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Constitutional Law - Racially-Motivated Peremptory Challenges - Batson v. Kentucky

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CONSTITUTIONAL LAW—Racially-Motivated Peremptory Challenges. *Batson v. Kentucky,* 106 S. Ct. 1712 (1986).

James Kirkland Batson, a black man, was indicted in Kentucky on charges of receipt of stolen goods and second-degree burglary. The prosecutor used his peremptory strikes to remove the four black persons from the venire,[1] leaving an all-white jury. Before the jury was sworn, defense counsel timely moved to discharge the jury on the ground that the prosecutor's removal of the four black veniremen violated the defendant's fourteenth amendment right to equal protection of the laws.[2] The trial judge denied the motion.[3]

The all-white jury convicted the defendant on both counts. The defendant appealed to the Supreme Court of Kentucky.[4] The defendant argued that the prosecutor's conduct *in his particular case* was sufficient to establish the prosecutor's discriminatory intent to exclude black veniremen from the jury on account of their race.[5] The Supreme Court of Kentucky rejected the defendant's constitutional claim and affirmed the trial court.[6] The defendant appealed to the United States Supreme Court.[7] In an opinion by Justice Powell, the Supreme Court reversed, holding that a defendant in a criminal case may establish a prima facie case of purposeful discriminatory intent[8] based solely on the prosecutor's use of peremptory challenges in the selection of the petit jury *at the defendant's trial.*[9] Once the defendant makes a prima facie case of discriminatory intent, the burden shifts to the prosecutor to rebut the inference with a neutral explanation for challenging the black[10] jurors. The neutral explanation must be more than the prosecution's affirmance of its good faith in

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1. Under the Kentucky Rules of Criminal Procedure, the parties exercise their peremptory challenges simultaneously by striking names from a list of qualified jurors equal to the number to be seated plus the number of allowable peremptory challenges. This is referred to as a "Struck Jury" system. KY. R. CRIM. P. 9.36.

2. Although the petitioner first presented the issue in terms of a sixth amendment case alleging a violation of his right to an impartial jury and a jury drawn from a cross-section of the community, the Court declined to consider these issues. Rather, the facts of the petitioner's case, along with the respondent's insistence that the petitioner was actually raising an equal protection claim, presented the court with an opportunity to reconsider Swain v. Alabama, 380 U.S. 202 (1965), which it proceeded to do. *See* Batson v. Kentucky, 106 S. Ct. 1712, 1715, 1716 n.4 (1986).

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

4. Batson v. Kentucky, *cert. granted,* 477 U.S. 1052 (1985) (mem.). The petitioner argued on appeal that the prosecutor had engaged in a pattern of "systematic exclusion of jurors on the basis of race." This was formerly the defendant's burden of proof for an equal protection challenge under Swain v. Alabama, 380 U.S. at 224. The Court declined to decide this issue. *Batson,* 106 S. Ct. at 1716 n.4.

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

6. *Id.* at 1715-16.

7. *Id.* at 1716.

8. In this casenote, the terms "discriminatory intent", "discriminatory purpose", and "discriminatory racial purpose" will be used synonymously to refer to the requisite state action to effectuate a violation of the equal protection clause of the fourteenth amendment.

9. *Id.* at 1722-23.

10. Actually, the *Batson* holding can apply to any member of a racial minority. *See, e.g.,* Bueno-Hernandez v. State, 724 P.2d 1132 (Wyo. 1986) (Hispanics).

individual selections or a justification for its challenges based on the assumption that black jurors are more likely to be biased toward black defendants.[11] This casenote examines the efficacy of *Batson*'s evidentiary requirement in insuring equal protection of the laws to minority defendants.

BACKGROUND

In *Strauder v. West Virginia*,[12] the Supreme Court recognized that a black defendant is denied equal protection when he is tried before a jury[13] from which the prosecutor has purposefully excluded members of his race.[14] The Court in *Strauder* addressed the inequality which exists when a white defendant receives a jury comprised of members of his own race while a similarly situated black defendant receives a jury from which the prosecutor has purposefully excluded members of his race.[15]

In *Swain v. Alabama*,[16] the Supreme Court decided that the prosecutor's use of peremptory strikes to remove all the black veniremen in a particular case did not necessarily establish the discriminatory intent required for an equal protection claim.[17] The *Swain* holding raised the presumption that the prosecutor's peremptories are made for non-discriminatory reasons.[18] A defendant could overcome this presumption only by showing that a particular prosecutor had a history of systematically excluding black veniremen.[19]

Prior to *Batson*, the evidentiary burden for establishing a discriminatory racial purpose in the selection of a criminal defendant's grand jury or jury venire was gradually eroding. In *Alexander v. Louisiana*,[20] the defendant showed that the number of blacks was disproportionately reduced at each stage in the process of selecting the grand jury for his trial.[21]

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

12. 100 U.S. 303 (1880).

13. There is no petit-grand jury distinction for fourteenth amendment purposes. *See* Alexander v. Louisiana 405 U.S. 625, 626 n.3 (1972).

14. Depriving a juror of the right to serve is not an issue in this casenote.

15. *Strauder*, 100 U.S. at 305.

16. 380 U.S. 202 (1965).

17. *Id.* at 221.

18. *Id.* at 222. For the effect of this holding, see, for example, United States v. Greene, 626 F.2d 75, 76 (8th Cir. 1980) (presumption of propriety where federal prosecutor used peremptory challenges to strike all five black veniremen in the prosecution of a black defendant), and United States v. Pearson, 448 F.2d 1207, 1218 (5th Cir. 1971) (presumption of propriety where federal prosecutor used peremptory challenges to strike all five black veniremen in the prosecution of a black defendant).

19. *Swain*, 380 U.S. at 227; *see, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886) (San Francisco ordinance violated the fourteenth amendment equal protection clause where its application showed a clear design to burden Chinese laundry operators. The city supervisors excluded all Chinese persons from operating laundries while permitting all non-Chinese persons to operate laundries.)

20. 405 U.S. 625 (1972).

21. *Id.* at 629-30. In the jurisdiction where the defendant was tried the black population eligible for grand jury service represented twenty-one percent of the total population. After a questionnaire was sent out by the jury commissioners, a pool was created in which fourteen percent of the members were black. From this pool a list of prospective jurors was

Because the selection procedures themselves were not racially neutral,[22] the defendant established a prima facie case of discriminatory intent in the selection of his grand jury. In *Castaneda v. Partida*,[23] the Court fully articulated the standard by which to assess a prima facie case of discriminatory racial intent in the selection of the venire. First, the defendant must show that he is a member of a clearly identifiable class which society has singled out for differential treatment under the laws.[24] Next, the defendant must prove the degree to which his class is underrepresented by comparing the percentage of representation in the population to the percentage of representation on grand juries over a significant period of time.[25] Finally, the defendant must show that the selection procedure permits "those to discriminate who are of a mind to discriminate."[26]

Subsequent Supreme Court decisions interpreting the equal protection clause further modified the evidentiary standard established in *Swain* for a finding of discriminatory racial purpose. In *Washington v. Davis*,[27] the Supreme Court recognized that a racially disproportionate impact in government hiring procedures may be circumstantial evidence of "an invidious discriminatory purpose."[28] Also, in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[29] the Supreme Court stated that a "single invidiously discriminatory governmental act . . . would not necessarily be immunized by the absence of such discrimination in the making of other comparable decisions."[30] These more recent cases relaxed the rigid evidentiary standard which *Swain* required for proof of a racially discriminatory purpose.

Soon after *Batson* was decided,[31] it was interpreted in Wyoming. In *Bueno-Hernandez v. State*,[32] a grand jury indicted a Mexican national for the attempted sexual assault of a nine-year-old white girl. During voir dire, the prosecutor peremptorily challenged three members of the venire.[33] The three challenged veniremen, apparently of Mexican-American heritage, all had Spanish surnames.[34] The defendant unsuccessfully moved for a

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compiled. Seven percent of the listed parties were black. The venire for the defendant's grand jury had a five percent black membership; the grand jury that indicted the defendant contained no black members.

22. *Id.* at 630. The jury commission used questionnaires and identification cards to select the prospective grand jurors. Both contained a clearly-visible racial designation.

23. 430 U.S. 482 (1977).

24. *Id.* at 494.

25. *Id.* This method of proof, referred to as the "rule of exclusion," simply recognizes the improbability that a large disparity over a significant period of time will be due to chance or accident.

26. *Id.; see, e.g.*, Avery v. Georgia, 345 U.S. 559 (1953).

27. 426 U.S. 229 (1976) (racially disproportionate impact of a written test on the number of black policemen hired).

28. *Id.* at 242.

29. 429 U.S. 252 (1977).

30. *Id.* at 266 n.14.

31. 106 S. Ct. 1712 (1986) (decided Apr. 30, 1986).

32. 724 P.2d 1132 (Wyo. 1986).

33. *Id.* at 1133.

34. *Id.* Because the defendant did not establish that the veniremen with Spanish surnames were actually of Mexican-American descent, he failed to establish a prima facie case of racial discrimination.

mistrial on the ground that the prosecutor's exclusion of the veniremen violated the defendant's right to a fair and impartial jury.[35] The motion was denied, and the defendant was convicted.[36]

On appeal, the Wyoming Supreme Court examined the case under the newly-decided *Batson* standard and held that the defendant failed to establish, to the trial court's satisfaction, a prima facie case of purposeful discrimination.[37] The court also stated as dictum that the prosecutor's "neutral explanation" for his peremptory challenges sufficiently rebutted a prima facie case of purposeful discrimination.[38] According to the prosecutor's neutral explanation, his peremptory challenges were motivated by prior contacts between the veniremen and the prosecutor's office.[39]

Swain created a practically irrebuttable presumption that the prosecutor's challenges lacked discriminatory intent. In vitiating this presumption, *Batson* demonstrated the Court's reluctance to base an equal protection violation on the prosecutor's use of peremptory challenges.

THE PRINCIPAL CASE

In *Batson,* the Supreme Court finally rejected the evidentiary formulation of *Swain* by allowing the defendant to make a prima facie showing of purposeful racial discrimination based solely on the prosecutor's use of peremptory strikes *at the defendant's trial.*[40] In reaching its decision, the Court considered its post-*Swain* decisions which relaxed the defendant's burden of showing a discriminatory racial purpose in a fourteenth amendment equal protection claim.[41] The Court also considered its other cases interpreting the equal protection clause,[42] particularly *Washington v. Davis*[43] and *Arlington Heights.*[44] These later decisions were instrumental in the Court's rejection of the *Swain* standard, which required proof of systematic exclusion of blacks over a period of time by a particular prosecutor.

The *Batson* Court ruled that, for the defendant to establish a prima facie case of a discriminatory purpose, he must show that he is a member

35. *Id.*
36. *Id.*
37. *Id.* at 1134-35.
38. *Id.* at 1135. Although an illustrative application of the *Batson* holding, this portion of the decision was unnecessary. Once the court decided there was no prima facie case, the prosecutor's neutral explanation was no longer relevant.
39. *Id.*
40. *Batson* applies retroactively to all cases pending on direct review or not yet final at the time of decision. Griffith v. Kentucky, 107 S. Ct. 708, 716 (1987). *Batson* is not, however, retroactive on collateral review of convictions that became final before its announcement. Allen v. Hardy, 106 S. Ct. 2878, 2880 (1986).
41. *Batson,* 106 S. Ct. at 1722. The primary cases considered were Castaneda v. Partida, 430 U.S. 482 (1977), and Alexander v. Louisiana, 405 U.S. 625 (1972).
42. *Batson,* 106 S. Ct. at 1722.
43. 426 U.S. 229 (1976).
44. 429 U.S. 252 (1977).

of a cognizable racial group and that the prosecutor peremptorily challenged members of that group from the petit jury.[45] Next, the defendant may rely on the fact that peremptory challenges are part of a selection procedure that permits "those to discriminate who are of a mind to discriminate."[46] Finally, the defendant must show that the exclusion of his race from the petit jury by a device that lends itself to discrimination, combined with other relevant circumstances,[47] raises an inference that the prosecution used its peremptory challenges to exclude veniremen from the petit jury on account of their race.[48]

Once the defendant establishes his prima facie case of a discriminatory racial purpose, the *Batson* Court ruled that the burden shifts to the prosecution to rebut the presumption that it purposefully used its peremptory strikes to exclude the veniremen from the petit jury on account of race.[49] To rebut the inference of a discriminatory racial purpose, the prosecution must give a neutral explanation for its peremptory strikes which "need not rise to the level justifying [the] exercise of a challenge for cause."[50] The explanation must, however, be more than an affirmance of good faith in the exercise of peremptory strikes or a justification based on the assumption that the jurors are unable to be impartial to the defendant because of their shared race.[51]

Because the trial court rejected Batson's timely objection to the removal of all of the black veniremen before the prosecutor could offer a neutral explanation to his peremptory challenges, the Supreme Court remanded the case to the trial court to allow the prosecutor to rebut the prima facie case of purposeful discriminatory intent.[52] If the prosecutor fails to rebut the inference, the petitioner's conviction must be reversed.[53]

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45. *Batson*, 106 S. Ct. at 1723; *see also Castaneda*, 430 U.S. at 494.

46. *Batson*, 106 S. Ct. at 1723; *see also* Avery v. Georgia, 345 U.S. 559, 562 (1953).

47. Examples of the other relevant circumstances are questions asked during voir dire or the 'pattern' of strikes against the excluded jurors. These examples, intended by the Court to be illustrative rather than exhaustive, may both "support or refute an inference of discriminatory purpose." *See Batson*, 106 S. Ct. at 1723.

48. *Id.* The combination of factors in the prima facie case raises the necessary presumption of a discriminatory purpose in the empaneling of the petit jury and the selection of the venire.

49. *Id.*

50. *Id.* See McCray v. Abrams, 750 F.2d 1113, 1132 (2d Cir. 1984), for further explanation of this somewhat nebulous standard.

51. *Batson*, 106 S. Ct. at 1723. The fallacies of this assumption are dealt with in Justice Marshall's concurring opinion:

> Exclusion of blacks from a jury, solely because of race, can no more be justified by a belief that blacks are less likely than whites to consider fairly or sympathetically the state's case against black defendant than it can be justified by the notion that blacks lack the "intelligence, experience, or moral integrity," *Neal v. Delaware*, 103 U.S. 370, 397 (1881), to be entrusted with that role.

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

52. *Id.* at 1725.

53. The defendant is then retried by a properly selected jury. *See, e.g.*, Whitus v. Georgia, 385 U.S. 545 (1967) (After two black defendants convicted of murder established a prima facie case of purposeful discrimination in the selection of their grand and petit juries, their convictions were reversed and remanded for new trials.).

Batson was a 7-2 decision, with Chief Justice Burger[54] and Justice Rehnquist[55] dissenting.[56] Justice Marshall's concurring opinion[57] indicated the seriousness of the discriminatory use of peremptory challenges to exclude black jurors from the venire in cases involving a black defendant. Justice Marshall suggested the potential for racial prejudice that inheres in the prosecutor's peremptory strike can only be abated by eliminating peremptory challenges entirely.[58] This drastic remedy is based on the "common and flagrant" misuse of peremptory challenges,[59] the constitutional priority of the right to equal protection over the right to peremptory challenges,[60] and the limited impact of the majority's ruling in preserving equal protection for black defendants.[61]

This latter point is critical to an analysis of *Batson*. The trial judge's discretion to determine the establishment and rebuttal of the defendant's prima facie case dilutes the significance of *Batson*'s holding.

ANALYSIS

Establishing the Prima Facie Case

Batson concluded twenty years of criticism of the *Swain* decision's prohibitive burden of proof in equal protection challenges to the prosecu-

54. *Batson*, 106 S. Ct. at 1731 (Burger, C.J., joined by Rehnquist, J., dissenting). The Chief Justice addressed the impropriety of deciding the case on equal protection grounds when the petitioner's appeal was based on the sixth amendment. *Id.* at 1731-33. In criticizing the majority ruling to restrict the prosecution's exercise of its peremptory challenges, the Chief Justice also discussed the historical function of the peremptory challenge in "securing perfect fairness and impartiality in a trial." *Id.* at 1734-38. This is the same rationale used twenty-two years ago to decide Swain v. Alabama, 380 U.S. 202, 219-20 (1965).

55. *Batson*, 106 S. Ct. at 1742 (Rehnquist, J., joined by Burger, C.J., dissenting). Justice Rehnquist opposed the scope of the *Batson* holding, emphasizing that the majority went beyond establishing the defendant's equal protection evidentiary burden and invaded the prosecutor's case-specific use of the peremptory challenge. Justice Rehnquist accepted the assumption that black jurors as a group are unable to be impartial towards a black defendant. The weakness of this position was articulated by Justice Brennan in Thompson v. United States, 105 S. Ct. 443, 445 (1984) (Brennan, J., dissenting from denial of certiorari):

> *[S]wain* authorized the presumption that a Negro juror will be partial to a Negro defendant simply because both belong to the same race. Implicit in such a presumption is a profound disrespect for the ability of individual Negro jurors to judge impartially. It is the race of the juror, and nothing more, that gives rise to the doubt in the mind of the prosecutor.

56. Justices White and O'Connor filed concurring opinions. Justice Stevens, joined by Justice Brennan, also filed a concurring opinion.

57. *Batson*, 106 U.S. at 1726 (Marshall, J., concurring).

58. *Id.*

59. *Id.* Justice Marshall cited several cases illustrative of the flagrant abuse of the peremptory challenge to remove black veniremen. *See, e.g.*, United States v. Carter, 528 F.2d 844, 848 (8th Cir. 1975) (In the Western District of Missouri, eighty-one percent of the black jurors were peremptorily challenged in fifteen cases involving black defendants.); United States v. McDaniels, 379 F. Supp. 1243 (E.D. La. 1974) (Although black veniremen made up only twenty-five percent of the venire, sixty-eight percent of the black veniremen were peremptorily challenged.); McKinney v. Walker, 394 F. Supp. 1015 (D.S.C. 1974) (Blacks represented 12.4% of the population called for jury duty, yet only 2.6% of the jurors sitting in judgment of black defendants were black.).

60. *Batson*, 106 S. Ct. at 1728.

61. *Id.* at 1727.

tor's use of peremptory challenges in empaneling the petit jury.[62] The courts have criticized this burden as being "crippling,"[63] "most difficult,"[64] and "virtually impossible"[65] because they have had to apply *Swain* to preserve the peremptory nature of prosecutorial strikes at the expense of the defendant's equal protection rights.[66] Although *Batson* is a step in the right direction, the racially discriminatory use of peremptory challenges is certain to continue. By vesting the trial judge with discretion to decide whether the defendant has established a prima facie case of discriminatory intent, *Batson* fails to eliminate the racially discriminatory impact of peremptory challenges.

After the defendant establishes that he is a member of a cognizable racial group which the prosecutor has excluded from the petit jury, the defendant may rely on the fact that peremptory challenges represent a jury selection device which lends itself to discrimination.[67] After the defendant makes this initial showing, he must next show that these established facts, together with any other relevant circumstances, raise an inference of a discriminatory purpose.[68]

The Court expressed confidence that experienced trial judges will be able to determine if these "other relevant circumstances" create an inference of discrimination against the minority jurors.[69] Justice Marshall's concurring opinion recognizes, however, that the examples of other relevant circumstances mentioned in Justice Powell's opinion are dubious indications of the prosecutor's true intent. The questions asked during voir dire, or the "pattern" of peremptory strikes, can easily be manipulated by a prosecutor with a disingenuous motive to exclude minority jurors.[70] Under *Batson*'s guise of propriety, it is the sequence in which the prosecutor excludes minorities from jury panels, rather than the prosecutor's motive for excluding minorities, that becomes the focus of the equal protection challenge.

Tradition may also influence the manner in which trial judges exercise their discretion. Although *Swain* is a twenty-two-year-old standard, *Batson* requires trial judges to reject a previously acceptable practice.

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62. *See, e.g.*, Thompson v. United States 105 S. Ct. 443, 445 (1984) (Brennan, J., dissenting from denial of certiorari); McCray v. New York, 461 U.S. 961, 963-70 (1983) (Marshall, J., joined by Brennan, J., dissenting from denial of certiorari); United States v. Pearson, 448 F.2d 1207, 1217 & n.25 (5th Cir. 1977); People v. Wheeler, 22 Cal. 3d 258, 275, 583 P.2d 748, 767-68, 148 Cal. Rptr. 890, 908-09 (1978); *see* Note, *Rethinking Limitations on the Peremptory Challenge*, 85 COLUM. L. REV. 1357, 1375 (1985).

63. *Batson*, 106 S. Ct. at 1720.

64. *Pearson*, 448 F.2d at 1217.

65. *Wheeler*, 22 Cal. 3d at 275, 583 P.2d at 768, 148 Cal. Rptr. at 909.

66. *See, e.g.*, United States v. Leslie, 783 F.2d 541 (5th Cir. 1986). *Leslie* based its denial of the defendant's sixth amendment claim on the holding in *Swain* that "racially based peremptory challenges . . . were a proper and a traditional part of the jury system as known to the common law and American jurisprudence." The pervasive effect of the *Swain* holding on lower courts is apparent from the *Leslie* decision.

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

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

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

70. *Id.* at 1726-27 (Marshall, J., concurring).

Justice Rehnquist, dissenting from the majority opinion in *Batson*, acknowledged his inability to understand how peremptory strikes based on "seat-of-the-pants instincts" can constitute an equal protection violation.[71] It therefore seems likely that experienced trial judges would have similar difficulty discerning the discriminatory impetus of circumstances surrounding the prosecutor's exercise of peremptory strikes.[72]

Massachusetts and California had previously adopted, as a matter of state law, an evidentiary standard similar to that established in *Batson*. Cases from these jurisdictions illustrate the defendant's burden of establishing a prima facie case of discriminatory intent based on the prosecutor's use of peremptory challenges.[73] In these states, only the most egregious use of peremptory challenges will establish a prima facie case of discriminatory intent.[74] The *Batson* holding is equally susceptible to these limitations because trial judges under the Court's standard have the same discretion.

Rebutting the Prima Facie Case

Once the defendant establishes a prima facie case of discriminatory racial purpose, the prosecutor has the burden of rebutting the inference. Again, the matter is left to the discretion of the trial judge. Subject to the limitations described above,[75] the prosecutor could conceivably offer an unlimited variety of contrived explanations to satisfy the standard articulated by the Court.[76] Once the trial court determines that the prosecutor's justification sufficiently rebuts the defendant's prima facie case of discriminatory intent, the judge's decision is accorded great deference on review.[77] The "neutral explanation" rebuttal of an otherwise valid inference of discriminatory intent operates, as in *Bueno-Hernandez*, to render *Batson*'s protection illusory.[78] Prosecutors that are adept at masking their racially-motivated peremptory challenges with an explanation that satis-

71. *Id.* at 1744-45. Justice Marshall observed that "such 'seat-of-the-pants instincts' may often be just another term for racial prejudice." *Id.* at 1728 (Marshall, J., concurring).

72. Comment, *A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process*, 18 ST. LOUIS U.L.J. 662, 679 (1974) (In an interview of eight St. Louis County circuit judges, none felt it possible to base a claim of discrimination solely on the prosecution's exercise of its peremptory challenges.).

73. *See* Commonwealth v. Robinson, 382 Mass. 189, 195, 415 N.E.2d 805, 809-10 (1981) (no prima facie case where defendant was black, one black was excluded for cause, two blacks and one Puerto Rican excluded peremptorily, leaving an all-white petit jury); People v. Rousseau, 129 Cal. App. 3d 526, 536-37, 179 Cal. Rptr. 892, 897-98 (1982) (no prima facie case established where defendant is black and prosecutor peremptorily strikes the only two blacks on the venire).

74. *See, e.g.*, Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499 (1979) (Prosecutor used peremptory challenges to exclude ninety-two percent of the available black jurors and only thirty-four percent of the available white jurors.).

75. *See supra* note 51 and accompanying text.

76. *Batson*, 106 S. Ct. at 1728 (Marshall, J., concurring); *see also* Bueno-Hernandez v. State, 724 P.2d 1132 (Wyo. 1986).

77. *See* Anderson v. Bessemer City, 470 U.S. 564 (1985).

78. *Batson*, 106 S. Ct. at 1728 (Marshall, J., concurring).

fies the trial court will seriously undermine the mandate of *Batson* and the fourteenth amendment rights which appeared resurrected from the quagmire of *Swain*.[79]

CONCLUSION

Batson ironically concludes a series of cases which balanced the interest in preserving the traditional nature of the peremptory challenge[80] against the demands of the equal protection clause. After *Swain*, the balance was beginning to shift away from the unappealable nature of the peremptory challenge.[81] *Batson* should have sounded the death knell for the *Swain* doctrine. Instead, *Batson* subjects the prosecutor's peremptory challenge to an empty inquiry, which, barring the prosecutor's inability to produce the minimal "neutral explanation," will still result in the denial of equal protection to minority defendants.

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79. *See Bueno-Hernandez*, 724 P.2d 1132 (Wyo. 1986). The Wyoming Supreme Court, applying the *Batson* standard, found the prosecutor's neutral explanations sufficiently rebutted a prima facie case of discriminatory intent. The prosecutor based his neutral explanations on an unfounded suspicion that the challenged jurors were anti-law enforcement. One of the excluded jurors had a four-year-old daughter, a circumstance which favored the prosecution in this child molestation case. For this juror's exclusion, the prosecution gave the following explanation:

> Annette Arragon, the first challenged by the State . . . is known to our office through Mr. Green who had a history of dealing with her at Legal Services as has also Mr. Tristanti. After discussing her in great length we unamiously [sic] decided she would not be an appropriate juror in this case even though she does have a four and a half year old daughter.

Appellee's Brief at 11, *Bueno-Hernandez* (No. 86-35). The prosecutor's neutral explanation explained nothing, except that the prosecutors discussed the juror before deciding to exclude her. It is odd that a lengthy discussion concerning a single juror did not yield a more concrete explanation for the decision to strike her.

80. *See* Swain v. Alabama, 380 U.S. 202, 221-22 (1965).

81. *See* McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984); Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499 (1979).