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Edmonson v. Leesville Concrete Co.: Has Batson Been Stretched Too Far

Melissa C. Hinton

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Edmonson v. Leesville Concrete Co.:¹ Has *Batson* Been Stretched Too Far?

I. INTRODUCTION

Peremptory challenges have a long history,² dating back to 1305 in England.³ In *Swain v. Alabama*,⁴ Justice Byron R. White stated, "[t]he persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury."⁵ Peremptory challenges enable litigants to exclude potential jurors "without a reason stated, without inquiry and without being subject to the court's control."⁶ In *Batson v. Kentucky*,⁷ however, decided in 1986, the Supreme Court restricted the power of prosecutors to exercise peremptory challenges based solely upon race. In 1991, the Supreme Court extended the application of *Batson*. In *Edmonson v. Leesville Concrete Co.*,⁸ the Court held that *Batson* prohibits private civil litigants from exercising peremptory challenges in a racially discriminatory manner.⁹

This Note discusses the facts and holding of *Edmonson*, examines decisions prior to *Batson*, provides an overview of how lower courts handled the issue the Supreme Court resolved in *Edmonson*, and analyzes the implications of the decision with an emphasis on Missouri practice.

II. FACTS

Plaintiff, Thaddeus David Edmonson, was injured while working on a construction site at Fort Polk, Louisiana, a federal enclave.¹⁰ Edmonson sued

1. 111 S. Ct. 2077 (1991).

2. For a discussion of the history of peremptory challenges, see *Swain v. Alabama*, 380 U.S. 202, 212-20 (1965); JON M. VAN DYKE, JURY SELECTION PROCEDURES 147-51 (1977).

3. VAN DYKE, *supra* note 2, at 147.

4. 380 U.S. 202 (1965).

5. *Id.* at 219.

6. *Id.* at 220.

7. 476 U.S. 79 (1986).

8. 111 S. Ct. 2077 (1991).

9. The Supreme Court also decided *Powers v. Ohio*, 111 S. Ct. 1364 (1991), during the 1991 term. In *Powers*, the Court held that a criminal defendant does not have to be of the same race as an excluded juror to raise a *Batson* challenge. *Id.* at 1373.

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

Leesville Concrete Company in the United States District Court for the Western District of Louisiana, claiming that his injuries were caused by one of Leesville's employees.¹¹ Edmonson requested a jury trial.¹²

Leesville used two of its three peremptory challenges to remove black venire members.¹³ Relying on the Supreme Court's decision in *Batson v. Kentucky*,¹⁴ Edmonson, who is black, asked the district court to require Leesville to provide a race-neutral explanation for striking the black members.¹⁵ The district court held *Batson* inapplicable in civil proceedings and denied Edmonson's request.¹⁶

The jury, which consisted of eleven white persons and one black person, returned a verdict for Edmonson.¹⁷ Although the jury assessed Edmonson's total damages at \$90,000, they attributed 80% of the fault to him and consequently awarded him only \$18,000.¹⁸ Edmonson sought a new trial, alleging that Leesville's use of peremptory challenges resulted in racial discrimination.¹⁹

A panel of the Fifth Circuit of the Court of Appeals held that *Batson* applies to civil actions.²⁰ The panel concluded that a private attorney representing a private litigant is a state actor when the attorney exercises peremptory challenges.²¹ The panel reversed the district court's judgment

11. *Id.* Edmonson claimed that an employee negligently allowed one of Leesville's trucks to roll backward, pinning him against construction equipment. *Id.*

12. *Id.* at 2080-81.

13. *Id.* at 2081. Edmonson and Leesville were each entitled to three peremptory challenges. See 28 U.S.C. § 1870 (1988) ("In civil cases, each party shall be entitled to three peremptory challenges"). Edmonson used all three of his peremptory challenges to remove white venire members. *Edmonson v. Leesville Concrete Co.*, 860 F.2d 1308, 1310 (5th Cir. 1988), *rev'd on reh'g*, 895 F.2d 218 (1990), *rev'd*, 111 S. Ct. 2077 (1991).

14. 476 U.S. 79 (1986).

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

16. *Id.*

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

18. *Id.*

19. *Id.*

20. *Id.* at 1314. For a detailed discussion of the panel's opinion, see Robert M. O'Connell, Note, *The Elimination of Racism from Jury Selection: Challenging the Peremptory Challenge*, 32 B.C. L. REV. 433 (1991); David Park, Note, *Edmonson v. Leesville Concrete Company, Inc.: Can the "No State Action" Shibboleth Legitimize the Racist Use of Peremptory Challenges in Civil Actions?*, 23 J. MARSHALL L. REV. 271 (1990).

21. *Edmonson*, 860 F.2d at 1313.

and remanded for determination of whether Edmonson had demonstrated a prima facie case of purposeful racial discrimination.²²

On defendant Leesville's motion, the court of appeals ordered a rehearing en banc,²³ and subsequently affirmed the judgment of the district court,²⁴ holding that the exercise of peremptory challenges by a private civil litigant was not state action invoking constitutional protections.²⁵ The United States Supreme Court granted certiorari and reversed the decision of the court of appeals.²⁶ The Supreme Court remanded the case to the trial court for determination of whether Edmonson established a prima facie case of racial discrimination.²⁷ The Court held that when a private civil litigant exercises peremptory challenges to remove venire members on the basis of race, the action is pursuant to a course of state action and violates the equal protection rights of the excluded members.²⁸

III. LEGAL BACKGROUND

A. Supreme Court Decisions Before *Batson v. Kentucky*

The United States Supreme Court first discussed the general issue of racial discrimination in the jury selection process in 1879. In *Strauder v. West Virginia*,²⁹ a black defendant was convicted of murder in state court.³⁰ Before the trial began, defendant Strauder sought removal of the trial because under West Virginia law black men were not eligible for jury duty.³¹ The trial court overruled this motion, as well as the defendant's other motions

22. *Id.* at 1315.

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

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

25. *Id.* at 222.

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

27. *Id.* at 2088-89.

28. *Id.* Because *Edmonson* originated in a federal court, the United States District Court for the Western District of Louisiana, the Supreme Court applied the equal protection component of the Fifth Amendment's Due Process Clause. *Id.* at 2080. When an action originates in a state court, however, the applicable constitutional provision is the Equal Protection Clause of the Fourteenth Amendment. It is very unlikely, however, that state courts would decline to follow *Edmonson* based on application of a similar, yet not identical, constitutional provision. For example, in *White v. Anderson*, 816 S.W.2d 18, 19 (Mo. Ct. App. 1991), a Missouri court held that *Edmonson* was controlling when a private litigant raises a *Batson* objection.

29. 100 U.S. 303 (1879).

30. *Id.* at 304.

31. *Id.*

objecting to the jury selection process.³² The Supreme Court held that a defendant had a right to be tried by a jury selected in a nondiscriminatory manner.³³ The Court did not determine whether the defendant had a right to a jury "composed in whole or in part of persons of his own race or color."³⁴

First, the Court noted the importance of jury composition to the protections the jury trial right is intended to secure.³⁵ Then the Court struck down the West Virginia statute for violating a black defendant's equal protection rights by discriminating against members of the defendant's race in the jury selection process.³⁶

It was 1965, nearly a century after *Strauder*, before the Supreme Court first faced the precise issue of racial discrimination in the exercise of peremptory challenges. In *Swain v. State of Alabama*,³⁷ Robert Swain was convicted of rape in a state court and sentenced to death.³⁸ After the jury was selected using the struck jury system,³⁹ the black defendant moved to have the petit jury declared void on the ground that the prosecutor violated the Fourteenth Amendment by striking six black venire members.⁴⁰ The Supreme Court upheld the trial court's denial of the defendant's motion.⁴¹

Justice White began the majority opinion with a discussion of cases that prohibited racial discrimination in jury selection because "racial discrimination . . . result[ing] in the exclusion from jury service of qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basis concepts of a democratic society and a representative government."⁴²

32. *Id.* at 304-05.

33. *Id.* at 310.

34. *Id.* at 305. Later decisions emphasize that *Strauder* merely stands for the proposition that black defendants have a right to be tried by a jury that is selected in a manner that does not purposely exclude blacks. The Supreme Court has never held that a black defendant has a right to be tried by a jury composed entirely or even partially of members of his race.

35. *Id.* at 308. In *Batson*, the Supreme Court noted that a petit jury protects a person accused of a crime from a prosecutor or judge who exercises his or her power in an arbitrary fashion. *Batson*, 476 U.S. at 86.

36. *Strauder*, 100 U.S. at 310. The Court noted that states may establish certain qualifications that their citizens must meet to serve as jurors. *Id.* The qualifications, however, cannot be based upon race or color.

37. 380 U.S. 202 (1965).

38. *Id.* at 203.

39. This system is explained *infra* note 47.

40. *Swain*, 380 U.S. at 210.

41. *Id.* at 211.

42. *Id.* at 204 (quoting *Smith v. Texas*, 311 U.S. 128, 130 (1940)).

The Court cautioned, however, that purposeful discrimination must be proved and that a mere assertion would not suffice.⁴³

In Talladega County, the site of Swain's trial, the size of a petit jury venire for a criminal case was about 35 for non-capital cases and about 100 for capital offenses.⁴⁴ In *Swain*, the petit jury venire included eight black members.⁴⁵ No blacks served on the jury that convicted Swain, however.⁴⁶ After excuses and removals for cause, the prosecutor "struck" the remaining black venire members.⁴⁷ The Supreme Court held that striking all the black venire members in a particular case is not a per se violation of the Equal Protection Clause of the Fourteenth Amendment.⁴⁸

The Court gave two reasons for its holding. First, all members of the venire, regardless of their race, national origin, or religion, are equally likely to be struck without cause.⁴⁹ Second, subjecting a prosecutor's exercise of peremptory challenges "to the demand and traditional standards of the Equal Protection Clause" would be at odds with the "nature and operation of the challenge."⁵⁰

The Supreme Court, however, was more concerned with Swain's allegations that black venire members were consistently excluded from civil and criminal juries in Talladega County as a result of prosecutors' exercise of peremptory challenges.⁵¹ According to the Court:

43. *Id.* at 205.

44. *Id.* at 210.

45. *Id.* at 205.

46. *Id.* Two of the black venire members were exempt, and the prosecutor struck six during the jury selection process. *Id.*

47. *Id.* at 210. Alabama has substituted a struck jury system for the common-law method of peremptory challenges. *Id.* at 211. The defense begins by striking two members of the venire; then the prosecution strikes one. This process continues as the defense and prosecution alternate turns until twelve jurors remain. *Id.* at 210. In Alabama, the struck jury system is used in all criminal cases, and it is available in civil cases. *Id.* The most common method of exercising peremptory challenges is called the "box" system. When a juror is excused, another potential juror takes the excluded juror's place in the jury box. Then the replacement juror is questioned and may be excused by challenges for cause or peremptory challenges. This process continues until all parties are satisfied with the jurors sitting in the box or have exhausted their peremptory challenges. Lee Goldman, *Toward a Colorblind Jury Selection Process: Applying the "Batson Function" to Peremptory Challenges in Civil Trials*, 31 SANTA CLARA L. REV. 147, 150 n.12 (1990).

48. *Swain*, 380 U.S. at 221.

49. *Id.*

50. *Id.* at 221-22.

51. *Id.* at 223. No blacks had served on a petit jury in Talladega County since about 1950. *Id.* at 205. The date of the alleged rape was February 7, 1962. *Swain*

[I]t is permissible to insulate from inquiry the removal of Negroes from a particular jury on the assumption that the prosecutor is acting on acceptable considerations related to the case he is trying, the particular defendant involved and the particular crime charged. But when the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries, the Fourteenth Amendment claim takes on added significance.⁵²

Systematic exclusion might indicate that the purpose of the peremptory challenge has been "perverted."⁵³ The Court explained that the prosecutor might strike black venire members for reasons unrelated to the particular case, thus denying blacks "the same right and opportunity to participate in the administration of justice enjoyed by the white population."⁵⁴ The Court, however, decided that the record in the case did not demonstrate that the state systematically struck black venire members.⁵⁵

B. *Batson v. Kentucky*

In 1986, the United States Supreme Court significantly lessened the evidentiary burden on a criminal defendant who claims denial of equal protection through the state's exercise of peremptory challenges.⁵⁶ The Court overruled *Swain* and permitted objections to be raised based only on the prosecutor's conduct during the defendant's own trial. A systematic pattern of exclusion was no longer required.

James Batson, a black man, was indicted for second-degree burglary and receipt of stolen goods.⁵⁷ After the judge conducted voir dire and excused certain venire members for cause, the prosecutor used peremptory challenges to strike all four black venire members.⁵⁸ Batson moved to discharge the

v. State, 156 So. 2d 368, 370 (Ala. 1963).

52. *Swain*, 380 U.S. at 223.

53. *Id.* at 224.

54. *Id.*

55. *Id.* The record "does not with any acceptable degree of clarity, show when, how often, and under what circumstances the prosecutor alone has been responsible for striking those Negroes who have appeared on petit jury panels in Talledega County Apparently in some cases, the prosecution agreed with the defense to remove Negroes." *Id.* at 224-25.

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

57. *Id.* at 82.

58. *Id.* at 82-83. Because Batson was indicted for a felony and an alternate juror

jury before it was sworn on the ground that the prosecutor's removal of all black venire members violated his Fourteenth Amendment right to equal protection.⁵⁹ The court denied the motion, and an all-white jury convicted him of both crimes.⁶⁰

Batson discussed three different types of harm that result from purposeful racial discrimination in selection of jurors in criminal trials. First, the racial discrimination violates the defendant's right to equal protection.⁶¹ Second, it harms the rights of the excluded juror.⁶² Third, purposeful racial discrimination in the selection of jurors undermines the public's confidence in the judicial system.⁶³

The Court concluded that *Swain* left the prosecutor's exercise of peremptory challenges virtually unchecked because the defendant had to meet a "crippling" burden of proof to establish a prima facie case of racial discrimination.⁶⁴ *Batson* relieved the criminal defendant of the burden of demonstrating systematic exclusion. To raise a *Batson* claim, the criminal defendant need only establish that he is a member of a cognizable racial group, that the prosecutor has used the state's peremptory challenges to strike venire members who share the defendant's race,⁶⁵ and that the facts and any other relevant circumstances raise an inference that the prosecutor exercised peremptory challenges to exclude venire members on the basis of race.⁶⁶

Once the defendant makes this prima facie showing, the burden shifts to the prosecution to provide a race-neutral explanation for striking the black members.⁶⁷ The prosecution need not provide an explanation that would suffice for cause, but merely stating that black members were struck because the prosecutor thought they might be partial because they shared the same race

was called, the prosecutor was permitted six peremptory challenges and *Batson* was permitted nine. *Id.* at 83 n.2 (citing KY. RULE CRIM. PROC. 9.40).

59. *Id.* at 83. *Batson* also alleged that his Sixth and Fourteenth Amendment right to a jury drawn from a cross section of the community had been violated. *Id.* The focus of this Note, however, is limited to equal protection.

60. *Id.*

61. *Id.* at 86.

62. *Id.* at 87.

63. *Id.*

64. *Id.* at 92-93.

65. *Id.* at 93-94.

66. *Id.* at 94. The trial court should consider "all relevant circumstances" in determining whether or not the defendant has met the burden. *Id.* at 96-97. The Court cited a pattern of striking black venire members and the prosecutor's behavior during voir dire as examples of relevant circumstances. *Id.* at 97.

67. *Id.*

as the defendant will not suffice.⁶⁸ Nor may the prosecutor simply deny an intent to discriminate or allege good faith.⁶⁹

It is important to note that *Batson* explicitly refused to express a view on "whether the Constitution imposed any limit on the exercise of peremptory challenges by defense counsel."⁷⁰ The Court expressly limited its holding to a prosecutor striking venire members sharing the defendant's race.⁷¹ On November 4, 1991, the Supreme Court granted a petition for writ of certiorari in *Georgia v. McCollum*.⁷² The Georgia Supreme Court held that *Batson* does not apply to criminal defendants.⁷³ A ruling is expected by July 1992.⁷⁴

C. *Powers v. Ohio*⁷⁵

In 1991, the United States Supreme Court, in the first of two landmark jury selection cases decided that term, ruled on the validity of a defendant's equal protection objection to racially discriminatory exercise of peremptory challenges when the defendant and the excluded juror do not share the same race.⁷⁶ Larry Joe Powers, who is white, was indicted for aggravated murder.⁷⁷ During jury selection, the prosecutor used his first peremptory

68. *Id.*

69. *Id.*

70. *Id.* at 89 n.12.

71. *Id.* at 99.

72. 112 S. Ct. 370 (1991).

73. *State v. McCollum*, 405 S.E.2d 688, 689 (Ga. 1991).

74. *See infra* note 334 and accompanying text for a discussion of the possible outcome.

75. 111 S. Ct. 1364 (1991).

76. *Id.* In *Holland v. Illinois*, 110 S. Ct. 803 (1990), the Court also faced the issue of whether a criminal defendant could object to the prosecutor's exercise of peremptory challenges when the excluded venire members and defendant do not share the same race. *Holland's* attorney based his objection on the Sixth Amendment fair cross section requirement, however, rather than equal protection. *Id.* at 805. The Court rejected *Holland's* argument that *Batson* should apply to the Sixth Amendment. *Id.* at 806. The prosecutor's use of peremptory challenges to exclude black venire members does not deprive a defendant of his Sixth Amendment right to the "fair possibility" of a jury representative of the community. *Id.* The "fair possibility" requirement only requires that no cognizable groups be excluded from the venire. *Id.* In *Holland*, the Court expressly limited its holding to the validity of the defendant's Sixth Amendment challenge, stating that the validity of an equal protection claim was not at issue. *Id.*

77. *Powers*, 111 S. Ct. at 1366.

challenge to strike a black venire member.⁷⁸ Powers objected, citing *Batson*, and requested the trial court to require the prosecutor to provide a race-neutral explanation for his action.⁷⁹ The trial court overruled Powers' objection. The prosecutor ultimately used seven of his ten peremptory challenges to strike black venire members, with Powers' objection being overruled each time.⁸⁰ After he was convicted, Powers appealed, arguing that the prosecutor's exercise of his peremptory challenges violated the Fourteenth Amendment's Equal Protection guarantee.⁸¹

The Supreme Court held that limiting *Batson* to circumstances in which the defendant and the excluded venire members share the same race "conforms neither with our accepted rules of standing to raise a constitutional claim nor with the substantive guarantees of the Equal Protection Clause and the policies underlying federal statutory law."⁸² Powers stated that *Batson* was based not only on the harm caused to the defendant, but also on the harm caused to the excluded jurors and the community. Powers characterized jury duty as an "honor and privilege" that provides citizens an opportunity to play a role in the democratic machinery.⁸³ Because exclusion based solely upon race "foreclosed a significant opportunity to participate in civil life," the Court held that an excluded juror is denied equal protection when a prosecutor exercises peremptory challenges solely on the basis of the prospective juror's race.⁸⁴ The Court concluded that a criminal defendant has standing to object to the violation of the excluded jurors' rights.⁸⁵

D. State Action

Because Powers focused broadly on the harm the discriminatory exercise of peremptory challenges causes to the excluded venire members as well as to the entire community, the decision invited an extension of *Batson* to civil actions. Applying *Batson* to civil proceedings, however, raises one issue not present in Powers—state action. In Powers, a criminal action, the defendant objected to the prosecutor's exercise of peremptory challenges. Therefore, the

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* Powers also claimed that his Sixth Amendment right to a trial by a jury representing a fair cross section of the community was violated. *Id.* The Supreme Court, however, only granted certiorari on the Equal Protection issue because *Holland* answered the Sixth Amendment question. *Id.* at 1367.

82. *Id.* at 1368.

83. *Id.* at 1368-69.

84. *Id.* at 1370.

85. *Id.* at 1370-74. This Note will not discuss third party standing.

Court did not have to decide the issue of state action, which was clearly present. The presence of state action in the exercise of peremptory challenges by private civil litigants is not quite as apparent.

Racial discrimination, as despicable as it may be, is not constitutionally prohibited unless the conduct can be attributed to the state. The Supreme Court has formulated a variety of tests for determining whether the state's involvement in private conduct rises to a level sufficient to invoke constitutional protection.⁸⁶

In *Burton v. Wilmington Parking Authority*,⁸⁷ a private restaurant located in a parking garage owned by the state of Delaware refused to serve a black man.⁸⁸ The Court found state action because Delaware "so far insinuated itself in a position of interdependence with [the restaurant] that it must be recognized as a joint participant in the challenged activity."⁸⁹ Commentators characterized the relationship between the state and restaurant as "symbiotic."⁹⁰ Although the state did not compel or even encourage the discrimination, both parties benefitted from the lessor/lessee relationship. The applicability of *Burton*, however, has been limited by the Court's subsequent interpretations, which focus upon the fact that the government owned property from which a black man was excluded and received rent from the discriminatory actor.⁹¹

In *Shelley v. Kraemer*,⁹² the Court faced the issue of whether state action was present when private, racially discriminatory, restrictive covenants were judicially enforced. Although the purpose of the covenants was to prevent blacks from owning or occupying property, the Court concluded that the covenants, in and of themselves, did not violate any constitutional provisions because there was no state action.⁹³ When a court enforces racially discriminatory covenants, however, there is state action. "[B]ut for the active intervention of the state courts, supported by the full panoply of state power," the covenants would not be enforced, and no discrimination would occur.⁹⁴

86. See, e.g., *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) (the "nexus" test); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970) (the "state compulsion" test); *Terry v. Adams*, 345 U.S. 461 (1953) (the "public function" test).

87. 365 U.S. 715 (1961).

88. *Id.* at 716.

89. *Id.* at 725.

90. See, e.g., *Goldman*, *supra* note 47, at 168.

91. *Id.* at 169.

92. 334 U.S. 1 (1948).

93. *Id.* at 13.

94. *Id.* at 19. According to the Court, "the States have made available to such individuals the full coercive power of government to deny to petitioners, on the

It is important to note that *Shelley* does not stand for the proposition that judicial enforcement of any private decision constitutes state action.⁹⁵ The Court emphasized that the covenants were discriminatory on their face and that the Court was being asked to require the parties to discriminate despite the parties' desire to the contrary.⁹⁶

In *Flagg Brothers Inc. v. Brooks*,⁹⁷ the Supreme Court stated that it "has never held that a State's mere acquiescence in a private action converts that action into that of the State."⁹⁸ In *Flagg Brothers*, a warehouse sought to sell Brooks' furniture pursuant to a New York statute.⁹⁹ The Supreme Court concluded that the sale of the furniture by the warehouse, although authorized by statute, is not attributable to the state.¹⁰⁰ The statute merely "permits but does not compel" the sale.¹⁰¹

Flagg Brothers demonstrates that the "[p]rivate use of state-sanctioned private remedies or procedures does not rise to the level of state action."¹⁰² The private use, however, of state-sanctioned remedies or procedures with "the overt, significant assistance of state officials" does constitute state action.¹⁰³

grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell." *Id.*

95. 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, 818-19 (1989). See also *Dennis v. Sparks*, 449 U.S. 24, 28 (1980) ("merely resorting to the courts . . . does not make a party a co-conspirator or a joint actor with the judge").

96. Goldwasser, *supra* note 95, at 819.

97. 436 U.S. 149 (1978).

98. *Id.* at 164.

99. *Id.* at 151-52.

100. *Id.* at 166.

101. *Id.* at 165. Similarly, *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), stands for the proposition that discrimination cannot amount to state action unless the government is responsible for the decision to discriminate.

102. *Tulsa Professional Collection Servs. v. Pope*, 485 U.S. 478, 485 (1988). In *Pope*, the Supreme Court concluded that there was "significant state action" involved in an Oklahoma law limiting the time in which creditors' claims could be presented to the executor of an estate after publication of a notice of probate proceedings. *Id.* at 487. According to Justice O'Connor's opinion, the time limitation does not begin to run until probate proceedings begin. *Id.* The probate court appoints the executor who must publish notification of the commencement of probate proceedings and file copies with the probate court. *Id.* A significant number of steps are required before the time limitation begins running and the probate court is "intimately involved" in each of the steps. *Id.*

103. *Id.* at 486.

In *Lugar v. Edmonson Oil Co.*,¹⁰⁴ the Supreme Court discussed a two-part analysis reflected in its cases concerning whether the deprivation of a constitutional right is attributable to the state.¹⁰⁵ The first part of the analysis states that "the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible."¹⁰⁶ The second part of the analysis states that "the party charged with the deprivation must be a person who may fairly be said to be a State actor."¹⁰⁷ A person may be a state actor if: (1) "he is a state official," (2) "he has acted together with or has obtained significant aid from state officials," or (3) "his conduct is otherwise chargeable to the State."¹⁰⁸

In *Lugar*, a private party, Edmonson Oil Company, sought prejudgment attachment of a debtor's property.¹⁰⁹ Edmonson filed an *ex parte* petition alleging that Lugar might dispose of his property to avoid paying his debts.¹¹⁰ The court issued a writ of attachment that the sheriff executed.¹¹¹ The Supreme Court held that "a private party's joint participation with State officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment."¹¹² In a footnote, however, the Court limited its holding to prejudgment attachments.¹¹³

E. The Extension of Batson in Lower Courts

After *Batson*, many lower federal and state courts faced the issue of whether to extend *Batson* beyond a prosecutor's striking of a venire member sharing the same race with the defendant. These decisions offer a preview of some of the issues raised in *Edmonson*.

104. 457 U.S. 922 (1982).

105. *Id.* at 937.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 924.

110. *Id.*

111. *Id.*

112. *Id.* at 941.

113. *Id.* at 939 n.21.

1. Applying *Batson* in Civil Actions

In *Clark v. City of Bridgeport*,¹¹⁴ the defendant city used all of its peremptory challenges to strike black venire members.¹¹⁵ The district court concluded that such action was a violation of equal protection, and the juries would have to be stricken.¹¹⁶ The court reasoned that *Batson's* protection is not limited to criminal defendants and held that civil plaintiffs were also protected.¹¹⁷ As authority for the holding, the court relied upon *Batson's* language indicating that racial discrimination in the exercise of peremptory challenges harms stricken venire members and undermines the public's trust in the judicial system.¹¹⁸ *Clark* assumed that because the Supreme Court discussed harm to the excluded venire members, it must intend *Batson* to apply to all situations where such harm occurs.¹¹⁹ It is important to note, however, that *Clark* did not reach the issue of state action because the discriminatory actor was the city of Bridgeport.¹²⁰

In another case in which a city was accused of discrimination, *Reynolds v. City of Little Rock*,¹²¹ the city attorney used his peremptory challenges to strike the only two black members of the venire.¹²² The defendant city

114. 645 F. Supp. 890 (D. Conn. 1986).

115. *Id.*

116. *Id.* at 898. *Clark* is actually a consolidation of three civil rights actions brought against the City of Bridgeport and its police officers. *Id.* at 891. Two of the plaintiffs were black and one was white. *Id.* at 892.

117. *Id.* at 895.

118. *Id.* at 894.

119. The court stated,

The guarantee that the State will not utilize discriminatory criteria in the selection of jurors is one to be enjoyed by criminal defendant and prospective juror alike. The protection also applies to the entire system of justice which, once scathed by the discrimination present at bar, finds its integrity and public trust undermined.

Id. (citing *Batson*, 476 U.S. at 87).

120. The court in *Clark* acknowledged this fact in a footnote: "That the assistant City attorney has taken official action acting in his official capacity in the representation of the City of Bridgeport and or its employees cannot be disputed." *Id.* at 895 n.6 (citations omitted). However, the court may not have regarded this difference as significant when it cited one case holding *Swain* applicable in both criminal and civil cases. *Id.* at 895 (citing *King v. County of Nassau*, 581 F. Supp. 493 (E.D.N.Y. 1984)). Additionally, the court discussed extensively the principle that jurors are to be selected in a nondiscriminatory manner in both civil and criminal cases. *Id.* at 895-96.

121. 893 F.2d 1004 (8th Cir. 1990).

122. *Id.* at 1006. In this case the city attorney rather than a private attorney

argued that it is not required to explain its exercise of its peremptory challenges because, unlike *Batson*, the action was civil.¹²³ *Batson*, the city contended, concerned only a criminal defendant's Sixth Amendment right to an impartial jury and did not affect the Seventh Amendment's provisions for civil juries.¹²⁴ Because *Batson* was decided on equal protection grounds and not under the Sixth Amendment, the court rejected the city's distinction between civil and criminal actions.¹²⁵ The court focused on the harm caused to the excluded jurors and the public's perception of the judicial system and concluded that *Batson* applies to state entities involved in civil suits.¹²⁶ According to the court, the only important distinction concerning the scope of *Batson* is the one between government and private actors.¹²⁷ *Reynolds*, like *Clark*, did not raise the issue of state action,¹²⁸ and the court "express[ed] no view on whether the action of the court alone, in a case involving no governmental litigants, can supply the necessary element of governmental action."¹²⁹

In *Maloney v. Washington*,¹³⁰ four white Chicago police officers sued the city of Chicago and various city officials in their official capacities claiming the plaintiffs were demoted because they did not support a black candidate's mayoral campaign.¹³¹ Plaintiffs used three of their four peremptory challenges to strike black venire members.¹³² The district court, relying upon *Batson*, refused to impanel the jury.¹³³ The court applied *Batson* to private civil litigants.¹³⁴ The district court discussed the harm to the excluded jurors and the incongruity of prohibiting discrimination in the selection of the venire but permitting it in selection of the petit jury.¹³⁵ The

represented the police officers.

123. *Id.* at 1008.

124. *Id.*

125. *Id.*

126. *Id.* at 1009.

127. *Id.*

128. *Id.*

129. *Id.* at 1008 n.2.

130. 690 F. Supp. 687 (N.D. Ill. 1988).

131. *Id.* at 688.

132. *Id.* at 688-89.

133. *Id.* at 689.

134. *Id.* Although a state entity was a party to the suit and the city of Chicago did use all four of its peremptory challenges to strike white venire members, the court was primarily concerned with the plaintiffs' exercise of their peremptory challenges. Thus, the court focused on the exercise of peremptory challenges by a private litigant in a civil action.

135. *Id.* at 690.

court briefly addressed the issue of state action, concluding a private party's use of a court's power might amount to state action.¹³⁶ The court concluded by refusing to permit its "power under Article III of the Constitution to be used to sanction such discriminatory conduct."¹³⁷ The court's explanation for its holding was, in effect, a preview of the Supreme Court's decision in *Edmonson*.

In *Dunham v. Frank's Nursery & Crafts, Inc.*,¹³⁸ the Seventh Circuit applied *Batson* to private civil litigants.¹³⁹ Martha and Preston Dunham, who are black, brought a negligence action against Frank's Nursery & Crafts.¹⁴⁰ Frank's used its peremptory challenges to strike the only black member of the venire.¹⁴¹ Although the Dunhams objected, the magistrate judge overruled their objection because no precedent existed supporting the application of *Batson* to civil cases.¹⁴²

Batson, according to the Seventh Circuit in *Dunham*, is based upon equal protection, which does not afford criminal litigants any rights that it withholds from civil litigants.¹⁴³ The court of appeals delineated three principles that underlie the Supreme Court's decision in *Batson*. First, a person's competence to serve as a juror does not depend upon his race.¹⁴⁴ Second, a prosecutor should not be able to justify the exercise of peremptory challenges on the assumption that jurors who are members of the defendant's race will be biased in the defendant's favor.¹⁴⁵ Third, racial discrimination in jury selection procedures affects the entire community by undermining the public's confidence in the judicial system.¹⁴⁶ The Seventh Circuit concluded that these three principles apply equally to the selection of civil juries.¹⁴⁷ Therefore, the court held that the Supreme Court must not have intended to limit *Batson* to criminal cases.¹⁴⁸ *Dunham* then addressed the presence of state action and concluded that the use of peremptory challenges, the alleged

136. *Id.*

137. *Id.*

138. 919 F.2d 1281 (7th Cir. 1990).

139. *Id.* at 1282.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 1283.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 1283-84.

148. *Id.* at 1284.

discriminatory act, is conduct attributable to the state because of the trial judge's role.¹⁴⁹

In *Fludd v. Dykes*,¹⁵⁰ a black citizen brought a civil rights action against a white police officer and the officer's supervisor.¹⁵¹ During selection of the jury, the defendants used peremptory challenges to strike all black members of the venire.¹⁵² The Eleventh Circuit held that the district court erred in overruling plaintiff's objection on the basis that *Batson* is not applicable in civil cases.¹⁵³ The Eleventh Circuit determined that *Batson* should apply in civil cases because the trial judge is a state actor.¹⁵⁴ According to the court:

[U]ntil the trial judge overrules a party's objection to the racial composition of the venire, the law treats any previous decision on the part of a state entity to discriminate as harmless, insofar as the objecting party is concerned. The trial judge's decision—to proceed to trial, over the party's objection, with a jury selected from the venire on the basis of race—is the one that harms the objecting party.¹⁵⁵

In contrast, *Esposito v. Buonome*¹⁵⁶ held *Batson* inapplicable in civil actions.¹⁵⁷ The defendants used two of their three peremptory challenges to strike the only two black members of the venire.¹⁵⁸ The court rejected the

149. *Id.* at 1285-88. The court applied the test laid out in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982). Judge Ripple dissented in *Dunham* arguing that *Batson* should not apply in civil cases because there is no state action. In *Batson*, the Supreme Court relied upon the prosecutor's exercise of peremptory challenges as the source of state action rather than on the judge's role. *Id.* at 1291. Furthermore, in a footnote, the Supreme Court expressly stated that it was not ruling on the use of peremptory challenges by the defense. *Id.*

150. 863 F.2d 822 (11th Cir. 1989).

151. *Id.* at 823.

152. *Id.*

153. *Id.*

154. *Id.* at 828.

155. *Id.*

156. 642 F. Supp. 760 (D. Conn. 1986).

157. *Id.* at 761. For examples of other cases not applying *Batson* in civil actions, see, e.g., *Polk v. Dixie Ins. Co.*, 897 F.2d 1346 (5th Cir. 1990) (*Batson* does not apply in a civil suit between private parties); *Swapshire v. Baer*, 865 F.2d 948 (8th Cir. 1989) (court expressed strong doubts about whether *Batson* applies in civil cases); *Wilson v. Cross*, 845 F.2d 163, 164 (8th Cir. 1988) (court had "strong doubts" about whether *Batson* applies in civil cases, but did not rule on the issue).

158. *Esposito*, 642 F. Supp. at 761. The defendants, Buonome and Louis Pasquariello, were sued individually and in their capacity as officers of the police

plaintiff's argument that the Constitution prohibits the use of peremptory challenges in a racially discriminatory manner.¹⁵⁹ The court provided two arguments to support its conclusion. First, just as *Clark* found language in *Batson* to support its proposition that *Batson* also applies in civil cases, *Esposito* found language in *Batson* indicating that "[s]pecial concern for the plight of the [criminal] defendant was clearly a factor."¹⁶⁰ Second, the court found important the distinction between a criminal defendant, in court involuntarily, and a civil plaintiff, in court voluntarily.¹⁶¹

Plaintiff argued the constitutional requirement of an impartial jury extends to civil as well as criminal cases.¹⁶² The court summarily dismissed this argument, however, because the plaintiff failed to claim that the jury would not be impartial.¹⁶³ The plaintiff merely contended that black venire members should not have been excluded.¹⁶⁴ The court also expressed difficulty with the fact that the plaintiff and excluded venire members were not of the same race.¹⁶⁵ Reading *Batson* strictly, the court concluded that plaintiff did not establish a prima facie case of racial discrimination because he did not contend that he was a member of a cognizable racial group and that defendants had exercised their peremptory challenges to exclude members of that group from the venire.¹⁶⁶

department of East Haven, Connecticut. *Id.* at 760. Although it appears from the record that a private attorney rather than a city attorney represented defendants, it is certainly arguable that the facts of this case are distinguishable from *Edmondson* because one of the litigants is a state actor.

159. *Id.* at 761.

160. *Id.* In support of this argument, the court cites *Batson* for the proposition that the petit jury "'safeguard[s] a person accused of a crime against the arbitrary exercise of power by prosecutor or judge.'" *Id.* (quoting *Batson*, 476 U.S. at 86).

161. *Id.* at 761.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* Clearly, after *Powers* such an argument would fail.

2. Applying *Batson* to Criminal Defendants¹⁶⁷

In *United States v. DeGross*,¹⁶⁸ the Ninth Circuit faced the issue of whether *Batson* applies to criminal defendants.¹⁶⁹ DeGross, a criminal defendant, used her peremptory challenges to exclude male venire members and was unable to provide a neutral explanation for such action.¹⁷⁰ The Ninth Circuit concluded that *Batson* applies when a criminal defendant discriminates in the exercise of her peremptory challenges because "the evils of discriminatory peremptory challenges result from the misuse of peremptory challenges regardless of which party exercises the challenges."¹⁷¹ In *DeGross*, the court supported its ruling by relying on the harm done to the excluded venire members and the public's confidence in the judicial system.¹⁷²

167. The Supreme Court will decide whether *Batson* applies to criminal defendants later in the 1992 term. See *infra* note 334 and accompanying text for a discussion of the possible outcome. On December 31, 1991, the Missouri Court of Appeals, Western District held that *Batson* applies to criminal defendants. *State ex rel. Riederer v. Coburn*, No. WD 45305CO, 1991 WL 276045 (Mo. Ct. App. Dec. 31, 1991). According to the court, the trial judge erred when he overruled the state's motion to compel a white criminal defendant to provide race neutral explanations for striking all the black venire members. *Id.* at *2. The defendant will appeal to the Missouri Supreme Court. Joe Lambe, *Court Rules on Jury Selection Racial Issue*, K.C. STAR, Jan. 1, 1991, at C1. See also Robert H. Dierker, *Peremptory Challenges in Criminal Cases*, 47 J. MO. B. 447 (1991).

168. 913 F.2d 1417 (9th Cir. 1990).

169. *Id.* Also at issue in the case was whether the United States had standing to raise the equal protection rights of the excluded male venire members. *Id.* at 1420-21. The Ninth Circuit concluded that the United States had standing. *Id.* at 1421. This Note, however, does not discuss third party standing in the context of peremptory challenges. This case also raises the issue of *Batson's* application to peremptory challenges based upon the gender of the prospective juror. *Id.* at 1421-23. The Supreme Court may decide this issue soon. During jury selection for his murder trial, an Alabama man objected to the prosecutor's exercise of peremptory challenges to exclude female venire members. *Fisher v. State*, So. 2d 1027, 1029 (Ala. Crim. App. 1991). The trial court overruled the defendant's objection, reasoning that *Batson* does not apply to peremptory challenges based upon gender, and the Alabama Court of Criminal Appeals affirmed. *Id.* at 1029-30. The Alabama Supreme Court decided not to review the case, but *Fisher* has appealed to the United States Supreme Court. Maria Coyle and Fred Strasser, *Court Asked to Extend Juror Challenge Limits*, NAT'L L.J., Dec. 30, 1991, at 5.

170. *DeGross*, 913 F.2d at 1419.

171. *Id.* at 1423.

172. *Id.*

The Ninth Circuit characterized a defendant's peremptory challenges as state action¹⁷³ because the source of peremptory strikes is statutory.¹⁷⁴ A criminal defendant is a state actor, the court stated, when the defendant exercises peremptory challenges because the defendant is "us[ing] . . . [a] state procedure with the overt, significant assistance of state officials."¹⁷⁵

3. Missouri Cases

During the five years between *Batson* and *Edmonson*, Missouri courts faced the question of the applicability of *Batson* to civil proceedings only once.¹⁷⁶ In *McDaniel v. Mutchnick*,¹⁷⁷ an all-white jury rendered a verdict for defendants.¹⁷⁸ The black plaintiff alleged that her equal protection rights were violated by the white defendants' exercise of their three peremptory challenges to exclude three black venire members.¹⁷⁹ Although the trial court determined that at least one of the defendants' peremptory challenges

173. *Id.*

174. 28 U.S.C. § 1870 (1988).

175. *DeGross*, 913 F.2d at 1424 (quoting *Tulsa Professional Collections Servs. v. Pope*, 485 U.S. 478, 486 (1988)). Applying the same analysis to a private litigant also leads to the conclusion that the litigant is a state actor.

176. For pre-*Edmonson* discussions of whether peremptory challenges may be exercised to exclude venire members on the basis of race in civil proceedings in other states, see, e.g., *Thomas v. Diversified Contractors, Inc.*, 551 So. 2d 343 (Ala. 1989) (not permitted); *Holley v. J & S Sweeping Co.*, 192 Cal. Rptr. 74 (Ct. App. 1983) (not permitted); *Williams v. Coppola*, 549 A.2d 1092 (Conn. Super. Ct. 1986) (not permitted); *City of Miami v. Cornett*, 463 So. 2d 399 (Fla. Ct. App. 1985) (not permitted); *Wilson v. Kauffman*, 563 N.E.2d 610 (Ind. Ct. App. 1990) (not permitted); *Jackson v. Housing Authority of City of High Point*, 364 S.E.2d 416 (N.C. 1988) (not permitted); *Chavous v. Brown*, 385 S.E.2d 206 (S.C. Ct. App. 1989) (not permitted); *Texas Health Enterprises Inc. v. Tolden*, 795 S.W.2d 17 (Tex. Ct. App. 1990) (permitted). See also Alan Raphael, *Discriminatory Jury Selection: Lower Court Implementation of Batson v. Kentucky*, 25 WILLAMETTE L. REV. 293 (1989).

177. No. WD41498, 1990 WL 165952 (Mo. Ct. App. Oct. 30, 1990). Obviously, *Edmonson* overruled this decision, and in *White v. Anderson*, 816 S.W.2d 18 (Mo. Ct. App. 1991), the Western District of the Missouri Court of Appeals, relying upon *Edmonson*, held that a private civil litigant may not exercise peremptory challenges in a racially discriminatory manner. *Id.* at 19.

178. *McDaniel*, 1990 WL 165952 at *1.

179. *Id.* Plaintiff also claimed that the defendants' exercise of their peremptory challenges violated the rights guaranteed to her by the Missouri constitution. *Id.* at *8. The court, however, summarily dismissed this argument because the plaintiff failed to specify which constitutional provision was violated. *Id.*

was based solely upon race, the court of appeals overruled plaintiff's new trial motion on the ground that *Batson* did not apply in civil proceedings.¹⁸⁰

McDaniel declined to extend *Batson* to civil proceedings because the court found no state action involved in civil litigants' exercise of peremptory challenges.¹⁸¹ The court applied the *Lugar* two-part test.¹⁸² Part one of the test, the exercise of a right or privilege created by the state, is easily satisfied because the defendants' right to exercise peremptory challenges is granted by statute.¹⁸³ The court found that part two, the conduct causing the deprivation is attributable to a state actor, was not satisfied.¹⁸⁴ The court held that neither the trial judge nor private attorneys are state actors in the context of peremptory challenges.¹⁸⁵ A trial judge is not a state actor because the judge "merely acquiesces in the private party's decision to exercise his peremptory strikes in a discriminatory manner."¹⁸⁶ Mere acquiescence, according to *Blum v. Yaretsky*,¹⁸⁷ is not attributable to the state.

Private attorneys, according to the court, are not state actors when they exercise peremptory challenges.¹⁸⁸ The statute may authorize them to use peremptory challenges in a discriminatory manner, but the statute does not compel such use.¹⁸⁹ Without compulsion, the "overt, significant assistance of state officials"¹⁹⁰ necessary to elevate the private use of state sanctioned procedures to state action is absent.

Although the court of appeals condemned the exercise of peremptory challenges in a racially discriminatory manner, the court could not remedy the matter because the conduct was not attributable to the state. To do so would amount to "legislat[ing] social policy on the basis of [their] own personal inclinations."¹⁹¹

Judge Wasserstrom dissented, contending that *Batson* is applicable to civil cases. After noting the importance of "an impartial jury drawn from a

180. *Id.* at *3.

181. *Id.* at *7.

182. *Id.* at *5.

183. *Id.* See MO. REV. STAT. §§ 494.200 & 494.065 (1986).

184. *McDaniel*, 1991 WL 165952 at *7.

185. *Id.*

186. *Id.* at *6.

187. 457 U.S. 991, 1004 (1982).

188. *McDaniel*, 1991 WL 165952 at *7.

189. *Id.*

190. *Tulsa Professional Collection Servs. Inc. v. Pope*, 485 U.S. 478, 486 (1988).

191. *McDaniel*, 1991 WL 165952 at *7 (quoting *Evan v. Abney*, 396 U.S. 435, 447 (1970)).

cross section of the community"¹⁹² and after pointing out the discussion in *Batson* of the harm to the excluded venire member and the entire community when peremptory challenges are exercised in a racially discriminatory manner,¹⁹³ Judge Wasserstrom argued that the level of state action is at least as great as the Supreme Court found to be sufficient in *Shelley, Pope*, and *Lugar*.¹⁹⁴ Judge Wasserstrom relied extensively on Judge Rubin's dissent in the *Edmonson* decision by the Fifth Circuit en banc. According to Judge Wasserstrom, "there can be no question that the State is inevitably and inextricably involved in the process of excluding jurors as a result of a defendant's peremptory challenges."¹⁹⁵ The state permeates every step of the jury selection process. The state summons potential jurors and oversees voir dire.¹⁹⁶ When a litigant exercises a peremptory challenge, authorized by statute, the trial judge "enforces the discriminatory decision by ordering the excused juror to leave the courtroom escorted by uniformed state officers and Deputy Sheriffs."¹⁹⁷ Because of the split among lower courts on the issue of whether *Batson* applies in civil proceedings, the Supreme Court granted certiorari in *Edmonson*.

IV. INSTANT DECISION

A. *The Majority Opinion*

Justice Kennedy wrote the majority opinion in which Justices White, Marshall, Blackmun, Stevens and Souter joined. Justice Kennedy began by discussing the recent analysis in *Powers*, which he also authored.¹⁹⁸ Justice Kennedy argued that, even though the line of cases in which the Supreme Court sought to eliminate racial discrimination in the jury selection process arose in a criminal context, this does not mean that the Court had implicitly held that racial discrimination in a civil proceeding was acceptable.¹⁹⁹ Excluded jurors suffer the same harm whether they are excluded in civil or criminal cases.²⁰⁰

After concluding that peremptory challenges by private litigants on the basis of race are harmful, Justice Kennedy addressed the question of state

192. *Id.* at *14.

193. *Id.*

194. *Id.* at *18.

195. *Id.* at *21.

196. *Id.*

197. *Id.*

198. *Edmonson*, 111 S. Ct. 2077, 2081-82 (1991).

199. *Id.* at 2082.

200. *Id.*

action, a prerequisite to any constitutional ruling.²⁰¹ Justice Kennedy applied the *Lugar* two-prong test and found that both prongs were satisfied.

Prong one, whether the alleged constitutional violation resulted from the exercise of a right or privilege having its source in state authority, is satisfied.²⁰² Although the purpose of peremptory challenges is to help secure an impartial jury, such challenges are not a constitutional right.²⁰³ Peremptory challenges are statutory rights—in the absence of statutory authorization, they may not be exercised.²⁰⁴

The more difficult issue in the case centers around the second *Lugar* prong: whether in all fairness, a private litigant exercising peremptory challenges must be deemed a state actor.²⁰⁵ Justice Kennedy listed three factors relevant to the inquiry: (1) the extent to which the actor relies on government assistance and benefits; (2) whether the actor is performing a traditional governmental function; and (3) whether the injury is aggravated in a unique way by the incidents of government authority.²⁰⁶

Justice Kennedy acknowledged that the private use of state-sanctioned private procedures does not amount to state action.²⁰⁷ The private use of state procedures may, however, constitute state action if the actor receives "overt, significant assistance of state officials."²⁰⁸ He argued that the very existence of peremptory challenges depends upon significant, overt, government participation.²⁰⁹ Peremptory challenges are useful only in jury trials, which the government conducts.²¹⁰ Statutes establish policies that various court officials must carry out during the selection process.²¹¹ The judge plays an active role during voir dire.²¹² After a litigant exercises a peremptory challenge, it is the judge who actually excuses the juror.²¹³ Justice Kennedy argued that "[w]ithout the direct and indispensable participation of the judge, who beyond all question is a state actor, the peremptory challenge

201. *Id.*

202. *Id.* at 2082-83.

203. *Id.* at 2083.

204. *Id.*

205. *Id.*

206. *Id.* (citations omitted).

207. *Id.* at 2083-84.

208. *Id.* at 2084 (quoting *Tulsa Professional Collection Servs., Inc. v. Pope*, 485 U.S. 478, 486 (1988)).

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

system would serve no purpose."²¹⁴ Thus, the *Edmonson* court found the first factor, reliance on governmental assistance, satisfied.

Factor two examines whether a private litigant's exercise of peremptory challenges involves the performance of a traditional governmental function. Justice Kennedy concluded that it does.²¹⁵ Peremptory challenges are used to select a jury, and a jury's factfinding is a traditional governmental function.²¹⁶ The purpose of the jury selection process is to "determine representation on a government body."²¹⁷ The only portion of the jury selection process not performed by the government is peremptory challenges.²¹⁸ Merely because the government permits private litigants to perform some of the jury selection duties, however, does not change the traditional governmental nature of the action.²¹⁹

Justice Kennedy discussed factor three only briefly. This is largely because one of the harms mentioned in *Batson* and focused upon in *Powers* and *Edmonson* is the reduction of public confidence in the judicial system. Justice Kennedy concluded that the injury caused by racial discrimination in the exercise of peremptory challenges is exacerbated by the fact that it occurs in the courtroom.²²⁰ Racial discrimination in the courtroom "raises serious questions as to the fairness of the proceeding conducted there . . . [and] mars the integrity of the judicial system."²²¹

After applying the three factors, Justice Kennedy concluded that the second prong of the *Lugar* test was satisfied.²²² The judgment of the court of appeals was reversed, and the case remanded for the trial court's determination whether Edmonson established a prima facie case of racial discrimination.²²³

B. Justice O'Connor's Dissent

Justice O'Connor wrote a dissent in which Chief Justice Rehnquist and Justice Scalia joined. She did not dispute that the first prong of the *Lugar* test is satisfied or that racial discrimination in the exercise of peremptory

214. *Id.* at 2085.

215. *Id.* at 2085-87.

216. *Id.* at 2085.

217. *Id.* at 2086.

218. *Id.*

219. *Id.*

220. *Id.* at 2087.

221. *Id.*

222. *Id.* at 2083.

223. *Id.* at 2088-89. The opinion also includes a discussion of third party standing. *Id.* at 2087-88.

challenges harms the excluded jurors and the public's perception of the judicial system. Her dissent focused on the majority's analysis of factors one and two of the second prong of the *Lugar* test. Justice O'Connor characterized the majority's argument as a statement that peremptory challenges must be attributable to the state because they occur during a trial.²²⁴ Justice O'Connor contended that an action is not attributable to the state merely because it occurs in the courtroom.²²⁵ She argued that the exercise of peremptory challenges is "fundamentally a matter of private choice and not state action."²²⁶ Although a trial judge must advise the potential juror that he or she has been excused, Justice O'Connor distinguished this from state action because the trial judge plays no part in the decision to excuse the juror.²²⁷ Justice O'Connor concluded that there is no "overt, significant participation" by the state in peremptory challenges.²²⁸ Litigants, without any encouragement from the government, decide whether to exercise peremptory challenges and, subject to the limitations of *Batson*, are not required to explain their decision.²²⁹

Justice O'Connor also disagreed with the majority's conclusion that the exercise of peremptory challenges is a traditional governmental function.²³⁰ She contended that the tradition is just the opposite—"one of unguided private choice."²³¹ Justice O'Connor also rejected Justice Kennedy's argument that the exercise of peremptory challenges by a private litigant is a delegated governmental function.²³² She argued that the exercise of a public function by a private actor is attributable to the state only if it is "something that *only* the government traditionally does."²³³ Justice O'Connor argued that the government has not always been responsible for jury selection and that peremptory challenges pre-date the Constitution.²³⁴ Therefore, the action that the majority attributed to the state is not an exclusive governmental function.

224. *Id.* at 2089.

225. *Id.*

226. *Id.*

227. *Id.* at 2090.

228. *Id.* at 2092.

229. *Id.*

230. *Id.* at 2092-94.

231. *Id.* at 2093.

232. *Id.* at 2093-94.

233. *Id.* at 2093.

234. *Id.*

C. Justice Scalia's Dissent

Although Justice Scalia joined Justice O'Connor's dissent, he also wrote separately. Justice Scalia characterized the majority's decision as an "overhaul [of] the doctrine of state action."²³⁵ Although the majority intended to protect minority litigants from race-based jury selection procedures, the decision will actually harm minority litigants.²³⁶ Justice Scalia did not understand how minority litigants could possibly benefit from the majority's decision because it prevents them from using peremptory challenges to help assure a racially diverse jury.²³⁷ Justice Scalia predicted that the majority's decision will be very costly because of the effect on an already overworked judicial system.²³⁸ The effect of *Edmonson*, in light of the Court's decision in *Powers*, will permit all civil litigants to object to their opponent's exercise of peremptory challenges based upon race.²³⁹ Courts will be forced to focus more upon collateral issues and less on the merits of the case.²⁴⁰ Justice Scalia also warned that *Edmonson* may eventually result in the abolition of peremptory challenges.²⁴¹

V. MISSOURI PRACTICE²⁴²

A. Procedure

In criminal cases the number of peremptory challenges allotted to the state and to the defendant depends upon the severity of the punishment for the crime with which the defendant is charged.²⁴³ In civil cases the plaintiff and

235. *Id.* at 2096.

236. *Id.* at 2095-96.

237. *Id.* at 2095.

238. *Id.* at 2095-96.

239. *Id.* at 2096.

240. *Id.*

241. *Id.*

242. For a comprehensive discussion of the procedural aspects of a *Batson* challenge not limited to Missouri, see Tom Meyer & Alan Sparer, *Restrictions on the Discriminatory Use of Peremptory Challenges*, in *JURYWORK: SYSTEMATIC TECHNIQUES* §§ 4.01-4.07 (Elissa Krauss and Beth Bonora eds., 1987); Timothy Patton, *The Discriminatory Use of Peremptory Challenges in Civil Litigation: Practical Procedure and Review*, 19 TEX. TECH L. REV. 921 (1988).

243. MO. REV. STAT. § 494.480 (Supp. 1990). If the defendant is charged with a crime punishable by death, the state and defendant are each entitled to nine peremptory challenges. *Id.* § 494.480.2.(1). If the defendant is charged with a crime not punishable by death but punishable by imprisonment in the penitentiary, the state

defendant are each entitled to three peremptory challenges.²⁴⁴ If the court determines that alternate jurors are appropriate, each side is entitled to additional peremptory challenges depending upon the number of alternate jurors empaneled.²⁴⁵ The state exercises its peremptory challenges first in a criminal action, and the plaintiff exercises his peremptory challenges first in a civil action.²⁴⁶

Missouri case law establishes the proper point in a trial at which a party should raise a *Batson* challenge. In criminal cases, a defendant should object to the prosecutor's peremptory challenges before the defendant exercises his peremptory challenges.²⁴⁷ The rationale for this timing is as follows:

if the state has made an improper strike, the trial court could disallow it. The State could then complete its peremptory strikes. In this manner, the entire jury panel would not be lost and judicial time would be maximized. Also, defense counsel could still make the defendant's strikes following those of the State.²⁴⁸

The right to make a *Batson* challenge is waived unless made in a timely manner. For example, *Batson* challenges made after the dismissal of the venire²⁴⁹ or the swearing of the jury²⁵⁰ are not timely. Although no Missouri authority discusses when to make a *Batson* challenge in a civil case, the proper time is relatively easy to predict by employing the rationale of criminal cases. In a civil case, as in criminal cases, the litigant should make a *Batson* challenge as soon as possible during the jury selection process to prevent the need to reconduct voir dire. Therefore, if the defendant wishes to make a challenge, he should make it immediately after the plaintiff completes his peremptory challenges. If the plaintiff wishes to make a challenge, he should make it as soon as the defendant exercises his challenges and before

and defendant are each entitled to six peremptory challenges. *Id.* § 494.480.2.(2). If the defendant is charged with a crime not punishable by death or imprisonment in the penitentiary, the state and defendant are each entitled to two peremptory challenges. *Id.* § 494.480.2.(3).

244. *Id.* § 494.480.1. Therefore, even if there are multiple plaintiffs and defendants, all parties on a side "shall join in their challenges as if there were one plaintiff and one defendant." *Id.* In other states, the number of peremptory challenges to which civil litigants are entitled varies from two to eight. Goldman, *supra* note 47, at 150 n.11.

245. MO. REV. STAT. § 494.485 (1986).

246. *Id.* § 494.480.

247. State v. Price, 763 S.W.2d 286, 289 n.3 (Mo. Ct. App. 1988).

248. *Id.*

249. State v. Lawrence, 791 S.W.2d 729, 730 (Mo. Ct. App. 1990).

250. State v. Smith, 791 S.W.2d 744, 747 (Mo. Ct. App. 1990).

the venire is excused or the jury is sworn. It is also very important that an attorney raising a *Batson* challenge create a record to support the challenge.²⁵¹

In Missouri, great deference is given to a trial court's findings on a *Batson* challenge. The trial court's decision is a finding of fact, which an appellate court overturns only if it is clearly erroneous.²⁵² A finding is clearly erroneous "if based on the entire record the appellate court is left with a definite and firm conviction that a mistake was made."²⁵³ For example, in *State v. Smith*,²⁵⁴ the court of appeals affirmed the trial court's finding that the defendant failed to make a prima facie showing of racial discrimination even though the court of appeals seemed to indicate that it thought the factors supporting a finding of a prima facie showing of racial discrimination outweighed the factors supporting no such showing.²⁵⁵

Explanations that depend upon subjective interpretation of a venire member's behavior during voir dire are much more likely to survive review because of the necessary deference given to the trial judge's finding based upon the judge's first-hand observation of the behavior. Explanations specific to the excluded juror and the particular case are also more likely to be upheld than very broad explanations. For example, it is not acceptable to strike a nurse because all nurses are generally sympathetic,²⁵⁶ but it is acceptable to strike a nurse in a case dependant upon medical testimony because of a fear that the nurse will exercise undue influence on the other jurors.²⁵⁷

B. Evaluating a *Batson* Challenge

In *State v. Price*,²⁵⁸ the Missouri Court of Appeals, Eastern District, delineated a six-step analysis for determining whether a criminal defendant has established a prima facie case of racial discrimination in the prosecutor's exercise of peremptory challenges. First, the defendant must demonstrate that he is a member of a cognizable racial group.²⁵⁹ Second, the defendant must show that the prosecutor has exercised his peremptory challenges to strike

251. *State v. Harding*, 734 S.W.2d 871, 877 (Mo. Ct. App. 1987).

252. *State v. Blankenship*, No. 56835, 1991 WL 164636 (Mo. Ct. App. Aug. 27 1991). See also *State v. Brown*, 747 S.W.2d 261, 264 (Mo. Ct. App. 1988).

253. *State v. Ivory*, 813 S.W.2d 102, 104 (Mo. Ct. App. 1991).

254. 791 S.W.2d 744 (Mo. Ct. App. 1990).

255. *Id.* at 750.

256. See *infra* note 298 and accompanying text.

257. *State v. Brown*, 747 S.W.2d 261, 262-63 (Mo. Ct. App. 1988).

258. 763 S.W.2d 286 (Mo. Ct. App. 1988).

259. *Id.* at 288.

venire members of the defendant's race.²⁶⁰ *Powers* changed the first two steps of the analysis. *Powers* gives a defendant third-party standing to assert the equal protection rights of excluded venire members even if the defendant is not a member of a cognizable racial group.²⁶¹

Third, the defendant must meet *Batson's* requirement of "show[ing]" that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice [the prosecutor's peremptory challenges] to exclude the veniremen from the petit jury on account of their race.²⁶² The Missouri Supreme Court in *State v. Antwine*,²⁶³ interpreted this language to "require the trial court to consider the State's explanation of the manner in which it employed its challenges prior to making a final determination as to whether a prima facie case exists."²⁶⁴ Prior to *Powers*, however, Missouri courts sometimes ruled, without considering the prosecutor's explanations, that a defendant did not establish a prima facie case of racial discrimination, the holding of *Antwine* notwithstanding.²⁶⁵ *State v. Hunter*²⁶⁶ explained the apparent inconsistency: "race neutral explanations are only required where the surrounding circumstances are either neutral on the question of racial discrimination or point toward its presence."²⁶⁷ In *Hunter*, the court asked, "Could any reasonable person argue that a jury consisting of five blacks and seven whites with two black alternates is unfair where the victim and all witnesses are also black?"²⁶⁸ In fact, case law in Missouri seemed to establish that, prior to *Powers*, a defendant could exercise a valid *Batson* challenge only if he was tried before an all white jury or a jury with only a "token" black member.²⁶⁹ For example, in *State v. Crump*,²⁷⁰ the defendant did not make a prima facie showing of racial discrimination. Although the prosecutor used all six of his peremptory challenges to strike black venire

260. *Id.*

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

262. *Price*, 763 S.W.2d at 288-89 (quoting *Batson v. Kentucky*, 476 U.S. 79, 96 (1986) (brackets in original)).

263. 743 S.W.2d 51 (Mo. 1987) (en banc).

264. *Id.* at 64.

265. *See, e.g.*, *State v. Burgess*, 800 S.W.2d 743 (Mo. 1990); *State v. Hunter*, 802 S.W.2d 201 (Mo. Ct. App. 1991); *State v. English*, 795 S.W.2d 610 (Mo. Ct. App. 1990).

266. 802 S.W.2d 201 (Mo. Ct. App. 1991).

267. *Id.* at 204.

268. *Id.*

269. *State v. Vincent*, 755 S.W.2d 400, 403 (Mo. Ct. App. 1988).

270. 747 S.W.2d 193 (Mo. Ct. App. 1988).

members, the defendant was still tried before a jury of five blacks and seven whites.²⁷¹

Powers has overruled the cases that held that a significant percentage of black jurors prevents a criminal defendant from exercising a *Batson* challenge.²⁷² The *Powers* court, emphasizing the rights of the excluded venire members, held that a criminal defendant has third party standing to assert the rights of the excluded members. Therefore, if any venire member is eliminated on the basis of race, a criminal defendant can assert the excluded member's equal protection rights regardless of the overall composition of the jury that actually tries the defendant. In light of the strong stance the United States Supreme Court took against racial discrimination in *Powers*, Missouri courts deciding the validity of a defendant's *Batson* challenge should not seek an explanation from the prosecutor for her exercise of peremptory challenges *before* determining whether the defendant has made a prima facie showing.²⁷³

In the fourth step of the *Price* analysis, the trial judge determines whether the defendant has made a prima facie showing of racial discrimination.²⁷⁴ If the defendant makes a prima facie showing, the state must provide a race neutral explanation to rebut the presumption that the prosecutor exercised peremptory challenges in a racially discriminatory manner. The state's explanation constitutes the fifth step of the analysis.²⁷⁵ In the sixth step of the analysis, the trial court determines whether the state's explanation is adequate or whether "the defendant has established purposeful discrimination."²⁷⁶

Missouri courts have sometimes failed to distinguish between steps four, five, and six. This is largely because no Missouri authority clearly distinguishes between the prosecutor's explanation, which *Antwine* requires the trial court to consider in step three before determining whether the defendant has made a prima facie showing, and step five, which requires a race neutral explanation to rebut a prima facie showing. It is possible, however, to discern some factors that trial judges consider during their analysis. For example, to determine whether the defendant has made a prima facie showing of racial discrimination, the trial judge should consider all relevant circumstances, including the victim's race and the race of important witnesses, the number

271. *Id.* at 195.

272. *State v. Robinson*, 811 S.W.2d 460, 462 (Mo. Ct. App. 1991).

273. *State v. Hudson*, 815 S.W.2d 430 (Mo. Ct. App. 1991). *See also* *State v. Hampton*, No. 58842, 1991 WL 164643 (Mo. Ct. App. Aug. 27, 1991); *State v. Hinton*, No. 58703, 1991 WL 127443 (Mo. Ct. App. July 16, 1991).

274. *Price*, 763 S.W.2d at 289.

275. *Id.* at 289.

276. *Id.* (quoting *Batson*, 476 U.S. at 98).

of blacks remaining on the panel after the state exercises its peremptory challenges, the treatment of similarly situated white venire members, and questions asked and statements made by the prosecutor during voir dire.²⁷⁷

When determining whether the prosecutor's explanations are race neutral or merely pretextual, *Antwine* instructs the trial judge to consider the "relevance of the State's justification for challenging a particular venireman to the kind of crime charged, the nature of the evidence to be adduced by both parties and the potential punishment which a guilty verdict may produce."²⁷⁸ The trial court must engage in

[a] sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised his challenges for cause or peremptorily.²⁷⁹

In *State v. Butler*,²⁸⁰ the court listed as factors for the trial judge's consideration on the sufficiency of the prosecutor's explanation many of the same factors that the judge is to consider when determining whether or not the defendant made a prima facie showing of racial discrimination.²⁸¹ Any explanations based upon a venire member's trait must be narrow—"the trait must apply to the juror specifically and to the facts of the particular case."²⁸² Otherwise, the explanation is pretextual.

After *Powers*, the Missouri Court of Appeals, Eastern District re-evaluated Missouri law on the factors a trial judge should consider when determining whether a prosecutor exercised the state's peremptory challenges in a racially discriminatory manner.²⁸³ The court found that "[m]any factors are still valid after *Powers* which may be used to indicate a lack of discrimi-

277. *State v. Smith*, 791 S.W.2d 744, 748 (Mo. Ct. App. 1990).

278. *Antwine*, 743 S.W.2d at 65.

279. *State v. Butler*, 731 S.W.2d 265, 269 (Mo. Ct. App. 1987) (quoting *People v. Hall*, 672 P.2d 854, 858 (Cal. 1983)).

280. 731 S.W.2d 265 (Mo. Ct. App. 1987).

281. For example, the judge should consider the race of the victim and the race of important witnesses. *Id.* at 269. The prosecutor's behavior during voir dire should be considered—what types of questions and how many did he ask each venire member. If the prosecutor merely conducts a cursory examination or fails to ask a venire member questions before striking him or her it may indicate an improper motive. *Id.* The treatment of similarly situated white venire members is also relevant. *Id.*

282. *Id.* For examples of explanations which are too broad, see *infra* notes 298-303 and accompanying text.

283. *State v. Robinson*, 811 S.W.2d 460 (Mo. Ct. App. 1991).

natory intent in the State's peremptory strikes."²⁸⁴ The court also cautioned that "one factor alone is rarely dispositive of a *Batson* challenge."²⁸⁵ *Powers* did not change the requirement that the trial judge must consider the validity of the state's explanations "in light of the entire voir dire."²⁸⁶

Although Missouri courts have not expressly considered each of the above factors in every case, some examples may be helpful. A court has held that when the state uses five of its six peremptory challenges to strike black venire members, and the sixth to strike an Asian woman, a black defendant makes a prima facie showing of racial discrimination.²⁸⁷ A prosecutor's use of five of nine peremptory challenges to strike black venire members when the venire consisted of 27 white members and 7 black members following challenges for cause also constituted a prima facie showing when the defendant and victim are both black.²⁸⁸

The explanation provided by prosecutors to explain their peremptory challenges that is consistently upheld as race neutral is that a relative of the excluded venire member has been charged with and possibly served time in prison for a serious crime.²⁸⁹ A prosecutor can strike a venire member even if the relative was acquitted.²⁹⁰ Striking a venire member because a relative has served time in prison, however, does not constitute a race neutral

284. *Id.* at 463. The court failed to specify which factors are no longer valid and an examination of the list provided by the court indicates no change. It is interesting to note that *Powers* marked a significant change in the focus of the harm caused by the discriminatory exercise of peremptory challenges. After *Powers*, harm to the excluded juror is just as important as harm to the defendant. Most of the factors that trial judges consider, however, are not relevant to the question of whether the excluded juror's rights have been harmed.

285. *Id.*

286. *State v. Ivory*, 813 S.W.2d 102, 104 (Mo. Ct. App. 1991).

287. *State v. Price*, 763 S.W.2d 286, 289 (Mo. Ct. App. 1988). In this case, the court concluded that the state did not provide adequate explanations for its actions. *Id.* at 290.

288. *State v. Kilgore*, 771 S.W.2d 57, 63 (Mo. 1989) (en banc), *cert. denied*, 493 U.S. 874 (1989). In this case, unlike the previous example, the court held that the state was able to provide race neutral explanations for its actions. *Id.*

289. *See, e.g., State v. Kilgore*, 771 S.W.2d 57, 63 (Mo. 1989) (relative charged with a violent crime); *Blankenship*, No. 56835, 1991 WL 164636 at *10 (brother-in-law serving a sentence for burglary; son serving a sentence for murder; uncle charged with murder); *State v. Brown*, 747 S.W.2d 261, 262-63 (Mo. Ct. App. 1988) (cousin convicted of selling drugs; brother convicted of forgery; brother convicted of drug possession).

290. *Blankenship*, 1991 WL 164636 at *10 (prosecutor's explanation race neutral when venire member's husband charged with murder but acquitted).

explanation if white venire members who have relatives in jail are not similarly struck.²⁹¹

In capital punishment cases, the prosecutor often explains her exercise of peremptory challenges by stating that venire members appeared hesitant to impose the death penalty. A trial court's finding that this is a sufficient explanation is not clearly erroneous.²⁹² Courts have also upheld striking a venire member who believes he might recognize the defendant when the state's case revolves around the victim's identification of the defendant.²⁹³ Likewise, striking a venire member who is familiar with a state's witness has been upheld.²⁹⁴ Venire members who exhibit unwillingness to serve on the jury by either stating their unwillingness directly, paying little attention during voir dire, or displaying a hostile attitude may be struck.²⁹⁵ If a venire member is noticeably more responsive to one party's attorney during voir dire, the other party's attorney may strike the member.²⁹⁶ Additionally, striking a venire member who might be hostile to the prosecution because her ex-son-in-law is a police officer has been upheld.²⁹⁷

A prosecutor's explanation that he struck a nurse because nurses are generally compassionate and might "feel sorry for defendants" has been held pretextual.²⁹⁸ A trial court's finding, however, that striking a teacher because teachers tend to be sympathetic is a neutral explanation that is not clearly erroneous.²⁹⁹ The only apparent way to reconcile the disparate treatment between the nurse and the teacher in the two cases is that in the former case the prosecutor failed to exclude white nurses.³⁰⁰ Excluding

291. *Price*, 763 S.W.2d at 288.

292. *See, e.g., Kilgore*, 771 S.W.2d at 63; *Blankenship*, 1991 WL 164636 at *10.

293. *Brown*, 747 S.W.2d at 263.

294. *Kilgore*, 771 S.W.2d at 63.

295. *Blankenship*, 1991 WL 164636 at *10. In *State v. Metts*, No. 59374, 1991 WL 264647 (Mo. Ct. App. Dec. 17, 1991), the court expressed concern about the "generality of such an explanation as inattentiveness for the striking of venire members. Determining who is and is not attentive requires subjective judgments that are particularly susceptible to the kind of abuse prohibited by *Batson*." *Id.* at *3. Therefore, the court held that the "State should inform the court of any perceived 'inattentiveness' on the part of a venire member. Any attorney who fails to call the court's attention to such inattentiveness should be fully prepared to have a strike due to inattentiveness disallowed." *Id.*

296. *Brown*, 747 S.W.2d at 263 (not clearly erroneous to strike a venire member who responds in a "belligerent, non-responsive" manner to the prosecutor yet is "very responsive" to the defense).

297. *State v. Ivory*, 813 S.W.2d 102, 104 (Mo. Ct. App. 1991).

298. *State v. Butler*, 731 S.W.2d 265, 272 (Mo. Ct. App. 1987).

299. *State v. Price*, 763 S.W.2d 286, 288 (Mo. Ct. App. 1988).

300. *Butler*, 731 S.W.2d at 272.

government employees because of a prosecutor's experience in a previous trial has been considered a "rote; neutral explanation."³⁰¹

*State v. Smith*³⁰² distinguished between striking venire members who might identify with the defendant, an acceptable, race neutral explanation, and striking venire members because they are government employees, a pretextual explanation. According to the court, "[t]he government employee explanation does not depend on any observation or assessment of the prospective juror. But whether a venire member might identify with a defendant does depend on observing the person's demeanor and attitude in responding to the voir dire questions."³⁰³

Since *Edmonson*, no Missouri court has delineated the factors a trial judge should consider when determining whether a private litigant has exercised peremptory challenges in a racially discriminatory manner. In *White v. Anderson*,³⁰⁴ the Missouri Court of Appeals, Western District, remanded the case for determination of whether the defendant could provide race neutral explanations for his exercise of peremptory challenges. Necessary to this order was a finding that the civil plaintiff had made a prima facie showing of racial discrimination. Anderson, a white defendant, used two peremptory challenges to strike black venire members and one peremptory challenge to strike a black alternate.³⁰⁵ An all-white jury determined that the plaintiff, a black man, was ninety percent at fault in the automobile accident giving rise to the action.³⁰⁶

VI. ANALYSIS

In *Edmonson*, the Supreme Court balanced the importance of eliminating racial discrimination in selecting jurors with the nature and function of peremptory challenges.³⁰⁷ *Edmonson*, however, was not the first Supreme Court decision to balance these considerations. In *Swain*, the Court first faced the question of racial discrimination in the exercise of peremptory challeng-

301. *State v. Smith*, 791 S.W.2d 744, 749 (Mo. Ct. App. 1990). *See also Price*, 763 S.W.2d at 288 (striking a venire member because she is a federal employee is not a sufficient explanation).

302. 791 S.W.2d 744 (Mo. Ct. App. 1990).

303. *Id.* at 749.

304. 816 S.W.2d 18 (Mo. Ct. App. 1991).

305. *Id.* at 19.

306. *Id.* at 18.

307. According to Justice White, "[t]he essential nature of the peremptory challenge is that it is one exercised without a reason, without inquiry and without being subject to the court's control." *Swain v. Alabama*, 380 U.S. 202, 220 (1965).

es.³⁰⁸ In that case, the Court favored the nature and function of peremptory challenges by presuming that the prosecutor was not abusing peremptory challenges.³⁰⁹ In *Batson*, however, the balance shifted. The Court overruled the *Swain* presumption and required the prosecutor to provide a race-neutral explanation for the exercise of peremptory challenges.³¹⁰

In addition to the balance shift, another important trend developed. *Strauder* only focused upon the harm caused to a criminal defendant by racial discrimination in jury selection.³¹¹ If the Court had maintained this narrow focus, it is unlikely that the *Edmonson* decision would have evolved. *Batson*, however, discussed three different harms that occur when peremptory challenges are exercised in a racially discriminatory manner.³¹² The discrimination harms the excluded jurors, the public at large, and the criminal defendant. *Powers* implies that discrimination in the exercise of peremptory challenges is unconstitutional even when the litigant suffers no harm. *Powers* permits white criminal defendants to assert the equal protection rights of excluded black jurors without claiming that any of the defendant's rights were violated.³¹³ Without this shift in emphasis from the criminal defendant's rights to the excluded juror's rights, the Court could not have reached the result in *Edmonson*.

Once this shift had been accomplished, the only real issue confronting the Court in *Edmonson* was state action. The state action analysis in *Edmonson* does not comport with the Court's recent "trend toward restrictive interpretation of the state action requirement."³¹⁴ One commentator notes "several troubling ambiguities that appear out of harmony with the Court's restrictive state action precedents of the past two decades."³¹⁵ For example, the Court has strictly limited its interpretation of *Burton*, essentially declining to extend that case beyond its facts.³¹⁶ In *Edmonson*, the Court arguably revived *Burton* when it contended that "[b]y enforcing a discriminatory peremptory challenge, the court 'has not only made itself a party to the [biased act], but has elected to place its power, property and prestige behind the [alleged] discrimination.'"³¹⁷ The Supreme Court has also strictly applied the public

308. *Id.* at 209.

309. *Id.* at 222.

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

311. *Strauder*, 100 U.S. at 308.

312. *Batson*, 476 U.S. at 86-87.

313. *Powers*, 111 S. Ct. at 1368-69.

314. Goldman, *supra* note 47, at 172. See also Martin A. Schwartz, *State Action: Revival or One Night Stand*, N.Y.L.J., Aug. 20, 1991, at 3.

315. Schwartz, *supra* note 314, at 3.

316. *Id.*

317. *Edmonson*, 111 S. Ct. at 2085 (quoting *Burton*, 365 U.S. at 725).

function test, finding state action only when the function is exclusively governmental.³¹⁸ In *Edmonson*, however, the majority did not mention the exclusivity requirement, an omission Justice O'Connor pointed out in dissent.³¹⁹

Edmonson may signal a "revival of the more liberal state action precedent"³²⁰ exemplified by the Warren Court, or it may be, in the words of one commentator, "only a one night stand."³²¹ *Edmonson* probably does not mark the beginning of a trend toward a less restrictive approach to the requirement of state action. It seems more accurate to characterize *Edmonson* as a carefully written opinion stretching recent precedent to reach a desired result.³²²

In *Edmonson*, the majority analyzed the presence of state action in the entire jury selection process whereas the dissent analyzed only the trial judge's role in peremptory challenges. Additionally, the majority appeared concerned with the potential erosion of public confidence in the judicial system, which could result from the discriminatory exercise of peremptory challenges. Justice Kennedy, however, only briefly mentioned this factor. He stated that "[r]acial discrimination has no place in the courtroom, whether the proceeding is civil or criminal."³²³ Justice Kennedy wanted to eradicate racial discrimination in the courtroom because it "raises serious questions as to the fairness of the proceedings conducted there . . . mars the integrity of the judicial system and prevents the idea of a democratic government from becoming a reality."³²⁴ If the Court had concluded that a private litigant's exercise of peremptory challenges is not attributable to the state, then it would appear as though the Court were sanctioning the conduct because it occurs in the courtroom. However, "independent, private decisions made in the context of civil litigation cannot be said to occur under color of law."³²⁵ To maintain the public's confidence in the judicial system, essential for courts to function, the majority emphasized the harm of racial discrimination to the detriment of two decades of state action precedent.³²⁶ By employing a broad approach to

318. Schwartz, *supra* note 314, at 3.

319. *Edmonson*, 111 S. Ct. at 2093.

320. Schwartz, *supra* note 314, at 3.

321. *Id.*

322. See Bruce Fein, *It's Been All Downhill Since Bork*, 77 A.B.A. J. 75, 78 (Oct. 1991).

323. *Edmonson*, 111 S. Ct. at 2088.

324. *Id.* at 2087.

325. *Lugar v. Edmondson Oil Co.*, 457 U.S. 951 (1982) (Powell, J., dissenting).

326. It is interesting to note that one commentator has suggested that "allegations of racial discrimination generally require a lesser showing of state involvement to satisfy the state action requirement than do other fourteenth amendment claims."

the state action question, the Court avoided an unsatisfactory result and preserved the public's confidence in the integrity of the judicial system.

The Supreme Court, however, could possibly have reached the same result without addressing the state action question. Under the "supervisory powers alternative,"³²⁷ federal appellate courts have inherent supervisory power "to preserve the integrity of the judicial system."³²⁸ In *United States v. Leslie*,³²⁹ a panel of the Fifth Circuit used its inherent supervisory power to restrict a prosecutor's discriminatory use of peremptory challenges.³³⁰ The court explained that excluding black jurors solely upon the basis of race "erodes public confidence in the judicial system, undermines judicial integrity, and is manifestly unfair."³³¹ The Fifth Circuit, en banc, reversed the panel's decision because the defendant failed to meet the strict burden of proof required by *Swain*.³³² A court, using the analysis of the Fifth Circuit panel, could use its inherent supervisory powers to limit a private litigant's exercise of peremptory challenges and reach the same result as *Edmonson* without discussing state action.

Edmonson leaves some questions unanswered concerning the discriminatory exercise of peremptory challenges.³³³ For example, the Court did not address what limitations, if any, apply to a criminal defendant's exercise of peremptory challenges. The Court, however, will address this issue when it decides *Georgia v. McCollum*.³³⁴ If the Court adheres to the *Edmonson*

Goldman, *supra* note 47, at 172. Because of the seriousness of the harm caused by racial discrimination, another commentator has argued that courts should apply less strict state action requirements in the context of racially discriminatory peremptory challenges. R. George Wright, *Litigating the State Action Issue in Peremptory Challenge Cases*, 13 AM. J. TRIAL ADVOC. 573, 589 (1989).

327. Chad Murdock, Note, *Edmonson v. Leesville Concrete Co.: State Action or Inaction-Does It Matter?*, 23 AKRON L. REV. 73, 84-88 (1989).

328. *United States v. Leslie*, 783 F.2d 541, 569 (5th Cir. 1986) (Williams, J., dissenting).

329. *Id.*

330. *Id.* at 542. See also Murdock, *supra* note 327, at 85.

331. Murdock, *supra* note 327, at 86.

332. 783 F.2d at 566.

333. *Edmonson* does not answer the question of whether *Batson* only applies to peremptory challenges based upon the prospective juror's race. For example, can a litigant strike venire members because of their gender? The Supreme Court may soon answer this question. See *supra* note 169. In William Kennedy Smith's rape trial, the question of *Batson's* application to peremptory challenges based upon a potential juror's religion arose. WALL STREET J., Dec. 3, 1991, at B6. Mr. Smith's lawyer contended that the prosecutor struck three venire members because they were Jewish. *Id.* The judge, however, rejected the defense's argument. *Id.*

334. See *supra* note 167.

rationale, it will likely hold that a criminal defendant cannot exercise peremptory challenges solely on the basis of the prospective juror's race. *Edmonson* decided the state action question. The trial judge's role in the exercise of peremptory challenges is sufficient to attribute the conduct to the state, and the trial judge's role is identical in civil and criminal cases. Furthermore, *Powers* and *Edmonson* emphasized the harm that racially discriminatory exercise of peremptory challenges causes to the excluded venire members and the effect discriminatory conduct has on the public's perception of the judicial system. These dangers are no different in criminal cases. It is possible, however, that the Supreme Court can decline to apply *Batson* to criminal defendants without contradicting its holding in *Edmonson*. The Court may conclude that the constitutional protections afforded criminal defendants prohibit restricting defendants' exercise of peremptory challenges.

Justice Scalia's *Edmonson* dissent alludes to some of the practical implications of the decision. Certainly, *Edmonson* will alter the method in which civil litigators exercise peremptory challenges. To some extent, *Edmonson* may reduce the effectiveness of peremptory challenges. For example, often an attorney will use a peremptory challenge to strike a juror because of a "gut feeling." If that juror happens to be a member of a cognizable minority, then the attorney may be required to provide a better explanation than a subjective bad feeling about the excluded juror. A better explanation may prove difficult because "[j]ury selection is, after all, an art and not a science. By their very nature, peremptory challenges require subjective evaluation of veniremen by counsel."³³⁵ Attorneys will have to provide explanations for behavior that is largely instinctual and inexplicable. On the other hand, *Edmonson* may require attorneys to face the fact that some of their gut feelings are actually unarticulated prejudice.

Edmonson also necessarily increases a trial judge's discretion while providing little opportunity for appellate review. A trial judge will have to determine whether a litigant makes a prima facie showing of discrimination and, if so, whether the opposing attorney's explanation is race neutral or pretextual. As the Missouri Supreme Court has noted, "the trial judge must focus all of the information and intuitive perceptions he has gathered to determine whether [a litigant's] use of his peremptory challenges proceeds from a racially discriminatory motive. We thus place great responsibility in our trial judges."³³⁶

Appellate courts must give considerable deference to the trial judge's discretion because so much of what occurs during jury selection cannot be captured in the record for review on appeal. For example, the record on appeal will not describe the manner in which a juror looked at an attorney or

335. *State v. Antwine*, 743 S.W.2d 51, 64 (Mo. 1987) (en banc).

336. *Id.* at 65.

the juror's tone of voice. The appellate court is "provided merely with the cold printed word of the transcript."³³⁷

Edmonson, by extending *Batson* to civil proceedings, will have a significant effect on the civil jury selection process. The decision also provides a basis for extending *Batson* even further. Moreover, the decision will have implications beyond the context of peremptory challenges. The majority's less restrictive state action analysis marked a significant change. Therefore, unless the Court intends to continue this less restrictive analysis, it will have to devise a way to distinguish *Edmonson* to limit its application. The persuasiveness of the Court's attempts to distinguish *Edmonson* and return to a narrow interpretation of the state action requirement will largely determine whether *Batson* has been extended too far.

MELISSA C. HINTON

337. *State v. Robinson*, 811 S.W.2d 460, 463 (Mo. Ct. App. 1991).