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# Striking the Peremptory Challenge from Civil Litigation: “Hey *Batson*, Stay Where You Belong!”†

## I. Introduction

The peremptory challenge<sup>1</sup> has been recognized as essential in providing for the oldest and most fundamental right in Amer-

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† An earlier draft of this Comment was circulated among the members of the United States Judicial Conferences Committee on Judicial Improvements, which is currently examining the discriminatory use of the peremptory challenge in all forms of litigation.

1. The examination process by which a trial court impanels a petit jury is called the voir dire. See generally R. SIMON, *THE JURY SYSTEM IN AMERICA* 48-66 (1975). This process — literally meaning “to speak the truth,” BLACK’S LAW DICTIONARY 1575 (6th ed. 1990) — serves three major purposes: (1) to gather information upon which jury selection is based; (2) to provide a conduit of communication between attorneys on both sides and the prospective jurors; and (3) to provide a forum in which the attorneys attempt to exert some influence over how the jury will process the evidence and testimony to be heard at trial. R. SIMON, *supra*, at 48. Optimally, the voir dire seeks to make prospective jurors aware of their own prejudices and stereotypes. *Id.* The voir dire is also used to educate prospective jurors with regard to the burdens of proof and elements of the crimes or claims that are to be tried. *Id.*

Typically, twelve people, depending on the jurisdiction’s jury size, are randomly selected from a larger group of assembled prospective jurors, called the venire, and questioned by the judge as to their general fitness to serve. *Id.* at 50. The judge may choose to excuse a juror(s) at this time. *Id.* Following this initial query, counsel from both sides are permitted to question the randomly selected group. *Id.*

If either lawyer objects to the impaneling of a particular venire person(s), assuming for simplicity that there is only one plaintiff and one defendant, that attorney may seek to remove the venire person(s) by one of three types of challenges. The first of these, beyond the scope of this Comment, is the challenge to the array. *Id.* This challenge may be used by the lawyer when she believes that the entire prospective jury panel has been irregularly selected. *Id.* The remaining two types of challenges are the subject of this Comment. First, is the challenge for cause. *Id.* Under this procedure, the challenging attorney dismisses a venire person for a particular cause. *Id.* The reason articulated usually concerns the venire person’s life experiences, occupation, financial interests, or preconceived biases. If the court accepts the basis for the challenge, the prospective juror is excused. An unlimited number of challenges for cause may be used. *Id.*

Next, following the completion of the challenge for cause process, each lawyer may choose to exercise a limited number of peremptory challenges. *Id.* The number of permitted challenges of this type is restricted by law or court rule, and varies depending upon the nature of the trial and whether the challenging party is the state or the defendant in a criminal trial. *Id.* Because the challenging attorney need not state a reason for

ican jurisprudence: the right to a fair trial by a jury of one's peers.<sup>2</sup> However, our justice system cannot lay claim to conceiving this device. Almost two hundred years before Columbus sailed to the new world, the peremptory challenge had already played a prominent role in the English trial by jury system.<sup>3</sup> This system was described by Blackstone as "the glory of the English law."<sup>4</sup> Thomas Jefferson considered trial by jury the government's "anchor" to the Constitution.<sup>5</sup> Why, then, has the peremptory challenge been subjected to heavy judicial scrutiny for over a century,<sup>6</sup> culminating, at least for now, in the Supreme Court's decision of *Batson v. Kentucky*?<sup>7</sup> The answer is simple: the peremptory challenge often threatens the right to a fair jury trial. In fact, it has become a significant means by which lawyers can undermine that right. It has been used by lawyers to strike all prospective jurors of a minority litigant's race, often resulting in all-white juries.<sup>8</sup> Although a litigant is not guaranteed a jury composed of members of her race,<sup>9</sup> justice is not promoted when the impaneled venire is racially dispro-

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removing the prospective juror, the peremptory challenge is a powerful device. *Id.*

If any prospective juror is excused by either the challenge for cause or the peremptory challenge, a new candidate is randomly chosen and the questioning begins again. *Id.* The voir dire continues until a complete jury is impaneled to the satisfaction of both attorneys. *Id.*

2. A fair and impartial jury trial is guaranteed under the sixth amendment for criminal trials and the seventh amendment for civil trials. Specifically, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ." U.S. CONST. amend. VI. The seventh amendment provides that "[i]n Suits at common law . . . the right of trial by jury shall be preserved . . ." U.S. CONST. amend. VII.

3. See L. MOORE, *THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY* 56 (1973); T. PLUNKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 433 (5th ed. 1956). The history of the peremptory challenge is discussed *infra* notes 11-17 and accompanying text.

4. 3 W. BLACKSTONE, *COMMENTARIES* 689 (J. Gavit ed. 1941).

5. 15 *THE PAPERS OF THOMAS JEFFERSON* 266, 269 (J. Boyd ed. 1958).

6. See *Strauder v. West Virginia*, 100 U.S. 303 (1879), examined *infra* notes 20-26 and accompanying text.

7. 476 U.S. 79 (1986). See *infra* notes 61-106 and accompanying text for a detailed examination of the *Batson* decision.

8. See, e.g., *Batson v. Kentucky*, 476 U.S. 79 (1986), discussed *infra* notes 61-106 and accompanying text; *Swain v. Alabama*, 380 U.S. 202 (1965), discussed *infra* notes 32-43 and accompanying text.

9. A litigant "is not constitutionally entitled to demand a proportionate number of his race on the jury . . ." *Swain*, 380 U.S. at 208.

portionate.<sup>10</sup>

This Comment will examine *Batson*, the Court's latest attempt to restore the fundamental right to an impartial jury by subjecting a prosecutor's use of peremptory challenges to the limits of the equal protection clause of the fourteenth amendment. It will explore the importance of the peremptory challenge in criminal litigation and its insignificance in the civil realm. Part II of this Comment will chronicle the history of the peremptory challenge and the early decisions that sought to constrain its abuse. This part will also review *Batson* and the case law discussing the use of the peremptory challenge in civil litigation. Part III will analyze the extension of *Batson* to civil litigation, concluding not only that it is unconstitutional, but also that it fails to achieve its intended purpose. Part III proposes the elimination of the peremptory challenge in civil litigation. This Comment concludes that the present challenge for cause system suffices, with only minor modifications, to protect the constitutional rights of both litigants and jurors in civil matters.

## II. Background

### A. History of the Peremptory Challenge

The use of the peremptory challenge has evolved throughout its history. Until 1305, this device was available to both the Crown and the defendant.<sup>11</sup> However, the Crown's widespread abuse of the challenge, resulting in juries that favored the prosecution, led Parliament to pass a statute limiting use of the peremptory challenge to criminal defendants.<sup>12</sup> Thus, only chal-

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10. See, e.g., *Patterson v. Alabama*, 294 U.S. 600 (1935). *Patterson* was one of the infamous "Scottsboro Boys Cases," in which nine black youths were found guilty of raping two white women. *Id.* at 601-04. The United States Supreme Court vacated the judgment of the Alabama Supreme Court, *id.* at 607, "upon the ground of the exclusion of negroes . . . from jury service." *Id.* at 601.

The Scottsboro Boys Cases continued for years, with several completely white juries consistently convicting the youths of rape. See *Weems v. State*, 224 Ala. 524, 141 So. 215 (1932); *Patterson v. State*, 224 Ala. 531, 141 So. 195 (1932); *Powell v. State*, 224 Ala. 540, 141 So. 201 (1932). Historians now believe that all nine black youths were falsely accused and convicted. See generally D. CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* 192-242 (1969).

11. See 4 W. BLACKSTONE, *COMMENTARIES* 347 (1st Eng. ed. 1769).

12. An Ordinance of Inquests, 33 Edw. 4 (1305).

lenges for cause were available to the Crown.<sup>13</sup> At English common law, the peremptory challenge was also confined to criminal cases.<sup>14</sup>

The peremptory challenge has evolved in American jurisprudence from the adaptation of the English statute of 1305, and from common law.<sup>15</sup> It was not until 1865, however, that Congress permitted the federal government to use the peremptory challenge in criminal trials.<sup>16</sup> Congress formally extended the right to use the challenge in civil proceedings forty-six years later.<sup>17</sup> The peremptory challenge has now become firmly established in the American court system.

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13. *Id.* The statute states, in pertinent part:

He that challenges a juror or jurors for the King shall shew his cause . . . but if they that sue for the King will challenge any of those jurors, they shall assign of their challenges a Cause Certain, and that the truth of the same challenge shall be enquired of according to the custom of the court . . . .

*Id.*

English prosecutors are not permitted to exercise peremptory challenges to this day. J. VAN DYKE, *JURY SELECTION PROCEDURES* 148 (1977). However, there exists a judicially created doctrine that arose from the 1305 statute, see *supra* note 12, known as "standing jurors aside." J. VAN DYKE, *supra*, at 148. This doctrine permits the prosecution to dismiss jurors without "cause" by ordering an undesired juror to "stand aside" while an attempt is made to assemble a jury panel of twelve. *Id.* If such a panel is gathered from an enlarged venire, the "stand aside" jurors are dismissed. *Id.* Such a procedure effectively circumvents the intent of the framers of the 1305 statute. *Id.* However, this process has survived judicial attack in the English courts. *Id.* See, e.g., *Ford v. Lord Grey of Werk*, 9 State Trials 128 (1682); *James O'Coigly*, 26 State Trials 1192 (1798). See generally Hughes, *English Criminal Justice: Is It Better Than Ours?*, 26 ARIZ. L. REV. 507, 593-94 (1984); *Swain v. Alabama*, 380 U.S. 202, 212-14 (1965), for a brief synopsis of the history of the peremptory challenge in English jurisprudence.

14. *Swain v. Alabama*, 380 U.S. 202, 217-18 n.21 (1965). In fact, the peremptory challenge was intended only for defendants in capital cases but was later extended to other criminal proceedings. 4 W. BLACKSTONE, *COMMENTARIES* 353 (9th ed. 1783). Today, the peremptory challenge is no longer used in English civil trials. J. VAN DYKE, *supra* note 13, at 169 (1977).

15. See *United States v. Marchant*, 25 U.S. (12 Wheat.) 480, 483-84 (1827) (recognizing the peremptory challenge as originating in common law). For a detailed discussion of the peremptory challenge in this country, see *Swain*, 380 U.S. at 214-21. The doctrine of "standing jurors aside," discussed *supra* note 13, was rejected in this country in *United States v. Shackleford*, 59 U.S. (18 How.) 588, 590 (1856). See generally Comment, *Swain v. Alabama: A Constitutional Blueprint for Perpetuation of the All-White Jury*, 52 VA. L. REV. 1157 (1966).

16. See *Swain*, 380 U.S. at 214-16. The criminal defendant had the right to exercise peremptory challenges as early as 1790. *Id.* at 214.

17. See 28 U.S.C. § 1870 (1982) and the historical references that follow it.

## B. *Abuse of the Peremptory Challenge and Early Attempts at Redress*

Theoretically, the peremptory challenge, or strike as it is often called, furnishes the means by which the constitutional requirement of an impartial jury is accomplished.<sup>18</sup> Notwithstanding this noble aim, the peremptory challenge has at times been transformed into a weapon of prejudice. "Trial lawyers frequently observe that they use their challenges not to secure impartial juries, but to secure juries likely to favor their positions."<sup>19</sup>

### 1. *Antecedents to Swain v. Alabama*

For over a century, American courts have endeavored to solve the problem of the abusive use of peremptory challenges. The following cases exemplify judicial attempts to eliminate racial discrimination from the jury selection process.

*Strauder v. West Virginia*<sup>20</sup> was the first case in which the Court considered the question of whether a state could exclude

18. Actually, the sixth amendment governing criminal actions, *see supra* note 2, expressly requires an "impartial jury," while the seventh amendment, controlling civil proceedings, does not. Nevertheless, it is well settled that impartiality is inherent in both amendments. *See generally* J. FRIEDENTHAL, M. KANE & A. MILLER, *CIVIL PROCEDURE* § 11.10, at 519-25, § 11.11, at 525 (1985).

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

Arguably, though, if each attorney uses peremptory strikes wisely, the result is an impartial panel. Nevertheless, it must be noted that a comprehensive study of the use of the peremptory challenge in twelve criminal trials concluded that lawyers generally exercised their challenges poorly and irregularly. *See* Zeisel & Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in Federal District Court*, 30 STAN. L. REV. 491 (1978). The study revealed that defense attorneys exercised their strikes more effectively than prosecuting attorneys. *Id.* at 517-18.

Still, some jurists postulate that there is nothing wrong with a "dog-eat-dog" approach to the use of the peremptory challenge. *See, e.g.,* *King v. County of Nassau*, 581 F. Supp. 493 (E.D.N.Y. 1984), discussed *infra* notes 131-41 and accompanying text. The *King* court stated that "it is legitimate for parties to selfishly pursue their own interests in making peremptory challenges . . . just as the American free enterprise system advocate[s] . . . self-serving behavior . . ." *King*, 581 F. Supp. at 500.

If the peremptory challenge is to perform the function of removing the "extreme" jurors on both sides, perhaps the answer lies in improved clinical training to instruct lawyers to recognize subtle traits of partiality.

20. 100 U.S. 303 (1879). *Strauder* was reaffirmed in *Batson v. Kentucky*, 476 U.S. 79, 89-90 (1986).

blacks from serving on a jury.<sup>21</sup> In *Strauder*, a black man was convicted of murder in West Virginia.<sup>22</sup> On appeal, the defendant petitioned to remove the case to federal court because "no colored man was eligible to be a member of the grand jury or to serve on a petit jury in the State, [and therefore], he could not have the full and equal benefit of all laws and proceedings in the State of West Virginia . . . enjoyed by white citizens."<sup>23</sup>

The Supreme Court, after reviewing the equal protection clause of the fourteenth amendment,<sup>24</sup> held that exclusion of blacks from jury service on the basis of race was repugnant to the Constitution:<sup>25</sup>

The very fact that colored people are singled out and expressly denied by a statute all right to participate . . . as jurors, because of their color, though . . . citizens, and . . . fully qualified, is . . . a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.<sup>26</sup>

The impact of *Strauder* was, however, very limited. While it eliminated the most obvious discriminatory technique — a prohibitive jury service statute — it offered no guidance concerning the more subtle means by which lawyers seek to produce partial juries.

Sixty years later, in *Smith v. Texas*,<sup>27</sup> the Court examined a county jury selection system which resulted in underrepresenta-

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21. The Court framed the issue as "whether, by the Constitution and laws of the United States, every citizen of the United States has a right to a trial . . . by a jury selected and impanelled without discrimination against his race or color, because of race or color . . . ." *Strauder*, 100 U.S. at 305.

22. *Id.* at 304.

23. *Id.* The West Virginia law at issue in *Strauder* stated: "All white male persons who are twenty-one years of age and who are citizens of this State shall be eligible to serve as jurors . . . ." *Id.* at 305.

24. Specifically, the equal protection clause provides that: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

25. *Strauder*, 100 U.S. at 310.

26. *Id.* at 308. The Court made an interesting analogy that illustrated the broad expansion of the equal protection clause. "[I]f a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the [equal protection clause]." *Id.*

27. 311 U.S. 128 (1940).

tion of blacks on grand juries over a seven-year period despite the fact that blacks constituted twenty percent of the county's population.<sup>28</sup> Reversing the defendant's conviction, the Court described the jury's function as one of the "basic concepts of a democratic society and a representative government."<sup>29</sup>

The function of the jury was further developed in the landmark civil case *Thiel v. Southern Pacific Co.*,<sup>30</sup> in which the Court wrote:

The American tradition of trial by jury, considered in connection with *either criminal or civil proceedings* necessarily contemplates an impartial jury drawn from a cross-section of the community. This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups.<sup>31</sup>

*Thiel* articulated the constitutional mandate that both criminal and civil trials require fair and impartial juries in order to protect the integrity and democratic ideals of the American system of justice.

## 2. Swain v. Alabama: A Step Backward

In *Swain v. Alabama*,<sup>32</sup> an all-white jury convicted and sentenced to death a black man for raping a white woman.<sup>33</sup> The Court's examination of the evidence concerning jury selection indicated that black males over twenty-one constituted twenty-six percent of all males in the county in that age group, while only ten to fifteen percent actually served on jury panels during the twelve years preceding *Swain*.<sup>34</sup> However, the Court did not find

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28. *Id.* at 128-30. Only three blacks actually served on grand juries between the years 1931 and 1938. *Id.* at 129.

29. *Id.* at 130. The jury's function was similarly espoused in *Carter v. Jury Comm'n*, 396 U.S. 320 (1970), discussed briefly *infra* note 323.

30. 328 U.S. 217 (1946).

31. *Id.* at 220 (emphasis added).

32. 380 U.S. 202 (1965).

33. See *Swain v. State*, 275 Ala. 508, 156 So. 2d 368 (1963).

34. *Swain*, 380 U.S. at 205.



such statistics indicative of merely "token" representation;<sup>35</sup> nor did it consider this evidence as fashioning a "*prima facie* case of invidious discrimination under the fourteenth amendment."<sup>36</sup> The Court rejected the cross-section requirement<sup>37</sup> espoused in *Thiel*.<sup>38</sup> In doing so, the Court sanctioned the use of peremptory challenges by lawyers on "grounds normally thought irrelevant to legal proceedings."<sup>39</sup>

35. *Id.* at 206.

36. *Id.*

37. *Id.* at 208:

[A] defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him nor on the venire or jury roll from which petit jurors are drawn. Neither the jury roll nor the venire need be a perfect mirror of the community or accurately reflect the proportionate strength of every identifiable group.

*Id.* (citations omitted).

Recently, however, in *Holland v. Illinois*, 110 S. Ct. 803 (1990), the Court ruled that a cross-section was required on the venire, but not on the petit jury itself.

The Sixth Amendment requirement of a fair cross section on the venire is a means of assuring, not a *representative* jury . . . but an *impartial* one . . . . Without that requirement, the State could draw up jury lists in such a manner as to produce a pool of prospective jurors disproportionately ill disposed towards one or all classes of defendants, and thus more likely to yield petit juries with similar disposition. The State would have, in effect, unlimited peremptory challenges to compose the pool in its favor. The fair-cross-section venire requirement assures, in other words, that in the process of selecting the petit jury the prosecution and defense will compete on an equal basis.

*Id.* at 807 (emphasis in original).

Because American jurisprudence evolved from English custom, it is interesting to note a difference between the American federal system and the historic English system with regard to cross-section requirements in petit juries. In England centuries ago, King John signed a charter permitting Jews to be tried by juries composed of an equal number of Jews and Christians. This law was less of a favor to Jews than it was self-serving to the King's interest in protecting property he regarded as his own. Further, laws were created that permitted foreign merchants the right to juries composed of jurors half of whom spoke the merchant's native language. The purpose of these laws, called *de medietate linguae*, was to stimulate foreign business in England. See S. WISHMAN, *ANATOMY OF A JURY* 31 (1986).

Some states have instituted a cross-section requirement in petit jury selection relying on independent state constitutional grounds. See, e.g., *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978), examined *infra* notes 44-60 and accompanying text; *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499, cert. denied, 444 U.S. 881 (1979), discussed *infra* note 117.

38. See *supra* note 31 and accompanying text.

39. *Swain*, 380 U.S. at 220-21. The Court stated that the peremptory challenge system "provides justification for striking any group of otherwise qualified jurors in any given case, whether they be Negroes, Catholics, accountants or those with blue eyes." *Id.* at 212. It also believed that the peremptory challenge could be exercised upon "sudden

The Court created a presumption that state prosecutors use peremptory challenges "to obtain a fair and impartial jury."<sup>40</sup> It reasoned that "any other result . . . would establish a rule wholly at odds with the peremptory challenge system as we know it."<sup>41</sup>

The *Swain* decision made it nearly impossible for a defendant to establish a violation of his equal protection rights. In order to overcome *Swain*, the litigant had to prove that "the prosecutor in a county, in case after case, whatever the circumstances . . . [was] responsible for the removal of Negroes who [had] been selected as qualified jurors."<sup>42</sup> Such a stringent threshold was not easily reached. Few jurisdictions maintained records of the patterns of peremptory strikes made by particular prosecutors.<sup>43</sup> Thus, the *Swain* test resulted in an almost insurmountable hurdle.

### 3. *People v. Wheeler: Back on Track*

The *Swain* holding effectively gave prosecutors a free hand to select partial juries, unrestricted by the equal protection

impressions and unaccountable prejudices . . . conceive[d] upon the bare looks and gestures of another," *id.* at 220 (quoting *Lewis v. United States*, 146 U.S. 370, 376 (1892)), "upon a juror's habits and associations," *id.* (quoting *Hayes v. Missouri*, 120 U.S. 68, 70 (1887)), "or upon the feeling that the bare questioning [of a juror's] indifference may sometimes provoke a resentment." *Id.* (quoting *Lewis*, 146 U.S. at 376).

40. *Id.* at 222.

41. *Id.* The Court described the function of the peremptory challenge as not only eliminating "extremes of partiality on both sides, but [also] assuring 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." *Id.* at 219. It reasoned that the peremptory challenge allowed "counsel to ascertain the possibility of bias through probing questions on the *voir dire*." *Id.*

42. *Swain*, 380 U.S. at 223. The *Swain* case itself is a classic example of just how ridiculous this standard was. In *Swain*, the defendant demonstrated that during the previous fifteen years an average of six blacks were among the petit jury venire, but no black had actually sat on a petit jury. *Id.* at 205. The Court, nevertheless, failed to consider this to be proof of systematic exclusion of blacks. *Id.* at 226. The absurdity extended even further. If the defendant was to prove the systematic exclusion of blacks, he had to demonstrate a pattern of exclusion by the particular prosecutor trying the case; a showing of repeated discriminatory exclusion by all the prosecutors in the jurisdiction was not sufficient to satisfy the *Swain* standard. *Id.* at 226-28.

43. See Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 YALE L.J. 1715, 1723 n.36 (1977); Smith, *Swain v. Alabama: The Use of Peremptory Challenges to Strike Blacks from Juries*, 27 How. L.J. 1571 (1984) (discussing the impossibility of establishing a trend of peremptory strikes against blacks by a newly hired prosecutor with no "track record"). *Id.* at 1576.

clause. Though presented with a criminal matter, the *Swain* Court did not analyze possible sixth amendment implications in its attempt to prevent discrimination in criminal trials.<sup>44</sup> The sixth amendment, along with the cross-section requirement rejected by *Swain*, became the foundation for the California case, *People v. Wheeler*.<sup>45</sup>

In *Wheeler*, the black defendants, convicted of murder, appealed to the California Supreme Court, claiming the state denied their right to trial by an impartial jury through the discriminatory use of peremptory challenges.<sup>46</sup> In addressing this claim, the *Wheeler* court reviewed several United States Supreme Court cases that found the cross-section rule essential in fulfilling the constitutional requirement of an impartial jury.<sup>47</sup> The

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44. The Supreme Court did not apply the sixth amendment to criminal trial jury selection until *Duncan v. Louisiana*, 391 U.S. 145 (1968).

45. 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

46. *Id.* at 262, 583 P.2d at 752, 148 Cal. Rptr. at 893. This was a typical abusive peremptory challenge case. The defendants were both black, and the man they were accused of murdering during a robbery was white. *Id.* Following the voir dire, the prosecutor attempted to strike for cause all the black venire persons, but the court refused to allow this. *Id.* The prosecutor then proceeded to strike every black using his peremptory challenges. The resulting jury was completely white. *Id.*

47. *Id.* at 266-70, 583 P.2d 754-57, 148 Cal. Rptr. 896-99. The *Wheeler* court first examined *Smith v. Texas*, 311 U.S. 128 (1940). In *Smith*, which reversed a state conviction on equal protection grounds based on an unfair jury, Justice Black stated: "[I]t is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." *Id.* at 130. See *supra* notes 27-29 and accompanying text.

Next, the *Wheeler* court reviewed *Glaser v. United States*, 315 U.S. 60 (1942). In *Glaser*, the defendants complained that women who were not members of the League of Women Voters were being excluded from jury selection. *Id.* at 61. Though these contentions were not proved, the Court stated that "[in choosing jurors], the concept of the jury as a cross section of the community [must be considered]." *Id.* at 86.

*Thiel v. Southern Pac. Co.*, 382 U.S. 217 (1946), the landmark decision that analyzed the community cross-section requirement, was also examined. See *supra* notes 30-31 and accompanying text. Following *Thiel*, the *Wheeler* court looked at *Ballard v. United States*, 329 U.S. 187 (1946). In *Ballard*, the Court reversed a federal conviction because women were excluded from the petit jury. *Id.* at 193-94. The Court reasoned that "the exclusion of one [sex] may . . . make the jury less representative of the community than would be if an economic or racial group were excluded." *Id.*

The *Wheeler* court next reviewed *Peters v. Kiff*, 407 U.S. 493 (1972). In *Peters*, blacks were arbitrarily removed from the jury. *Id.* at 503-04. Justice Marshall concluded, in a plurality opinion, that the exclusion from jury service of a large and identifiable segment of society "deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented." *Id.*

Finally, the *Wheeler* court examined the case of *Taylor v. Louisiana*, 419 U.S. 522

*Swain* Court, of course, had rejected the cross-section rule for petit juries.<sup>48</sup> Nevertheless, the California Supreme Court adopted this rule in *Wheeler*, concluding that the defendants were entitled to an impartial jury consisting of a representative cross-section, and "that the use of peremptory challenges to remove prospective jurors on the sole ground of *group bias* violates the right to trial by jury . . . ."<sup>49</sup>

*Wheeler* attempted to draw a bright line distinction between group bias and *specific bias*.<sup>50</sup> The court defined group

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(1975). *Taylor* also dealt with the exclusion of women from petit juries. *Id.* at 528-30. In eloquent language, the Court stressed the fundamental objective of the American jury.

The purpose of a jury is to guard against the exercise of arbitrary power — to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over conditioned or biased response of a judge. This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation . . . is not only consistent with our democratic heritage but is also critical to public confidence. . . . Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial.

*Id.* at 530 (citation omitted).

48. See *supra* note 38 and accompanying text.

49. *Wheeler*, 22 Cal. 3d at 276-77, 583 P.2d at 761-62, 148 Cal. Rptr. at 903 (emphasis added). It would appear that the California Supreme Court was in direct conflict with the United States Supreme Court decision in *Swain* when it instituted a cross-section rule in state petit jury selection. However, a closer look indicates no clash or impropriety with the *Swain* Court. Justice Mosk, the author of the majority opinion, later wrote that "[i]n California, we have employed independent nonfederal grounds found in our State Constitution (Article I, Section 16) to prevent the use of peremptory challenges for racially discriminatory purposes." Letter of Justice Stanley Mosk, N.Y. Times, June 24, 1983, at A24, col. 3. It is well settled that state constitutional guarantees may exceed those granted by the Federal Constitution. See *infra* note 89 for a further discussion of this concept and its particular effect on the *Wheeler* decision.

50. *Wheeler*, 22 Cal. 3d at 275-76, 583 P.2d at 761-62, 148 Cal. Rptr. at 902-03. In the case of specific bias — "a bias relating to the particular case or trial or the parties or witnesses thereto," *id.* — peremptory strikes were allowed because their use would not "significantly skew the population mix of the venire in one direction or another; rather, they promote impartiality of the jury without destroying its representativeness." *Id.* Examples of specific bias include jurors having relatives in law enforcement, prior criminal records, or past negative experiences with the police. *Id.*

The effort to differentiate between group bias and specific bias has weakened the decision. For example, the state may justifiably challenge a juror for his "looks" based upon apparent lack of attentiveness to the judicial proceeding. See Note, *Due Process Limits on Prosecutorial Peremptory Challenges*, 102 HARV. L. REV. 1013, 1022-23 (1989). However, it is difficult to know if the challenge was sincere or if it stemmed from racial, ethnic or religious motives. *Id.* Under *Wheeler*, the answer would be unclear. See *gener-*

bias as prejudice against certain jurors "merely because they are members of an identifiable group distinguished on racial, religious, ethnic or similar grounds."<sup>51</sup> Peremptory challenges were not permitted against the "group" because they would upset "the demographic balance of the venire [and frustrate] the primary purpose of the representative cross-section requirement."<sup>52</sup>

*Wheeler* then assessed the means by which the complaining party could expose group bias. The court first established a presumption that the "party exercising a peremptory challenge is doing so on a constitutionally permissible ground."<sup>53</sup> The court then relied on more "traditional procedures"<sup>54</sup> to unmask the discrimination. This was accomplished by the complaining party's assertion of group bias to the court's satisfaction.<sup>55</sup> After a complete record indicating all relevant circumstances was presented, the complaining party had to "establish that the persons excluded [were] members of a cognizable group within the meaning of the representative cross-section rule."<sup>56</sup>

Once the complaining party demonstrated a *prima facie*

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ally Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322-44 (1987).

Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites. To the extent that this cultural belief has influenced all of us, we are all racists. At the same time most of us are unaware of our racism. We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.

*Id.* at 322 (footnotes omitted).

51. *Wheeler*, 22 Cal. 3d at 276-77, 583 P.2d at 760-61, 148 Cal. Rptr. at 902-03.

52. *Id.* at 279, 583 P.2d at 762, 148 Cal. Rptr. at 904-05.

53. *Id.* at 279-80, 583 P.2d at 762-63, 148 Cal. Rptr. at 904-05. In establishing this presumption, the court relied on the "legislative intent underlying such challenges . . . and [its] respect for counsel as officers of the court." *Id.*

54. *Id.* at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905.

55. *Id.*

56. *Id.* The court declined to address the concept of the cognizable group because the challenged parties were black, therefore clearly falling within this classification. *Id.* at n.26. Although doubt remains as to what a cognizable group is, a working judicial definition would characterize a segment of the population, historically discriminated against in American society, specifically minority races, as a "cognizable group." See *infra* note 229. A statistical definition has also been offered. See *infra* note 79.

case, the burden shifted to the challenging party to explain his challenges, asserting a cause related to the trial at hand.<sup>57</sup> The judge, in her discretion, could accept the explanation, in which case the trial would continue, or she could dismiss the entire jury and begin again.<sup>58</sup>

*Wheeler*, even with its flawed distinction between group and specific bias, nevertheless set the impartial jury ship back on course.<sup>59</sup> It did not violate the *Swain* decision, yet it provided an effective and workable method through which defendants could attack the discriminatory use of peremptory challenges by the prosecutor; this was something *Swain* never proffered.<sup>60</sup>

### C. Batson v. Kentucky: A Contemporary Triumph

Barnacles continued to attach to the *Swain* decision. In 1983, Justices Marshall and Brennan indicated that the time had come for the Court to consider overruling *Swain*.<sup>61</sup> Three

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57. *Wheeler*, 22 Cal. 3d at 278-82, 583 P.2d at 762-65, 148 Cal. Rptr. at 904-06.

58. *Id.* at 282, 583 P.2d at 765, 148 Cal. Rptr. at 906.

59. The *Wheeler* rationale was ultimately incorporated in *Batson v. Kentucky*, 476 U.S. 79 (1986), discussed *infra* notes 61-106 and accompanying text.

60. Five years after the *Wheeler* decision, Justice Mosk said that "complaints about racial composition of trial juries have been virtually eliminated in California [because of *Wheeler*]." Letter of Justice Stanley Mosk, N.Y. Times, June 24, 1983, at A24, col. 3.

61. See *McCray v. New York*, 461 U.S. 961, 963-70 (1983) (Marshall, J., joined by Brennan, J., dissenting from denial of certiorari). Justice Marshall stated: "In the nearly two decades since it was decided, *Swain* has been the subject of almost universal and often scathing criticism. Since every defendant is entitled to equal protection of the laws . . . I would . . . reexamine the standard set forth in *Swain*." *Id.* at 964-66 (emphasis in original) (footnotes omitted).

In *McCray*, a black man was accused of robbing a white person. *Id.* at 963. The prosecutor exercised his peremptory challenges to exclude all black and Hispanic venire members. *Id.* Following conviction by the all-white jury, the defendant moved for a mistrial, asserting that the prosecutor violated the Constitution through his challenges, or in the alternative, that a hearing be conducted to examine the prosecutor's motives in using his challenges. *Id.* These motions were denied and the trial court's rulings were affirmed by New York's highest court. *Id.* The defendant unsuccessfully sought certiorari to the United States Supreme Court. *Id.* at 961.

The defendant moved for reargument in the New York Court of Appeals, in light of the strongly worded Marshall dissent that accompanied the denial of certiorari; but the motion was denied. *People v. McCray*, 60 N.Y.2d 587, 454 N.E.2d 127, 467 N.Y.S.2d 1031 (1983).

Having exhausted all of his state remedies, the defendant filed for, and was granted, a petition for habeas corpus in federal district court. *McCray v. Abrams*, 576 F. Supp. 1244 (E.D.N.Y. 1983). The petition was later affirmed in part, vacated in part, and remanded. *McCray v. Abrams*, 750 F.2d 1113 (2d Cir. 1984). See *infra* note 137 for a fur-

years later *Swain* was partially overruled in *Batson v. Kentucky*.<sup>62</sup>

### 1. *Facts and Procedural History*

Batson, a black man, was indicted in Kentucky on burglary charges.<sup>63</sup> During the voir dire,<sup>64</sup> the prosecutor used his peremptory challenges to remove all four black venire persons, leaving an all-white jury.<sup>65</sup> After considering the defendant's motion to discharge the jury because the prosecutor's removals violated Batson's rights under the sixth and fourteenth amendments, the trial judge ruled that peremptory challenges could be used to strike any potential jurors.<sup>66</sup> Batson was convicted on all counts.<sup>67</sup>

On appeal to the Kentucky Supreme Court, Batson asserted that his rights under both the state and federal constitutions had been violated because he had been denied a trial by an impartial jury drawn from a cross-section of the community.<sup>68</sup> He also contended that the prosecutor had engaged in a "pattern" of discriminatory strikes. Thus, the requirements for establishing a prima facie equal protection violation under *Swain* had been met.<sup>69</sup>

Affirming the lower court's decision, the Kentucky Supreme Court rejected the reasoning of *Wheeler*<sup>70</sup> and a similar Massachusetts decision,<sup>71</sup> reaffirming its reliance on *Swain*.<sup>72</sup> The United States Supreme Court granted certiorari.<sup>73</sup>

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ther discussion of *McCray*.

62. 476 U.S. 79 (1986).

63. *Id.* at 82.

64. See *supra* note 1 for a discussion of the voir dire process.

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

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 84.

70. See *supra* notes 44-60 and accompanying text.

71. See *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499, cert. denied, 444 U.S. 881 (1979). This case, like *Wheeler*, advocated a cross-section requirement. *Id.* at 478-83, 387 N.E.2d at 510-13. See *infra* note 117 for a discussion of the *Soares* case.

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

73. *Batson v. Kentucky*, 471 U.S. 1052 (1985).

2. *The Defendant's Prima Facie Case of Purposeful Jury Discrimination: A New Standard*

*Batson* "require[d] [the Court] to reexamine that portion of *Swain* . . . concerning the evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race from the petit jury."<sup>74</sup> This inquiry resulted in the partial overruling of *Swain*<sup>75</sup> and the reaffirmation of *Strauder v. West Virginia*.<sup>76</sup> In its decision, the Court announced a new purposeful discrimination standard, consisting of two steps: first, the defendant had to "establish a *prima facie* case of purposeful discrimination";<sup>77</sup> then, if the *prima facie* case was demonstrated, the burden shifted to the prosecutor to "come forward with a neutral explanation for challenging black jurors . . . [but one not rising] to the level justifying exercise of a challenge for cause."<sup>78</sup>

To satisfy the first step, the defendant "must show that he is a member of a cognizable racial group"<sup>79</sup> . . . and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race."<sup>80</sup> The Court stated that the defendant could "rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury se-

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74. *Batson*, 476 U.S. at 82 (footnote omitted).

75. *Id.* at 93. The *Swain* evidentiary burden, discussed *supra* notes 42-43 and accompanying text, was considered too difficult to sustain. *Batson*, 476 U.S. at 95-96.

76. *Batson*, 476 U.S. at 89. See *supra* notes 20-26 and accompanying text for a discussion of *Strauder*. The *Batson* Court noted that "[t]he principles announced in *Strauder* have never been questioned in any subsequent decision of [the] Court." *Batson*, 476 U.S. at 89.

77. *Batson*, 476 U.S. at 96.

78. *Id.* at 97.

79. The concept of a "cognizable racial group" was addressed in *Castaneda v. Partida*, 430 U.S. 482, 494-95 (1977). Although *Castaneda* dealt with discriminatory practices in grand jury selection, the Court's analysis is also appropriate for petit jury selection. *Castaneda* applied a statistically oriented test. *Id.* at 496-97 n.17. To prove membership in such a group, one must show a "significant disparity between the number of minorities selected by an actor and the number that a random process would have been expected to produce." Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 170 (1989). See also *Pottinger v. Warden*, 716 F. Supp. 1005, 1008 (W.D. Ky. 1989) ("[T]he striking of one black [prospective] juror [does not] comprise a *prima facie* case if the racial reason is not apparent, from statistical inference or other reasons.").

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



lection practice that permits 'those to discriminate who are of a mind to discriminate.'"<sup>81</sup> "Finally, the defendant must show that these facts and any other relevant circumstances<sup>82</sup> raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race."<sup>83</sup>

### 3. *The Prosecutor's Neutral Explanation*

As explained above, once the defendant has established a *prima facie* case of purposeful discrimination, the burden shifts to the prosecutor to provide a neutral explanation for challenging the black prospective jurors.<sup>84</sup> This explanation, according to the Court, falls somewhat short of a challenge for cause.<sup>85</sup> The prosecutor must articulate reasons related to the case. He cannot simply "rebut the . . . [defendant's] *prima facie* case of discrimination by stating merely that he challenged [prospective] jurors of the defendant's race on the assumption — or his intuitive judgment — that they would be partial to the defendant because of their shared race."<sup>86</sup>

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81. *Id.* at 96 (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)). The situation in *Avery* was quite interesting. Names of the venire were written on color-coded paper. A different color was used for each race. The trial judge then selected the jury panel by drawing the pieces of paper at "random." *Avery*, 345 U.S. at 560-62. The Supreme Court found a *prima facie* case of purposeful discrimination, even though no evidence had been presented to prove deliberate discrimination in the selection process, because the use of color-coding provided the opportunity for discrimination. *Id.*

82. The Court permitted great latitude in the determination of "relevant circumstances." Historical patterns of striking prospective jurors of the defendant's race in a particular venire, as well as specific questions and statements made by the prosecutor during the voir dire examination, may suffice. *Batson*, 476 U.S. at 96-97. Further, the Court stated that the trial judge had discretion in supervising the voir dire to decide whether the use of peremptory challenges constituted a *prima facie* case of discrimination. *Id.* at 97.

83. *Id.* at 96.

84. *Id.* at 97.

85. *Id.* For a discussion of the challenge for cause, see *supra* note 1.

86. *Batson*, 476 U.S. at 96. Nor can the prosecutor simply employ "racial arithmetic"; see, e.g., *United States v. Johnson*, 721 F. Supp. 1077 (E.D. Mo. 1989) (prosecutor did not meet his burden by simply stating that only two of five black prospective jurors were struck).

While the Court did not provide a procedure for applying this new two-step standard, one has been devised. In *United States v. Alcantar*, 832 F.2d 1175 (9th Cir. 1987), the Ninth Circuit stated that the district court must allow the complaining party to hear and respond to explanations rebutting an alleged *prima facie* case of discrimination. *Id.* at 1180. The challenges will not stand if the district court refuses the complaining party

#### 4. *The Majority's Reasoning*

In overruling the portion of *Swain* that announced the evidentiary burdens necessary to develop a prima facie case of discrimination,<sup>87</sup> the Court based its decision on the equal protection clause,<sup>88</sup> and expressly avoided any discussion of sixth amendment claims.<sup>89</sup>

The Court began its equal protection analysis with an examination of *Strauder v. West Virginia*,<sup>90</sup> noting that *Strauder* had "laid the foundation" for the eradication of racial discrimination

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an opportunity to hear the reasons for excluding potential jurors and to argue that those reasons are pretextual. *Id.* See also *United States v. Alvarado*, 891 F.2d 439, 440-43 (2d Cir. 1989).

87. *Batson*, 476 U.S. at 95-96. See *supra* notes 42-43 and accompanying text for a discussion of the *Swain* evidentiary burden.

88. See *supra* note 24 for the text of the equal protection clause. One of the most important elements of a violation of the equal protection clause is "state action." See *infra* notes 253-89 and accompanying text for a detailed discussion of the state action concept.

89. "We . . . express no view on the merits of any . . . Sixth Amendment arguments." *Batson*, 476 U.S. at 85 n.4. This apparently places the validity of *Wheeler* in doubt. *Wheeler*, along with *Booker v. Jabe*, 775 F.2d 762 (6th Cir. 1985) and *McCray v. Abrams*, 750 F.2d 1113 (2d Cir. 1984), was announced on sixth amendment/cross-section requirement grounds. In light of the *Batson* decision, both *Booker* and *McCray* were vacated and remanded by the Supreme Court. *Booker v. Jabe*, 775 F.2d 762 (6th Cir. 1985), vacated, 478 U.S. 1001 (1986); *McCray v. Abrams*, 750 F.2d 1113 (1984), *reh'g denied*, 756 F.2d 277 (2d Cir. 1985) (en banc), vacated, 478 U.S. 1001 (1986).

A closer look, however, may indicate that *Wheeler's* rationale is still legitimate. *Booker* and *McCray* both dealt with a black criminal defendant's objection to the use of peremptory challenges by the prosecutor. See *Booker*, 775 F.2d at 763-64; *McCray*, 750 F.2d at 1114-16. These "*Batson*-like" facts appear to be properly suited to a fourteenth amendment equal protection analysis. See *supra* notes 63-73 and accompanying text.

Although *Wheeler* was factually similar to *Booker* and *McCray*, see *supra* note 46 and accompanying text, its holding was based upon state constitutional and sixth amendment grounds. See *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978) ("[We] hold that in this state the right to trial by a jury drawn from a representative cross section of the community is guaranteed equally and independently by the Sixth Amendment . . . and the California Constitution."). *Id.* at 268, 583 P.2d at 758, 148 Cal. Rptr. at 900 (footnote omitted).

Historically, state court decisions are not overruled by the federal courts if the state constitutional protections exceed those granted by the Federal Constitution. See, e.g., *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980) ("[T]he State [can] exercise its . . . sovereign right to adopt in its constitution individual [rights] more expansive than those conferred by the Federal Constitution."). *Id.* at 81. See also *Cooper v. California*, 386 U.S. 58 (1967) ("[T]he State . . . [has the] power to impose higher standards . . . than required by the Federal Constitution if it chooses to do so."). *Id.* at 62.

90. 100 U.S. 303 (1879). For a discussion of this case, see *supra* notes 20-26 and accompanying text.

in jury selection.<sup>91</sup> The Court found that the exclusion of black jurors discriminates against both the defendant and the excluded potential jurors.<sup>92</sup> Furthermore, the harm suffered as a result of discriminatory use of peremptory strikes "extends beyond that inflicted on the defendant and the excluded juror to touch the entire community."<sup>93</sup> The Court, therefore, held that:

Although a prosecutor ordinarily is permitted to exercise peremptory challenges . . . [without explanation,] the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.<sup>94</sup>

Nevertheless, the majority rejected Justice Marshall's proposed solution, which called for the elimination of the peremptory challenge.<sup>95</sup> "While the Constitution does not confer a right to peremptory challenges . . . those challenges traditionally have been viewed as one means of assuring the selection of a qualified and unbiased jury."<sup>96</sup>

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91. *Batson*, 476 U.S. at 85.

92. *Id.* at 87. See *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting) (person's race is "unrelated to his fitness as a juror"). The *Batson* Court said "that by denying a person participation in jury service on account of his race, the state unconstitutionally discriminated against the excluded juror." *Batson*, 476 U.S. at 87. A further discussion of the discrimination suffered by potential jurors because of exclusion is found *infra* note 323.

93. *Batson*, 476 U.S. at 87 (public confidence in our system of justice would be undermined).

94. *Id.* at 89 (citations omitted).

95. See *id.* at 102-03. See *infra* notes 98-106 and accompanying text for a discussion of Justice Marshall's concurring opinion.

96. *Batson*, 476 U.S. at 91 (citations omitted). The Court's holding was limited to the prosecutor's actions in a criminal trial. *Id.* at 90. One issue arising in the wake of *Batson* was whether it applied to the discriminatory use of peremptory strikes by the defense. Although *Batson* was silent on this issue, a recent case held that *Batson* did apply to the use of peremptory strikes by the defense. See *People v. Kern*, 75 N.Y.2d 638, 554 N.E.2d 1235, 555 N.Y.S.2d 647 (1990) (the "Howard Beach Case" in which the court, relying on *Batson* and on state constitutional grounds, restricted the use of peremptory challenges by the white defendants).

Commentators have debated this issue. See Note, *Discrimination By the Defense: Peremptory Challenges after Batson v. Kentucky*, 88 COLUM. L. REV. 355 (1988) (arguing that continued use of discriminatory challenges by the defense violates the equal protection clause). But see Goldwasser, *Limiting A Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 HARV. L. REV. 808 (1989) (stating that criminal defendants should have the widest possible latitude in con-

### 5. *The Marshall Concurrence*

The *Batson* case provoked strong opinions from all of the Justices,<sup>97</sup> but Justice Marshall's concurrence<sup>98</sup> is the most worthy of close examination. Justice Marshall called Justice Powell's majority opinion "eloquent"<sup>99</sup> and a "historic step toward eliminating the shameful practice of racial discrimination in the selection of juries."<sup>100</sup> He concluded, however, that racial discrimination can end only by "eliminating peremptory challenges entirely."<sup>101</sup>

Justice Marshall believed that the "reformed" peremptory

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ducting their defense).

Another issue — whether *Batson* extends to civil litigation — is the subject of this Comment. See, e.g., Note, *Batson v. Kentucky: Challenging the Use of the Peremptory Challenge*, 15 AM. J. CRIM. L. 263 (1988); Comment, *Viitation of Peremptory Challenge in Civil Actions: Clark v. City of Bridgeport*, 61 ST. JOHN'S L. REV. 155 (1986) (both advocating free use of the peremptory challenge in civil litigation). But see Note, *The Civil Implications of Batson v. Kentucky and State v. Gilmore: A Further Look at Limitations on the Peremptory Challenge*, 40 RUTGERS L. REV. 891 (1988) (stating that *Batson* is fully applicable to civil actions).

At least one commentator has reasoned that the application of the equal protection clause to the *Batson* case should be dismissed in favor of a due process approach. See Note, *Due Process Limits on Prosecutorial Peremptory Challenges*, 102 HARV. L. REV. 1013 (1989). The author argued that the sixth amendment and the equal protection clause fail to prevent discrimination in jury selection. *Id.* at 1015-23. Because a discernible liberty interest of the defendant is at stake, the removal of a qualified juror by a peremptory strike does not comply with the due process clause of the fourteenth amendment. *Id.* at 1024-34. This analysis might also apply to civil proceedings because the civil litigant has a discernible property interest guaranteed by the due process clause.

97. These opinions include: concurrences by Justice White, *Batson*, 476 U.S. at 100; Justice O'Connor, *id.* at 111 (stating that *Batson* should not be applied retroactively); Justice Marshall, *id.* at 102, discussed *infra* notes 98-106 and accompanying text; Justice Stevens, joined by Justice Brennan, *id.* at 108 (agreeing that the equal protection clause should be applied to the discrimination issue even though the defense counsel failed to rely on that ground on certiorari); dissents by Chief Justice Burger, joined by Justice Rehnquist, *id.* at 112 (stating that *Swain* should not be overruled based upon an equal protection argument that was not raised by the defendant on certiorari, that the peremptory challenge should not be restricted in any manner, and that the Court's decision should not be applied retroactively); Justice Rehnquist, joined by Chief Justice Burger, *id.* at 134 (expressing the view that the *Swain* "historical pattern of discriminatory strikes" standard should still be adhered to, and not the majority's reasoning that a prosecutor's use of peremptory challenges to exclude blacks from one particular jury constitutes an equal protection violation).

98. *Batson*, 476 U.S. at 102.

99. *Id.*

100. *Id.*

101. *Id.* at 102-03.

challenge still provided the means by which the prosecutor could discriminate in jury selection.<sup>102</sup> For example, he noted, "defendants cannot attack the discriminatory use of peremptory challenges at all unless the challenges are so flagrant as to establish a prima facie case."<sup>103</sup> Furthermore, he stated, it is also difficult for a trial court to assess a "prosecutor's motives."<sup>104</sup> Justice Marshall preferred the complete elimination of the peremptory challenge from the criminal justice system.<sup>105</sup> Under Justice Marshall's rationale, neither the prosecution nor the defense would be permitted to exercise the challenges.<sup>106</sup>

#### D. *The Peremptory Challenge in Civil Litigation*

##### 1. *Pre-Batson*

Even before *Batson*, a number of courts, both state and federal, had examined the issue of the discriminatory use of peremptory challenges in civil matters.

For example, in *Malvo v. J.C. Penney Co.*,<sup>107</sup> which involved a false imprisonment and slander action by a black plaintiff, the Supreme Court of Alaska held that although no blacks were on the jury, no prima facie case of discrimination had been shown.<sup>108</sup> "[T]he constitutional fair — and impartial — jury

102. *Id.* at 105-07.

103. *Id.* at 105. Justice Marshall's fears may be well founded. For example, in *Woods v. Dugger*, 711 F. Supp. 586 (M.D. Fla. 1989), the court implied that even "token" black representation on the jury defeats any inference of discrimination.

A prosecutor's leaving black jurors unchallenged on the final jury, a prosecutor's having only a small number of black jurors on the venire from which the jurors are selected, and evidence of non-racial reasons for the prosecutor's challenges, tend to rebut an inference arising solely from an alleged pattern of discriminatory peremptory challenges.

*Id.* at 595 (footnote omitted).

104. *Batson*, 476 U.S. at 105.

105. *Id.* at 106.

106. *Id.* at 107. Justice Marshall wrote that the criminal justice system "requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held." *Id.* at 107 (quoting *Hayes v. Missouri*, 120 U.S. 68, 70 (1887)). *But see* Brown, McGuire & Winters, *The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse*, 14 NEW ENG. L. REV. 192 (1978) (arguing that while the prosecutor should be banned from utilizing the peremptory challenge, the defendant's use of the challenge should be permitted because of its necessity in providing for a fair trial).

107. 512 P.2d 575 (Alaska 1973).

108. *Id.* at 582.

guaranty does not require that every economic, racial or ethnic class shall be represented on every jury venire or panel."<sup>109</sup> Under the strict *Swain* rationale,<sup>110</sup> the plaintiff "failed to sustain her burden of proving that the method by which the jury was selected was one [designed] to exclude . . . systematically and intentionally some cognizable group or class of citizens in the community."<sup>111</sup>

In 1983, an intermediate California appellate court examined whether "the exercise of peremptory challenges in civil proceedings is subject to scrutiny under the Constitutional standard announced in . . . *Wheeler*."<sup>112</sup> In *Holley v. J & S Sweeping Co.*, a black plaintiff brought a negligence action against the defendant.<sup>113</sup> The case was tried before an all-white jury, and was decided in favor of the defendants.<sup>114</sup> The appellate court reversed, holding that "the systematic exclusion of [prospective] jurors . . . in either criminal or civil proceedings . . . is constitutionally impermissible [and subject to the *Wheeler* safeguards]."<sup>115</sup> The court found that in both criminal and civil trials, the jury "perform[s] the same important function of ultimate fact finders under the same state constitutional guarantee."<sup>116</sup>

Shortly after the *Holley* decision, a Massachusetts intermediate appellate court expressed, in dicta, its desire to apply the state's "*Wheeler* equivalent"<sup>117</sup> to civil actions.<sup>118</sup> In *Terrio v.*

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109. *Id.* (quoting *Nolan v. United States*, 423 F.2d 1031, 1035 (10th Cir. 1969)).

110. *Swain v. Alabama*, 380 U.S. 202 (1965). See *supra* notes 32-43 and accompanying text.

111. *Malvo v. J.C. Penney Co.*, 512 P.2d 575, 582 (Alaska 1973) (citations omitted).

112. *Holley v. J & S Sweeping Co.*, 143 Cal. App. 3d 588, 192 Cal. Rptr. 74 (1983) (citations omitted). See *supra* notes 44-60 and accompanying text for a detailed discussion of *Wheeler*.

113. *Holley*, 143 Cal. App. 3d at 590, 192 Cal. Rptr. at 75.

114. *Id.*

115. *Id.* at 593, 192 Cal. Rptr. at 77 (emphasis added).

116. *Id.* at 592, 192 Cal. Rptr. at 77.

117. *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499, cert. denied, 444 U.S. 881 (1979). The facts in *Soares* were similar to the facts in *Wheeler*. The prosecutor had utilized his peremptory challenges to strike twelve of thirteen black venire persons. *Id.* at 473, 387 N.E.2d at 508. In resolving the issue of discriminatory strikes, the *Soares* court adopted a test similar to that announced in *Wheeler*. *Id.* at 488-91, 387 N.E.2d at 516-18. It concluded that the right to trial by jury required that the jury be representative of the community as a whole. *Id.* at 478-83, 387 N.E.2d at 510-13.

118. In *Terrio v. McDonough*, 16 Mass. App. Ct. 163, 450 N.E.2d 190 (1983), a

*McDonough*,<sup>119</sup> the court balanced the importance of safeguards in civil and criminal litigation.<sup>120</sup> It concluded that while the consequences of criminal actions might demand greater protection, certain civil cases in which peremptory challenges were used in a discriminatory manner could also have serious consequences.<sup>121</sup>

The last notable pre-Batson state court decision was *City of Miami v. Cornett*.<sup>122</sup> In *Cornett*, a black plaintiff lost his personal injury case against the city and two of its police officers.<sup>123</sup> The action was tried before an all-white jury after four blacks had been removed by peremptory challenges.<sup>124</sup> Following the verdict, the trial judge granted the plaintiff a new trial.<sup>125</sup>

On appeal, the appellate division examined the case in light of the Florida Supreme Court's decision in *State v. Neil*,<sup>126</sup> a

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prima facie case was not developed according to the *Soares* criteria; therefore this issue could not be addressed directly. *Id.* at 172, 450 N.E.2d at 196.

119. *Id.* at 163, 450 N.E.2d 190.

120. *Id.* at 167-70, 450 N.E.2d at 194-96.

121. *Id.* at 170, 450 N.E.2d at 195. For example, the court made a reference to *Malvo v. J.C. Penney Co.*, 512 P.2d 575 (Alaska 1973), discussed *supra* notes 107-11 and accompanying text.

122. 463 So. 2d 399 (Fla. Dist. Ct. App. 1985).

123. *Id.* at 400.

124. *Id.*

125. *Id.* In his order granting a new trial to the plaintiff, the trial judge reviewed the social and racial unrest that plagued Miami at the time of *Cornett*. The judge noted two happenings that preceded *Cornett* by just a few weeks: first, the decision in *Andrews v. State*, 438 So. 2d 480 (Fla. Dist. Ct. App. 1983), vacated, 459 So. 2d 1018 (Fla. 1985); and second, the infamous "McDuffie Riots." *Andrews*, 438 So. 2d at 482 n.4. In *McDuffie*, a black businessman was brutally beaten to death by several white police officers. *Miami Times*, June 23, 1983, at 1, col. 1. The officers were acquitted. *Id.* As in *Cornett*, all the black prospective jurors were removed from the venire by the opposing counsel's peremptory challenges. *Id.* See Pizzi, *Batson v. Kentucky: Curing the Disease but Killing the Patient*, 1987 SUP. CT. REV. 97, 153; *Cornett*, 463 So. 2d at 400-01. The plaintiff in *Cornett* was paralyzed from the waist down after the incident with the police, and the trial judge greatly feared that racial tensions could explode. *Id.* at 400.

126. 457 So. 2d 481 (Fla. 1984). *Neil*, the Florida equivalent of California's *Wheeler*, see *supra* notes 44-60 and accompanying text, concerned the trial of a black man accused of murdering a Haitian immigrant. *Neil*, 457 So. 2d at 482. The prosecutor used his peremptory challenges to remove the first three blacks called from the venire. *Id.* *Neil* argued that the prosecution's challenges were discriminatory. *Id.* The court ruled in favor of the prosecution, stating that it need not explain its challenges. *Id.* at 482-83. *Neil* was convicted. *Id.* at 483.

On appeal, *Neil* claimed the trial court erred in permitting the prosecution's challenges to stand. *Id.* The appellate court, recognizing the implications of this issue, certified the question of whether the prosecution must explain its peremptory challenges, *id.*

criminal case, in which the court held that further adherence to *Swain v. Alabama*<sup>127</sup> "would impede rather than further the right to a fair and impartial trial . . . ."<sup>128</sup> The *Cornett* court first considered whether *Neil* applied to civil actions.<sup>129</sup> Finding that it did, the court stated that while the Florida Constitution "does not expressly grant civil litigants the right of trial by an *impartial* jury, we believe that anything less . . . is the functional equivalent of no jury at all."<sup>130</sup>

In the notable pre-*Batson* decision of *King v. County of Nassau*,<sup>131</sup> one federal court also addressed the use of peremptory challenges in civil trials. *King* involved an equal employment opportunity suit brought by a black plaintiff against a public county college, which had used its peremptory challenges to remove two black prospective jurors.<sup>132</sup> Following both strikes, the plaintiff moved to require the county to demonstrate that no discriminatory motive influenced the exercise of the challenges.<sup>133</sup>

A hearing was held in the magistrate's chambers to discuss the plaintiff's motions.<sup>134</sup> The county argued that during the voir dire, the two black venire persons sat isolated from the rest physically as well as "emotionally . . . [and therefore would not be able to] objectively deliberate with other jurors in the case should they be selected as such."<sup>135</sup> The magistrate ruled in

at 482, and submitted it to the Florida Supreme Court. *Id.* at 483.

Florida's highest court ruled that the prosecution must show that the peremptory challenges in question were not racially motivated when the challenged party demonstrates to the court that such an explanation is warranted. *Id.* at 488. The case was remanded for a new trial. *Id.*

127. 380 U.S. 202 (1965). See *supra* notes 32-43 and accompanying text.

128. *Cornett*, 463 So. 2d at 401.

129. *Id.* at 402.

130. *Id.* (emphasis in original) (footnote omitted).

131. 581 F. Supp. 493 (E.D.N.Y. 1984).

132. *Id.* at 494-95.

133. *Id.* at 495. It is worth noting that the black plaintiff exercised his peremptory strikes to remove two white venire persons following all challenges for cause. Of the fourteen prospective jurors remaining, only two were black. *Id.*

One issue that arises in such a situation is whether the black plaintiff, in exercising his peremptory challenges in striking white venire persons, need explain his challenges on neutral criteria. See *infra* note 229 for a discussion of the Court-imposed multi-tiered equal protection analysis and its possible effect on this scenario.

134. *King*, 581 F. Supp. at 495.

135. *Id.* The county also argued that the black venire persons were "less than com-



favor of the county.<sup>136</sup>

In reviewing this ruling, the district court discussed both *McCray v. Abrams*<sup>137</sup> and *Swain*<sup>138</sup> to determine whether to apply *McCray*, a criminal holding, to the civil case at bar.<sup>139</sup> The court determined that it should not.<sup>140</sup> "*Swain* is the correct statement of the law and is applicable to both criminal and civil cases, regardless of whether the peremptory challenge is made by a governmental entity or a private party."<sup>141</sup>

## 2. *Post-Batson*

*Batson*<sup>142</sup> was based upon the fourteenth amendment equal protection clause.<sup>143</sup> To prove a violation of this clause, an aggrieved party must demonstrate the presence of state action. This requirement presents difficulty in civil litigation between private parties.<sup>144</sup>

The decisions immediately following *Batson* did not directly address the state action issue. In the civil case of *Esposito v. Buonome*,<sup>145</sup> the court held that *Batson* was not applicable.<sup>146</sup>

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municative" and on that basis could be challenged. *Id.*

136. The magistrate stated that the "[d]efendant's . . . opinion [that] these two jurors [challenged by the county] would not be so open to the reception of evidence . . . [was] a sufficient reason." *Id.* at 496.

137. 576 F. Supp. 1244 (E.D.N.Y. 1983), *aff'd*, 750 F.2d 1113 (2d Cir. 1984). In his petition for habeas corpus, McCray, a black defendant convicted at trial, alleged that the prosecutor's use of peremptory challenges violated the Constitution because all black and Hispanic venire persons were removed from the jury. *McCray*, 750 F.2d at 1114. See *supra* note 61 for a discussion of *McCray* on certiorari to the Supreme Court.

The Second Circuit, affirming in part the petition for habeas corpus, held that the prosecutor had to offer non-racial explanations to remove the black jurors struck by peremptory challenges; otherwise the venire should be quashed. See *McCray*, 750 F.2d at 1113.

138. See *supra* notes 32-43 and accompanying text.

139. *King*, 581 F. Supp. at 499-502.

140. *Id.* at 499-500.

141. *Id.* The court stated that arguably the use of peremptory challenges enables the jury to reach a unanimous verdict, obviating the necessity for a retrial. Furthermore, the "selfish use of peremptory challenges tends in general to promote societal goals." *Id.* at 500.

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

143. See *supra* notes 87-96 and accompanying text.

144. For a comprehensive discussion of the state action requirement, see *infra* notes 253-89 and accompanying text.

145. 642 F. Supp. 760 (D. Conn. 1986).

146. *Id.* at 761.

The court based its holding on two factors: first, there was "[s]pecial consideration for the plight of the accused criminal";<sup>147</sup> and second, "the complaining party [was] a civil plaintiff who [had] chosen of his own free will to initiate judicial process."<sup>148</sup> Although the court recognized that *Batson* might apply to civil matters generally, it refused to examine the issue directly because the plaintiff had not established a *prima facie* case of purposeful discrimination.<sup>149</sup>

The state action requirement was easily met in *Clark v. City of Bridgeport*<sup>150</sup> because the city, clearly a state actor, was a defendant.<sup>151</sup> In *Clark*, three plaintiffs brought a section 1983<sup>152</sup> claim against two police officers and the city.<sup>153</sup> During jury selection, the attorney for the city struck every black venire person.<sup>154</sup> The plaintiffs argued that the city had used its challenges to discriminate.<sup>155</sup>

Holding that the use of peremptory challenges to strike the black venire persons violated the equal protection clause,<sup>156</sup> the

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147. *Id.*

148. *Id.* (emphasis omitted).

149. *Id.* Because the plaintiff in *Esposito* was not black, he could not establish that he was a member of a cognizable racial group, see *supra* note 79, and that the defendants had exercised peremptory strikes to remove venire members of his race.

150. 645 F. Supp. 890 (D. Conn. 1986). For commentary on this decision, see Comment, *Vitiation of Peremptory Challenge in Civil Actions: Clark v. City of Bridgeport*, 61 ST. JOHN'S L. REV. 155 (1986).

151. For a discussion of whether state action exists when only private parties are involved, see *infra* notes 253-89 and accompanying text.

152. In pertinent part, § 1983 states:

Every person who, under color of any statute . . . subjects . . . any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .

42 U.S.C. § 1983 (1982).

153. *Clark* actually consisted of three consolidated cases: *Clark v. City of Bridgeport*; *Rizzoli v. Muniz*; *Simmons v. Formichella*.

154. *Clark*, 645 F. Supp. at 891-92.

155. *Id.*

156. *Id.* at 898. For one of the three plaintiffs, Rizzoli, a white man, this holding was based upon "the totality of circumstances and inferences arising from the particular series of jury selections, and the inherent discriminatory nature of the use of the peremptory [challenge] . . . ." *Id.* at 897.

The *Clark* court held that the challenged black venire members suffered a violation of equal protection. *Id.* at 891-94. The court stated that *Batson* applied to protect the rights of the challenged potential jurors as much as it did to protect the rights of the litigants. *Id.* The *Clark* court applied its "supervisory power" to reach this conclusion.

court reviewed historical sources.<sup>157</sup> It first cited *Thiel v. Southern Pacific Co.*,<sup>158</sup> quoting its famous passage characterizing the role of the American jury in both criminal and civil litigation.<sup>159</sup>

The court next considered a congressional enactment<sup>160</sup> concerning jury selection in both civil and criminal cases, which requires, among other things, that no citizen be excluded from jury service based upon race. Conceding that the enactment was not applicable in *Clark*,<sup>161</sup> the court stated that it did, however, indicate "a clear Congressional policy that all citizens shall have the right to be considered for jury service and all litigants shall have the right to have these citizens so considered without regard to their race."<sup>162</sup> Because the state action component was readily satisfied, *Clark* became the first case to extend *Batson* to civil litigation.<sup>163</sup> The moment was now ripe to examine the more difficult question of whether *Batson* is applicable to cases involving solely private litigants. Indeed, only a few federal courts have considered this issue to date.<sup>164</sup>

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The supervisory power of the court is "commonly viewed as a [discretionary] inherent power to preserve the integrity of the judicial process." *United States v. Ramirez*, 710 F.2d 535, 541 (9th Cir. 1983). See *Thiel v. Southern Pac. Co.*, 328 U.S. 217 (1946), *supra* notes 30-31 and accompanying text, in which the Court exercised its supervisory power to prevent discrimination against prospective jurors in civil cases.

157. *Clark*, 645 F. Supp. at 894-96.

158. 328 U.S. 217 (1946). See *supra* notes 30-31 and accompanying text.

159. *Clark*, 645 F. Supp. at 895. See *supra* note 31 and accompanying text for the words of this celebrated passage.

160. 28 U.S.C. § 1862 (1982) provides that "[n]o citizen shall be excluded from service as a grand or petit juror in the district courts of the United States or in the Court of International Trade on account of race, color, religion, sex, national origin, or economic status." *Id.*

161. The court stated that the statute was "inapplicable to the instant case, in that it deals with the judicial machinery used to arrive at the venire [not the litigant's selection of the jury]." *Clark*, 645 F. Supp. at 896.

162. *Id.*

163. See also *Reynolds v. City of Little Rock*, 893 F.2d 1004 (8th Cir. 1990), discussed *infra* note 183.

164. At least one state court has examined the extension of *Batson* to a civil action between two private litigants. In *Chavous v. Brown*, 396 S.E.2d 98 (S.C. 1990), the South Carolina Supreme Court held that *Batson* does not apply to civil cases. *Id.* at 99. Although it did not "address the situation . . . where the State is a party," *id.* at 98 n.2, the court refused to find state action when the proceedings involved only private entities. *Id.* at 100. Further, the court did not find that the trial judge's involvement in the challenging process constituted state action. "[T]he trial judge performs merely a ministerial function in excusing [prospective] jurors . . . . There is no judicial discretion involved." *Id.* at 99.

In *Maloney v. Washington*,<sup>165</sup> four white police officers sued the City of Chicago, former Mayor Washington, and other city officials, alleging that they were demoted for racial and political reasons.<sup>166</sup> In the first of two attempts at trial, the court refused to impanel the jury because both sides had utilized their peremptory challenges in a discriminatory manner.<sup>167</sup> The court advised the parties, after the first failed attempt, that the principles espoused in *Batson*<sup>168</sup> "would be applied . . . and that the plaintiffs would be required to justify their use of peremptory challenges against blacks and the defendants their use of peremptories against whites."<sup>169</sup> Following the parties' challenges in the second attempt at trial, the court again refused to impanel a jury because of the improper use of peremptory challenges.<sup>170</sup>

The court reiterated that "*Batson* applies with equal force and effect to jury selection in civil cases and to all the parties in those cases, whether state actors or not."<sup>171</sup> Deciding that both parties had abused their peremptory challenges, the court closely examined the use of the strikes in the second attempt to select a jury.<sup>172</sup> It then "concluded that racial discrimination

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The trial judge's role in the peremptory challenge process has become a key issue in the state action debate when only private litigants are involved. See *infra* notes 274-84 and accompanying text.

165. 690 F. Supp. 687 (N.D. Ill. 1988).

166. *Id.* at 688-89.

167. *Id.* Each party exercised all of its challenges to remove potential jurors for racial reasons. *Id.*

168. See *supra* notes 61-106 and accompanying text.

169. *Maloney*, 690 F. Supp. at 688.

170. *Id.* at 688-89. The plaintiffs exercised three of their four challenges to remove blacks and the defendants used all four of their challenges to remove whites. *Id.*

171. *Id.* at 689. The court reached this conclusion by examining the equal protection clause of the fourteenth amendment. *Id.* at 689-90. It also found the necessary state action because the court administers the peremptory challenge process. *Id.* at 690. The classification of the trial court as a state actor is discussed *infra* notes 274-84 and accompanying text.

172. *Maloney*, 690 F. Supp. at 690-91. The plaintiffs were asked to justify their challenges on non-racial grounds. The first black prospective juror was challenged because she worked for the Urban League of Chicago and would perhaps be partial to the concerns of minorities. *Id.* at 691. The court found the prospective juror non-biased, "yet acknowledged that plaintiffs may have had a good faith basis for challenging this . . . [person]." *Id.* The second black prospective juror was excused because she had previously been employed by the Chicago Police Department, and because her former supervisor might be called as a witness at trial. *Id.* The court found this justification "specious." *Id.* "[P]olice officers are involved on both sides of this litigation . . . [and the

permeated the jury selection process . . . [because] both sides had twice used their challenges almost exclusively along racial lines — the second time in violation of the court's clear admonition . . . [Therefore, the] right to make peremptory challenges [was] lost [for the third attempt at selecting a jury]."<sup>173</sup> The court administered this sanction because both parties had "consistently ignored the court's orders to select a jury without considering race, and because it [was] the most effective means of ensuring an unbiased jury selection process."<sup>174</sup>

In *Wilson v. Cross*,<sup>175</sup> a white owner of a roller skating rink lost his section 1983<sup>176</sup> suit against a number of police officers.<sup>177</sup> In this case, the plaintiff had conducted a promotion called "soul night" in an attempt to attract a larger number of blacks to his rink.<sup>178</sup> He alleged that the officers conducted vehicle

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prospective juror] testified she never heard of the 'supervisor' . . . ." *Id.* The third black prospective juror was removed because she "lied" about having any prior trouble with the law." *Id.* The prospective juror indicated on her questionnaire that she had no previous arrest record. *Id.* During the voir dire she admitted that she had been arrested for disorderly conduct and fined \$25. *Id.* The court found this reason "pretextual [because the] plaintiffs had accepted several white jurors who had similarly been mistaken about answers in the questionnaire and who had likewise amended those answers under questioning by the court." *Id.* The court was "not troubled by the fact that the plaintiffs did permit one black prospective juror to survive the second selection process." *Id.*

Similarly, the defendants could not meet the burden required by the court.

All of their peremptory challenges were used against whites in both trials. However, they did permit some whites to survive their strikes — probably because it was impossible, given the composition of the second venire (35 whites, 13 blacks, 1 Hispanic), to strike all of the white people. We further find the attempted justifications for the defendants' use of their peremptories to be less than satisfactory.

*Id.* at 691-92.

173. *Id.* at 692.

174. *Id.* Though the *Maloney* court withdrew the right to peremptorily challenge, it did not discuss how the parties would be compensated for the removal of this important device. See *infra* notes 309-32 and accompanying text for an exploration of alternatives to the peremptory challenge. The *Maloney* court's purpose in removing the challenge was a means of punishment and not a broad step toward addressing the discriminatory jury selection problem.

175. 845 F.2d 163 (8th Cir. 1988).

176. See *supra* note 152 for the text of § 1983.

177. *Cross* was the second case heard involving the parties. In the first, *Wilson v. City of North Little Rock*, 801 F.2d 316 (8th Cir. 1986), the court affirmed a directed verdict for the defendant city and remanded for retrial the claims against the individual officers. Upon retrial, the individual defendants were found not liable. *Cross*, 845 F.2d at 164.

178. *Cross*, 845 F.2d at 164.

safety checks at a roadblock every time the promotion was held, resulting in both harassment and inconvenience to his potential black customers.<sup>179</sup> The issue on appeal was the defendant's use of peremptory challenges to exclude black venire persons.<sup>180</sup>

As in *Esposito*,<sup>181</sup> the court did not directly address the jury discrimination question because a white plaintiff was the complaining party.<sup>182</sup> Nevertheless, in dicta, the *Wilson* court indicated it had "strong doubts about whether *Batson* was intended to limit the use of peremptory strikes in civil cases . . . ."<sup>183</sup>

In direct contrast, the Eleventh Circuit, in *Fludd v. Dykes*,<sup>184</sup> held that *Batson*<sup>185</sup> does indeed extend to civil cases.<sup>186</sup> *Fludd* arose out of a police shooting.<sup>187</sup> The plaintiff, Fludd, sued Dykes, the county sheriff, and Tiller, the deputy sheriff, contending that the shooting violated his constitutional rights.<sup>188</sup> Fludd sought money damages under section 1983.<sup>189</sup>

Following the voir dire, the defendants peremptorily challenged the only two black prospective jurors, leaving an all-white jury.<sup>190</sup> The plaintiff, citing *Batson*, argued that the defendants were required to offer "neutral explanations" for their

179. *Id.*

180. *Id.* A secondary issue on appeal concerned the jury instruction on the elements of *Wilson*'s constitutional claim. *Id.* at 165.

181. See *supra* notes 145-49 and accompanying text.

182. *Wilson v. Cross*, 845 F.2d 163 (8th Cir. 1988).

183. *Id.* at 164-65. See also *Swapshire v. Baer*, 865 F.2d 948, 954 (8th Cir. 1989) (also expressing "strong doubts" as to the extension of *Batson* to civil cases). But see *Reynolds v. City of Little Rock*, 893 F.2d 1004 (8th Cir. 1990). In *Reynolds*, the plaintiff, the administrator of the decedent's estate, claimed that police officers used excessive force when they fatally shot a mentally disturbed black man waving a pocket knife at them. *Id.* at 1005. The court held that the city's attorney had to offer neutral explanations before peremptorily challenging the blacks on the venire because he represented the police officers in their official capacities. *Id.* at 1008-09. "If the police officers . . . had been separately represented [by private counsel], . . . a different question might be presented. We need not answer that now." *Id.* at 1009. See *Clark v. City of Bridgeport*, 645 F. Supp. 890 (D. Conn. 1986), *supra* notes 150-63 and accompanying text, for a discussion of another civil action where the city used its peremptory challenges against black venire members.

184. 863 F.2d 822 (11th Cir. 1989).

185. 476 U.S. 79 (1986).

186. *Fludd*, 863 F.2d at 823-24.

187. *Id.* at 824.

188. *Id.*

189. *Id.* See *supra* note 152 for the pertinent text of § 1983.

190. *Fludd*, 863 F.2d at 823.

peremptory strikes against the two potential black jurors.<sup>191</sup> The trial court overruled that objection, and the jury subsequently rendered a verdict in favor of both defendants.<sup>192</sup> Fludd appealed.<sup>193</sup>

The Eleventh Circuit began its opinion by reviewing the historical decisions concerning the equal protection clause and discriminatory jury selection practices.<sup>194</sup> It then examined the means by which an equal protection violation can be demonstrated when no apparent state action exists.<sup>195</sup> It considered the trial judge to be the discriminatory state actor "even when the decision to exclude blacks may have originated in another state entity, such as the legislature."<sup>196</sup> The court concluded that the "judge's decision — to proceed to trial, over [Fludd's objection], with a jury selected . . . on the basis of race — is [the functional equivalent of state action]."<sup>197</sup> Indeed, this court found that in such a situation "the judge becomes guilty of the sort of discriminatory conduct that the equal protection clause proscribes."<sup>198</sup>

Although the court affirmed the verdict in favor of Dykes,<sup>199</sup>

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191. *Id.* *Batson*, tried in a state court because the defendant was charged under the Kentucky penal law, was decided upon fourteenth amendment equal protection grounds. See *supra* notes 87-96 and accompanying text. *Fludd*, tried in federal district court as a federal question case pursuant to § 1983, applied the fifth amendment due process clause. *Fludd*, 863 F.2d at 824. The fifth amendment contains no semantic equivalent to the fourteenth amendment's equal protection clause. In reaching its holding, the court implied that the two clauses parallel each other in the protection they provide. *Id.* Indeed, it is well settled that the two clauses are equivalent. See *Johnson v. Robison*, 415 U.S. 361, 364 n.4 (1974).

Although the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustifiable as to be violative of due process. . . . Thus, if a classification would be invalid under the Equal Protection Clause of the Fourteenth Amendment, it is also inconsistent with the due process requirement of the Fifth Amendment.

*Id.*

192. *Fludd v. Dykes*, 863 F.2d 822, 823 (11th Cir. 1989).

193. *Id.*

194. *Id.* at 824-28.

195. *Id.* at 828. The defendants argued "that the equal protection clause is inapplicable to a civil suit," *id.*, because no state prosecutor is involved. *Id.* The court disagreed with the defendants' contention. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* at 828-29.

199. *Id.* at 824. At the conclusion of the evidence, the trial court directed a verdict

it remanded the matter concerning Tiller for a determination of whether the plaintiff had established a prima facie case of jury discrimination.<sup>200</sup>

The most definitive decision to date examining *Batson*'s extension to civil litigation is the case of *Edmonson v. Leesville Concrete Co.*<sup>201</sup> In *Edmonson*, the Fifth Circuit sitting en banc succinctly phrased the issue as:

[W]hether a private litigant in a federal civil case who challenges a venire member peremptorily can be made to give reasons for his action. Specifically, we must determine whether he can be required to do so when his opposing party is a black person and the venireman stricken is black, so as to rebut the inference that he exercised the strike because of the would-be juror's ethnic group.<sup>202</sup>

In *Edmonson*, a black man filed a negligence claim against Leesville in a federal district court.<sup>203</sup> The plaintiff used all three of his peremptory challenges to remove white venire persons.<sup>204</sup> Leesville used its challenges to strike two white and one black venire persons.<sup>205</sup> The plaintiff, citing *Batson*, requested that the trial court require Leesville to articulate a "neutral explanation" as to why it had exercised its challenges.<sup>206</sup> The trial court denied the request on the ground that *Batson* was not applicable to civil actions. It then impaneled a jury consisting of eleven whites and one black.<sup>207</sup> The jury returned a verdict in favor of the plaintiff.<sup>208</sup> However, the damage award was reduced because the jury found Edmonson eighty percent comparatively

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in favor of Dykes concluding that Fludd had failed to establish any wrongdoing on Dykes' part. On appeal, the Eleventh Circuit affirmed. *Id.*

200. *Id.* at 829.

201. 895 F.2d 218 (5th Cir.) (en banc), cert. granted, 111 S. Ct. 41 (1990). See also *Edmonson v. Leesville Concrete Co.*, 860 F.2d 1308 (5th Cir. 1988) (*Batson* is applicable to civil litigation), for the earlier Fifth Circuit decision in this case before the rehearing en banc.

202. *Edmonson*, 895 F.2d at 218-19.

203. *Edmonson*, 860 F.2d at 1309-10.

204. *Id.* at 1310.

205. *Id.*

206. *Id.* See *supra* notes 84-86 and accompanying text for a discussion of the "neutral explanation" standard.

207. *Edmonson*, 860 F.2d at 1310.

208. *Id.*



negligent.<sup>209</sup> Edmonson appealed to the Fifth Circuit, seeking a new trial, alleging that Leesville had utilized its strikes in a discriminatory fashion.<sup>210</sup>

On rehearing, the Fifth Circuit affirmed the trial court's ruling, holding that *Batson* does not apply to civil suits.<sup>211</sup> The court reached this conclusion based upon two reasons:

[T]he mechanical one, that state action is not present in a case as this; and the logical one, that striking a venireman in a civil case because you fear he may tend to favor your opponent over you neither demeans him nor calls in question the fairness of the civil justice system.<sup>212</sup>

In its examination of the state action question, the Fifth Circuit applied the two-step test articulated by the Supreme Court in *Lugar v. Edmondson Oil Co.*<sup>213</sup> The court conceded that the first step of *Lugar* had been met. Specifically, "the claimed deprivation [the removal of black prospective jurors] resulted from the exercise of a right or privilege having its source in governmental authority [the peremptory challenge statute]."<sup>214</sup> However, the court did not find "the presence of some figure who can fairly be characterized as a state actor."<sup>215</sup>

The court quickly rejected the notion that the trial judge acted on behalf of the state.<sup>216</sup>

The merely ministerial function exercised by the judge in simply permitting the venire members cut by counsel to depart is an action so minimal in nature that one of less significance can scarcely be imagined. No exercise of judicial discretion is involved, rather a mere standing aside; so that the fault — if it is fault — lies

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209. *Id.* The total damage award was \$90,000, but the plaintiff only recovered \$18,000 because of his negligence. *Id.*

210. *Id.*

211. *Edmonson*, 895 F.2d at 219.

212. *Id.*

213. *Id.* at 221. See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), discussed *infra* notes 262-84 and accompanying text.

214. *Edmonson*, 895 F.2d at 221.

215. *Id.* In *Batson*, discussed *supra* notes 61-106 and accompanying text, state action was obviously present. "[T]here the entire proceeding was commenced and carried through by the prosecuting attorney, the very embodiment of the state's power, acting in the direct interest of its most fundamental function, maintaining law and order." *Edmonson*, 895 F.2d at 221.

216. *Edmonson*, 895 F.2d at 221.

with the system which permits such challenges, not with the judge's mere ministerial compliance with what the rule requires.<sup>217</sup>

The court believed that if the judge was deemed a state actor by merely excusing the stricken venire persons, "it follows that every aspect of every civil trial [is state action] — a quantum procedural leap that we leave for the Supreme Court to make, should it wish to do so."<sup>218</sup>

Similarly, the court made short work of the notion that privately retained counsel may be characterized as state actors.<sup>219</sup> It likened the private attorney's relationship with the state to that of the public defender — who was previously declared not to be a state actor by the Supreme Court.<sup>220</sup> "[The private attorney] is licensed by the State; not, however, for its benefit but in the hope of insuring a minimum degree of competence to his clients. Like the public defender, it is *their* interests, their partisan interests, which he serves [and not the state's concerns]."<sup>221</sup>

The court turned next to the logical reason for affirming the trial court's decision not to extend *Batson* to civil actions. The majority found the unrestricted peremptory challenge to be "of greater significance in federal court [civil] proceedings than in [state court civil proceedings], for there the attorney's role in jury selection is [more limited]."<sup>222</sup> It then embarked upon an

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217. *Id.* at 221-22 (footnotes omitted).

218. *Id.* at 222. Indeed, Judge Gee, writing for the *Edmonson* majority, distinguished between the state's interest in civil litigation and criminal litigation. "[I]n the former case [the state] simply furnishes a level playing field for dispute resolution in the name of civic peace, in the latter it is the instigator and actor, with powerful interests of its own at stake." *Id.*

219. *Id.*

220. *Id.* See *Polk County v. Dodson*, 454 U.S. 312 (1981), *infra* note 272 and accompanying text.

221. *Edmonson*, 895 F.2d at 222 (emphasis in original).

222. *Id.* at 223. Indeed, in most federal court trials the voir dire is conducted entirely by the judge. See *infra* notes 315-17 and accompanying text.

As was seen in *Fludd v. Dykes*, 863 F.2d 822 (11th Cir. 1989), discussed *supra* notes 184-200 and accompanying text, the court had to draw a parallel between the fourteenth amendment's equal protection clause, applicable to the states, and the fifth amendment's due process clause, applicable to the federal government, before a theoretical extension of *Batson* could be made to a federal court proceeding. The first Fifth Circuit panel in *Edmonson* accomplished this through analogy of the two clauses. "[T]he due process clause implies a [fourteenth amendment-]like guarantee against the denial of equal protection of the laws of the federal government." *Edmonson*, 860 F.2d at 1310. See also

elaborate discussion of the peremptory challenge in criminal, as opposed to civil, matters. It concluded that the state's interest in criminal matters was vastly different from its concern in the civil realm, where the "state has no purpose at all . . . beyond preempting the use of private force to settle disputes . . ."<sup>223</sup> The court continued that in a civil trial the striking of a potential juror for racial reasons may even be appropriate in certain circumstances and is, therefore, not necessarily demeaning to him.<sup>224</sup>

The *Edmonson* majority distinguished the purpose of the state prosecutor and criminal jury from that of the civil advocate and jury. According to the court, the criminal jury "is a central feature of the . . . system, . . . hold[ing] not only fact-finding powers but . . . [also the] power to pardon."<sup>225</sup> The prosecutor's objective must be to further justice.<sup>226</sup> On the other hand, the civil jury functions only in a fact-finding capacity and is primarily limited to economic issues of far less consequence than the life and liberty at stake in a criminal trial.<sup>227</sup> The civil advocate,

*Bolling v. Sharpe*, 347 U.S. 497 (1954); *United States v. Hawes*, 529 F.2d 472 (5th Cir. 1976).

223. *Edmonson*, 895 F.2d at 223.

224. *Id.* at 224. The majority believed that the removal of black venire persons in criminal trials was repugnant to the Constitution. *Id.* "[U]nequal treatment of citizens on the ground of race . . . is insulting — even the suggestion that one is unfit to discharge a civic duty for that reason." *Id.* However, in civil matters it was not shameful nor undignified to be challenged because of race. *Id.* The court supported its logic with colorful hypotheticals:

[F]or obvious reasons counsel representing a defendant airline in a damage suit might well peremptorily challenge a black airline pilot who was himself on strike for higher wages against another airline. Such a challenge, based upon an assumed animosity toward his client, clearly raises no equal protection problems, even though the venireman stricken is black. . . . [Also,] a well-known member of the Ku Klux Klan in an action for, say, breach of contract by a white plaintiff might strike any black veniremen whom he had been unable to convince the judge to excuse for cause, not for any ethnic inferiority, but rather on the prudential ground of probable hostility. . . . Such an action does not demean the stricken subject; it merely recognizes a probable fact of life.

*Id.* This differentiation between civil and criminal proceedings was essentially a matter of public policy. "[W]e think [it is] sound policy that requires the state to conform to stricter standards and appearances in dealing with its citizens than are demanded of those citizens in their dealings with each other." *Id.* at 225.

225. *Id.* at 225.

226. *Id.*

227. *Id.* See *infra* notes 232-48 and accompanying text for a further discussion of the differences between the criminal and civil trial systems.

unlike the prosecutor, is involved in "a fight [and] [i]t is [his] first imperative . . . to see that it is his side that wins."<sup>228</sup>

The majority concluded with a jab at the *Batson* decision itself, finding that a double standard may be employed when a white venire person was challenged.<sup>229</sup> "It is not for us to quarrel with . . . [the] *Batson* [Court's] reconfiguration of the peremptory, but we decline to extend its strictures on this ancient right into the civil area, where the considerations . . . , if present at all, [are] far weaker than in the criminal field."<sup>230</sup>

Although most of the federal circuits have still not been heard from on this issue, a conflict nonetheless exists. This lack of uniformity can be attributed to the Supreme Court's failure to offer guidance, not only concerning the extension of *Batson*,

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228. *Edmonson*, 895 F.2d at 226. The court was quick to point out that zealotness must be balanced by "fair and ethical conduct." *Id.*

229. *Id.* The court's disfavor of *Batson* stems from the reality that a black defendant challenging a white venire person may be able to strike the prospective juror without much reaction from the judge. To understand this apparent "discrimination in reverse," two concepts must be developed. First, the cognizable group must be defined. *See supra* note 79. Second, and incorporating the first, the judicially created concept of a "multi-tiered" equal protection analysis must be examined. Historically, and for reasons of policy, significant deference is given to social welfare and economic legislation provided there exists some rational relation between the means and the end. *See, e.g., New York Transit Auth. v. Beazer*, 440 U.S. 568 (1979).

It is conceivable that this "rational basis" approach may apply when the affected party (the white venire person) does not have the distinguishing and immutable characteristics of a "suspect class," or more precisely in this instance — the cognizable group. The suspect class/cognizable group requirement signals to the Court that a higher standard of equal protection analysis must be applied. This is called "strict scrutiny." *See L. TRIBE, AMERICAN CONSTITUTIONAL LAW* § 16-6 (1978).

Accordingly, therefore, this court-made differentiation, when applied to the peremptory challenge process, holds strikes by a white litigant under strict scrutiny, with a presumption of discriminatory intent. Conversely, the black litigant's challenges may escape this "grilling," because it is problematical whether the deprived party in this case, the white venire person, will be deemed to be a member of a suspect class/cognizable group. Such a distinction, however, may prove to be splitting hairs. Indeed, at least one federal court treated the discriminatory antics of both the white and black litigants in the same fashion. *See Maloney v. Washington*, 690 F. Supp. 687 (N.D. Ill. 1988), discussed *supra* notes 165-74 and accompanying text.

To further complicate matters, the Supreme Court has enlarged its own doctrine to include "heightened scrutiny." This middle-level analysis is predominantly applied to gender-based discrimination. Though beyond the scope of this Comment, as a matter of interest, the reader is referred to G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, *CONSTITUTIONAL LAW* 610-52 (1986). *See also Michael M. v. Sonoma County Superior Court*, 450 U.S. 464 (1981); *Craig v. Boren*, 429 U.S. 190 (1976).

230. *Edmonson*, 895 F.2d at 226.

but to the very foundations of jury selection in civil trials as well.

### III. Analysis

It was hardly prophetic to reason that the question of the extension of *Batson v. Kentucky* to civil litigation would drop on the collective laps of the Justices of the Supreme Court. As Judge Gee of the Fifth Circuit articulated, "it is unlikely that the Court will leave such an issue as this dangling."<sup>231</sup> While there is no doubt concerning the need for major reform in civil trial jury selection, this Comment proposes that *Batson* is not the solution. Why *Batson* fails in civil litigation and what can be done to amend this system is the subject of the remainder of this Comment.

#### A. *The Criminal Defendant Versus the Civil Litigant: Has the Criminal Defendant More at Stake?*

The right to use the peremptory challenge is not guaranteed by the Constitution,<sup>232</sup> but is granted by statute in both criminal and civil litigation.<sup>233</sup> It has been argued that the peremptory challenge is not essential in providing for a fair trial by an impartial jury.<sup>234</sup> Some scholars have even proposed that the peremptory challenge be eradicated entirely from the American justice system.<sup>235</sup>

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231. *Edmonson v. Leesville Concrete Co.*, 860 F.2d 1308, 1315 (5th Cir. 1988) (Gee, J., dissenting). Indeed, the United States Supreme Court recently granted certiorari to the *Edmonson* case. *Edmonson v. Leesville Concrete Co.*, 895 F.2d 218 (5th Cir.) (en banc), cert. granted, 111 S. Ct. 41 (1990).

232. "There is nothing in the Constitution of the United States which requires the Congress [or the states] to grant peremptory challenges." *Stilson v. United States*, 250 U.S. 583, 586 (1919).

233. See 28 U.S.C. § 1870 (1982) for civil trials, and FED. R. CRIM. P. 24(b) for criminal trials.

234. See *Frazier v. United States*, 335 U.S. 497, 505 n.11 (1948).

235. See *Batson v. Kentucky*, 476 U.S. 79, 91 (1986) (Marshall, J., concurring), discussed *supra* notes 98-106 and accompanying text; Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153 (1989).

At least one state has introduced a bill calling for the elimination of the peremptory challenge in all forms of litigation. In 1974, the Massachusetts House of Representatives examined, but did not pass, such legislation at the urging of the Chief Justice of the Suffolk County Superior Court. The bill had the support of the state bar on the condi-

Such sweeping assertions cannot be dismissed lightly. However, in criminal matters in which the stakes are greater, the peremptory challenge serves to "eliminate extremes of partiality on both sides, [and to] assure the parties that the jurors . . . will decide on the basis of evidence before them, and not otherwise."<sup>236</sup>

To accomplish this purpose, the peremptory challenge fulfills functions that the challenge for cause cannot.<sup>237</sup> First and foremost, the peremptory challenge sends a message to the community that the jury system is fair and proper because it is the litigant herself who chooses the jury. Through the exercise of peremptory challenges, she removes those prospective jurors she considers to be incapable of candor.<sup>238</sup> Secondly, the didactic nature of the peremptory challenge permits the subtle dismissal of potential jurors without stereotypical references to race, even though such "type-casting" may be justified in a particular case.<sup>239</sup>

If the use of the peremptory challenge is akin to "playing with fire,"<sup>240</sup> the arena in which it is exercised must be worth the risk. A criminal proceeding, unlike its civil counterpart, provides just such a setting. The issues at stake in a criminal trial far outweigh those in a civil action, even though civil actions often involve important property rights.<sup>241</sup> The historical importance

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tion that lawyers would be allowed to conduct the voir dire questioning, which at the time was done by judges. J. VAN DYKE, *JURY SELECTION PROCEDURES* 169 (1977).

236. *Swain v. Alabama*, 380 U.S. 202, 219 (1965).

237. See *supra* note 1 for a definition of the challenge for cause. See also Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 *STAN. L. REV.* 545, 550 (1975).

238. Babcock, *supra* note 237, at 552. The peremptory challenge permits the dismissal of those prospective jurors feared by the litigant, leaving the litigant and the community with "a good opinion of the jury." *Id.*

239. *Id.* at 553. Professor Babcock warned the following colloquy might occur if peremptory challenges were not part of the justice system:

Your honor, my client is a 20-year-old black "dude" who has never held a job and is wearing \$100 shoes. I move to strike for cause all black men over 45 who hold jobs as porters, janitors, or grade-level fives or lower in the government on the ground that they will be biased against my client.

*Id.* See also J. VAN DYKE, *supra* note 235, at 146.

240. Even Blackstone recognized the possible danger of the challenge but added that it preserves the appearance and substance of impartiality by guaranteeing that the defendant will not be tried by anyone whom he intuitively dislikes. 4 *W. BLACKSTONE, COMMENTARIES* 346 (1st Eng. ed. 1769).

241. "[V]astly different things are at stake in criminal trials . . . where liberty and

attached to the criminal trial system in this country supports this assertion.

First, criminal verdicts must be unanimous, while many jurisdictions permit divided jury verdicts in civil cases.<sup>242</sup> Second, the sixth amendment of the Constitution guarantees the defendant the right to counsel.<sup>243</sup> No such provision is contained in the seventh amendment, the civil action counterpart to the sixth amendment.<sup>244</sup> Third, while a jury trial is required in most criminal cases,<sup>245</sup> it must often be requested by civil litigants in the pleadings.<sup>246</sup>

The judicial system's greater protection of criminal defendants is not startling. After all, it is the criminal defendant who is dragged into court "unwillingly" to face potential incarceration or loss of life.<sup>247</sup> The civil defendant, although arguably in a position similar to that of the criminal defendant, does not risk losing life or liberty.

For these reasons, *Batson*<sup>248</sup> provides appropriate standards under which the use of peremptory challenges in criminal matters may be restricted. The danger of potential misuse of the

even life are at stake." *Edmonson v. Leesville Concrete Co.*, 895 F.2d 218, 225 (5th Cir. (en banc), cert. granted, 111 S. Ct. 41 (1990)). See generally D. DOBBS, REMEDIES §§ 5.1-5.16 (1973) for a discussion of particular property rights and specialized remedies available to civil litigants concerning these rights.

242. See, e.g., *Holley v. J & S Sweeping Co.*, 143 Cal. App. 3d 588, 192 Cal. Rptr. 74 (1983), discussed *supra* notes 112-16 and accompanying text. The California Constitution provides that "[t]rial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." CAL. CONST. art. I, § 16.

243. "[T]he accused . . . [shall] have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. See also *Gideon v. Wainwright*, 372 U.S. 335 (1963).

244. The full text of the seventh amendment states:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII.

245. The Supreme Court has made a distinction between so-called "serious crimes" and "petty offenses," where the latter may be tried without a jury. See *Baldwin v. New York*, 399 U.S. 66, 70 (1970); see also *Duncan v. Louisiana*, 391 U.S. 145, 158 (1968).

246. See FED. R. CIV. P. 38(b) — Jury Trial of Right. "Any party may demand a trial by jury of any issue . . . by serving upon the other parties a demand therefor in writing . . ." See also FED. R. CIV. P. 39(b) — Trial by Jury or by the Court. "[T]he court in its discretion . . . may order a trial by a jury . . ."

247. *Edmonson v. Leesville Concrete Co.*, 860 F.2d 1308, 1313 (5th Cir. 1988).

248. See *supra* notes 61-106 and accompanying text.

peremptory challenge must be weighed against the criminal defendant's constitutional right to an impartial jury. As such, the use of this powerful tool is appropriate in criminal actions. Under the watchful eye of *Batson*, the peremptory challenge can be both effective and efficient. But what if we venture to apply *Batson* to civil proceedings? Are there constitutional obstacles to such an extension? Is there another solution to the discriminatory jury selection problem in civil litigation?

### B. *What Should Become of the Civil Litigant?*

While few would dispute that the jury selection system in civil trials is in need of amelioration, there is no consensus of opinion as to the means for addressing this problem.<sup>249</sup> Certainly the most obvious approach would be to extend the criteria developed in *Batson v. Kentucky*<sup>250</sup> to civil litigation.<sup>251</sup> However, this is comparable to forcing a square peg into a round hole. Stated simply, it does not work. Furthermore, the very nature of the peremptory challenge is volatile, and in cases in which only property rights are imperiled,<sup>252</sup> the opportunity that the challenge provides for discriminatory jury strikes makes it an unnecessary risk to the right of an impartial jury trial.

#### 1. *Why Batson Would Not Work in Civil Litigation*

The analysis as to why *Batson* cannot be extended is three tiered. First, no state action exists in a civil trial involving only private parties, even though the court has arguably sanctioned discriminatory peremptory strikes by one or more of the liti-

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249. See, e.g., Pizzi, *Batson v. Kentucky: Curing the Disease but Killing the Patient*, 1987 SUP. CT. REV. 97, 119 (arguing that *Batson* can be applied to the government's use of peremptory strikes in some civil actions); Note, *The Civil Implications of Batson v. Kentucky and State v. Gilmore: A Further Look at Limitations on the Peremptory Challenge*, 40 RUTGERS L. REV. 891 (1988) (arguing that *Batson* is applicable to all civil actions). But see Fleming v. Moore, 479 U.S. 890 (1986) (denying certiorari to a petitioner seeking to raise the issue of the extension of *Batson* to civil actions — discussed in 55 U.S.L.W. 3100 (1986)); Comment, *Vitiation of Peremptory Challenge in Civil Actions*: Clark v. City of Bridgeport, 61 ST. JOHN'S L. REV. 155 (1986) (arguing that *Batson* should not be extended and that the stricter *Swain* criteria should be adhered to).

250. 476 U.S. 79 (1986). See *supra* notes 61-106 and accompanying text.

251. See, e.g., Fludd v. Dykes, 863 F.2d 822 (11th Cir. 1989), discussed *supra* notes 184-200 and accompanying text.

252. See *supra* notes 232-48 and accompanying text.



gants. Second, *Batson*, a criminal case, was not premised upon the seventh amendment. Assuming, arguendo, that the sixth and seventh amendments are parallel in all respects, the extension of *Batson* still cannot be justified because the seventh amendment is not applicable to the states through the fourteenth amendment. Lastly, the *Batson* Court was silent on its application to civil matters.

a. *The State Action Dilemma*

The equal protection guarantee of the fourteenth amendment does not prohibit discrimination between private parties. Rather, it forbids the *state* from "deny[ing] to any person within its jurisdiction the equal protection of the laws."<sup>253</sup> Frequently, however, it is difficult to discern a bright line separation between private and state action.<sup>254</sup> To apply *Batson* to civil matters, though, this distinction must be made in order to demonstrate a violation of equal protection.<sup>255</sup>

The Supreme Court has endeavored to distinguish the two. The Court has said that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the state in private conduct be attributed its true significance."<sup>256</sup> Arguably, therefore, state action is present when conduct deprives an individual of a federal right and that conduct is attributed to the state.<sup>257</sup>

In *Shelley v. Kraemer*,<sup>258</sup> the Court held that racially restrictive covenants between private property owners are not ju-

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253. U.S. CONST. amend. XIV, § 1.

254. *Edmonson v. Leesville Concrete Co.*, 860 F.2d 1308, 1311 (5th Cir. 1988).

255. Ironically, *Batson* was decided on equal protection grounds though *Batson*'s counsel never raised the issue on certiorari. See *Batson v. Kentucky*, 476 U.S. 79, 109 (1986) (Stevens, J., concurring). Instead, *Batson* argued that the prosecution had used its peremptory challenges to exclude blacks in violation of his sixth and fourteenth amendment rights to an impartial jury drawn from a cross-section of the community. *Id.* at 84 n.4.

Perhaps foreshadowing its decision in *Lockhart v. McCree*, 476 U.S. 162 (1986), the Court declined to discuss *Batson*'s sixth amendment claims. *Batson*, 476 U.S. at 84 n.4. In *Lockhart*, the Court held that in a capital case the removal of jurors strongly opposed to the death penalty was not a violation of the defendant's sixth amendment rights. *Lockhart*, 476 U.S. at 165.

256. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 723 (1961).

257. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

258. 334 U.S. 1 (1948).

dicially enforceable because these covenants violate the equal protection clause.<sup>259</sup> Upholding such agreements by "judicial officers in their capacities is to be regarded as action of the State."<sup>260</sup> Arguably, according to the *Shelley* analysis, the support of the discriminatory use of peremptory challenges by the trial judge may also be deemed state action. However, the legacy of *Shelley* has taught differently. The decision has not been expansively read.<sup>261</sup>

The leading contemporary case attributing the actions of private persons to the state is *Lugar v. Edmondson Oil Co.*<sup>262</sup> In *Lugar*, the defendant creditor, Edmondson Oil, invoked a state attachment statute.<sup>263</sup> Lugar successfully avoided the attachment because Edmondson Oil had not complied with the statutory prerequisites.<sup>264</sup> Lugar then filed suit under section 1983, alleging that Edmondson Oil and the state had acted jointly to deprive him of his property without due process of law.<sup>265</sup>

The Court formulated a two-tiered inquiry into whether state action is present when a private person(s) invokes a state

259. *Id.*

260. *Id.* at 14.

261. The *Shelley* decision did not render "every instance of judicial cognition of private discrimination . . . state action prohibited by the fourteenth (or fifth) amendment." Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 12 (1959); see also McCoy, *Current State Action Theories, the Jackson Nexus Requirement, and Employee Discharges by Semi-Public and State-Aided Institutions* 31 VAND. L. REV. 785, 792-803 (1978). Professor McCoy wrote:

[T]he *Shelley* doctrine is applicable only when the private right is asserted as part of the cause of action and not when it is asserted by way of defense; that is applicable only when the private contractual right impacts on a third party . . . *Shelley* is really a case concerning the assumption of municipal zoning powers by private parties rather than one of judicial enforcement of private rights.

*Id.* at 793 (footnotes omitted). See also Schneider, *State Action — Making Sense out of Chaos — An Historical Approach*, 37 U. FLA. L. REV. 737, 754-55 (1985). Professor Schneider opined:

[T]he Court . . . has not taken *Shelley* to its theoretical limits. By the 1960's, the Court no longer cited *Shelley* in cases to which it was relevant, at least with regard to its holding that judicial enforcement of private action transformed the latter into state action. Other indicia of state involvement would be necessary to justify a finding of state action.

*Id.* at 754-55 (footnotes omitted).

262. 457 U.S. 922 (1982).

263. *Id.* at 924.

264. *Id.* at 940-41.

265. *Id.* at 940-42.

sanctioned procedure. "[T]he first question is whether the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority."<sup>266</sup> The second inquiry is whether under the facts of the case, the private person(s) "may be appropriately characterized as 'state actors.'"<sup>267</sup>

If this test is applied to the peremptory challenge procedure, the answer to the first question is probably yes.<sup>268</sup> The peremptory challenge, while not guaranteed by the Constitution,<sup>269</sup> is granted by statute.<sup>270</sup> But the answer to the second question is not as clear. Certainly, if a state attorney is involved, no question exists as to the state actor.<sup>271</sup> However, public defenders are not state actors even though they are employed by the state.<sup>272</sup> Thus, privately retained attorneys, and certainly private litigants, cannot be characterized as state actors either.<sup>273</sup>

The issue that remains, then, is whether, in the context of the peremptory challenge procedure, the trial judge can be characterized as a state actor. If so, both parts of the *Lugar* test are satisfied. If she is not jointly participating with the state, no state action is present and consequently no violation of equal protection can be found.<sup>274</sup> The issue becomes whether her role

266. *Id.* at 939.

267. *Id.* Applying this formulation, the Court held that *Lugar* had presented a valid § 1983 claim insofar as he challenged the constitutionality of the state attachment statute. *Id.* at 942. *Edmondson Oil* was characterized as a state actor on the basis of its participation in the deprivation process. *Id.* at 940-42. Thus, *Lugar* was deprived of his property through state action. *Id.*

268. See *Edmonson v. Leesville Concrete Co.*, 860 F.2d 1308, 1315 (5th Cir. 1988) (Gee, J., dissenting) ("[I]t would be difficult to maintain that the strikes exercised by counsel . . . [do] not constitute the exercise of a right or privilege having its source in state authority.") (citation omitted).

269. See *supra* note 232 and accompanying text.

270. See, e.g., CONN. GEN. STAT. ANN. § 51-241 (West 1985); N.Y. CIV. PRAC. L. & R. § 4109 (McKinney 1989); *supra* note 233 and accompanying text.

271. See *Clark v. City of Bridgeport*, 645 F. Supp. 890 (D. Conn. 1986), discussed *supra* notes 150-63 and accompanying text.

272. See *Polk County v. Dodson*, 454 U.S. 312 (1981), *supra* note 220 and accompanying text.

273. See *Edmonson v. Leesville Concrete Co.*, 895 F.2d 218, 222 (5th Cir.) (en banc), cert. granted, 111 S. Ct. 41 (1990).

274. Certainly, the judge is a state actor when performing within the "scope" of her judicial responsibilities. For example, ruling on the admissibility of evidence and instructing the jury on the law are considered within the scope. A great degree of intent and thought must be utilized by the judge in these jurisprudential matters. But is not the judge's role in the peremptory challenge process one of inaction thereby raising

is passive in the challenging process.

A trial judge cannot be characterized as a state actor in the context of the peremptory challenge procedure because her actions are "minimal."<sup>275</sup> She performs a mere ministerial function by permitting the venire members rejected by counsel to depart from the courtroom.<sup>276</sup> No judgment or discretion is required.<sup>277</sup>

In *Blum v. Yaretsky*,<sup>278</sup> the Court pronounced:

[A] state normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement . . . that the choice must . . . be deemed that of the state [and that] mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the state responsible for those initiatives under the . . . fourteenth amendment.<sup>279</sup>

In *Lugar*,<sup>280</sup> such coercive power was evident. An attachment proceeding is a state sanctioned means of acquiring the property of another to satisfy a debt or to pressure the debtor into finding alternate means to meet his creditor's demands.<sup>281</sup> In the exercise of peremptory challenges by private litigants, coercive authority is not present. The challenge is utilized entirely by the party, without any judicial assistance or encouragement whatsoever.<sup>282</sup> Moreover, the *Lugar* Court limited its holding to the "particular context of prejudgment attachment."<sup>283</sup> There-

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doubts as to whether the jurist is performing at all, let alone performing within the scope of her judicial responsibilities? See generally *Pierson v. Ray*, 386 U.S. 547 (1967) (discussing absolute immunity from suit granted to state court judges when acting within the scope of judicial responsibilities).

275. *Edmonson*, 895 F.2d at 221.

276. *Id.* See also Goldwasser, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 HARV. L. REV. 808, 819 (1989). After all, the nature of the peremptory challenge allows the litigant to remove a potential juror on a mere whim, without any judicial input. See *supra* note 1 for a discussion of how the peremptory challenge is utilized.

277. *Edmonson*, 895 F.2d at 221-22. See *supra* note 274.

278. 457 U.S. 991 (1982).

279. *Id.* at 1001. This language was quoted in *Edmonson*, 895 F.2d at 221-22.

280. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982).

281. See BLACK'S LAW DICTIONARY 126 (6th ed. 1990) (the writ of attachment, strictly governed by state statute, is utilized to secure the creditor's claim in the event of a judgment against the debtor).

282. See Goldwasser, *supra* note 276, at 817 n.52.

283. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 n.21 (1982).

fore, while in *Batson* it was quite obvious that the state actor was the prosecutor, in a civil trial context no action can be fairly attributed to the state.<sup>284</sup>

The last state action theory worthy of mention is the "public function" doctrine.<sup>285</sup> Applying this doctrine, courts impose constitutional restrictions on private parties performing state functions, thereby preventing the state from avoiding its constitutional responsibilities.<sup>286</sup> Under this theory, the appropriate method of determining whether state action is present is to analyze the totality of the circumstances. If the peremptory challenge process is a state function assigned to a private individual, then the litigant who exercises it is a state actor.<sup>287</sup>

This approach, however, is too simplistic. The question is not whether the peremptory challenge is a state function, but whether the state's function is to fulfill its constitutional duty to provide an impartial jury. Obviously, the answer to this question is yes. The peremptory challenge is often the means of performing that function.<sup>288</sup> The litigant operates within the constitutional bounds administered by the state. In this forum, she may challenge prospective jurors whom she considers biased, or she may accept the impaneled jury, declining to challenge. Whatever her choice, the state has not delegated any function to her, but rather has permitted the litigant to achieve that which must be secured by the state: the right to an impartial jury.<sup>289</sup>

Thus, applying *Batson* to civil actions is extremely troublesome. It is not an appropriate standard in civil matters. The re-

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284. *Id.* at 937. Unless the private party can be shown to be a state actor, no degree of state involvement will result in the finding of state action. *Id.*

285. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 18-5 (1978).

286. See Note, *Discrimination by the Defense: Peremptory Challenges After Batson v. Kentucky*, 88 COLUM. L. REV. 355, 360 (1988); *Nixon v. Condon*, 286 U.S. 73 (1932) (a Texas political party rule that permitted only whites to vote in a state primary was declared unconstitutional state action even though an actual state law with the same objective had been invalidated by the Court some years earlier).

287. See Note, *The Civil Implications of Batson v. Kentucky and State v. Gilmore*, *supra* note 249, at 951.

288. See *supra* notes 236-39 and accompanying text.

289. In fact, the *Edmonson* court examined the public function theory from a different angle, looking at the attorney himself rather than the peremptory challenge device. The court could not conceive of any public function served by privately retained counsel in a civil suit. *Edmonson v. Leesville Concrete Co.*, 895 F.2d 218, 222 (5th Cir.) (en banc), *cert. granted*, 111 S. Ct. 41 (1990).

quirement of state action necessary for a violation of equal protection under the fourteenth amendment, upon which *Batson* was founded, cannot be satisfied. State action is not, however, the only troublesome consideration in extending *Batson* to civil litigation.

b. *The Seventh Amendment Hitch*

The *Batson* decision was not based upon the sixth<sup>290</sup> or the seventh amendment; it was based upon fourteenth amendment grounds.<sup>291</sup> Before *Batson*, many courts relied upon sixth amendment and state constitutional grounds to require that a jury in a criminal trial reflect a cross-section of the community.<sup>292</sup> A clever alternative to the harsh *Swain* standard,<sup>293</sup> this subtle circumventing of *Swain* was permitted for two reasons: first, the sixth amendment applies to the states through the fourteenth amendment;<sup>294</sup> and second, state constitutional guarantees may exceed those of the Federal Constitution.<sup>295</sup> However, as was stated previously, the seventh amendment has not been applied to the states by the fourteenth amendment.<sup>296</sup>

290. See *supra* note 89 and accompanying text.

291. See *supra* notes 87-96 and accompanying text.

292. See *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978), discussed *supra* notes 44-60 and accompanying text; *McCray v. Abrams*, 576 F. Supp. 1244 (E.D.N.Y. 1983), *aff'd*, 750 F.2d 1113 (2d Cir. 1984), discussed *supra* notes 61 & 137 and accompanying text.

293. See *supra* notes 32-43 and accompanying text.

294. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Duncan v. Louisiana*, 391 U.S. 145 (1968).

295. See *supra* note 89.

296. There is much case law that supports this. In *Walker v. Sauvinet*, 92 U.S. 90, 92 (1875), the Court stated: "A trial by jury in suits at common law pending in the State courts is not . . . a privilege . . . which the States are forbidden by the Fourteenth Amendment to abridge."

Almost a half century later, the Court in *Minnesota & St. Louis R.R. v. Bombolis*, 241 U.S. 211 (1916) asserted:

[T]he Seventh [amendment is] not concerned with state action and deal[s] only with Federal action, . . . [a]nd . . . [it] applies only in proceedings in courts of the United States and does not in any manner whatever govern or regulate trials by jury in state courts or the standards which must be applied concerning the same. *Id.* at 216.

More recently, the Fifth Circuit reiterated the historical precedent in *Woods v. Holy Cross Hosp.*, 591 F.2d 1164 (5th Cir. 1979). "While state laws are subjected to federal equal protection . . . requirements of the fourteenth amendment, . . . the seventh amendment right to jury trial does not apply in state court." *Id.* at 1171 n.12.

The seventh amendment guarantees to civil litigants the same right that the sixth amendment grants to criminal defendants — the right to an impartial jury trial.<sup>297</sup> However, *Batson* requires fourteenth amendment state action, and because the civil litigant is protected by the “incompatible” seventh,<sup>298</sup> it is conceivable that in a state civil trial, *Batson* would not apply.<sup>299</sup>

c. *The Extension of Batson to Civil Litigation: Is the Silence Deafening?*

“This case requires us to reexamine . . . the evidentiary burden placed on a *criminal* defendant . . .”<sup>300</sup> With these words, Justice Powell introduced the *Batson* majority opinion. The *Batson* Court held only that “the state’s privilege to strike individual [prospective] jurors through peremptory challenges, is subject to . . . the Equal Protection Clause.”<sup>301</sup> The Court reserved comment on whether these restrictions also apply to the defense.<sup>302</sup> No mention of its application to civil litigation was

297. See *supra* note 18.

298. Although *Batson* was a criminal case, it was not based upon the sixth amendment; rather, it was decided upon the fourteenth amendment, see *supra* notes 87-96 and accompanying text. However, the fourteenth amendment incorporates the sixth amendment, see *supra* note 294 and accompanying text. Therefore, the Supreme Court’s decision in *Batson* was not only logical, but intellectually “honest” as well.

The application of the *Batson* holding to civil matters, however, is an entirely different story. Certainly, one could argue that *Batson* applies to state civil trials as it does to state criminal matters, provided the same basic element is present — fourteenth amendment state action. But this analogy is flawed. Unlike the sixth and fourteenth amendments, no connection exists between the seventh and fourteenth amendments. See *supra* note 296 and accompanying text. As a result, the extension of *Batson* to state civil actions may very well be intellectually “dishonest.”

299. The seventh amendment does, of course, readily apply to civil cases in federal court because the fifth amendment due process clause provides litigants with the same equal protection guarantees in federal court that the fourteenth amendment offers litigants in state court. See *supra* notes 191 & 222. *Batson*, therefore, could be applied in this situation assuming the state action hurdle is overcome.

Obviously, this is highly inequitable and would create an even greater burden on the federal court system. Why sue in state court, if an action can be brought in federal court with possibly greater constitutional protection?

300. *Batson v. Kentucky*, 476 U.S. 79, 82 (1986) (emphasis added).

301. *Id.* at 89 (emphasis added).

302. “We express no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel.” *Id.* at 89 n.12. One state court has since extended *Batson* to the defense. See *People v. Kern*, 75 N.Y.2d 638, 554 N.E.2d 1235, 555 N.Y.S.2d 647 (1990) (applying *Batson* and state constitutional grounds to re-

made by the Court.

In sum, because the Court did not even consider the most logical extension of *Batson* — to the criminal defendant — the interpretation that the Court implicitly supported the application of *Batson* to civil litigation is improper.

The *Batson* decision is incompatible with the civil justice system. It fails on constitutional grounds under the fourteenth amendment because, first, there is no state action, and second, the seventh amendment does not apply to the states. Furthermore, it falls short on the subtle grounds of judicial interpretation. Thus, another response to the jury selection problem must be developed.

## 2. *Solution: Elimination of the Peremptory Challenge from Civil Litigation*

The peremptory challenge in American jurisprudence is a product of the English system.<sup>303</sup> The English have since "abolished the use of peremptory challenges in the few civil trials that use juries."<sup>304</sup> It should not be shocking, then, to suggest that we again follow the English lead and abolish the use of peremptory challenges in civil actions.<sup>305</sup> *Batson v. Kentucky* is not the answer to problems in civil jury selection.<sup>306</sup> The continued use of the peremptory strike, in criminal litigation under *Batson* guidelines, is indispensable in assuring an impartial jury trial;<sup>307</sup> however, the peremptory challenge should be eradicated from all forms of civil litigation.<sup>308</sup> A brief survey of various alternatives to the peremptory challenge system follows.

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strict the use of peremptory challenges by the white defendants).

303. See *supra* notes 11-17 and accompanying text.

304. J. VAN DYKE, JURY SELECTION PROCEDURES 169 (1977). See generally L. MOORE, THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY 134 (1973) (cited in VAN DYKE, *supra*).

305. See *supra* notes 15-17 and accompanying text.

306. See *supra* notes 249-302 and accompanying text.

307. See *supra* notes 236-47 and accompanying text.

308. Recall that in *Clark v. City of Bridgeport*, 645 F. Supp. 890 (D. Conn. 1986), discussed *supra* notes 150-63 and accompanying text, the state was a party to the civil action. *Clark*, 645 F. Supp. at 891. State action poses no problem in this context, thereby permitting the fourteenth amendment equal protection clause, upon which *Batson* was based, to be applied. To avoid confusion and further the desire for order and uniformity in the judicial system, however, the peremptory challenge should be eradicated entirely from civil litigation, including proceedings similar to *Clark*.



a. *Non-Viable Alternatives*

There exist several plausible approaches to the jury selection problem in civil litigation. Three of them are discussed here. While each alternative has unique benefits, all three result in more damage than redress.

The first of these is limiting the voir dire.<sup>309</sup> This can be accomplished in three ways. First, in an effort to promote judicial economy, several courts curtail the number and types of questions that can be asked of a potential juror.<sup>310</sup> The irony of employing this tactic is that the lawyer would most likely need her peremptory challenges to strike those prospective jurors not sufficiently questioned, or risk their partiality.<sup>311</sup> Second, it has been suggested that to expedite the selection process, all venire persons should be questioned together, as a group, rather than individually.<sup>312</sup> "Such a procedure [however,] makes it difficult for people who are not accustomed to speaking in front of others to respond to the questions . . ."<sup>313</sup> More importantly, it is very likely that venire members will respond with answers tempered by the situation or according to the societal norm.<sup>314</sup> Third, is the method of "judge-conducted voir dire."<sup>315</sup> This procedure has been used in many jurisdictions.<sup>316</sup> Judicial economy is also served here, but the right to an impartial jury is not furthered.

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309. See *supra* note 1 for a detailed discussion of the typical voir dire process.

310. Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 STAN. L. REV. 545, 546 (1975). See also *Ham v. South Carolina*, 409 U.S. 524 (1973) (trial court's failure to question the venire about its reaction to facial hair was ignored by the Supreme Court despite a bearded defendant).

311. The Court in *Swain v. Alabama*, 380 U.S. 202, 218-19 (1965), recognized that the "voir dire in American trials tends to be extensive and probing . . ." The Court considered this thorough practice necessary to impanel a proper jury. *Id.* at 219.

312. Babcock, *supra* note 310, at 547.

313. *Id.*

314. Prospective jurors that are outwardly biased may not readily reveal their biases when questioned in front of a large number of persons. It is far easier to be candid when in more intimate surroundings. See Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503, 511 (1965).

315. Babcock, *supra* note 310, at 548.

316. See, e.g., *People v. Crowe*, 8 Cal. 3d 815, 506 P.2d 193, 106 Cal. Rptr. 369 (1973). See also Suggs & Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis*, 56 IND. L.J. 245 (1981) (although questioning is currently conducted by most federal judges, it is the attorney and not the judge who is more competent to question prospective jurors).

In fact, the time conserved during the voir dire is actually a function of the quantity and quality of the questions asked by the judge.<sup>317</sup> It is reasonable to suppose that the judge would not pursue the inquiry with the vigor exhibited by private counsel. Certainly, there exists no adversarial desire for victory, not to mention the quest to pocket legal fees.

The second alternative to the peremptory challenge is to expand the jury pool.<sup>318</sup> It is more likely that a representative cross-section would be impaneled if there were a greater number of venire persons to choose from.<sup>319</sup> However, quantity and quality also come into play here and must be assessed together. To have a larger pool, the present eligibility standards designed to "weed out" incompetent and incompatible individuals must be relaxed.<sup>320</sup> However, this could result in an impaneled jury of a more invidiously discriminatory nature than a peremptory system would ever permit.

The third alternative is to suggest that the peremptory system be reduced but not abolished.<sup>321</sup> As the federal statute applicable to civil trials now states, "each party shall be entitled to three peremptory challenges. . . . [T]he court may allow additional peremptory challenges . . . to be exercised . . . ."<sup>322</sup> Perhaps, the argument goes, if the permitted number of peremptory strikes was limited by statute even more than they are now, lawyers could still remove some potential jurors believed to be bi-

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317. Suggs & Sales, *supra* note 316.

318. See, e.g., Jury Selection and Service Act of 1968 § 101, 28 U.S.C. § 1861 (1982). This Act requires that venire members in federal court be selected from voter registration lists. The Act also requires that additional lists be utilized if voter lists alone prove inadequate to promote random jury selection.

319. See, e.g., *People v. Harris*, 36 Cal. 3d 36, 679 P.2d 433, 201 Cal. Rptr. 782 (1984) (defendant made a prima facie showing by demonstrating that voter lists alone failed to provide a sufficient pool from which an impartial jury could be selected).

320. For example, a requirement such as "good moral character," R.I. GEN. LAWS § 9-9-23 (1985), which allows the clerk discretion in selecting members for the venire, would have to be abolished or greatly eased.

321. For example, in 1977 there was an attempt to reduce the number of peremptory challenges in federal criminal actions. See Act of July 30, 1977, Pub. L. No. 95-78, § 2(c), 91 Stat. 319 (the rejection by Congress of the Supreme Court's 1976 proposed amendment to the Federal Rules of Criminal Procedure which would have limited the number of peremptory challenges to five for each side in non-capital felony matters and twelve per side in capital cases).

322. 28 U.S.C. § 1870 (1982).

ased, or unfit for jury responsibilities, though not partial enough to be challenged for cause. Nevertheless, this idea is unsatisfactory. The right to serve on a jury must also be considered.<sup>323</sup> Further, the root of the evil sought to be eliminated would still remain: the attorney could still discriminate through the use of the peremptory challenge, albeit to a lesser degree. Such a concession is certainly not a positive stride toward eliminating partial juries.

### b. *The Challenge for Cause Approach*

This Comment has discussed the important role of the peremptory challenge in criminal litigation to preserve the constitutional right to a fair trial by an impartial jury,<sup>324</sup> and has advocated the challenge's abolition from all civil proceedings.<sup>325</sup> Various options to the peremptory challenge were examined and rejected. However, a challenge for cause<sup>326</sup> approach would suffice to protect the impartiality concerns of civil litigants. The initial advantage of such a system is that it already exists. It requires no upheaval of the jury selection process and no revolutionary voir dire procedures.

Almost two centuries ago, Chief Justice Marshall commented:

[L]ight impressions which may fairly be supposed to yield to the testimony that may be offered; which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror; but those strong and deep impressions, which

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323. See, e.g., *Ballard v. United States*, 329 U.S. 187 (1946). The *Ballard* Court reversed a federal conviction because women were deliberately excluded from both the grand and petit juries. The Court concluded that "[t]he injury is not limited to the defendant — there is injury to the jury system . . . ." *Id.* at 195; see also *Carter v. Jury Comm'n*, 396 U.S. 320 (1970). In *Carter*, the plaintiff was granted relief from jury service exclusion. The Court held that "[d]efendants . . . do not have the only cognizable legal interest in nondiscriminatory jury selection." *Id.* at 329.

In *Rose v. Mitchell*, 443 U.S. 545, 558 (1979), the Court equated the injury suffered by the excluded venire person with that forbidden by the equal protection clause. "[A]lthough alternative remedies remain to vindicate the rights of those members of the class denied the chance to serve on . . . juries, . . . permitting challenges to unconstitutional state action by defendants has been, and is, the main avenue by which Fourteenth Amendment rights are vindicated in this context." *Id.*

324. See *supra* notes 236-47 and accompanying text.

325. See *supra* notes 303-08 and accompanying text.

326. See *supra* note 1.

will close the mind against the testimony that may be offered in opposition to them; which will combat the testimony and resist its force, do constitute a sufficient objection to him.<sup>327</sup>

The challenge for cause permits people holding varying views and ideas concerning a case to participate as jurors, as long as they set aside any preconceived notions and opinions during the trial and subsequent deliberations.<sup>328</sup>

The cause system is actually more effective than the peremptory system. The challenge for cause is used intellectually, based upon the lawyer's assessment of information gathered from the voir dire, and not whimsically, as the peremptory challenge is often exercised.

Two alterations to the present cause system are necessary before adopting it as the only challenge system in civil actions. First, the trial court cannot rely exclusively on the prospective jurors to be entirely candid about their biases.<sup>329</sup> Trial judges must exercise broad discretion in permitting challenges for cause while observing prospective jurors' reactions during the voir dire.<sup>330</sup>

Second, the information concerning venire members, amassed during the voir dire, must be enlarged and improved. To logically challenge potential jurors, enough must be known about their beliefs and ideals. This is the drawback of refusing to permit the haphazard striking of prospective jurors for any reason at all, as the peremptory system condones.

To accomplish this second modification, the expansion of the voir dire and the promotion of judicial economy must be balanced. The trial judge frequently limits questioning, for the sake of efficiency, regardless of promising lines of inquiry.<sup>331</sup> In the peremptory system, the attorney need only strike potential jurors without explanation, thereby eliminating any concern about their personalities and views not exposed during questioning. In an exclusive challenge for cause approach, however, the justice

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327. *United States v. Burr*, 25 F. Cas. 49, 51 (C.C.D. Va. 1807) (No. 14,692).

328. *See Irvin v. Dowd*, 366 U.S. 717 (1961).

329. Many jurisdictions will not infer that a prospective juror is biased; rather, the bias must be self-proclaimed by the prospective juror before the court will find her incapable of fairness. *See generally Babcock, supra* note 310, at 549-50.

330. *See, e.g., Dennis v. United States*, 339 U.S. 162, 168 (1950).

331. *See Babcock, supra* note 310, at 546.

system may at times have to sacrifice efficiency to preserve the right to an impartial jury. Perhaps, though, judicial economy may be better served because an impartial jury will result in fewer appeals and new trials.

Admittedly, the challenge for cause approach is not a perfect solution. It is possible, for example, that biased jurors may be impaneled despite the existence of safeguards to remove them. Attorneys are only human and cannot read the minds of venire members. It is in this situation that the peremptory challenge is truly indispensable. However, where the stakes are lower, as in civil proceedings,<sup>332</sup> such a disturbing prospect is of secondary significance. Impartiality is better served by a cause system, because courts and society will be reasonably cognizant that the jury panel hearing the evidence, deliberating, and reaching a verdict, is the product of a judicial system that strives to protect the constitutional rights of both the litigant and the juror.

#### IV. Conclusion

"Denying jury service to any group deprives . . . [c]ourts [of] the justice that flows from impartial juries . . . ."<sup>333</sup> With the advent of *Batson*, Lyndon Johnson's ominous words are rather tame now. *Batson* has seized the wild bull by the horns and has shaped the peremptory challenge into the instrument by which our constitutional right to a fair trial by an impartial jury is preserved in criminal litigation.

However, the civil sphere still falls short of the jury system cherished by Blackstone<sup>334</sup> and Jefferson.<sup>335</sup> *Batson* is not the appropriate standard for civil trials; we must look elsewhere for reform. One need not look any further than the present jury selection procedure for a solution.

The peremptory challenge in civil litigation plays a much smaller role in assuring impartiality than does its criminal trial counterpart. Life and liberty are not at issue. Although benefi-

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332. See *supra* notes 240-47 and accompanying text.

333. 1 PUBLIC PAPERS OF LYNDON B. JOHNSON 461, 464 (1966) (statement to Congress proposing stronger civil rights legislation).

334. See *supra* note 4 and accompanying text.

335. See *supra* note 5 and accompanying text.

cial if it can be managed properly, the peremptory challenge can be deadly if uncontrolled. Therefore, the peremptory challenge should be abolished from civil litigation. The cause system adequately protects litigants and jurors alike, while promoting the constitutional notions of justice and impartiality.

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