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J.D. Candidate, 2007, Fordham University School of Law. Many thanks to Professor Daniel Richman for his guidance

COMMENT

JOHNSON V. CALIFORNIA AND THE INITIAL ASSESSMENT OF *BATSON* CLAIMS

*Deana Kim El-Mallawany**

INTRODUCTION

Peremptory challenges—the procedural device for removing eligible venirepersons from the petit jury without having to provide a reason—result in the exclusion of jurors on the basis of race, gender, and other group identifications.[1] On one hand, this result is not surprising, as anyone exposed to a dose of pop psychology might assume that people are more likely to favor the position of others with the same group affiliation.[2] On the other hand, this result is appalling, considering that the U.S. Supreme Court has unequivocally condemned the practice of status-based peremptory strikes, which reduces minority participation in the democratic institution of jury service.[3] But in either case, status-based peremptory strikes invite public skepticism about the race neutrality and impartiality of jury proceedings, even if group membership ultimately has no effect on the jury's decision.[4]

Although the Supreme Court recognized long ago the equal protection rights that are violated when attorneys exercise peremptory challenges on

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1. *See* Gregory E. Mize, *A Legal Discrimination: Juries Aren't Supposed to be Picked on the Basis of Race and Sex, But It Happens All the Time*, Wash. Post, Oct. 8, 2000, at B8 (cited in Miller-El v. Dretke (*Miller-El II*), 125 S. Ct. 2317, 2341 (2005) (Breyer, J., concurring)).

2. *See Unreasonable Doubt*, New Republic, Oct. 23, 1995, at 8 (discussing the O.J. Simpson acquittal and stating that "[l]ike bartering legislators, representative jurors [are] expected to vote their group loyalties"). Particularly in racially or otherwise charged cases, peremptory challenges are plainly based on such expectations. *See, e.g.*, United States v. Nelson, 277 F.3d 164 (2d Cir. 2002) (vacating the conviction of a black defendant for the murder of an Orthodox Jew during a time of hostility between the African-American and Jewish communities because the district court sua sponte removed and replaced jurors to include members of the defendant's and victim's races).

3. *See infra* note 24 and accompanying text.

4. Nancy J. King, *Racial Jurymandering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. Rev. 707, 764, 764-65 (1993) (quoting the Chair of The Jury Project of New York's remark that "'[a]mong minorities, a perception that they are not being called to serve in sufficient numbers exacerbates existing suspicions about whether the justice system works for minorities or is stacked against them'").

the basis of group membership, the Court has struggled to give meaningful protection to these rights.[5] In *Batson v. Kentucky*,[6] the Court developed a three-part framework[7] for determining the constitutionality of peremptory challenges, but it has proven largely ineffective.[8] The persistence of status-based peremptory challenges despite *Batson* invited Justice Stephen G. Breyer to echo Justice Thurgood Marshall's original call for the abolition of peremptory challenges in two recent concurring opinions.[9] Many scholars and judges also urge for the elimination of peremptory strikes or propose alternative jury selection procedures.[10] Indeed, abolition appears to be the

5. *See Miller-El II*, 125 S. Ct. at 2324 (admitting that although the Court has recognized that discrimination in jury selection offends the Equal Protection Clause, "[t]he rub has been the practical difficulty of ferreting out discrimination in selections discretionary by nature").

6. 476 U.S. 79 (1986).

7. See *infra* text accompanying notes 49-51 for a description of the three-part framework.

8. See *infra* Part II.A.2 for a discussion of some criticisms of *Batson*.

9. *See* Rice v. Collins, 126 S. Ct. 969, 976-77 (2006) (Breyer, J., concurring); *Miller-El II*, 125 S. Ct. at 2340-44 (Breyer, J., concurring) (discussing the problems with *Batson*, the persistence of the discriminatory use of peremptory strikes despite *Batson*, the anomaly that peremptory strikes have become in the judicial system, and the growing support for abolition). In *Rice*, Justice David H. Souter joined the concurrence and the movement for abolition.

10. *See, e.g.*, Edwards S. Adams & Christian J. Lane, *Constructing a Jury that is Both Impartial and Representative: Utilizing Cumulative Voting in Jury Selection*, 73 N.Y.U. L. Rev. 703 (1998) (proposing a method of jury selection that dispenses with peremptory challenges and that instead is based on a cumulative voting model); Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 Temp. L. Rev. 369 (1992); Arthur L. Burnett, Sr., *Abolish Peremptory Challenges: Reforming Juries to Promote Impartiality*, Crim. Just., Fall 2005, at 26 (proposing that peremptory challenges should be abolished completely); Katherine Goldwasser, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 Harv. L. Rev. 808, 811 (1989) (advocating the elimination of only prosecutorial peremptory challenges); Nancy S. Marder, *Justice Stevens, the Peremptory Challenge, and the Jury*, 74 Fordham L. Rev. 1683 (2006) (urging the Supreme Court to eliminate the peremptory and expanding the for-cause challenge); Toni M. Massaro, *Peremptories or Peers? Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C. L. Rev. 501 (1986) (arguing for the elimination of the prosecutor's right to peremptory challenges); Kenneth B. Nunn, *Rights Held Hostage: Race, Ideology and the Peremptory Challenge*, 28 Harv. C.R.-C.L. L. Rev. 63, 69-70 (1993) (arguing that "the peremptory challenge of Black venirepersons should be prohibited whenever there is a substantial likelihood that racial issues would impact the trial"); Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 Am. Crim. L. Rev. 1099, 1100 (1994) (recommending new restrictions on the use of peremptory challenges); Andrew G. Gordon, Note, *Beyond* Batson v. Kentucky*: A Proposed Ethical Rule Prohibiting Racial Discrimination in Jury Selection*, 62 Fordham L. Rev. 685 (1993) (proposing ethical rules to substantiate *Batson*); Brent J. Gurney, Note, *The Case for Abolishing Peremptory Challenges in Criminal Trials*, 21 Harv. C.R.-C.L. L. Rev. 227 (1986). *But see* Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 Stan. L. Rev. 545 (1975) (arguing the virtues of peremptory strikes); Barbara L. Horwitz, Comment, *The Extinction of the Peremptory Challenge: What Will the Jury System Lose by Its Demise?*, 61 U. Cin. L. Rev. 1391 (1993) (opposing the abolition of peremptory challenges). In practice, at least one federal judge has independently barred the use of peremptory challenges in her courtroom. *See* Minetos v. City Univ. of N.Y., 925 F. Supp. 177, 183, 185 (S.D.N.Y. 1996) (holding that peremptory challenges are "an

best solution for eradicating discrimination from the selection of the petit jury.[11]

Nevertheless, in 2005, the Court issued two *Batson* decisions,[12] confirming that *Batson* and the peremptory challenge are still valid features of the American jury trial. If, or until, a majority of the Court considers abolishing peremptory strikes, *Batson* challenges are the only protection against status-based exclusions of jurors. This reality urges a new look at the Court's most recent interpretations of the *Batson* framework.

This Comment examines the Court's decision last year in *Johnson v. California* in light of the Court's previous peremptory challenge cases to assess whether the Court is advancing both the practical implementation and the theory of *Batson* in the right direction. This Comment ultimately argues that, by mandating a low prima facie threshold at the first step of *Batson*, the *Johnson* Court undermined the only workable step in the process of determining whether peremptory strikes are purposefully discriminatory. By instead permitting trial courts to develop stricter prima facie requirements, the Court would have enabled trial judges to implement the prima facie standard as a tool to sort *Batson* challenges, compelled trial judges to focus their determinations on more reliable evidence, and substantiated the prima facie case with a rebuttable presumption of discrimination. Although allowing trial courts to raise the prima facie threshold certainly would not solve all of the problems with *Batson* and is perhaps an unconventional position, this approach would have been a step toward more effective regulation of peremptory challenges.

Part I of this Comment provides background on the peremptory challenge, its inherent conflict with equal protection, and the Supreme Court cases that recognized the rights at stake when peremptory challenges are exercised on the basis of group bias. Part I then examines *Batson*'s three-step analysis for ferreting out the discriminatory use of peremptory challenges and the cases interpreting each of the three steps in the *Batson* framework. Part II focuses on *Johnson v. California*, contrasting the Supreme Court's approach with the forgone alternative. Part II identifies the arguments in favor of and against the Court's imposition of a low prima facie standard as well as arguments in favor of and against the discretion of trial courts to raise the prima facie standard. Finally, Part III argues that the strongest arguments are in favor of allowing trial courts to implement higher prima facie standards.

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unnecessary waste of time and an obvious corruption of the judicial process," as well as a "*per se* violat[ion of] equal protection").

11. Abolition of peremptory challenges alone, however, would not result in more representative juries because defects in other parts of the jury selection process contribute to the problem of underrepresentation of minorities on juries. *See infra* note 24.

12. The Court decided *Miller-El II* and *Johnson v. California* on the same day, June 13, 2005. Each case is discussed *infra* Part I.C.1. and I.C.3.

I. THE HISTORY AND CURRENT STATE OF *BATSON* AND EQUAL PROTECTION IN JURY SELECTION

A. *The Peremptory Challenge: A Two-Faced Symbol of Fairness and Injustice in Jury Trials*

The peremptory challenge is a time-honored feature of the jury trial.[13] In the United States, federal and state courts have long recognized the right of parties to exercise peremptory challenges.[14] Using a statutorily specified number of peremptory challenges, parties may exclude qualified prospective jurors from the petit jury without assigning any reason for the challenge.[15]

From the perspective of the striking party, the peremptory challenge is an instrument of fairness, enabling parties to secure fair trials by removing jurors who appear biased in favor of the opposing side or inclined to decide the case on some basis other than the evidence presented at trial.[16] Trial lawyers frequently rely on peremptory strikes when the trial judge denies their challenges for cause,[17] which require a "narrowly specified, provable

13. The earliest use of peremptory challenges dates back to the selection of the first juries in the Roman Empire. *See* Batson v. Kentucky, 476 U.S. 79, 119-20 (1986) (Burger, C.J., dissenting) (citing W. Forsyth, History of Trial by Jury 175 (1852)). The United States adopted the peremptory challenge from English common law, codified the peremptory challenge by the defendant in federal criminal trials in 1790, and extended its exercise to prosecutors in 1865. Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 Cornell L. Rev. 1, 9-12 (1990) (describing the origin and purpose of the peremptory challenge). "By 1870, most, if not all, states had enacted statutes conferring on the prosecution a substantial number of peremptory challenges." Swain v. Alabama, 380 U.S. 202, 216 (1965).

14. Jeffrey S. Brand, *The Supreme Court, Equal Protection and Jury Selection: Denying that Race Still Matters*, 1994 Wis. L. Rev. 511, 564-65.

15. *Swain*, 380 U.S. at 220 ("The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control."); *see also* Black's Law Dictionary 223 (7th ed. 1999) (defining the peremptory challenge as one "that need not be supported by any reason, although a party may not use such a challenge in a way that discriminates against a protected minority").

16. *See Batson*, 476 U.S. at 91 (noting that peremptory challenges "traditionally have been viewed as one means of assuring the selection of a qualified and unbiased jury"); *Swain*, 380 U.S. at 219 (noting that "[t]he function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise").

17. *See* Leonard Post, *Striking Peremptories Gets a Cool Reception*, Nat'l L.J., June 20, 2005, at 6 (reporting statements by both defense lawyers and prosecutors that peremptory strikes are necessary to remove jurors that the trial judge should have excused for cause and should not be abolished for that reason). If a defendant peremptorily strikes a juror to correct a judge's erroneous ruling on a challenge for cause, however, the defendant may not seek review of the erroneous ruling on appeal because he has not, in effect, been harmed despite his loss of a peremptory strike. *See* United States v. Martinez-Salazar, 528 U.S. 304 (2000) (holding that the defendant's rights secured by the rule entitling defendants to peremptory strikes and the defendant's due process rights were not violated when he exercised a peremptory challenge to remove a prospective juror after the district court erroneously refused to dismiss the juror for cause). For a discussion of the implications of

and legally cognizable basis" for the juror's bias.[18] Recognizing the importance of the peremptory challenge in selecting an unbiased jury, the Supreme Court has noted that, although the right to peremptory challenges is not guaranteed by the Constitution,[19] it is "'one of the most important of the rights secured to the accused.'"[20]

From another perspective, however, the peremptory challenge is not an instrument of fairness, but rather of injustice. Because the peremptory challenge requires no explanation for its exercise, trial lawyers may remove prospective jurors based on "an often seriously mistaken or ill-intended sociological judgment about the effect of a juror's race, nationality or gender [on the juror's attitude] towards a particular party."[21] These judgments tend to rely on traditional stereotypes or modern demographic surveys that characterize the attitudes of individuals according to race, ethnicity, gender, occupation, socioeconomic status, and age.[22] Status-based exclusion of jurors, which has come to be regarded as an "inherent aspect of the peremptory challenge system,"[23] impedes the participation of minorities in jury service and often nullifies minority defendants' rights to a jury of their peers.[24] The ongoing project of the Supreme Court has been to

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using peremptory challenges to correct perceived error in a judge's ruling on challenges for cause, see generally William G. Childs, *The Intersection of Peremptory Challenges, Challenges for Cause, and Harmless Error*, 27 Am. J. Crim. L. 49 (1999).

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

19. *Batson*, 476 U.S. at 91. The right to exercise peremptory challenges is provided by federal and state statutes, which specify the number of peremptories available to each party.

20. *Swain*, 380 U.S. at 219 (quoting Pointer v. United States, 151 U.S. 396, 408 (1894)). Some commentators agree about the importance of the right to peremptory strikes. *See, e.g.*, Babcock, *supra* note 10, at 555 (arguing that the "impartiality-promoting role of the peremptory challenge makes it central to the jury trial right"); William F. Fahey, *Peremptory Challenges: A Crucial Tool for Trial Lawyers*, Crim. Just., Spring 1997, at 24, 30 (concluding that the trend in the law to limit peremptory challenges is causing the justice system to suffer).

21. Leonard L. Cavise, *The* Batson *Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 Wis. L. Rev. 501, 502-03. *But see* Fahey, *supra* note 20, at 27 ("Every experienced trial attorney will tell you that you can and must rely on known group memberships and identifications in selecting a winning jury . . . . Not to take group membership into account would be foolhardy and, perhaps, malpractice").

22. Brian J. Serr & Mark Maney, *Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 J. Crim. L. & Criminology 1, 8 (1988); *see also* Carol A. Chase & Colleen P. Graffy, *A Challenge for Cause Against Peremptory Challenges in Criminal Proceedings*, 19 Loy. L.A. Int'l & Comp. L. Rev. 507, 508 (1997) ("[P]eremptory challenges, which are often based on ethnic, religious, cultural, or socioeconomic factors, reflect the prejudices and biases of the attorneys, the parties, and often the costly jury consultants retained to assist in the jury selection process.").

23. Kenneth J. Melilli, Batson *in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 Notre Dame L. Rev. 447, 447 (1996); *see also* Serr & Maney, *supra* note 22, at 8 ("The very nature of the peremptory challenge is at odds with a jury of peers.")

24. Serr & Maney, *supra* note 22, at 9. For an empirical study of the underrepresentation of minorities on juries, see Hiroshi Fukurai et al., Race and the Jury: Racial Disenfranchisement and the Search for Justice (1994). The peremptory challenge is not alone responsible for the underrepresentation of minorities in juries. All stages of jury

eliminate peremptory strikes based on group status without sacrificing the historic privilege of parties to remove jurors at their discretion.

B. *The Birth and Evolution of the Equal Protection Right*

The Supreme Court first addressed the constitutional concerns that arise with discriminatory jury selection practices in 1879. In *Strauder v. West Virginia*,[25] the Court announced the principle that a state denies a black defendant equal protection when it puts him on trial before a jury from which members of his race have been purposefully excluded.[26]

In 1965,[27] a young black defendant in Alabama invoked the *Strauder* principle to challenge his rape conviction and death sentence rendered by an all-white jury from which the prosecutor had excluded the only six black veniremen using peremptory strikes.[28] In this case, *Swain v. Alabama*,[29] the Court recognized that a black defendant is denied equal protection when the prosecutor exercises peremptory strikes intentionally to exclude members

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selection—venue choice, source list development, qualified list development, and jury panel selection—contribute to the disproportionate exclusion of minorities. King, *supra* note 4, at 712. See *id.* at 711-19, for a brief discussion of jury selection procedures and the reasons why minorities are still underrepresented. To address the persistent problem of underrepresentation of minorities in jury pools, Judge Nancy Gertner recently ordered a departure from her district's venire selection plan to ensure the inclusion of African-Americans in the jury pool for the capital trial of two black defendants. United States v. Green, 389 F. Supp. 2d 29 (D. Mass. 2005) (ordering repeated attempts to contact individuals in selected ZIP codes where a high percentage of African-Americans reside). The First Circuit entered a writ of mandamus blocking the order. *In re* United States, 426 F.3d 1 (1st Cir. 2005). Whereas the peremptory challenge cases concern the defendant's equal protection right secured by the Fourteenth Amendment, the venire selection cases concern the Sixth Amendment, which requires juries to be selected from a jury pool representing a fair cross section of the community under *Duren v. Missouri*, 439 U.S. 357 (1979).

25. 100 U.S. 303 (1879) (holding that West Virginia's law explicitly barring African-Americans from serving on juries violated black defendants' rights to equal protection of the laws).

26. The same day, however, the Court held that while a black defendant is entitled to a jury selected without discrimination against members of his race, he is not entitled to a jury that contains members of his race. Virginia v. Rives, 100 U.S. 313 (1879). Further undermining the impact of *Strauder*, the Court held that if a state's facially discriminatory jury service statute was passed prior to the post-Civil War Amendments, then the constitutional amendments and the Civil Rights Act of 1875 render the statute inoperative, and there can be no violation of a black defendant's equal protection rights, even if no single African-American has ever served on a jury in the state. Neal v. Delaware, 103 U.S. 370 (1880).

27. In the period between 1880 and 1965, the Court decided several cases on the exclusion of African-Americans from grand and petit jury venires. *See* Cassell v. Texas, 339 U.S. 282 (1950); Atkins v. Texas, 325 U.S. 398 (1945); Norris v. Alabama, 294 U.S. 587 (1935); Thomas v. Texas, 212 U.S. 278 (1909). For an insightful discussion of the Court's venire selection cases and how they shaped the Court's framework for dealing with race discrimination in the peremptory challenge cases, see Brand, *supra* note 14, at 530-72.

28. *See* Pamela S. Karlan, Batson v. Kentucky*: The Constitutional Challenges of Peremptory Challenges*, *in* Criminal Procedure Stories 381, 382 (Carol S. Steiker, ed., 2006).

29. 380 U.S. 202 (1965).

of the defendant's race from the petit jury.[30] Ultimately, however, the Court concluded that Robert Swain failed to establish a prima facie case of purposeful discrimination, which required sufficient detail about the prosecutor's longstanding and "systematic use" of peremptory strikes based on the jurors' race.[31] In the battle between the prosecutor's statutory right to exercise peremptory strikes and the defendant's equal protection right to be tried before a jury selected free from racial discrimination, the sanctity of the peremptory challenge prevailed,[32] and Swain's conviction was upheld.

In *Batson v. Kentucky*,[33] the tables turned, and the peremptory challenge had to give way to the constitutional claim of equal protection.[34] The Court recognized that the State's use of peremptory strikes to exclude members of the defendant's race not only denied Batson equal protection, but also unconstitutionally discriminated against the four excluded black jurors[35]

30. *Id.* at 203-04 ("[A] State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause.").

31. *Id.* at 227 ("[T]he defendant must, to pose the issue, show the prosecutor's systematic use of peremptory challenges against Negroes over a period of time."). See *infra* Part I.C.1 for a more lengthy discussion of the prima facie requirement in *Swain*.

32. *Swain*, 380 U.S. at 221-22 ("To subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge. The challenge, *pro tanto*, would no longer be peremptory . . . [a]nd a great many uses of the challenge would be banned.").

33. 476 U.S. 79 (1986).

34. *Id.* at 98-99 (stating that "the peremptory challenge occupies an important position in our trial procedures," but "[b]y requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges, our decision enforces the mandate of equal protection and furthers the ends of justice"). The Court actually granted James Kirkland Batson certiorari on Sixth Amendment grounds, the only grounds on which Batson challenged the prosecutor's peremptory strikes, but ultimately identified the violation as one offending the Equal Protection Clause. *See id.* at 83-84, 89. In *Batson*, the Court did not expressly rule on the question of whether the Sixth Amendment prohibited the racially discriminatory use of peremptory challenges. *Id.* at 85 n.4. After *Batson*, however, the Court expressly rejected the application of Sixth Amendment principles to peremptory strikes. *See* Holland v. Illinois, 493 U.S. 474 (1990) (holding that the Sixth Amendment's fair cross section requirement does not prevent the prosecution from exercising its peremptory strikes to remove cognizable racial groups from the jury). For a historical and analytical account of the Court's choice of the Equal Protection Clause over the Sixth Amendment as a vehicle for the jeopardized right, see generally Karlan, *supra* note 28. For arguments that the Court should analyze the discriminatory exercise of peremptory challenges under the Sixth Amendment rather than the Equal Protection Clause, see generally Massaro, *supra* note 10; Eric L. Muller, *Solving the* Batson *Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 Yale L.J. 93 (1996). Prior to *Batson*, a number of state courts, most notably the California Supreme Court, and two federal courts of appeals had espoused the view that discriminatory use of peremptory strikes violates the defendant's Sixth Amendment right to an impartial jury of the defendant's peers drawn from a fair cross section of the community. *Batson*, 476 U.S. at 82 n.1. For further discussion of the California Supreme Court's pre-*Batson* decision, see *infra* notes 66-69 and accompanying text.

35. *Batson*, 476 U.S. at 83 (noting that the "prosecutor used his peremptory challenges to strike all four black persons on the venire, and a jury composed only of white persons was selected").

and undermined the public confidence in the fairness of our system of justice.[36]

Through a series of cases since 1986, the Court expanded *Batson* dramatically. A critical turning point in the development of *Batson* was in 1991, when the Court held in *Powers v. Ohio*[37] that a defendant has standing under the Equal Protection Clause to object to race-based exclusions of jurors whether or not the defendant and excluded jurors share the same race. The Court emphasized, as the basis of its decision, the equal protection right of the excluded juror as paramount over that of the defendant.[38] The project of *Batson* thus evolved into the protection of minorities' rights to participate in the democratic institution of the American jury.[39] Also of analytic significance, by shifting *Batson*'s focus to the excluded juror, without regard to the race of the defendant, the Court advanced a standard of colorblindness that affords the same rights to white and black defendants alike.[40]

Powers opened the doors of the *Batson* framework to usher in an expansive equal protection jurisprudence.[41] The Court next extended

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36. *See id.* at 87. The three harms that discriminatory jury selection inflicts and against which *Batson* seeks to protect are as follows: harm to the defendant, harm to the excluded juror, and harm to the community. For a discussion of these three harms and how assumptions about racial bias affect their calculus, see generally David Zonana, *The Effect of Assumptions About Racial Bias on the Analysis of* Batson*'s Three Harms and the Peremptory Challenge*, 1994 Ann. Surv. Am. L. 203 (1995).

37. 499 U.S. 400 (1991).

38. Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?* 92 Colum. L. Rev. 725, 726 (1992) (noting that in *Powers*, "the rights of the jurors took center stage"); Michael A. Cressler, Comment, Powers v. Ohio*: The Death Knell for the Peremptory Challenge?*, 28 Idaho L. Rev. 349, 350 (1992) ("*Powers*, through its third-party standing analysis, marked a significant shift in analytical focus from the equal protection rights of the criminal defendant to those of the challenged venireman"). Commentators' reactions to *Powers* have been mixed. *Compare* Underwood, *supra*, at 726 (arguing that *Powers* "identified not merely an alternative basis for the prohibition on jury discrimination, but in fact a better and sounder basis for the entire existing body of jury discrimination law"), *with* Cressler, *supra*, at 353-54 (arguing that the "Court's shift in analytical focus . . . create[s] a conflict between the challenged veniremen's equal protection rights and the parties' right to an impartial jury" that may lead to the abolishment of the peremptory challenge).

39. *See Powers*, 499 U.S. at 406-07 (describing the importance of the opportunity to serve on a jury and participate in the democratic process).

40. *See* Susan N. Herman, *Why the Court Loves* Batson*: Representation-Reinforcement, Colorblindness, and the Jury*, 67 Tul. L. Rev. 1807, 1824 (1993). The Court's colorblindness principle has been strongly criticized. *See id.* at 1825 (commenting that "the Court prefers to ignore defendants' claims that real jurors in the real world are not colorblind because the Court is inclined to value colorblindness as a categorical imperative"); Nunn, *supra* note 10, at 69 (arguing that "colorblindness, as applied by the Supreme Court, is a form of racial politics that privileges white interests over Black"). *But see* Underwood, *supra* note 38, at 734 (agreeing with the Court that "the Equal Protection Clause *should* give white defendants the same right that black defendants have to the possibility of being judged by jurors of a different race").

41. *See* Cressler *supra* note 38, at 350 (stating that, "[w]ith the focus upon the newly-created equal protection rights of the challenged venireman, the potential for equal protection claims against the exercise of peremptory challenges becomes incalculable").

standing to raise *Batson* challenges to private litigants in civil trials[42] and to prosecutors challenging the defendant's use of peremptory strikes in criminal trials.[43] In another line of cases, the Court applied *Batson* to protect groups other than African-Americans.[44] It is now unconstitutional to exercise peremptory challenges not only on the basis of race but also on the basis of ethnicity[45] and gender.[46] According to Justice Sandra Day O'Connor, writing for the Court in 1994, *Batson* would protect any group otherwise receiving "heightened scrutiny" under the Equal Protection Clause.[47]

C. Batson's *Framework for Protecting the Equal Protection Right*

The previous section discussed the Supreme Court cases that recognized and expanded the equal protection rights at stake when peremptory strikes are used to exclude jurors on the basis of group identification. This section examines the three-step framework that the *Batson* Court developed to protect those rights and to determine the constitutionality of peremptory

42. Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991).

43. Georgia v. McCollum, 505 U.S. 42 (1992). While on the facts, *McCollum* prevented white defendants from using peremptory challenges to exclude black jurors on the basis of race, Justice Clarence Thomas noted that "it is difficult to see how the result could be different if the defendants here were black" and using peremptory challenges to exclude white jurors suspected of harboring racial prejudices. *Id.* at 62 n.2 (Thomas, J., concurring). Courts indeed have upheld the application of *McCollum* to black defendants exercising race-based peremptory strikes. *See, e.g.*, State v. Johnson, 737 A.2d 1140 (N.J. Super. Ct. App. Div. 1999); People v. Yarbrough, 589 N.Y.S.2d 891 (App. Div. 1992). Commentators, however, have argued against this application of *McCollum*. *See, e.g.*, Deborah Zalesne & Kinney Zalesne, *Saving the Peremptory Challenge: The Case for a Narrow Interpretation of* McCollum, 70 Denv. U. L. Rev. 313 (1993). The majority's application of *Batson* to the defendant's use of peremptory strikes led Justice Thomas to remark, "In effect, we have exalted the right of citizens to sit on juries over the rights of the criminal defendant, even though it is the defendant, not the jurors, who faces imprisonment or even death." *McCollum*, 505 U.S. at 62 (Thomas, J., concurring). For a pre-*McCollum* article arguing that the defendant's use of peremptory challenges should not be limited, see Goldwasser, *supra* note 10.

44. The question of which groups *Batson* protects is a question of whether the group is cognizable for equal protection purposes. Lower courts addressing the cognizability question have expanded *Batson* to several specific groups beyond those recognized by the Supreme Court. *See, e.g.*, Green v. Travis, 414 F.3d 288 (2d Cir. 2005) (holding that an aggregate of minorities of different races constitutes a cognizable group); State v. Jordan, 828 P.2d 786 (Ariz. Ct. App. 1992) (holding that for purposes of *Batson*, a person of Asian descent is a member of a racially cognizable group); Joseph v. State, 636 So. 2d 777 (Fla. Dist. Ct. App. 1994) (holding that Jewish persons constituted a cognizable class where the Jewish population of the county was approximately ten percent, and the group had sufficient cohesiveness of beliefs and experiences to constitute an ethnic group). Some commentators have urged the Supreme Court to grant certiorari to examine religion-based peremptory challenges and provide protection in this area. *See, e.g.*, Courtney A. Waggoner, Comment, *Peremptory Challenges and Religion: The Unanswered Prayer for a Supreme Court Opinion*, 36 Loy. U. Chi. L.J. 285 (2004).

45. Hernandez v. New York, 500 U.S. 352 (1991).

46. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994).

47. *Id.* at 135.

strikes.[48] The first step requires the objecting party to show that he is a member of a cognizable group, that the striking party has exercised peremptory strikes to remove venirepersons of his group, and that the facts—including the fact that peremptory challenges permit "'those to discriminate who are of mind to discriminate'"—and any other relevant circumstances raise an inference that the striking party excluded the venirepersons from the petit jury on account of their group identification.[49] Once the objecting party establishes a prima facie case of purposeful discrimination, the burden shifts to the striking party to come forward with a race-neutral explanation for the peremptory strikes.[50] And finally, if a race-neutral reason is tendered, the trial court must decide whether the opponent of the strike has proved purposeful discrimination.[51]

Initially, the Supreme Court expressly declined to instruct lower courts on how to implement this three-step process.[52] Over the years, the Court has provided some guidance,[53] reviewing cases concerning each step to correct what the Court deemed to be a misinterpretation of *Batson*'s commands in lower courts.[54] The rest of this section discusses the Court's cases that shed light on the prima facie step, the race-neutral reasons step, and the credibility determination step.

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48. *See* Batson v. Kentucky, 476 U.S. 79, 96-98 (1986).

49. *Id.* at 96 (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)). For a discussion of the cases interpreting the first step, see *infra* Part I.C.1.

50. *See id.* at 97. For a discussion of the cases interpreting the second step, see *infra* Part I.C.2.

51. *Id.* at 98. For a discussion of the cases interpreting the third step, see *infra* Part I.C.3.

52. *Id.* at 99 ("We decline . . . to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges."); Charles J. Ogletree, *Supreme Court Jury Discrimination Cases and State Court Compliance, Resistance, and Innovation*, *in* Toward a Usable Past: Liberty Under State Constitutions 339, 349 (Paul Finkelman & Stephen E. Gottlieb, eds., 1991) ("The *Batson* Court left the important issue of determining whether a defendant had established a prima facie case of discrimination and whether the prosecution had rebutted that prima facie showing to the trial courts.").

53. Justice Byron White predicted in *Batson* that "[m]uch litigation will be required to spell out the contours of the Court's equal protection holding today." *Batson*, 476 U.S. at 102 (White, J., concurring). Although there has been much litigation, the Court's guidance has consisted mostly of negative holdings rather than prescriptive rules on how to implement the three-step framework.

54. There are strong elements of a power struggle between the Supreme Court and the lower courts over who decides how to apply *Batson*. For example, in *Miller-El II*, the Court intervened for the second time with the Fifth Circuit's *Batson* analysis, granting certiorari after the Court had remanded the case on the first appeal. 125 S. Ct. 2317, 2339 (2005) (finding the Fifth Circuit's conclusion on the second appeal "as unsupportable as the 'dismissive and strained interpretation' of [Miller-El's] evidence that we disapproved" on the first appeal). To persuade the Supreme Court to hear the second appeal, the lawyer representing Thomas Joe Miller-El appealed to the Court's desire to win the power struggle, arguing that "by ignoring the Supreme Court majority, the Fifth Circuit's decision 'undermines this court's supervisory authority' and needed the court's attention once again." Linda Greenhouse, *Supreme Court Rules for Texan on Death Row*, N.Y. Times, June 14, 2005, at A1 (quoting Seth P. Waxman, former solicitor general handling Miller-El's case). See *infra* Part I.C.3 for a discussion of *Miller-El*.

1. Lowering the Prima Facie Threshold for *Batson* Challenges at Step One

In *Swain*, the Supreme Court imposed an insurmountable evidentiary burden on defendants to establish a prima facie case of discrimination in asserting an equal protection claim.[55] *Swain* required the defendant to show that a prosecutor, "in case after case, whatever the circumstances, . . . is responsible for the removal of Negroes who have been selected as qualified jurors . . . with the result that no Negroes ever serve on petit juries."[56] This evidentiary requirement made it "virtually impossible" for black defendants to establish a prima facie case in asserting their equal protection claim.[57]

The "primary significance" of *Batson*[58] was the Court's rejection of the "crippling burden of proof"[59] that *Swain* required of defendants to make a prima facie showing of purposeful discrimination.[60] Following *Swain* by more than twenty years, *Batson* overruled its precedent's evidentiary rule[61] that left prosecutor's peremptory challenges "largely immune from constitutional scrutiny."[62] The *Batson* Court decided that a defendant may rely "solely on the facts . . . *in his case*" to raise an inference that the prosecutor exercised peremptory challenges to exclude jurors on the basis of race.[63]

To guide lower courts' assessments of the prima facie case, the Court gave "merely illustrative" examples of factors to consider, expressing "confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances . . . create[] a prima facie case of discrimination against black jurors."[64] With such discretion, state courts independently interpreted the prima facie threshold and developed standards or factors to measure the evidentiary sufficiency of the prima facie case.[65]

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55. Ogletree, *supra* note 52, at 346 ("The requirement in *Swain* . . . proved insurmountable in the vast majority of cases."); *see also* McCray v. Abrams, 750 F.2d 1113, 1120 (2d Cir. 1984) (referring to the *Swain* burden of proof as "Mission Impossible"); Karlan, *supra* note 28, at 383 (describing *Swain*'s prima facie requirement as "an insuperable evidentiary barrier").

56. Swain v. Alabama, 380 U.S. 202, 223 (1965).

57. Colbert, *supra* note 13, at 94 (noting that "during the next twenty-one years [after *Swain*], state and federal courts regularly rejected [defendants' equal protection] claims").

58. Holloway v. Horn, 355 F.3d 707, 720 (3d Cir. 2004); *see also* Williams v. Woodford, 396 F.3d 1059, 1064 (9th Cir. 2005) (Rawlinson, J., dissenting) (stating, in dissent from the denial of rehearing en banc, "the purpose of *Batson* was to *lower* the bar for establishing a prima facie case and to *open* the door to different methods of proving racial discrimination in the jury selection process").

59. Batson v. Kentucky, 476 U.S. 79, 92 (1986).

60. Interestingly, the Court was careful to appear to admonish a "number of lower courts['] . . . interpretation of *Swain*" as requiring "proof of repeated striking of blacks over a number of cases," rather than the principle announced in *Swain* itself. *See id.* at 92.

61. *Id.* at 100 n.25.

62. *Id.* at 92-93.

63. *Id.* at 95.

64. *Id.* at 97.

65. *See* Melilli, *supra* note 23, at 471-72 (describing eight different "methods of quantifying the results of the peremptory challenges used by the Batson respondent").

The California Supreme Court, however, preceded the U.S. Supreme Court in lowering *Swain*'s impossible prima facie hurdle for defendants. Eight years before *Batson*, in the landmark case *People v. Wheeler*,[66] the California Supreme Court turned to its own state constitution to protect the rights of defendants and excluded minority jurors.[67] Although in later years, the California courts vacillated as to the correct interpretation of the prima facie standard set forth in *Wheeler*,[68] the California Supreme Court resolved that, to establish a prima facie case, the objecting party must show a strong likelihood—or that it was more likely than not—that the striking party's peremptory challenges, if not explained, were based on group bias.[69]

The "more likely than not" standard created a conflict between the California Supreme Court and the Ninth Circuit Court of Appeals over whether this formulation of the prima facie standard violated *Batson*.[70] The Ninth Circuit denounced California's standard as "'a lower standard of scrutiny to peremptory strikes than the federal Constitution permits.'"[71]

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66. 583 P.2d 748 (Cal. 1978) (holding that the use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the defendant's right to a trial drawn from a representative cross section of the community as guaranteed by the state constitution and the Sixth Amendment of the Federal Constitution). It is noteworthy that the *Wheeler* court grounded the violation in the Sixth Amendment, rather than the Fourteenth Amendment. *See supra* note 34 for a discussion of this distinction.

67. *See* Ogletree, *supra* note 52, at 346 (suggesting that "[t]he Supreme Court's unwillingness to prohibit the discriminatory use of peremptory challenges in *Swain* gave the states an opportunity to go beyond *Swain* to find further protections in state constitutional provisions and other federal constitutional provisions," and that "[t]he California Supreme Court led the way in *People v. Wheeler*").

68. *Wheeler* used both the terms "strong likelihood" and "reasonable inference" in describing the standard for a prima facie case. 583 P.2d at 764. Inconsistent interpretations resulted from state appellate courts that understood the two terms to signify different standards. *Compare* People v. Bernard 32 Cal. Rptr. 2d 486, 490 (Ct. App. 1994) (interpreting "reasonable inference" to be a lower standard than "strong likelihood"), *with* People v. Box, 5 P.3d 130, 174 (Cal. 2000) (disapproving of *Bernard* and stating that "reasonable inference" and "strong likelihood" are the same standard, as *Wheeler* implied).

69. *See* People v. Johnson, 71 P.3d 270, 280 (Cal. 2003).

70. *Id.* at 277-78 (describing the line of cases that involves the disagreement between the California Supreme Court and the Ninth Circuit over the correct legal standard for a prima facie case).

71. Cooperwood v. Cambra, 245 F.3d 1042, 1047 (9th Cir. 2001) (quoting Wade v. Terhune, 202 F.3d 1190, 1196-97 (9th Cir. 2000) (concluding that California courts following the "strong likelihood" standard are not applying the correct legal standard for a prima facie case under *Batson* but nonetheless affirming the denial of the writ of habeas corpus, finding no prima facie case on de novo review)). Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), federal courts hearing habeas claims must review a state court's determinations of factual issues—including the fact-specific determination of whether a defendant has made a prima facie case of a *Batson* violation—under a "presumption of correctness," which the applicant of the habeas petition must rebut by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1) (2000). AEDPA also provides that federal courts may disturb a state court's determinations of law only if they were "contrary to," or "involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *Id.* § 2254(d)(1). In *Wade*, the Ninth Circuit determined that the state court did not reasonably apply federal law as clearly established by the Supreme Court in *Batson* and therefore reviewed the petitioner's habeas

The California Supreme Court, on the other hand, defended its formulation as consistent with *Batson*, particularly considering that the Supreme Court reserved for state courts "some flexibility in establishing the exact procedures to follow" in implementing *Batson*.[72]

In *Johnson v. California*, the Supreme Court intervened to settle the issue of the prima facie threshold set forth in *Batson*.[73] The Court concluded that "[a]lthough . . . States do have flexibility in formulating appropriate procedures to comply with *Batson*, . . . California's more likely than not standard is an inappropriate yardstick by which to measure the sufficiency of a prima facie case."[74] The Court made clear that, at the prima facie stage, the objecting party does not bear the burden of establishing by a preponderance of the evidence that the prosecutor's strikes, if unexplained, were the product of intentional discrimination.[75]

According to the Court's interpretation of *Batson*'s first step, the objecting party must simply produce "evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred."[76] In other words, the evidence need only be sufficient to support a logical conclusion[77] or suspicion[78] that the prosecutor's exclusion of the juror might be the consequence of the juror's belonging to a cognizable racial group.

By mandating a low prima facie threshold, the Supreme Court restricted the liberty of state courts to experiment with the formulation of the prima facie standard[79] and paved the way for *Batson* challenges to proceed through the second and third steps of the framework.

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claims de novo because the state court's findings were not entitled to deference. *Wade*, 202 F.3d at 1192, 1194-95.

72. *See Johnson*, 71 P.3d at 277.

73. 125 S. Ct. 2410, 2416 (2005).

74. *Id.* at 2416 (internal quotations omitted).

75. *Id.* at 2417.

76. *Id.*

77. *See id.* at 2416 n.4 (defining inference as a "'conclusion reached by considering other facts and deducing a logical consequence from them'" (quoting Black's Law Dictionary, *supra* note 15, at 781)). At oral arguments, Stephen B. Bedrick, the attorney representing Johnson, suggested that an analog for the appropriate standard would be whether the judge thought "in his view a reasonable jury could think it more likely than not" that the peremptory strikes were based on group bias. Transcript of Oral Argument at 5, *Johnson*, 125 S. Ct. 2410 (No. 03-6539) (argued March 30, 2004) [hereinafter "Oral Argument"]. This case was argued a second time on April 18, 2005. Transcript of Oral Argument, *Johnson*, 125 S. Ct. 2410 (No. 04-6964).

78. *Johnson*, 125 S. Ct. at 2419 (noting that the California Supreme Court's acknowledgment that "it certainly looks suspicious that all three African-American prospective jurors were removed from the jury" was sufficient to establish a prima facie case (internal quotations omitted)).

79. *See The Supreme Court, 2004 Term—Leading Cases*, 119 Harv. L. Rev. 218, 226 (2005) (suggesting that in *Johnson*, "the Court cabined the lower courts' ability and incentive to take advantage of *Batson*'s flexibility. . . . The Court thus closed the door on doctrinal development and announced that *Batson*'s first step is no longer a work in progress").

2. Lessening the Burden of Proffering a Race-Neutral Explanation at Step Two

According to *Batson*, once the party objecting to a peremptory strike establishes a prima facie case, the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation.[80] An affirmation of good faith or a denial of discriminatory motive in exercising the strikes is insufficient to rebut the prima facie showing.[81] Rather, the proponent of the strike "must articulate a neutral explanation related to the particular case to be tried,"[82] stating a "'clear and reasonably specific' explanation of 'legitimate reasons' for exercising the challenges."[83]

In *Hernandez v. New York*,[84] the Court interpreted the second step to require only facial neutrality:[85] "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral."[86] Based on this interpretation, the Court affirmed the trial court's finding of no discriminatory intent where a prosecutor struck two Latino jurors,[87] proffering the explanation that he doubted their ability to defer to the official translation of anticipated Spanish-language testimony.[88] In response to the petitioner's contention that strikes based on Spanish-speaking ability would disparately impact Latinos,[89] Justice Anthony

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

81. *Id.* at 98 ("Nor may the prosecutor rebut the defendant's case merely by denying that he had discriminatory motive or 'affirm[ing] [his] good faith in making individual selections.'" (alteration in original) (quoting Alexander v. Louisiana, 405 U.S. 625, 632 (1972)).

82. *Id.*

83. *Id.* at 98 n.20 (quoting Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 258 (1981) (a Title VII case)). Since adopting the three-part framework in *Batson*, the Court has regularly relied on Title VII cases to shed light on the burden-shifting process. *See, e.g.*, Johnson v. California, 125 S. Ct. 2410, 2418 n.7 (2005) (referring to *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978), as an example of a Title VII case interpreting the burden-shifting framework to be merely a sensible way to evaluate evidence); Purkett v. Elem, 514 U.S. 765, 768 (1995) (citing *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), for the principle that "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike"); Hernandez v. New York, 500 U.S. 352, 360 (1991) (relying on *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), for the proposition that proof of discriminatory intent is required to show a violation of the Equal Protection Clause).

84. 500 U.S. 352 (1991) (plurality opinion).

85. *See* Anthony Page, Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. Rev. 155, 167 (2005) (commenting that in *Hernandez*, "facial neutrality became paramount").

86. *Hernandez*, 500 U.S. at 360.

87. The prosecutor struck four Latino jurors in total, but Dionisio Hernandez did not press his *Batson* claim with respect to two jurors whose brothers had been convicted of crimes. *Id.* at 356.

88. *Id.* at 356-57. However, it is unclear that the prosecutor even knew whether the jurors spoke Spanish or were Latino. *See id.* at 356 (quoting the prosecutor saying, "Your honor, my reason for rejecting the—these two jurors—I'm not certain as to whether they're Hispanics").

89. *Id.* at 361-62.

Kennedy, writing for a plurality, established that "[u]nless the government actor adopted a criterion with the intent of causing the impact asserted, the impact itself does not violate the principle of race neutrality."[90] The question of race neutrality therefore turns on whether the prosecutor's explanation for the strikes was discriminatory on its face and not whether the strikes effect the elimination of jurors of a particular group.[91]

The Court addressed the second step of *Batson* once again in a short per curiam opinion in *Purkett v. Elem*.[92] *Purkett* interpreted the requirement of a "legitimate reason"[93] to mean "not a reason that makes sense, but a reason that does not deny equal protection."[94] Based on this interpretation, the Court found acceptable the prosecutor's proffered explanation that he struck two black jurors because they had facial hair and long hair, which made them look suspicious.[95] The Court stated that the neutral explanation need not be "persuasive, or even plausible" to satisfy the second step of *Batson*.[96] Any reason, even a "silly or superstitious" reason, so long as it is not based on race, is sufficient to shift the burden back to the defendant to prove that those reasons are pretextual or false.[97]

After *Hernandez* and *Purkett*, the second step of *Batson* became only of nominal function and significance.[98] Both decisions helped to usher *Batson* challenges toward the final step of the *Batson* analysis: "the decisive question" of "whether counsel's race-neutral explanations for a peremptory challenge should be believed."[99] The *Hernandez* Court gave some guidance as to the final step, advising trial judges to base the credibility determination on the striking attorney's demeanor, which is often the only

90. *Id.* at 362.

91. *See* Cavise, *supra* note 21, at 531 (commenting that the language of *Hernandez* "clearly tells the trial judge to pay no attention to the content of the strike, unless blatantly racist, and consider only whether the striking attorney was credible when the reason was given"). Justice John Paul Stevens firmly disapproved of "focusing the entire inquiry on the subjective state of mind of the prosecutor" at the third step of *Batson*. *See Hernandez*, 500 U.S. at 378 (Stevens, J., dissenting). He argued that "[b]y requiring that the prosecutor's explanation itself provide additional, direct evidence of discriminatory motive, the Court has imposed on the defendant the added requirement that he generate evidence of the prosecutor's actual subjective intent to discriminate." *Id.*

92. 514 U.S. 765 (1995) (per curiam) (holding that the race-neutral explanation proffered by the proponent of a peremptory challenge need not be persuasive or even plausible).

93. *See supra* text accompanying note 83 (quoting *Batson* for the proposition that the prosecutor must state "legitimate reasons").

94. *Purkett*, 514 U.S. at 769.

95. *Id.*

96. *Id.* at 767-68.

97. *Id.* at 768.

98. *See* Page, *supra* note 85, at 169 ("Satisfying *Batson*'s second step is trivial."). One commentator remarked that *Purkett* "marked the definitive retrieval of the peremptory challenge from the endangered species list and, with no more than a whimper, . . . marked the final demise of the *Batson* doctrine into the rule of useless symbolism." Cavise, *supra* note 21, at 528.

99. Hernandez v. New York, 500 U.S. 352, 365 (1991).

evidence of the striking attorney's state of mind.[100] The *Hernandez* Court also reminded appellate courts to review the trial judges' evaluations of credibility, which are questions of fact, on a deferential standard.[101]

3. Assessing Credibility Determinations at Step Three of *Batson*

In *Miller-El v. Cockrell* (*Miller-El I*),[102] the Supreme Court elaborated on the guidance provided in *Hernandez* for both trial courts and appellate courts making credibility determinations at the third step of *Batson*. First, the Court reversed the U.S. Court of Appeals for the Fifth Circuit's denial of Thomas Joe Miller-El's application for a certificate for appealability ("COA").[103] With this reversal, the Court signaled to federal courts that "[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review."[104] Second, in establishing that Miller-El had met the necessary threshold to be granted a COA,[105] the Court analyzed the facts and circumstances of Miller-El's *Batson* claim, identifying types of evidence, beyond demeanor, upon which to rely when evaluating the striking party's credibility.[106] According to the Court, judges should evaluate credibility based on the prosecutor's demeanor, how reasonable or probable the explanation is, and whether the proffered rationale has some basis in accepted trial strategy.[107]

Applying these principles to the case, the Court concluded that the denial of Miller-El's constitutional right was indeed debatable by jurists of reason,

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100. *Id.* According to one commentator, with these instructions, "the plurality intended to direct the court to peer, as closely as possible, into the striking attorney's mind, to examine his personal motivation in exercising the peremptory challenge." Robin Charlow, *Tolerating Deception and Discrimination After* Batson, 50 Stan. L. Rev. 9, 35 (1997).

101. *Hernandez*, 500 U.S. at 364 ("In *Batson*, we explained that the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal . . . ."). This standard virtually insulates peremptory strikes from appellate review. *See* Ogletree, *supra* note 10, at 1107 (noting that "trial court determinations . . . are largely unreviewable" due in part to "the long history of deference to state court factual findings").

102. Miller-El v. Cockrell (*Miller-El I*), 537 U.S. 322, 339 (2003), *rev'd sub nom.*, Miller-El v. Dretke, 125 S. Ct. 2317 (2005).

103. *Id.* at 348. If a district court denies a prisoner's petition for a writ of habeas corpus, the prisoner is not automatically entitled to appeal the district court's decision to the court of appeals. Under AEDPA, no such appeal may be taken to a court of appeals unless the circuit judge issues a certificate of appealability ("COA"), which may issue only if the applicant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(1)-(2) (2000).

104. *Miller-El I*, 537 U.S. at 340.

105. *Id.* at 341 (stating that "we have no difficulty concluding that a COA should have issued"). Under AEDPA, a prisoner seeking a COA must demonstrate "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In interpreting this provision, the Supreme Court has held that a petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or conclude the issues presented are adequate to deserve encouragement to proceed further. Slack v. McDaniel, 529 U.S. 473, 484 (2000).

106. *Miller-El I*, 537 U.S. at 339.

107. *Id.*

thereby meeting the standard for the issuance of a COA.[108] The Court based this conclusion on five types of evidence or analysis: the statistical evidence that the Dallas District Attorney used ten out of eleven peremptory challenges to exclude nine out of fourteen African-Americans on the jury venire;[109] the prosecutor's exclusion of black jurors for reasons that applied to similarly situated white jurors who were not removed;[110] the prosecutor's use of disparate questioning of black and white jurors during voir dire, betraying an attempt to elicit disqualifying answers from black jurors;[111] the prosecutor's practice of jury shuffling when a large number of black jurors reached the front of the panel;[112] and evidence that the Dallas District Attorney's office had a policy of racially discriminatory jury selection.[113]

When, on remand, the Fifth Circuit affirmed the Texas state court's determination that the prosecutor's peremptory strikes were not purposefully discriminatory, the Supreme Court again granted certiorari to Miller-El, finding the decision as "unsupportable as the dismissive and strained interpretation of his evidence" in the previous appeal.[114] Reversing the Fifth Circuit for a second time in *Miller-El v. Dretke* (*Miller-El II*), the Supreme Court again signaled to appellate courts that they should be more vigilant in reviewing trial court determinations of credibility.[115]

The Court decided *Miller-El II* on the same day as *Johnson* in 2005.[116] These twin decisions marked an affirmative effort by the Court to salvage the *Batson* framework from what the Court viewed as misapplication by the lower courts.[117] The overarching message of the two decisions was that whenever the trial judge can infer that a peremptory challenge was based on a juror's group membership, a *Batson* challenge will ensue, and "'the decisive question will be whether counsel's race-neutral explanation for a

108. *Id.* at 354. See *supra* note 105 for more information about the standard for COA issuance.

109. *See Miller-El I*, 537 U.S. at 342.

110. *See id.* at 342-43.

111. *See id.* at 344-45.

112. *See id.* at 346.

113. *See id.* at 346-47.

114. *Miller-El II*, 125 S. Ct. 2317, 2339 (2005) (internal quotations omitted).

115. *See id.* at 2325 ("The [clear and convincing] standard is demanding but not insatiable; as we said the last time this case was here, '[d]eference does not by definition preclude relief.'" (quoting *Miller-El I*, 537 U.S. at 340)); *see also* Charles Lane, *Justices Overturn Verdict, Cite Race: Blacks Were Unjustly Kept Off Texas Jury in '86 Death Row Case*, Wash. Post, June 14, 2005 (reporting that Miller-El's supporters believe the Court to be "'saying *Batson* has to be taken very seriously and the lower federal courts can't just defer to the conclusory findings of state courts'" (quoting David Ogden, the lawyer who represented Miller-El at the Supreme Court)).

116. Both cases were decided on June 13, 2005, although they were argued months apart.

117. *See supra* note 54 and accompanying text; *see also* Oral Argument, *supra* note 77, at 40 (a question from the bench suggesting that states following the same standard as California would be "out of line"). Arguably, the questions that *Batson* left open to trial courts "created opportunities for state and lower federal courts to interpret the commands of *Batson* differently and, in some cases, to undermine the protection it offered." Ogletree, *supra* note 52, at 349.

peremptory challenge should be believed.'"[118] The next part of this Comment will further explore the Court's reasoning behind this interpretation of the *Batson* framework, as well as the related criticisms, and contrast them with the reasoning behind the interpretation that the *Johnson* Court rejected and the criticisms of that position.

II. THE EFFORT TO REMEDY *BATSON* IN *JOHNSON V. CALIFORNIA* AND THE FORGONE ALTERNATIVE

In *Johnson v. California*, the U.S. Supreme Court differed from the California Supreme Court on the question of whether the prima facie stage requires the objecting party to bear a burden of persuasion. An examination of each court's answer to this question reveals two ways of conceiving of *Batson*'s burden-shifting framework and how it should function. Each interpretation has its merits and shortcomings. Part II.A will discuss the Supreme Court's approach in *Johnson*, and Part II.B will discuss the alternative approach of allowing state courts to raise the prima facie threshold above the permissive inference of purposeful discrimination that *Johnson* mandated.[119]

A. *The Road Taken: The Supreme Court's Approach in* Johnson v. California

The Supreme Court's interpretation of *Batson*'s first step as requiring a low prima facie standard reflected the Court's view that *Batson*'s burden-shifting framework is a procedural device that provides "'a means of arranging the presentation of evidence.'"[120] The first and second steps of *Batson* merely "govern the production of evidence that allows the trial court to determine the persuasiveness of the defendant's constitutional claim"[121] at step three. Only at this final stage, when the parties have presented all the facts and circumstances, should the trial judge weigh the evidence.[122]

By treating the burden-shifting framework as a formula for presenting evidence, the Court purported to bring *Batson* in line with cases arising under Title VII of the Civil Rights Act of 1964.[123] In *McDonnell Douglas Corp. v. Green*,[124] an employment discrimination case, the Court refined the three-part framework for determining discriminatory intent in Title VII cases. There, the Court indicated that the first step of the burden-shifting scheme required the plaintiff to show that the defendant's actions were

118. *See Miller-El I*, 537 U.S. at 339 (quoting Hernandez v. New York, 500 U.S. 352, 365 (1991)).

119. *See supra* text accompanying notes 76-78.

120. *Johnson v. California*, 125 S. Ct. 2410, 2418 & n.7 (quoting St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510 & n.3 (1993)).

121. *Id.* at 2417-18.

122. *Id.* at 2417.

123. *Id.* at 2418 n.7 (noting that the majority's explanation "comports" with the interpretation of the burden-shifting framework in the Title VII cases).

124. 411 U.S. 792 (1973).

more likely than not, if unexplained, the product of discrimination.[125] Then in *St. Mary's Honor Center v. Hicks*, the Supreme Court reinterpreted the first two steps to have only the practical function of shifting a burden of production, rather than persuasion, from the plaintiff to defendant.[126] The Court relied in part on *Hicks* to decide *Johnson*.[127]

1. The Merits of a Low Prima Facie Standard

Several arguments can be made for treating the burden-shifting framework as a procedural device. First, imposing no greater burden on the objecting party than the production of some evidence of discriminatory purpose allays concerns of unfairness to the objecting party. In *Johnson*, the Court argued that imposing a burden of persuasion at the prima facie stage would be unduly "onerous" because defendants would have to persuade the judge based on facts that were "impossible for the defendant to know with certainty."[128] Those unknowable facts are the prosecutor's stated reasons for excluding the jurors, which the trial judge should learn before deciding whether the peremptory challenges were improperly motivated.[129]

Second, by facilitating the objecting party's progression to step two, the *Batson* framework produces "actual answers to suspicions and inferences that discrimination may have infected the jury selection process."[130] The *Johnson* Court's underlying assumption was that the prosecutor's facially neutral explanation provides "a direct answer" to the "simple question"[131]

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125. *See* Furnco Constr. Corp. v. Walters, 438 U.S. 567, 576 (1978) (stating that *McDonnell Douglas* made clear that the plaintiff carried the initial burden of showing actions "from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on discriminatory criterion illegal under the Act" (internal quotations omitted)).

126. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510 n.3 (1993) (stating that despite *McDonnell Douglas*'s language indicating otherwise, "as a practical matter . . . in the real-life sequence of a trial," it is "technically accurate" that the defendant bears the burden to state a nondiscriminatory reason "not when the plaintiff's prima facie case is *proved*, but as soon as evidence of it is *introduced*); *see also* Sheila R. Foster, *Causation in Antidiscrimination Law: Beyond Intent Versus Impact*, 41 Hous. L. Rev. 1469, 1542 (2005) (noting that in *Hicks*, the Court made a "dramatic move" by reducing the presumption from a plaintiff's prima facie case to a procedural device "no different than a host of other procedural rules that litter civil procedure"). *But see* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 509-15 (2002) (noting that the prima facie case should not be treated as a formula to be pleaded).

127. *See supra* note 119.

128. *Johnson*, 125 S. Ct. at 2417. In alleviating this "onerous" burden on the defendant, the *Johnson* Court mimicked the *Batson* Court's reaction to the "crippling" burden under *Swain*: remove obstacles that tend to immunize peremptory strikes from constitutional scrutiny. *See supra* Part I.C.1.

129. *Johnson*, 125 S. Ct. at 2417. The attorney for the petitioner Johnson emphasized this point in oral arguments. *See* Oral Argument, *supra* note 77, at 23 (arguing that "the information we're trying to find . . . goes to the guts of the question of racial discrimination" which cannot "be determined unless we know the prosecutor's reason").

130. *Johnson*, 125 S. Ct. at 2418.

131. *Id.*

of whether or not purposeful discrimination motivated the prosecutor's use of peremptory strikes. Obtaining the prosecutor's direct answers prior to deciding the *Batson* issue may be preferable to the "needless and imperfect speculation" in which the trial judge would engage if required to weigh the evidence at the prima facie stage.[132]

Third, by entitling the objecting party to hear the striking party's reasons, "[t]he three-step process . . . serves the public purposes that *Batson* is designed to vindicate."[133] The *Johnson* Court's overriding concern was the harm that discriminatory jury selection inflicts on the entire community: status-based exclusion of persons from jury service, an important institution of democratic society and representative government,[134] undermines "public confidence" in the judicial system.[135] The Court's reasoning implied that a low prima facie standard, which allows challenges to proceed through all three steps, facilitates access to jury service or, at least, an appearance of fairness in our system of justice.[136] Even if the objecting party does not succeed in the *Batson* challenge, the prima facie case recognizes the allegation of racial discrimination and the claim of equal protection by allowing the excluded juror to have her "day in court."[137] Dismissing suspicions of discriminatory purpose at the first stage of *Batson*, without asking the striking party to provide its reasons, would be to deny access not only to jury service, but to "the heart of the equal protection analysis."[138]

2. The Criticisms of a Low Prima Facie Standard

The virtues of the *Johnson* Court's decision, however, can also be construed as shortcomings. First, reducing the role of the prima facie inquiry to a procedural device[139] destroys the powerful normative assumptions underlying the presumption of purposeful discrimination that

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132. *Id.* According to Johnson's lawyer, the State Attorney General's office "speculated as to five possible reasons for the challenges" to one juror and "eight possible reasons for the challenges" to another juror, indicating that the prosecutor's real reasons cannot be determined through speculation. Oral Argument, *supra* note 77, at 23.

133. *Johnson*, 125 S. Ct. at 2418.

134. *See* Underwood, *supra* note 38, at 726-27 (noting the importance of jury service as a democratic institution).

135. *See id.*; *cf.* King, *supra* note 4, at 766 (noting that in the context of venire selection, "*the very legitimacy of our jury system is at stake*" when "juries fail to reflect the racial diversity of the communities from which they are drawn").

136. *See* King, *supra* note 4, at 766. In *Swain v. Alabama*, the Court remarked that "to perform its high function in the best way, 'justice must satisfy the appearance of justice.'" 380 U.S. 202, 219 (1965) (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)).

137. *Cf.* Martin v. Wilks, 490 U.S. 755, 762 (1989) (noting, in the context of collateral attacks, our "'deep-rooted historic tradition that everyone should have his own day in court'" (quoting 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4449, at 417 (1981))). This notion is bound up in our understanding of procedural due process.

138. Hernandez v. New York, 500 U.S. 352, 367 (1991).

139. *See supra* text accompanying notes 120-22.

forms at the prima facie stage.[140] A merely procedural prima facie inquiry allows the trial court to be uncritical about the ways in which peremptory strikes "permit[] 'those to discriminate who are of a mind to discriminate'"[141] and removes the sting of the presumption of racist jury selection practices that the prima facie case creates.

Second, by emphasizing the importance of discovering the "direct answers" of the striking party, the *Johnson* Court forced trial judges to focus on the weakest evidence produced in the three-part framework.[142] The striking party's proffered reasons are not necessarily probative of its actual reasons for excluding the prospective jurors, as the Court assumed.[143] As a result, the *Johnson* decision is subject to the same criticisms that *Batson* has endured since its inception, and particularly after *Hernandez v. New York* and *Purkett v. Elem.*[144]

For years, commentators have remarked that Batson's "Achilles heel" is its focus on proof of the discriminatory state of mind of the striking party.[145] Proof of intent to discriminate is particularly elusive because, as Justice Marshall warned, racism may be conscious[146] or unconscious in the

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140. *Cf.* Foster, *supra* note 126, at 1542 (arguing in the employment discrimination context that "the reduction of the presumption of status influence from the plaintiff's prima facie case showing to a mere 'procedural device, designed only to establish [the] order of proof and production,'" strips the presumption of its underlying normative assumptions about the existence and persistence of status discrimination in the labor market (quoting St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 521 (1993))). The Title VII case to which Professor Sheila R. Foster refers is the case that the Supreme Court quotes in *Johnson* for the same proposition. *See supra* note 120 and accompanying text.

141. *See* Batson v. Kentucky, 476 U.S. 79, 96 (1986) (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).

142. *Miller-El II*, 125 S. Ct. 2317, 2325 (2005) ("*Batson*'s individualized focus came with a weakness of its own owing to its very emphasis on the particular reasons a prosecutor might give.").

143. Because the prosecutor's stated reasons may not be probative of the actual reasons for the peremptory strikes, defendants have urged appellate courts to recognize a right to cross-examine prosecutors at *Batson* hearings. *See, e.g.*, Majid v. Portuondo, 428 F.3d 112, 128 (2d Cir. 2005) (recognizing "'the value of cross-examination in exposing falsehood'" (quoting Pointer v. Texas, 380 U.S. 400, 404 (1965)), but concluding that the lack of opportunity for cross-examination, alone, did not render an otherwise full and fair hearing in trial court inadequate). For a discussion of other cases that have addressed the role of cross-examination in *Batson* hearings, see *id.* at 127-28. Some trial courts have experimented with ex parte examinations of prosecutors' voir dire notes and have generally been upheld on appeal. *See, e.g.*, United States v. Garrison, 849 F.2d 103, 106 (4th Cir. 1988).

144. *See, e.g.*, Cavise, *supra* note 21, at 538 (noting that one Illinois court has called the post-*Purkett* neutral explanation a "charade" and surmised that "'[s]urely, new prosecutors are given a manual, probably entitled, Handy Race-Neutral Explanations or 20 Time-Tested Race-Neutral Explanations'" (quoting People v. Randall, 671 N.E.2d 60, 65-66 (Ill. App. Ct. 1996)).

145. *See, e.g.*, Brand, *supra* note 14, at 599; Brian Wilson, Batson v. Kentucky: *Can the 'New' Peremptory Challenge Survive the Resurrection of* Strauder v. West Virginia*?*, 20 Akron L. Rev. 355, 364 (1986) ("[S]ince *Batson* places much emphasis on a trial judge's ability to identify prosecutorial intent to discriminate, *Batson* lacks the necessary 'teeth' required to ensure that black jurors are not excluded on the basis of race.").

146. Conscious racism was more of a concern in the years following *Batson*. *See, e.g.*, Serr & Maney, *supra* note 22, at 47 (noting that considering the "lengthy list of valid

minds of striking parties and judges presiding over voir dire.[147] Professor Leonard L. Cavise has observed that "[a] large variety of explanations can be surrogates for race, gender, or ethnicity."[148] Courts have accepted explanations that directly correlate with race, such as living in the same neighborhood as the defendant or in a high-crime area,[149] even though "it does not follow that the juror and the striking party have similar perspectives and that therefore the juror cannot be fair and impartial."[150]

By relying on the credibility determination to do the work of ferreting out discrimination, *Johnson* also invites the long-standing criticism that trial judges are "ill equipped to second-guess" the striking party's facially neutral reasons.[151] The Supreme Court has conceded that "[t]here will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge."[152] Studies have shown, however, that judging credibility based on demeanor is susceptible to great inaccuracy.[153] Furthermore, considering the prevalence

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prosecutorial justifications, it is apparent that any thoughtful prosecutor can sufficiently disguise racial discrimination with racially-neutral reasons"). Today, unconscious stereotyping is more of a concern. *See generally* Page, *supra* note 85, at 161 (proposing steps to reduce discriminatory use of peremptory strikes in light of the psychological fact that "much bias is automatic, unconscious, and unintentional").

147. *See* Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring) ("A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is 'sullen,' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically."); *see also* Brand, *supra* note 14, at 613 (agreeing that "'requiring proof of conscious or intentional motivation as a prerequisite to constitutional recognition that a decision is race-dependent ignores much of what we understand about how the human mind works'" (quoting Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317, 323 (1987)).

148. Cavise, *supra* note 21, at 532.

149. *See id.* (citing cases that have upheld such explanations and further noting that "[o]ne prosecutor successfully excused several African-American jurors with the explanation that they were affiliated with Alabama State University, 'a predominantly black institution'"). *But see* United States v. Bishop, 959 F.2d 820, 825 (9th Cir. 1992) (finding the prosecutor's explanation that he struck an African-American juror not because of her race but rather because "she lived in Compton, a poor and violent community whose residents are likely to be 'anesthetized to such violence,'" to be pretextual because it "both reflected and conveyed deeply ingrained and pernicious stereotypes").

150. Cavise, *supra* note 21, at 532.

151. *Batson*, 476 U.S. at 106 (Marshall, J., concurring); *see also* Theodore McMillian & Christopher J. Petrini, Batson v. Kentucky*: A Promise Unfulfilled*, 58 UMKC L. Rev. 361, 369 (1990) ("Ineffective scrutiny of prosecution explanations is the single greatest problem hindering the effective implementation of *Batson*."); Ogletree, *supra* note 10, at 1110 ("*Batson*'s greatest flaw is its implicit assumption that courts are capable of detecting race-based challenges to Afro-American jurors.").

152. Hernandez v. New York, 500 U.S. 352, 365 (1991).

153. *See* Olin Guy Wellborn III, *Demeanor*, 76 Cornell L. Rev. 1075, 1075 (1991) (arguing that, contrary to the legal premise that triers of fact will make significantly more accurate judgments of credibility if given the opportunity to observe demeanor, some empirical evidence indicates "that the observation of demeanor diminishes rather than enhances the accuracy of credibility judgments").

of unconscious racism,[154] a striking party could presumably give false reasons with an earnest demeanor.

A somewhat more effective tool is comparing excluded jurors with similarly situated jurors that were not excluded to discern disparate treatment.[155] This type of analysis can be complicated when some but not all of the struck jurors are similarly situated to accepted jurors, or when the overall number of minorities in the jury pool is low.[156] Also, comparative juror analysis is not always available, particularly because trial judges often curtail voir dire questioning.[157]

Even with the proper tools, however, trial judges may have little incentive to identify purposeful discrimination because, at the credibility determination stage, the trial judge is often in the awkward position of questioning whether a prosecutor, who comes before the judge on a regular basis, is lying to the court.[158] Judges will tend to find stated reasons acceptable to avoid the uncomfortable position of "implicitly call[ing] an officer of the court a liar by ruling to reject his reason."[159]

Considering these many criticisms, did *Johnson* perhaps foreclose an alternative remedy that would have enabled courts to regulate peremptory strikes more effectively? The next section will discuss the reasoning for permitting state courts to raise the prima facie standard above a permissive inference.

B. *The Road Forsaken: Allowing Trial Courts to Raise the Prima Facie Standard*

Whereas the *Johnson* Court interpreted the first step of *Batson* to require evidence that would permit a judge to infer that the striking party's challenges were status based, the California Supreme Court interpreted the first step to require evidence that the striking party's peremptory challenges were more likely than not, if unexplained, based on impermissible group bias.[160] This standard demands a higher quantum of proof, "a strong mass of evidence" that has persuasive value.[161] This interpretation of *Batson*'s first step reflects the California Supreme Court's view that the prima facie

154. *See supra* note 146 (discussing unconscious racism).

155. The Supreme Court modeled this type of analysis in *Miller-El I*, 537 U.S. 322, 342-43 (2003), *rev'd sub nom.*, Miller-El v. Dretke, 125 S. Ct. 2317 (2005).

156. *See* Cavise, *supra* note 21, at 543.

157. *See* Deborah L. Forman, *What Difference Does It Make? Gender and Jury Selection*, 2 UCLA Women's L.J. 35, 71 (1992); *cf.* Ogletree, *supra* note 10, at 1125-26 (commenting that the "restrictive nature of voir dire" is one reason that peremptory challenges have been used to exclude certain groups that the striking party feels will be unfavorable).

158. *See* José Felipé Anderson, *Catch Me If You Can! Resolving the Ethical Tragedies in the Brave New World of Jury Selection*, 32 New Eng. L. Rev. 343, 376 (1998).

159. *Id.*

160. People v. Johnson, 71 P.3d 270, 272 (Cal. 2003).

161. *See* Oral Argument, *supra* note 77, at 39, 43 (the attorney for California arguing that Wigmore's concept of "strong mass of evidence" should be applied at the first step of *Batson* challenges) (referring to 9 J. Wigmore, Evidence § 2494 (3d ed. 1940)).

case creates a "legally mandatory, rebuttable presumption" of purposeful discrimination,[162] rather than the permissive inference created by the first step of the *Johnson* Court's framework.

1. The Merits of a Higher Prima Facie Standard

Several arguments support the "more likely than not" standard. First, by successfully establishing a prima facie case, the objecting party would be entitled to prevail unless the striking party rebutted the facts or explained the reasons for its peremptory challenges.[163] Clearly defining the quantum of proof that the objecting party must show to prevail serves both the striking party and the objecting party in two ways: one, it informs the parties as to their likelihood of success on a challenge and thus encourages more selectivity in bringing challenges,[164] and two, it constrains the decision making of judges in their capacity as fact finders, resulting in less arbitrary determinations.[165]

Second, because it creates an actual presumption of discrimination, rather than simply a permissive inference, the higher prima facie standard is likely to place greater pressure on the striking party to produce more probative evidence of its reasons for excluding the jurors in question.[166] A stronger presumption would likely serve a prophylactic function as well, deterring the use of peremptory strikes to remove minority jurors in cases where no other valid reason exists or where no reason is sufficient to rebut the presumption.[167]

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162. *Johnson*, 71 P.3d at 278 ("[W]hen it refers to the objector establishing 'an inference of discriminatory purpose,' the high court means establishing a legally mandatory rebuttable presumption, and *not* merely presenting enough evidence to *permit the inference*" (citations omitted)).

163. *See* Oral Argument, *supra* note 77, at 39; *cf.* Henry L. Chambers, Jr., *Recapturing Summary Adjudication Principles in Disparate Treatment Cases*, 58 SMU L. Rev. 103, 134 (2005) (noting in the context of Title VII cases that although "the Supreme Court may no longer agree, by definition, a prima facie case supports an inference of discrimination and, if the facts underlying it have not been disproved, is sufficient to support a verdict for plaintiff").

164. Under a lower prima facie standard, criminal defense lawyers have proven to be "relatively unselective about raising *Batson* challenges." Melilli, *supra* note 23, at 461; *see also* Oral Argument, *supra* note 77, at 45 (the attorney for California arguing that a "low standard will create an incentive to bring these motions more frequently").

165. *Cf.* Chambers, *supra* note 163, at 115 (noting that in the Title VII context, the *McDonnell Douglas* test "specifically provided guidance to judges in their capacity as factfinders"); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 Mich. L. Rev. 2229, 2237 (1995) (stating that if after *Hicks*, the *McDonnell Douglas* test can do "nothing the normal rules of civil procedure cannot do, [and] it neither aids nor constrains judicial decisionmaking, [then] one must ask whether it makes sense to continue to use the [*McDonnell Douglas*] proof structure at all"). See *supra* notes 124-26 and accompanying text for an explanation of the *McDonnell Douglas* and *Hicks* cases.

166. *See* Oral Argument, *supra* note 77, at 38 (the bench noting that if the prima facie case is successful, the prosecutor is "in a rather difficult spot . . . [b]ecause the prosecutor has already been told you lose unless you've got a darned good reason").

167. *See id.* at 38-39.

Third, this version of the burden-shifting framework privileges evidence of a more reliable nature than the striking party's stated reasons.[168] The facts and circumstances supporting a *Batson* challenge are not susceptible to the same perils of fabrication and unconscious pretext as are facially neutral reasons.[169] Once a prima facie case is established by the preponderance of the evidence, the probative value of the proffered explanation is only comparative, measured against the strength of the evidence supporting the presumption of discrimination.

A fourth advantage of focusing on the facts of the prima facie case is that trial judges are arguably more capable of determining the sufficiency of a prima facie showing than the credibility of facially neutral reasons for peremptory strikes.[170] According to the California Supreme Court, trial judges are "in a good position to make [prima facie] determinations" due to "their knowledge of local conditions and of local prosecutors," "their powers of observation, their understanding of trial techniques, and their broad judicial experience."[171] Furthermore, trial judges exercise this type of judgment regularly in the course of litigation, for example, when determining preliminary questions regarding the admissibility of evidence.[172]

2. The Criticisms of a Higher Prima Facie Standard

A higher prima facie standard does not solve all of *Batson*'s problems, nor does it escape criticism. First, according to the dissent in *People v. Johnson*, imposing a burden of persuasion on the objecting party at the first step of *Batson* "short-circuits the process, and provides inadequate protection" of the jeopardized rights.[173] In fact, the higher prima facie standard prioritizes the peremptory nature of peremptory challenges over

168. See *supra* note 142 and accompanying text for remarks on the unreliability of the striking party's proffered reasons.

169. See *supra* notes 146-47 and accompanying text for remarks on the susceptibility of stated reasons to fabrication and pretext. In *Miller-El II*, the Court even noted that when the falsity of stated reasons had not "shown up within the four corners of a given case," the trial court may need to rely on the relevant circumstances that gave rise to an inference of purposeful discrimination. 125 S. Ct. 2317, 2325 (2005).

170. *Cf.* Chambers, *supra* note 163, at 134 ("[F]ocusing on the prima facie case rather than proof of falsity and pretext . . . better addresses the core concern that justifies the *McDonnell Douglas* test—fear of improper judicial fact-finding . . . .").

171. People v. Johnson, 71 P.3d 270, 274 (Cal. 2003) (internal quotation omitted).

172. The California Supreme Court's prima facie determination is a mixed question of law and fact because it involves the application of a legal standard to facts. Some mixed questions of law and fact are determined by the trial court. *See* United States v. Gaudin, 515 U.S. 506, 525-26 (1995) (Rehnquist, C.J., concurring) (noting examples of mixed questions of law and fact that remain in the trial court's domain, including preliminary questions in a trial regarding the admissibility of evidence under Federal Rule of Evidence 104(a), the competency of witnesses, the voluntariness of confessions, and the legality of searches and seizures).

173. *Johnson*, 71 P.3d at 291 (Kennard, J., dissenting).

the equal protection rights of the defendant and excluded juror.[174] This compromise weighs against constitutionally protected rights and in favor of the inferior statutory right of parties to challenge peremptorily.[175]

A second criticism is that a higher prima facie standard tolerates a higher quantum of discrimination.[176] The "more likely than not" standard would insulate the peremptory challenges that raise a suspicion or inference of discrimination but fall short of showing that the peremptory challenges were more likely than not status based.[177] This insulation invites two criticisms: First, the risk of the case being tried by a jury chosen with racial discrimination should outweigh the cost of inefficiency to the system;[178] and second, by tolerating a greater degree of discrimination, the higher prima facie standard detracts from *Batson*'s expressive function of demonstrating that the law prevents stigmatization of excluded groups as inferior or less worthy of participation in the system of justice.[179]

Finally, as the *Johnson* Court concluded, the "more likely than not" prima facie standard requires trial judges to engage in "needless and imperfect speculation."[180] Upon the objecting party's introduction of evidence to establish a prima facie case, the judge would have to consider the likelihood that, in the absence of an intent to discriminate, the striking party would have a reason nonetheless to exclude the juror.[181] Considering

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174. *See* Oral Argument, *supra* note 77, at 45 (the attorney for California defending "the nature of privilege of peremptory challenges," and equating it with "the nature of any other privilege that protects information").

175. *Miller-El II*, 125 S. Ct. 2317, 2344 (2005) (Breyer, J., concurring) (agreeing with Justice Goldberg's dissenting opinion in *Swain*, which states, "'Were it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former'" (quoting Swain v. Alabama, 380 U.S. 202 (1965) (Goldberg, J., dissenting))).

176. The toleration of any quantum of discrimination has been criticized since *Batson*'s inception. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 105 (1986) (Marshall, J., concurring) (identifying among the *Batson* framework's limitations the fact that "[p]rosecutors are left free to discriminate against blacks in jury selection provided that they hold that discrimination to an 'acceptable' level").

177. This approach strongly contrasts with the approach that Johnson's lawyer advocated in *Johnson* of finding a prima facie case "when in doubt." *See* Oral Argument, *supra* note 77, at 11.

178. *See id.* at 10.

179. An expressive theory of law claims that the law and legal official actions are "symbolic" and "send a message" and should be evaluated in those terms. *See* Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. Pa. L. Rev. 1363, 1364 (2000). Many scholars of equal protection emphasize the expressive rationale of the antidiscrimination principle. *See, e.g.*, Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 Harv. L. Rev. 1, 8 (1976); Cass R. Sunstein, *The Anticaste Principle*, 92 Mich. L. Rev. 2410 (1994). *But see* Adler, *supra* (arguing that expressive theories are not persuasive).

180. Johnson v. California, 125 S. Ct. 2410, 2418 (2005).

181. According to social scientists, this type of reasoning process is called "counterfactual reasoning." *See* Foster, *supra* note 126, at 1475. Professor Foster argues that counterfactual reasoning suffers from the erosion of normative assumptions about the existence, prevalence, and operation of discrimination on which the counterfactual exercise is based. *Id.* at 1534-47.

that there may be more than one plausible reason for striking a juror,[182] the trial court's speculation is too imperfect a ground on which to reject the objecting party's *Batson* challenge.

This part identified the merits and dangers of a low prima facie standard and contrasted them with the merits and dangers of a high prima facie standard. The next part will argue that, ultimately, the higher prima facie standard would improve *Batson*'s efficacy in regulating peremptory strikes.

III. IN DEFENSE OF GATEKEEPING: THE SYSTEMIC BENEFITS OF A HIGHER PRIMA FACIE STANDARD FOR *BATSON* CLAIMS

To quarrel with the *Johnson* Court's decision on this "narrow but important"[183] issue would seem, at first blush, unthinkable for anyone concerned with *Batson*'s project of equal protection.[184] Under California's "more likely than not" standard, many decent *Batson* challenges might fail at the prima facie stage.[185] Considering the persistence of discriminatory practices in jury selection,[186] what would justify raising hurdles for the objecting party at the first stage of the *Batson* analysis?

A closer examination of *Johnson*, however, suggests that the Supreme Court may have moved in exactly the wrong direction. With its ruling in *Johnson*, the Court pushed *Batson* and peremptory strikes farther down the road to extinction. Had the Court ruled exactly opposite, instead allowing state courts to establish a more rigorous prima facie standard for *Batson* challenges, the ailing *Batson* framework might have had a chance to survive.

Certainly, a higher prima facie standard, alone, would not have been the panacea for all of *Batson*'s ills, but it would have been a step toward more meaningful and effective regulation of peremptory strikes. This part argues that a higher prima facie standard would have significant systemic benefits and would positively influence litigants' jury selection behavior. The question of whether *Batson* and peremptory strikes, even with these improvements, would be worth salvaging is left open.[187]

The primary benefit of a higher prima facie standard is a better separation of *Batson* claims.[188] Our judicial system values the separation of claims for

182. *See supra* note 132.

183. *Johnson*, 125 S. Ct. at 2416.

184. This position is at least unconventional. In the context of Title VII, one commentator arguing for more rigorous assessment of claims at the prima facie stage noted that "[u]ndoubtedly, focusing on the prima facie case rather than proof of falsity and pretext is unconventional." Chambers, *supra* note 163, at 134.

185. *See supra* text accompanying note 177.

186. *See supra* notes 1, 9 and accompanying text.

187. *See supra* notes 9-10 and accompanying text (providing citations to those who support and oppose the abolition of peremptory strikes).

188. The California Supreme Court described the prima facie burden as having this sorting function. *See* People v. Johnson, 71 P.3d 270, 279 (Cal. 2003) (stating that the prima facie burden "is one 'which a party may reasonably be expected to sustain in meritorious

both its efficiency and truth-seeking benefits and entrusts this gatekeeping role to civil judges, who make rulings on motions to dismiss, and prosecutors, who have broad charging discretion and investigatory powers. A higher prima facie standard would regulate the flow of *Batson* challenges similarly to the way a motion to dismiss or motion for summary judgment regulates the flow of civil lawsuits, including equal protection cases in other settings. These mechanisms are designed to filter out claims that are factually insufficient or too insubstantial to warrant the use of judicial resources.[189]

Gatekeeping is particularly important in the jury selection context because *Batson* hearings normally occur within an ongoing criminal prosecution, where the judge, as well as the parties, has a strong interest in avoiding unnecessary mini-hearings.[190] Moreover, the danger that a trial judge would dismiss a meritorious *Batson* claim at the prima facie stage is no greater than the danger of a judge denying a remedy to a deserving claim at the third stage of *Batson*. Both decisions are equally exposed to appellate review.[191]

When seeking appellate review, a *Batson* challenger who failed to meet a higher prima facie standard may have the advantage of a better voir dire record than a challenger who lost at the credibility determination stage of the current *Batson* framework. As a motion for summary judgment would incentivize parties to conduct diligent discovery to support their claims, so too would the imposition of a higher prima facie standard incentivize the *Batson* challenger to be a vigilant investigator during voir dire, gathering and recording as many facts as possible to create a presumption of discrimination.[192] Whether the challenge fails at the prima facie stage or

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cases, but which he cannot abuse to the detriment of the peremptory challenge system'" (quoting People v. Wheeler, 583 P.2d 748, 763 (Cal. 1978)).

189. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (stressing the value of summary judgment in sorting out meritless claims in light of the shift to notice pleading under the Federal Rules of Civil Procedure). *But see* Jack H. Friedenthal & Joshua E. Gardner, *Judicial Discretion to Deny Summary Judgment in the Era of Managerial Judging*, 31 Hofstra L. Rev. 91, 117 (2002) (noting the danger that summary judgment can be used as a docket control measure). One commentator has noted that, with the increasing number of cases brought under the Civil Rights Act, federal courts have sought to weed out insubstantial claims by declaring conclusory allegations inadequate to state a civil rights claim. Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 Colum. L. Rev. 433, 449 (1986). In particular, the Third Circuit has noted that "'[i]t is an important public policy to weed out the frivolous and insubstantial cases at an early stage in the litigation.'" *Id.* (quoting Rotolo v. Borough of Charleroi, 532 F.2d 920, 922 (3d Cir. 1976)).

190. *Batson* "minihearings" abound in trial courts. J.E.B. v. Alabama, 511 U.S. 127, 147 (1994) (O'Connor, J., concurring) ("*Batson* minihearings are now routine in state and federal trial courts."); Cavise, *supra* note 21, at 541 (remarking that the "proliferation of 'minihearings' is perhaps the most obvious of the *Batson* after-shocks").

191. A trial judge's error at any stage in a *Batson* ruling constitutes a structural defect and grounds for reversal.

192. Commentators have urged the need for "[e]xpansive attorney-conducted voir dire . . . as a necessary step towards empaneling a fair jury and reducing the role of stereotypes and biases in the jury selection process." Ogletree, *supra* note 10, at 1100. *But see* Norbert L.

the credibility determination stage, the augmented record will serve both the appellate lawyer arguing the trial judge's error and the appellate judge reviewing the ruling.[193]

In contrast, a low prima facie standard provides no incentive to the objecting party to be scrupulous in building the voir dire record. Objectors successfully argue prima facie cases with minimal presentation of facts. In this sense, a low prima facie standard fails to function optimally as a trigger for the production of evidence.[194] Circuit courts rejecting the imposition of additional evidentiary requirements,[195] such as statistical accounting of the race of prospective jurors in the venire, have suggested that specific requirements would impose an "undue burden upon the defendant[s]" at the prima facie stage.[196] To the contrary, the burden is appropriately imposed and ultimately places the defendant at an advantage. Appeals of *Batson* rulings are much stronger when the record meticulously reflects the circumstances of the peremptory strikes and provides facts on which the appellate attorney can draw for comparative juror analyses and other arguments.[197]

Since the facts supporting a *Batson* challenge are readily apparent to the trial judge but not to the appellate judge, the appellate court is more likely to defer to the trial court's "no prima facie case" finding when the defendant fails to put relevant facts in the record.[198] The paucity of a voir dire record may force appellate judges to defer to rulings at the credibility determination stage of *Batson* as well. As the Supreme Court noted in *Miller-El II*, when the falsity of stated reasons is not "shown up within the

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Kerr et al., *On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity: An Empirical Study*, 40 Am. U. L. Rev. 665, 699 (1991) (noting that voir dire by its nature has a limited power to describe the potential biases of a particular juror). Other drawbacks to voir dire questioning about bias have been duly noted. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 129 (1986) (Burger, C.J., dissenting) (arguing that *Batson* would imprint "racial differentiation" on voir dire, because the parties would develop evidence to support their claims by asking jurors to state their race and national origin, even if those questions were personally offensive to the jurors); Jere W. Morehead, *When a Peremptory Challenge Is No Longer Peremptory:* Batson*'s Unfortunate Failure to Eradicate Invidious Discrimination from Jury Selection*, 43 DePaul L. Rev. 625, 636-37 (1994) (describing the voir dire required by *Batson* as too time-consuming and expensive).

193. Commentators have urged defendants to "make a record of the 'numbers' relevant to raising an inference of intentional discrimination" and noted that "appellate courts are requiring the record to contain information regarding the number of defendant's minority group on the venire and the number serving on the actual jury." Serr & Maney, *supra* note 22, at 38.

194. For a discussion of the prima facie inquiry operating as a means to arrange the production of evidence, see *supra* notes 120-21 and accompanying text.

195. *See* Williams v. Woodford, 396 F.3d 1059, 1066-67 (9th Cir. 2005) (Rawlinson, J., dissenting from the denial of rehearing en banc) (rejecting the requirement of statistical evidence because, while informative, it is not mandatory); Holloway v. Horn, 355 F.3d 707 (3d Cir. 2004) (rejecting Pennsylvania's additional evidentiary requirements at the prima facie stage).

196. *Holloway*, 355 F.3d at 728.

197. An incomplete record is one of the greatest challenges facing appellate defense attorneys challenging errors in *Batson* rulings.

198. Serr & Maney, *supra* note 22, at 38.

four corners of a given case," the court will need to rely on the relevant circumstances that gave rise to an inference of purposeful discrimination.[199] A solid record of these circumstances is indispensable to meaningful appellate review.

Another corollary of a higher prima facie standard is a more adversarial *Batson* proceeding. Because the objecting party bears a persuasive burden at the prima facie stage, the attorney would not only be more rigorous in discovering facts to support the *Batson* challenge, but also in advocating for a presumption of discrimination. An adversarial presentation of evidence at the prima facie stage would force the striking party to defend its strikes with better evidence of neutrality. The adversarial pressure and the force of the presumption of racial discrimination may even compel the striking party to state the reasons for the strikes more candidly.[200] As an adversarial proceeding rather than a procedural device for presenting evidence, *Batson* hearings may be better structured for truth seeking.

The higher prima facie standard would positively influence litigants' behavior in a prophylactic way as well. One study highlights the disproportionate failure of criminal defendants to prevail on *Batson* challenges compared with other litigants under the current framework and postulates that "criminal defense lawyers are relatively unselective about raising *Batson* challenges."[201] Facing a higher prima facie hurdle, striking parties would be forced to think more carefully about the strength of the case and decide whether or not to bring the challenge. This self-regulation may serve a gatekeeping function in addition to the trial judge's sorting of strong and weak claims. It is likely that by being more selective, striking parties would see an increase in the success rate of *Batson* challenges.

One criticism of a demanding prima facie standard is that a quantum of discrimination will be tolerated.[202] Invariably, some discriminatory uses of peremptory strikes will go undetected below the radar of the prima facie threshold. But objecting parties that fail to raise a presumption of discrimination are unlikely to prevail ultimately, and "[t]hus, most of this 'insulated' discrimination is nonremediable."[203] Moreover, *Batson* itself accounted for this modicum of unregulated discrimination, allowing some deference to the parties' prerogatives to exercise peremptory strikes.[204]

Allowing courts to impose a higher prima facie threshold certainly embodies different priorities than the Supreme Court's decision in *Johnson*. While *Johnson* prioritized the "public confidence" in our judicial system and the appearance of fairness,[205] the sorting approach prioritizes the efficacy of the *Batson* framework and the regulation of litigants' jury

199. *Miller-El II*, 125 S. Ct. 2317, 2325 (2005).
200. *See supra* note 166 and accompanying text.
201. Melilli, *supra* note 23, at 461.
202. *See* supra notes 176-77 and accompanying text.
203. Serr & Maney, *supra* note 22, at 42.
204. *Id.* at 43.
205. *See supra* notes 135-36 and accompanying text.

selection practices. Ultimately, the sorting approach seems to have the priorities in order. Only if peremptory strikes are more effectively regulated will the jury selection process ever appear fair in the eyes of the community.