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Georgia v. McCollum: Protecting Jurors from Race-Based Peremptory Challenges but Forcing Criminal Defendants to Risk Biased Juries

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Georgia v. McCollum: Protecting Jurors From Race-Based Peremptory Challenges But Forcing Criminal Defendants to Risk Biased Juries

The peremptory challenge is a jury selection procedure which gives a litigant the right to exclude particular persons from the jury without stating a reason.[1] During jury selection the litigant, usually through their attorney, uses either a challenge for cause[2] or a peremptory challenge to exclude prospective jurors.[3] The critical distinction between the two challenges is that while the peremptory challenge allows the attorney to remove a potential juror without stating a reason,[4] the challenge for cause must be accompanied by a specific reason.[5] Another difference between the two challenges is that while the trial judge decides whether to grant or deny a

1. *See* Batson v. Kentucky, 476 U.S. 79, 89 (1986) (stating that the peremptory challenge entitles a litigant to remove a juror for any reason at all). While the right to use a peremptory challenge belongs to the litigant, unless the litigant is representing him or herself, peremptory challenges are usually exercised by the litigant's attorney. *See* FED. R. CRIM. P. 24(b) (granting peremptory challenges to litigants in criminal trials); *see also* JAMES J. GOBERT, JURY SELECTION 276 (2d ed. 1990) (outlining the procedure by which the trial attorney exercises peremptory challenges), *see also infra* 57-74 and accompanying text (discussing peremptory challenges).

2. *See* Swain v. Alabama, 380 U.S. 202, 220 (1965) (stating that the challenge for cause permits rejection of jurors on a narrowly specified and legally cognizable basis of partiality); *infra* notes 36-56 and accompanying text (discussing the challenge for cause).

3. *See generally* LISA BLUE & JANE N. SAGINAW, JURY SELECTION: STRATEGY AND SCIENCE § 2:01-2:03 (1986) (discussing the differences between the challenge for cause and the peremptory challenge).

4. *See supra* note 1 and accompanying text (defining the peremptory challenge).

5. *See Swain*, 380 U.S. at 220 (stating that the challenge for cause permits the exclusion of potential jurors who, based on specific, provable and legally accepted grounds, are unable to be impartial); *supra* note 2 and accompanying text (defining the challenge for cause).

challenge for cause,[6] the trial attorney retains complete control over the exercise of peremptory challenges.[7] The trial attorney can exercise peremptory challenges for any reason, including sudden impressions or intuition about a juror's partiality that did not qualify the juror to be challenged for cause.[8] This discretion enables the trial attorney to remove a juror suspected of bias even if that juror does not fall within one of the narrow categories accepted for a causal challenge.[9] Furthermore, by excusing jurors suspected of partiality, the peremptory challenge can neutralize the adverse effect of a judge's erroneous denial of a challenge for cause on the outcome of the trial.[10] However, the trial attorney's complete control over peremptory challenges may also allow the peremptory challenge to be abused.[11]

Beginning in 1965, the United States Supreme Court attempted to eliminate the abuse of racially discriminatory peremptory challenges from the jury selection process by limiting the trial attorney's complete discretion over the challenge.[12] This initial res-

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6. *See* GOBERT, *supra* note 1, at 200 (stating that after an attorney challenges a juror for cause, the trial judge has complete discretion whether to excuse the challenged juror). On appeal, the judge's decision will be reversed only for an abuse of discretion or a clear misapplication of law. *Id.*

7. *See Swain*, 380 U.S. at 220 (explaining that the essential nature of the peremptory challenge is that it is exercised by the attorney without providing a reason and without being subject to the court's control).

8. *See id.* (quoting Lewis v. United States, 146 U.S. 370, 376 (1892)) (asserting that the peremptory challenge permits removal of a juror for real or imagined bias or sudden impressions of partiality).

9. *See* GOBERT, *supra* note 1, at 271 (explaining that peremptory challenges allow an attorney to remove persons who appear to be unfavorable towards the attorney's case even when there is insufficient evidence of bias to justify a challenge for cause).

10. *See id.* (stating that after the trial judge has refused to remove a juror for cause, the trial attorney may then avoid the possible bias resulting from having challenged that juror by using a peremptory challenge to remove the questioned juror); *infra* notes 69-71.

11. *See* Batson v. Kentucky, 376 U.S. 79, 102-03 (1986) (Marshall, J., concurring) (declaring that peremptory challenges are inherently racially discriminatory). Justice Marshall asserted that once the Supreme Court invalidated state laws which prohibited African-Americans from serving on juries, states turned to the peremptory challenge to keep African-Americans off juries. *Id.* at 103. *See* Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369, 370-75 (1992) (arguing that peremptory challenges are habitually employed to discriminate against prospective jurors).

12. *See Swain*, 380 U.S. at 204 (declaring that racial discrimination in jury selection not only violates the Constitution but is also at odds with the basic concepts of democracy); *id.* at 220 (stating that the peremptory challenge is not subject to the trial court's control).

triction led to the Supreme Court's 1986 decision in *Batson v. Kentucky*[13] which narrowed the application of peremptory challenges by holding that the prosecution in a criminal case violates the Equal Protection Clause of the Fourteenth Amendment when it exercises peremptory challenges based solely on the race of prospective jurors.[14] The Supreme Court extended *Batson* in *Edmonson v. Leesville Concrete Co., Inc.*,[15] holding that civil litigants are also prohibited from using their peremptory challenges to exclude jurors based solely on their race.[16] Recently, in *Georgia v. McCollum*,[17] the Court extended the *Batson* limitation on peremptory challenges to criminal defendants.[18] The *McCollum* Court held that a criminal defendant's exercise of peremptory challenges constitutes state action, and thus, if the peremptory challenge is racially discriminatory, it violates the Equal Protection Clause.[19]

This Note argues that the Supreme Court's decision in *Georgia v. McCollum*,[20] by subjecting the criminal defendant's peremptory challenge to court control, denies the criminal defendant an important tool in securing a fair and impartial jury.[21] Part I of this Note reviews the historical foundation and primary purposes of the peremptory challenge and outlines the legal foundation for the Supreme Court's decision in *Georgia v. McCollum*.[22] Part II dis-

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13. 476 U.S. 79 (1986).

14. *Id.* at 92-93. The trial court will not question the reasons behind a peremptory challenge unless the challenging party's opponent objects to the peremptory by asserting a prima facie case of purposeful discrimination. *See infra* notes 132-150 and accompanying text (providing a thorough discussion of the *Batson* decision including the requirements for a prima facie case).

15. 111 S. Ct. 2077 (1991).

16. *See* Edmonson v. Leesville Concrete Co., Inc., 111 S. Ct. 2077, 2087 (1991) (holding that civil litigants violate the Equal Protection Clause when they use their peremptory challenges to exclude jurors based solely on their race), *infra* notes 188-212 and accompanying text (providingan in-depth discussion of the *Edmonson* decision).

17. 112 S. Ct. 2348 (1992).

18. *See* Georgia v. McCollum, 112 S. Ct. 2348, 2359 (1992) (stating that criminal defendants are subject to the equal protection mandate of the Fourteenth Amendment when using their peremptory challenges).

19. *Id.*; *see infra* notes 217-298 and accompanying text (providing a detailed discussion and analysis of the *McCollum* decision).

20. 112 S. Ct. 2348 (1992).

21. *See infra* notes 336-413 and accompanying text (arguing that the *McCollum* decision lacks a realistic assessment of the rights granted to the criminal defendant).

22. *See infra* notes 25-216 and accompanying text.

cusses the majority, concurring, and dissenting opinions in *McCollum*.[23] Finally, Part III examines the possible ramifications of the *McCollum* decision.[24]

I. LEGAL BACKGROUND

The primary objective of the American jury selection process is to impanel fair and impartial fact-finders.[25] In order to achieve this objective, a preliminary examination of prospective jurors called voir dire is conducted.[26] During voir dire the trial judge or the trial attorneys question prospective jurors to determine the jurors' qualifications and suitability to serve on the jury.[27] The

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23. *See infra* notes 217-335 and accompanying text.

24. *See infra* notes 336-413 and accompanying text.

25. *See* U.S. CONST. amend. VI (granting the accused the right to be tried by an impartial jury); U.S. CONST. amend. XIV (granting all citizens the right to due process of law); Duncan v. Louisiana, 391 U.S. 145, 149-51 (1968) (incorporating the criminal defendant's Sixth Amendment right to an impartial jury into the Due Process Clause of the Fourteenth Amendment, thereby making it binding against the states). The Jury Selection and Service Act of 1968 provides for both mandatory exemptions from and minimum qualifications for jury service in federal trials. 28 U.S.C. §§ 1862, 1863(b)(6) (1988). Under the Act, members of the armed forces, members of state or federal police and fire departments, and state or federal public officers actively engaged in official duties are barred from jury service. *Id.* § 1862 (1988). The qualifications for a potential juror under the Act include: United States citizenship; an ability to speak English and to read, write and understand English well enough to complete the juror qualification form; a lack of any mental or physical infirmity that would prevent a person from rendering satisfactory jury service; and a lack of convictions or pending charges for state or federal felony offenses. *Id.* § 1863(b)(6) (1988).

26. *See* BLACK'S LAW DICTIONARY 1575 (6th ed. 1990) (defining "voir dire" as the preliminary examination of prospective jurors to determine their qualification and suitability to serve as jurors); V. HALE STARR & MARK MCCORMICK, JURY SELECTION 39 (1985) (stating that in the federal system the court may permit the parties or their attorneys to conduct voir dire or may do the questioning themselves). When the court does the questioning, it must permit the parties to supplement the inquiry with such additional questions as it deems proper. FED R. CRIM. P. 24(a); FED. R. CIV. P. 47(a). *See* Edmonson v. Leesville Concrete Co., Inc., 111 S. Ct. 2077, 2084 (1991) (explaining that most district court judges conduct the entire voir dire themselves); STARR & MCCORMICK, *supra*, at 26 (stating that a 1977 survey of federal judges showed that 75% of the judges excluded oral participation of counsel during voir dire).

27. *See* Stephen A. Saltzburg & Mary E. Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 MD. L. REV. 337, 339 n.13 (1982) (describing the various methods of conducting voir dire employed in the United States). Some jurisdictions allow for juror questioning solely by the trial judge and others combine questioning by the judge with questions from the trial attorneys. *Id.* The permissible scope of the questioning also varies among jurisdictions. *Id.* Some jurisdictions restrict voir dire questions to those that will provide a basis for a challenge for cause while others allow questions having any relation to the exercise of challenges for cause or peremptory challenges. *Id.* However, the trial judge has discretion to limit irrelevant or

information obtained during voir dire assists trial attorneys in determining how to use their jury challenges effectively to eliminate biased jurors.[28]

A. Three Types of Jury Challenges and Their Application

There are three types of jury challenges available to the trial attorney: challenges to the array,[29] challenges for cause,[30] and peremptory challenges.[31] Although *Georgia v. McCollum* only addressed the peremptory challenge, it is helpful to explain all three challenges in order to illustrate *McCollum's* implications on the jury selection process.

1. Challenge to the Array

The first type of jury challenge, the challenge to the array, focuses on the process of selecting the entire jury panel.[32] Chal-

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insubstantial questioning. *Id.* Voir dire questions may be addressed to either the entire jury panel or to the jurors individually. *Id.; see* Barbara A. Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545, 547-48 (1975) (explaining that when voir dire questions are addressed to the jury panel, the effect may be that some jurors fail to speak up for fear of speaking in front of the other jurors or of disclosing personal feelings).

28. BLUE & SAGINAW, *supra* note 3, at § 2:01; *see* Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981) (declaring that without adequate voir dire, the trial judge's responsibility to remove prospective jurors who will not be able to impartially follow the court's instructions and evaluate the evidence cannot be fulfilled); Swain v. Alabama, 380 U.S. 202, 219-20 (1965) (stating that attorneys may ask probing questions during voir dire to ascertain bias and prejudice to assist them in exercising jury challenges); *see also* FED. R. CIV. P. 47 (providing that the trial judge should have extensive control over voir dire in the federal system in order to control the information that may be discovered about a prospective juror, thereby affecting the litigants' exercise of challenges for cause and peremptory challenges).

29. BLACK'S LAW DICTIONARY 230 (6th ed. 1990) (defining "challenge to the array" as a challenge that focuses on the illegality of drawing, selecting, or impaneling the jury).

30. *See supra* note 2 (defining the "challenge for cause"); *see also Swain*, 380 U.S. at 220 (explaining that the challenge for cause permits the exclusion of potential jurors who, based on specific, provable, and legally accepted grounds, are unable to be impartial).

31. *See supra* note 1 (defining the "peremptory challenge"); *see also* 28 U.S.C. § 1870 (1966) (granting peremptory challenges in federal civil trials); FED. R. CRIM. P. 24(b) (granting peremptory challenges in federal criminal trials). Sequentially, an attorney should exercise a challenge to the array first, followed by challenges for cause, and lastly, peremptory challenges. GOBERT, *supra* note 1, at 143-44.

32. BLUE & SAGINAW, *supra* note 3, at § 2:02 (providing a thorough discussion of the challenge to the array).

lenges to the array usually concentrate on a judicial defect or irregularity in the process of selecting the jurors.[33] A successful challenge to the array results in the entire jury being disqualified.[34] This type of challenge is most often successful upon proof that the state personnel responsible for compiling jury lists or calling jurors have a significant interest in the outcome of the case.[35]

2. *Challenge for Cause*

The second type of jury challenge, the challenge for cause, questions the partiality of an individual juror.[36] When challenging a juror for cause, an attorney is required to state a specific, provable and legally cognizable basis of partiality.[37] Since the law presumes that jurors are impartial,[38] the burden is on the party

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33. *See* STARR & MCCORMICK, *supra* note 26, at 43 (defining the challenge to the array); *see also* Irwin v. Dowd, 366 U.S. 717, 728 (1961) (disqualifying the jury, reversing a conviction of murder and vacating a sentence of death where eight of 12 jurors had expressed during voir dire their opinion as to the defendant's guilt of a crime which had been the subject of extensive pre-trial publicity).

34. BLUE & SAGINAW, *supra* note 3, at § 2:02.

35. *Id.* Recently challenges to the array have focused on the fair cross-section requirement of the Sixth Amendment. *Id.*; *see* U.S. CONST. amend. VI (granting the criminal defendant the right to a jury drawn from a fair cross-section of the community); Duren v. Missouri, 439 U.S. 357, 364 (1979) (holding that a prima facie violation of the Sixth Amendment requirement, that a jury be drawn from a fair cross-section of the community, requires that the group allegedly excluded is distinctive within the community, that this group's representation on the jury is not fair and reasonable in relation to their number within the community, and this under-representation is caused by the jury selection process).

36. *See* BLUE & SAGINAW, *supra* note 3, at § 2:03 (discussing the use of, and acceptable reasons for, a challenge for cause).

37. *See* Swain v. Alabama, 380 U.S. 202, 220 (1965) (stating that the challenge for cause requires the attorney to state a legally recognized reason for the challenge). Under federal law in civil cases, the challenge is divided into those for cause and those for favor. 28 U.S.C. § 1870 (1988). A panelist who does not meet the statutory requirements for jury service is subject to a challenge for cause. *Id.* A biased juror can be removed from the jury with a cause for favor. *Id.* In practice this distinction has been lost and a challenge for cause suffices to disqualify a juror for bias or for failure to meet statutory requirements. *See* Judge David Hittner & Eric J.R. Nichols, *Jury Selection in Federal Civil Litigation: General Procedures, New Rules, and the Arrival of Batson*, 23 TEX. TECH. L. REV. 407, 424 (1992) (providing a detailed analysis of the challenge for cause in federal civil trials).

38. *See* GOBERT, *supra* note 1, at 200-202 (discussing the procedure for exercising a challenge for cause); *see also* Reynolds v. United States, 98 U.S. 145, 157 (1878) (stating the presumption of a juror's impartiality is overcome only if the challenger is able to show the actual existence of a bias in the mind of the juror).

seeking to challenge a juror for cause to prove a legal basis for disqualification.[39] In order for a juror to be challenged for cause, the attorney must establish, from information obtained during voir dire questioning, that a particular juror is unable to objectively evaluate and render a decision upon the facts of the case.[40] Since the partiality of a juror successfully challenged for cause renders that juror incompetent to serve on the jury, challenges for cause are unlimited in number in the effort to eliminate all biased jurors.[41] Generally, the acceptable legal grounds for challenges for cause are set out by statute,[42] and include any quality that would prevent the juror

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39. *See* GOBERT, *supra* note 1, at 201 (stating that the challenge for cause, unlike the peremptory challenge, requires an attorney to articulate a basis for disqualification). It is tactically advisable for an attorney to make a challenge for cause in chambers or at the bench, out of the hearing of the jurors. *Id.* Challenging the juror in chambers avoids possible prejudice resulting from the challenge on the part of the juror if the challenge is denied or bias on the part of the juror's friends on the jury if the challenge is accepted. *Id.* For this reason, many courts allow attorneys to challenge jurors for cause anonymously by submitting a list of the jurors they seek to challenge to the trial judge. *Id.*

40. *See* BLUE & SAGINAW, *supra* note 3, at § 2:03 (discussing the challenge for cause).

41. *See* GOBERT, *supra* note 1, at 193-94 (stating that challenges for cause are unlimited because of the need to disqualify all impartial jurors in order that each party receive its constitutional right to a fair and impartial jury); *see also* U.S. CONST. amend. VI (granting the accused the right to a fair and impartial jury). Furthermore, in order to conserve judicial time and money and to avoid confusion among jurors and the attorneys, challenges for cause should be exercised before the jury is sworn. *See* BLUE & SAGINAW, *supra* note 3, at § 2:03 (explaining that, generally, a challenge for cause that is not timely raised is deemed waived); GOBERT, *supra* note 1, at 202 (explaining that in the pursuit of an impartial jury some courts permit attorneys to challenge a juror for cause after the jury is sworn if the reason for the juror's disqualification was not discovered until after the jury was empaneled).

42. *See* CAL. CIV. PROC. CODE § 229 (West 1992) (specifying that a few of the acceptable reasons for a challenge for cause in either a criminal or civil case are: relation within the fourth degree (*e.g.* first cousins) with any party, alleged victim or witness in the case at bar; standing in the relation of or being a parent, spouse, child, guardian, conservator, employer or employee, landlord or tenant, principal or agent, debtor or creditor, or business partner to any party; having served as a grand juror on the case at bar, witness in previous action between the same parties, or grand juror on any trial in which either party was the plaintiff or defendant in a civil action or defendant in a criminal action; interest in the outcome of the case; having an unqualified opinion or belief as to the merits of the case; having bias towards either party; and, if the offense is punishable by death, having a conscientious objection to the death penalty that would preclude finding the defendant guilty); *see also* ALA. CODE § 12-16-150 (1975); CONN. GEN. STAT. § 51-240 (1985); FLA. STAT. ANN. § 913.03 (West 1985); IDAHO CODE § 19-2018, 19-2019, 19-2020 (1987); IOWA CODE ANN. § 813.2 (West 1979); LA. CIV. CODE ANN. art. 1765 (West 1987); ME. REV. STAT. ANN. tit. 14, § 1301 (West 1980); NEB. REV. STAT. § 29-2006 (1989); N.Y. CODE CRIM. PROC. § 270.20 (Consol. 1982); N.C. GEN. STAT. § 15A-1212 (1992); N.D. CENT. CODE § 28-14-06 (1991); S.D. CODIFIED LAWS ANN. § 15-14-6 (1973); TENN. CODE ANN. § 22-3-102 (1980); WASH. REV. CODE § 4.44.180 (1988); WYO. STAT. ANN. § 1-11-203 (1977) (stating the acceptable grounds for a challenge for cause in their

from making an impartial decision.[43] The most commonly accepted grounds for challenges for cause are: a juror's inability to follow the law;[44] jury service in a related case;[45] a juror's familial relationship with an attorney, witness or party to the litigation;[46] or a juror's financial interest in the outcome of the case.[47]

Once a legally proper cause for the challenge has been shown by an attorney, excusal of the juror becomes a question of fact left to the discretion of the trial judge.[48] The trial judge's ruling on a challenge for cause is given broad deference on appeal because the trial judge has had the opportunity to observe the juror's demeanor during voir dire.[49] This opportunity renders the trial judge in a better position to assess the juror's credibility.[50] A trial judge's

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respective states).

43. GOBERT, *supra* note 1, at 198-200. Common law challenges for cause include relation to the parties within the ninth degree (e.g. third cousins once removed), that the juror was a godfather to a child of either party, or that the juror was master, servant, counselor, steward or attorney for either party. *Id.* at 196; *see id.* (stating that at common law, jurors could also be challenged for cause if they had already formed and declared an opinion about the case).

44. *Id.* at 196; *see* Morgan v. Illinois, 112 S. Ct. 2222, 2229 (1992) (holding that a juror who would ever impose capital punishment is not impartial and may be challenged for cause); Brooks v. Estelle, 697 F.2d 586, 589 (5th Cir. 1982) (holding that a juror was properly excused for cause when the juror could not convict a defendant of murder when that defendant had not actually pulled the trigger of the murder weapon).

45. GOBERT, *supra* note 1, at 196; *see* Leonard v. United States, 378 U.S. 544, 545 (1964) (per curiam) (holding that all jurors on a jury must be challenged for cause when the second jury knew that the defendant was convicted in the first trial).

46. GOBERT, *supra* note 1, at 196; *see* Hopt v. Utah, 120 U.S. 430, 433 (1887) (listing familial relation among the reasons to challenge a juror for cause).

47. GOBERT, *supra* note 1, at 196; *see* Chestnut v. Ford Motor Co., 445 F.2d 967, 971-72 (4th Cir. 1971) (holding that in a lawsuit involving a company, a stockholder of that company is incompetent to sit as a juror).

48. GOBERT, *supra* note 1, at 200; *see* Patton v. Yount, 467 U.S. 1025, 1036 (1984) (stating that the factual question of whether a juror should be disqualified for cause is a twofold inquiry: first, whether the juror stated under oath that they could set aside any outside opinions and decide the case on the evidence presented during the trial; and second, whether the trial judge believed the juror's protestation of impartiality).

49. GOBERT, *supra* note 1, at 200; *see Patton*, 467 U.S. at 1038 (stating that because the extended voir dire proceedings are specifically designed to identify biased jurors and this determination is essentially one of credibility, the trial judge is in the best position to make the determination).

50. *Patton*, 467 U.S. at 1038.

ruling on a challenge for cause will be reversed only for an abuse of discretion or a misapplication of settled principles of law.[51]

The legally accepted grounds for challenges for cause have been criticized as too narrow to eliminate all bias from the jury.[52] This criticism points out that restrictive voir dire procedures, including limitations on the right of counsel to question jurors directly and limits on the scope of an attorney's inquiry,[53] combined with the narrow grounds for challenges for cause[54] make it extremely difficult to discover whether prospective jurors have subconscious biases that will affect their ability to be impartial.[55] The limited nature of the challenge for cause is one of the reasons trial attorneys are granted peremptory challenges.[56]

3. The Peremptory Challenge

The third type of jury challenge available to the trial attorney is the peremptory challenge.[57] There are two critical differences between peremptory challenges and challenges to the array and challenges for cause.[58] First, unlike challenges to the array and challenges for cause, which must be based on statutorily defined

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51. *Id.* (stating that the trial court's determination of a juror's credibility should be given great deference by appeals courts); *see* Reynolds v. United States, 98 U.S. 145, 156 (1878) (declaring that the finding of a trial court on the issue of a prospective juror's partiality should not be set aside by a reviewing court unless the error is manifest).

52. *See* Saltzburg & Powers, *supra* note 27, at 340 (discussing the restrictive role of the challenge for cause); *see also* Roger S. Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235, 243-44 (1968) (criticizing the challenge for cause as too narrow to eliminate bias from the jury).

53. *See* Babcock, *supra* note 27, at 545 (providing a detailed description of the voir dire process); *supra* notes 26-27 (discussing the different types of voir dire procedures and their effect on the information obtained from the jurors).

54. *See supra* notes 42-47 and accompanying text (discussing the acceptable grounds for challenging a juror for cause).

55. *See* Saltzburg & Powers, *supra* note 27, at 340 n.13 (stating that the method of conducting voir dire has a significant effect on the amount of information available to the attorney in exercising jury challenges); *see also* Babcock, *supra* note 27, at 547-48 (describing the effect of different voir dire methods on the information obtained from jurors).

56. GOBERT, *supra* note 1, at 143.

57. *Id.* at 143; *see supra* note 1 (defining the peremptory challenge).

58. *See* GOBERT, *supra* note 1, at 270-78 (distinguishing the peremptory challenge from the challenge for cause).

justifications, no explanation is required when removing a prospective juror with a peremptory challenge.[59] The second difference is that unlike the first two types of jury challenges which are unlimited in number, the number of peremptory challenges granted to a litigant is fixed by statute.[60] For example, under current federal law the defendant is granted ten peremptory challenges and the prosecution six, when a felony not punishable by death is charged.[61] For federal civil cases, each party is entitled to three peremptory challenges.[62] Most state statutes follow the basic federal pattern in granting peremptory challenges; the number of peremptory challenges allowed in civil cases is usually less than in criminal cases and more peremptory challenges are granted for more serious crimes.[63]

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59. *See id.* at 270 (stating that ordinarily an attorney does not have to provide explanations for peremptory challenges). The one exception to this rule occurs when a litigant establishes a prima facie case that peremptory challenges have been exercised to exclude jurors based on their race. *See* Batson v. Kentucky, 376 U.S. 79, 92-93 (1986) (requiring that once a prima facie case of purposeful discrimination has been demonstrated the prosecution must state a race-neutral explanation for its peremptory challenges); *see also* Georgia v. McCollum, 112 S. Ct. 2348, 2357 (1992) (applying the *Batson* holding to criminal defendants); Edmonson v. Leesville Concrete Co., Inc., 111 S. Ct. 2077, 2080 (1991) (applying the *Batson* holding to civil litigants).

60. *See* 28 U.S.C. § 1870 (1966) (granting three peremptory challenges to each party in federal civil trials); FED. R. CRIM. P. 24(b) (granting 20 peremptory challenges in federal criminal trials where the possible punishment is the death penalty; three peremptories in misdemeanor cases; and six to the prosecution and 10 to the defendant when a felony not punishable by death is charged).

61. FED. R. CRIM. P. 24(b); *see id.* (providing for court discretion to grant additional peremptory challenges when more than one defendant is being tried before a single jury).

62. 28 U.S.C. § 1870 (1966).

63. *See* CAL. CIV. PROC. CODE § 231 (West 1992) (allowing the prosecution and the defendant 20 peremptory challenges each if the crime charged is punishable by life imprisonment or death; six peremptories each if the crime charged is punishable by imprisonment for 90 days or less; 10 peremptories each for any criminal offense punishable by less than life but more than 90 days in prison; and in civil cases each party is entitled to six peremptory challenges); *see also* ARK. CODE ANN. § 16-33-305 (Michie 1987); COLO. REV. STAT. § 16-10-104 (1990); CONN. GEN. STAT. § 54-82g (1985); D.C. CODE ANN. § 23-105 (1981); FLA. STAT. ANN. § 913.08 (West 1985); HAW. REV. STAT. § 635-30 (1985); IDAHO CODE § 19-2015, 19-2016, 19-2030 (1987); ILL. REV. STAT. ch. 725, para. 5/115-4 (1992); IND. CODE ANN. § 35-37-1-3, 35-37-1-4 (West 1986); IOWA CODE ANN. § 813.2 (West 1979); KAN. STAT. ANN. § 22-3412 (1988); LA. CODE CRIM. PROC. ANN. art. 799 (West 1993); MD. CODE ANN., CTS. & JUD. PROC. § 8-301 (1989); MASS. GEN. LAWS ANN. ch. 234, § 29 (West 1986); MICH. COMP. LAWS ANN. § 768.12, 768.13 (West 1992); MISS. CODE ANN. § 99-17-3 (1972); MO. ANN. STAT. § 494.480 (Vernon 1993); MONT. CODE ANN. § 46-16-116 (1991); NEB. REV. STAT. § 29-2005 (1989); NEV. REV. STAT. § 175.051 (1991); N.H. REV. STAT. ANN. § 606:4 (1986); N.J. STAT. ANN. § 2A:78-7 (West 1993); N.Y. CRIM. PROC. LAW § 270.25 (Consol. 1982); N.C. GEN. STAT. § 15A-1217 (1992); OHIO REV. CODE ANN. § 2945.21 (Anderson 1987); OKLA.

Since peremptory challenges are limited in number and require no explanation, they are usually exercised after challenges to the array and challenges for cause have failed.[64] Due to the narrow scope and judicial control over the challenge to the array and the challenge for cause,[65] many jurors suspected of bias which the attorney unsuccessfully attempts to exclude will remain on the jury panel.[66] Furthermore, challenges for cause are often denied as long as jurors state that they can put aside their bias and decide the case impartially.[67] Since peremptory challenges require no explanation and are not judicially controlled, they allow for the removal of jurors suspected of bias who were not able to be excluded under a challenge to the array or a challenge for cause.[68]

The peremptory challenge also eliminates the possibility of bias when used after a trial judge erroneously refuses to grant a litigant's challenge for cause.[69] A litigant who believes the judge has made an incorrect ruling on a challenge for cause can remove the juror in question through a peremptory challenge.[70] Thus, because the juror suspected of bias did not actually decide the defendant's case, an appeal of the denial of the challenge for cause is unnecessary, therefore saving judicial time and money.[71]

STAT. ANN. tit. 22, § 655 (West 1992); OR. REV. STAT. § 136.230 (1987); S.C. CODE ANN. § 14-7-1110 (Law. Co-op 1987); S.D. CODIFIED LAWS ANN. § 23A-20-20 (1981); TENN. CODE ANN. § 22-3-105 (1932); TEX. CRIM. PROC. CODE ANN. art. 35.15 (West 1993); WASH. REV. CODE § 4.44.130 (1988); W. VA. CODE § 62-3-3 (1949); WIS. STAT. ANN. § 972.03 (West 1985); WYO. STAT. § 7-11-103 (1985) (setting forth the number of peremptory challenges granted in each state).

64. *See* STARR & MCCORMICK, *supra* note 26, at 315 (discussing the order in which an attorney should exercise jury challenges).

65. *See supra* notes 32-34, 36-46 and accompanying text (discussing the judicial control over and narrow scope of the challenge to the array and the challenge for cause, respectively).

66. Babcock, *supra* note 27, at 549-50.

67. *Id.*

68. STARR & MCCORMICK, *supra* note 26, at 315; *see* Swain v. Alabama, 380 U.S. 202, 218-19 (1965) (stating that peremptory challenges allow attorneys greater opportunity to discover bias through probing questions during voir dire); *id.* (explaining that peremptory challenges facilitate challenges for cause because they allow the attorney to excuse a juror who became offended during scrutinizing voir dire examination or after that juror was unsuccessfully challenged for cause).

69. GOBERT, *supra* note 1, at 271 (stating that the peremptory challenge's corrective function permits an increased chance of removing partiality from the jury).

70. *Id.*; *see* Ross v. Oklahoma, 487 U.S. 81, 88 (1988) (upholding a state statute permitting a peremptory challenge to be used to cure a judge's incorrect refusal to excuse a juror for cause).

71. GOBERT, *supra* note 1, at 271.

By permitting the removal of jurors whose partiality is questioned, the peremptory challenge helps to ensure that the jurors decide the case on the evidence placed before them and not on an improper basis or bias.[72] Granting peremptory challenges promotes the ideal that the jury should actually be, as well as appear to be, fair and impartial to those whose interests are at stake.[73] The important role that the peremptory challenge plays in eliminating partiality from the jury is the reason it has been a part of the jury selection process since the earliest use of juries.[74]

B. The Historical Evolution of the Peremptory Challenge

The peremptory challenge has very old credentials[75] and has been used without inquiry into its basis for nearly as long as juries have existed.[76] One of the earliest statutes granting peremptory challenges was enacted under Roman law in 104 B.C.[77] This statute, the *Lex Servilia*, provided that the prosecution and the defense would each select 100 jurors and that each side would then peremptorily remove fifty jurors so that a jury of 100 remained to try the crime.[78]

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72. *Swain*, 380 U.S at 219.

73. *See id.* (quoting *In re* Murchinson, 349 U.S. 133, 136 (1955)) (stating that the function of the peremptory challenge is to satisfy the appearance of justice); Babcock, *supra* note 27, at 552 (stating that the peremptory challenge teaches the litigant and the community that the jury is a good and proper mode for deciding societal matters).

74. *See* Saltzburg & Powers, *supra* note 27, at 341 (stating that the Supreme Court considers the peremptory challenge one of the most effective means of securing an impartial jury); *see also* Pointer v. United States, 151 U.S. 396, 408 (1894) (asserting that any system which prevents the full, unrestricted exercise of the peremptory challenge must be condemned); Lewis v. United States, 146 U.S. 370, 376 (1892) (describing the peremptory challenge as a necessary element of trial by jury); *infra* notes 75-106 and accompanying text (discussing the historical use of peremptory challenges).

75. *Swain*, 380 U.S. at 212. The *Swain* opinion contains a detailed review of the history of the peremptory challenge. *Id.* at 212-19.

76. *See* Batson v. Kentucky, 376 U.S. 79, 119 (1986) (Burger, C.J., dissenting) (stating that peremptory challenges are nearly as old as juries themselves).

77. *See id.* (citing PETTINGAL, AN ENQUIRY INTO THE USE AND PRACTICE OF JURIES AMONG THE GREEKS AND ROMANS 115, 135 (1769), which discusses the ancient history of the peremptory challenge).

78. *Id.* (citing PETTINGAL, AN ENQUIRY INTO THE USE AND PRACTICE OF JURIES AMONG THE GREEKS AND ROMANS 115, 135 (1769), which states that the peremptory challenge was permitted only in criminal cases).

Peremptory challenges were also used in the common law jury system in England.[79] At common law, prior to the fourteenth century, the criminal defendant was entitled to peremptorily challenge thirty-five prospective jurors in felony trials.[80] While originally the peremptory challenge was only granted to the criminal defendant, the Crown was later entitled to peremptorily challenge an unlimited number of persons from the jury by asking jurors to stand aside.[81] Allowing the prosecution an unlimited number of peremptory challenges resulted in significant delays and lengthened trials because it required extensive juror questioning and the summoning of a great number of jurors.[82] Furthermore, it gave the prosecution the ability to effectively handpick the jury.[83]

In an attempt to remedy this problem, Parliament passed the Ordinance of Inquest[84] in 1305, which rescinded the prosecution's peremptory challenge.[85] However, because the prosecution's

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79. *See Swain*, 380 U.S. at 212 (discussing the common law history of the peremptory challenge in England). The concept of trial by jury dates back to 1166 in the Assize of Claredon which required that inquiries of robbery and murder be made by the 12 most lawful men. *See* 3 ENCYCLOPEDIA BRITANNICA 348 (1985) (defining the Assize of Claredon as a series of ordinances initiated by King Henry II of England attempting to improve the procedures in criminal law and establishing the grand jury system consisting of 12 men).

80. LLOYD E. MOORE, THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY 54 (1988) (stating that where death was a possible punishment the defendant was entitled to 35 peremptory challenges). Peremptory challenges were also allowed in trials where death was not a possible punishment. *See* Gray v. Regina, 11 Cl. & Fin. 427, 450 (H.L. 1844) (allowing peremptory challenges in a trial for a felony not punishable by death). Blackstone noted that granting the peremptory challenge to the criminal defendant demonstrated the tenderness and humanity of English law. 4 WILLIAM BLACKSTONE, COMMENTARIES 353 (15th ed. 1809). However, common law did not grant the peremptory challenge to civil litigants. *See* Creed v. Fisher, 23 L.J. Ex. 143, 144 (1853) (holding that peremptory challenges were not allowed in civil trials).

81. MOORE, *supra* note 80, at 54.

82. COKE ON LITIGATION 156 (14th ed. 1791) (stating that the prosecution's unlimited number of peremptory challenges led to infinite delays and danger of unfairness to the defendant).

83. MOORE, *supra* note 80, at 54.

84. *See* 33 Edw. 1, Stat. 4 (1305) (proclaiming that the prosecution must assign a certain cause to their challenge and that the truth of the challenge shall be inquired of according to the custom of the Court).

85. *Id.* The defendant's right to the peremptory challenge remained unaltered by this ordinance. *Id.* However, beginning in 1530 the English Parliament began to erode the criminal defendant's peremptory challenge by reducing the number of challenges from 35 to 20 in all cases except high treason. Y.B. 22 Hen. 8, fo. 14, pl. 6 (1530). In 1825, the number was reduced to only seven. Y.B. 6 Geo. 4, fo. 50, pl. 29 (1825). Eventually, in 1988, the criminal defendant's right to peremptory challenge was abolished in England. Criminal Justice Act 1988 § 118.

power to remove jurors was so entrenched in the jury selection process, the English courts interpreted the ordinance to allow the prosecution to continue to eliminate jurors by asking them to stand aside.[86] When the prosecution asked a juror to stand aside, that juror would be excused from jury service unless after all jurors were questioned there was an insufficient number of jurors to compose a jury.[87] If vacant seats on the jury remained, the jurors who had been asked to stand aside would fill them unless at that time the prosecution was able to show proper cause for their dismissal.[88] If the prosecution could not show proper cause, the jurors were seated on the jury over the prosecution's stand aside objection.[89]

The English common law provided the foundation for the jury selection system that developed in the United States.[90] An early act of Congress in 1790[91] granted criminal defendants thirty-five peremptory challenges in trials for treason and twenty in trials for felonies punishable by death.[92] Since the peremptory challenge was considered primarily a device to protect defendants, Congress did not grant them to the government until 1865.[93] When they

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86. Swain v. Alabama, 380 U.S. 202, 213 (1965). The prosecutor's right to ask a juror to stand aside was liberally construed. *Id.* at 213 n.11. All attempts to limit or abolish this right were rejected. *Id.*

87. *See* GOBERT, *supra* note 1, at 270 (discussing the stand aside system used by the prosecution in English courts).

88. *Id.*; *see* Mansell v. Reg., 8 El. & Bl. 54, 73 (1857) (holding that the prosecution is not required to assign a cause until all the names appearing on the jury panel have been called); Rex v. Parry, 7 Car. & P. 836, 837 (1837) (stating the Crown has the right to set aside any juror when called and is not required to assign a cause until it appears that there cannot be a full jury).

89. *Swain*, 380 U.S. at 213; *see id.* at 213 n.12 (stating that current English law continues to allow the prosecution to use the stand aside system).

90. *Id.* at 214. *See generally* Batson v. Kentucky, 376 U.S. 79, 119-20 (1986) (Burger, C.J., dissenting) (reviewing the common law and statutory history of the peremptory challenge in the United States).

91. *See* 1 Stat. 119 (1790) (granting peremptory challenges in federal criminal trials).

92. *Id.*; *see Swain*, 380 U.S. at 214 (stating that the 1790 statute granting peremptory challenges did not address the government's right to a peremptory challenge); *see also id.* (discussing the number of peremptory challenges granted to the criminal defendant throughout early American legal history).

93. *See* 13 Stat. 500 (1865) (granting peremptory challenges to the prosecution in a federal criminal trial); Hayes v. Missouri, 120 U.S. 68, 70-71 (1887) (upholding the constitutionality of the prosecution's peremptory challenge, stating that peremptory challenges assist in producing an impartial jury).

were finally permitted, the prosecution was only granted five peremptory challenges while the defendant retained twenty.[94]

The individual states tended to parallel the federal peremptory challenge system.[95] Typically, state granted peremptory challenges were conferred upon the defendant by statute.[96] The number of peremptory challenges granted to the defendant by statute often corresponded to the federal system.[97] Also, as in the federal system, most states had enacted statutes granting peremptory challenges to the prosecution by 1870.[98]

While granting peremptory challenges to the defendant was widely accepted, allowing the prosecution to use peremptory challenges was controversial.[99] In *Hayes v. Missouri*,[100] the constitutionality of a Missouri statute granting the prosecution peremptory challenges was questioned under the Equal Protection Clause.[101] The Missouri statute granted fifteen peremptory challenges to the prosecution in a capital case in a city with over 100,000 inhabitants, but only eight in lesser populated areas.[102] The Supreme

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94. 13 Stat. 500 (1865). In 1872, the defendant was granted 10 peremptory challenges and the government three in all felonies not punishable by death. 17 Stat. 282 (1872). This right was extended to allow each side three peremptory challenges in both misdemeanor and civil trials. *Id.* Current federal law grants the prosecution and the defense 20 peremptory challenges each in capital cases and three each in misdemeanor cases. FED. R. CRIM. P. 24(b). Presently, in a non-capital felony prosecution, the defendant is granted 10 peremptory challenges and the prosecution six. *Id.*

95. *Swain*, 380 U.S. at 215.

96. *Id.*; *see supra* note 63 (citing current state statutes granting peremptory challenges).

97. *Compare supra* note 94 (stating that in 1865 federal law granted the defendant 20 peremptory challenges) *with* People v. McQuade, 18 N.E. 156, 158-59 (N.Y. 1888) (citing a New York statute allowing the defendant 20 peremptory challenges in a case for murder or a felony punishable by 10 years in prison); *compare supra* note 92 (stating that federal law prior to 1865 granted the defendant 35 peremptory challenges) *with* State v. Humphreys, 1 Tenn. 306 (1808) (citing a Tennessee statute stating that when the possible punishment is death, the defendant is entitled to 35 peremptory challenges).

98. *See Swain*, 380 U.S. at 215 n.18 (citing state statutes that granted the prosecution peremptory challenges in 1870).

99. *See Swain*, 380 U.S. at 242 (Goldberg, J., dissenting) (asserting that granting peremptory challenges to the prosecution is unwarranted and unnecessary); *see also* Hayes v. Missouri, 120 U.S. 68, 71-72 (1887) (reviewing the constitutionality of granting peremptory challenges to the prosecution).

100. 120 U.S. 68 (1887).

101. *Id.* at 70. In *Hayes*, the defendant moved to limit the prosecution's number of peremptory challenges to eight. *Id.* After the trial court rejected the prosecution's motion, the prosecution removed 15 of the 47 qualified jurors with peremptory challenges. *Id.*

102. *See id.* at 68 (citing REV. ST. MO. §§ 1900-1902).

Court specifically upheld granting the prosecution's peremptory challenge because the Court believed it assisted in impaneling an impartial jury.[103] Following this early debate, federal[104] and state courts[105] have continued to question and, in effect, erode the use of peremptory challenges.[106]

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103. *See Hayes*, 120 U.S. at 71 (stating that the legislature has discretion over the number of peremptory challenges granted as long they fulfill their function of empaneling an impartial jury). The Court held that granting more peremptory challenges may be the only means of ensuring an impartial jury in larger cities. *Id.* at 72.

104. Since *Hayes*, federal courts have placed equal protection restrictions on peremptory challenges. *See, e.g.*, Georgia v. McCollum, 112 S. Ct. 2348, 2359 (1992) (subjecting the criminal defendant's peremptory challenge to the equal protection clause); Edmonson v. Leesville Concrete Co., Inc., 111 S. Ct. 2070, 2080 (1991) (subjecting civil litigants' peremptory challenges to the equal protection clause); Batson v. Kentucky, 376 U.S. 79, 92-93 (1986) (subjecting the prosecutor's peremptory challenge to the equal protection clause).

105. Some state courts have limited peremptory challenges based on their own state constitutions. *See* People v. Wheeler, 22 Cal. 3d 258, 277, 583 P.2d 748, 762, 148 Cal. Rptr. 890, 903 (1978) (holding that the use of peremptory challenges by either the prosecution or the defendant to remove prospective jurors on the sole ground of group bias violates the right to a trial by jury drawn from a fair cross-section of the community under the California Constitution, CAL. CONST. art. 1, § 16); Riley v. State, 496 A.2d 997, 1009-13 (Del. 1985) (holding that the prosecution's use of peremptory challenges to exclude jurors solely because of their race violates the defendant's right to an impartial jury under the Delaware Constitution, DEL. CONST. art. 1, § 7); State v. Neil, 457 So. 2d 481, 486 (Fla. 1984) (holding the prosecution's racially discriminatory peremptory challenges violate the defendant's right to an impartial jury under the Florida Constitution, FLA. CONST. art. 1, § 16); Commonwealth v. Soares, 387 N.E.2d 499, 515 (Mass.) (holding that when the prosecution excludes persons from the jury because of their particular group affiliation, it violates the defendant's right to an impartial jury under the Massachusetts Constitution, MASS. CONST. pt. 1, art. 12) *cert. denied*, 444 U.S. 881 (1979); People v. Kern, 554 N.E.2d 1235, 1241 (N.Y. 1990) (holding that the prosecution's racially discriminatory peremptory challenges violate the New York Constitution, N.Y. CONST. art 1, § 1).

106. *See supra* notes 104-105 (citing the cases which have restricted the unfettered use of peremptory challenges). Numerous law review articles have also been written on the use of peremptory challenges. *See, e.g.*, Michael N. Chesney & Gerard T. Gallagher, *State Action and the Peremptory Challenge: Evolution of the Court's Treatment and Implications for* Georgia v. McCollum, 67 NOTRE DAME L. REV. 1049 (1992); E. Vaughn Dunnigan, *Discrimination by the Defense: Peremptory Challenges After* Batson v. Kentucky, 88 COLUM. L. REV. 355 (1988); Katherine Goldwasser, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 HARV. L. REV. 808 (1989); Brent J. Gurney, *The Case for Abolishing Peremptory Challenges in Criminal Trials*, 21 HARV. C.R.-C.L. L. REV. 227 (1986); Michael M. Raeber, *Toward An Integrated Rule Prohibiting All Race-Based Peremptory Challenges: Some Considerations on* Georgia v. McCollum, 26 GA. L. REV. 503 (1992);

C. Legal Erosion of the Peremptory Challenge

In *Swain v. Alabama*,[107] the Supreme Court took its first step in the process of eroding the unfettered use of peremptory challenges.[108] The defendant in *Swain*, an African-American youth, was charged with raping a seventeen year old white girl in Talladega County, Alabama.[109] At trial, the prosecution used peremptory challenges to exclude all African-Americans from the jury.[110] The defendant was tried and convicted by an all-white jury.[111] On appeal, the defendant based his argument on the Supreme Court's decision in *Strauder v. West Virginia*.[112] In *Strauder*, the Supreme Court held that the purposeful exclusion of jurors of the defendant's race from the jury violated the Equal Protection Clause of the Fourteenth Amendment.[113] Relying on *Strauder*, the defendant exercised a challenge to the array, arguing that his jury was selected in a racially discriminatory manner in violation of the Equal Protection Clause.[114]

In *Swain*, the question before the United States Supreme Court was whether an African-American defendant was denied equal protection when the prosecution used peremptory challenges to

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107. 380 U.S. 202 (1965).

108. *See* Swain v. Alabama, 380 U.S. 202, 222-24 (1965) (holding that if a prosecutor excluded African-Americans from the jury in case after case a presumption of purposeful discrimination would arise).

109. Swain v. Alabama, 156 So. 2d 368, 370 (Ala. 1963), *aff'd*, 380 U.S. 202 (1965).

110. *Swain*, 380 U.S. at 205. Eight prospective African-American jurors were called for jury service. *Id.* Two were exempt and the other six were peremptorily struck by the prosecution. *Id.*

111. *Id.* The defendant was sentenced to death. *Swain v. State*, 156 So. 2d at 369.

112. 100 U.S. 303 (1879).

113. *See* U.S. CONST. amend. XIV (declaring that no state shall deny to any person within its jurisdiction the equal protection of the laws); Strauder v. West Virginia, 100 U.S. 303, 310 (1879) (recognizing the criminal defendant's right not to be tried by a jury from which members of the defendant's race have been purposefully excluded). The *Strauder* decision laid the foundation for the Supreme Court to erode peremptory challenges by subjecting them to the Equal Protection Clause. *See* Batson v. Kentucky, 476 U.S. 79, 85 (1986) (citing *Strauder* as the foundation case for the *Batson* decision).

114. *Swain*, 380 U.S. at 203. The trial court denied the motion and the Alabama Supreme Court affirmed the conviction. Swain v. State, 156 So. 2d 368 (Ala. 1963).

exclude all the members of the defendant's race from the jury.[115] The Court began its decision by noting the extensive common law and statutory history of the peremptory challenge[116] and the important role of peremptory challenges in achieving an impartial jury.[117] Next, the *Swain* Court refused to find that the striking of the African-American jurors in the defendant's particular case violated the Equal Protection Clause because such a restriction would radically change the nature and operation of the peremptory challenge.[118] Particularly, the Court explained that it is essential to the nature of the peremptory challenge that it be exercised without stating a reason.[119] The Court asserted that if explanations for using peremptory challenges were required under the Equal Protection Clause, the challenge would no longer be peremptory.[120]

Instead of requiring explanations for peremptory challenges, the *Swain* Court delineated a test which presumed that the prosecutor's motive in using the peremptory challenge was to obtain a fair and impartial jury.[121] This presumption could be overcome by evidence that the peremptory system as a whole was being corrupted by the prosecution's discriminatory peremptory challenges in case after case.[122] However, the *Swain* test was criticized as too stringent to effectively protect the rights of the

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115. *Swain*, 380 U.S. at 221. The defendant in *Swain* was unable to challenge the jury under the Sixth Amendment fair-cross section requirement because the Sixth Amendment did not become applicable to the states until three years after *Swain* was decided. *See* U.S. CONST. amend VI (granting the accused the right to an impartial jury); *supra* note 25 (discussing the Sixth Amendment cross-section requirement); *see also* Duncan v. Louisiana, 391 U.S. 145, 150-51 (1968) (holding that the Sixth Amendment right to an impartial jury is binding upon the States).

116. *Swain*, 380 U.S at 212-17; *see supra* notes 75-106 and accompanying text (reviewing the history of the peremptory challenge).

117. *See Swain*, 380 U.S. at 219 (referring to the peremptory challenge as essential to trial by jury).

118. *Id.* at 221-22.

119. *Id.* at 222.

120. *Id.* (stating that the prosecutor's judgment underlying each peremptory challenge would be open to scrutiny for reasonableness and sincerity).

121. *Id.* This presumption was later overruled in *Batson v. Kentucky*, 476 U.S. 79, 96 (1986). *See infra* notes 143-150 and accompanying text (discussing the evidentiary burden delineated in *Batson*).

122. *Swain*, 380 U.S. at 224. To preserve the capricious nature of the peremptory challenge, the Court declined to inquire into the prosecutor's motivations for every single challenge. *Id.* at 222.

criminal defendant.[123] Much of this criticism pointed out the practically insurmountable burden placed upon the criminal defendant.[124] For example, under the *Swain* test, an African-American defendant could establish a prima facie case of purposeful discrimination only by showing that the prosecutor was using racially motivated peremptory challenges in case after case.[125] The *Swain* burden was extremely difficult for the criminal defendant to meet because it required defendants to show a prosecutor's previous conduct over an indefinite amount of time, in trials in which they were not involved and of which the defendants could not easily obtain records.[126] In order to achieve this arduous task, defendants would have to investigate, over a number of cases, the race of the persons tried in the particular jurisdiction, the racial composition of the venire and the jury, and the manner in which both parties exercised their peremptory challenges.[127] In jurisdictions where court records do not contain the juror's race or where voir dire proceedings are not transcribed, this burden will be impossible for the defendant to meet.[128] Furthermore, the

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123. GOBERT, *supra* note 1, at 279; *see, e.g.*, Frederick L. Brown et al., *The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse*, 14 NEW ENG. L. REV. 192 (1978); John A. Martin, *The Fifth Circuit and Jury Selection Cases: The Negro Defendant and His Peerless Jury*, 4 HOUS. L. REV. 448 (1966) (criticizing the evidentiary standard of *Swain*); Comment, Swain v. Alabama: *A Constitutional Blueprint for the Perpetuation of the All-White Jury*, 52 VA. L. REV. 1157, 1163 (1966) [hereinafter Comment, *Blueprint for All-White Jury*].

124. Comment, *Blueprint for All-White Jury*, *supra* note 123, at 1161; *see Batson*, 476 U.S. at 92-93 (stating that the impossibility of the defendant's burden under *Swain* often resulted in the prosecution's peremptory challenges being immune from constitutional scrutiny).

125. *Swain*, 380 U.S. at 224 (stating that the presumption of non-discrimination would be overcome only if the purposes behind the peremptory challenge were being corrupted).

126. *See* Comment, *Blueprint for All-White Jury*, *supra* note 123, at 1161 (explaining that problems of evidentiary logistics, time pressures, and lack of records prevented the defendant from meeting the *Swain* standard).

127. United States v. Pearson, 448 F.2d 1207, 1217 (5th Cir. 1971) (concluding that because of economic and time restraints coupled with the unavailability of information, most criminal defendants would be unable to meet the *Swain* burden).

128. *See* People v. Wheeler, 22 Cal. 3d 258, 285-86, 583 P.2d 748, 767-68, 148 Cal. Rptr. 890, 908-09 (1978) (noting that in the state of California there has never been a criminal defendant who has attempted to comply with the *Swain* burden and succeeded). A review of the attempts by criminal defendant's to meet the *Swain* burden in federal and state courts revealed that in the 10 years after *Swain* was decided no defendant was successful in proving purposeful discrimination by the prosecution. Annotation, *Use of Peremptory Challenge to Exclude from the Jury Persons Belonging to a Class or Race*, 79 A.L.R. 3d 14, 24, 56-73 (1979). *But see* State v. Brown, 371 So. 2d 751 (La.

stringency of this burden is illustrated by the *Swain* facts themselves.[129] Even though the defendant was able to prove that no African-American person had served on a jury in Talladega County in fifteen years, the Court concluded that the defendant failed to meet his burden of proof.[130]

Despite this criticism, the *Swain* standard for proving purposeful discrimination in the use of peremptory challenges remained in effect until 1986 when the United States Supreme Court decided *Batson v. Kentucky*.[131] In *Batson*, the defendant, an African-American male, was indicted in Kentucky for second-degree burglary and receipt of stolen goods.[132] During voir dire, the prosecutor used peremptory challenges to remove the only four African-American persons on the venire, resulting in an all-white jury.[133] The defendant challenged the array, arguing that the prosecution's actions violated his Sixth Amendment right to a jury composed of a fair cross-section of the community[134] and his Fourteenth Amendment right to equal protection of the laws.[135] The Kentucky Supreme Court denied the defendant's motions, holding that the defendant had not proved the systematic exclusion of members of his race from the jury, as required under the *Swain* test.[136] The United States Supreme Court granted certiorari in

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1979) (holding that the defendant made a sufficient showing to establish a prima facie case of discrimination).

129. Swain v. Alabama, 380 U.S. 202, 203-04 (1965); *see supra* note 109-114 and accompanying text (discussing the factual background of *Swain*).

130. *Swain*, 380 U.S at 226.

131. 476 U.S. 79 (1986).

132. *Id.* at 82.

133. *Id.* at 83.

134. *Id.*; *see* U.S. CONST. amend VI (granting the accused the right to a trial by an impartial jury chosen from a fair cross-section of the State and district where the crime was committed); Duncan v. Louisiana, 391 U.S. 145, 150-51 (1968) (holding that the Sixth Amendment is binding upon the states).

135. *Batson*, 476 U.S. at 83; *see* U.S. CONST. amend. XIV (granting all citizens equal protection of the laws). The trial judge denied both motions stating that the parties were entitled to remove any juror they wanted to and that the fair cross-section requirement applied only to the selection of the jury panel and not the trial jury. *Batson*, 476 U.S. at 83.

136. *Batson*, 476 U.S. at 84. The Kentucky Supreme Court expressly refused to follow the reasoning of *People v. Wheeler*, 22 Cal. 3d 258, 277, 583 P.2d 748, 762, 148 Cal. Rptr. 890, 903 (1978), and *Commonwealth v. Soares*, 387 N.E. 2d 499, 515, *cert. denied*, 444 U.S. 881 (1979), both of which rejected the systematic exclusion rule of *Swain*. *Id.*; *see supra* note 105 (stating the holdings

Batson to re-examine the systematic exclusion burden of *Swain*.[137]

In *Batson*, the Supreme Court began its opinion by reaffirming the principle that purposeful discrimination against African-Americans in the jury selection process violated the equal protection of the laws under the Fourteenth Amendment.[138] Next, the majority rejected the defendant's challenge to the array, which alleged a violation of the Sixth Amendment's cross-section requirement.[139] The Court stated that although criminal defendants have the right not to have members of their race excluded from the jury, they do not have a right to be tried by a jury containing persons of their race.[140] The *Batson* Court then went on to reject the evidentiary standard of *Swain*, which required a showing of systematic exclusion, stating that it placed a crippling burden of proof on the defendant.[141] After overruling the *Swain* standard, the *Batson* Court created a new standard in which a criminal defendant could establish a prima facie case of purposeful discrimination based

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of both *Wheeler* and *Soares*).

137. *Batson*, 476 U.S. at 93 (stating that the evidentiary burden of *Swain* is inconsistent with the Equal Protection Clause because it does not allow a defendant to prove purposeful discrimination relying solely on the peremptory challenges exercised in the defendant's case).

138. *Id.* at 84. Justice Powell delivered the opinion of the Court, joined by Justices Brennan, White, Marshall, Blackmun, Stevens, and O'Connor. *Id.* at 81. Justices White, Marshall and O'Connor each filed separate concurring opinions. *Id.* at 100 (White, J., concurring); *id.* at 102 (Marshall, J., concurring); *id.* at 111 (O'Connor, J., concurring). Justice Stevens filed a concurring opinion in which Justice Brennan joined. *Id.* at 108 (Stevens, J., concurring). Chief Justice Burger and Justice Rehnquist each filed separate dissenting opinions. *Id.* at 112 (Burger, C.J., dissenting); *id.* at 134 (Rehnquist, J., dissenting).

139. *Id.* at 84; *see supra note* 134 and accompanying text (citing the Sixth Amendment and the cross-sectional requirement).

140. *See Batson*, 476 U.S. at 85 (stating that the number of races and nationalities in our country prevents guaranteeing that every trial will contain a juror of the defendant's race or nationality); Taylor v. Louisiana, 419 U.S. 522, 538 (1975) (stating that although the Sixth Amendment guarantees that a defendant's jury will be selected from a representative cross-section of the community, it would be impossible to have a jury of 12 persons reflect the proportion of each of the various distinctive groups with our society).

141. *Batson*, 476 U.S. at 92-93.

solely on evidence of the prosecutor's discriminatory peremptory challenges at the defendant's trial.[142]

1. The Batson *Test*

The *Batson* Court replaced the systematic exclusion burden of *Swain* with a new three part test for establishing a prima facie case of purposeful discrimination.[143] Under the first part of the *Batson* test, the defendant must be a member of a cognizable racial group and prove that the prosecution has exercised peremptory challenges to remove persons of the defendant's race from the jury.[144] Second, the defendant must show that the facts and relevant circumstances raise an inference that the prosecutor used peremptory challenges to remove jurors because of their race.[145] In raising this inference, the *Batson* test allows the defendant to rely upon the presumption that the peremptory challenge is a jury selection procedure which gives litigants who wish to discriminate the opportunity to discriminate.[146] Next, the *Batson* test requires that once the defendant has established a prima facie case of purposeful discrimination, the burden shifts to the prosecution to come forward

142. *Id.* at 95. The Supreme Court noted that several state courts, interpreting their state's constitution, had accepted the view that peremptory challenges used to strike black jurors in the defendant's particular case were unconstitutional. *Id.* at 82 n.1; *see supra* note 105 (citing these state court decisions).

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

144. *Id.*; *see id.* n.19 (stating that defendants may make out a prima facie case by proving that in a particular jurisdiction members of their race have not been summoned for jury service over an extended period of time or proof that members of the defendant's race have been systematically excluded from the venire). However, at least one lower court has refused to extend *Batson* to peremptory challenges based on ethnicity. *See* United States v. Campione, 942 F.2d 429, 432-33 (7th Cir. 1991) (holding that an Italian-American defendant failed to establish that two Italian-American surnamed jurors were members a cognizable racial group).

145. *Batson*, 476 U.S. at 96; *see id.* at 97 (stating that a pattern of strikes against African-American jurors as well as questions and statements made by the prosecutor during voir dire might lead to an inference of purposeful discrimination).

146. *Id.* at 96; *see* Avery v. Georgia, 345 U.S. 559, 563 (1953) (stating that the defendant is not required to prove a particular act of discrimination by a particular official responsible for the selection of the jury).

with a race-neutral explanation for the peremptory challenge.[147] The *Batson* Court explained that this explanation need not rise to the level required for challenges for cause.[148] However, the Court warned that the peremptory challenge cannot be based on the assumption that because of the juror's shared race with the defendant, the juror is incapable of remaining impartial.[149] The Court stated that it would not specify an exact amount of proof required under the *Batson* test, but would defer this decision to trial courts because of their more capable experience with voir dire.[150]

2. *Extending the* Batson *Holding*

The specific holding of *Batson* is that a prosecutor cannot purposefully use peremptory challenges to exclude African-Americans from a jury when the defendant is African-American.[151] Recently, the Supreme Court extended *Batson* in two ways.[152] First, in *Powers v. Ohio*,[153] the Court eliminated the *Batson* requirement

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147. *Batson*, 476 U.S. at 97. The Supreme Court gave little guidance to lower courts in defining acceptable race-neutral explanations. *See id.* at 99 (stating that the Court declined to formulate particular procedures in light of the variety of different jury selection procedures followed in the state and federal courts). Hence, reasons found acceptable in one case in a jurisdiction may not be sustained in another case in the same jurisdiction. *Compare* Daniels v. State, 768 S.W.2d 314 (Tex. App. 1988) (rejecting the explanation that the challenged jurors were inattentive and gave more attention to the defense counsel) *with* Campbell v. State, 775 S.W.2d 419 (Tex. App. 1989) (accepting the argument that the juror was inattentive to the prosecution and gave more attention to the defense counsel as a race-neutral explanation).

148. *See supra* notes 42-47 and accompanying text (discussing the acceptable explanations for challenges for cause).

149. *Batson*, 476 U.S. at 97. An example of a race-neutral explanation given by the prosecution that has been accepted by the Supreme Court was the concern that a Hispanic juror who could not understand English would not listen to and be able to follow an interpreter. Hernandez v. New York, 111 S. Ct. 1859 (1991).

150. *Batson*, 476 U.S. at 99. This aspect of the *Batson* decision has been criticized as lengthening the jury selection process by requiring trial judge's to hold *Batson* hearings during voir dire. *See* Albert L. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 156-57 (1989) (arguing that *Batson* creates seven additional areas of litigation).

151. *Batson*, 476 U.S at 92-93.

152. *See* Powers v. Ohio, 111 S. Ct. 1364, 1370-71 (1991) (extending *Batson* to allow defendants of one race third-party standing to challenge the purposeful exclusion of jurors of another race); Edmonson v. Leesville Concrete Co., Inc., 111 S. Ct. 2077, 2087 (1991) (extending *Batson* to civil litigants).

153. 111 S. Ct. 1364 (1991).

that the defendant and the excluded juror share the same race.[154] Second, in *Edmonson v. Leesville Concrete Co., Inc.*,[155] the Court extended *Batson* to civil litigants, holding that the Equal Protection Clause prohibits civil litigants from exercising their peremptory challenges in a racially discriminatory manner.[156]

a. Powers v. Ohio: *Allowing Defendants of One Race Third-Party Standing to Assert the Rights of Excluded Jurors of Another Race*

In *Powers*, the Supreme Court declared that the equal protection restrictions of *Batson* were intended to protect both the defendant and the excluded jurors from the harms caused by purposeful discrimination.[157] The *Powers* Court stated that purposeful discrimination in jury selection denies defendants their Sixth Amendment right to impartial juries.[158] Furthermore, purposeful discrimination also harms the excluded jurors by ignoring their individual qualifications and abilities and instead judging them based on the false assumption that they will be biased because of their race.[159] The Court asserted that these harms extend beyond the defendant and the excluded jurors and affect the entire community.[160] The *Powers* Court explained that discriminatory selection procedures undermine the public confidence in our jury system and cast doubt upon the fairness of jury verdicts.[161] Therefore, unlike *Batson* in

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154. *Id.* at 1370-71.

155. 111 S. Ct. 2077 (1991).

156. *Id.* at 2087.

157. *Powers*, 111 S. Ct. at 1368. In *Powers*, a white male was indicted for aggravated murder. *Id.* at 1366. During jury selection, the prosecution used its peremptory challenges to remove seven African-Americans from the jury. *Id.* The defendant objected under *Batson*. *Id.* The trial court denied the defendant's motion and the defendant was convicted. *Id.* The Ohio Court of Appeals affirmed the defendant's conviction. *Id.*

158. *Id.* at 1370.

159. *Id.* (stating that an individual does not have a right to sit on any particular jury but does possess the right not to be excluded from a jury because of race); *see* Thiel v. Southern Pacific Co., 328 U.S. 217, 227 (1946) (stating that a person's race is unrelated to his competence to serve as a juror).

160. *Powers*, 111 S. Ct. at 1370.

161. *Id.* at 1372 (stating that one purpose of the jury system is to impress upon the criminal defendant and the community as a whole that the verdict reached is fair and just).

which the Court based its holding on the equal protection rights of the defendant, the *Powers* Court held that individual jurors and the community deserve equal protection from discriminatory peremptory challenges.[162]

Next, the *Powers* Court held that the defendant had third-party standing to assert the equal protection rights of excluded jurors.[163] Ordinarily, litigants must assert their own legal rights and cannot seek relief for an injury done to a third party.[164] However, the Supreme Court allows litigants to bring actions on behalf of third parties if the litigant: has suffered an injury giving the litigant a sufficient interest in the outcome of the case,[165] has a close relation to the third party, and the third party is hindered in protecting the third party's own interests.[166]

Under the first part of the third-party standing test, the *Powers* Court analyzed whether the defendant had suffered a cognizable injury.[167] The Court explained that discriminatory peremptory challenges threaten the defendant's chance of being tried by an impartial jury.[168] Particularly, the Court asserted that the defendant is injured because discriminatory jury selection procedures cast doubt upon the integrity of the judicial process and question

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162. *Id.* at 1370; *Batson*, 476 U.S. at 87.

163. *Powers*, 111 S. Ct. at 1373.

164. *Id.* at 1370 (citing United States Dept. of Labor v. Triplett, 110 S. Ct. 1428 (1990)).

165. *Id.*

166. *Id.* at 1370-71; *see* Singleton v. Wulff, 428 U.S. 106, 115 (1978) (stating that in order to qualify for third-party standing the relationship between the litigant and the third party must render the litigant just as effective a proponent of the right as the third party would have been). The Supreme Court has found these criteria satisfied in a number of cases. *See, e.g.*, United States Dept. of Labor v. Triplett, 494 U.S. 715, 722 (1990) (holding that an attorney may challenge an opposing counsel's attorney's fees by asserting the due process rights of a client); Craig v. Boren, 429 U.S. 190, 197 (1976) (holding that a licensed beer vendor has standing to raise the equal protection claim of a male customer challenging a statutory scheme prohibiting the sale of beer to males under the age of 21 and to females under the age of 18); Griswold v. Connecticut, 381 U.S. 479, 481 (1965) (holding that Planned Parenthood officials and licensed physicians can raise the constitutional rights of married contraceptive users with whom they had professional relationships).

167. *Powers*, 111 S. Ct. at 1371.

168. *Id.*; *see* Allen v. Hardy, 478 U.S. 255, 259 (1986) (per curiam) (recognizing that the defendant has an interest in neutral jury selection procedures); *see also* Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981) (stating that jury selection is the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial or political prejudice).

the fairness of the defendant's trial.[169] Thus, the *Powers* Court concluded that the defendant suffered an injury that satisfied the first part of the third party standing test.[170]

Second, the *Powers* Court assessed whether the relation between the defendant and the excluded juror was sufficiently close to ensure that the juror's rights would be vigorously and effectively advocated by the defendant.[171] The Court determined that the excluded juror and the defendant had a common interest in eliminating racial discrimination from the courtroom.[172] Jurors rejected because of their race suffer public humiliation which may cause them to lose confidence in the court and its verdicts.[173] Such discrimination also erodes the confidence of defendants in the system that will try their case.[174] Furthermore, the defendant will be a motivated and effective advocate because the prosecution's violation of the juror's equal protection rights could lead to a reversal of the defendant's conviction.[175] Therefore, the *Powers* Court concluded that the interests shared by the defendant and the excluded juror created a sufficiently close relationship to qualify the defendant for third-party standing.[176]

The final determination necessary under the third-party standing test is whether the excluded jurors are deterred from asserting their

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169. *Powers*, 111 S. Ct. at 1371; *see id.* (stating that active discrimination by a prosecutor during the jury selection process condones violations of the United States Constitution within the very institution entrusted with its enforcement, inviting cynicism about the jury's neutrality and the government's obligations to obey the law); *id.* at 1372 (stating that the purpose of the jury system is to impress upon the criminal defendant and the community that a verdict or acquittal is fair); *see id.* (stating that the jury's verdict will not be accepted by the community as fair if the jury is chosen by unlawful means). Therefore, racial discrimination in jury selection undermines the state's interest in promoting acceptance of jury verdicts as fair decisions made by impartial persons. *Id.*

170. *Id.* at 1371.

171. *Id.*

172. *Id.* at 1372.

173. *See id.* (stating that the humiliation of racial discrimination is compounded when it occurs in public during voir dire).

174. *Id.*

175. *See id.* (stating that there is no doubt that the defendant will be a motivated and effective advocate of the excluded juror's rights); Batson v. Kentucky, 476 U.S. 79, 100 (1986) (stating that if the defendant establishes a prima facie case of purposeful discrimination and the prosecution does not come forward with a race neutral explanation for the peremptory challenge, the defendant's conviction will be reversed).

176. *Powers*, 111 S. Ct. at 1372.

own equal protection rights.[177] The *Powers* Court explained that the practical and financial barriers of litigation will discourage excluded jurors from asserting their own rights.[178] Since jurors are not parties to the jury selection process, they have no opportunity to be heard at the time of their exclusion.[179] Thus, in order for the jurors to protect their own interests, they would have to bring their own action which can be very costly as well as time consuming.[180] Additionally, the *Powers* Court determined that due to the economic burdens of litigation, jurors are further deterred by the relatively small financial stake in bringing their own actions.[181] Thus, the *Powers* Court concluded that: the criminal defendant suffers an injury sufficient to ensure vehement litigation of the juror's rights, the juror and the defendant share the interest in achieving an impartial jury, and the jurors themselves are unlikely to vindicate their own rights, and therefore, the criminal defendant qualifies for third-party standing and may assert the equal protection rights of the excluded jurors.[182]

In *Batson* and *Powers*, the Supreme Court prohibited the prosecution from using peremptory challenges to discriminate based on race.[183] However, the question of whether this requirement also applied to civil litigants and criminal defendants was left unanswered by the Court.[184] The Supreme Court resolved the first of these unanswered questions concerning civil litigants in *Edmonson v. Leesville Concrete Co., Inc.*[185]

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177. *Id.*

178. *Id.* at 1372-73. Although an excluded juror has the right to bring his own action, as a practical matter these actions are very rare. *Id.* at 1372.

179. *Id.* at 1373.

180. *See id.* (declaring that jurors dismissed because of their race will leave the courtroom possessing little incentive to begin the arduous task of vindicating their own rights).

181. *Id.*; *see id.* (stating that it is unlikely that jurors would be able to receive declaratory or injunctive relief because it would be very difficult for jurors to show that discrimination against them would be likely to recur).

182. *Id.* at 1370-73.

183. *See supra* notes 138-150 and 157-182 and accompanying text (discussing the *Batson* and *Powers* decisions respectively).

184. *See* Batson v. Kentucky, 476 U.S. 79, 89 n.12 (1986) (stating that the Court did not express an opinion on whether the Constitution imposes any limits upon the exercise of peremptory challenges by criminal defendants).

185. 111 S. Ct. 2077, 2080 (1991).

b. Edmonson v. Leesville Concrete Co., Inc.: *A Civil Litigant is a State Actor When Exercising Peremptory Challenges*

The Equal Protection Clause prohibits the State from denying any person equal protection of the laws.[186] Both *Batson* and *Powers* involved a peremptory challenge exercised by a prosecutor, who is clearly a state actor,[187] while *Edmonson* involved a civil litigant's peremptory challenge.[188] Therefore, in order to find that the Equal Protection Clause prohibited civil litigants from using their peremptory challenges to discriminate, the *Edmonson* Court had to determine that a civil litigant's exercise of peremptory challenges constituted state action.[189]

In *Edmonson*, an African-American construction worker who was involved in an on-site accident at a federal enclave sued the Leesville Concrete Company for negligence.[190] During voir dire, the defendant used two of its three peremptory challenges to remove African-Americans from the jury.[191] The plaintiff, citing *Batson*, requested that the defendant articulate race-neutral explanations for striking the jurors.[192] The Supreme Court granted certiorari to resolve a split among the courts of appeals over whether civil litigants are state actors when exercising their peremptory

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186. *See* U.S. CONST. amend. XIV (declaring that the state cannot deny any person the equal protection of the laws); *see also Edmonson*, 111 S. Ct. at 2082 (stating that because the Fourteenth Amendment only applies to state action, racial discrimination violates the Equal Protection Clause only when it can be attributed to the state).

187. Powers v. Ohio, 111 S. Ct. 1364, 1366 (1991); *Batson*, 476 U.S. at 83.

188. *Edmonson*, 111 S. Ct. at 2080.

189. *Id.*; *see supra* note 186 and accompanying text (discussing the Equal Protection Clause of the Fourteenth Amendment).

190. *Edmonson*, 111 S. Ct. at 2080. Edmonson sued Leesville Concrete Company in the United States District Court for the Western District of Louisiana. *Id.*

191. *Id.* at 2081. As impaneled, the jury consisted of 11 white jurors and one African-American juror. *Id.* The jury rendered a verdict for Edmonson, assessing his total damages at $90,000. *Id.* However, because the jury attributed 80 percent of the damages to Edmonson's own comparative negligence, he was awarded only $18,000. *Id.*

192. *Id.* The District Court denied the request, stating that Batson does not apply in civil proceedings. *Id.* The plaintiff appealed and a divided panel of the Fifth Circuit reversed the trial court. *Id.* The Court of Appeals for the Fifth Circuit reversed and remanded. *Id.* On rehearing en banc, the Court of Appeals affirmed. Edmonson v. Leesville Concrete Co., Inc., 860 F.2d 1308 (5th Cir. 1989) *aff'd*, 895 F.2d 216 (5th Cir. 1990) (en banc) *rev'd*, 111 S. Ct. 2077 (1991).

challenges and would thus be subject to the race-neutral restriction of *Batson*.[193]

In analyzing whether civil litigants are state actors the majority used the two-part state action test of *Lugar v. Edmonson Oil Co.*[194] Under the *Lugar* state action test, a private actor's conduct is considered state action when the private actor exercises a right created by the state and can fairly be characterized as a state actor.[195] The *Edmonson* Court concluded that the civil litigant's peremptory challenge clearly met the first prong of the state action test because the peremptory challenge is a statutory privilege created by the State.[196] In analyzing the second prong of the state action test, the Court evaluated three principles: whether the private actor relies on government assistance and benefits,[197] whether the private actor is performing a traditional government function,[198] and whether the injury caused to the excluded juror is aggravated in a unique way by government authority.[199]

First, the *Edmonson* Court concluded that civil litigants benefit from the state created jury system.[200] The *Edmonson* Court concluded that the government is significantly involved in the exercise of the civil litigant's peremptory challenge.[201] The state establishes qualifications for jurors, summons them to jury service, and advises jurors when they have been excused.[202] Furthermore, the

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193. *Edmonson*, 111 S. Ct. at 2081.

194. *See id.* at 2082 (citing Lugar v. Edmonson Oil Co., 457 U.S. 922, 937 (1982)). The Court recognized that a state action analysis depends upon the specific facts of each individual case. *Id.* at 2083 (citing *Lugar*, 457 U.S. at 939).

195. *Id.* at 2082-83 (citing *Lugar*, 457 U.S. at 939-41).

196. *Id.* at 2083; *see* 28 U.S.C. § 1870 (1966) (granting each litigant in a civil proceeding three peremptory challenges); *supra* note 63 (citing the state statutes granting peremptory challenges).

197. *Edmonson*, 111 S. Ct. at 2083; *see* Tulsa Professional Collection Serv., Inc. v. Pope, 485 U.S. 478, 487-88 (1988) (finding state action when the probate court was intimately involved with the decision made by an administrator of a will).

198. *Edmonson*, 111 S. Ct. at 2085.

199. *Id.* at 2087; *see* Shelley v. Kraemer, 334 U.S. 1, 20 (1948) (finding state action when the court enforces a racially discriminatory covenant).

200. *Edmonson*, 111 S. Ct. at 2084.

201. *Id.*; *see id.* (stating that without the overt, significant assistance of the government the peremptory challenge system could not exist).

202. *Id.* at 2084; *see* 28 U.S.C. § 1865 (1993) (establishing the procedures by which jurors are selected for service); *id.* §§ 1863(b)(5)-(6) (1993) (outlining the lawful reasons for excusal from jury service).

Court asserted that when the trial judge as a state actor enforces a discriminatory peremptory challenge by excusing the challenged juror, the state places its authority behind the discrimination.[203]

Next, the Court assessed whether the peremptory challenge as a jury selection procedure performs a traditional government function.[204] The objective of jury selection is to select a jury which is a government body.[205] Therefore, exercising peremptory challenges to help choose that government body qualifies as a government function.[206] Furthermore, the *Edmonson* Court declared that when the government allows civil litigants to assist in the government function of choosing a jury, the civil litigants must be subject to the same equal protection mandates as the state.[207]

In its final inquiry under the state action test, the *Edmonson* Court analyzed whether the government's involvement in jury selection aggravated the harm to jurors excluded by a civil litigant's discriminatory peremptory challenge.[208] The Court determined that the courtroom in which peremptory challenges are exercised by a civil litigant intensifies the harmful effects of racial discrimination.[209] The Court explained that when racial discrimination occurs within a government building, jurors and the community are left with serious questions concerning the fairness of the proceeding and the jury system as a whole.[210] Furthermore, the Court asserted that racial discrimination during jury selection

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203. *See Edmonson*, 111 S. Ct. at 2085 (stating that the state has created the legal framework governing the challenged conduct and has therefore significantly involved itself with invidious discrimination).

204. *Id.*

205. *Id.*; *see id.* (stating that the jury is a traditional government body having no private function).

206. *Id.*; *see id.* (stating that the jury selection process performs the critical government functions of guarding the rights of litigants and insuring the continued acceptance of the laws by all people).

207. *Id.*; *see* Terry v. Adams, 345 U.S. 461, 470 (1953) (holding that a political organization's primary election is state action). *But see* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353 (1974) (holding that a utility company is not a state actor).

208. *Edmonson*, 111 S. Ct. at 2083.

209. *Id.*; *see id.* (stating that few places are more expressive of the constitutional authority of the government than the courtroom).

210. *Id.*; *see id.* (declaring that racial bias in the courtroom impugns the integrity of the proceedings and prevents the ideas of democratic government from becoming a reality).

offends the dignity of jurors and the integrity of the courts.[211] Thus, the *Edmonson* Court concluded that because a civil litigant's racially discriminatory peremptory challenges qualified as state action, they violated the equal protection rights of the excluded jurors.[212]

The Edmonson holding continued the erosion of the peremptory challenge begun by the Court in *Swain*, *Batson*, and *Powers*.[213] After the Supreme Court's decisions in *Batson*, *Powers*, and *Edmonson*, peremptory challenges exercised by a plaintiff or defendant in a civil proceeding, or a prosecutor in a criminal trial, were restricted by the Equal Protection Clause.[214] However, until the *Georgia v. McCollum*[215] decision, the Supreme Court had not addressed the issue of whether the Equal Protection Clause applied to a criminal defendant's peremptory challenges.[216]

II. THE CASE

The United States Supreme Court granted certiorari in *Georgia v. McCollum*[217] to decide whether the United States Constitution prohibits a criminal defendant from engaging in purposeful racial

211. *Id.*; *see id.* (stating that to permit racial exclusion in the public forum of the courtroom compounds the racial insult inherent in judging a person by the color of their skin).

212. *Id.* Relying on its recent decision in *Powers v. Ohio*, 111 S. Ct. 1364 (1991), the *Edmonson* Court concluded that a civil litigant could assert the rights of the excluded juror. *Id.* at 2088; *see supra* note 157-182 and accompanying text (discussing the *Powers* decision which held that a criminal defendant had third-party standing to assert the equal protection rights of excluded jurors).

213. *See supra* notes 107-130 and accompanying text (examining the initial erosion of the peremptory challenge in *Swain*); *supra* notes 138-150 and accompanying text (analyzing the continued erosion of the peremptory challenge in *Batson*); *supra* notes 157-182 and accompanying text (discussing the holding of *Powers*).

214. *Batson*, 476 U.S. at 84; *Edmonson*, 111 S. Ct. at 2077; *Powers*, 111 S. Ct 1370-73.

215. 112 S. Ct. 2348 (1992).

216. *See Batson*, 476 U.S. at 89 n.12 (stating that the Court issued no opinion on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel in a criminal case). *But see id.* at 125-26 (Burger, C.J., dissenting) (arguing that the inescapable result of the *Batson* decision would be to limit the defense attorney's peremptory challenges).

217. 112 S. Ct. 370 (1992) (granting certiorari).

discrimination in the exercise of peremptory challenges.[218] In *McCollum*, the Supreme Court held that the Equal Protection Clause prohibits a criminal defendant from using peremptory challenges to purposefully discriminate on the grounds of race.[219]

A. Factual and Procedural History

The defendants, Thomas, William and Ella McCollum were indicted in Dougherty County, Georgia for aggravated assault and simple battery.[220] The charges alleged that the McCollums, who are white, assaulted Jerry and Myra Collins, an African-American couple, at the McCollums' drycleaning business in Albany, Georgia.[221] In response to the alleged assaults, a leaflet was circulated in the local African-American community reporting the assaults and urging community residents not to patronize the McCollums' dry cleaning store.[222] This boycott of the defendants' store led to heightened racial tensions within the community which continued throughout the trial.[223]

Before jury selection began, the prosecutor, relying on the reasoning of *Batson*, moved to prohibit the defendants from exercising their peremptory challenges in a racially discriminatory manner.[224] The prosecutor claimed that the defense counsel planned to exclude all African-Americans from the jury in order to achieve

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218. *McCollum*, 112 S. Ct. 2348, 2351 (1992). Prior to the *McCollum* decision, many state courts, acting pursuant to their state constitutions, had prohibited criminal defendants from using peremptory challenges to racially discriminate against jurors. People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978). The Ninth Circuit recently prohibited criminal defendants from exercising peremptory challenges on the basis of gender; State v. Alvarado, 534 A.2d 440 (N.J. 1987); State v. Neil, 457 So. 2d 481 (Fla. 1984); State v. Levinson, 795 P.2d 845 (Haw. 1990); Commonwealth v. Soares, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979); People v. Kern, 545 N.Y.S.2d 4 (1989); United States v. De Gross, 960 F.2d 1433 (9th Cir. 1992) (en banc). The United States Supreme Court recently granted certiorari in a case to decide whether the Equal Protection Clause prohibits gender-based peremptory challenges. J.E.B. v. State of Alabama *ex rel.* T.B., 606 So. 2d 156 (Ala. 1992), *cert. granted*, 61 U.S.L.W. 3771 (U.S. May 17, 1993) (No. 92-1239).

219. *McCollum*, 112 S. Ct. at 2359.

220. *Id.* at 2351.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*; Batson v. Kentucky, 476 U.S. 79, 97 (1986).

an all white jury.[225] The prosecutor explained that forty-three percent of Dougherty County's population was African-American and therefore, if a statistically representative jury panel were assembled, only eighteen of the forty-two potential jurors[226] would be African-Americans.[227] Based on these numbers, the prosecutor argued that because both the prosecution and defense each receive twenty peremptory challenges, it would be possible for the defendants to remove all African-Americans from the selected jury.[228] Therefore, the prosecutor sought an order under *Batson* providing that if the prosecutor made out a prima facie case of racial discrimination, the defendants would be required to articulate race-neutral explanations for their peremptory challenges.[229]

The trial court, finding that neither Georgia law nor federal law prohibited criminal defendants from exercising their peremptory challenges in a racially discriminatory manner, denied the prosecutor's motion and the issue was certified for immediate appeal.[230] The Supreme Court of Georgia, by a four to three vote, affirmed the trial court's ruling.[231] The United States Supreme Court granted certiorari to decide the question left open by its previous decisions in *Batson* and *Edmonson*: whether the Constitution prohibits a criminal defendant from using race-based peremptory challenges.[232]

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225. *McCollum*, 112 S. Ct. at 2351.

226. *Id.* at 2352 n.1. Under Georgia law, the jury in a felony trial is selected from a venire of 42 persons. GA. CODE ANN. § 15-12-160 (1990).

227. *McCollum*, 112 S. Ct. at 2351.

228. *Id.* Under Georgia law, a defendant who is charged with an offense carrying a penalty of four or more years is granted 20 peremptory challenges. *Id.*; GA. CODE ANN. § 15-12-165 (1992).

229. *McCollum*, 112 S. Ct. at 2351-52; *see supra* notes 147-150 and accompanying text (discussing acceptable race-neutral explanations under *Batson*).

230. *McCollum*, 112 S. Ct. at 2352.

231. State v. McCollum, 405 S.E.2d 688 (Ga.), *cert. granted*, 112 S. Ct. 370 (1991), *rev'd*, 112 S. Ct. 2348 (1992). Citing the long history of jury trials in protecting human rights, a majority of the Georgia Supreme Court refused to extend the United States Supreme Court's decisions in *Batson* and *Edmonson* which held that the prosecution and civil litigants could not use their peremptory challenges to racially discriminate against jurors, to include criminal defendants. State v. McCollum, 405 S.E.2d at 688. Three justices dissented, arguing that the Supreme Court's decision in *Edmonson* must logically apply to criminal defendants as well. State v. McCollum, 405 S.E.2d at 689-93 (Hunt, J., Fletcher, J. and Benham, J., dissenting).

232. *Id.*

B. The Majority Opinion

The United States Supreme Court, in an opinion written by Justice Blackmun,[233] addressed whether the Equal Protection Clause of the United States Constitution prohibits criminal defendants from using their peremptory challenges in a racially discriminatory manner.[234] In order to decide this issue, the Supreme Court separated its opinion into four questions: first, whether a criminal defendant's exercise of racially discriminatory peremptory challenges harm the excluded juror, the community, and the judicial system;[235] second, whether the exercise of peremptory challenges by a criminal defendant constitutes state action;[236] third, whether the prosecution has standing to assert the equal protection rights of excluded jurors;[237] and fourth, whether the constitutional rights of criminal defendants are outweighed by the harm done by discriminatory peremptory challenges.[238]

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233. *McCollum*, 112 S. Ct. at 2351 (7-2 decision). Chief Justice Rehnquist, Justice White, Justice Stevens, Justice Kennedy, and Justice Souter joined the opinion of the Court written by Justice Blackmun. *Id.* at 2350. Justice Rehnquist and Justice Thomas each filed a separate concurring opinion. *Id.* at 2359 (Rehnquist, C.J., concurring); *id.* (Thomas, J., concurring). Justice O'Connor and Justice Scalia each filed separate dissenting opinions. *Id.* at 2361 (O'Connor, J., dissenting); *id.* at 2364 (Scalia, J., dissenting). Although the votes of Chief Justice Rehnquist and Justice Thomas are counted on the side of the majority, both joined the Court's opinion reluctantly and only because they felt *McCollum* was the logical extension of *Edmonson*. *Id.* at 2359 (Rehnquist, C.J., concurring); *id.* (Thomas, J., concurring).

234. *Id.* at 2359; *see id.* (stating that peremptory challenges may not be based on either the race of the juror or the racial stereotype held by the challenger).

235. *Id.* at 2353-54; *see infra* notes 239-247 and accompanying text (concluding that the same harms result when a criminal defendant uses peremptory challenges to racially discriminate as result from the prosecution's discriminatory use).

236. *McCollum*, 112 S. Ct. at 2354-57; *see infra* notes 249-275 and accompanying text (discussing the Court's conclusion that criminal defendants are state actors when exercising their peremptory challenges to racially discriminate).

237. *McCollum*, 112 S. Ct. at 2357; *see infra* notes 277-286 and accompanying text (concluding that the prosecution has third-party standing to assert the equal protection rights of the excluded jurors).

238. *McCollum*, 112 S. Ct. at 2357-59; *see infra* notes 287-294 and accompanying text (determining that the constitutional rights guaranteed to the criminal defendant outweigh the discrimination done to the excluded juror).

1. The Harms Caused by Racially Discriminatory Peremptory Challenges

The Court began its opinion by explaining that its decisions in *Batson*, *Powers* and *Edmonson* were designed to serve multiple ends.[239] While these decisions were intended to protect the criminal defendant from discriminatory jury selection, they were also designed to remedy the harms to the individual jurors and the community resulting from discriminatory peremptory challenges.[240] Thus, the question facing the Court was whether the same harms resulted when criminal defendants used peremptory challenges to racially discriminate as when discriminatory peremptory challenges were exercised by prosecutors and civil litigants.[241]

First, the *McCollum* Court concluded that whether initiated by a prosecutor, a civil litigant, or a criminal defendant, racially discriminatory peremptory challenges harm the excluded jurors by subjecting them to open and public discrimination.[242] The Court explained that while jurors do not have the right to sit on a particular jury, they do have the right not to be excluded from a jury based solely on their race.[243]

Next, the Court found that no matter who exercises the discriminatory peremptory challenge, discrimination impugns the fairness of jury verdicts and undermines the public's confidence in our justice system.[244] The Court asserted that the public's confidence in the integrity of the justice system is essential for preserving community peace in trials involving race-related crimes.[245] The Court explained that public confidence in jury verdicts in trials involving

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239. *McCollum*, 112 S.Ct. at 2353.

240. *Id.* (stating that the extension of *Batson* to civil litigants was designed to remedy the harm done to the dignity of the jurors and the integrity of the courts).

241. *Id.*; *see* Edmonson v. Leesville Concrete Co., Inc., 111 S. Ct. 2077, 2082 (1991) (stating that racial discrimination harms the excluded juror no less in the civil proceeding than in a criminal trial); Powers v. Ohio, 111 S. Ct. 1364, 1368 (1991) (stating that *Batson* was designed to serve the multiple ends of remedying harms to the excluded juror and the community).

242. *McCollum*, 112 S. Ct. at 2353.

243. *Id.*

244. *Id.* at 2353-54 (citing *Powers*, 111 S. Ct. at 1371).

245. *Id.* at 2354.

race-related crimes is extremely important because reaction of the affected community to the verdicts will inevitably be heated and volatile.[246] Thus, the Court concluded that the harms resulting from a criminal defendant's discriminatory peremptory challenge undermine the confidence in the fairness of jury verdicts and the justice system as a whole.[247] However, in order for the Court to remedy this harm under the Equal Protection Clause, the criminal defendant's exercise of peremptory challenges must qualify as state action.[248]

2. *Is a Criminal Defendant A State Actor?*

The second question the Court addressed in determining whether the Equal Protection Clause prohibits criminal defendants from using peremptory challenges in a racially discriminatory manner was whether the criminal defendant's use of peremptory challenges constituted state action.[249] The Court needed to resolve this question because the Fourteenth Amendment only prohibits the state from violating the Equal Protection Clause.[250] The Court analyzed the criminal defendant's use of peremptory challenges under the state action test delineated in *Lugar v. Edmonson Oil Co.*[251] The Court noted that under the two-part state action test, it must assess whether the constitutional violation resulted from a right created by the state and whether the private party charged with the violation can fairly be described as a state actor.[252] The majority concluded that the first part of the test was met because the peremptory challenge is a statutory right that is not constit-

246. *Id.*; *see supra* note 223 and accompanying text (stating that the *McCollum* trial involved heightened racial tensions).

247. *McCollum*, 112 S. Ct., at 2354.

248. *Id.*

249. *Id.*

250. *Id.*; *see id.* (stating that racial discrimination violates the Constitution only when it is attributable to the state).

251. *Id.*; *see supra* notes 194-199 and accompanying text (discussing the *Lugar* state action test).

252. *McCollum*, 112 S. Ct. at 2354-55.

utionally guaranteed.[253] In analyzing the second part of the state action test, whether the defendant can be fairly characterized as a state actor, the Court looked to the same three principles evaluated in *Edmonson*: the extent to which the private actor relied on government benefits and assistance; whether the private action is a traditional government function; and whether the injury caused by the constitutional violation is aggravated by government involvement.[254]

In analyzing whether the criminal defendant relies on government benefits and assistance, the *McCollum* Court asserted that the jury system could not exist without the assistance of the government.[255] The Court explained that the state compiles jury lists, summons jurors to jury service, pays jurors for their service, administers the jury's oath, and ultimately excuses the juror when a litigant exercises a peremptory challenge.[256] Thus, the Court concluded that when a private actor exercises a peremptory challenge during jury selection, that actor is relying on significant government assistance and benefits.[257]

Next, the Court analyzed whether exercising peremptory challenges is a traditional government function.[258] The Court concluded that the peremptory challenge fulfills a traditional government function because its sole purpose is to assist the government in the selection of an impartial jury.[259] The Court explained that the jury system performs the critical government functions of protecting the rights of the accused against government oppression and promoting acceptance of the laws within the community.[260] Further, the Court asserted that the state is under a constitutional

253. *Id.* at 2355.

254. *Id.* (citing Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2083 (1991)).

255. *Id.*

256. *Id.*; *see* GA. CODE ANN. § 15-12-40 (1990) (stating that jury lists should be comprised of intelligent and upright citizens representing a fair cross-section of the county); *id.* § 15-12-120 (1990) (providing that the judge of the superior court shall draw the names of and summon the persons chosen to serve as trial jurors); *id.* § 15-12-132 (1990) (requiring each jury panel to take the oath set forth by this statute); *id.* § 15-12-163 (1990) (authorizing the court to excuse jurors for cause).

257. *McCollum*, 112 S. Ct. at 2355.

258. *Id.*

259. *Id.* (citing *Edmonson*, 111 S. Ct. at 2083).

260. *Id.* at 2355 (citing *Edmonson*, 111 S. Ct. at 2085).

duty to provide an impartial jury,[261] and that the trial courts cannot avoid their constitutional responsibilities by delegating the public function of jury selection to private parties.[262] Thus, the Court determined that the private action of criminal defendants exercising their peremptory challenges was a traditional government function.[263]

The third issue the majority addressed in its state action analysis was whether the injury resulting from the criminal defendant's discriminatory peremptory challenges was aggravated by governmental authority.[264] The majority asserted that regardless of who exercises the discriminatory peremptory challenge, the perception will be that the court has excused jurors because of their race, and that discrimination will be attributed to the state.[265] The majority asserted that the courtroom setting of peremptory challenges aggravates the harm to the juror because, when the state excuses the juror for a peremptory challenge based on race, it appears as if the state is sanctioning racial discrimination.[266] Thus, the Court concluded that a criminal defendant's exercise of peremptory challenges met the three-part state action test and is therefore restricted by the Equal Protection Clause of the Fourteenth Amendment.[267]

After concluding that a criminal defendant's exercise of peremptory challenges constitutes state action, the Court distinguished *McCollum* from the Court's contrary 1981 decision in *Polk County v. Dodson*.[268] In *Dodson*, a criminal defendant sued a public

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261. *Id.* at 2355-56; *see supra* note 25 (discussing the Sixth Amendment right to an impartial jury).

262. *McCollum*, 112 S. Ct. at 2355-56; *cf.* West v. Atkins, 487 U.S. 42, 57 (1988) (holding that a private physician hired to provide medical services at a state prison was a state actor because he was fulfilling a duty otherwise belonging to the state); Terry v. Adams, 345 U.S. 461, 477 (1953) (holding that a private political party's determination of qualifications for primary voters was state action).

263. *McCollum*, 112 S. Ct. at 2356.

264. *Id.* at 2355.

265. *Id.* at 2356; *see* Barbara A. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right is it Anyway?*, 92 COLUM. L. REV. 725, 751 n.117 (1992) (arguing that it is common practice not to reveal the identity of the challenging party to the jurors, enhancing the perception that it is the court that has rejected the jurors).

266. *McCollum*, 112 S. Ct. at 2356.

267. *Id.* at 2355-56.

268. 454 U.S. 312 (1981).

defender under a federal statute applicable only to state actors.[269] The defendant claimed that the public defender had violated his constitutional rights in failing to provide adequate representation.[270] The Supreme Court held that a public defender cannot violate a defendant's constitutional rights because public defenders do not qualify as state actors when engaged in the general representation of their clients.[271] The *McCollum* Court distinguished *Dodson* by limiting the *Dodson* holding to mean that the attorney's public employment alone was not sufficient to qualify the attorney as a state actor.[272] In differentiating *Dodson* from the Court's holding in *McCollum*, the *McCollum* Court stated that unlike the representative role of the public defender in question in the *Dodson* case, criminal defendants use their peremptory challenges to choose an essential governmental body.[273] After determining that the factual situations in *Dodson* and *McCollum* were distinguishable, the *McCollum* Court concluded that whether an attorney is a state actor depends on the nature and context of the function the attorney is performing.[274] Thus, the *McCollum* Court reiterated its holding that racially discriminatory peremptory challenges exercised by the criminal defendant are state action and therefore in violation of the Equal Protection Clause.[275] However, in order for the prosecution to challenge the equal protection violation resulting to jurors from

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269. *Id.* at 314 (1981); *see* 42 U.S.C. § 1983 (1981) (providing that every person who, under color of state law, subjects any person within the jurisdiction thereof to the deprivation of any rights secured by the Constitution and laws shall be liable to that deprived person for redress).

270. *Dodson*, 454 U.S. at 314.

271. *Id.* at 319. Although the *Dodson* Court actually determined whether the public defender's actions were under color of state law, as opposed to whether or not they constituted state action, the Supreme Court has subsequently held that the two inquiries are the same. *See, e.g.*, Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982) (stating that the color of state law required under 28 U.S.C. § 1983 has consistently been treated the same as the state action requirement under the Fourteenth Amendment). Furthermore, the Supreme Court has specifically extended its reasoning in *Dodson* to state action cases. Blum v. Yaretsky, 457 U.S. 991, 1009 n. 20 (1982).

272. Georgia v. McCollum, 112 S. Ct. 2348, 2356 (1992). *But see id.* at 2362 (O'Connor, J., dissenting) (stating that the clear holding of *Dodson* is that defending an accused is a private function and not state action).

273. *Id.*, 112 S. Ct. at 2356.

274. *Id.*; *see* Branti v. Finkel, 445 U.S. 507 (1980) (holding that a public defender is a state actor when making personnel decisions on behalf of the state).

275. *McCollum*, 112 S. Ct. at 2356.

the criminal defendant's race-based peremptory challenge, the Court needed to determine whether the prosecution qualified for third party standing to assert the rights of the excluded jurors.[276]

3. *The Prosecution's Third-Party Standing to Assert the Rights of Jurors Excluded By Discriminatory Peremptory Challenges*

The *McCollum* Court began its analysis by stating that, ordinarily, persons are only allowed to assert their own legal rights and may not rest a claim for relief on an injury to a third party.[277] However, the Supreme Court recognized that it does allow litigants to bring actions on behalf of third parties if: the litigant has suffered a concrete, redressable injury, the litigant has a close relation to the injured party, and there exists some hinderance to the third party's protecting its own interests.[278] Applying the third-party standing test, the *McCollum* Court concluded that the prosecution qualified for third party standing and could bring an equal protection challenge against the criminal defendant.[279]

In analyzing the first prong of the third-party standing test, the Court determined that the prosecution is harmed by racially discriminatory peremptory challenges.[280] The Court explained that racial discrimination by the criminal defendant during the jury selection process places the fairness of the judicial system in doubt and impugns the integrity of the criminal trial.[281] Next, in analyzing the second prong of the third-party standing test, the Court concluded that the prosecution has a close relation to the excluded juror.[282] Voir dire establishes a bond of trust between the prosecution and the jurors and this trusting relationship is severed

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276. *Id.* at 2357.

277. *Id.*; Powers v. Ohio, 111 S. Ct. 1364, 1370 (1991); *see supra* note 164-166 and accompanying text (stating that third-party standing is required in order for the defendant to assert the rights of excluded jurors).

278. *McCollum*, 112 S. Ct. at 2357.

279. *Id.*

280. *Id.*

281. *Id.* (citing *Powers*, 111 S. Ct. at 1371).

282. *Id.*

when a juror is excluded based on race.[283] Therefore, the Court reasoned that the prosecution, as the representative of the state, is the logical and proper party to assert the equal protection rights of excluded jurors.[284] Finally, under the third prong of the standing test, the Court concluded that jurors excluded by discriminatory peremptory challenges are unlikely to be able to vindicate their own rights because of the practical and financial barriers of litigation.[285] Thus, because the *McCollum* Court determined that the prosecution fulfilled all three requirements under the third-party standing test, the Court concluded that the prosecution has standing to bring the equal protection claims of jurors excluded by the criminal defendant's discriminatory peremptory challenge.[286] The final issue confronting the Court was whether the harms to the juror and the community resulting from discriminatory peremptory challenges outweighed the criminal defendant's constitutional rights.

4. The Criminal Defendant's Constitutional Rights Weighed Against the Harms Resulting from Discrimination

The final issue the Court addressed was whether the rights of the criminal defendant are outweighed by the harms to the excluded jurors and the community resulting from discriminatory peremptory challenges.[287] The Court began by explaining that the use of peremptory challenges is not a constitutionally guaranteed

283. *Id.* (citing *Powers*, 111 S. Ct. at 1372).

284. *Id.*

285. *Id.*; *see* Dunnigan, *supra* note 106, at 367 (stating that jurors have no opportunity to be heard at the time of their exclusion and that due to the economic burdens of litigation, jurors are deterred by the relatively small financial stake in bringing their own action). The third-party standing analysis used in *McCollum* to determine whether the prosecution could assert the rights of jurors excluded by the criminal defendant's racially discriminatory peremptory challenges was based exclusively on the Court's reasoning in *Powers*. *McCollum*, 112 S. Ct. at 2357; *see supra* notes 167-182 and accompanying text (outlining the third-party standing analysis used by the *Powers* Court to determine that the prosecution could assert the rights of a juror excluded by a criminal defendant's racially discriminatory peremptory challenge).

286. *McCollum*, 112 S. Ct. at 2357.

287. *Id.* at 2357-58.

right.[288] Peremptory challenges are only a device created by the state to help achieve the Sixth Amendment right to an impartial jury.[289] Prohibiting a criminal defendant from using discriminatory peremptory challenges altogether would not violate the defendant's Sixth Amendment right to an impartial jury.[290] Furthermore, the Court asserted that prohibiting peremptory challenges would not violate the defendant's Sixth Amendment right to effective counsel.[291] The *McCollum* Court explained that it would be possible for defense attorneys to come forward with race-neutral explanations for their peremptory challenges without revealing confidential communication or compromising trial strategy.[292] Thus, the Court concluded that while the defendant has a right to a jury free from racial bias, this right only extends to removing jurors who harbor racial prejudice and not to discriminating against jurors on account of their race.[293] The Court declared that the Constitution will not permit racial discrimination to be the price that is paid for the acceptance of jury verdicts as fair and impartial.[294]

In conclusion, the *McCollum* Court held that the exercise of discriminatory peremptory challenges by a criminal defendant constitutes state action and, as a result, violates the equal protection rights of excluded jurors.[295] The Court determined that discrimination within the criminal justice system damages the integrity of the criminal courts by bringing the fairness of its proceedings into doubt.[296] Furthermore, the Court concluded that the harms to the jurors and the community resulting from racial discrimination outweighed the criminal defendant's right to unrestricted peremptory

288. *Id.* at 2358.

289. *See id.* (asserting that the peremptory challenge can be withheld altogether without violating a criminal defendant's Sixth Amendment right to a fair and impartial jury).

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.* at 2359.

294. *Id.* at 2358 (stating that it is an affront to justice to argue that a fair trial demands the right to racially discriminate).

295. *Id.* at 2354-57.

296. *Id.* at 2357.

challenges.[297] Finally, the *McCollum* Court reaffirmed the rule enunciated in *Batson* that peremptory challenges may not be exercised on the basis of a juror's race or on racial stereotypes held by the challenger.[298]

C. Concurring Opinion of Chief Justice Rehnquist

Chief Justice Rehnquist filed a brief concurring opinion reaffirming his belief that *Edmonson* was incorrectly decided.[299] In *Edmonson*, Chief Justice Rehnquist joined Justice O'Connor's dissent which argued that a peremptory challenge by a civil litigant is a matter of private choice and not state action, and therefore, could not violate the equal protection rights of excluded jurors.[300] In *McCollum*, Chief Justice Rehnquist concurred with the majority but did so only because he felt that *Edmonson* controlled the outcome of *McCollum*.[301]

D. Concurring Opinion of Justice Thomas

Justice Thomas filed a concurring opinion in which he, like Chief Justice Rehnquist, only joined the opinion of the majority because he believed *Edmonson* was controlling precedent.[302] Justice Thomas wrote separately to express his dissatisfaction with the Court's continued erosion of the peremptory challenge.[303] He declared that the unrestricted use of peremptory challenges is essen-

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297. *Id.* at 2358.

298. *Id.* at 2359. The case was remanded to the Georgia trial court, giving the prosecution the opportunity to demonstrate a prima facie case of purposeful racial discrimination under the *Batson* test. *Id.* If the prosecution establishes a prima facie case of discrimination, the defendants will be required to articulate racially-neutral reasons for their peremptory challenges. *Id.*; *see supra* notes 143-150 and accompanying text (discussing the prima facie case and burden of proof under *Batson*).

299. *McCollum*, 112 S. Ct. at 2359 (Rehnquist, C.J., concurring).

300. *Id.*; Edmonson v. Leesville Concrete Co., Inc., 111 S. Ct. 2077, 2089 (1991) (O'Connor, J., dissenting).

301. *McCollum*, 112 S. Ct. at 2359 (Rehnquist, C.J., concurring).

302. *See id.* (Thomas, J., concurring) (stating that because Edmonson is recent precedent, the Court must accept the consequences of *Edmonson*'s holding). Justice Thomas stated that absent *Edmonson* he would have voted with the dissent in this case. *Id.*

303. *Id.*

tial for a minority criminal defendant to achieve racial representation on the jury.[304]

Justice Thomas argued that the majority departed from the original reasoning of *Strauder v. West Virginia*,[305] which recognized the right of criminal defendants not to be tried by a jury from which members of their race had been purposefully excluded.[306] He explained that the *Strauder* decision recognized that the racial composition of a jury may affect the outcome of the trial.[307] Therefore, racial representation on the jury may help the minority defendant overcome racial bias and improve the defendant's chance of receiving a fair trial.[308] However, Justice Thomas asserted that *McCollum*'s restrictions on the peremptory challenge will frustrate the minority defendant's attempts to achieve a racially representative jury.

Furthermore, Justice Thomas argued that this departure from *Strauder* will have several unfavorable consequences, particularly for minority defendants.[309] Justice Thomas asserted that the first unfavorable consequence of the *McCollum* decision will be the emergence of more biased juries.[310] After *McCollum*, minority defendants will be unable to secure representation of their minority group on the jury by removing members of the majority with peremptory challenges.[311] The second negative consequence is that the Court has exalted the equal protection rights of jurors over the right of the criminal defendant to have a fair and impartial jury.[312] Justice Thomas believed this to be in error because it is the criminal defendant and not the juror who faces imprisonment

304. *Id.*

305. Strauder v. West Virginia, 100 U.S. 303 (1879); *see supra* note 113 (discussing the *Strauder* decision).

306. *McCollum*, 112 S. Ct. at 2359 (Thomas, J., concurring).

307. *Id.* at 2360.

308. *Id.*

309. *Id.* at 2359 (stating that this departure will lead to unfavorable consequences, particularly for the African-American criminal defendant).

310. *Id.* at 2360.

311. *Id.*

312. *Id.*

or even death, depending on the jury's decision.[313] Justice Thomas expressed concern that, under the majority's decision, even if the defendant believes a juror to be racist, unless a juror actually admits racial prejudice during voir dire, the defendant will be unable to remove the juror and instead will suffer the consequences of a biased jury.[314]

E. Dissenting Opinion of Justice O'Connor

Justice O'Connor wrote separately because she disagreed with the majority's state action analysis.[315] The second prong of the state action test requires that a private actor be fairly characterized as a state actor.[316] Justice O'Connor believed that the majority's analysis of this prong lacked a realistic assessment of the adversarial relationship between the defendant and the government in a criminal proceeding.[317] She asserted that the result of the adversarial relationship on the state action analysis was made clear in *Polk County v. Dodson*.[318] In *Dodson*, the Supreme Court held that a public defender is not a state actor when performing traditional functions of an attorney for a defendant.[319] Similar to the situation in *Dodson*, Justice O'Connor stated that the obligations of defense counsel in *McCollum* were to act in the best interests of the client.[320] She explained that this is achieved, not by acting in

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313. *Id.* (Thomas, J., concurring) (referring to the *McCollum* decision as a misordering of priorities).

314. *Id.*

315. *Id.* at 2361 (O'Connor, J., dissenting); *see supra* notes 249-275 and accompanying text (discussing the majority's state action analysis in *McCollum*).

316. *McCollum*, 112 S. Ct. at 2361 (O'Connor, J., dissenting). The majority analyzed three questions in addressing the second prong of the *Lugar* state action test. *Id.* at 2355. First, the majority determined the extent to which the actor receives governmental assistance. *Id.* Second, the majority decided whether the private party was performing a traditional government function. *Id.* Finally, the majority analyzed whether the injury caused was aggravated in a unique way by government authority. *Id.*

317. *Id.* at 2361 (O'Connor, J., dissenting).

318. 454 U.S. 312 (1981).

319. *McCollum*, 112 S. Ct. at 2362 (O'Connor, J., concurring); *see supra* notes 268-274 and accompanying text (discussing the *Dodson* case).

320. *McCollum*, 112 S. Ct. at 2362 (O'Connor, J., dissenting).

conjunction with the State, but by opposing the interests advanced by the State.[321]

Justice O'Connor further argued that the independence of defense counsel from state control has constitutional dimensions.[322] Implicit in the constitutional right to an attorney is the assumption that the attorney will be free from state control.[323] Thus, due to the adversarial nature of the criminal trial, Justice O'Connor concluded that the criminal defendant's use of peremptory challenges could not be attributed to the state and that, therefore, the criminal defendant was not a state actor.[324]

Next, Justice O'Connor distinguished *McCollum* from the Supreme Court's holding in *Edmonson*, which held that civil litigants were state actors.[325] She argued that the adversarial relationship between the State and the defendant that exists in a criminal trial was not present in the civil proceeding in *Edmonson*.[326] In civil litigation, two private parties are in opposition, but in a criminal trial the defendant is in direct opposition to the state.[327] Therefore, Justice O'Connor concluded that the adversarial relationship between the defendant and the prosecution in a criminal trial precluded the majority's finding that a criminal defendant is a state actor.[328]

Finally, Justice O'Connor addressed the argument she found to be implicit in the majority's reasoning: that allowing criminal defendants to use discriminatory peremptory challenges will shift the balance in jury selection in the defendant's favor.[329] Disagreeing with this argument, Justice O'Connor maintained that

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321. *Id.*

322. *Id.*; *see* U.S. CONST. amend VI (granting the criminal defendant the right to counsel in federal criminal trials); Gideon v. Wainwright, 372 U.S. 335 (1963) (establishing the defendant's right to independent counsel in state proceedings under the Fourteenth Amendment due process clause).

323. *See McCollum*, 112 S. Ct. at 2362 (O'Connor, J., dissenting) (stating that a fair trial cannot exist without effective and independent counsel).

324. *Id.* at 2361 (O'Connor, J., dissenting).

325. *Id.*

326. *Id.* at 2363 (O'Connor, J., dissenting).

327. *Id.*

328. *Id.*

329. *Id.* at 2363-64 (O'Connor, J., dissenting).

many aspects of a criminal trial are intended to favor the defendant.[330] She asserted that the concept that only the government can violate a person's constitutional rights under the Equal Protection Clause is a fundamental tenet of our legal order, not an obstacle to be overcome by extending state action status to private actors.[331] In conclusion, Justice O'Connor asserted that the majority's holding will harm minority defendants because unrestricted peremptory challenges are necessary for a minority defendant to secure minority representation on the jury and lessen the possibility of racial bias.[332]

F. Dissenting Opinion of Justice Scalia

Although Justice Scalia agreed with the majority, Chief Justice Rehnquist and Justice Thomas, that the *McCollum* decision is the next logical step after *Edmonson*, he dissented because he believed that *Edmonson* was incorrectly decided.[333] Justice Scalia stated that he agreed with Justice O'Connor's conclusion that criminal defendants are not state actors but wrote separately from Justice O'Connor because he felt that *Edmonson* was indistinguishable from *McCollum*.[334] He stated, without further expanation, that the majority's decision, in the attempt to further racial harmony, has destroyed the criminal defendant's right to secure a fair jury.[335]

III. LEGAL RAMIFICATIONS

The majority in *Georgia v. McCollum* held that criminal defendants must provide race-neutral explanations for their peremptory challenges after the prosecution has raised a prima facie case of

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330. *Id.* at 2364.

331. *Id.*

332. *Id.*

333. *See id.* (Scalia, J., dissenting) (stating that the *McCollum* decision reduces *Edmonson* to the terminally absurd because a criminal defendant in the course of defending himself against the state cannot be at the same time acting on behalf of the state).

334. *See id.* at 2365 (Scalia, J., dissenting).

335. *Id.*

purposeful discrimination.[336] The *McCollum* decision completed the Supreme Court's erosion of the peremptory challenge begun twenty-seven years ago in *Swain v. Alabama*.[337] The *Swain* Court, despite the ancient roots of unrestricted peremptory challenges, held that prosecutors could not use their peremptory challenges to systematically exclude jurors in case after case based solely on their race.[338] In *Batson v. Kentucky*,[339] this concept was supplemented with a new evidentiary burden which allowed criminal defendants to raise a prima facie case based on the peremptory challenges exercised by the prosecution during their particular trial.[340] Under *Batson*, once a criminal defendant has raised a prima facie case of purposeful discrimination, the prosecution is required to provide a race-neutral reason for using a peremptory challenge to remove the excluded juror.[341] If the prosecution cannot come forward with an acceptable explanation then the challenged juror will remain on the jury.[342] In *Edmonson v. Leesville Concrete Co. Inc.*,[343] the Court furthered the impact of this erosion on the unrestricted use of peremptory challenges by requiring civil litigants to provide race-neutral explanations for their peremptory challenges as well.[344]

Now, after the *McCollum* decision, all litigants in both civil and criminal trials are required to provide race-neutral explanations for their peremptory challenges once their opponent has raised a prima

336. *Id.* at 2359; see *supra* notes 143-147 and accompanying text (discussing the requirements for a prima facie case under *Batson*).

337. 380 U.S. 202 (1965); *see supra* notes 107-130 and accompanying text (reviewing the Court's decision in *Swain*).

338. *Swain*, 380 U.S. at 224 (1965).

339. 476 U.S. 79 (1986).

340. *Batson*, 476 U.S. at 96 (1986); *see supra* notes 143-150 and accompanying text (explaining the *Batson* test).

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

342. *Id.*

343. 111 S. Ct. 2077 (1991).

344. *Id.* at 2089; *see supra* notes 194-212 and accompanying text (outlining the reasoning of the Court's holding in *Edmonson*).

facie case of purposeful discrimination.[345] Although the extension of *Batson* to criminal defendants has been characterized by some as inevitable,[346] there are significant practical and constitutional differences in the treatment of criminal defendants as opposed to the prosecutor and civil litigants which affect the state action determination.[347] The majority in *McCollum* failed to consider these differences in its state action analysis.

A. A Criminal Defendant Cannot in all Fairness be Deemed a State Actor

The question of whether a criminal defendant's peremptory challenges are constrained by the Equal Protection Clause of the Fourteenth Amendment depends upon whether the criminal defendant can "fairly be deemed a state actor."[348] Using the same state action analysis applied to civil litigants in *Edmonson*, the *McCollum* Court held that a criminal defendant was a state actor.[349] However, in reaching its conclusion, the majority failed to consider the unique adversarial relationship between the prosecution and the defense which did not exist in the civil proceeding in *Edmonson*.[350] Furthermore, the *McCollum* majority failed to

345. *See* Georgia v. McCollum, 112 S. Ct. 2348, 2359 (1992) (requiring criminal defendants to provide race-neutral explanations for their peremptory challenges); *Edmonson*, 111 S. Ct. at 2089 (holding that civil litigants must provide race-neutral explanations); Batson v. Kentucky, 476 U.S. 79, 97 (1986) (declaring that the prosecution must provide race-neutral explanations). Recently, the United States Supreme Court granted certiorari to decide whether the Equal Protection Clause prohibits gender-based peremptory challenges. J.E.B. v. State of Alabama *ex rel.* T.B., 606 So. 2d 156 (Ala. 1992), *cert. granted*, 61 U.S.L.W. 3771 (U.S. May 17, 1993) (No. 92-1239).

346. *See Edmonson*, 111 S. Ct. at 2095 (Scalia, J., dissenting) (stating that the extension of requiring civil litigants to provide explanations for their peremptory challenges must also logically apply to criminal defendants).

347. *See infra* notes 352-365 and accompanying text (describing the practical and legal differences between civil litigants and criminal defendants).

348. *McCollum*, 112 S. Ct. at 2355.

349. *Id.* at 2356; *see supra* notes 194-212 and accompanying text (outlining the state action analysis used in *Edmonson*).

350. *McCollum*, 112 S. Ct. at 2363 (O'Connor, J., dissenting).

evaluate whether the constitutional protections granted to the accused affect the state action determination.[351]

1. The Adversarial Nature of a Criminal Trial Precludes a Finding that a Criminal Defendant is a State Actor

The *McCollum* Court determined that it was fair to consider a criminal defendant exercising a peremptory challenge as a state actor.[352] The majority concluded that the same criteria which qualified civil litigants as state actors in *Edmonson* also existed when criminal defendants exercised peremptory challenges in *McCollum*.[353] However, the *McCollum* Court's analysis failed to evaluate the practical and constitutional differences between civil litigants and criminal defendants during trial.[354]

When extending the *Batson* test to include civil litigants, the *Edmonson* Court limited its holding to the ordinary civil context where the state was not a party.[355] This limitation of the *Edmonson* holding recognizes the unique position which develops when the state enters the litigation.[356] In contrast to civil litigants who each share the same relationship to the state during litigation,[357] the criminal defendant is engaged in a battle against the state.[358] Thus, it is the existence of the State as prosecutor in the criminal trial which disrupts the symmetry between the litigants

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351. However, the majority did weigh the jurors' equal protection rights against the criminal defendant's rights later in the opinion. *Id.* at 2358.

352. *Id.* at 2357.

353. *Id.* at 2354-57; *see supra* notes 194-199 and accompanying text (outlining the criteria required for finding that an individual is a state actor).

354. *Id.* at 2361.

355. *See* Edmonson v. Leesville Concrete Co., Inc., 111 S. Ct. 2077, 2086 (1991) (stating that when the government is not a party, an adversarial relationship does not exist between the government and the civil litigants).

356. *See id.* (stating that in the civil context, the government and the civil litigants work towards the same end).

357. *Id.*

358. *See* Brief for the National Association of Criminal Defense Lawyers at 8, Georgia v. McCollum, 112 S. Ct. 2348 (1992) (No. 91-372) (arguing that the adversary nature of a criminal trial precludes finding that a criminal defendant is a state actor when exercising peremptory challenges).

and the state that was crucial to the Court's decision in *Edmonson*.[359]

The *Edmonson* Court emphasized the important impact of the adversarial relationship between the state and the criminal defendant in the criminal trial by rejecting the holding of *Polk County v. Dodson*.[360] In *Dodson*, the Court held that public defenders could not fairly be called state actors because of their adversarial relationship with the state.[361] The *Edmonson* Court distinguished civil litigants from public defenders by asserting that an adversarial relationship does not exist in a civil proceeding.[362] While this is true in the civil context, the *McCollum* majority mistakenly applied the same reasoning to the criminal trial where an adversarial relationship does exist.[363] The *McCollum* majority distinguished *Dodson* by stating that unlike the public defender's representative role in defending a client, a criminal defendant uses peremptory challenges to chose a government body—the jury.[364] While it is true that the result of the jury selection process is to choose a government body, the majority's narrow characterization of the purpose of jury selection fails to consider the criminal defendant's uniquely personal stake in the selection of impartial fact-finders.[365]

The decision to remove a particular juror is a tactical decision made in the process of defending one's client.[366] In most instances, an attorney will challenge jurors because of an intuitive

359. *Id.*; *see* Goldwasser, *supra* note 106, at 821 (stating that asymmetry between the defendant and the prosecution in a criminal trial is rooted in the constitutional protections granted to the accused).

360. *Edmonson*, 111 S. Ct. at 2086 (citing Polk County v. Dodson, 454 U.S. 312 (1981)).

361. Polk County v. Dodson, 454 U.S. 312, 325 (1981).

362. *Edmonson*, 111 S. Ct. at 2086.

363. Georgia v. McCollum, 112 S. Ct. 2348, 2356 (1992).

364. *Id.*

365. Brief for the National Association of Criminal Defense Lawyers at 12-13, *McCollum* (No. 91-372); *see* Goldwasser, *supra* note 106, at 829 (stating that for the defendant everything about the criminal trial is intensely personal).

366. Brief for the National Association of Criminal Defense Lawyers at 12-13, *McCollum* (No. 91-372); *see* Respondent's Brief at 8, Georgia v. McCollum, 112 S. Ct. 2348 (1992) (No. 91-372) (asserting that a criminal defendant's exercise of a peremptory challenge is always a strategic decision made solely by the accused and the attorney based upon the facts and circumstances of the case).

sense that the prospective jurors will not be fair.[367] The attorney's objective in using peremptory challenges to remove jurors is not to impanel a government body but to prevent trial by jurors who are biased against the defendant.[368] Therefore, the *McCollum* Court's state action analysis lacked a realistic analysis of the criminal defendant as a state actor because it ignored the unique adversarial nature of the criminal trial.[369] Furthermore, the relationship between the prosecution and the defendant in a criminal trial is not the same by constitutional definition because the possession which the defendant stands to lose is liberty and possibly even life.[370]

2. *The Constitutional Protections Granted to the Criminal Defendant Preclude a Finding of State Action*

The majority's decision in *McCollum* relied on the theory that in a criminal prosecution between the accused and the state, "the scales are to be evenly held."[371] However, in reality, the prosecution and the defense are not treated alike.[372] This asymmetry between the prosecution and the defense is rooted in the Constitution which grants the criminal defendant a number of trial related rights.[373] The criminal defendant enjoys the right to be

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367. Brief for the National Association of Criminal Defense Lawyers at 12-13, *McCollum* (No. 91-372).

368. *See* Respondent's Brief at 11, *McCollum* (No. 91-372) (stating that in a criminal trial the defendant is in combat against the state during jury selection); *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES 353 (15th ed. 1809) (declaring that under the law a defendant should not be tried by any juror whom the defendant believes is prejudiced, even if the defendant cannot assign a reason for this belief).

369. Brief for the National Association of Criminal Defense Lawyers at 8, *McCollum* (No. 91-372).

370. *See* Georgia v. McCollum, 112 S. Ct. 2348, 2360 (1992) (Thomas, J., concurring) (asserting that it is the criminal defendant who faces imprisonment and possibly even death in a criminal trial); Respondent's Brief at 14, *McCollum* (No. 91-372) (declaring that a criminal trial is the most important battle of the defendant's life because it is a struggle to preserve liberty and possibly even life).

371. *McCollum*, 112 S. Ct. at 2353 n.4 (quoting Hayes v. Missouri, 120 U.S. 68, 70 (1887)).

372. *See* Goldwasser, *supra* note 106, at 821 (arguing that fairness does not require that the prosecution and the defendant be granted the exact same rights).

373. Brief for National Association of Criminal Defense Lawyers at 17, *McCollum* (No. 91-372); *see* Duncan v. Louisiana, 391 U.S. 145, 155 (1968) (stating that the Framers granted the criminal defendant the right to trial by jury in order to prevent oppression by the government).

presumed innocent,[374] the Fifth Amendment privilege against self-incrimination,[375] and the Fifth and Fourteenth Amendment due process rights.[376] The Sixth Amendment grants the criminal defendant the right to trial by an impartial jury,[377] the right to confront and cross-examine adverse witnesses,[378] the right to compulsory process for obtaining favorable testimony[379] and the right to the assistance of counsel in preparing a defense.[380] The government, however, enjoys no comparable constitutional protections.[381] Moreover, unlike in the civil context, the discovery rules in criminal trials favor the criminal defendant by placing an affirmative duty on the prosecution to disclose evidence favorable to the defense.[382] The criminal defendants, however, have no reciprocal duty and cannot be compelled to produce information against them-

374. *See* Coffin v. United States, 156 U.S. 432, 453 (1895) (declaring that the right to be presumed innocent lies at the foundation of the administration of our criminal law).

375. *See* U.S. CONST. amend. V (providing that no person shall be compelled in any criminal case to be a witness against themselves); Malloy v. Hogan, 378 U.S. 1, 3 (1964) (holding that the Fifth Amendment's guarantee against self-incrimination was made applicable to the states by the Fourteenth Amendment); *see also* Ullmann v. United States, 350 U.S. 422, 426 (1956) (describing this right as one of the most important advancements in the development of liberty and in society's struggle to become civilized).

376. *See* U.S. CONST. amend. V (providing that no person shall be deprived of life, liberty, or property without due process of law); *id.* amend. XIV (declaring that no state may deny due process to any person).

377. *See id.* amend. VI (granting the criminal defendant the right to a speedy and public trial by an impartial jury).

378. *See id.* amend. VI (providing that the accused shall be confronted with the witnesses against him); Pointer v. Texas, 380 U.S. 400, 403-404 (1965) (holding that the criminal defendant's Sixth Amendment right to cross-examine witnesses is applicable to the states through the Fourteenth Amendment).

379. *See* U.S. CONST. amend. VI (granting the accused the right to compulsory process for obtaining witnesses in his favor).

380. *See id.* amend. VI (providing that the accused shall have the assistance of counsel for his defense); Gideon v. Wainwright, 372 U.S. 335, 343 (1963) (holding that the Fourteenth Amendment makes the Sixth Amendment's guarantee of right to counsel obligatory upon the states).

381. Brief for the National Association of Criminal Defense Lawyers at 17, *McCollum* (No. 91-372); *see* U.S. CONST. amends. V, VI, XIV (making no mention of any rights granted to the prosecution).

382. FED. R. CRIM. P. 16; *see* Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that the prosecution must disclose evidence favorable to the accused).

selves.[383] Finally, one of the strongest advantages afforded the criminal defendant is the due process requirement that the government prove its case beyond a reasonable doubt.[384]

The Framers of the Constitution granted these rights to criminal defendants to protect them from government oppression during the criminal trial.[385] In fact, the entire criminal process is designed to shift the constitutional balance in favor of criminal defendants because of their personal stake in the outcome of the trial.[386] It is difficult to imagine a party to whom it would be less fair to call a state actor than the criminal defendant who is engaged in a battle against the state.[387] Therefore, *McCollum*'s conclusion that a criminal defendant is a state actor is both illogical and unfair to the criminal defendant. Furthermore, the Court's incorrect decision ignores the criminal defendant's Sixth Amendment right to an impartial jury.

383. Brief for the National Association of Criminal Defense Lawyers at 18, *McCollum* (No. 91-372); *see* Wardius v. Oregon, 412 U.S. 470, 475 n.9 (1973) (stating that given the state's inherent information-gathering advantages, the imbalance in discovery rights should favor the defendant); Respondent's Brief at 22, *McCollum* (No. 91-372) (stating that criminal defendants may secrete evidence favorable to the prosecution); *see also* Ullmann v. United States, 350 U.S. 422, 427 (1956) (declaring that it is better for an occasional crime to go unpunished than for the prosecution to use enforced disclosures by the accused to build their criminal case).

384. Brief for the National Association of Criminal Defense Lawyers at 18, *McCollum* (No. 91-372); *see In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (stating that proof beyond a reasonable doubt reflects the fundamental value in our legal system that it is worse to convict an innocent person than to let a guilty person go free); Addington v. Texas, 441 U.S. 418, 423-26 (1979) (declaring that the high standard of proof in criminal case as compared with civil proceedings reflects a societal belief that safeguards are necessary to protect the criminal defendant against deprivation of life and liberty).

385. *See* Ullmann v. United States, 350 U.S. 422, 428 (1956) (asserting that these rights were aimed at preventing a recurrence of the Inquisition and the Star Chamber); Goldwasser, *supra* note 106, at 821-22 (stating that the Framers were particularly concerned with unchecked prosecutorial power).

386. *In re Winship*, 397 U.S. 358 (1970); *see* Williams v. Florida, 399 U.S. 78 (1970) (Black, J., concurring in part and dissenting in part) (asserting that the tactical advantage to the defendant is inherent in the type of criminal trial required by our Bill of Rights).

387. Brief for the National Association of Criminal Defense Lawyers at 19, *McCollum* (No. 91-372) (arguing that the adversary relationship between the criminal defendant and the state precludes a finding of stating action); *see* Goldwasser, *supra* note 106, at 820 (concluding that it is unfair to consider a criminal defendant a state actor); *supra* note 195 and accompanying text (stating that the second prong of the state action test requires that the private individual be fairly characterized as a state actor).

B. Unrestricted Peremptory Challenges Help to Secure the Criminal Defendant's Sixth Amendment Right to an Impartial Jury

The Sixth Amendment grants criminal defendants the right to be tried by an impartial jury.[388] Throughout the history of juries, granting the defendant peremptory challenges has been considered essential to achieving an impartial jury.[389] In the final part of its opinion, the *McCollum* majority briefly addressed the criminal defendant's Sixth Amendment rights.[390] The majority concluded that the equal protection rights of the prospective jurors outweighed the defendant's right to unrestricted peremptory challenges.[391] However, the majority failed to consider the unique personal stake that the criminal defendant has in the selection of the jury.[392] Further, in choosing to elevate the jurors' rights over those of the criminal defendant, the majority has misordered the priorities which are basic to our criminal justice system.[393]

1. The Criminal Defendant has a Uniquely Personal Stake in the Unrestricted Exercise of Peremptory Challenges

Peremptory challenges have long been considered an effective tool in securing an impartial jury.[394] Yet, as Blackstone explained, "the law wills not that [a prisoner] should be tried by

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388. U.S. CONST. amend. VI.

389. Swain v. Alabama, 380 U.S. 202, 219 (1965) (noting the long held belief that the peremptory challenge is a necessary part of the jury trial); Lewis v. United States, 146 U.S. 370 (1892) (stating that the peremptory challenge comes from the common law with the trial by jury and has always been considered essential to the fairness of trial by jury); *see supra* notes 75-98 and accompanying text (reviewing the historical use of peremptory challenges).

390. Georgia v. McCollum, 112 S. Ct. 2348, 2357-59 (1992) (discussing whether the interests served by *Batson* must give way to the rights of a criminal defendant).

391. *See McCollum*, 112 S. Ct. at 2358 (concluding that its decision will not undermine the contribution of the peremptory challenge to the administration of justice).

392. *See infra* notes 394-400 and accompanying text (discussing the defendant's personal stake in the criminal trial).

393. *See McCollum*, 112 S. Ct. at 2360 (Thomas, J., concurring) (declaring that the majority's holding produces a serious misordering of priorities because it leaves defendants with less means of protecting themselves from biased juries).

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

any one man against whom he has conceived a prejudice even without being able to assign a reason for such dislike."[395] Thus, another function of the peremptory challenge is to give effect to the defendant's intuitive or subjective "dislike" of a potential juror.[396]

For the criminal defendant, everything about the criminal trial, especially the selection of the jury, is intensely personal.[397] In contrast, the prosecutor represents the state whose constitutional obligation to impartiality requires that its objective be to ensure that justice is achieved.[398] The prosecution's involvement in the trial is not personal but civic.[399] While it is completely appropriate to allow criminal defendants to challenge jurors based on their personal intuition of bias, the obligation to justice prevents the prosecution from acting upon personal feelings.[400]

2. *The Criminal Defendant's Right to Unrestricted Peremptory Challenges Gives Expression to the Sixth Amendment Right to Trial by an Impartial Jury*

For over one hundred years, the Supreme Court has treated the peremptory challenge as essential to securing the defendant's Sixth Amendment right to an impartial jury.[401] During jury selection, the defendant can observe the facial expressions and body language

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395. 4 WILLIAM BLACKSTONE, COMMENTARIES 353 (15th ed. 1809).

396. Brief for the National Association of Defense Lawyers at 26-28, *McCollum* (No. 91-372); *see Swain,* 380 U.S. at 219 (stating that one function of the peremptory challenge is to assure defendants that the jurors who decide their fate are fair and impartial).

397. *See* Goldwasser, *supra* note 106, at 829 (arguing that a major function of the peremptory challenge is to give effect to the personal intuitive dislike of prospective jurors).

398. Berger v. United States, 295 U.S. 78, 88 (1935); *see* National Association of Defense Lawyers at 26, *McCollum* (No. 91-372) (stating that the prosecution, as a representative of the state, must vindicate the public good without bias).

399. Brief for the National Association of Criminal Defense Lawyers at 26, *McCollum* (No. 91-372); *see* Goldwasser, *supra* note 106, at 830-31 (arguing that unlike the defendant, the prosecutor cannot properly be viewed as personally involved in the trial).

400. *See* Goldwasser, *supra* note 106, at 829-31 (stating that as a representative of the state the prosecutor has an obligation to act impartially, not based on personal feelings).

401. *See* Lewis v. United States, 146 U.S. 370 (1892) (asserting that the defendant must be allowed unfettered peremptory challenges so it can serve its function in securing a fair trial); *see also* Pointer v. United States, 151 U.S. 396 (1894) (referring to the peremptory challenge as one of the most important rights guaranteed to the accused); *supra* notes 75-98 and accompanying text (reviewing the historical foundation of the peremptory challenge).

of the jurors.[402] All of these physical expressions are signs of the jurors' true feelings which will ultimately affect the outcome of the trial.[403] For example crossed legs, folded arms, and clenched fists during questioning may signify hostility towards the defendant's case.[404] However, a defendant's intuition gained from these observations about a juror's bias does not qualify the juror to be excused for cause. Furthermore, when asked, most jurors will claim that they can remain fair and assure the court that they can decide the defendant's case impartially.[405] Thus, the peremptory challenge is the defendant's only way to remove biased jurors who deny their prejudice during voir dire.[406] Thus, the *McCollum* decision, by restricting the criminal defendant's peremptory challenge, forces the defendant to risk a biased jury.

3. *The Criminal Defendant's Rights Outweigh the Rights of Jurors*

The majority in *McCollum* held that the rights of jurors outweigh the right of criminal defendants to use unrestricted peremptory challenges.[407] However, this conclusion ignores the central theme of our American criminal justice system.[408] The Constitution and the Bill of Rights grant the criminal defendant rights designed to protect the defendant from overzealous pro-

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402. Brief for the National Association of Defense Lawyers at 32, *McCollum* (No. 91-372); *see* GOBERT, *supra* note 1, at 461 (stating that non-verbal responses may betray verbal deceptions and provide insight into a juror's true biases); *id.* at 462-63 (discussing the interpretation of facial expressions and body movements during voir dire).

403. Brief for the National Association of Criminal Defense Lawyers at 32-33, *McCollum* (No. 91-372); *see* STARR & MCCORMICK, *supra* note 26, at 224 (stating that jury composition can be the single most important factor in determining the outcome of the defendant's case).

404. GOBERT, *supra* note 1, at 463.

405. *See* Babcock, *supra* note 27, at 550 (stating that jurors earnestly assert their ability to be fair).

406. *See* Swain v. Alabama, 380 U.S. 202, 219 (1965) (stating that one function of the peremptory challenge is to remove partial jurors not removable through a challenge for cause); Goldwasser, *supra* note 106, at 828 (arguing that in reality even when there is some indication of bias, challenges for cause are often denied by trial judges).

407. Georgia v. McCollum, 112 S. Ct. 2348, 2357-59 (1992).

408. *See supra* note 386 and accompanying text (stating that the scales in a criminal trial are tipped in favor of the defendant because the defendant has so much at stake).

secutors.[409] These protections recognize that the criminal defendant is the one on trial and in jeopardy of losing liberty and possibly even life.[410] Thus, it is clear that the defendant has more at stake than the juror who has been excluded by a peremptory challenge.[411]

CONCLUSION

In *Georgia v. McCollum*, the Supreme Court continued the erosion of the peremptory challenge by prohibiting criminal defendants from using race-based peremptory challenges. The intended purpose of the peremptory challenge, to help ensure that a criminal defendant is tried by an impartial jury, is frustrated by requiring explanations for its use. In order to prevent racial discrimination against jurors, the Court has elevated the rights of jurors over the rights of criminal defendants, even though it is the defendant that faces imprisonment or even death.[412] Although the *McCollum* Court had the good intention of providing for greater racial harmony, the decision is likely to backfire with adverse results for criminal defendants. If our jury system is truly committed to providing the criminal defendant with a fair and impartial trial, then it is better for a juror to be excluded because of race than to risk the chance that criminal defendants will be tried by jurors who are biased against them.[413]

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409. *See supra* notes 373-384 and accompanying text (discussing the rights granted to the accused).

410. *See supra* notes 382-384 and accompanying text (explaining that the Constitution shifts the balance to favor criminal defendants because of their personal stake in the outcome of the trial).

411. *McCollum*, 112 S. Ct. at 2360 (Thomas, J., concurring) (stating that the majority has mistakenly exalted the rights of citizens to sit on juries over the rights of the criminal defendant to a fair trial).

412. *See id.* at 2360 (characterizing the elevation of jurors' rights over the rights of criminal defendants as a serious misordering of priorities).

413. *See* Respondent's Brief at 24, *McCollum* (No. 91-372) (citing Justice Harlan's assertion that the constitutional safeguards protecting the accused are based on the ideal that it is better for a guilty person to go free than for an innocent person to be convicted, in *In re Winship*, 397 U.S. 358 (1970)).