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One Step Too Far: The Supreme Court Denies Criminal Defendants the Unfettered Use of the Peremptory Challenge in Georgia v. McCollum

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ONE STEP TOO FAR: THE SUPREME COURT DENIES CRIMINAL DEFENDANTS THE UNFETTERED USE OF THE PEREMPTORY CHALLENGE IN *GEORGIA V. McCOLLUM*

I. INTRODUCTION

The jury system has long been recognized as an essential feature of criminal trials.¹ As part of a criminal defendant's trial by jury, the peremptory challenge functions to eliminate extremes of partiality amongst potential jurors, and to assure the parties that the jurors will decide the case on the basis of the evidence presented.² In an attempt to combat racial discrimination, the Supreme Court has attacked the discriminatory use of peremptory challenges.³ First, the Court prohibited a prosecutor from exercising peremptory challenges in a discriminatory manner.⁴ Then, the Court denied civil litigants the right to engage in the discriminatory use of peremptory challenges.⁵

Most recently, in *Georgia v. McCollum*,⁶ the Supreme Court denied the criminal defendant the right to use the peremptory challenge in a discriminatory manner, holding that such use violates the equal protection rights of excluded jurors.⁷ At best, the Court's decision in *McCollum* is a frustrated attempt to solve the problems of racism in our society. At worst, the Court's decision seriously undermines the criminal defendant's right to a fair trial. What is certain from *McCollum*, though, is that the long-held and highly esteemed procedural rights of the accused are now inferior to the right of potential jurors to be protected from discrimination.

After a statement of the case in Part II, this Comment will explore the legal background of *McCollum* in Part III.⁸ Part IV will discuss the Supreme Court's

1. *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

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

3. A peremptory challenge is a challenge without cause. The exercise of peremptory challenges is by nature, therefore, discriminatory. For purposes of this comment, however, "discriminatory exercise of peremptory challenge" means exercising those challenges in a racially discriminatory manner.

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

5. *See Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991).

6. 112 S. Ct. 2348 (1992).

7. *Id.* at 2359.

8. *See infra* notes 24-75 and accompanying text.

disposition of *McCullum*.⁹ This Comment will then explore and critically analyze the reasoning of the *McCullum* Court's decision. Specifically, Part V-A critiques the Court's exaggerated concern with the right of potential jurors to sit on a jury.¹⁰ Part V-B evaluates the Court's decision that a criminal defendant is a state actor, and concludes that the Court unduly expanded the state action doctrine and ignored prior principles of state action.¹¹ Finally, in Part V-C, the Comment explores the Court's determination that the prospective juror's equal protection rights outweigh a criminal defendant's rights, and concludes that the Court underestimated the value of the free use of peremptory challenges by criminal defendants.¹²

II. STATEMENT OF THE CASE

On August 10, 1990, the defendant was indicted and charged with aggravated assault and simple battery.¹³ The indictment alleged that the defendant, who was white, had beaten two African Americans.¹⁴ The prosecution moved to prohibit the defendant from exercising peremptory challenges in a racially-discriminatory manner.¹⁵ According to the prosecution, the defendant's counsel indicated an intent to use the twenty peremptory challenges to exclude African Americans, in an attempt to seat an all-white jury.¹⁶

Invoking *Batson v. Kentucky*,¹⁷ the Sixth Amendment, and the Georgia State Constitution, the prosecution sought an order requiring the defendant to articulate a race-neutral explanation for the peremptory challenges.¹⁸ The trial judge denied the state's motion, reasoning that "neither Georgia nor federal law prohibits criminal defendants from exercising peremptory strikes in a racially discriminatory manner."¹⁹

On appeal,²⁰ the Supreme Court of Georgia affirmed the trial court, noting that *Edmonson v. Leesville Concrete Co.*²¹ applied to private civil litigants, not

9. See *infra* notes 76-84 and accompanying text.

10. See *infra* notes 85-92 and accompanying text.

11. See *infra* notes 93-119 and accompanying text.

12. See *infra* notes 120-46 and accompanying text.

13. *Georgia v. McCollum*, 112 S. Ct. 2348, 2351 (1992).

14. *Id.*

15. *Id.*

16. *Id.*

17. 476 U.S. 79 (1986).

18. *Georgia v. McCollum*, 112 S. Ct. 2348, 2351-52 (1992).

19. *Id.* at 2352.

20. The issue was certified for immediate appeal to the Georgia Supreme Court. *Id.* at 2348.

21. 111 S. Ct. 2077 (1991). See *infra* notes 59-77 and accompanying text.

criminal defendants.²² In its opinion, the Georgia Supreme Court stated:

While it may be that the United States Supreme Court may, in another case, prohibit a criminal defendant from exercising peremptory challenges to exclude jurors on the basis of race, it has not yet done so. Bearing in mind the long history of jury trials as an essential element of the protection of human rights, this court declines to diminish the free exercise of peremptory strikes by a criminal defendant.²³

The United States Supreme Court granted the petition for a writ of certiorari to decide whether a criminal defendant's use of the peremptory challenge in a racially discriminatory manner violates the Equal Protection Clause of the Constitution.

III. LEGAL BACKGROUND OF THE CASE

The Fourteenth Amendment, adopted in 1868, prohibits the states from depriving persons "of life, liberty, or property, without due process of law."²⁴ The amendment further provides that no person can be denied the "equal protection of the laws."²⁵ Just twelve years after the Fourteenth Amendment's ratification, the Supreme Court used equal protection to regulate the jury selection process.

In *Strauder v. West Virginia*,²⁶ the Court held that a West Virginia statute making African-Americans ineligible for grand or petit jury service violated the Fourteenth Amendment's equal protection guarantees.²⁷ Although the Court did not face the question of whether a defendant has a "right to a grand or petit jury composed in whole or in part of persons of his own race or color,"²⁸ it did hold that persons of the defendant's race may not be excluded from the jury

22. *State v. McCoilum*, 405 S.E.2d 688 (Ga. 1991), *rev'd*, *Georgia v. McCollum*, 112 S. Ct. 2348 (1992).

23. *Id.* at 689. Three justices dissented, arguing that the long line of United States Supreme Court decisions establish that racially motivated peremptory strikes by a criminal defendant violate the Constitution. *Id.* at 689-93.

24. U.S. CONST. amend. XIV, § 1.

25. *Id.*

26. 100 U.S. 303 (1879).

27. *Id.* at 305. (quoting 1872-1873 W. Va. Acts 102, which provides in pertinent part: "All white male persons, who are twenty-one years of age, and who are citizens of this state, shall be liable to serve as jurors, except as herein provided.").

28. *Id.*

by law solely because of their race or color.²⁹ Since *Strauder*, the Court has looked beyond the juror-qualification statutes and has found invalid the implementation of facially neutral laws in a discriminatory manner.³⁰ As the Court stated in *McCullum*, "[o]ver the last century, in an almost unbroken chain of decisions, this Court gradually has abolished race as a consideration for jury service."³¹

In *Swain v. Alabama*,³² the Court was directly confronted with the issue of whether the discriminatory use of the peremptory challenge during petit jury selection was subject to equal protection scrutiny. The prosecution in *Swain* struck all six African Americans from the petit jury with peremptory challenges, and the defendant argued that the petit jury was void because it was chosen in a racially discriminatory way.³³ On appeal, the United States Supreme Court refused to hold that the Constitution requires an examination into the prosecutor's reasons for the exercise of peremptory challenges in any given case.³⁴

The Court did, however, hold that systematic strikes of African American veniremen raised a different issue.³⁵ Such a pattern, the Court stated, could rise to the level of a *prima facie* case of a prosecutor denying African

29. *Id.* at 310. The Court also held that the exclusion of African American jurors violates the African American defendant's right to equal protection, because: "[i]t is well known that prejudices often exist against particular classes in the community, which may sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy." *Id.* at 309.

Some commentators have interpreted this statement as asserting that a white jury is not likely to give a fair trial in many instances to an African American defendant. See, e.g., Albert Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 188-91 (1989); Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 124 (1990).

30. See, e.g., *Hernandez v. Texas*, 347 U.S. 475, 478-79 (1954); *Avery v. Georgia*, 345 U.S. 559, 561 (1953); *Norris v. Alabama*, 294 U.S. 587, 589 (1935); *Ex Parte Virginia*, 100 U.S. 339, 346-47 (1886); *Neal v. Delaware*, 103 U.S. 370, 397 (1881).

31. *Georgia v. McCullum*, 112 S. Ct. 2348, 2352 (1992).

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

33. *Id.* at 203. The trial judge overruled the defendant's objections, and the Alabama Supreme Court subsequently affirmed. 156 So. 2d 368 (Ala. 1963).

34. *Swain v. Alabama*, 380 U.S. 202, 222 (1965). According to the Court, once the challenge stage of jury selection begins, African Americans are, like the "white, Protestant and Catholic . . . subject to being challenged without cause." *Id.* at 221. The Court also examined the nature of the peremptory challenge and concluded that "it is often exercised upon the 'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another.'" *Id.* at 220 (citing *Lewis v. United States*, 146 U.S. 370, 376 (1892)).

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

Americans the right to serve on a jury.³⁶ Despite the fact, however, that “no Negro ha[d] actually served on a petit jury” in Talladega County, Alabama, for fourteen years,³⁷ the Court held that no *prima facie* case of discrimination existed, because the defendant failed to lay the proper foundation showing that “the prosecutor alone” was responsible.³⁸

In *Batson v. Kentucky*,³⁹ the Supreme Court overruled *Swain*’s evidentiary standard for establishing a *prima facie* case of discrimination in petit jury selection.⁴⁰ *Batson* involved a African American defendant’s criminal trial,⁴¹ in which the prosecutor used his peremptory challenges to remove all four African Americans on the venire, resulting in a jury composed entirely of whites.⁴² On appeal, the United States Supreme Court reversed the lower state court decision. The Court held that a defendant may establish a *prima facie* case of purposeful discrimination in selecting the petit jury solely on evidence of the prosecutor’s discriminatory use of peremptory challenges in that particular case, even if no pattern of systemic exclusion across cases could be shown.⁴³

A substantial amount of Justice Powell’s majority opinion in *Batson*

36. *Id.* The Court stated that an inference of purposeful discrimination would be raised if it were shown that a prosecutor:

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 served on petit juries.

Id.

37. *Id.* at 205.

38. *Id.* at 224. The burden of laying this foundation was quite high. Indeed, only two claims have successfully established a *prima facie* case of discrimination: *State v. Brown*, 371 So. 2d 751 (La. 1979), and *State v. Washington*, 375 So. 2d 1162 (La. 1979).

39. 476 U.S. 79, 80 (1986).

40. See Jonathan B. Mintz, Note, *Batson v. Kentucky: A Half Step in the Right Direction (Racial Discrimination and Peremptory Challenges Under the Heavier Confines of Equal Protection)*, 72 CORNELL L. REV. 1026, 1031 (1987).

41. *Batson*, 476 U.S. at 82.

42. *Id.* at 82-83. The trial judge rejected the arguments of the defense counsel that the removal of all African Americans denied the defendant equal protection of the law under the Fourteenth Amendment and denied him the right to a jury drawn from a cross section of the community. *Id.* at 83.

On appeal to the Kentucky Supreme Court, *Batson* largely abandoned his Fourteenth Amendment equal protection challenge and relied heavily on his Sixth Amendment argument that he was deprived of his constitutional right to an impartial jury drawn from a cross section of the community. *Id.* at 84-85. The Supreme Court of Kentucky affirmed the decision of the trial court, basing its decision on *Swain v. Alabama*. *Id.* at 84.

43. *Id.* at 96.

discussed how an equal protection violation may be proven.⁴⁴ If the defendant makes a *prima facie* showing of purposeful discrimination, the burden shifts to the prosecution to rebut the defendant's case.⁴⁵ The prosecution must come forward with a neutral explanation for the peremptory strike that is "related to the particular case to be tried."⁴⁶ The Court explicitly refused to detail any specific procedures to be followed by a trial court upon a defendant's objection to a peremptory challenge.⁴⁷ Instead, the Court left the specific implementation of the *Batson* procedures to lower state and federal courts.⁴⁸

The Court also declined to decide whether a criminal defendant's discriminatory use of peremptory challenges is similarly limited.⁴⁹ In his dissent, however, Chief Justice Burger posed the rhetorical question: "Once the Court has held that prosecutors are limited in their use of peremptory challenges, could we rationally hold that defendants are not?"⁵⁰

44. To establish a *prima facie* case of discrimination, the defendant must first show membership in a cognizable racial group and that the prosecutor exercised peremptory challenges to exclude members of the defendant's race from the petit jury. *Batson v. Kentucky*, 476 U.S. 79, 96 (1986). Second, the defendant may rely on the fact that peremptory challenges constitute a jury selection practice that provides an opportunity to discriminate. *Id.* Finally, the burden remains on the defendant alleging the discriminatory selection practice to show that the circumstances surrounding the use of the prosecutor's challenges create an inference that the prosecutor used peremptory challenges to exclude jurors on the basis of race. *Id.* This inference of purposeful exclusion, the Court noted, could arise from a pattern of conduct by the prosecutor or from questions and statements made by the prosecutor during *voir dire*. *Id.* at 96-97.

It has been subsequently held, however, that the mere fact that the prosecution used a peremptory challenge to exclude an African American venireperson does not create the inference of purposeful discrimination. *See, e.g., United States v. Lewis*, 837 F.2d 415, 417 (9th Cir. 1988); *United States v. Porter*, 831 F.2d 760, 767-68 (8th Cir. 1987); *United States v. Vaccaro*, 816 F.2d 443, 457 (9th Cir. 1987).

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

46. *Id.* The striking of one minority juror for racial reasons has been held to violate the Equal Protection Clause even if the striking of other minority jurors is justified by race neutral reasons. *See, e.g., Splunge v. Clark*, 960 F.2d 705 (7th Cir. 1992); *United States v. Battle*, 836 F.2d 1084 (8th Cir. 1987).

47. *Batson*, 476 U.S. at 99.

48. *Id.* at 99 n.24. Some commentators have criticized the lack of precise rules or procedures governing *Batson* challenges as so time consuming that Congress is likely to completely remove the peremptory challenge from our justice system. *See, e.g., William T. Pizzi, Batson v. Kentucky: Curing the Disease but Killing the Patient*, SUP. CT. REV. 97, 119 (1987) (arguing that *Batson* will unduly hamper the litigation process); David M. Kaston, Comment, *Vitiation of Peremptory Challenge in Civil Actions*: *Clark v. City of Bridgeport*, 61 ST. JOHN'S L. REV. 155 (1986) (arguing that *Batson* should not be extended and that the Court should adhere to the stricter *Swain* criteria).

49. *Batson v. Kentucky*, 476 U.S. 79, 89 n.12 (1986).

50. *Id.* at 126. *But see infra* notes 122-47 and accompanying text for an answer in the affirmative. Justice Marshall went a step further. He argued that peremptory strikes should be abolished altogether. *Id.* at 103 (Marshall, J., concurring). He argued that the Court's decision would not end racial discrimination in the exercise of peremptory challenges. *Id.* That goal, according to Justice Marshall, could only be accomplished by completely eliminating peremptory

In *Powers v. Ohio*,⁵¹ the Supreme Court held that a white criminal defendant has standing to raise the equal protection objection to a prosecutor's allegedly race-based exercise of peremptory challenges to exclude prospective African American jurors.⁵² In its holding, the Court maintained that the criminal defendant could assert the excluded juror's equal protection rights under principles of third-party standing.⁵³ The *Powers* majority did not discuss the claim that the practice of race-based peremptory challenges violates the defendant's own right to equal protection. Instead, it granted relief on the theory that race-based jury selection violates the equal protection rights of the excluded jurors.⁵⁴ The fact that the defendant's race differed from that of the juror was irrelevant, according to the Court, since "the utility of the peremptory challenge system must be accommodated to the command of racial neutrality."⁵⁵

In the dissent in *Holland v. Illinois*, Justice Scalia, joined by Chief Justice Rehnquist, rejected the right of a white defendant to assert these rights as an unwarranted and dangerous expansion of the Court's decision in *Batson*:

Not only does this [decision] exceed the rationale of *Batson*, but it exceeds *Batson*'s emotional and symbolic justification as well

I am unmoved, and I think most Americans would be, by this white defendant's complaint that he was sought to be tried by an all-white jury or that he should be permitted to press black jurors' unlogged complaint that they were not allowed to sit in judgment of him.⁵⁶

After *Batson* and *Powers*, it was inevitable that the courts would face the question of whether a civil litigant's use of the peremptory challenge in a racially discriminatory way implicates the equal protection clause.⁵⁷ Unlike a

challenges. *Id.* at 102-03.

51. 111 S. Ct. 1364 (1991).

52. *Id.*

53. *Id.* at 1370-73.

54. This result was foreshadowed by the Court's decision in *Holland v. Illinois*, wherein five justices stated that they would, if the issue presented itself, recognize the right of a white defendant to assert the equal protection rights of excluded African American jurors. See *Holland v. Illinois*, 493 U.S. 474, 488 (1990) (Kennedy, J., concurring); *id.* at 490 (Marshall, J., dissenting) (opinion joined by Justices Brennan and Blackmun); *id.* at 504 (Stevens, J., dissenting).

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

56. *Holland*, 493 U.S. at 434.

57. See Michael N. Chesney and Gerard T. Gallagher, Note, *State Action and the Peremptory Challenge: Evolution of the Court's Treatment and Implications for Georgia v. McCollum*, 67 NOTRE DAME L. REV. 1049, 1055 (1992).

criminal trial--such as in *Batson*--where the prosecutor is easily identifiable as a state actor, the use of peremptory challenges in a civil trial raises the more difficult question of whether state action is present.⁵⁸

The Supreme Court resolved this question in *Edmonson v. Leesville Concrete Co.*⁵⁹ In *Edmonson*, an African American man brought a negligence action against a construction company.⁶⁰ Two of the three jurors struck by the defendant were African American, and all of the jurors struck by the plaintiff were white.⁶¹ The plaintiff challenged the defendant's peremptory strikes under *Batson*, and requested that the district court require the defendant to articulate a race-neutral reason for striking the two African American jurors.⁶² The judge denied the request and held that *Batson* does not apply in civil proceedings.⁶³

On appeal, the Supreme Court reversed, holding that a civil litigant who uses a peremptory challenge to remove a juror on the basis of race violates the juror's equal protection rights.⁶⁴ To determine whether the race-based

58. The constitutional protections against infringement of individual liberty and equal protection apply in general only to action by the government. See *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179 (1988). Even blatantly discriminatory private conduct does not violate constitutionally guaranteed equal protection rights. See *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974). Thus, the finding of state action is generally a prerequisite to the finding of a constitutional violation.

Some lower federal courts considered the issue of whether a civil litigant's use of the peremptory challenge constitutes state action and disagreed on whether state action was present. See *Dunham v. Frank's Nursery & Craft's, Inc.*, 919 F.2d 1281 (7th Cir. 1990) (holding that a private litigant is a state actor for the purpose of a *Batson* challenge), *cert. denied*, 111 S. Ct. 2797 (1991); *Edmonson v. Leesville Concrete Co.*, 895 F.2d 218 (5th Cir. 1990) (en banc) (holding that there was no state action in the exercise of peremptory challenges by private litigants), *rev'd*, 111 S. Ct. 2077 (1991).

59. 111 S. Ct. 2077 (1991).

60. *Id.* at 2080.

61. *Id.* at 2081.

62. *Id.*

63. *Id.* As impaneled, the jury included eleven white persons and one African American person. *Id.*

64. *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2088 (1991). The equal protection component of the Fifth Amendment's Due Process Clause applies to the excluded jurors in federal court. The Fifth Amendment provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without the due process of law; nor shall private property be taken without just compensation.

U.S. CONST. amend. V.

peremptory challenges at issue were within the realm of state action, the *Edmonson* Court employed the two-part test set forth in *Lugar v. Edmondson Oil Co.*⁶⁵ In addressing the first part of the test, whether the constitutional deprivation was caused by the exercise of a state-created right or privilege, the Court found that the peremptory challenge easily meets this prong because it is a statutorily-created device.⁶⁶

The second part of the test, whether the party charged with the deprivation may be fairly said to be a state actor, led the Court to consider three factors: (1) whether the actor relied on state assistance and benefits;⁶⁷ (2) whether the actor performed a traditional state function;⁶⁸ and (3) whether the injury was aggravated in a unique way by the incident of state authority.⁶⁹ In considering these factors, the Court found, first, that the government's significant involvement in the jury selection process made it possible for private parties to exercise peremptory challenges.⁷⁰ Second, the Court held that the selection of jurors was a unique state function delegated in part to private litigants.⁷¹ Thus, discrimination in the selection of jurors resulted from government delegation and participation.⁷² Finally, the Court noted that the government's active participation in the jury selection process serves to aggravate the injury of discrimination.⁷³

65. See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). *Lugar* was the lessee-operator of a truckstop, and *Edmondson* was one of his suppliers. *Id.* at 924. *Edmondson* sued *Lugar* under § 1983, alleging deprivation of property without due process of law. *Id.* at 925. The district court held that there was no state action. *Id.* at 925. The Fourth Circuit affirmed. *Id.*

On appeal, the Supreme Court held that joint action with a state official to accomplish a prejudgment deprivation of a constitutionally protected property interest will support a claim against a private party. *Id.* at 928. The Court then addressed the proper standard for determining whether or not state action exists. The Court stated that the proper inquiry is whether "the conduct allegedly causing the deprivation of a federal right (is) fairly attributable to the State." *Id.* at 937. The Court stated that this inquiry has two parts:

First, 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. Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state.

Id.

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

67. *Id.* at 2084.

68. *Id.* at 2085.

69. *Id.* at 2087.

70. *Id.* at 2084. The Court noted that, in the federal system, Congress has statutorily provided for the qualifications of jurors, as well as the procedure for their selection. *Id.*

71. *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2087 (1991).

72. *Id.*

73. *Id.*

Having found state action, the final issue before the Court was whether a private litigant had standing to raise the equal protection rights of the excluded jurors. Relying on *Powers*,⁷⁴ the Court held that a private litigant could assert the rights of the excluded juror.⁷⁵

IV. THE SUPREME COURT DISPOSITION OF *GEORGIA V. MCCOLLUM*

In *McCollum*, the issue was whether criminal defendants can use peremptory challenges in a discriminatory manner. Despite the fact that the Court in *Edmondson* recently had found state action present in a civil defendant's discriminatory use of a peremptory challenge,⁷⁶ the question of whether a criminal defendant's discriminatory use of the peremptory challenge violates the Equal Protection Clause remained unanswered.⁷⁷ In a majority opinion authored by Mr. Justice Blackmun, the Court held that the Constitution prohibits criminal defendants from exercising peremptory challenges in a racially discriminatory manner.⁷⁸ In deciding whether the Constitution prohibits race-based peremptory challenges, the Court stated that it must ask four questions:

First, whether a criminal defendant's exercise of peremptory challenges in a racially discriminatory manner inflicts the harms addressed by *Batson*. Second, whether the exercise of peremptory challenges by a criminal defendant constitutes state action. Third, whether prosecutors have standing to raise the constitutional challenge. And fourth, whether the constitutional rights of a criminal defendant nonetheless preclude the extension of [Supreme Court] precedents to this case.⁷⁹

74. See *supra* notes 51-57 and accompanying text.

75. *Edmonson*, 111 S. Ct. at 2087-88. To overcome the general rule that a litigant cannot base a claim on the legal rights of a third party, the Court stated:

[A] litigant may raise a claim on behalf of a third party if the litigant can demonstrate that he or she has suffered a concrete, redressable injury, that he or she has a close relation with the third party, and that there exists some hindrance to the third party's ability to protect his or her own interests. All three of these requirements for third party standing were held satisfied in the criminal context, and they are satisfied in the civil context as well.

Id. at 2087.

76. See *supra* notes 59-75 and accompanying text.

77. This issue has received attention in the lower courts. Several states have held that a criminal defendant's discriminatory use of peremptory challenges violates their state constitutions. See, e.g., *People v. Wheeler*, 583 P.2d 748 (Cal. 1978); *State v. Neil*, 457 So. 2d 481 (Fla. 1984); *State v. Levinson*, 795 P.2d 845 (Haw. 1990); *Commonwealth v. Soares*, 387 N.E.2d 499 (Mass. 1979), *cert. denied*, 444 U.S. 881 (1979); *State v. Alverado*, 534 A.2d 440 (N.J. Super. Ct. Law Div. 1987); *People v. Kern*, 555 N.Y.S.2d 647 (N.Y. 1990), *cert. denied*, 111 S. Ct. 77 (1990).

78. *Georgia v. McCollum*, 112 S. Ct. 2348, 2359 (1992).

79. *Id.*

In considering these factors, the Court found, first, that the harm of subjecting the juror to public discrimination is the same whether the state or defense inflicts it, and therefore the harm is the same as that in *Batson*.⁸⁰ Second, the Court held that the exercise of peremptory challenges by a criminal defendant constitutes state action, because peremptory challenges are established by statute or decisional law, and a private party can be characterized as a state actor.⁸¹ Third, the Court found that prosecutors have standing to raise an equal protection challenge on behalf of excluded jurors.⁸² Finally, the Court held that the constitutional rights of a criminal defendant did not preclude an extension of *Batson*.⁸³ The Court, therefore, concluded that the criminal defendant's use of peremptory challenges in a racially discriminatory manner was unconstitutional.⁸⁴

V. ANALYSIS

Although the Court may have improved the perception of juries with some members of the public, the *McCullum* decision is wrong. The Court has simply decided that the fundamental and long-held rights of criminal defendants are less important than the right of citizens to sit on juries. Having decided this, the Court wrongly characterized criminal defendants as state actors when exercising peremptory challenges. This wide expansion of state actor status ignores important qualities of the criminal defendant that separate him from other litigants and that makes his use of the peremptory challenge, even if based on racial stereotypes, justifiable.

80. *Id.* at 2358. See *infra* notes 85-92 and accompanying text.

81. *Georgia v. McCollum*, 112 S. Ct. 2348, 2359 (1992). See *infra* notes 93-119 and accompanying text.

82. *Id.* See *infra* note 120.

83. *Id.* at 2358-59. See *infra* notes 120-146 and accompanying text.

84. Chief Justice Rehnquist filed a concurring opinion in which he maintained that the Court's decision in *Edmondson* was wrongly decided but, because that decision remains the law and therefore controls the *McCullum* decision, he joined the opinion of the Court. *Id.* at 2359.

Justice Thomas also concurred, expressing concern that the decision, "while protecting jurors, leaves defendants with less means of protecting themselves." *Id.* at 2360. He also noted that the Court's decision "has taken [the Court] down a slope of inquiry that has no clear stopping point." *Id.*

Two Justices dissented. Justice O'Connor, in her dissent, argued that the majority's finding of state action was incorrectly decided. She stated that "our decisions specifically establish that criminal defendants and their lawyers are not government actors when they perform traditional trial functions." *Id.* at 2361.

Further, Justice Scalia dissented, agreeing with Justice O'Connor that state action is not present when a criminal defendant exercises peremptory challenges. *Id.* at 2364-65.

A. *The Harms Addressed by Batson*

To satisfy itself that a racially motivated use of the peremptory challenge by criminal defendants violates the equal protection rights of excluded jurors, the majority in *McCullum* first asked whether the criminal defendant's exercise of peremptory challenges based on race inflicts the same harms as addressed by *Batson*.⁸⁵ The Court initially recognized that *Batson* was designed to further many goals, "only one of which was to protect individual defendants from discrimination in the selection of jurors."⁸⁶ By focusing on the protection of the excluded juror, as the Court had done in *Batson*, as well as in *Edmondson* and *Powers*, the Court was able to conclude that "[r]egardless of who invokes the discriminatory challenge, there can be no doubt that the harm is the same."⁸⁷

Focusing attention on the rights of the excluded jurors, as the Court has done since *Batson*, has some value. Removing racial discrimination from the justice system, for instance, is undoubtedly an important goal toward which the Supreme Court should and does aspire. In extending the holding in *Batson* to criminal defendants, however, the Court places the potential juror's right not to be racially stereotyped above vital procedural rights of the accused.⁸⁸

Perhaps equally dangerous, though, is the *McCullum* Court's apparent attempt to cater to public opinion with its decision.⁸⁹ The Court's concern with

85. *Id.* at 2353.

86. *Georgia v. McCollum*, 112 S. Ct. 2348, 2353 (1992) (citation omitted). Although the defendant in *Batson* asserted his own rights, the Court later noted in its holding that the rights of the excluded juror were also implicated:

Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try. Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence at trial . . . [and a]s long ago as *Strauder*, therefore, the Court recognized that by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror.

Batson v. Kentucky, 476 U.S. 79, 87 (1986) (citations omitted).

87. *McCullum*, 112 S. Ct. at 2353.

88. See *infra* notes 120-46 and accompanying text.

89. There is much evidence that the concerns of society are beginning to outweigh the right of the accused to a fair trial. For instance, Alex Kozinski (Judge on the U.S. Court of Appeals for the Ninth Circuit) points out that there are strains in our case law that allow the rights of others to be considered in trials; the right of the press to cover a trial; and the gradual expansion of *Batson* to give members of the venire the right not to be racially excluded from jury service. See Darlene Ricker, *Holding Out*, A.B.A. J., Aug. 1992, at 51.

Other evidence exists that our justice system is being held hostage to political behavior. For instance, in the retrial of a Miami police officer charged with manslaughter in the deaths of two African American men, Dade County Circuit Judge W. Thomas Spencer cited the "Rodney King verdict" in ordering a change of venue, hoping that such a change would improve the odds that

racial discrimination did not cease with excluded jurors, but extended to the community as a whole. This concern is clearly evident in *McCullum*, as the Court found:

[T]he harm from discriminatory jury selection extends beyond that inflicted on the . . . excluded juror to touch the entire community . . . [T]he need for public confidence is especially high in cases involving race-related crimes Public confidence in the integrity of the criminal justice system is essential for preserving community peace in trials involving race-related crimes.⁹⁰

Thus, in an attempt to improve public perceptions of our justice system, the Court severely weakened the peremptory challenge, an essential device for the criminal defendant's fair trial.⁹¹ Unlike *Batson*, though, in which the Court took the peremptory challenge away from the state to eliminate racial discrimination, the Court in *McCullum* unfairly placed the burden of eradicating racial discrimination upon the criminal defendant. Moreover, the Court seemed to entirely neglect the fact that it is the accused who has much to lose, sometimes even his life.⁹² Improving racial relations in American society is unquestionably necessary to our success as a nation. Neglecting vital procedural

African Americans would be seated on the jury. See Mark Hansen, *Different Jury, Different Verdict?*, A.B.A. J., Aug. 1992, at 54.

In a Washington, D.C. civil trial alleging police use of excessive force, Superior Court Judge Michael Rankin allowed jurors to take a day off from their deliberations to participate in a protest of the "Rodney King verdict." *Id.* Note that even the phrase "Rodney King verdict" reveals the political focus of trials. In reality its proper name is *People v. Powell, et al. Id.*

Lawmakers in New Jersey and California have proposed legislation designed to avoid a repeat of the rioting that followed the acquittal of the police officers who beat Rodney King by requiring, for the first time, that demographics be taken into account in any decision to change a trial's venue. *Id.* at 55.

Finally, under a bill introduced in the New Jersey legislature, a judge who decides to move a trial would be required to select a new venue with the same racial, ethnic, and socioeconomic characteristics as the original site. *Id.*

90. *McCullum*, 112 S. Ct. at 2353 (citation omitted).

91. As Justice Scalia aptly points out:

In the interest of promoting the supposedly greater good of race relations in the society as a whole (make no mistake that this is what underlies all of this), we use the Constitution to destroy the age-old right of criminal defendants to exercise peremptory challenges as they wish, to secure a jury that they consider fair.

Id. at 2365 (Scalia, J., dissenting).

92. See 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, 837 (1989) (stating that a prohibition against race-based peremptory challenges does not jeopardize the procedural fairness of trials from the prosecutors point of view. For defendants, however, those limitations would impair the ability to establish a defense free from state interference and would mean that a defendant's role in the jury selection process would no longer be consonant with his or her personal stake in the jury's decision.).

rights of criminal defendants, however, is the wrong way to reach that goal.

B. State Action

The second question that the *McCullum* Court asked in order to find an equal protection violation in a criminal defendant's discriminatory use of the peremptory challenge was whether state action exists.⁹³ When approaching the question of whether the state's involvement with a private party constitutes state action, the Court has struggled unsuccessfully to fashion a meaningful standard.⁹⁴ Professors Nowak and Rotunda have suggested that the Court will not find state action when it deems the challenged practice compatible with the Fourteenth Amendment, but will find state action when it finds that the harm to protected rights outweighs the value of the challenged practice.⁹⁵ Considering the emphasis placed on the rights of potential jurors not to be racially stereotyped, the Court's finding of state action may not be so surprising. Nonetheless, the Court's decision that a criminal defendant's use of peremptory challenges constitutes state action is, as Justice O'Connor described it, "a remarkable conclusion."⁹⁶

As it did in *Edmonson*, the Court employed the two-prong analysis of *Lugar v. Edmondson Oil* to determine whether state action existed.⁹⁷ The Court held that the first prong, whether the alleged deprivation has resulted from the exercise of a right or privilege having its source in state authority, was satisfied.⁹⁸ The Court maintained that, since the state provided the peremptory challenge, "there can be no question" that the challenges satisfy *Lugar's* first

93. Although the Court's burden of finding state action in the context of *McCullum* may have been eased somewhat by its recent decision in *Edmonson*, the conclusion that a criminal defendant was a state actor was not at all certain. See Goldwasser, *supra* note 92, at 820 (stating that the adversarial relationship between the state and the defendant in criminal cases compels the conclusion that a defendant's use of peremptory challenges is not state action). But see Chesney & Gallagher, *supra* note 57, at 1077 (maintaining that the Court should find state action in a criminal defendant's use of peremptory challenges).

94. The Court has formulated several tests for determining when private conduct is attributable to the state, but has also recognized that these tests may be nothing more than "different ways of characterizing the necessarily fact-bound (state action) inquiry." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982). This case-by-case analysis basically amounts to determining whether there is a sufficient quantum of state connections to a particular activity to subject that activity to the strictures of the Fourteenth Amendment, even though that activity is performed by a private party. See JOHN NOWAK & RONALD ROTUNDA, CONSTITUTIONAL LAW 483 (4th ed. 1991). [Hereinafter NOWAK & ROTUNDA].

95. See NOWAK & ROTUNDA, *supra* note 94, at 485.

96. *McCullum v. Georgia*, 112 S. Ct. 2348, 2361 (1992) (O'Connor, J., dissenting).

97. See *supra* note 65 for a description of the *Lugar* test.

98. *McCullum*, 112 S. Ct. at 2354.

prong.⁹⁹

The second prong of the *Lugar* test requires that "the private party charged with the deprivation [of constitutional rights] can be described as a state actor."¹⁰⁰ Just as in *Edmonson*, the second prong required a lengthier analysis. The Court identified three factors to determine whether *Lugar's* second prong was satisfied.¹⁰¹

The Court's analysis of the first factor, the extent to which the actor relies on governmental assistance and benefits, was brief. The Court stated that a criminal defendant relies on "governmental assistance and benefits" as much as a civil litigant does.¹⁰² Because *Edmonson* held that a civil litigant sufficiently relies on governmental assistance and benefits enough to constitute state action, the majority in *McCollum* concluded that a criminal defendant's exercise of a peremptory challenge similarly constitutes state action.¹⁰³

The conclusory manner in which the Court found this factor satisfied is troubling. The tremendous stake that a criminal defendant has in his own trial should have given the Court reason to pause and re-examine the assistance and benefits factor. Moreover, the decision in *Edmonson* with respect to this factor was arguably incorrectly decided.¹⁰⁴ As Justice Scalia aptly pointed out in his

99. *Id.* at 2354-55.

100. *Id.* at 2355. Interestingly, the second prong was phrased differently in *Lugar*. It read: "whether the private party charged with the deprivation could be described *appropriately and in all fairness* as a state actor." *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2091 (1991) (citation omitted) (emphasis added). Not surprisingly, Justice O'Connor reminded the Court of this in her dissent when she noted that "[w]hat our cases require, and what the Court neglects, is a realistic appraisal of the relationship between defendants and the government that has brought them to trial." *McCollum*, 112 S. Ct. at 2361 (O'Connor, J., dissenting).

101. See *supra* notes 67-69 and accompanying text.

102. *Georgia v. McCollum*, 112 S. Ct. 2348, 2355 (1992).

103. *Id.*

104. The Court in *Edmonson* cited *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), for support that a private lawyer is a state actor, yet *Burton* is clearly distinguishable. *Burton* involved a restaurant on state property that admitted only white persons. *Id.* at 716. The restaurant received rent from the restaurant operator, who leased it from the state. *Id.* at 720. The Court held that the restaurant operator could be fairly characterized as a state actor. *Id.* at 725. Clearly, in this situation a restaurant operator who earns much, if not all, of his livelihood from a state-owned business is assisted by and benefits from his contract with the state.

The assistance and benefits an attorney and his client receive from the state, however, are distinguishable. An attorney and client do receive some benefits from the state, including the peremptory challenge. These benefits, however, are broad, and result from a procedure designed to benefit the entire justice system. In contrast, the benefit and assistance that the restaurant operator received from the state in *Burton* was much greater.

Justice O'Connor recognized this in her dissent in *Edmonson*, where she pointed out that "[d]espite the fact that the courthouse and its procedures are inseparable from the practice of law,

dissent, "a bad decision should not be followed logically to its illogical conclusion."¹⁰⁵

The Court found that the second factor, whether the actor is performing a traditional governmental function, is satisfied by a criminal defendant's use of a peremptory challenge.¹⁰⁶ The Court noted that, in the context of a criminal defendant, this is especially the case.¹⁰⁷ This is so, according to the Court, "because the selection of a jury in a criminal case fulfills a unique and constitutionally compelled governmental function."¹⁰⁸

The Court's analysis of the second factor dangerously broadens the concept of traditional governmental function. The government and criminal defendant are adversaries, and the principle function of a criminal jury in our system has always been to provide "a defense against arbitrary law enforcement."¹⁰⁹ Justice O'Connor reminded the Court of this in her dissent in *Edmonson*, when she stated that "challenges are not a traditional governmental function; the tradition is one of unguided private choice."¹¹⁰ Nevertheless, the Court in *McCollum* chose to focus on the tradition of government's selection of juries, rather than the long tradition of protecting the procedural rights of the accused. Thus, the *McCollum* majority unfairly widened the concept of traditional governmental function to encompass a criminal defendant's use of peremptory challenges.

Finally, the Court considered a third factor, asking whether the injury was aggravated in some unique way by the incidents of government authority.¹¹¹ The Court found this factor easily satisfied because the courtroom setting, as it found in *Edmonson*, "intensifies the harmful effects of the private litigant's discriminatory act."¹¹²

Despite the satisfaction of the *Lugar* test, the Court was faced with the task of reconciling the decision that state action exists in *McCollum* with the earlier decision of *Polk County v. Dodson*,¹¹³ in which the Court held that a public

riding a bus is not converted into state action merely because the government has built the road and provided public transportation." *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2090 (1991) (O'Connor, J., dissenting).

105. *McCollum*, 112 S. Ct. at 2365.

106. *Georgia v. McCollum*, 112 S. Ct. 2348, 2355 (1992).

107. *Id.*

108. *Id.*

109. *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

110. *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2093 (1991).

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

112. *Id.*

113. 454 U.S. 312 (1981).

defender was not a state actor when engaged in adversarial functions.¹¹⁴ The Court distinguished *Polk County* by stating that “[t]he exercise of a peremptory challenge differs significantly from other action taken in support of a defendant’s defense. In exercising a peremptory challenge, a criminal defendant is wielding the power to chose a quintessential governmental body--indeed, the institution of government is one upon which our judicial system depends.”¹¹⁵

The best that can be said about the Court’s finding of state action in light of its prior precedent is that it requires some “deft maneuvering.”¹¹⁶ Certainly, it is a decision that, as Justice O’Connor notes, “simply cannot be squared with [the Court’s decision in *Polk County*].”¹¹⁷ The Court’s state action analysis in *McCollum*, moreover, should raise serious concerns. The concept of state action is a fundamental principle that defines the limit of the Constitution and separates the private sphere from the government. In *McCollum*, the majority unduly expands the state action doctrine by failing to recognize the private nature of a criminal defendant. The precedential effects that this expansion will have on state action theory will likely be troublesome. Even more dangerous, though, is the immediate effect that will surely be felt by criminal defendants. The criminal defendant and prosecution are adversaries, and the accused has, therefore, traditionally been given procedural safeguards considered essential to a fair trial.¹¹⁸ Most notable of these protections is the peremptory challenge.¹¹⁹

114. *Polk County*, 454 U.S. at 318. The issue in *Polk County* was whether a public defender acts “under color of state law.” *Id.* at 314. The Court found that a public defender functions as an adversary of the state in a criminal trial. *Id.* at 320. Thus, the Court could not find any “color of state law” in the public defender’s adversarial functions. *Id.* Despite this, however, the Court did leave open the possibility that a public defender “would act under color of state law while performing certain administrative and possibly investigative functions.” *Id.* at 325. See also *Tower v. Glover*, 467 U.S. 914, 920 (1983) (stating that “[a]ppointed counsel in a state criminal prosecution . . . does not act ‘under color of’ state law in the normal course of conducting the defense.”).

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

116. One commentator has noted that “*McCollum* continues the tradition of reading *Batson* broadly even if that means engaging in some deft maneuvering to find the constitutional requirement of ‘state action’ in the activities of the criminal defense bar.” Stephanie B. Goldberg, *Batson and the Straight-Face Test*, A.B.A. J., Aug. 1992, at 82.

117. *Georgia v. McCollum*, 112 S. Ct. 2348, 2362 (1992) (O’Connor, J., dissenting).

118. See *infra* notes 120-46 and accompanying text.

119. See *supra* notes 1-2 and accompanying text.

C. *Rights of the Criminal Defendant*

The Court's fourth and final inquiry¹²⁰ was whether the interests served by *Batson* must give way to the rights of a criminal defendant.¹²¹ Initially, the Court noted that the right to exercise peremptory challenges is not a constitutionally protected fundamental right, but rather "one state-created means to the constitutional end of an impartial jury and fair trial."¹²² The Court then considered three specific rights of the criminal defendant: first, the right to a fair trial; second, the Sixth Amendment right to effective assistance of counsel; and third, the Sixth Amendment right to a trial by an impartial jury.¹²³ The Court concluded that prohibiting the use of peremptory challenges in a racially discriminatory way does not violate these rights.¹²⁴

First, the Court decided that denying a criminal defendant the use of racially-motivated peremptory challenges would not undermine a defendant's right to a fair trial.¹²⁵ The Court retreated from this conclusion, though, because it then stated: "nonetheless, 'if race stereotypes are the price for acceptance of a jury panel as fair,' we reaffirm today that such a 'price is too high to meet the standard of the Constitution.'"¹²⁶ Thus, the Court did not really wish to preserve a criminal defendant's right to a fair trial, which the unfettered use of the peremptory challenge secures. Rather, the Court simply

120. The Court's third inquiry was whether the prosecution has third party standing to raise the rights of the excluded juror. *McCollum*, 112 S. Ct. at 2357. Because the issue of third party standing was settled in *Powers*, the Court in *McCollum* did not expand or modify the law in this area. Thus, only brief mention will be made of the Court's analysis.

The *McCollum* Court applied the same three-part test which had been applied in *Edmonson* and *Powers*. The test asks: first, whether the litigant can demonstrate that he or she has suffered a concrete injury; second, whether the litigant has a close relation to the third party; and third, whether there exists some hindrance to the third party's ability to protect its own interests. *McCollum*, 112 S. Ct. at 2357.

The Court found the first part of the test satisfied because the state suffers an injury when the integrity of the judicial process is undermined by the exercise of discriminatory peremptory challenges. *Id.* Second, the state has a close relation to potential jurors because the state represents its citizens. *Id.* Finally, the Court found that the third part of the test was satisfied because the barriers to a lawsuit by an excluded juror are formidable. *Id.*

121. *McCollum*, 112 S. Ct. at 2357-58.

122. *Georgia v. McCollum*, 112 S. Ct. 2348, 2358 (1992). However, the Court also stated that in *Swain*, it recognized the "long and widely held belief that the peremptory challenge is a necessary part of trial by jury." *Id.* (quoting *Swain v. Alabama*, 380 U.S. 202, 219 (1965)). In *Edmonson*, the Court also recognized that "the role of litigants in determining the jury's composition provides one reason for wide acceptance of the jury system and of its verdicts." *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2090 (1991).

123. *Id.* at 2358.

124. *Id.*

125. *Id.*

126. *Georgia v. McCollum*, 112 S. Ct. 2348, 2358 (1992) (citation omitted).

decided that there can be no discrimination on the basis of race in the use of peremptory challenges, regardless of any adverse effects that this decision might have on criminal defendants.

There can be no doubt that removing racial discrimination from our justice system is a praiseworthy goal. Thus, the Court's decision in *Batson* denying the State the right to use peremptory challenges in a racially discriminatory manner is correct, and was long overdue. The decision in *McCullum*, though, is flawed because it fails to take into account the unique qualities of a criminal defendant that make his or her use of the peremptory challenge, even if based on race, justifiable. Moreover, considering what is at stake for the accused, eliminating a fundamental procedural protection, such as the peremptory challenge, should have given the Court reason to hesitate.¹²⁷

History illustrates that the purpose behind granting criminal defendants the right to trial by jury was "to prevent oppression by the government."¹²⁸ A part of this right traditionally includes the peremptory challenge, which "has long been recognized primarily as a device to protect defendants."¹²⁹ Therefore, early statutes granted peremptory challenges only to defendants, and even today many jurisdictions still allow a greater number to the defense.¹³⁰

The functions of the peremptory challenge also explain why its use by criminal defendants is justified, even when based on racial stereotypes. First, the peremptory challenge is necessary to "eliminate extremes of partiality on both sides."¹³¹ Furthermore, the peremptory challenge is of critical importance to the criminal defendant because of the way the challenge gives effect to a criminal defendant's personal reaction to those who might decide his

127. As Justice Thomas stated: "In effect, we have exalted the right of citizens to sit on juries over the rights of the criminal defendant, even though it is the defendant, not the jurors, who faces imprisonment or even death. At a minimum, I think that this inversion of priorities should give us pause." *Id.* at 2360 (concurring opinion).

128. *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968). See also *Patton v. United States*, 281 U.S. 276 (1930), where the Court observed that "[t]he record of English and Colonial jurisprudence antedating the Constitution will be searched in vain for evidence that trial by jury in criminal cases was regarded as part of the structure of government, as distinguished from a right or privilege of the accused." *Id.* at 296.

129. *Swain v. Alabama*, 380 U.S. 202, 242 (1965) (Goldberg, J., dissenting). See also 4 WILLIAM BLACKSTONE, COMMENTARIES 353 (stating "in criminal cases, or at least in capital ones, there is . . . allowed to the prisoner an arbitrary and capricious species of challenge . . . which is called a peremptory challenge; a provision full of that tenderness and humanity to prisoners." (citation omitted)). See also Goldwasser, *supra* note 92.

130. JON M. VAN DYKE, JURY SELECTION PROCEDURES 145, 282-84 (1977) (listing 15 states that allow the defense more peremptory challenges than the prosecution in all felony prosecutions and no states that allow the prosecution more peremptories).

131. *Swain v. Alabama*, 380 U.S. 202, 219 (1965). See generally Goldwasser, *supra* note 92.

or her case.¹³² Professor Goldwasser notes that giving effect to such personal reactions as "dislike" may not be compatible with our notions of justice, but only where the prosecution is concerned.¹³³ For the defendant, Goldwasser maintains, everything about a criminal trial is intensely personal, and giving effect to a defendant's personal reaction acknowledges this unique personal stake in the outcome.¹³⁴

The Supreme Court has clearly recognized the importance of allowing peremptory challenges by the defendant. In *Lewis v. United States*,¹³⁵ the Court stated that "[t]he right of the peremptory challenge comes from the common law with the trial by jury itself, and has always been held essential to the fairness of trial by jury."¹³⁶

The Court also considered the defendant's Sixth Amendment right to the effective assistance of counsel.¹³⁷ The Court decided, however, that this right was not violated because "counsel can ordinarily explain the reasons for peremptory challenges without revealing anything about the trial strategy or any confidential client communications."¹³⁸ The Court's treatment of this right clearly departs from prior cases that more fully protected a criminal defendant's right to effective assistance of counsel. The Supreme Court recognized the importance of this right in *Weatherford v. Bursey*,¹³⁹ when it stated that "the Sixth Amendment's assistance of counsel guarantee can be meaningfully implemented only if a criminal defendant knows that his communications with his attorney are private and that his lawful preparations for trial are secure against intrusion by the government, his adversary in the criminal proceeding."¹⁴⁰

132. See Goldwasser, *supra* note 92, at 829. Professor Goldwasser describes this function as an intuitive reaction, for which the best word might be "dislike." *Id.* Dislike may result from a belief that a potential juror favors the other side, or is biased against one's own side. *Id.* At other times, however, it may be wholly unexplainable except by saying "I do not like (or feel comfortable with) that person." *Id.* See also BLACKSTONE, *supra* note 129, at 353 (stating "how necessary it is that a prisoner . . . should have a good opinion of his jury, the want of which might totally disconcert him").

133. *Id.*

134. *Id.*

135. 146 U.S. 370 (1892). In *Lewis*, the defendant was required to use his peremptories from a list of names, outside the presence of the prospective jurors. *Id.* at 375-76. On appeal, the Court overturned his conviction. *Id.* at 380.

136. *Id.* at 376. For support, the Court cited Blackstone, who described the peremptory challenge as "a provision full of . . . tenderness and humanity to prisoners." *Id.* (quoting BLACKSTONE, *supra* note 129, at 353); see *supra* note 132.

137. *Georgia v. McCollum*, 112 S. Ct. 2348, 2358 (1992).

138. *Id.*

139. 429 U.S. 545 (1977).

140. *Id.* at 554 n.4.

Finally, the Court considered the defendant's Sixth Amendment right to a trial by an impartial jury.¹⁴¹ The Court noted that a challenge for cause exists, which allows defendants to remove "those on the venire whom the defendant has specific reason to believe" would be racist.¹⁴² Thus, the Court concluded that "the exercise of a peremptory challenge must not be based on either the race of the juror or the racial stereotypes held by the party."¹⁴³

What the Court ignored in its conclusion is that not all stereotypes are inaccurate, and not all bias can be detected during voir dire. It is, indeed, disturbing that our American heritage includes racism, and our society is often divided along racial lines. However, because of this division, it is possible to generalize with some accuracy about an individual's biases and predispositions based on his or her race.¹⁴⁴

Furthermore, the Court's conclusion that a mechanism exists to remove bias is of little help to the accused. First, potential jurors in a public setting are unlikely to admit being prejudiced.¹⁴⁵ Second, even honest potential jurors may not be aware of their own biases.¹⁴⁶ Thus, the challenge for cause alone will not assure a fair trial for the accused. What is required, and what the Court has traditionally protected, is the criminal defendant's free use of the peremptory challenge.

VI. CONCLUSION

In a strained effort to ease what the Court perceived as dissatisfaction with

141. *McCullum*, 112 S. Ct. at 2358.

142. *Georgia v. McCullum*, 112 S. Ct. 2348, 2359 (1992).

143. *Id.*

144. Goldwasser, *supra* note 92, at 837. In addition, Professor Goldwasser notes that some studies have found that juror race may actually affect the outcome of a criminal trial. See, e.g., Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1625-31 (1985) (showing that mock studies suggest that racial bias affects the determination of guilt). See also, Denis Chimaeze E. Ugwuegbu, *Racial and Evidential Factors in Juror Attribution of Legal Responsibility*, 15 J. EXPERIMENTAL SOC. PSYCHOL. 133 (1979) (concluding that defendants who are of a different race from their jurors are considered by the jurors to be more culpable than those in cases in which defendants and jurors are of the same race). See also, David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99.

145. See Thomas Colbert, *Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1583 (1988). This is a reality that has been acknowledged by the courts, as well. See, e.g., *Coppedge v. United States*, 272 F.2d 504, 508 (D.C. Cir. 1959) (noting that prospective jurors were unlikely to admit being influenced by newspaper reports).

146. See Colbert, *supra*, note 145, at 1584. In addition, the Supreme Court recognized this over a century ago when it stated: "It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny persons of those classes the full enjoyment of that protection which others enjoy." *Strauder v. West Virginia*, 100 U.S. 303, 309 (1879).

our jury system, the majority in *McCullum* twisted precedent to find state action. In so doing, the Court ignored the reality of the antagonistic relationship between the government and the accused. Instead, the majority dogmatically asserted the ideal that prospective jurors should not be stereotyped on the basis of skin color, no matter what cost this value judgment entails, or who has to bear it. Ultimately, the decision in *McCullum* is wrong because the Court failed to recognize that the right of criminal defendants to a fair trial, which the unfettered use of the peremptory challenge secures, outweighs the equal protection rights of prospective jurors.

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