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# Edmonson v. Leesville Concrete Co.: State Action or Inaction - Does It Matter?

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STATE ACTION OR INACTION

— DOES IT MATTER?<sup>1</sup>

INTRODUCTION

Prior to *Batson v. Kentucky*<sup>2</sup> a prosecutor could exclude prospective black jurors for racial reasons if the prosecutor did not make a habit of it.<sup>3</sup> However, in *Batson*, the Supreme Court held that the exclusion of prospective jurors solely on the basis of race violated the equal protection clause.<sup>4</sup> *Batson* requires that the trial court inquire into a prosecutor's suspect strike and deny that strike if it was racially motivated.<sup>5</sup> Thus, the venerable right to peremptory challenge gave way, somewhat, to the constitutional right of equal protection.<sup>6</sup>

Several lower courts have applied *Batson* to a *state* in civil proceedings, too.<sup>7</sup> Courts have limited the principal to the state because of the state action prerequisite of the equal protection clause.<sup>8</sup> However, in *Edmonson v. Leesville Concrete Co.*,<sup>9</sup> the Fifth Circuit court of appeals applied *Batson* to civil proceedings between *private* litigants — an

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<sup>1</sup> Edmonson v. Leesville Concrete Co., 860 F.2d 1308 (5th Cir. 1988).

<sup>2</sup> *Batson v. Kentucky*, 476 U.S. 79 (1986).

<sup>3</sup> See *Swain v. Alabama*, 380 U.S. 202 (1965).

<sup>4</sup> *Batson*, 476 U.S. at 81. The Court noted that “[a] person’s race simply ‘is unrelated to his fitness as a juror.’” *Id.* at 87 (quoting *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)). In *Batson*, however, the primary issue was whether the prosecutor’s exercise of peremptory challenges, in a particular case, constituted purposeful racial discrimination against the black criminal defendant. See *infra* notes 44-58.

<sup>5</sup> *Id.* at 97-100. The Court noted that a trial court may either reinstate the challenged juror or conduct *voir dire* again. *Id.* n.24.

<sup>6</sup> The *Batson* rationale, which the *Edmonson* court applied to civil proceedings, may be characterized as a dichotomy between the interests of a historical procedure (peremptory challenges) and those of a constitutional right to equal protection of the law. Although on the surface the *Batson* principle seems to abridge the use of peremptory challenges, in actuality the reason given for a strike has been usually deemed neutral. See Serr and Maney, *Racism, Peremptory Challenges, and the Democratic Jury: the Jurisprudence of a Delicate Balance*, 79 J. CRIM. L. & CRIMINOLOGY 1 (1988). For a history of peremptory challenges see *Swain*, 380 U.S. at 212-21.

<sup>7</sup> See *Clark v. City of Bridgeport*, 645 F. Supp. 890 (D. Conn. 1986). See also Patton, *The Discriminatory Use of Peremptory Challenges in Civil Litigation: Practice, Procedure and Review*, 19 TEX. TECH. L. REV. 921 (1988).

<sup>8</sup> State action is a requirement in any Fourteenth Amendment Equal Protection Clause claim. See, e.g., *Davis, The Supreme Court: Finding State Action . . . Sometimes*, 26 How. L.J. 1395 (1983). The fourteenth amendment is applicable to the federal government through the Fifth Amendment Due Process Clause. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

<sup>9</sup> 860 F.2d at 1313.

extension of state action no prior court had been willing to make.<sup>10</sup> The fifth circuit, nevertheless, further sharpened judicial focus on the use of peremptory challenges via the equal protection clause.<sup>11</sup> But the rationale underlying the extension of the state action doctrine from *Batson* to *Edmonson* is too tenuous to support the *Edmonson* holding.

This note first reviews the facts of *Edmonson*. Second, this note examines the history of judicial inquiry into the use of peremptory challenges. Third, this note reviews the application of *Batson* to civil cases. Finally, this note analyzes the extension of the state action doctrine in *Edmonson* and discusses an alternative to the *Edmonson* approach to state action.

### FACTS

Edmonson, a black man, sued Leesville Concrete Company for negligence.<sup>12</sup> Edmonson was a laborer for a road construction company.<sup>13</sup> While at the construction site, Edmonson was caught between the back bumper of Leesville's concrete truck and the front of a curb-and-gutter machine.<sup>14</sup> As a result, he sustained injuries.<sup>15</sup>

Edmonson brought suit in the United States District Court for the Western District of Louisiana (Lake Charles Division).<sup>16</sup> In *voir dire*, Leesville exercised its peremptory challenges to strike two black veniremen.<sup>17</sup> Citing *Batson*, Edmonson requested the district court to require Leesville to give a racially neutral reason for its challenges.<sup>18</sup> The district court denied the request stating as its basis that *Batson*, a *criminal* case, did not apply to civil proceedings.<sup>19</sup> The case proceeded

<sup>10</sup> The *Edmonson* court extended existing precedent in two significant areas: (1) state action, and (2) the application of *Batson* to civil litigants. But given existing precedent, the "state action" extension was the more tenuous. See *infra* notes 75-103.

<sup>11</sup> The Supreme Court first opened the door to judicial inquiry into the use of peremptories in *Swain*. See *infra* notes 38-43. *Batson* opened the door further. See *infra* notes 51-58. *Edmonson* applied the same judicial inquiry procedure employed in *Batson*, a criminal proceeding, to a civil proceeding. *Edmonson*, 860 F.2d at 1315.

<sup>12</sup> *Edmonson*, 860 F.2d at 1309-10. Edmonson brought suit under 28 U.S.C. § 1331. *Id.* n.2.

<sup>13</sup> Brief for Appellant at 3, *Edmonson*, 860 F.2d 1308 (5th Cir. 1988) (No. 87-4804).

<sup>14</sup> *Id.*

<sup>15</sup> *Edmonson*, 860 F.2d at 1309.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 1310.

<sup>18</sup> *Id.*

<sup>19</sup> The district court judge stated that "there is no discrimination, no violation of the law in the selection procedure." Brief for Appellee at 6, *Edmonson*, 860 F.2d 1308 (5th Cir. 1988) (No. 87-4804) (quoting the U.S. Dist. Ct. W.D. La., Transcript, v. 3 at 61).

to trial. The jury assessed Edmonson's damages at \$90,000.00.<sup>20</sup> However, the jury found Edmonson 80 percent negligent and awarded him only \$18,000.00.<sup>21</sup> Edmonson appealed the district court's decision to the fifth circuit court of appeals seeking a new trial because of Leesville's alleged discrimination.<sup>22</sup>

On appeal, the fifth circuit held that the equal protection clause forbids a private civil litigant in federal court from using peremptory challenges to strike prospective jurors solely on the basis of race.<sup>23</sup> In doing so, the fifth circuit expressly extended the *Batson* principle.<sup>24</sup> The court had little trouble finding that this *civil* case between private litigants involved state action.<sup>25</sup>

The court found a sufficient nexus for state action between the private litigant's exercise of peremptory challenges and the trial judge's involvement as a government official in that conduct.<sup>26</sup> The court reasoned that the government is intimately involved in the peremptory process: the government assembles the venire; 28 U.S.C. § 1870 grants the civil litigant the right to peremptory challenges; the challenges are exercised in a judicial setting, (operated by the government); the challenges are not self-executing, (the trial judge must excuse the veniremen); and, the trial judge acts in a federal court required by the Constitution to be open to the public, whereby the public might observe the judge's toleration of a discriminatory use of peremptory challenges.<sup>27</sup> The court, therefore, concluded that "[t]he litigant exercises the peremptory challenge, but it is the judge, acting in a judicial capacity, who excuses the prospective juror."<sup>28</sup>

To further support its holding, the court cited federal appellate and district courts that have applied the *Batson* principle to civil cases.<sup>29</sup>

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<sup>20</sup> *Edmonson*, 860 F.2d at 1310.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 1314.

<sup>24</sup> *Id.* at 1314 ("We, therefore, hold that the principle announced by the Supreme Court in *Batson* applies to civil cases as well").

<sup>25</sup> *Id.* at 1312-13.

<sup>26</sup> *Id.* The court cited the following cases as controlling on the issue of state action: *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Tulsa Professional Collection Serv. v. Pope*, 108 S.Ct. 1340 (1988); and *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961).

<sup>27</sup> *Edmonson*, 860 F.2d at 1312.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 1314. The court cited: *Maloney v. Washington*, 690 F. Supp. 687 (N.D. Ill.) (mem.), *vacated on other grounds*, *Maloney v. Plunkett*, 854 F.2d 152 (7th Cir. 1988) (noting little difference in racial prejudice between criminal and civil proceedings in federal court); *Wilson v. Cross*, 845 F.2d 163 (8th Cir. 1988) (expressing strong doubts that *Batson* is limited to criminal cases); and, *Clark v. City of Bridgeport*, 645 F. Supp. 890 (D. Conn. 1986) (holding that *Batson* applies to civil proceedings where "state action"). The court distinguished *Espino v. Buonome*, 642 F. Supp. 760 (D. Conn. 1986), which held that *Batson* was not controlling in a 42 U.S.C. § 1983 action.

The court concluded that to limit *Batson* to criminal cases “would betray *Batson’s* fundamental principle: the state’s use, toleration, and approval of peremptory challenges based on race violates the equal protection clause.”<sup>30</sup>

The fifth circuit remanded the case.<sup>31</sup> The court stated that if Edmonson could establish a *prima facie* case of discrimination, then the equal protection clause required that the district court inquire into Leesville’s reasons for striking the two black veniremen.<sup>32</sup> If Leesville could not give a racially neutral reason for its challenges, then the district court would have to order a new trial.<sup>33</sup>

### *The Edmonson Dissent*

The *Edmonson* dissent disagreed that state action could be found through the private litigant’s exercise of peremptory challenges.<sup>34</sup> The dissent reasoned that although the government grants the use of peremptory challenges, neither the private litigant nor the trial judge could be characterized as a state actor.<sup>35</sup> More fundamentally, however, the dissent criticized the presumption in *Batson*, and now in *Edmonson*, that the use of peremptory challenges “along ethnic lines necessarily involves or gives the appearance of involving derogatory racial views.”<sup>36</sup> Finally, the dissent disapproved of what it deemed to be *Edmonson’s* effect — to abridge the traditional use of peremptory challenges.<sup>37</sup>

## BACKGROUND

### *Pre-Batson*

In *Swain v. Alabama*,<sup>38</sup> the Supreme Court held that if a black defendant could demonstrate, over a series of cases, that a prosecutor

<sup>30</sup> *Edmonson*, 860 F.2d at 1314.

<sup>31</sup> *Id.* at 1315.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 1316 (Gee, J., dissenting). The dissent cited the following cases as controlling on the issue of state action: *Polk County v. Dodson*, 454 U.S. 312 (1981); and, *Blum v. Yaretsky*, 457 U.S. 991 (1982).

<sup>35</sup> *Edmonson*, 860 F.2d at 1316 (Gee, J., dissenting).

<sup>36</sup> *Id.* at 1316. Proponents of the unabridged use of peremptory challenges claim that “excluding a particular cognizable group from *all* venire pools is stigmatizing and discriminatory in several interrelated ways that the peremptory challenge is not,” because peremptories are applied arbitrarily. *United States v. Leslie*, 783 F.2d 541, 554 (5th Cir. 1986) (emphasis added) (*en banc*), *vacated*, 479 U.S. 1074 (1987). See also *Batson*, 476 U.S. at 119-20 (Berger, J., dissenting).

<sup>37</sup> *Edmonson*, 860 F.2d at 1317 (Gee, J., dissenting).

<sup>38</sup> 380 U.S. 202 (1965), *overruled by* *Batson v. Kentucky*, 476 U.S. 79. In *Swain*, the Supreme Court implied that race was a legitimate ground for challenge in an individual case. *Swain*, 380 U.S. at 221. See also *United States v. Carter*, 528 F.2d 844 (8th Cir. 1975), *cert. denied*, 425 U.S. 961 (1976).

systematically excluded prospective black jurors through the exercise of peremptory challenges, then the presumption that the prosecutor's strikes were to obtain a fair and impartial jury "may well be overcome."<sup>39</sup> Otherwise, the Court held, a prosecutor's exercise of peremptory challenges to strike prospective black jurors did not violate the equal protection clause.<sup>40</sup> Consequently, the Court rejected the argument that equal protection required the prosecutor to explain the reasons for his suspect use of peremptory challenges. "Any other result . . .," the Court said, "would establish a rule wholly at odds with the peremptory challenge system as we know it."<sup>41</sup> Although *Swain* did recognize that equal protection mandated a means of judicial inquiry into a prosecutor's suspect use of peremptory challenges, that means proved insurmountable to a defendant claiming discrimination.<sup>42</sup> Because of this onerous burden, the *Batson* Court overruled that portion of *Swain* and held that a black defendant may rely solely on the circumstances of his/her own case to establish an equal protection claim.<sup>43</sup>

### *Batson v. Kentucky*

James Batson, a black man, was indicted in Kentucky for burglary and receiving stolen property.<sup>44</sup> In *voir dire*, the prosecutor exercised his peremptory challenges to strike all four black veniremen; an all-white jury was selected.<sup>45</sup> Batson moved to discharge the jury on several grounds.<sup>46</sup> One ground was that the prosecutor's use of his peremptory challenges violated the equal protection clause.<sup>47</sup> The trial judge denied the motion.<sup>48</sup> The jury convicted Batson and he appealed. On appeal, the Supreme Court of Kentucky affirmed the trial court's decision.<sup>49</sup> Batson appealed to the United States Supreme Court.<sup>50</sup>

Under *Batson*, a defendant must establish a *prima facie* case of purposeful discrimination.<sup>51</sup> To establish a *prima facie* case, a defendant must show that: (1) he is a member of a "cognizable racial group" and the

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<sup>39</sup> *Swain*, 380 U.S. at 224.

<sup>40</sup> *Id.* at 221.

<sup>41</sup> *Id.* at 222.

<sup>42</sup> See Patton, *supra* note 7, at 922-23.

<sup>43</sup> *Batson v. Kentucky*, 476 U.S. at 96.

<sup>44</sup> *Id.* at 82.

<sup>45</sup> *Id.* at 83.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 84. The Supreme Court of Kentucky recently had reaffirmed its reliance on *Swain*. *Id.*

<sup>50</sup> *Batson v. Kentucky*, cert. granted, 471 U.S. 1052 (1985).

<sup>51</sup> *Batson*, 476 U.S. at 97.

prosecutor has used peremptory challenges to strike members of that group; and, (2) from the facts of the defendant's case, the judge might infer that the prosecutor used peremptory challenges to strike prospective jurors on the basis of race.<sup>52</sup> The defendant may also "rely on the fact . . . that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" <sup>53</sup> If the defendant can establish a *prima facie* case, then the burden shifts to the prosecutor to provide a racially neutral reason for his race-based strikes.<sup>54</sup> Thus, the *Batson* Court, relative to the *Swain* court, mandated greater judicial scrutiny concerning the prosecutor's suspect use of peremptory challenges.<sup>55</sup>

Although the primary issue in *Batson* was whether the prosecutor violated the defendant's equal protection rights, the Court also recognized the equal protection rights of prospective black jurors who might otherwise be excluded because of their race relation to the defendant.<sup>56</sup> Furthermore, the Court noted that "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community."<sup>57</sup> Thus, *Batson* recognized both the excluded juror *and* the public as aggrieved parties. Arguably, the same parties would be equally aggrieved if the discriminatory use of peremptory challenges occurred in civil proceedings.<sup>58</sup>

### *Batson's Application to Civil Proceedings*

In *Clark v. City of Bridgeport*<sup>59</sup> a United States district court judge applied the *Batson* principle to civil proceedings against the state for alleged discriminatory use of peremptory challenges. The court stated that "there simply is no reason why the equal protection analysis now employed in *Batson* should not apply with equal force to" civil cases involving state action.<sup>60</sup> In *Esposito v. Buonome*,<sup>61</sup> however, a judge in the same district court refused to apply *Batson* to a civil case where the

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<sup>52</sup> *Id.* at 96.

<sup>53</sup> *Id.* (quoting in part *Avery v. Georgia*, 345 U.S. 559, 562 (1953)).

<sup>54</sup> *Id.* at 97.

<sup>55</sup> See Patton, *supra* note 7, at 924.

<sup>56</sup> *Batson*, 476 U.S. at 87. See also *Chew v. State*, 71 Md. App. 681, 527 A.2d 332, cert. granted, 311 Md. 301, 534 A.2d 369 (1987).

<sup>57</sup> *Batson*, 476 U.S. at 87.

<sup>58</sup> See *Chew*, 71 Md. App. at 692-93, 527 A.2d at 337-38.

<sup>59</sup> 645 F. Supp. 890.

<sup>60</sup> *Id.* at 895-96.

<sup>61</sup> 642 F. Supp. 760 (D. Conn. 1986).

plaintiff alleged the discriminatory use of peremptory challenges.<sup>62</sup> The *Esposito* court reasoned that *Batson's* focus was to safeguard the rights of criminal defendants who are forced into court against their will, rather than a civil plaintiff who has chosen to initiate the judicial process.<sup>63</sup> The *Esposito* court never reached the state action issue.

Many courts and commentators have concluded that “[s]ince the interests of the litigants, the rights of the excluded jurors, and the involvement of the public in a civil proceeding do not differ radically from a criminal proceeding . . . , the existing differences do not automatically justify permitting discriminatory peremptories in civil litigation.”<sup>64</sup> Furthermore, in *Chew v. State*,<sup>65</sup> a Maryland appellate court noted that the Supreme Court implied *Batson's* application to civil proceedings because the holding was based on the equal protection clause rather than the sixth amendment, which only applies to criminal proceedings.<sup>66</sup> The *Chew* court concluded that “[t]he rule in *Batson*, therefore, was designed ‘to serve multiple ends.’ ”<sup>67</sup> But a limit to *Batson's* application—judicial inquiry into the suspect use of peremptory challenges—in civil cases is the state action requirement of the equal protection clause.

### *Batson's State Action Requirement*

The *Batson* holding was based on the Fourteenth Amendment's Equal Protection Clause.<sup>68</sup> The equal protection clause applies only to state action.<sup>69</sup> Based on the state action limitation, the *Batson* principle has not been categorically applied in civil actions. In *Clark*, the court applied *Batson* to civil cases only where the *government* violated equal

<sup>62</sup> *Id.* at 761. The *Edmonson* court noted that *Esposito* did not “expressly decid[e] whether the exercise of peremptory challenges in a civil case involves government action.” *Edmonson v. Leesville Concrete Co.*, 860 F.2d at 1314.

<sup>63</sup> *Esposito*, 642 F. Supp at 761. In distinguishing *Esposito*, the *Clark* court noted that “the plaintiff was neither a member of a cognizable group . . . , nor was the burden with regard to a *prima facie* case met by the plaintiff.” *Clark v. City of Bridgeport*, 645 F. Supp. at 895 n.5.

<sup>64</sup> See Patton, *supra* note 7, at 928-29. Although the *Edmonson* court recognized that “[t]here are manifest differences between the nature of a criminal prosecution and a civil action,” *Batson*, the court stated, was not “limited to the state's involvement in criminal prosecutions.” *Edmonson*, 860 F.2d at 1313.

<sup>65</sup> 71 Md. App. 681, 527 A.2d 332.

<sup>66</sup> *Id.* at 690, 527 A.2d at 336-37. The Supreme Court could have limited *Batson* to criminal proceedings by analyzing the issue solely under the sixth amendment right to a fair trial. But the Court applied the Fourteenth Amendment Equal Protection Clause and expressed “no view on the merits of any of petitioner's sixth amendment arguments.” *Batson v. Kentucky*, 476 U.S. at 85 n.4.

<sup>67</sup> *Chew*, 71 Md. App. at 692, 527 A.2d at 338 (quoting *Allen v. Hardy*, 478 U.S. 255, 259 (1986)).

<sup>68</sup> The relevant section of the federal Equal Protection Clause provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

<sup>69</sup> The Civil Rights Cases, 109 U.S. 3 (1883).

protection in its use of peremptory challenges.<sup>70</sup> Also, in *King v. County of Nassau*,<sup>71</sup> a United States district court judge expressed doubts that a trial court's acceptance of a private litigant's suspect use of peremptory challenges constituted state action.

The *Chew* court, however, suggested that "the very establishment of a jury selection procedure may qualify as [s]tate action, regardless of which party ultimately exercises the peremptory challenges in an allegedly discriminatory fashion."<sup>72</sup> Furthermore, commentators have stated that if the benefits from applying equal protection to an activity would outweigh the burdens that such a holding would entail, then a court is more likely to find state action in that activity.<sup>73</sup> Therefore, whether state action exists in a private litigant's exercise of peremptory challenges is subject to debate.

### ANALYSIS

The *Edmonson* court concluded that if the discriminatory use of peremptory challenges to exclude prospective black jurors in criminal cases violates equal protection, then the same procedure in civil cases also violates equal protection. The court stated that "[r]acial prejudice has no more place in the federal courtroom on the days the court is conducting a civil trial than it does on the days when the same judge, seated at the same bench, in the same courtroom, is conducting a criminal trial."<sup>74</sup> But *Edmonson* involved *private* litigants: *Batson* could only apply if there was *state* action. Although the *Edmonson* court found that state action existed by private counsel's exercise of peremptory challenges in federal court, the extension from a prosecutor in *Batson* to private counsel in *Edmonson* is tenuous under the state action doctrine. The questionable extension weakens the *Edmonson* holding. As an alternative, the fifth circuit could have applied the *Batson* principle to the trial court through its inherent supervisory powers.

#### *Edmonson's Approach to State Action*

In finding state action, the *Edmonson* court applied the two-prong test announced in *Lugar v. Edmondson Oil Co*<sup>75</sup>: (1) whether the claimed

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<sup>70</sup> Clark v. City of Bridgeport, 645 F. Supp. at 896.

<sup>71</sup> 581 F. Supp. 493, 499 (E.D.N.Y. 1984).

<sup>72</sup> Chew v. State, 71 Md. App. at 690, 527 A.2d at 337.

<sup>73</sup> See Davis, *supra* note 8, at 1400. See also Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656, 659-61 (1974).

<sup>74</sup> *Edmonson v. Leesville Concrete Co.*, 860 F.2d at 1313-14.

<sup>75</sup> 457 U.S. at 937.

equal protection violation resulted from the exercise of a statutory right, and (2) whether the private litigant might be characterized as a state actor. The court satisfied the first prong by holding that the litigant's use of peremptory challenges granted under 28 U.S.C. § 1870<sup>76</sup> is a statutory right.<sup>77</sup> Under the facts in *Edmonson*, however, the second prong of the *Lugar* test was not as straightforward. The court claimed to have satisfied the second prong by reasoning that the private litigant's and the trial judge's joint participation in the exercise of peremptory challenges was sufficient to characterize the private litigant as a state actor.<sup>78</sup> The *Edmonson* court analogized their facts to the facts of *Shelley v. Kraemer*,<sup>79</sup> *Tulsa Professional Collection Services v. Pope*,<sup>80</sup> and *Burton v. Wilmington Parking Authority*.<sup>81</sup> In each of those cases, the Supreme Court found state action.

In *Shelley*, the Court reasoned that the judicial enforcement of a racially restrictive covenant involved state action.<sup>82</sup> If the state court had enforced the covenant, through its coercive power, then the state would have effectuated the discrimination. The Court focused on the state court as state actor, not the private litigants.<sup>83</sup> In *Edmonson*, the trial court was not asked to enforce anything, nor to use its coercive power; peremptory challenges require only that the trial court excuse the challenged juror.<sup>84</sup>

The *Edmonson* court stated that the "Court in *Shelley* recognized that governmental action triggered by a private litigant retains its official character."<sup>85</sup> But many courts and commentators disagree with that statement.<sup>86</sup> As one commentator stated: *Shelley* "did not hold that judicial orders enforcing private decisions imbue [the] decision with sufficient state action to review [it] as the acts of government."<sup>87</sup>

<sup>76</sup> See 28 U.S.C. § 1870 (1982). § 1870 provides: "In civil cases, each party shall be entitled to three peremptory challenges." However, the right to peremptory challenges is not guaranteed by the Constitution. See *Stilson v. United States*, 250 U.S. 583, 586 (1919).

<sup>77</sup> *Edmonson*, 860 F.2d at 1312.

<sup>78</sup> *Id.* at 1311.

<sup>79</sup> 334 U.S. 1. See *supra* note 14-26.

<sup>80</sup> 108 S.Ct. 1340. See *supra* note 14-26.

<sup>81</sup> 365 U.S. 715. See *supra* note 14-26.

<sup>82</sup> *Shelley*, 334 U.S. at 23.

<sup>83</sup> The Court stated: "It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint." *Id.* at 19. Furthermore, the Court concluded that the restrictive covenants standing alone were not violative of equal protection. *Id.*

<sup>84</sup> *Edmonson v. Leesville Concrete Co.*, 860 F.2d at 1316 (Gee, J., dissenting).

<sup>85</sup> *Id.* at 1311.

<sup>86</sup> See Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962). See, e.g., *Peterson v. City of Greenville*, 373 U.S. 244 (1963) (one of five "sit-in" cases that did not rely on *Shelley* under similar facts).

<sup>87</sup> Glennon and Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221, 238.

In *Pope*, the Court found state action where “private parties make use of state procedures with the overt, significant assistance of state officials.”<sup>88</sup> *Pope* involved a state probate court’s management of a nonclaim statute.<sup>89</sup> The Court distinguished the probate court’s active management of the nonclaim statute from an ordinary statute of limitations, where there would be no state action.<sup>90</sup> However, a trial court’s involvement in the use of a peremptory challenge—excusing the challenged juror—seems more related to a trial court’s involvement in dismissing a claim because the statute of limitations has run, rather than managing a nonclaim statute.<sup>91</sup>

In *Burton*; the Court reversed a state court decision that had denied a black patron access to a private restaurant, on state property, solely on the basis of race.<sup>92</sup> The Court found state action through the state’s lease agreement with the private restaurant, and its failure to include in that agreement a non-discrimination clause.<sup>93</sup> The circumstantial evidence in *Burton* suggested that the government benefited from excluding the clause; thus, “*Burton* can be understood as entailing an inference of purposeful racial discrimination by government.”<sup>94</sup> It is difficult to ascertain any benefit the government would obtain from a private litigant’s discriminatory use of a peremptory challenge. Indeed, one commentator has cautioned that the state action rationale in *Burton* should not be extended beyond the particular facts of that case.<sup>95</sup>

The *Edmonson* court concluded, quoting *People v. Gary M.*,<sup>96</sup> that “the [s]tate is not merely an observer of the discrimination, but a significant participant . . . The only thing the [s]tate does not do is make the

<sup>88</sup> *Tulsa Professional Collection Serv. v. Pope*, 108 S.Ct. at 1345.

<sup>89</sup> *Id.* at 1345. The nonclaim statute in issue becomes operative only after court proceedings in which the judge appoints an executor/executrix, directs the executor/executrix to notify creditors (who have two months to file a claim), and requires the executor/executrix to file copies of the notice and an affidavit of publication with the court. *Id.* at 1345-46.

<sup>90</sup> The Court stated that “the state’s involvement in the mere running of a general statute of limitation [was not] generally sufficient to implicate” the fourteenth amendment. *Id.* at 1345. See *Texaco, Inc. v. Short*, 454 U.S. 516 (1982).

<sup>91</sup> In *Pope*, the Court noted that the trial court managed many activities necessary for implementing the nonclaim statute. *Pope*, 108 S.Ct. at 1346. In regard to whether state action exists when a court dismisses a claim because the statute of limitations has run, the Court in *Pope* stated that “[t]he state has no role to play beyond enactment of the limitations period.” *Id.* at 1345.

<sup>92</sup> *Burton v. Wilmington Parking Auth.*, 365 U.S. at 726.

<sup>93</sup> *Id.* at 718-20.

<sup>94</sup> See *TRIBE, AMERICAN CONSTITUTIONAL LAW*, § 18-3, at 1701 n.13 (2d ed. 1988).

<sup>95</sup> See *Lewis, Burton v. Wilmington Parking Authority — A Case Without Precedent*, 61 COLUM. L. REV. 1458 (1961).

<sup>96</sup> *People v. Gary M.*, 138 Misc. 2d 1081, 526 N.Y.S.2d 986 (N.Y. Sup. Ct. 1988).

decision to discriminate.’<sup>97</sup> In *Gary M.*, the prosecutor claimed that the defendant had discriminately used his peremptory challenges; the trial court agreed. The trial court found that the defendant was a state actor because the state initiated the proceedings, the defense counsel was an officer of the court, the challenges were made in open court, the state granted the right to peremptory challenges, and the alleged discrimination was racial.<sup>98</sup> The similarity with *Edmonson* extends to the facts that Leesville’s counsel was an officer of the court;<sup>99</sup> the government granted the right to peremptory challenges;<sup>100</sup> and, the alleged discrimination was racial.<sup>101</sup> None of these facts, however, seem pertinent to whether a private litigant might be characterized as a state actor under the second prong of *Lugar*.<sup>102</sup> Under the facts in *Edmonson*, therefore, the private litigant in conjunction with the trial judge cannot be fairly characterized as a state actor.<sup>103</sup>

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<sup>97</sup> *Edmonson v. Leesville Concrete Co.*, 860 F.2d at 1312 (quoting *Gary M.*, 138 Misc. 2d at \_\_\_\_\_, 526 N.Y.S.2d at 994.

<sup>98</sup> *Gary M.*, 138 Misc. 2d at \_\_\_\_\_, 526 N.Y.S.2d at 994.

<sup>99</sup> As the *Edmonson* dissent points out, however, if a state-employed public defender is not a state actor as the Supreme Court held in *Polk*, then it seems clear that a private litigant’s counsel is not a state actor. *Edmonson* 860 F.2d at 1315-16 (Gee, J., dissenting). See *supra* note 34. See, e.g., *Slavin v. Curry*, 574 F.2d 1256, modified and reh’g denied, 583 F.2d 779 (5th Cir. 1978) (holding that private counsel does not act under color of state law).

<sup>100</sup> See *supra* note 76. Furthermore, in *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978), the Court held that the private use of state-sanctioned private procedures does not rise to the level of state action.

<sup>101</sup> The fact that the discrimination was racial does seem to have an effect on whether a court will find state action, in general. See *supra* note 73. The *Gary M.* court concluded that “government has been permitted fewer contacts with private actors engaged in racial discrimination than with those otherwise acting in a manner which the government itself could not.” *Gary M.*, 138 Misc. 2d at \_\_\_\_\_, 526 N.Y.S.2d at 993 (quoting *Under 21 Catholic Home Bur. for Dependent Children v. City of N.Y.*, 65 N.Y.2d 344, 363, 482 N.E.2d 1, 10, 492 N.Y.S.2d 522, 531 (1985)). The *Gary M.* court, however, did “not decide whether under the *Lugar* test there is in this case ‘state action.’ ” *Id.* n.9.

<sup>102</sup> The second prong of the *Lugar* test states that “the party charged with the deprivation must be a person who may fairly be said to be a state actor, either 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.” *Lugar v. Edmondson Oil Co.*, 457 U.S. at 923. “Without a limit such as this,” the Court noted, “private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them.” *Id.* at 937. Finally, in *Lugar*, the Court stated that “we do not hold today that ‘a private party’s mere invocation of state legal procedures constitutes ‘joint participation’ or ‘conspiracy’ with state officials,’ ” because “[t]he holding today . . . is limited to the particular context of prejudgment attachment.” *Id.* at 939 n. 21 (quoting in part Justice Powell’s dissenting opinion at 953). Invoking a trial court’s coercive power to attach property prior to judgment is distinguishable from a private litigant’s use of a peremptory challenge, whereby the trial court merely excuses the challenged juror.

<sup>103</sup> As the *Edmonson* dissent noted, state action is normally only found where the government “ ‘has exercised coercive power or has provided such significant encouragement . . . that the choice must . . . be deemed that of the state’ and that ‘[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient to justify’ ” state action. *Edmonson*, 860 F.2d at 1316 (Gee, J., dissenting) (quoting *Blum v. Yaretsky*, 457 U.S. at 1004).

## *An Alternative to Edmonson's Approach to State Action*

In holding that the *Batson* principle applied in civil proceedings, the *Edmonson* court implicitly interpreted 28 U.S.C. § 1870 as prohibiting the discriminatory use of peremptory challenges,<sup>104</sup> at least where there was state action. Without state action, even with the *Batson* principle implicit in the granting of peremptory challenges, Leesville's suspect use of its peremptory challenges was beyond judicial inquiry. Thus, if Leesville did discriminate, then the rights of the two excluded black jurors and of the public, as announced in *Batson*,<sup>105</sup> would be unenforceable.<sup>106</sup> In other words, while the substance of equal protection would be violated, the form of the violation would preclude enforcement. Consequently, if Leesville did discriminate, then the excluded jurors and the public would be aggrieved without a judicial remedy.<sup>107</sup> Under a federal appellate court's inherent supervisory powers,<sup>108</sup> however, the *Edmonson* court could have applied the *Batson* principle to remedy such an equal protection violation, even though the Constitution did not specifically authorize the procedure.<sup>109</sup> To apply *Batson* to a private litigant through the trial court is not as tenuous as to characterize the same litigant a state actor.

Under the supervisory powers alternative, if a black litigant objects, on the basis of race, to a white litigant's exercise of a peremptory challenge,<sup>110</sup> then the trial court must inquire into the reason for the

<sup>104</sup> The *Edmonson* court stated that "[i]nterpreting 28 U.S.C. § 1870 to allow the exclusion of jurors because of their race would condone conduct that could not be explicitly allowed." *Edmonson* 860 F.2d at 1312. See *Reitman v. Mulkey*, 387 U.S. 369 (1967) (holding that a state constitutional amendment that prohibited government interference in private discrimination was unconstitutional).

<sup>105</sup> See *supra* notes 56-57.

<sup>106</sup> Private discrimination, after all, is outside the reach of equal protection. See *supra* note 69.

<sup>107</sup> But, as the Supreme Court stated in *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984), "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."

<sup>108</sup> Supervisory powers lay on the premise that federal appellate "courts must be given the ability to preserve the integrity of the judicial system." *United States v. Leslie*, 783 F.2d 541, 569 (5th Cir. 1986) (Williams, J., dissenting). See also Note, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656 (1963).

<sup>109</sup> See *United States v. Hasting*, 461 U.S. 499, 505 (1983). A purpose of supervisory powers is "to implement a remedy for violation of recognized rights." *Id.* See *McNabb v. United States*, 318 U.S. 332 (1943). See *supra* notes 56-57. Furthermore, "[t]he supervisory power is often exercised to prevent or correct injustice where existing procedures have proved inadequate. In many cases, the problem could have been solved without resort to supervisory power but frequently only by distorting traditional legal doctrines." Note, *The Judge-Made Supervisory Power of the Federal Courts*, 53 GEO. L.J. 1050, 1078 (1965).

<sup>110</sup> In effect, the black litigant could act as an agent for the excluded juror, requiring the trial court to recognize the excluded juror's right. See *National Motor Freight Traffic Ass'n v. United States*, 372 U.S. 246 (1963). See also *People v. Gary M.*, 138 Misc. 2d at \_\_\_\_\_, 526 N.Y.S.2d at 995. *But*, see *supra* note 111.

strike.<sup>111</sup> By objecting, the black litigant invokes the *Batson* principle that, as the fifth circuit held, was implicit in 28 U.S.C. § 1870.<sup>112</sup> Otherwise, if the judge were to permit the suspect strike without question and excuse the juror, then the trial court would condone possible discrimination and, if the black litigant's allegation were true, violate the recognized rights of the excluded juror and of the public. As the *Edmonson* court stated, "the remedy is not to *condone* [racially motivated challenges] but to *insist*, when objection is made, that the guarantee of equal protection against all racial prejudice is enforced."<sup>113</sup>

In applying *Batson* to civil proceedings, the *Clark* court concluded that it was within the court's "inherent supervisory power to protect the right of the excluded jurors, as well as to preserve the integrity of this [court and the judicial process]."<sup>114</sup> In *Thiel v. Southern Pacific Co.*,<sup>115</sup> the Supreme Court reversed the trial court's decision to deny a motion to strike the jury panel in a civil case. The empaneled jury did not represent a fair cross-section of the community.<sup>116</sup> In reversing the decision, the Court exercised its "power of supervision over the administration of justice in the federal courts."<sup>117</sup>

Prior to *Batson*, the fifth circuit in panel in *United States v. Leslie*<sup>118</sup> invoked its supervisory powers to limit a prosecutor's discriminatory use of peremptory challenges.<sup>119</sup> Under *Leslie*, the fifth circuit reasoned that the public would not tolerate federal officers who racially discriminated in federal court.<sup>120</sup> Also, the court reasoned that the exclusion of prospec-

<sup>111</sup> The *Gary M.* court noted that the state (in this case the trial court) "has standing to assert the equal protection claims of the excluded jurors under the doctrine of *jus tertii* or third-party standing." *Gary M.*, 138 Misc. 2d at \_\_\_\_\_, 526 N.Y.S.2d at 995. See also *Singleton v. Wulff*, 428 U.S. 106 (1976). Although, under the supervisory powers alternative, standing is not an issue. However, the issue might arise as a policy consideration in upholding the equal protection rights of the excluded juror and of the public over the litigant's discriminatory use of peremptory challenges. See *supra* note 6. The *Gary M.* court did "not decide whether it can entertain this claim under its supervisory power." *Gary M.*, 138 Misc. 2d at \_\_\_\_\_, 526 N.Y.S.2d at 996 n.12.

<sup>112</sup> See *supra* note 104.

<sup>113</sup> *Edmonson v. Leesville Concrete Co.*, 860 F.2d at 1314 (emphasis added).

<sup>114</sup> *Clark v. City of Bridgeport*, 645 F. Supp. at 897.

<sup>115</sup> 328 U.S. 217 (1946).

<sup>116</sup> The Court stated that "[t]he American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community." *Id.* at 220. Similar reasoning has been applied to the limited use of peremptory challenges in civil proceedings. See, e.g., *Patton*, *supra* note 7, at 930-32.

<sup>117</sup> *Thiel*, 328 U.S. at 225.

<sup>118</sup> *United States v. Leslie*, 759 F.2d 366 (5th Cir. 1985).

<sup>119</sup> "In the exercise of our supervisory power and in the interest of justice, therefore, we conclude that the federal prosecutor's precious, though not absolute, right to employ peremptory challenges without review must yield in those cases where the defendant can establish that the prosecutor misused those challenges and engaged in invidious racial discrimination." *Id.* at 374.

<sup>120</sup> *Id.* at 373. See also *Patton*, *supra* note 7, at 944.

tive black jurors erodes public confidence in the judicial system, undermines judicial integrity, and is manifestly unfair.<sup>121</sup> However, on rehearing *en banc*, the fifth circuit reversed the panel's holding as violative of *Swain*, and stated that supervisory powers should not be invoked to alter existing law unless recognized rights have been violated.<sup>122</sup> But as the New Jersey Supreme Court commented: "*Batson* for all practical purposes reinstates the panel's holding."<sup>123</sup>

If *Edmonson* is overturned for lack of state action, then the recognized rights of jurors excluded because of race, and of the public who could have witnessed the discrimination, would be illusory in civil proceedings between private litigants. But, in all civil proceedings, as in all criminal proceedings, the trial court, not the parties, empanel and then excuse challenged jurors. Although the trial court's involvement might not be state action, it might, nonetheless, appear to condone discrimination. As the fifth circuit stated: "[j]ustice would indeed be blind if it failed to recognize that the federal court is employed as a vehicle for racial discrimination when peremptory challenges are used to exclude jurors because of their race."<sup>124</sup> The *Batson* principle applied to the trial court, through an appellate court's supervisory powers, would reach all civil proceedings and avoid the tenuous state action extension in *Edmonson*.

## CONCLUSION

*Edmonson* applied the *Batson* principal—judicial inquiry into the suspect use of peremptory challenges—to civil proceedings between private litigants via the equal protection clause. In so doing, the fifth circuit had to find, and ostensibly did find, state action in a private litigant's use of peremptory challenges. But the fifth circuit's rationale in finding state action was too tenuous to support the *Edmonson* holding.

*Batson* recognized three parties aggrieved by the discriminatory use of peremptory challenges. Two of the parties—the excluded black juror and the public—are likewise aggrieved by the discriminatory use of peremptory challenges in civil proceedings, whether the state is the party who allegedly discriminated or not. To assure justice, therefore, the trial court must require a racially neutral reason before excusing a prospective black juror. *Batson* held as much; *Edmonson* applied the requirement to civil proceedings between private litigants to further the

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<sup>121</sup> *Id.*

<sup>122</sup> *United States v. Leslie*, 783 F.2d at 566 (*en banc*).

<sup>123</sup> *State v. Gilmore*, 103 N.J. 508, 521, 511 A.2d 1150, 1156 n.1 (1986).

<sup>124</sup> *Edmonson v. Leesville Concrete Co.*, 860 F.2d at 1313.

assurance of justice. To frame such a requirement in an illusive doctrine like state action, however, seems unnecessary when a more viable alternative is available. This note offers a supervisory powers alternative to *Edmonson's* extension of state action. Under the alternative, the fifth circuit could have applied *Batson*, through its authority to formulate trial procedure, to the private litigants in *Edmonson*—with or without state action. Thus, if a private litigant makes a *Batson*-type objection, then the trial court, as part of its pretrial procedure, would inquire into the reason for the strike and deny the strike if it was racially motivated. Such a procedure is the substance of the *Edmonson* holding, absent the formal baggage of state action.

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