color prosecutor's judgments); Johnson, *supra* note 287, at 1026-36 (same). Persons who might be denied their constitutional rights as a result of prosecutors' conscious or unconscious racism are entitled to adequate procedures to protect those rights. Thus, prosecutors' obligation to speak truthfully is no substitute for adequate procedures to evaluate their credibility.

308. *See Batson*, 476 U.S. at 98 n.21 (trial judge's findings will depend largely on evaluation of prosecutor's credibility); *Jackson*, 322 N.C. at 255, 368 S.E.2d at 840 (reviewing court should give trial court's findings great deference because it depends on credibility).

309. *See supra* notes 252-56 and accompanying text.

310. *See supra* note 287.

311. *See supra* text accompanying notes 253-54.

312. *Id.*

313. 5 J. WIGMORE, *supra* note 182, § 1367, at 32 (Chadbourne rev. 1974); *see* E. CLEARY, *supra* note 119, § 19, at 47. So essential is cross-examination to the accuracy and completeness of testimony, that it is a right and not merely a privilege in trials. E. CLEARY, *supra* note 119, § 19, at 47. Wigmore described cross-examination as "the greatest legal engine ever invented for the discovery of truth" and "the great and permanent contribution of the Anglo-American system of law to improved methods of trial procedure." 5 J. WIGMORE, *supra* note 182, § 1367, at 32 (Chadbourne rev. 1974).

peremptory challenges.[314] The *Jackson* court's concern about and emphasis on the disruption that might result from adversarial *Batson* hearings, while understandable at first glance, are unwarranted. Permitting examination of the prosecutor would not add substantially to the disruption of the trial, since *Batson* hearings already involve an interruption of the trial. By the time the defendant examines the prosecutor, the trial already would have been stopped for the defendant to argue the existence of a prima facie case and for the prosecutor to explain the disputed peremptory strikes. Furthermore, the defendant already has the right to introduce further evidence in surrebuttal; examination of the prosecutor would not take significantly more time. Trial judges can prevent undue disruption by exercising their traditional powers to preclude examination that is badgering, repetitive, or a mere fishing expedition. Moreover, according to Professor Raphael, most courts simply have not experienced undue disruptions as a result of adversarial *Batson* hearings.[315] Most important, a small, additional disruption in the trial cannot justify withholding from defendants the legal system's most effective tool for exposing the falsity of prosecutors' assertions when the constitutional rights of minority defendants and prospective jurors are at stake.

At the very least, no rationale justifies the North Carolina Supreme Court's absolute prohibition of examining the prosecutor. When a prosecutor must explain his peremptory challenges in a hearing on remand from an appellate court, disruption of the trial is not a concern. In this situation no reason exists for an absolute prohibition against cross-examining the prosecutor because the problem at the heart of the *Jackson* court's rationale for the prohibition is absent.[316] Moreover, the trial judge is in the best position to determine the value of examining the prosecutor and the disruption that might result from that examination. The trial judge, therefore, should at least have the discretion to permit examination of the prosecutor.

3. Harmless Error

The North Carolina Supreme Court also has addressed the procedural issue of harmless error under *Batson*. In *State v. Robbins*[317] the court rejected the defendant's *Batson* claim in part because the defendant failed to exhaust his allotted peremptory challenges, the theory apparently being that the defendant still could have removed jurors with whom he was dissatisfied and thus was not prejudiced by any *Batson* errors.[318] This holding once again misconstrues the

314. One commentator has suggested that defendants ordinarily should be permitted to examine the prosecutor, with exceptions made only if the prosecutor demonstrates that his trial strategy would be "compromised substantially" as a result of the examination. *See* Raphael, *supra* note 178, at 338.

315. Professor Raphael reported: "The experience of most courts . . . indicates that the *Jackson* court was in error in fearing that cross-examination of a prosecutor would be disruptive . . . ." Raphael, *supra* note 178, at 338.

316. *See* Note, *supra* note 142, at 205.

317. *See supra* notes 160-76 and accompanying text.

318. State v. Robbins, 319 N.C. 465, 495, 356 S.E.2d 279, 297 (citing State v. Wilson, 313 N.C. 516, 524, 330 S.E.2d 450, 457 (1985)), *cert. denied*, 484 U.S. 918 (1987); *see also* State v. Davis, 325

constitutional principles upon which *Batson* is based.

The North Carolina Supreme Court's requirement that parties exercise all of their peremptory challenges to show prejudice derives from cases in which defendants claimed the trial court improperly denied their challenges for cause. The court held in those cases that the defendants were not prejudiced by the trial judge's refusal to excuse the jurors because, if they truly wanted the jurors off the jury, the defendants could have removed them with their remaining peremptory challenges.[319] These cases are inapposite, however, to attacks by defendants on prosecutorial peremptory challenges under *Batson*. When defendants make *Batson* claims, they are not necessarily asserting particular dissatisfaction with the persons who actually served on the jury. Rather, the claim simply is that some persons were removed unconstitutionally from the jury. This claim is especially true because, even if the defendants are not harmed by prosecutors' discriminatory peremptory challenges, such challenges deny the excluded jurors equal protection of the laws and undermine public confidence in the legal system.[320] "Prejudice" for the purposes of *Batson*, therefore, is present when any person is peremptorily challenged on account of race. The fact that defendants still had peremptory challenges remaining and could have used them to strike persons accepted by the prosecutor does not remove this prejudice. Indeed, the United States Supreme Court has noted that because jury selection goes to the very integrity of the legal system, harmless error analysis simply does not apply.[321] Thus, the North Carolina Supreme Court's reliance on its previous cases dealing with prejudice and the use of peremptory challenges is misplaced.

D. Justifications for Suggested Doctrinal Revisions

North Carolina's implementation of *Batson* has been marked by a constrictive view of the decision and a misapprehension of *Batson*'s operation and constitutional underpinnings. The courts have misconstrued the operation of the prima facie case by improperly considering challenged jurors' voir dire responses when determining whether an inference of discrimination exists. The courts

N.C. 607, 620, 386 S.E.2d 418, 424 (1989) (finding no prejudice when defendant had three peremptory challenges remaining), *cert. denied*, 110 S. Ct. 2587 (1990).

319. *See, e.g.*, State v. Quesinberry, 319 N.C. 228, 235, 354 S.E.2d 446, 450 (1987), *vacated on other grounds*, 110 S. Ct. 1465 (1990); State v. Avery, 315 N.C. 1, 21, 337 S.E.2d 786, 797 (1985); *see also* State v. Wilson, 313 N.C. 516, 524-25, 330 S.E.2d 450, 457 (1985) (defendant dissatisfied with jurors recruited by sheriff during middle of jury selection). These cases applied the North Carolina jury selection procedures statute, which provides in part: "In order for a defendant to seek reversal of the case on appeal on the ground that the judge refused to allow a challenge made for cause, he must have:

(1) Exhausted the peremptory challenges available to him[.]" N.C. GEN. STAT. § 15A-1214(h)(1) (1988).

320. *Batson*, 476 U.S. at 87.

321. *See* Gray v. Mississippi, 481 U.S. 648, 668 (1987) (*Witherspoon* error resulting in improper exclusion of jurors for cause in death penalty case is never harmless); *see also* Mitchell v. State, 295 Ark. 341, 351, 750 S.W.2d 936, 941 (1988) (Despite evidence of overwhelming guilt, *Batson* error requires reversal, since "[w]e are concerned here with prejudice to the system of justice."); *cf.* State v. Cofield, 320 N.C. 297, 301, 303, 357 S.E.2d 622, 624-25, 626 (1987) (question is not whether racial discrimination in selection of grand jury foreperson affected the outcome of the proceedings, but rather whether there was racial discrimination at all).

readily have accepted any facially neutral reason put forth by prosecutors as sufficient to rebut a prima facie case, and have paid excessive deference to trial court findings of *Batson* issues.

The courts' narrow views of *Batson* may be explained by North Carolina's historical support for the peremptory challenge. North Carolina was one of the first states to permit the exercise of peremptory challenges and, more particularly, prosecutorial peremptory challenges.[322] As a result, the North Carolina courts have sought to give life to *Batson* without meaningfully changing the exercise of the peremptory challenge. This phenomenon has been most evident in the wide range of rebuttal reasons the courts have accepted; they have been unwilling to reject any facially nonracial explanation that, by definition, is ordinarily a proper basis for a peremptory challenge. The result, however, has been a scheme that has been ineffective in answering *Batson's* challenge to erradicate jury selection discrimination. The inherent conflict between the equal protection clause and the peremptory challenge means that equal protection cannot be guaranteed without intrusions on the peremptory challenge. Unless the North Carolina courts revise their approach to *Batson* and promote in practical ways the decision's fundamental goal of eliminating discrimination, *Batson* protection in North Carolina may become permanently illusory.

The revisions suggested in this Comment are justified for several reasons, despite their limitations on North Carolina prosecutors' traditional uses of peremptory challenges. Most important, the North Carolina Constitution provides special protections against discrimination in jury selection; indeed, they are stronger than those contained in the federal constitution. Article 1, section 26 of the North Carolina Constitution expressly provides that "[n]o person shall be excluded from jury service on account of sex, race, color, religion, or national origin."[323] This provision is distinct from, and in addition to, the state equal protection clause.[324] In *State v. Cofield*[325] the supreme court construed section 26 in the context of grand jury foreperson selection. In powerful language, the court noted that by adopting this constitutional provision the people of North Carolina

> have declared that they will not tolerate the corruption of their juries by racism, sexism and similar forms of irrational prejudice. They have recognized that the judicial system of a democratic society must operate evenhandedly if it is to command the respect and support of those subject to its jurisdiction.[326]

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322. *See supra* notes 46-54 and accompanying text. In addition, the North Carolina trial tradition has been to promote freedom for its attorneys in selecting juries. *See supra* note 54.

323. N.C. CONST. art. I, § 26.

324. *See id.* § 19. This section provides in pertinent part: "No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin." *Id.*

325. 320 N.C. 297, 357 S.E.2d 622 (1987) (*Cofield I*).

326. *Id.* at 302, 357 S.E.2d at 625. The supreme court found the need for racially neutral procedures so imperative that in *Cofield II* the court again reversed the defendant's conviction because of the grand jury foreperson selection process employed, even though the court was "satisfied that there was not the slightest hint of racial motivation" in the judge's selection of the foreperson. State v. Cofield, 324 N.C. 452, 459-60, 379 S.E.2d 834, 839 (1989) (*Cofield II*).

The court explicitly acknowledged that this policy applies not only to the selection of grand jury forepersons, but also to the selection of petit jurors.[327] As Justice Mitchell explained in his concurring opinion: "[I]t is clear beyond any doubt that this section of our Constitution was intended as an absolute guarantee that all citizens of this State would participate fully in the honor and obligation of jury service in all forms; as petit jurors, grand jurors, and as foremen of the grand jury."[328] The supreme court later discussed the specific relationship of peremptory challenges to section 26 in *Jackson v. Housing Authority*.[329] The *Housing Authority* court observed: "Although long embedded in our common law, the use of peremptory challenges is based upon statutory authority and is not of [state] constitutional dimension. Therefore, the statutory authority to exercise peremptory challenges must yield to . . . constitutional mandate . . . ."[330] The mandate of the people of North Carolina thus requires that the North Carolina appellate courts rigorously protect defendants and prospective jurors from invidious discrimination, even if it means contraction of a prosecutor's use of peremptory challenges.

This Comment's recommended revisions also are justified because the peremptory challenge simply is not of federal constitutional magnitude,[331] and reasonable limitations on its use are essential to the protection of fourteenth amendment rights. Furthermore, proponents of the prosecutorial peremptory challenge overstate its historical significance. Professor Van Dyke has noted that peremptory challenges "have been subject to abuse from the time juries were first introduced in England."[332] This phenomenon was true despite peremptory challenges in England being much less susceptible to discriminatory use than those in the United States because of the homogeneity of English society; in the heyday of the English peremptory challenge, only propertied males could serve as jurors.[333] As times changed and English jurors became more diverse, Parliament limited, and eventually abolished, the peremptory challenge.[334] Similarily, the historical significance of peremptory challenges in North Carolina is less than overwhelming. Although the North Carolina General Assembly in 1827 granted prosecutors the right to exercise peremptory challenges, it was not until one hundred fifty years later that they gave prosecutors the same

327. *Cofield I*, 320 N.C. at 303, 357 S.E.2d at 626; *see also* State v. Mitchell, 321 N.C. 650, 653, 365 S.E.2d 554, 556 (1988) (recognizing that *Batson* and *Cofield I* stand for analogous propositions that potential jurors may not be excluded nor grand jury forepersons selected on discriminatory grounds).

328. *Cofield I*, 320 N.C. at 310, 357 S.E.2d at 630 (Mitchell, J., concurring).

329. 321 N.C. 584, 364 S.E.2d 416 (1988). *Jackson* prohibited the exercise of peremptory challenges on account of race in civil cases. *Id.* at 585, 364 S.E.2d at 417.

330. *Id.* As early as 1887, the North Carolina Supreme Court recognized that "if [the prosecutor's right to stand jurors aside] had been [abused] . . . such abuse would have warranted a recall of the permission." State v. Sloan, 97 N.C. 499, 502-03, 2 S.E. 666, 668 (1887).

331. *See Batson*, 476 U.S. at 108 (Marshall, J., concurring); Stilson v. United States, 250 U.S. 583, 586 (1919). The Court has held that the right to peremptory challenge may be withheld without impairing the constitutional guarantee of an impartial jury. Frazier v. United States, 335 U.S. 497, 505 n.11 (1948); United States v. Wood, 299 U.S. 123, 145 (1936).

332. J. VAN DYKE, *supra* note 2, at 147.

333. *See* Alschuler, *supra* note 7, at 165.

334. *See* Gobert, *supra* note 27, at 528-29.

number of peremptory challenges as defendants.[335]

The final justification for this Comment's suggested revisions to North Carolina's *Batson* law is that the practical value of the peremptory challenge is questionable.[336] In a 1978 study, for example, the prospective jurors whom the prosecutor peremptorily challenged were as likely to favor convictions as were the jurors actually selected.[337] It follows that the most important function of the peremptory challenge is not to facilitate the selection of juries that are actually impartial, but rather to foster the perception of impartiality and thus promote confidence in the criminal justice system.[338] Both *Batson* and *Cofield* teach that when peremptory challenges are used for discriminatory reasons, "[t]he harm . . . extends . . . to touch the entire community" because unconstitutionally motivated challenges "undermine public confidence in the fairness of our system of justice."[339] Limiting the use of the peremptory challenge to protect against discrimination, therefore, is not only justified, but is the only way that the peremptory challenge may perform its function of promoting confidence in the criminal justice system.

V. CONCLUSION

Five years after *Batson*, no North Carolina defendant has attacked prosecutorial peremptory challenges successfully on equal protection grounds. *Batson* has been rendered ineffective in North Carolina by the North Carolina appellate courts' efforts to minimize *Batson*'s impact on the peremptory challenge, a device historically employed in North Carolina. The American criminal justice system is not big enough for both the equal protection clause and the traditional, arbitrary and capricious peremptory challenge; the equal protection clause and the peremptory challenge are inherently contradictory. Consequently, the North Carolina courts must revise their approach to *Batson* and promote more effectively *Batson*'s primary goal of eradicating the discriminatory use of peremptory challenges. As Justice Frye of the North Carolina Supreme Court recognized: "[I]t is the province of the courts [of North Carolina] to ensure that [peremptory challenges] are used in such a manner not offensive to the constitutional rights of our citizens."[340]

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335. *See supra* note 53 and accompanying text.

336. *See* R. HASTIE, S. PENROD & N. PENNINGTON, INSIDE THE JURY 129 (1983) ("no hard evidence that current systematic jury selection methods are useful in typical felony cases"); Note, *The Case for Striking Peremptory Strikes*, *supra* note 140, at 212-13.

337. Zeisel & Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491, 513-18 (1978).

338. *See supra* note 33 and accompanying text.

339. *Batson*, 476 U.S. at 87.

340. State v. Jackson, 322 N.C. 251, 260, 368 S.E.2d 838, 843 (1988) (Frye, J., concurring), *cert. denied*, 490 U.S. 1110 (1989).