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# ARTICLE

## PEREMPTORY CHALLENGES REVISITED

Jon M. Van Dyke\*

Does a criminal defendant have a right to challenge prospective jurors peremptorily because of their race? This question can be raised in a number of different contexts.

Suppose a white police officer has been charged with murdering a young African-American during a traffic stop. When the media reported the circumstances surrounding the youth's death, the inner city neighborhoods broke out into three days of sustained rioting. The Coalition of Churches for a United People actively pursued the case and called upon the governor to appoint a special prosecutor. Many of the ministers in the Coalition have given sermons condemning the action of the police officer. Additionally, the Coalition has devoted its most recent monthly newsletter to a call for an end to all forms of racial discrimination. The case has generated a great deal of controversy in the community. At times the controversy has given way to a marked separation along racial lines.<sup>1</sup>

Suppose a 20-year-old African-American college student is accused of brutally beating a socially prominent white physician in the community. The doctor owned the apartment building in which the youth and his family lived. The city building department had issued over fifty citations in the past two years for building code violations in this building, but the owner did not correct the situation. On the day of the assault, the building department notified the tenants that they would have to move because the building was unfit for human habitation. The youth went to the doctor's office and assaulted the doctor after a heated argument.

When the defense attorneys select the jurors for these trials, they will exercise the peremptory challenges<sup>2</sup> granted to their clients to impanel jurors that are sympathetic to the accused and are as close to their clients in socio-economic and ethnic backgrounds as possible.<sup>3</sup> *Batson v. Kentucky*<sup>4</sup> ruled

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1. This fact situation is based on the acquittal in May, 1980 of four white police officers accused of beating a 33-year-old African-American named McDuffie in Miami. The trial was transferred to Tampa, which has a sizable Black population. However, no Blacks served on the jury because the four defendants coordinated their peremptories to remove every prospective Black juror from the venire. See Pizzi, *Batson v. Kentucky: Curing the Disease But Killing the Patient*, 1987 SUP. CT. REV. 97, 153.

2. See generally J. VAN DYKE, *JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS* 145-60, 166-69 (1977) (discussion of peremptory challenges).

3. See *id.* at 23-44.

that the constitution forbids prosecutors from exercising their peremptories to remove jurors explicitly because of race. The U.S. Supreme Court has not yet decided, however, whether the Constitution similarly prohibits defense attorneys from using peremptories in a race-specific fashion.

The prosecution is frequently looking for a juror who is middle-aged, middle-class, and white; the assumption is that this type of juror identifies with the government rather than the defendant and will be more likely to convict.<sup>5</sup> Although this generalization is not always true, many prosecutors rely upon it. From the opposite perspective, Clarence Darrow once warned criminal defense attorneys that they should avoid wealthy jurors, because, "next to the Board of Trade, the wealthy man considers the penitentiary to be the most important of all public buildings."<sup>6</sup>

Attorneys for both sides seek removal of potential jurors who the attorneys believe hold extreme views. Rich Christie, who with Jay Schulman assisted the defense in trials such as the 1972 Harrisburg Seven and the 1975

4. 476 U.S. 79 (1986); see *infra* notes 47-56 and accompanying text for a discussion of this case.

5. An unusual insight into the aims of one prosecutor's office was provided when the Texas Observer reprinted an article prepared in the Dallas County District Attorney's Office to help train prosecuting attorneys in Texas. Jon Sparling, an Assistant District Attorney in Dallas made famous for persuading a jury to impose a 1,000-year sentence on a convicted felon, offered the following advice:

Who you select for jury is, at best, a calculated risk. Instincts about veniremen may be developed by experience, but even the young prosecutor may improve the odds by the use of certain guidelines — if you know what to look for . . . .

### III. What to look for in a juror.

#### A. Attitudes

1. You are not looking for a fair juror, but rather a strong, biased and sometimes hypocritical individual who believes that defendants are different from them in kind, rather than degree.
2. You are not looking for any member of a minority group which may subject him to oppression—they almost always empathize with the accused.
3. You are not looking for the free thinkers . . . .

#### B. Observation is worthwhile.

1. Look at the panel out in the hall before they are seated. You can often spot the showoffs and the liberals by how and to whom they are talking.
2. Observe the veniremen as they walk into the courtroom.
  - a. You can tell almost as much about a man by how he walks, as how he talks.
  - b. Look for physical afflictions. These people usually sympathize with the accused.
3. Dress
  - a. Conservatively, well dressed people are generally stable and good for the State.
  - b. In many counties, the jury summons states that the appropriate dress is coat and tie. One who does not wear a coat and tie is often a non-conformist and therefore a bad State's juror.
4. Women
  - a. I don't like women jurors because I don't trust them.
  - b. They do, however, make the best jurors in cases involving crimes against children.
  - c. It is possible that their "women's intuition" can help you if you can't win your case with the facts.
  - d. Young women too often sympathize with the Defendant; old women wearing too much make-up are usually unstable, and therefore are bad State's jurors.

Arnold, *Wretched Excess in Dallas*, Texas Observer, May 11, 1973, at 9.

6. Note, *The Jury Voir Dire: Useless Delay or Valuable Technique?*, 11 S.D.L. REV. 306, 356 (1966).

Joan Little murder case by conducting *voir dire* using sociological and psychological tests, stated: "Essentially what we are trying to do in these cases is to get rid of the kooks, the very overrigid, irrationally law-and-order people. We are looking for fair-minded jurors willing to listen to the evidence."<sup>7</sup> A "kook" or "weirdo" in one attorney's view, however, may be ideal for the opposition.

In many—perhaps most—cases, the peremptory challenges of the two sides tend to cancel each other. They remove those who appear to hold strong opinions. Often, this results in a jury comprised of the least offensive people who probably also have the least distinctive points of view on issues. This practice necessarily means that the resulting jury will be less representative than the panel that is first sent into the courtroom, because anyone who is idiosyncratic or strange in any observable way will be challenged by one side or the other.

More significantly, peremptory challenges can be used to reduce dramatically or eliminate totally a distinct segment of the population. This phenomenon has been well documented elsewhere.<sup>8</sup> The groups eliminated are most frequently minority ethnic or racial groups.

#### THE USE OF PEREMPTORY CHALLENGES

An evaluation of the constitutional legitimacy of a defense attorney's use of peremptories in a race-specific manner should begin with a historical overview of peremptory challenges and their relationship to challenges for cause. Both types of challenges purport to eliminate jurors who may be biased for or against the defendant, the prosecution, or the case, thus threatening the jury's impartiality.

Prospective jurors can be challenged in two ways: *challenges for cause*, on a "narrowly specified, provable and legally cognizable basis of partiality"<sup>9</sup> and *peremptory challenges*, made without giving any reason, and — according to the pre-*Batson* view—"without inquiry and without being subject to the court's control."<sup>10</sup> The court's acceptance of challenges for cause depends upon a finding of specific bias — as in the potential juror's relationship to the defense, prosecution, or witnesses — or nonspecific bias — such as prejudice against the race or religion of the defendant. An unlimited number of jurors may be challenged for cause, but the judge must agree that the juror is indeed prejudiced before he or she is removed for cause. In an average trial only one, two, or three potential jurors are excused for cause.<sup>11</sup>

After all prospective jurors who have displayed any overt bias are challenged for cause, each litigant is permitted a certain number of peremptory challenges, which can be used to remove those jurors who are believed for some reason or another to favor the other side. The traditional function of the

7. Tivnan, *Jury by Trial*, New York Times, Nov. 16, 1975, at 30, 64.

8. See, e.g., J. VAN DYKE, *supra* note 2, at 155-56.

9. *Swain v. Alabama*, 380 U.S. 202, 220 (1965); see *infra* notes 41-56 and accompanying text for a discussion of this case.

10. *Swain*, 380 U.S. at 220. The number of peremptory challenges each litigant can exercise varies significantly from state to state (and in relation to the nature of the case) from a low of 3 to a high of 25. For figures accurate as of 1977, see J. VAN DYKE, *supra* note 2, at 282-84.

11. See generally A. F. GINGER, *JURY SELECTION IN CRIMINAL TRIALS* (1975) (extensive overview of the jury selection process).

peremptory challenge, as Justice Byron R. White wrote in *Swain v. Alabama*, is "to eliminate the extreme of partiality on both sides, [and] to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise."<sup>12</sup>

In most courts, the questioning of jurors during the *voir dire* sets the stage for peremptory challenges as well as for challenges for cause. The United States Supreme Court stated specifically in 1965 that questioning to form the basis for a peremptory challenge is appropriate: "The *voir dire* in American trials tends to be extensive and probing, operating as a predicate for the exercise of peremptories. . . ."<sup>13</sup>

Peremptory challenges may be used when an attorney suspects a prospective juror of being biased but cannot prove it to the judge according to the guidelines set down for challenges for cause. Many judges will accept a juror's statement at face value that he or she is not prejudiced against an individual or group involved in the case. Perhaps the judge must, if the judge is to avoid making judgments on the juror's personal integrity. The attorney may still suspect prejudice but be unable to prove it. In such a case, the prospective juror can be challenged peremptorily. Similarly, jurors who belong to certain professions not directly connected with the case—and thus not challengeable for cause—may be challenged peremptorily. Additionally, the attorney may peremptorily challenge those of a particular age, race, or religion that the attorney suspects will dispose the juror unfavorably toward the client. The prospective juror's personality, as well as the juror's dress or bearing, which the attorneys can gauge through the *voir dire*, may also suggest that a peremptory challenge is necessary.

Attorneys usually must exercise some restraint in exercising peremptory challenges and will eliminate only those persons who appear "worse" than average. Under the usual system, a juror challenged peremptorily is replaced in the jury box by someone selected randomly from among the remaining prospective jurors, and the new juror may be someone worse—from the perspective of the litigant exercising the challenge—than the challenged juror.

A second system of exercising peremptory challenges, the "struck jury" system, permits peremptories to be employed in a more sophisticated manner and gives both sides more opportunity to manipulate the jury. Under this system, the attorneys and the judge question the prospective jurors and make their challenges for cause until a number of "qualified" jurors are assembled equal to the size of the jury, usually twelve, plus the number of peremptory challenges available to the two sides. Each side then uses its "peremptory strikes" to reduce the jury to its final size.<sup>14</sup> Although the "struck jury" sys-

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12. 380 U.S. at 219.

13. *Id.* at 218-19; but see *Ham v. South Carolina*, 409 U.S. 524 (1973) (trial court's refusal to grant petitioner's request for inquiry of the jurors as to racial bias during *voir dire* denied petitioner a fair trial in violation of the due process clause of the fourteenth amendment).

14. There are many variations on the struck jury system. One was used in the 1972 Harrisburg Seven trial, where the forty-six qualified jurors remaining after challenges for cause were reduced to twelve in the following way: The defense had a combined total of twenty-eight peremptory strikes, and the prosecution had six; each side exercised its strikes in an alternating pattern until twelve jurors remained. In civil cases in Virginia, thirteen qualified jurors are found, and a list with the thirteen names is passed between the attorneys, who each cross off three, leaving a jury of seven. New Jersey uses its unique struck jury system when "the nature and importance of the matter in controversy render it reasonable and proper." N.J. STAT. ANN. § 2A: 75-1 (West 1976). The clerk prepares a list

tem gives attorneys great power to change the jury profile, it has consistently been upheld as sufficiently "impartial" to satisfy the Constitution.<sup>15</sup>

### THE HISTORY OF PEREMPTORY CHALLENGES

Peremptory challenges have been subject to abuse from the time juries were first introduced in England. Accordingly, the history of peremptories is worth retelling because it reminds us that the exercise of peremptories—particularly by the prosecution—has not always been permitted, but has instead been a subject of constant debate. The earliest juries were effectively hand-picked by the crown or its allies, and if someone unacceptable appeared on the jury list, the crown could remove him because it claimed an unlimited number of peremptory challenges. In 1305, the English parliament decided that this type of jury was inappropriately biased toward the prosecution.<sup>16</sup>

In that year, a statute was passed limiting the crown to challenges for "cause certain" and eliminated completely the right of the king's attorneys to exercise peremptory challenges.<sup>17</sup> Criminal defendants, however, were still allowed to challenge jurors peremptorily. William Blackstone, the influential legal commentator of the eighteenth century, saw the peremptory challenge clearly as the defendant's right — "a provision full of that tenderness and humanity to prisoners for which our English laws are justly famous."<sup>18</sup> Defendants were originally granted thirty-five peremptory challenges, but the number was reduced in 1530 to twenty in all cases except high treason,<sup>19</sup> and it is now set at seven.<sup>20</sup>

The prosecution in England still has no statutory right to exercise peremptory challenges, but the crown's attorneys are nonetheless able to remove jurors they do not like without showing "cause" because the English judges

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of thirty-six or forty-eight or more jurors, according to the judge's instructions. Then the judge, on his own motion or that of a party, strikes off names of those "unfit or not well qualified for service as struck jurors." *Id.* at §§ 2A:75-2,-3. When half of the list is eliminated, jurors are summoned into court, and the normal *voir dire* begins, with each party exercising peremptories as usual. In civil cases, however, the number of peremptories drops from six to three. *Id.* at § 2A:78-7. *See also infra* notes 47, 57 and accompanying text.

15. *See, e.g.,* Swain v. Alabama, 380 U.S. 202, 218 (1965); Pointer v. United States, 151 U.S. 396 (1894); United States v. Peterson, 475 F.2d 806, 812 (9th Cir. 1973); Amsler v. United States, 381 F.2d 37, 44 (9th Cir. 1967); Brown v. State, 62 N.J.L. 666, 42 A. 811 (1899), *aff'd*, 175 U.S. 172 (1899).

16. United States v. Douglass, 25 F. Cas. 896, 896-99 (S.D.N.Y. 1851) (No. 14,988). This historical summary is adapted from J. VAN DYKE, *supra* note 2, at 147-50. Justices Antonin Scalia and John Paul Stevens offer sharply different versions of this history and its meaning for modern interpretation of the sixth amendment in *Holland v. Illinois*, 110 S. Ct. 803, 58 U.S.L.W. 4164 (Jan. 22, 1990). Justice Scalia asserts repeatedly in his opinion for the Court that both the prosecution and the defense had the right to exercise peremptories at the time the U.S. Constitution was adopted. *Id.* at 4164 n.1. However, Justice Stevens demonstrates how controversial the exercise of peremptories by the prosecutor was during this period, stating that "[t]he exercise of peremptory challenges by the prosecution was a subject of debate throughout the eighteenth and nineteenth centuries . . ." *Id.* at 4174 n.15. Justice Stevens's historical summary, similar to Van Dyke's, *see supra* note 2, also notes that "a clause providing 'the right of challenge' was contained within the original draft of the sixth amendment but was eliminated by the Senate prior to ratification." *Id.* at 4174 n. 15 (citing 1 Annals of Cong. 435 (1789)).

17. Challenge of Jurors, 33 Edw. I, Stat. 4 (1305).

18. 4 W. BLACKSTONE, COMMENTARIES 353.

19. 22 Henry VIII, c. 14 sec. 6, and 32 Henry VIII, c. 3; Regina v. Gray, 11 C. & Fin. 427 (House of Lords, 1843).

20. 23 HALBURY'S LAWS OF ENGLAND § 6, para. 48, at 26 (3rd ed. 1975).

created the doctrine of "standing jurors aside." Although the 1305 law clearly states that the crown can remove jurors only for "cause certain,"<sup>21</sup> the English judges have assumed that cause exists whenever the crown wants to challenge a juror.<sup>22</sup> Court practice thus allowed the crown to continue a procedure that Parliament had explicitly eliminated. The practice of standing jurors aside was challenged numerous times on behalf of defendants, but never successfully.<sup>23</sup>

In the early colonial and state courts in North America, the 1305 statute providing for peremptory challenges by defendants was accepted as part of the received common law.<sup>24</sup> The prosecution's practice of "standing jurors aside" was, however, more controversial, and substantial protest was raised against it. The two most populous states, New York,<sup>25</sup> and Virginia,<sup>26</sup> both denied the prosecution any peremptory challenges for most of the nineteenth century.<sup>27</sup> Several states continued to authorize "standing aside."<sup>28</sup> Other states gradually began allowing the prosecution to challenge a limited number of jurors peremptorily. Delaware, for instance, gave the defendant six and the government three peremptory challenges, but for each challenge actually exercised by the state, the defendant was given a compensating extra peremptory strike.<sup>29</sup>

In Alabama, the prosecutors were given only four peremptory challenges, while the defendant had sixteen challenges in capital cases and twelve in non-

21. The text reads:

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 challenge a Cause Certain, and that the truth of the same challenges shall be enquired of according to the custom of the courts . . .*

33 Edw. I, Stat. 4 (1305) (emphasis added).

22. The system works as follows: When panels of jurors are examined, the defendant presents challenges for cause - which the judge promptly rules upon - and exercises peremptory challenges. The crown also raises certain challenges for "cause" but does not offer any explanation; the judge then directs the jurors so challenged to "stand aside." If a panel of 12 unchallenged jurors can be assembled, the jurors whom the crown had asked to "stand aside" are permanently dismissed, even though the prosecution has never explained why the potential jurors cannot be impartial. Only rarely does the entire jury panel fail to produce 12 unchallenged jurors, because of the large numbers of jurors summoned. If insufficient jurors remain, the judge asks the prosecutor why the jurors who are "standing aside" are incapable of rendering an impartial verdict. This question had been asked so infrequently that a prosecutor, when asked in 1699 to "show cause" for the persons who were "standing aside," replied: "I do not know in all my practice of this nature, that it was ever put upon the King to show cause and I believe some of the King's counsel will say they have not known it done." Merriam, *The Right of Prosecutors to Stand Jurors Aside*, 14 CENTRAL L.J. 403 (1882) (quoting 13 How. St. Tr. 1108) (Trial of Spencer Cowper, at Hertford Assizes, for the murder of Mrs. Sarah Stout, 11 Williams III, 1699).

23. See, e.g., Anonymous, 1 Vent. 309, 86 Eng. Rep. 199; Ford Lord Grey of Werk, 9 State Trials 128 (1682); James O'Coigly, 26 State Trials 1192 (1798).

24. See, e.g., A DIGEST OF ENGLISH STATUTES IN FORCE IN THE STATE OF GEORGIA 115 (1826); *A Report of All English Statutes Held Applicable to Laws of Maryland by Local Courts of Law or Equity* (1811); Law of Kentucky, ch. LXXVII, sec. 18, 19 (1799); Laws of New Jersey, Juries VI, VII (1800); Stat. at Large of Virginia, Act passed October 1792, ch. 13, sec. 7, 8 (1835).

25. See *People v. Aichinson*, 7 How. Pr. 241 (New York 1852).

26. See *Montague v. Commonwealth*, 51 Va. (10 Gratt.) 767 (1853).

27. New York did not grant the prosecution a peremptory challenge until 1881, and Virginia refused to give the prosecution any peremptories until 1919.

28. Appellate courts in Georgia, Florida, Louisiana, North Carolina, Pennsylvania, and South Carolina approved of the practice in the early nineteenth century.

29. 5 DEL. LAWS 9 (1782).

capital cases.<sup>30</sup> In two states, Kentucky and Maryland, efforts in the middle of the nineteenth century to give the government the right to strike peremptorily were decisively beaten back at constitutional conventions.<sup>31</sup>

The U.S. Congress passed a statute in 1790 giving defendants in federal courts 35 peremptory challenges in cases of treason and 20 in other capital cases but made no mention of the right of the state to exercise peremptories.<sup>32</sup> The federal courts were soon faced with the question whether the right to "stand aside" existed. One supporter of "standing aside" and the exercise of peremptories by the government wrote in 1817 that a prosecutor might not be able to prove that a potential juror was biased.<sup>33</sup> "Standing aside," he suggested, was more efficient in eliminating bias. He argued that it was appropriate to allow the prosecution to use peremptories in the United States because American people did not have to fear the power of the government.<sup>34</sup>

Ten years later, in 1827, U.S. Supreme Court Justice Joseph Story asserted that the "standing aside" procedure had always been part of the common law and was still the law.<sup>35</sup> Although this remark was not directly relevant to the case before the Court and hence not a binding holding, it was nevertheless followed by most federal judges because of Story's prestige.<sup>36</sup>

Through the nineteenth century, peremptories for the prosecution gradually became the rule rather than the exception. The Supreme Court held in 1856 that federal courts were not required to permit "standing aside" and should follow the lead of the courts of the state in which they sat,<sup>37</sup> but by this time, states had begun authorizing peremptory challenges by the prosecution, and so the "standing aside" procedure became unnecessary.<sup>38</sup> In 1887, the

30. DIGEST OF LAWS OF ALABAMA, *Criminal Law* 9, § 51.

31. KENTUCKY CONSTITUTIONAL CONVENTION OF 1849, DEBATES 91-92, 675, 693-94, 1085 (defeated 55-30); 1 DEBATES AND PROCEEDINGS OF MARYLAND CONVENTION 191 (1851) (defeated 42-25).

32. 1 Stat. 119, ch. 30 (1790).

33. ROBERTS, A DIGEST OF SELECT BRITISH STATUTES COMPRISING THOSE WHICH, ACCORDING TO THE REPORT OF THE JUDGES OF THE SUPREME COURT, APPEAR IN FORCE IN PENNSYLVANIA 229-30 (1817).

34. *Id.* at 330-31.

There cannot exist that same cause of jealousy, in regard to challenge on the part of the prosecution here that might be well founded in *England*, where the influence of the crown, especially in former times, was exerted to convict those who were obnoxious to the king. *Here*, the accused has nothing to fear from those in power. The sole object of prosecutions . . . is to maintain the public peace and safety, by enforcing laws of unexampled mildness. *Id.* (emphasis in original).

35. *United States v. Marchant*, 25 U.S. (12 Wheat.) 480, 483 (1827).

36. One federal judge did, however, protest in a dissenting opinion that the prosecution was being given an unfair advantage:

The whole theory of criminal jurisprudence looks to placing the advantage, if one accompanies the case, on the side of the accused; and I think that, after the efforts almost universally put forth in the United States to strengthen and extend such privilege, particularly to a person on trial for his life, we are taking a long step backwards in setting up the practices of the English assizes, originating in an age of colder sympathy for human life than pervades our era and the jurisprudence of the United States.

*United States v. Douglass*, 25 F. Cas. 896, 900 (S.D.N.Y. 1851) (No. 14,988) (Betts, J., dissenting).

37. *United States v. Shackelford*, 59 U.S. (18 How.) 588 (1856).

38. The states authorized government use of peremptories at the following times listed: Delaware—1782; Pennsylvania—1813; Tennessee—1821; Georgia—1822; Illinois—1827; North Carolina—1827; Mississippi—1836; Alabama—1837; Arkansas—1837; Louisiana—1837; Indiana—1843; Missouri—1845; California—1851; Kentucky—1854; Connecticut—1858; New Hampshire—1860; Massachusetts—1869; Vermont—1870; New Jersey—1871; Rhode Island—1872; South Carolina—



Supreme Court upheld a Missouri statute that gave the prosecution fifteen peremptory challenges in capital cases tried in cities of over a hundred thousand (*i.e.*, Kansas City and St. Louis) but only eight challenges in other areas. The defendant had twenty in either case. The Court offered the following justification for the government's need to challenge jurors peremptorily:

In our large cities there is such a mixed population[;] there is such a tendency of the criminal classes to resort to them, and such an unfortunate disposition on the part of business men to escape from jury duty, that it requires special care on the part of the government to secure the[s]e competent and impartial jurors.<sup>39</sup>

The government, in this view expressed by Justice Stephen Field, thus has a legitimate interest in trying to keep certain elements off juries.

By the beginning of the twentieth century, the government's right to exercise peremptory challenges was firmly established, as was its ability, especially where the struck-jury system was employed, to use this power to eliminate entire races or classes of people from jury panels. For almost a century after the civil war, African-Americans rarely appeared on jury lists at all in the South, and when—after years of litigation—they were finally included on the qualified list, the prosecution frequently used its peremptory challenges to exclude them from the jury box.<sup>40</sup> It was this pattern of challenges that set the stage for a major Supreme Court decision on peremptories in 1965.

#### *SWAIN V. ALABAMA*<sup>41</sup>

In *Swain*, a young African-American convicted and sentenced to death for raping a young white woman complained that, although an average of six or seven Blacks appeared on the trial jury lists for criminal cases, not one Black person had served on a jury in that county since 1950.<sup>42</sup> Despite these figures, the Supreme Court, in an opinion written by Justice Byron R. White, held that the defendant had not proved that the prosecution systematically and deliberately used its challenges to deny Black persons the right to participate in the jury system, and thus affirmed Swain's death sentence.<sup>43</sup> The Court did say that a prosecutor's systematic exclusion of a race from jury panels by the continued use of peremptory challenges, time after time, whatever the circumstances, the crime, or the defendant, would be a violation of the fourteenth amendment. However, the Court placed the burden squarely on the accused to prove such systematic exclusion.<sup>44</sup> Justice White observed that peremptory challenges play a major role in ensuring that the impaneled jury is unbiased. He also noted that challenges are to be used against real or imagined partiality that is difficult to designate or demonstrate and may be exercised on grounds normally thought irrelevant to official action or legal

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1873; Florida—1877; New York—1881; Maine—1883; Virginia—1919. Congress gave the prosecutor peremptories in federal courts in 1872.

39. *Hayes v. Missouri*, 120 U.S. 68, 70-71 (1887). This statute was again upheld in *State v. Granberry*, 284 S.W.2d 295, 299-300 (Mo. 1972).

40. *See, e.g.*, Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235, 283 (1968).

41. 380 U.S. 202 (1965).

42. Eight Black men were on the panel that was called for Swain's trial, but none served; two had been excused and the prosecutor peremptorily challenged the other six.

43. 380 U.S. at 228.

44. *Id.* at 223-24.

proceedings, such as race or religion.<sup>45</sup>

The majority opinion in *Swain* set the tone for subsequent cases considered in federal courts. Although the prosecution frequently used its peremptories to remove all members of a particular ethnic group, no litigant successfully challenged this practice on appeal until the Supreme Court's decision in *Batson v. Kentucky*.<sup>46</sup>

#### BATSON V. KENTUCKY

The defendant in *Batson* was a Black man accused of second-degree burglary and the receipt of stolen goods. The prosecutor exercised his peremptory challenges<sup>47</sup> to remove all four Black prospective jurors, and the jury that heard the case was comprised solely of whites.<sup>48</sup> The United States Supreme Court remanded *Batson's* conviction to the trial court to consider whether *Batson* had been denied the protection guaranteed to him by the Constitution against racial discrimination. The Court's decision thus reversed the approach adopted twenty one years earlier in *Swain*.

In an opinion written by Justice Powell, the Court held that a defendant may establish a *prima facie* case of discrimination "solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial."<sup>49</sup> The Court thus rejected the impossible evidentiary burden set forth in *Swain*<sup>50</sup> and adopted a new test defendants must meet to establish a *prima facie* case under *Batson*:

[T]he defendant first must show that he is a member of a cognizable racial

45. *Id.* at 220-21. The dissent, consisting of Justices Goldberg, Douglas, and Warren, applied standards of earlier jury discrimination cases, and concluded that the state should be required to rebut the *prima facie* showing of total exclusion by the showing that reasons other than racial discrimination were responsible for the total exclusion of Blacks from jury panels since 1950, and that peremptory challenges were not being used as a form of state discrimination. *Id.* at 229-30. The justices complained that Justice White gave too much importance to the state's use of peremptory challenges, which had been recognized chiefly as a device to protect defendants. The majority had confused its priorities; for the peremptory challenge is not a constitutional requirement, but a trial by an impartial jury is required. The dissenters charged that Justice White's opinion was in effect a holding that stated, "[t]here is nothing in the Constitution of the United States which requires the State to grant trial by an impartial jury so long as the inviolability of the peremptory challenge is secured." *Id.* at 244.

46. 476 U.S. 79 (1986). State courts recognized the defects of the *Swain* approach earlier. *See, e.g.,* *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978), in which the California Supreme Court rejected *Swain* because it created a standard that was almost impossible to meet. The California Court noted that "[Swain] demeans the Constitution to declare a fundamental personal right under that charter and at the same time make it virtually impossible for an aggrieved citizen to exercise that right." 583 P.2d at 768. *See also* *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979); *Neil v. State*, 457 S.2d 481 (Fla. 1984).

47. *Kentucky* was using a "struck-jury" system. *See supra* notes 14-15 and accompanying text.

After jurors have been excused for cause, the parties exercise their peremptory challenges simultaneously by striking names from a list of qualified jurors equal to the number to be seated plus the number of allowable peremptory challenges. [Ky. Rule Crim. Proc.] 9.36. Since the offense charged in this case was a felony, and an alternate juror was called, the prosecutor was entitled to six peremptory challenges, and defense counsel to nine. Rule 9.40.

476 U.S. at 83 n.2.

48. *Id.* at 83.

49. *Id.* at 96. For a discussion of gender discrimination through the use of peremptory strikes, *see also* *Sagawa, Batson v. Kentucky: Will It Keep Women on the Jury?*, 3 BERKELEY WOMEN'S L.J. 14, 18 (1988).

50. *See Batson*, 476 U.S. at 92-93.

group . . . and . . . that the prosecutor has exercised peremptory challenges to remove the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.<sup>51</sup>

Once the defendant introduces sufficient evidence to raise an inference that the prosecution is exercising its peremptory challenges to exclude prospective jurors because of their race, the burden then shifts to the prosecution "to come forward with a neutral explanation for challenging black jurors."<sup>52</sup>

The explanation of the prosecution "need not rise to the level justifying exercise of a challenge for cause;" nevertheless, the prosecution cannot rebut a *prima facie* showing by arguing that the challenged juror would be biased solely because the juror is of the same race as the defendant, by simply denying that the challenge was motivated by a discriminatory motive, or by asserting that the challenge was based on good faith.<sup>53</sup>

Kentucky argued that any departure from the *Swain* approach would destroy the fair trial values promoted by the use of peremptory challenges. The Court acknowledged the important position peremptory challenges occupy in modern trial procedure but did not agree that the decision in *Batson* would detract from the values peremptory challenges had made to the administration of justice.<sup>54</sup> In contrast, the Court's majority argued that its decision would enforce "the mandate of equal protection and . . . the ends of justice"<sup>55</sup> if trial courts were sensitive to the possibility that peremptory challenges can be exercised in a racially discriminatory fashion.<sup>56</sup>

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51. *Id.* at 96 (citations omitted).

52. *Id.* at 97.

53. *Id.*

54. *Id.* at 98-99.

55. *Id.*

56. *Id.* The Court also rejected Kentucky's argument that its holding would create serious administrative obstacles. The Court noted that the states that had already rejected *Swain* had not encountered any difficulties. For a contrary perspective, see Pizzi, *supra* note 1, at 153-55. Upon remand, the trial court was instructed to determine if the facts established a *prima facie* case of purposeful racial discrimination. If the prosecution did not or could not advance a neutral explanation for the use of peremptory challenges, then *Batson*'s conviction would be reversed. *Batson*, 476 U.S. at 100. Justice Thurgood Marshall's concurring opinion, arguing that peremptories should be abolished is discussed *infra* at notes 82-84 and accompanying text.

In the curious decision of *Holland v. Illinois*, 110 S. Ct. 803, 58 U.S.L.W. 4462 (1990), the Supreme Court held that a white defendant had standing to challenge the exclusion of Blacks by a prosecutor through the exercise of peremptory challenges, but then ruled 5-4 that such exclusion does not violate the sixth amendment's requirement that juries be "impartial." The decision is curious because a clear majority of the Court also stated that such exclusion does violate the fourteenth amendment's equal protection clause, thus reaffirming *Batson*. Notwithstanding this observation, five Justices—Scalia, White, O'Connor, Kennedy, and Chief Justice Rehnquist—felt they could not draw upon the fourteenth amendment for their decision in this case because their grant of certiorari had been limited to the sixth amendment claim. However, in *Batson* the Court's decision was unaffected despite a similarly limited grant of certiorari *Id.* at 4166 n.3.

Justices Marshall, Brennan, Blackmun, Stevens, and Kennedy explicitly stated that the fourteenth amendment prohibited prosecutorial use of peremptories to eliminate racial groups, and even Justice Scalia in his opinion for the Court acknowledged that the fourteenth amendment, as construed in *Batson*, prohibits prosecutors from assuming that a Black juror is partial simply because he is Black. *Id.* at 4165 n.2.

### SHOULD BATSON BE APPLIED TO CRIMINAL DEFENDANTS?

*Batson* addresses only the constitutionality of the exercise of racially discriminatory peremptory challenges by the prosecution. Does a defendant's use of peremptory challenges to exclude jurors based on their race also violate the equal protection rights of excluded jurors and erode the fairness of the justice system? This question requires a different analysis because the defendant is not under the mandate of the Constitution as directly as the government prosecutor. The defense lawyer in *Alabama v. Cox*,<sup>57</sup> for instance, offered the classic argument that the equal protection clause prohibits only official governmental discrimination and does not apply to a criminal defendant who is a private person.<sup>58</sup>

At stake for any criminal defendant is the prospect of the loss of liberty by the imposition of a prison term. It is argued therefore, that each criminal defendant should be given every opportunity to prevail against the state. The defendant should, therefore, retain the right to exclude any juror, for whatever reason. Harvard Law Professor Lloyd Weinreb stated:

The defendant does not have an absolute right to pick a jury or the use of peremptory challenges, but only the rights that the states give him. We now have to decide how much we are willing to give to the defendant in using these challenges . . . Remember, the state doesn't need any assurances that it has a jury of its peers. The defendant ought to be allowed to get someone off a jury for no reason at all, including an absolutely arbitrary notion that those people are not part of his own group. . . . My instinct is there is a special reason to allow the defendant to get rid of any potential juror on the basis that, if you're going to send someone to prison, he ought to have a sense that he has been convicted and sentenced by his own group and that he's not been subjected to an alien imposition.<sup>59</sup>

The defendant's unlimited right to use peremptory challenges without constitutional limitations is also recognized in *Holtzman v. Supreme Court of*

57. 531 So. 2d 71 (Ala. Crim. App. 1988), *cert. denied*, 480 U.S. 1018 (1989). Two alleged Ku Klux Klan members, Benjamin Frank Cox and Bennie Jack Hays, were placed on trial in February 1988 for allegedly aiding and abetting the murder of an African-American. Alabama utilized the "struck jury" system, *see supra* notes 14-15 and accompanying text, and assembled sixty-five prospective jurors after challenges for cause were considered. Each side was allowed to exercise 26 peremptories to reduce the jury to twelve plus an alternate. Sixteen members of this jury pool were Black, and all of them stated during pretrial questioning that they believed they could give the two defendants a fair hearing. Nonetheless, the defense lawyers removed all sixteen of the Blacks from the jury venire, leaving an all-white jury. Coyle, *Can Bias by Defense Be Barred?* *The National Law Journal*, Nov. 14, 1988, at 3, col. 1.

The prosecutor objected to this conduct on the ground that it violated the equal protection component of the Fourteenth Amendment, citing *Batson*. Defense lawyer Neil Hanley responded by saying that his conduct was really in the best interest of his clients for the "same reasons I'd strike Jewish people if I had a PLO defendant." The trial judge declined to limit the actions of the defense counsel in the absence of any precedent on which to establish a ruling to the contrary. Curriden, *Alleged Klansmen's White Jury*, A.B.A. J., May 1989, at 20.

58. Curriden, *supra* note 57, at 20 (quoting defense attorney Neil Hanley):

The Equal Protection clause applies exclusively to the state in prohibiting official governmental discrimination and has no application to a criminal defendant with peremptory strikes. It's one thing for the state to discriminate against an individual but different when someone is facing a criminal charge and life prison term who has a number of peremptory challenges which can be used to strike anybody for any reason. But I don't think the government — and that's who we are facing in this case — has a right to equal protection.

*Id.*

59. *Id.* at 20, 22.

*the State of New York*.<sup>60</sup> The District Attorney for Kings County brought an action seeking a declaratory judgment against the New York Supreme Court to test the validity of a state criminal statute authorizing defense counsel to exercise peremptory challenges that were racially motivated.<sup>61</sup> In deciding that *Batson* did not apply to the defense counsel, the court ruled that the defense counsel's actions did not constitute "state action" sufficient to trigger the requirements of the fourteenth amendment's equal protection clause. Although the U.S. Supreme Court has not provided a universal definition of "state action," the Court has said that state action is determined by a fact-bound inquiry:

1. Does the alleged deprivation arise from the operation of privilege or right that has an origin in state law?
2. Under the fact pattern of a case, can the private individuals be characterized as being state actors?<sup>62</sup>

The state is not generally held responsible for private discrimination solely on the basis that it permits the discrimination to occur. A determination that defense peremptory challenges are state action must be based on more than the fact that many defense attorneys are paid by the state pursuant to a state statute. Rather, it must be based on the participation, facilitation, and acquiescence of the trial judge and other state officials in the racial discrimination. Another New York court, relying on this same analysis, reached the opposite result<sup>63</sup> in ruling that defense attorneys are *not* free from constitutional restraints when they exercise their peremptories:

When the clerk asks the defendant to exercise peremptory challenges, defense counsel — an officer of the court and a member of the Bar established by the State, whose profession is regulated by the courts — calls the jurors' names or numbers out, and the judge accepts the challenges. Then in open court the judge or clerk orders the excluded jurors to leave, and they are guided out of the room by uniformed court officers or Deputy Sheriffs. The jurors perceive the judge as the person who is responsible for the conduct of the trial, and although they do not know whether the prosecutor, the defense lawyer or the judge is rejecting them, they do know that officials of the State are telling them to leave. Under these circumstances, if all the black ju-

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60. 139 Misc. 2d 109, 526 N.Y.S.2d 892 (N.Y. Sup. Ct. 1988).

61. In support of the argument for declaratory relief, the plaintiff named six different criminal trials where it was believed that defense counsel had exercised racially motivated peremptory challenges in criminal cases within the jurisdiction of her office.

62. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936-37. In *Lugar* the Court found that the joint participation of private individuals with state officials was sufficient to characterize that person as a state actor for the purpose of the Equal Protection Clause analysis.

63. *People v. Davis*, 142 Misc. 2d 881, 537 N.Y.S.2d 430 (N.Y. Sup. Ct. 1988). Davis, an African-American, was charged with attempted murder. Defendant's counsel peremptorily challenged all of the eight prospective white jurors who had not been excused for cause. After eight Black and Latino jurors and no Whites had been selected, the prosecutor, citing *Batson*, moved to require defense counsel to supply a racially neutral explanation for the exercise of peremptory challenges of the white prospective jurors. After explanations were offered, the trial judge concluded that at least three of the eight peremptory challenges by the defense were not racially neutral. Accordingly, the judge ruled that the prosecutor had established a case of purposeful discrimination and dismissed the jury.

During the second jury selection, the judge required the defense counsel to provide racially neutral nonpretextual explanations for the exercise of peremptory challenges, and a jury of eleven Blacks and one white was selected. For reasons unrelated to *Batson*, the defense moved to discharge the second jury on grounds described as a mistrial. The prosecutor consented to the request advanced by the defense. During the third selection of jurors, the defense moved to be relieved from an obligation to explain the exercise of peremptory challenges. The judge denied the motion.

rors—say, 9 or 10—were asked to leave but only 1 or 2 whites out of the dozen were excluded, a perception that the Court was engaging in discrimination would be reasonable . . . .<sup>64</sup>

The *Holtzman* court's opposite view emphasized that an important distinction must be made between an action that the state compels and an action that the state permits:

It is the view of this court that the State cannot be held *responsible* for the conduct complained of merely because the Judges are required to grant the peremptory challenge once it is exercised. The State, through its Judges, cannot be said to be responsible for the decision of the defense counsel to challenge a particular juror . . . True it is . . . that the peremptory challenge must be granted when defense counsel chooses to exercise it. But the *choice* to exercise it or not to exercise it still ultimately resides with defense counsel.<sup>65</sup>

Regarding the second prong of the *Lugar* test, whether defense counsel can be said to be "state actors," the *Holtzman* court held that they were not.<sup>66</sup> Citing *Polk County v. Dodson*,<sup>67</sup> the court noted that the Supreme Court has unequivocally held that "a public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a state criminal proceeding."

This dispute between the lower courts was resolved in 1990 by the New York Court of Appeals, which ruled unanimously that the systematic use of peremptory challenges by a defendant to exclude members of a race from a jury panel violates the New York constitution's civil rights and equal protection clauses.<sup>68</sup> This case involved the racially charged "Howard Beach Incident" of December 20, 1986, in which a group of white youths were accused of assaulting three Black youths, killing one, who had left their disabled car shortly after midnight and were walking in the neighborhood seeking assistance. The trial judge ruled during *voir dire* that the defense lawyers could not exercise their peremptories in a racially discriminatory manner and required them to provide racially neutral explanations when they sought to use their peremptory challenges to remove prospective jurors who were African-American.<sup>69</sup>

64. *Id.* at 888, 537 N.Y.S.2d at 434 (citing *People v. Muriale*, 138 Misc. 2d 1056, 1062-1063, 526 N.Y.S.2d 367 (N.Y. Sup. Ct. 1988)).

65. *Holtzman*, 139 Misc. 2d at 118, 526 N.Y.S.2d at 898 (citing *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978)) (emphasis in original). The court noted that "[t]his court . . . has never held that a State's mere acquiescence in a private action converts that action into that of the State." *Id.* at 117, 526 N.Y.S.2d at 897.

66. *Id.* at 118, 526 N.Y.S.2d at 898.

67. 454 U.S. 312, 325 (1981).

68. *People v. Kern*, 75 N.Y.2d 638, 554 N.E.2d 1235, 555 N.Y.S.2d 647 (1990).

69. On the first day of jury selection, the defense attorney peremptorily challenged all three prospective black jurors. The trial judge then ruled that racially neutral explanations would be required for all subsequent peremptories against black jurors. The defense then

peremptorily challenged seven Black jurors. One juror was excused without explanation and the defense proffered racially neutral explanations for the challenges to the remaining six. The court accepted the explanations as to three of the jurors, and rejected the explanations offered as to the other three jurors. Two of those jurors, however, were subsequently excused for unrelated reasons and only one juror was seated over defense objection. That juror, however, was also excused when her son became ill prior to the completion of the trial. The first alternate, who had been accepted by both the prosecution and the defense, took her place and deliberated with the other jurors, all of whom the defense had indicated were satisfactory.

The New York Court of Appeals affirmed the trial court's ruling that defendants cannot exercise their peremptories "to exclude persons of a particular race from service on a criminal jury."<sup>70</sup> The court relied exclusively on the New York Constitution to reach this conclusion, but its analysis is similar to that of the U.S. Supreme Court in *Batson v. Kentucky*<sup>71</sup> which should prove persuasive to other courts. The New York court focused on whether the racially discriminatory exercise of peremptories by a defendant is "state action" which is subject to constitutional restrictions. The New York Court of Appeals emphasized that jury service "is a civil right established by Constitution and statute"<sup>72</sup> and that "there can be no question that the State is inevitably and inextricably involved in the process of excluding jurors as a result of a defendant's peremptory challenges."<sup>73</sup>

The Hawaii Supreme Court came to the same conclusion by a four-to-one vote three and one-half months later, relying heavily on the New York Court of Appeals' *Kern* decision to hold that:

[W]hen a *prima facie* case of the use of peremptory challenges by the defense to discriminate against potential jurors because of their race, religion, sex or ancestry is established, it is incumbent upon the court to require a non-discriminatory explanation of the challenge, which satisfies it that the challenge is not based on a prohibited discriminatory basis, before excusing the juror.<sup>74</sup>

The Hawaii case involved a criminal prosecution of a man accused of murdering his wife. The defendant had used his peremptories to excuse nine women and three men, leaving a jury of eleven men and one woman, with three alternates.<sup>75</sup> The Hawaii Supreme Court ruled that the defendant's use of peremptories was sufficiently part of the overall jury selection process to constitute "state action" and, therefore, was to be subject to constitutional restrictions. The court also carried this matter one step further in ruling that the protections against discrimination applied to women as well as to members of minority racial groups.

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*Id.* at 647-48, 554 N.E.2d at 1239, 555 N.Y.S.2d at 651. The three defendants in this trial were convicted of second-degree manslaughter and first-degree assault. *Id.*

70. *Id.* at 643, 554 N.E.2d at 1236, 555 N.Y.S.2d at 648.

71. 476 U.S. 79 (1986); see *supra* notes 47-56 and accompanying text.

72. *Kern*, 75 N.Y.2d at 651, 554 N.E.2d at 1242, 555 N.Y.S.2d at 654.

73. *Id.* at 656, 554 N.E.2d at 1245, 555 N.Y.S.2d at 657. The court's conclusion that constitutional restrictions apply to the defendant's exercise of peremptories is quoted below because of its importance to this discussion.

A defendant's right to exercise the challenges is conferred by State statute (CPL 270.25). The jurors are summoned for jury service by the State (see, Judiciary Law § 516), sit in a public courtroom and are subject to voir dire at the direction of the State, and although defense counsel exercises the peremptory challenge and advises the Judge of the decision, it is the Judge, with the full coercive authority of the State, who enforces the discriminatory decision by ordering the excused juror to leave the courtroom escorted by uniformed court officers or Deputy Sheriffs. The jurors do not know whether it is the Judge, the prosecutor or the defense attorney who has excused them, and the inference is inescapable to both the excluded jurors and the public that it is the State that has ordered the jurors to leave. When these jurors are so excluded solely because of their race, the State cannot ignore its role in the discrimination against them.

*Id.*

74. *State of Hawaii v. Levinson*, 795 P.2d 845, 850 (Haw. 1990).

75. *Id.* at 847. In fact, the defendant's attorney acknowledged that he would have excused the only woman remaining on the jury had he not been concerned about the constitutionality of such an action. *Id.* "Respondent Carvalho's attorney admitted that at least some of the women were excused solely due to their gender, stating that he believed it would be in his client's best interest to have an all-male jury." *Id.*

To summarize, the argument against extending *Batson* to the defendant is, in essence, that the defendant is a private person whose conduct does not constitute state action for purposes of constitutional limitation.<sup>76</sup> Therefore, the law should give the defendant greater leeway in exercising peremptories to ensure fairness in criminal trials because peremptories are an important trial-related protection for criminal defendants.<sup>77</sup> Characterizing the defendant's use of peremptory challenges as state action does not reflect a tenable view of a defendant's role in a criminal trials.<sup>78</sup> Furthermore, limiting peremptory challenges used by criminal defendants would conflict with the general principle that individual criminal defendants should be allowed the widest possible latitude in conducting their defense.<sup>79</sup>

The contrary argument is that the defendant's continued use of racially discriminatory peremptory challenges violates the equal protection clause of the fourteenth amendment. The equal protection component of the fourteenth amendment does not preclude discrimination undertaken by private persons. When the level of cooperation and interaction between the state and private individuals is involved, it is often an arduous task to pinpoint exactly where the private action ceased and the state action begins.<sup>80</sup> The Supreme Court, in considering the issue, has stated that a precise formula is impossible to reach with respect to when there should be recognition of state action in such an intertwined fact pattern.<sup>81</sup>

Arguably, state action is implicit in the exercise of a defendant's peremptory challenges. If the entire judicial process is taken into account, as the highest courts in New York<sup>82</sup> and Hawaii<sup>83</sup> have done, the argument that the defense counsel's racially discriminatory exercise of peremptory challenges does not violate an excluded juror's equal protection rights is a questionable conclusion. The appropriate remedy, however, may not be to create a bureaucratic regime to govern the defense's exercise of peremptories, but rather to limit the number of peremptories and prohibit the use of the struck jury, as explained below.<sup>84</sup> Several related problems also require analysis.

#### IS THE EXERCISE OF PEREMPTORIES SUBJECT TO CONSTITUTIONAL LIMITATIONS IN CIVIL CASES?

In the majority of civil cases, both parties are private litigants. Therefore, in order to apply *Batson* to civil cases, the "private nature" of such suits must

76. 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, 811-20 (1989).

77. *Id.* at 821-26.

78. *Id.* at 816. In *Polk County v. Dodson*, 454 U.S. 312, 325 (1981), the Court stated that at least "when performing a lawyer's traditional function as counsel to a criminal defendant in a criminal proceeding," a public defender does not engage in action for which the state is responsible.

79. Goldwasser, *supra* note 76, at 821 (pointing out that asymmetry is a mark of our trial process, rooted in the United States Constitution).

80. See P. BREST & S. LEVINSON, *PROCESSES OF CONSTITUTIONAL DECISION MAKING* 821 (2d ed. 1982); Black, *State Action, Equal Protection and California's Proposition 14*, 81 HARV. L. REV. 69 (1967).

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

82. *People v. Kern*, 75 N.Y.2d 638, 554 N.E.2d 1235, 555 N.Y.S.2d 647 (1990); see *supra* notes 68-73 and accompanying text.

83. *State of Hawaii v. Levinson*, 795 P.2d 845 (Haw. 1990); see *supra* notes 74-75 and accompanying text.

84. See *infra* notes 108-111 and accompanying text.



be sufficiently intertwined with the operation of state law in order to bring them within the scope of state action. Although the parties are private litigants, they are availing themselves of the judicial processes and facilities that are provided for them by the operation of state law.

The three federal appellate circuits that have considered this question have reached different results. In *Fludd v. Dykes*<sup>85</sup> the U.S. Court of Appeals for the Eleventh Circuit held that *Batson* should apply to civil cases. In finding sufficient operation of state law to make the private suit a part of state action, the court noted that a private litigant could effectively remove the racial peers of his adversary.<sup>86</sup> Because there is no great burden or prejudice to require a civil litigant to explain the rationale for striking a prospective juror whenever the circumstances indicate the possibility that it was exercised for a racially discriminatory reason, the court imposed the same obligation on civil litigants as *Batson* imposed on the prosecutor in criminal cases.<sup>87</sup>

The Eighth Circuit reached a similar result in *Reynolds v. City of Little Rock*.<sup>88</sup> The court noted that "the equal protection clause of the fourteenth amendment does not contain any latent distinction between criminal and civil legal process,"<sup>89</sup> and that "[t]he more natural reading of *Batson* is that its rule of non-discrimination applies . . . without distinguishing criminal and civil legal proceedings."<sup>90</sup>

The U.S. Court of Appeals for the Fifth Circuit reached the opposite conclusion in *Edmonson v. Leesville Concrete Co., Inc.*<sup>91</sup> The court, sitting *en banc*, overturned a decision reached by a three-judge panel<sup>92</sup> and voted twelve to four that the exercise of peremptories in a civil case is not limited by constitutional restraints. In *Edmonson* a Black plaintiff brought a suit for negligence against a company, Leesville Concrete. The plaintiff used his three allotted peremptory challenges to remove three white prospective jurors, and the defendant company used its three peremptories to remove two prospective Black jurors and one white juror. The trial judge denied the plaintiff's motion that the company should be obliged to articulate neutral explanations for its use of peremptories, ruling that this requirement did not apply to civil proceedings. The resulting jury, consisting of eleven whites and one Black, ruled in favor of plaintiff Edmonson, assessing damages at \$90,000. However, the jury also found Edmonson eighty percent contributorily negligent and thus awarded him only \$18,000. He sought a new trial on the ground that the company discriminated on the basis of race in its use of peremptories.

The majority opinion begins by extolling the virtues of peremptory chal-

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85. 863 F.2d 822 (11th Cir. 1989). A Black plaintiff sought monetary damages for a violation of constitutional rights by a deputy sheriff and his supervisor. The defendant exercised peremptories against two prospective Black jurors, producing an all-white jury. The court held that whenever a Black juror is excluded from serving on a jury because of race, the *Batson* standards apply.

86. *Id.* at 828-29.

87. *Id.* at 829.

88. 893 F.2d 1004 (8th Cir. 1990).

89. *Id.* at 1008.

90. *Id.*

91. 895 F.2d 218 (5th Cir. 1990) (*en banc*), *rev'g* 860 F.2d 1308 (5th Cir. 1988).

92. 860 F.2d 1308 (5th Cir. 1988). The original panel consisted of Judges Wisdom, Rubin, and Gee; Judges Wisdom and Rubin voted that *Batson* does apply to civil trials, with Judge Gee dissenting. In the *en banc* decision Judge Gee wrote the majority opinion, and Judges Wisdom and Rubin were among the four dissenters.

lenges, quoting extensively from *Swain v. Alabama*.<sup>93</sup> It then notes the administrative burdens created by the *Batson* rule as an argument against its extension unnecessarily.<sup>94</sup> Finally, it concludes that "state action" is not involved when a peremptory challenge is exercised in a civil case.<sup>95</sup> In concluding, for instance, that the role of the judge in approving the exercise of the peremptory does not constitute state action, the majority states:

The notion of trial judge as "state actor" need not detain us long. In the first place, as the Supreme Court observed in *Swain* — factually and not in such a manner as to be subject to overruling by *Batson* — the peremptory challenge "is one exercised . . . without being subject to the court's control. . . ." 380 U.S. at 220. 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 a fault — lies with the system which permits such challenges, not with the judge's mere ministerial compliance with what the rule requires.<sup>96</sup>

The dissenting judges took sharp issue with this characterization: The majority's view of the court's "purely ministerial role" in supervising peremptory challenges is perhaps most strikingly belied in the trial judge's broad discretion to determine the manner in which peremptory challenges are exercised: he may decide which side exercises the last challenge, may require simultaneous exercise of challenges by the prosecution and defense, and may even require that one party exercise her challenges first, thereby allowing the other party to then act with full knowledge of her opponent's choices. . . . Peremptory challenges are not self-executing but are effected by the action of the judge who excuses the prospective juror. . . . By carrying out his duties in a way that permits peremptory challenges based on race, the rest of the judge's approval of discrimination rubs off onto society, corroding the national character by giving private prejudice the imprimatur of state approval.<sup>97</sup>

These competing perspectives thus present the different views that exist on this issue. If the process of juror selection is accepted as an integral part of state action, then it logically follows that the exercise of nonneutral racially motivated peremptory challenges constitutes a violation of the excluded juror's and the litigant's equal protection rights. The exclusion is accomplished by state processes. The juror is excused by the judge from further participation. When the exclusion results from racial discrimination or other types of group bias, the exclusion is violative of that individual's right to equal protection under the law.

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93. 380 U.S. 202 (1965); see *supra* notes 41-56 and accompanying text. The majority's perspective on the sanctity of peremptories is illustrated by its description of *Batson v. Kentucky*, 476 U.S. 79 (1986), as a case in which the U.S. Supreme Court had acted "to trammel the use of the peremptory challenge." *Edmonson*, 895 F.2d at 220 (emphasis added).

94. 895 F.2d at 221 n.6.

95. *Id.* at 221-22.

96. *Id.* at 221-22 (citations omitted). See *supra* note 73 for a sharply different perspective expressed by the New York Court of Appeals in *People v. Kern*, 75 N.Y.2d 638, 554 N.E.2d 1235, 555 N.Y.S.2d 647 (1990).

97. *Edmonson*, 895 F.2d at 232-33 (citations omitted).

## SHOULD PEREMPTORY CHALLENGES BE ELIMINATED ALTOGETHER?

In his concurring opinion in *Batson*,<sup>98</sup> Justice Thurgood Marshall stated that because peremptory challenges have been exercised to exclude jurors on racial grounds, the Court should ban peremptories totally from the criminal justice system. In Marshall's view the criminal courtroom should be an equal playing field with total freedom from bias directed toward the accused and from any prejudice against the prosecution.<sup>99</sup> He believed this balance could be maintained only by eliminating the use of peremptory challenges by both the prosecution and defendants.

In determining the constitutionality of eliminating peremptory challenges, Justice Marshall noted that the Court has emphasized that the exercise of peremptory challenges is not a right that is rooted in the Constitution. Therefore, withholding the right to exercise peremptory challenges in a jury trial would not be a procedure that would impair the constitutional guarantee of the right to a fair trial by an impartial jury.<sup>100</sup>

The opposite view is expressed by Judge Gee in his dissent in the original decision of *Edmonson v. Leesville Concrete Co.*<sup>101</sup> He argued that the decisions of private litigants should not be viewed as state action.<sup>102</sup> He also believed that exercising peremptory strikes along ethnic lines did not necessarily involve or give the appearance of derogatory racial views.<sup>103</sup>

In arguing that *Batson* should not apply to civil cases, Judge Gee noted Justice Marshall's eloquent plea in *Batson*: "In this much at least he [Marshall] is surely correct, that we must go on or backward; to stay here is to rest content with a strange procedural creature. . . ."<sup>104</sup>

If *Batson* were applicable to the defense, the end result would indeed be a strange procedural system, awkward to administer. If a lawyer always used peremptory challenges to eliminate accountants, and a challenged accountant was not a member of a minority group, no reason would have to be given for striking the individual. If, however, the accountant were a member of an identifiable ethnic group, and especially if other members of that group were also eliminated by use of peremptory challenges, the lawyer would have to advance a rational explanation for the action unrelated to race. Some peremptory challenges could, therefore, be exercised without explanation in some instances and not in others. It would be time consuming and difficult to administer a scheme requiring explanations from defense attorneys whenever they are sus-

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98. See *Batson v. Kentucky*, 476 U.S. 79, 102-108 (1986).

99. *Id.* at 107 (citing *Hayes v. Missouri*, 120 U.S. 70 (1887)). See also Goldwasser, *supra* note 69, at 839; Pizzi, *supra* note 1, at 144-47.

100. See *Batson*, 476 U.S. at 108.

101. 860 F.2d 1308, 1315 (5th Cir. 1988), *rev'd*, 895 F.2d 218 (5th Cir. 1990).

102. *Id.* at 1316.

103. *Id.* In his *Batson* dissent Chief Justice Burger included the following quote:

Exclusion from the venire summons process implies that the government (usually the legislative or judicial branch) . . . has made the general determination that those excluded are unfit to try *any* case. Exercise of the peremptory challenge, by contrast, represents the discrete decision . . . that the challenged venire person will likely be more unfavorable to that litigant in that *particular case* than others on the same venire.

*Batson*, 476 U.S. at 122 (citing *United States v. Leslie*, 783 F.2d 541, 554 (5th Cir. 1986) (emphasis in original)).

104. *Edmonson*, 860 F.2d at 1317.

pected of using peremptories in a racially discriminatory manner.<sup>105</sup> Requiring such explanations would reduce the protection this device provides for persons accused.

### POLITICAL TRIALS AND PEREMPTORY CHALLENGES

The applicability of *Batson* to the defense has been considered in the context of the usual criminal or civil trial. What about the exceptional trial in which the defendant is alleged to have committed a crime, but the underlying motivation for the prosecution of the defendant is political in nature? Requiring the defense to provide neutral explanations for the exercise of peremptory challenges might be an intolerable burden in this type of situation.

Suppose an African-American civil rights activist is accused of inciting a riot. This defendant may wish to exercise peremptory challenges to eliminate from the jury white middle-class jurors without the necessity of advancing a reason for doing so. If such an entitlement is not available, the defense will have to have an articulable explanation for the exercise of the challenge each time it is exercised. The net result could be that the peremptory is transformed into nothing more than a challenge for cause which could be rejected by the court.

### CONCLUSION

*Batson v. Kentucky*<sup>106</sup> provides a long-overdue reform of the ill-advised *Swain*<sup>107</sup> rule, but it has opened a number of difficult questions, as this article has explained. The trickiest one is whether a defendant should be entitled to exercise peremptories in a racially-specific fashion without violating the limits imposed by the equal protection clause. Most courts have examined this question from the narrow vantage point of whether the defendant's actions constitute "state action" in this context. Examined in the context of the overall trial process, such challenges probably should be viewed as state action, but this narrow focus may be misleading because it ignores some other important structural problems involved in these situations.

One device that is clearly inappropriate and leads to unrepresentative jury panels is the struck-jury system,<sup>108</sup> which was used in the *Cox* case described above.<sup>109</sup> Such a system gives litigants an unwarranted opportunity to manipulate the composition of the jury and to reduce its ability to represent a cross-section of the community.<sup>110</sup> The struck-jury system should be found unconstitutional because its use is inconsistent with the sixth amendment's requirement of an "impartial" jury. Also, the system violates the rights to equal protection of the litigants and the prospective jurors.

Another culprit is the use of large numbers of peremptories. In the *Cox* case described above,<sup>111</sup> *each side* was given 26 peremptories. This grossly excessive figure ensures that anyone with any sense of uniqueness will be re-

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105. *Id.* See also Pizzi, *supra* note 1, at 153-56.

106. 476 U.S. 79 (1986); see *supra* notes 47-56.

107. See *supra* notes 41-46 and accompanying text.

108. See *supra* notes 14-15, 47, 57 and accompanying text.

109. See Curriden, *supra* notes 57-58 and accompanying text.

110. See J. VAN DYKE, *supra* note 2, at 146-47.

111. See *supra* notes 57-58 and accompanying text.

moved from the final jury panel, which inevitably means that the resulting jury panel will consist of bland personalities.

Peremptory challenges have a place in our system to give a defendant an assurance that he or she is being tried by persons without preconceived biases; they should, however, be limited in number. The defendant should be allowed three peremptories in the usual cases, and five in the trials involving the most serious accusations, and the defendant should always be given more peremptories than the prosecutor.<sup>112</sup> If the number is kept at this low limit, then the defendant should be allowed to exercise peremptories in a true "peremptory" fashion (*i.e.*, without explanation), as such low numbers could not dramatically distort the ultimate composition of the jury panel. This approach is preferable because we are committed to ensuring that a defendant is provided a trial that is perceived to be fair, and because the process of administering a system in which defendants must explain their peremptories would inevitably be burdensome.

The prosecution should continue to be governed by the *Batson* standard, because we do expect our government to bend over backward to be fair *and* because — as the early history tells us<sup>113</sup> — the right to exercise peremptories was not always a right of the government but was primarily a right of the accused.

If, on the other hand, defendants are given large numbers of peremptories, or if a struck-jury system is used, then the defendant should be restrained by constitutional notions of equal protection in exercising peremptories, because the government has established a system that otherwise will almost inevitably lead to an unrepresentative jury.<sup>114</sup>

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112. See J. VAN DYKE, *supra* note 2, at 168-69.

113. See *supra* notes 16-40.

114. In civil cases, the number of peremptories should also be kept low. Three should suffice in most cases. However, courts should ensure fairness by monitoring the use of peremptories when race appears to be a factor, especially when the government is involved, as in *Fludd v. Dykes*, 863 F.2d 822 (11th Cir. 1989). See *supra* notes 85-87 and accompanying text.