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Race-Based Peremptories No Longer Permitted in Civil Trials: Jackson v. Housing Authority of High Point

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Race-Based Peremptories No Longer Permitted in Civil Trials: *Jackson v. Housing Authority of High Point*

In *Jackson v. Housing Authority of High Point*[1] the North Carolina Supreme Court held that an attorney may not exercise a peremptory challenge to strike a prospective civil juror on the basis of the juror's race.[2] This ruling is likely to change fundamentally the process of jury selection in North Carolina. This Note traces the development of constitutional restraints on the exercise of peremptory challenges in federal and state courts on both equal protection and sixth amendment grounds. The Note concludes that the North Carolina Supreme Court erred in holding that the state constitution places limits on the exercise of peremptory challenges. The Note further concludes that the supreme court could have achieved its goal of preventing racial discrimination in civil jury selection by extending United States Supreme Court precedent on criminal jury selection into the civil arena.

On February 19, 1978, Mary Jackson, a black woman,[3] died of carbon monoxide poisoning in her apartment, which was owned and managed by the Housing Authority of the City of High Point.[4] Jackson's administrator, also a black woman,[5] brought a wrongful death suit against the Authority, alleging that the carbon monoxide entered Jackson's apartment because debris, including a bird's nest and a bird's carcass, blocked the chimney pipe of the natural gas heater.[6] The claim was brought under theories of negligence, breaches of implied and express warranties of habitability, strict liability, and gross, willful, and wanton negligence.[7] At the initial trial, the judge directed a verdict in favor of defendant on all claims.[8] The court of appeals reversed and granted plaintiff a new trial.[9]

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1. 321 N.C. 584, 364 S.E.2d 416 (1988) [hereinafter *Jackson III*]. This was the third appellate court decision in this case. In the first, Jackson v. Housing Auth. of High Point, 73 N.C. App. 363, 326 S.E.2d 295 (1985), *aff'd*, 316 N.C. 259, 341 S.E.2d 523 (1986) [hereinafter *Jackson I*], the court of appeals reversed the trial court's directed verdict for defendant. The supreme court, in Jackson v. Housing Auth. of High Point, 316 N.C. 259, 341 S.E.2d 523 (1986) [hereinafter *Jackson II*], affirmed and remanded for a new trial. The trial on remand produced a jury verdict for defendant. This Note focuses on the supreme court's opinion upholding that verdict.

2. *Jackson III*, 321 N.C. at 585, 364 S.E.2d at 416.

3. *See* Brief for Appellant at 3, *Jackson III* (No. 8718SC413).

4. *Id.* The complex, Clara Cox Apartments, was a low-income housing project. *Jackson II*, 316 N.C. at 260, 341 S.E.2d at 524. Jackson had been a tenant at Clara Cox since 1973. *Jackson I*, 73 N.C. App. at 364, 326 S.E.2d at 296.

5. Brief for Appellant at 3.

6. *Jackson II*, 316 N.C. at 260, 341 S.E.2d at 524.

7. Brief for Appellant at 3.

8. *Jackson II*, 316 N.C. at 261, 341 S.E.2d at 524.

9. *Jackson I*, 73 N.C. App. at 364, 326 S.E.2d at 296. The North Carolina Supreme Court denied the Housing Authority's request to review the court of appeals' decision. *Jackson II*, 316 N.C. at 261, 341 S.E.2d at 524. The Authority, however, appealed the ruling by the court of appeals reversing dismissal of plaintiff's claim for punitive damages as a matter of right. *Id.* at 260, 341 S.E.2d at 523. The Authority claimed that punitive damages may not be recovered from a municipal corporation in a wrongful death action. *Id.* at 262, 341 S.E.2d at 525. The supreme court held that "the North Carolina Wrongful Death Act *does* contain a statutory provision providing for the recov-

During the *voir dire* at the second trial, four blacks were called to the jury box to be considered for service as petit jurors or alternates.[10] Defense counsel exercised peremptory challenges to excuse all four.[11] These were defendant's only peremptory challenges.[12] The resulting jury consisted of twelve white jurors and two white alternate jurors.[13]

After the jury was selected, but before it was empaneled, plaintiff's counsel moved to discharge the jury alleging that its composition violated both the United States and North Carolina Constitutions.[14] The trial court denied the motion.[15] At the conclusion of the trial, the jury ruled in favor of the Housing Authority.[16] Plaintiff appealed to the court of appeals, alleging reversible error in the trial court's refusal to discharge the jury after defense counsel's allegedly unconstitutional exercise of peremptory challenges.[17] Before the court could hear argument, however, the supreme court granted defendant's petition for discretionary review.[18]

The supreme court decided that the jury selection issue is properly resolved by the North Carolina Constitution rather than the United States Constitution.[19] Specifically, its opinion rested on article I, section twenty-six of the state constitution, which provides: "No person shall be excluded from jury service on account of sex, race, color, religion, or national origin."[20] The court's holding was succinct: "The sole issue before us on this appeal is whether article I, section 26 of the North Carolina Constitution proscribes peremptory challenges to jurors in civil cases on the basis of race. We hold that it does."[21]

The court's reasoning also was brief. First, the court noted that article I, section twenty-six makes no distinction between civil and criminal trials and, therefore, applies to both.[22] Next, the court stated that "this provision of the constitution would be eviscerated if the use of peremptory challenges did not come within its ambit."[23] The court concluded its analysis by recognizing that although the peremptory challenge has been "long embedded in our common

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ery of punitive damages from bodies politic, which includes municipal corporations," and thus affirmed. *Id.* at 265, 341 S.E.2d at 526-27.

10. Brief for Appellant at 3-4. Three were called to serve on the jury, and one was called as a prospective alternate.

11. *Id.* at 4.

12. *Id.* at 4. Defendant actually was entitled to five additional peremptories, but apparently chose not to exercise them. *See* N.C. GEN. STAT. § 9-19 (1986) (providing eight peremptory challenges to each party in a civil case).

13. Brief for Appellant at 4.

14. *Id.*

15. *Id.*

16. *Id.* at 3.

17. *Id.* at 5.

18. *Jackson III*, 321 N.C. at 584, 364 S.E.2d at 416; *see* N.C. R. APP. P. 15(a) (allowing either party to an appeal docketed in the court of appeals to petition the supreme court to hear the case, thereby bypassing the court of appeals).

19. *Jackson III*, 321 N.C. at 585, 364 S.E.2d at 416.

20. N.C. CONST. art I, § 26.

21. *Jackson III*, 321 N.C. at 584-85, 364 S.E.2d at 416.

22. *Id.* at 585, 364 S.E.2d at 416.

23. *Id.*

law," its use "is based upon statutory authority and is not of constitutional dimension. Therefore, the statutory authority to exercise peremptory challenges must yield to the constitutional mandate of section 26."[24] Nonetheless, because plaintiff did not provide a transcript of the *voir dire* from which the court could determine whether the prospective black jurors improperly were excluded, the court upheld the trial jury's verdict.[25]

The purpose of the peremptory challenge "is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise."[26] Although not constitutionally required,[27] the peremptory challenge has "always been considered one of the most effective means of securing an impartial jury."[28] The peremptory challenge was an essential component of the English common law[29] and was recognized by each state and the federal government at independence.[30] Although it originally was aimed primarily at criminal trials, each state today affords peremptory challenges to both sides in criminal and civil cases.[31] In North Carolina, both parties to a civil case are entitled to eight peremptory challenges;[32] both the defendant and the state are entitled to fourteen peremptory challenges in capital criminal cases[33] and six peremptory challenges in noncapital criminal cases.[34] "The persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury."[35]

The North Carolina Supreme Court has held that peremptory challenges " 'may be made or omitted according to the judgment, will, or caprice of the party entitled thereto, without assigning any reason therefor,' "[36] and that a party's reason for peremptorily challenging "cannot be called in question."[37] This contrasts with challenges for cause, which "permit rejection of jurors [only] on a narrowly specific, provable and legally cognizable basis of partiality."[38]

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24. *Id.* at 585, 364 S.E.2d at 417.

25. *Id.* at 585-86, 364 S.E.2d at 417.

26. Swain v. Alabama, 380 U.S. 202, 219 (1965), *overruled in part*, Batson v. Kentucky, 476 U.S. 79 (1986).

27. Stilson v. United States, 250 U.S. 583, 586 (1919).

28. Saltzburg & Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 MD. L. REV. 337, 341 (1982).

29. *Swain*, 380 U.S. at 213; Note, *Rethinking Limitations on the Peremptory Challenge*, 85 COLUM. L. REV. 1357, 1359 (1985).

30. *Swain*, 380 U.S. at 214-16.

31. *Id.* at 216; *see* Note, *supra* note 29, at 1359.

32. N.C. GEN. STAT. § 9-19 (1986).

33. *Id.* § 15A-1217(a) (1988).

34. *Id.* § 15A-1217(b).

35. *Swain*, 380 U.S. at 219; *see* State v. Bryant, 282 N.C. 92, 95, 191 S.E.2d 745, 748 (1972), *cert. denied*, 410 U.S. 958 (1973).

36. Freeman v. Ponder, 234 N.C. 294, 302, 67 S.E.2d 292, 298 (1951) (quoting 50 C.J.S. *Juries* § 280 (1947)).

37. Dupree v. Virginia Home Ins. Co., 92 N.C. 417, 424 (1885).

38. *Swain*, 380 U.S. at 22; *see Freeman*, 234 N.C. at 302, 67 S.E.2d at 298. In North Carolina, a challenge for cause properly may be exercised against a juror who: 1) is related by blood or marriage to a criminal defendant, State v. Allred, 275 N.C. 554, 561, 169 S.E.2d 833, 837 (1969); 2) has formed an opinion as to the criminal defendant's guilt or innocence, State v. Zigler, 42 N.C.

Peremptory challenges provide a mechanism to "eliminat[e] those prospective jurors who the lawyer believes, but cannot prove, will be less than impartial,"[39] without expanding the limited time and scope of the *voir dire*. "The peremptory challenge permits both sides to strike at hidden, subtle, or subconscious biases that may be just as threatening as overt prejudice to the concept of an . . . impartial jury."[40]

Peremptory challenges are often exercised upon "sudden impressions" gathered from "bare looks and gestures" of prospective jurors.[41] Sometimes they are exercised to exclude jurors who are so indifferent that their resentment about being detained quickly may turn into prejudice against one of the parties.[42] Occasionally, inferences of partiality arise from the "habits and associations" of prospective jurors, which, if not sufficient to justify a challenge for cause, form the basis of a peremptory challenge.[43] Finally, peremptory challenges are sometimes "exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations" of prospective jurors.[44]

Good civil trial lawyers view race and other group affiliations as important factors in determining inherent biases of prospective jurors and in selecting impartial juries. "Given the need for reasonable limitations on the time devoted to *voir dire*, the use of such 'proxies' . . . may be extremely useful in eliminating from the jury persons who might be biased in one way or another."[45] "Common human experience, common sense, psychosociological studies, and public opinion polls tell us that it is likely that certain classes of people statistically have predispositions that would make them inappropriate jurors for particular kinds of cases."[46] One leading treatise on jury selection notes that race is an "extremely important" indication of how prospective jurors will decide cases, and

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App. 148, 154, 256 S.E.2d 479, 483 (1979); 3) is employed by a party to the case, Blevins v. Erwin Cotton Mills Co., 150 N.C. 493, 497, 64 S.E. 428, 429 (1909); 4) is an agent or employee of a party's insurer, Fulcher v. Pine Lumber Co., 191 N.C. 408, 410, 132 S.E. 9, 11 (1926); 5) is a stockholder in a party-corporation, Murchison Nat'l Bank v. Dunn Oil Mills Co., 150 N.C. 683, 686, 64 S.E. 883, 884-85 (1909); or 6) has a suit pending during the same term, State v. Ashburn, 187 N.C. 717, 719, 122 S.E. 833, 833 (1924). *See* N.C. GEN. STAT. § 15A-1212 (1988) (listing nine permissible grounds for a challenge for cause in a criminal trial). The trial court has discretion in allowing or denying challenges for cause. State v. Kennedy, 320 N.C. 20, 28, 357 S.E.2d 359, 364 (1987).

39. Note, *supra* note 29, at 1360.

40. Saltzburg & Powers, *supra* note 28, at 354. Parties are afforded peremptory challenges at least in part because prospective jurors seldom admit their biases. Denials of bias are not reliable for several reasons:

> [F]irst, jurors are embarrassed to admit their prejudices when questioned before a large group; second, it is common for certain veniremen to decide that they want to be on the jury and then to evade questions—often unconsciously—in order to avoid being struck; third, jurors are often unaware of the existence or extent of their biases.

Id. at 355 (footnotes omitted).

41. Lewis v. United States, 146 U.S. 370, 376 (1892); *see* State v. Smith, 291 N.C. 505, 526, 231 S.E.2d 663, 676 (1977).

42. *See Lewis*, 146 U.S. at 376.

43. *See* Hayes v. Missouri, 120 U.S. 68, 70 (1887).

44. Swain v. Alabama, 380 U.S. 202, 220 (1965), *overruled in part*, Batson v. Kentucky, 479 U.S. 79 (1986).

45. Batson v. Kentucky, 476 U.S. 79, 138-39 (1986) (Rehnquist, J., dissenting).

46. Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545, 553 (1975).

thus, how peremptory challenges should be exercised.[47] Another treatise notes that "[g]enerally speaking, Jews, Blacks, Irish, Italians, Hispanics, Puerto Ricans, and other groups that have experienced oppression are sympathetic and have proplaintiff tendencies. Germans, Norwegians, Swedes, English, [and] Orientals are thought by some to be better defense jurors."[48]

For more than twenty years, the 1965 United States Supreme Court case *Swain v. Alabama*[49] was the seminal authority on the constitutional parameters of peremptory challenges in criminal cases. The *Swain* court held that the equal protection clause of the fourteenth amendment to the United States Constitution[50] is not violated in any individual case by a prosecutor's purposeful exclusion of black jurors through peremptory challenges.[51] According to the Court, only when peremptory challenges are used *systematically*, case after case, to exclude blacks from jury service is the equal protection guarantee infringed.[52] In 1986, the Supreme Court overruled *Swain*'s case-after-case requirement. In *Batson v. Kentucky*,[53] the Court held that a criminal defendant can make out a prima facie case of racial discrimination violating the equal protection clause simply by showing that *at the defendant's trial* the prosecutor challenged prospective jurors on the basis of race.[54]

The *Batson* court articulated a test for trial judges to follow in ascertaining whether there has been impermissible discrimination in a criminal case. Initially, the defendant must show that she is a member of a "cognizable racial group" and that the prosecutor used peremptory challenges to remove members of that group.[55] The defendant also must show that the "relevant circum-

47. R. WENKE, THE ART OF SELECTING A JURY 64-65 (1979). Judge Wenke notes that "[b]lacks tend to be proplaintiff . . . and sympathetic to the 'underdog,' the young, the blue collar worker, and the unemployed. They tend to be prejudiced against executives." *Id.* at 76.

48. W. WAGNER, ART OF ADVOCACY: JURY SELECTION § 1.04[8] (1988).

49. 380 U.S. 202 (1965), *overruled in part*, Batson v. Kentucky, 476 U.S. 79 (1986).

50. The fourteenth amendment provides in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

51. *Swain*, 380 U.S. at 221. The Court held:

> In light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, we cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case. The presumption in any particular case must be that the prosecution is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecution therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes. Any other result, we think, would establish a rule wholly at odds with the peremptory challenge system as we know it.

Id. at 222.

52. *Id.* at 223-24.

53. 476 U.S. 79 (1986).

54. *Id.* at 96. The Court held:

> Just as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors . . . so it forbids the State to strike black veniremen simply because the defendant is black. The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' race.

Id. at 97-98.

55. *Id.* at 96.

stances" raise an inference of discrimination.[56] The trial judge then, in her discretion, must determine whether the defendant has established a prima facie case of purposeful discrimination.[57] If the trial judge finds that a prima facie case of discrimination exists, the prosecution must proffer nondiscriminatory explanations for the exercise of the challenges, "related to the particular case to be tried."[58] Such explanations "need not rise to the level of justifying exercise of a challenge for cause."[59] The prosecution, in offering such explanations, may not assume that a black juror will be partial to a black defendant merely because of their common race.[60] Finally, the trial judge must weigh the evidence and "determine if the defendant has established purposeful discrimination."[61]

Batson has served as controlling precedent in several criminal cases recently decided by the North Carolina appellate courts. In none of these opinions, however, has the court found a constitutional violation in the exercise of peremptory challenges.[62] The first such case was *State v. Clay*.[63] Defendant's jury was empaneled on July 24, 1985. On July 26, 1985, the state rested. Three days later, "the defendant filed a motion to dismiss all charges against her on the ground that the State violated defendant's constitutional rights by systematically excluding five members of the jury of the black race, the same race as the defendant."[64] Because this was not a "timely objection" as required by *Batson*, the trial court ruled that the objection had been waived.[65] The court of appeals agreed and affirmed.[66]

In *State v. Abbott*[67] five black prospective jurors were called to the jury box. The state peremptorily challenged three of them and defendant challenged one for cause, with the resulting jury consisting of eleven whites and one black.[68] Defendant alleged racial discrimination violating *Batson*. The North Carolina Supreme Court held that

> the defendant has not made a prima facie case of racially motivated peremptory challenges. Five blacks were tendered as prospective jurors to the State. It exercised peremptory challenges to three of them. The State was willing to accept 40% of the blacks tendered. . . . There was not a showing from the State's action in this case that it was determined not to let a black sit as a juror on account of the race of the

56. *Id.*
57. *Id.* at 96-97.
58. *Id.* at 98.
59. *Id.* at 97.
60. *Id.*
61. *Id.* at 98.
62. *But see infra* notes 85-90 and accompanying text for discussion of a North Carolina case that found a procedural violation of *Batson*.
63. 85 N.C. App. 477, 355 S.E.2d 510, *disc. rev. denied*, 320 N.C. 634, 360 S.E.2d 96 (1987).
64. *Id.* at 479, 355 S.E.2d at 512.
65. *Id.* (inferring from the factual context of *Batson* a duty to make a timely objection to the allegedly discriminatory peremptories).
66. *Id.* at 484, 355 S.E.2d at 514. Thus, the court of appeals never addressed the merits of defendant's *Batson* claim.
67. 320 N.C. 475, 358 S.E.2d 365 (1987).
68. *See id.* at 480, 358 S.E.2d at 369.

defendant.[69]

In *State v. Jackson*[70] the state exercised five peremptory challenges, four against blacks and one against a white, so that the empaneled jury consisted of eleven whites and one black.[71] Finding that defendant had " 'made a prima facie showing of the inference of purposeful discrimination,' "[72] the prosecutor was called upon to offer nondiscriminatory explanations for her challenges. In response, the prosecutor first noted that one of the state's principal witnesses was a black detective; therefore, race was not a consideration in selecting the jury.[73] She then stated that one black was challenged because she was unemployed and had been a student counselor at Shaw University.[74] These factors, the prosecutor said, indicated a liberal bias.[75] A second black was challenged because he was a law student at the University of North Carolina at Chapel Hill where he had been taught by professors of "somewhat liberal views."[76] A third black was challenged because of hesitant answers to *voir dire* questions and perceived indifference or hostility toward serving on the jury.[77] The final black was challenged because she had a son the approximate age of defendant and, because defendant's mother was expected to testify, would likely lean toward defendant.[78] After analyzing these explanations, the trial judge denied defendant's motion for a mistrial.[79] The supreme court, after reviewing the procedural requirements of *Batson*,[80] the prosecutor's nondiscriminatory explanations,[81] and use of the *Batson* model in other jurisdictions,[82] held that "taking into account all circumstances of the case,"[83] although "[w]e might not have reached

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69. *Id.* at 481-82, 358 S.E.2d at 369-70. Similarly, in State v. Gray, 322 N.C. 457, 459, 368 S.E.2d 627, 628 (1988), the supreme court held that defendant had failed to establish a prima facie case under *Batson* because only two of six peremptory challenges were exercised against blacks.

70. 322 N.C. 251, 368 S.E.2d 838 (1988).

71. *Id.* at 252-53, 368 S.E.2d at 839.

72. *Id.* at 253, 368 S.E.2d at 839 (quoting trial court).

73. *Id.* At this point the prosecutor also stated:

> "Prior to trial my co-counsel and I felt that it was of the utmost importance that we select a jury that was stable, government oriented, employed, and had sufficient ties to the community . . . [to] pay more attention to the needs of law enforcement than the fine points of individual rights."

Id. (quoting prosecutor's statement to the trial court). The supreme court approved of the prosecutor's use of such a jury profile, holding that these factors "are legitimate criteria in picking a jury." *Id.* at 257, 368 S.E.2d at 841.

74. *Id.* at 253, 368 S.E.2d at 839.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 254, 368 S.E.2d at 839.

80. *Id.* at 254-55, 368 S.E.2d at 839-40; *see supra* text accompanying notes 55-61.

81. *Jackson*, 322 N.C. at 256-57, 368 S.E.2d at 840.

82. *Id.* at 255-56, 368 S.E.2d at 840-41. The court looked to explanations that have been accepted as nondiscriminatory in other jurisdictions, such as potential black jurors' youth, unemployment, avoiding of eye contact, United States v. Cartlidge, 808 F.2d 1064, 1070-71 (5th Cir. 1987), "educational backgrounds, their employment history, the employment of their spouses and children, and criminal record," People v. Cartagena, 128 A.D.2d 797, 797, 513 N.Y.S.2d 497, 498, *appeal denied*, 70 N.Y.2d 798, 516 N.E.2d 1229, 522 N.Y.S.2d 116 (1987), and religious preference, Chambers v. State, 724 S.W.2d 440, 442 (Tex. Ct. App. 1987).

83. *Jackson*, 322 N.C. at 255, 368 S.E.2d at 840. These circumstances included:

the same result as the superior court[,] . . . giving, as we must, deference to its findings, we hold it was not error to deny the defendant's motion for mistrial."[84]

State v. Green[85] is to date the only North Carolina appellate opinion to remand a lower court's disposition on the basis of *Batson*. The remand, however, was on procedural, not substantive, grounds. In *Green*, defendant pleaded guilty to two counts of first-degree murder and two counts of robbery. He was tried by a jury as to punishment and was sentenced to death. Defendant appealed to the supreme court, alleging racially discriminatory use of peremptory challenges.[86] The supreme court remanded to the trial court for an evidentiary hearing on the issue of the prosecutor's use of peremptory challenges.[87] The trial court, on remand, ruled that defendant could neither cross-examine the prosecutor nor introduce evidence at the hearing.[88] After listening to the prosecutor's explanations, the trial judge concluded that racial discrimination had not occurred.[89] The supreme court remanded yet again, holding that it was error to deny defendant the opportunity to introduce evidence at the hearing: "If the defendant can put on evidence which tends to rebut the State's contentions he should be allowed to do so. If the case for discrimination is stronger than can be shown by the pattern of strikes in the present case, the defendant should have the benefit of this showing."[90]

The use of peremptories to exclude members of distinct groups from jury service in a criminal case also has been attacked on sixth amendment grounds.[91]

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(1) one of the principal witnesses for the State was a black police officer, (2) the first peremptory challenge was to a white juror, (3) the State left a black person on the jury when it still had three peremptory challenges, and (4) there were no comments by either prosecutor which would indicate a discriminatory intent by the State.

Id.

84. *Id.* at 257, 368 S.E.2d at 841. The court of appeals considered a similar case in State v. Cannon, 92 N.C. App. 246, 374 S.E.2d 604 (1988). There the state exercised a total of six peremptory challenges—all against blacks. Upon defendants' objections, the state, without any request to do so from the trial court, proffered nondiscriminatory explanations for the first three challenges. The trial court required explanations for the next three challenges. The prosecutor explained that five of the six challenged jurors had connections to a defendant, a member of a defendant's family, or to a state's witness. The sixth juror was challenged because he recently had been fined for a traffic violation for which he insisted he was innocent. *Id.* at 252-53, 374 S.E.2d at 606-08. The trial court overruled defendants' objections, "finding that the peremptory challenges were not made with a purpose to discriminate." *Id.* at 252, 374 S.E.2d at 607-08. Noting both the nondiscriminatory explanations and lack of a record indicating the prosecutor made any comments implying a purpose to discriminate, the court of appeals held: "After paying special deference to the findings of the trial court as mandated by *Jackson*, we hold the court did not err in finding the State's explanations sufficient to rebut any prima facie showing of purposeful discrimination that may have been made by defendants." *Id.* at 252, 374 S.E.2d at 608.

85. 324 N.C. 238, 376 S.E.2d 727 (1989) [hereinafter *Green II*].

86. *Id.* at 239, 376 S.E.2d at 728. The opinion does not indicate how many blacks were challenged by the prosecution.

87. *Id.* at 240, 376 S.E.2d at 728; *see* State v. Green, 320 N.C. 173, 358 S.E.2d 60 (1988) (*Green I*). The sentencing trial took place before *Batson* was decided. *Green II*, 324 N.C. at 240, 376 S.E.2d at 727.

88. *Green II* at 240, 376 S.C.2d at 728.

89. *Id.*

90. *Id.*

91. The sixth amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." U.S. CONST. amend. VI. The United States Supreme Court has had two opportunities to rule on whether the exercise of

In the 1984 case of *McCray v. Abrams*[92] the United States Court of Appeals for the Second Circuit ruled on a case in which the prosecutor used eight of her eleven peremptories to challenge seven prospective black jurors and one prospective Hispanic juror, resulting in an all-white jury. The trial judge denied defendant's request to have the prosecutor explain her motivations for these challenges and denied defendant's motion for mistrial.[93] The Second Circuit, precluded by *Swain* from finding an equal protection violation,[94] instead focused on the Supreme Court's 1975 decision in *Taylor v. Louisiana*.[95] There the Court held that the sixth amendment requires that trial juries be selected from a venire representing a fair cross section of the community.[96] From *Taylor*, the Second Circuit extrapolated that "the state is not permitted to restrict unreasonably the possibility that the petit jury will comprise a fair cross section of the community."[97] Thus, the court reasoned, the state's use of peremptory challenges purposefully to remove all nonwhites from the jury violates the fair cross section requirement of the sixth amendment.[98] The court therefore reversed and remanded for a new trial.[99] The Second Circuit is one of only two federal circuits to extend *Taylor*'s fair cross section requirement to the use of peremptory challenges.[100] Seven state appellate courts also have held that a prosecutor violates

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peremptory challenges can violate the sixth amendment. The first was Batson v. Kentucky, 476 U.S. 79 (1986), in which the Court, though presented with a sixth amendment challenge, *see id.* at 112-18 (Burger, C.J., dissenting), decided the case on fourteenth amendment grounds. *See supra* notes 53-61 and accompanying text. In a footnote, the *Batson* court expressed "no view on the merits of any of petitioner's sixth amendment arguments." *Batson*, 476 U.S. at 85 n.4. More recently, in Teague v. Lane, 109 S. Ct. 1060 (1989), the Court sidestepped the peremptory challenge question altogether—though this was the question on which certiorari was granted, *id.* at 1065—and decided the case instead on retroactivity grounds. *Id.* at 1065, 1069.

92. 750 F.2d 1113 (2d Cir. 1984), *vacated and remanded*, 478 U.S. 1001 (1986), *appeal dismissed per stipulation*, No. 84-2026, slip op. (2d Cir. 1986). The Supreme Court remanded for the Second Circuit to reconsider its holding in light of *Batson*. Abrams v. McCray, 478 U.S. 1001, 1001 (1986). Although the Second Circuit did not have the chance to reevaluate its opinion in light of *Batson* because of the parties' settlement, the following year it reaffirmed that *McCray* was good law notwithstanding the Supreme Court's remand. *See* Roman v. Abrams, 822 F.2d 214, 224-27 (2d Cir. 1987), *cert. denied*, 109 S. Ct. 1311 (1989).

93. *McCray*, 750 F.2d at 1115.

94. *Id.* at 1123-24. *McCray* was decided before *Batson*; thus *Swain* was still the controlling authority on the equal protection parameters of peremptory challenges. For a discussion of *Swain*, see *supra* notes 49-52 and accompanying text.

95. 419 U.S. 522 (1975).

96. *Id.* at 530.

97. *McCray*, 750 F.2d at 1129.

98. *Id.* at 1131.

99. *Id.* at 1135.

100. The Sixth Circuit followed *McCray* in Booker v. Jabe, 775 F.2d 762 (6th Cir. 1985), *vacated and remanded*, 478 U.S. 1001, *opinion reinstated*, 801 F.2d 871 (6th Cir. 1986) (per curiam), *cert. denied*, 479 U.S. 1046 (1987). In *Booker* the prosecutor used 22 of 26 peremptory challenges to exclude potential black jurors, in several instances without addressing a single question to the excused juror. Defendant was tried and convicted before an all-white jury. The Sixth Circuit concluded that "under the Sixth Amendment, neither prosecutor nor defense counsel may systematically exercise peremptory challenges to excuse members of a cognizable group from service on a criminal petit jury." *Id.* at 772. *Contra* United States v. Hamilton, 850 F.2d 1038 (4th Cir. 1988), *cert. dismissed*, 109 S. Ct. 1564 (1989); Nevius v. Sumner, 852 F.2d 463 (9th Cir. 1988); Teague v. Lane, 820 F.2d 832 (7th Cir. 1987), *aff'd on other grounds*, 109 S. Ct. 1060 (1989); United States v. Leslie, 783 F.2d 541 (5th Cir. 1986), *vacated and remanded*, 479 U.S. 1074, *remanded to district court*, 813 F.2d 658 (5th Cir. 1987); United States v. Thompson, 730 F.2d 82 (8th Cir.), *cert. denied*, 469 U.S. 1024 (1984); Willis v. Zant, 720 F.2d 1212 (11th Cir. 1983), *cert. denied*, 467 U.S. 1256 (1984).

their state constitutions' fair cross section requirement by using peremptory challenges purposefully to exclude members of distinct groups from serving on the criminal trial jury.[101]

In *State v. Belton*[102] the North Carolina Supreme Court was invited to adopt the Second Circuit's fair cross section analysis either through the sixth amendment to the federal constitution or article I, section twenty-four of the state constitution.[103] Two black men were charged with kidnapping and raping two white women. The state used eight of its fourteen peremptory challenges, including challenges to alternates, to excuse potential black jurors. The petit jury that convicted defendants consisted of eight whites and four blacks.[104] During the selection process, the state passed on seven black prospective jurors while peremptorily challenging six whites.[105] Defendants requested the supreme court to adopt the *McCray* analysis "to preclude the state from challenging peremptorily prospective jurors solely on the basis of their race or group affiliation. . . ."[106] Noting that the facts did not create an inference that the peremptory challenges had been exercised solely on the basis of race,[107] the court refused to consider whether a *McCray* analysis is warranted under either the United States or North Carolina Constitutions.[108] In a bitter dissent, Justice Meyer scolded his colleagues for refusing to decide the substantive question whether the federal or state constitution permits a *McCray* analysis.[109]

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101. People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978); Fields v. People, 732 P.2d 1145 (Colo. 1987); Riley v. State, 496 A.2d 997 (Del. Super. Ct. 1985), *cert. denied*, 478 U.S. 1022 (1986); State v. Neil, 457 So. 2d 481 (Fla. 1984); Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979); State v. Gilmore, 199 N.J. Super. 389, 489 A.2d 1175 (1985), *aff'd*, 103 N.J. 508, 511 A.2d 1150 (1986); State v. Crespin, 94 N.M. 486, 612 P.2d 716 (1980). These cases all were decided during the period in which *Swain* precluded an equal protection challenge to allegedly discriminatory use of peremptory challenges in an individual case. These state courts, searching for a method to prohibit such a practice, looked to the impartial jury provisions of their state constitutions to imply the fair cross section requirement that *Taylor* held was embodied in the sixth amendment to the federal constitution. Two state appellate courts recently have joined *McCray* and *Booker* in holding that group-based peremptories are prohibited by the sixth amendment to the United States Constitution. State v. Superior Ct. In & For Maricopa County, 157 Ariz. 541, 760 P.2d 541 (1988); People v. Gary M., 138 Misc. 2d 1081, 526 N.Y.S.2d 986 (N.Y. Sup. Ct. 1988).

102. 318 N.C. 141, 347 S.E.2d 755 (1986).

103. *Id.* at 158, 347 S.E.2d at 765. Article I, section 24 of the North Carolina Constitution provides in pertinent part: "No person shall be convicted of any crime but by the unanimous verdict of a jury in open court." Defendant, in his brief, suggested that the word "jury" in this section means a "fair jury," thus giving rise to the fair cross section requirement. *See* Brief for Appellant at 4, *Belton* (No. 693A84).

104. *Belton*, 318 N.C. at 153, 347 S.E.2d at 762-63. One alternate was white and one was black.

105. *Id.*

106. *Id.* at 158, 347 S.E.2d at 765.

107. *Id.* at 159, 347 S.E.2d at 766. Citing the state's passing on seven blacks though challenging six whites, the court concluded that "[t]he challenges complained of affirmatively demonstrate that concerns other than race must have motivated the prosecutor." *Id.*

108. *Id.* at 158, 347 S.E.2d at 765.

109. *Id.* at 169-72, 347 S.E.2d at 770-72 (Meyer, J., dissenting). Justice Meyer, concluding that such an analysis is flawed under either constitution, insisted that "[t]he possibility that a prosecutor will systematically eliminate a defendant's 'fair chance' at a representative cross-section by systematically removing blacks or other racial minorities—*McCray*'s ultimate concern—has been eliminated by the holding in *Batson v. Kentucky*." *Id.* at 171-72, 347 S.E.2d at 772 (Meyer, J., dissenting). After *Belton*, the supreme court declined another opportunity to employ a *McCray* analysis in State v. Mitchell, 321 N.C. 650, 655, 365 S.E.2d 554, 558 (1988), citing lack of an adequate record. Defend-

No federal appellate court has extended the fair cross section rationale of *McCray* to prohibit the use of race-based peremptory challenges in *civil* cases. Very recently, however, the United States Court of Appeals for both the Fifth and Eleventh Circuits has extended *Batson*'s equal protection rationale to civil cases.[110] In *Edmonson v. Leesville Concrete Co., Inc.*[111] an injured 34-year-old black worker brought a personal injury action against defendant construction company in federal district court.[112] Defendant challenged peremptorily two black and one white prospective jurors.[113] Plaintiff objected and asked the district court to require defendant to proffer nondiscriminatory explanations for the challenges to the prospective black jurors. The trial judge denied the request, declaring that *Batson* does not apply to civil trials.[114] The jury of eleven whites and one black found plaintiff eighty percent at fault for his injuries, and reduced his verdict accordingly.[115]

The Fifth Circuit, in analyzing plaintiff's appeal grounded upon *Batson*, first considered whether there is sufficient "state action" in the selection of a civil jury to implicate the equal protection guarantee of the fifth amendment.[116] The *Edmonson* court relied in part on a recent Supreme Court case that held, "the state acts when 'private parties make use of state procedures with the overt, significant assistance of state officials.' "[117] The court concluded that because "it is the judge, acting in a judicial capacity, who excuses the prospective juror"

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ant actually had "filed a motion to require the court reporter to note the race of every potential juror examined to perfect the record and determine if there was a substantial likelihood that any jurors were challenged on the basis of race." *Id.* at 653, 365 S.E.2d at 556. The trial court denied the motion. *Id.* The supreme court held:

> If a defendant in cases such as this believes a prospective juror to be of a particular race, he can bring this fact to the trial court's attention and ensure that it is made a part of the record. Further, if there is any question as to the prospective juror's race, this issue should be resolved by the trial court based upon questioning of the juror or other proper evidence, as opposed to leaving the issue to the court reporter who may not make counsel aware of the doubt. In the present case the defendant did not avail himself of this opportunity, despite the trial court's suggestion at the pre-trial hearing that he might wish to do so during jury selection. . . . Thus, the defendant has failed to demonstrate that the prosecutor exercised peremptory challenges solely to remove members of any particular race from the jury.

Id. at 656, 365 S.E.2d at 557-58.

110. Both of these cases were decided *after Jackson III*. Before these two cases were decided, one federal district court had extended *Batson* to civil cases. In Clark v. City of Bridgeport, 645 F. Supp. 890 (D. Conn. 1986), three civil rights actions were brought against a city and its police officers. The trial judge held that the assistant city attorney's conduct in using peremptories to strike each of the eight prospective black jurors called to the jury box in the three trials was "constitutionally impermissible" because seven of the eight admittedly were excluded solely on account of their race. *Id.* at 894.

111. 860 F.2d 1308 (5th Cir. 1988), *reh'g en banc granted*, 860 F.2d 1317 (5th Cir. 1989).

112. *Id.* at 1309-10. Federal jurisdiction was based on diversity of citizenship pursuant to 28 U.S.C. § 1331 (1982).

113. *Edmonson*, 860 F.2d at 1310. Each party to a federal civil trial is entitled to three peremptory challenges. 28 U.S.C. § 1870 (1982).

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

115. *Id.*

116. The fourteenth amendment's equal protection guarantee expressly applies only to the states. In Bolling v. Sharpe, 347 U.S. 497 (1954), the Supreme Court held that the fifth amendment's due process clause implies an equal protection guarantee in federal actions.

117. *Edmonson*, 860 F.2d at 1311 (quoting Tulsa Professional Collection Servs. v. Pope, 457 U.S. 922, 939 (1982)).

peremptorily challenged,[118] the exercise of such challenges constitutes "state action."[119] The court then reasoned 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 on the same bench, in the same courtroom, is conducting a criminal trial."[120] The court concluded:

> If we were to limit *Batson* to criminal cases, we would betray *Batson's* fundamental principle: the state's use, toleration, and approval of peremptory challenges based on race violates the equal protection clause. We, therefore, hold that the principle announced by the Supreme Court in *Batson* applies to civil cases as well.[121]

Two weeks after *Edmonson* was decided, the Eleventh Circuit reached the same conclusion in *Fludd v. Dykes*.[122] Plaintiff, a black man, was shot by a white police officer while the latter was attempting to take a suspected narcotics trafficker into custody. Plaintiff brought a civil rights suit against the officer and his white supervisor.[123] Defendants peremptorily challenged two black prospective jurors, resulting in an all-white jury that returned a verdict for defendants.[124] Just as in *Edmonson*, the trial court refused plaintiff's request to require defense counsel to proffer nondiscriminatory explanations for the challenges, ruling that *Batson* is inapplicable to civil cases.[125] The court of appeals reasoned that the trial judge's overruling of one party's objection to the other party's use of peremptory challenges in a civil trial constitutes "state action" sufficient to implicate equal protection principles.[126] The court then concluded:

> [T]he policies underlying the Supreme Court's decision in *Batson* are equally applicable in the civil context. . . . [W]e see no reason why a civil litigant would be unduly prejudiced by explaining the purpose of a strike where the circumstantial evidence indicates that he made it for a discriminatory purpose. . . . We therefore hold that *Batson* applies in civil cases.[127]

Prior to *Jackson v. Housing Authority of High Point*, two state appellate courts had held that race- or group-based peremptory challenges, even in civil cases, violate their state constitutions. In *Holley v. J & S Sweeping Co.*,[128] a case decided before *Batson*, a California Court of Appeal held that group-based per-

118. *Id.*

119. *Id.* at 1313. The court reasoned: "By carrying out his duties in a way that permits peremptory challenges based on race, the rust of the judge's approval of discrimination rubs off onto society, corroding the national character by giving private prejudice the imprimatur of state approval." *Id.*

120. *Id.* at 1313-14 (footnote omitted).

121. *Id.* at 1314. Judge Gee's dissent admittedly quarreled less with the majority's rationale in extending *Batson* to civil cases than with the principle embodied in *Batson* itself: "What remains after today's holding is not the peremptory challenge which our procedure has known for decades—or not one which can be freely exercised against all jurors in all cases, at any rate." *Id.* at 1317 (Gee, J., dissenting).

122. 863 F.2d 822 (11th Cir. 1989).

123. *Id.* at 824. The suit was grounded upon 42 U.S.C. § 1983 (1982).

124. *Fludd*, 863 F.2d at 823.

125. *Id.* at 824.

126. *Id.* at 828.

127. *Id.* at 828-29.

128. 143 Cal. App. 3d 588, 192 Cal. Rptr. 74 (Cal. Dist. Ct. App. 1983).

emptories in civil cases violate its state constitution. Plaintiff, a black man, had brought a negligence action. During *voir dire*, defense counsel, without conducting any questioning, exercised three of six peremptory challenges to exclude all three prospective black jurors who were called to the box and were not excused for cause. Plaintiff unsuccessfully objected to defendant's use of peremptories and plaintiff's claim was tried by an all-white jury. The jury returned a verdict for defendant and plaintiff appealed.[129]

The *Holley* court reasoned that group-based peremptories raise "substantially similar constitutional concerns" in civil cases as they do in criminal cases.[130]

> [A] failure to permit similar judicial supervision in a civil setting would not only frustrate . . . [the] fundamental purpose [of achieving impartiality through group interaction], but would conceivably sanction the indiscriminate use of peremptory challenges based upon group bias alone thus seriously eroding the constitutional guarantee extended equally to civil litigants.[131]

The *Holley* court then reiterated the procedural inquiry the California Supreme Court had formulated to test the use of group-based peremptories for constitutional violations in criminal cases.[132] The inquiry begins with a timely objection to the opposing attorney's use of apparently race-based peremptory challenges.[133] Next, the objecting attorney must establish that the excluded venirepersons are members of a cognizable group.[134] She then must demonstrate a strong likelihood that such prospective jurors were challenged on the basis of group affiliation, rather than their individual bias in the particular case.[135] These factors will establish a prima facie showing of the impermissible exercise of peremptory challenges.[136] At this point, the burden shifts to the allegedly offending attorney to offer non-group-based reasons for the challenges.[137] If the trial judge believes the attorney's explanations, the prima facie case is rebutted, and jury selection resumes.[138] If, however, the trial judge finds that the attorney's explanations are pretexts and that the challenges actually were exercised on the basis of group affiliation, the entire venire must be quashed, and jury selection must begin anew.[139] The court of appeal found suffi-

129. *Id.* at 590-93, 192 Cal. Rptr. at 75-78.

130. *Id.* at 592, 192 Cal. Rptr. at 77.

131. *Id.* The *Holley* court's decision was grounded on a state constitutional provision that provides in pertinent part: "Trial by jury is an inviolate right and shall be secured to all. . . ." CAL. CONST., art. I, § 16. The California Supreme Court previously had interpreted this section to require criminal petit juries to be as near a representative cross section of the community as random draw permits. *See* People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

132. *See Wheeler*, 22 Cal. 3d at 280-82, 583 P.2d at 764-65, 148 Cal. Rptr. at 905-06.

133. *Holley*, 143 Cal. App. 3d at 591, 192 Cal. Rptr. at 76.

134. *Id.*

135. *Id.*

136. *Id.* at 592, 192 Cal. Rptr. at 76.

137. *Id.* at 592, 192 Cal. Rptr. at 76-77.

138. *Id.* at 592, 192 Cal. Rptr. at 77.

139. *Id.* This inquiry is very similar to the one announced three years later by the United States Supreme Court in *Batson*. *See supra* notes 55-61.

cient evidence in the record to make out a prima facie case of impermissible use of peremptories.[140] Because the trial judge did not require defendant's counsel to proffer neutral explanations for the challenges, the court reversed the jury's verdict and remanded for a new trial.[141]

In *City of Miami v. Cornett*[142] a Florida District Court of Appeal held that the impartial jury rationale underlying the prohibition of race-based peremptory challenges in criminal cases "applies with equal force to a civil jury trial."[143] Plaintiff, a black man, sued the City of Miami and two of its police officers for injuries, including paralysis, suffered from a gunshot to the back during apprehension. Four blacks were summoned to the venire. Defense counsel, over plaintiff's objections, used each of his four allotted peremptories to exclude each of the black venirepersons as they were called to the box. The all-white jury found for defendant. On plaintiff's motion, the trial judge ordered a new trial, agreeing with plaintiff's contention that defendant's use of peremptories improperly denied plaintiff an impartial jury.[144]

The district court of appeal affirmed, reiterating the procedural test the Florida Supreme Court had fashioned to scrutinize race-based peremptory challenges in criminal cases,[145] which is almost identical to the California court's *Holley* test.[146] Because the trial judge in *Cornett* did not require defense counsel to explain the allegedly race-based peremptories, a new trial was required.[147]

Despite this large body of relevant law, the North Carolina Supreme Court in *Jackson v. Housing Authority of High Point*[148] addressed the issues raised by the case in a two-page opinion. In its brevity, the opinion failed to address the intent of the drafters of article I, section twenty-six of the state constitution, which might have led the court to a different conclusion. Such an analysis particularly was warranted because this was the first time the supreme court grounded an opinion squarely on this provision.[149] The court also failed to establish a procedure through which civil parties can challenge the use of per-

140. *Holley*, 143 Cal. App. 3d at 593, 192 Cal. Rptr. at 78.

141. *Id.* at 594, 192 Cal. Rptr. at 78.

142. 463 So. 2d 399 (Fla. Dist. Ct. App.), *cause dismissed*, 469 So. 2d 748 (Fla. 1985).

143. *Id.* at 400. The court's decision was grounded on article I, section 22 of the Florida Constitution, which provides that "[t]he right of trial by jury shall be secure to all and remain inviolate." The Florida Supreme Court, employing a *McCray* analysis, set forth *supra* at notes 92-99 and accompanying text, previously had interpreted this section to forbid the exclusion of blacks from criminal juries through peremptory challenges. State v. Neil, 457 So. 2d 481 (Fla. 1984).

144. *Cornett*, 463 So. 2d at 400-01.

145. *See Neil*, 457 So. 2d at 486-87 (Fla. 1984).

146. *See supra* text accompanying notes 132-39. The one major distinction between the *Holley* test and the *Cornett* test is that the latter specifically is limited to cognizable *racial* groups. *Cornett*, 463 So. 2d at 401.

147. *Cornett*, 463 So. 2d at 402.

148. 321 N.C. 584, 364 S.E.2d 416 (1988).

149. In State v. Cofield, 320 N.C. 297, 303, 357 S.E.2d 622, 626 (1987), however, the court held that racial discrimination in the selection of a grand jury foreman denies the equal protection guaranteed by sections 19 and 26 of article I. The court held:

> Article I, section 26 does more than protect individuals from unequal treatment. The people of North Carolina have declared in this provision that they will not tolerate the corruption of their juries by racism, sexism and similar forms of irrational prejudice. They have recognized that the judicial system of a democratic society must operate evenhand-

emptories allegedly motivated by race. Most importantly, the court failed to recognize that a prospective juror's race may, in some instances, affect her view of the case.

Although the court concluded that article I, section twenty-six "would be eviscerated if the use of peremptory challenges did not come within its ambit,"[150] the history behind its adoption strongly suggests that peremptory challenges never were intended to come within its ambit. The current language of article I, section twenty-six first appeared in the 1971 constitution.[151] The previous constitution, however, contained a similar provision that was enacted in 1945: "No person shall be excluded from jury service on account of sex."[152] This provision was adopted three months after the state supreme court held in *State v. Emery*[153] that women were not eligible to serve on juries. The *Emery* court concluded that "until the common-law *disqualification* of sex is removed from our law, women are not required to assume the obligation of jury service. They were *ineligible* for such service at the time of the adoption of the Constitution of 1868, and the same law which then obtained still subsists."[154] The 1945 constitutional amendment obviously was drafted to overrule *Emery*.[155] Because *Emery* stood for the blanket proposition that women were *disqualified* or *ineligible* to perform jury services, the opposite conclusion must be reached about the 1945 provision—it merely provided that women are *qualified* or *eligible* to serve on juries. Neither *Emery* nor the 1945 amendment had anything to do with the use of peremptory challenges; they were concerned with the selection of the jury *venire* from the community at large.[156] Because the language of article I, section twenty-six tracked its 1945 counterpart, adding "race, color, religion, or na-

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edly if it is to command the respect and support of those subject to its jurisdiction. It must also be *perceived* to operate evenhandedly.

Id. at 302, 357 S.E.2d at 625 (footnote omitted).

150. *Jackson III*, 321 N.C. at 585, 364 S.E.2d at 416.

151. North Carolina citizens have adopted three constitutions since statehood—the constitutions of 1776, 1868, and 1971. T. EURE, CONSTITUTION OF NORTH CAROLINA: ITS HISTORY AND CONTENT iii (1985).

152. N.C. CONST. of 1868, art. I, § 19 (1945). The 1971 provision (article I, section 26) provides: "No person shall be excluded from jury service on account of sex, race, color, religion, or national origin." N.C. CONST. art. I, § 26.

153. 224 N.C. 581, 31 S.E.2d 858 (1944). The majority, over two bitter dissents, held that article I, section 19 of the constitution of 1868, which provided that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful *men* in open court," N.C. CONST. 1868, art. I, § 19 (1868) (emphasis added), should be read literally to exclude women from eligibility to serve on criminal juries. The court therefore held that defendant's jury, comprised of ten men and two women, was constitutionally infirm in that it contained women. *Emery*, 224 N.C. at 589, 31 S.E.2d at 864.

154. *Emery*, 224 N.C. at 584, 31 S.E.2d at 861 (emphasis added and citation omitted).

155. Not only did the general assembly enact the amendment three months after the decision was handed down, it amended all seven sections of the constitution in which *men* explicitly were given privileges not afforded to women by substituting the word "person" in each instance. Act of March 15, 1945, ch. 634, 1945 N.C. Sess. Laws 875.

156. *See Emery*, 224 N.C. at 587, 31 S.E.2d at 862-63 (majority argues that the process of drawing up jury lists would have to change significantly if women were declared eligible for jury service); Act of March 15, 1945, ch. 634, 1945 N.C. Sess. Laws 875 (indicating, parenthetically, that the effect of the amendment to article I, section 19 was "*[q]ualifying* women to serve on juries." (emphasis added)).

tional origin"[157] to the sentence, it is probable that its drafters did not intend its protection to extend further than it had before—to the *qualification* or *eligibility* of prospective jurors to be included on jury *venires*. Therefore, the most plausible reading of article I, section twenty-six is one that prohibits the exclusion of gender, racial, color, religious, and nationality groups from jury *venires*, not from petit juries.

North Carolina's official constitutional history[158] supports this view of article I, section twenty-six. The history notes that "all the rights newly expressed in [article I of] the Constitution of 1971 were already guaranteed by the United States Constitution[.] [T]heir inclusion simply constituted an explicit recognition by the state of their importance."[159] If this historical note is accurate, there is no doubt that the *Jackson* opinion goes much further than the drafters of article I, section twenty-six intended, because it was not until 1986 that the United States Supreme Court held that the exercise of peremptory challenges in a given case is constrained by the Constitution.[160]

Before *Jackson*, the North Carolina Supreme Court tacitly had interpreted article I, section twenty-six to apply only to jury venires, not petit juries and the use of peremptory challenges. During the fifteen-year period between the adoption of the 1971 constitution and *Batson*, the North Carolina Supreme Court ruled on five cases in which criminal defendants presented solid evidence of racially motivated peremptory challenges in their jury selections.[161] One of these cases specifically called the court's attention to article I, section twenty-six as requiring relief.[162] If the court believed that article I, section twenty-six applied to petit juries and the prosecutor's use of peremptory challenges, it would have interceded on behalf of the defendants, who each were convicted by all-white or

157. N.C. CONST. art. I, § 26. The inclusion of these new groups in the 1971 constitution probably was motivated by passage of the 1964 Civil Rights Act, which prohibits discrimination on account of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a) (1982).

158. T. EURE, *supra* note 151.

159. T. EURE, *supra* note 151, at 9. The accuracy of this notation, however, is questionable. Although it is true that by 1971 the Supreme Court had held that the exclusion of blacks from jury venires violates the fourteenth amendment, Strauder v. West Virginia, 100 U.S. 303, 310 (1879), the Court never has held that the exclusion of religious or national groups from jury venires violates the Constitution.

160. *See* Batson v. Kentucky, 476 U.S. 79, 89 (1986), discussed *supra* at notes 53-61 and accompanying text; Swain v. Alabama, 380 U.S. 202, 221 (1945), *overruled in part*, Batson v. Kentucky, 476 U.S. 79 (1986), discussed *supra* at notes 49-52 and accompanying text. *Strauder* stood only for the proposition that blacks are *qualified* to serve on juries and therefore must be included on jury lists. *See Strauder*, 100 U.S. at 308-10.

161. *See* State v. Gilliam, 317 N.C. 293, 297, 344 S.E.2d 783, 786 (1986) (objection grounded on N.C. CONST. art I, §§ 19 & 24); State v. Lynch, 300 N.C. 534, 546-47, 268 S.E.2d 161, 168 (1980) (objection grounded on state constitution, generally); State v. Alford, 289 N.C. 372, 376, 222 S.E.2d 222, 225 (1976) (objection grounded on U.S. CONST. amend. XIV); State v. Noell, 284 N.C. 670, 681, 202 S.E.2d 750, 758 (1974) (objection grounded on U.S. CONST. amends. VI & XIV and N.C. CONST. art I, § 26), *vacated in part*, 428 U.S. 902 (1976); State v. Shaw, 284 N.C. 366, 370, 200 S.E.2d 585, 588 (1973) (objection grounded on N.C. CONST. art I, § 19).

162. *Noell*, 284 N.C. at 681, 202 S.E.2d at 758. The court held that Swain v. Alabama, 380 U.S. 202 (1965), *overruled in part*, Batson v. Kentucky, 476 U.S. 79 (1986), discussed *supra* at notes 49-52 and accompanying text, was the controlling authority, notwithstanding article I, section 26. *Noell*, 284 N.C. at 682-83, 202 S.E.2d at 758-59.

nearly all-white juries.[163] Instead, in each of these cases, the court held that *Swain v. Alabama*[164] insulated the prosecutor's peremptory challenges from attack.[165] Not until 1988 in *Jackson* did the court hold that the antidiscrimination provision of article I, section twenty-six, which has existed in some form since 1945,[166] applies to petit juries and the use of peremptory challenges.

Another serious shortcoming of *Jackson* is its failure to establish a procedure by which the trial court may address claims of improper use of peremptory challenges in civil cases. The court's only guide to litigants concerned the quantum of evidence necessary to prevail on such a claim at the appellate level:

> The statement by plaintiff's counsel is not sufficient, standing alone, to support a finding of discriminatory use of peremptory challenges. We hold that as a rule of practice, counsel who seek to rely upon an alleged impropriety in the jury selection process must provide the reviewing court with the relevant portions of the transcript of the jury voir dire.[167]

Because the court noted that its holding was supported by the California decision in *Holley* and the Florida decision in *Cornett*,[168] it is possible that it intended to endorse the procedural tests set forth in those cases.[169] It also is possible the court intended for trial courts to use the *Batson* procedure to analyze possible violations.[170] Unfortunately, litigants and trial judges cannot be absolutely sure what procedure the court had in mind.

The most serious shortcoming of *Jackson*, however, is its failure to recognize that a juror's sex, race, color, religion, or national origin may affect substantially the juror's view of a particular case.[171] *Jackson* appears to hold that it is constitutionally impermissible for defense counsel to challenge peremptorily blacks called to the jury box in a suit by a black against a white-run police department alleging false arrest; for defense counsel to challenge peremptorily women called to the jury box in a suit brought by a woman alleging sexual harassment by a male employer; and for defense counsel to challenge peremptorily Jews called to the jury box in a suit brought by a Jew against a Nazi sympa-

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163. *Gilliam*, 317 N.C. at 297, 344 S.E.2d at 785 (jury consisted of 11 whites and one black); Brief for Appellant at 14, *Lynch* (Nos. 79 CRS 7592, 79 CRS 7593, 79 CRS 7594) (all-white jury); *Alford*, 289 N.C. at 376, 222 S.E.2d at 225 (all-white jury); *Noell*, 284 N.C. at 681, 202 S.E.2d at 758 (all-white jury); *Shaw*, 284 N.C. at 369, 200 S.E.2d at 587 (all-white jury).

164. 380 U.S. 202 (1965), *overruled in part*, Batson v. Kentucky, 476 U.S. 79 (1986), discussed *supra* at notes 49-52 and accompanying text.

165. *Gilliam*, 317 N.C. at 297, 344 S.E.2d at 786; *Lynch*, 300 N.C. at 546, 268 S.E.2d at 168; *Alford*, 289 N.C. at 377, 222 S.E.2d at 226; *Noell*, 284 N.C. at 682-83, 202 S.E.2d at 758-59; *Shaw*, 284 N.C. at 369-70, 200 S.E.2d at 587-88.

166. *See supra* notes 151-52 and accompanying text.

167. *Jackson III*, 321 N.C. at 585-86, 364 S.E.2d at 417.

168. *Id.* at 585, 364 S.E.2d at 417.

169. *See supra* notes 133-139 & 146 and accompanying text. *Holley* is discussed *supra* at notes 128-41 and accompanying text; *Cornett* is discussed *supra* at notes 142-47 and accompanying text.

170. For a discussion of this procedure see *supra* notes 55-61 and accompanying text. Such a test, however, does not seem consistent with article I, § 26 because *Batson* sought to proscribe *discrimination* in jury selection whereas *Jackson III* sought to proscribe *exclusion* of particular groups in jury selection. For further discussion of this distinction see *infra* notes 178-82 and accompanying text.

171. *See supra* notes 45-48 and accompanying text.

thizer alleging that the latter defaced the former's home with a swastika. Yet in each case it is at least plausible that the individuals in the excluded group would find it difficult to remain impartial. Prohibiting counsel from exercising peremptory challenges to screen out such perceived bias is seriously at odds with the overriding purpose of peremptory challenges—"to strike at hidden, subtle, or subconscious biases that may be just as threatening as overt prejudice to the concept of an . . . impartial jury."[172] Moreover, given the limited time and scope of *voir dire*, and the resistance of most people to admitting their biases in public,[173] disallowing trial lawyers' use of such group affiliations as proxies for specific bias almost certainly will result in partial juries and unfair trials.

Rather than holding that article I, section twenty-six of the North Carolina Constitution facially prohibits peremptory challenges on the basis of group affiliation, the North Carolina Supreme Court should have extended *Batson* to the civil setting either through article I, section nineteen of the North Carolina Constitution,[174] or through the Fourteenth Amendment to the United States Constitution, as the Fifth and Eleventh Circuits did subsequent to *Jackson*.[175] Such a holding would have achieved the desired result—preventing racial discrimination in civil jury selection—without eliminating the effective use of peremptory challenges.

There are two central distinctions between *Jackson*'s article I, section twenty-six rationale and *Batson*'s equal protection rationale. First, *Jackson* prohibits not only race-based peremptory challenges, but challenges on the basis of sex, religion, and national origin as well.[176] *Batson* is limited to race-based challenges.[177] The imposition on the use of peremptory challenges is therefore more pronounced under *Jackson*. Second, and perhaps more importantly, *Jackson* recognizes "exclusion" as a constitutional violation[178] whereas *Batson* recog-

172. Saltzburg & Powers, *supra* note 28, at 354.

173. *See supra* note 40.

174. Article I, section 19 of the North Carolina Constitution provides in pertinent part: "No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin." N.C. CONST. art I, § 19. Although plaintiff's brief in *Jackson III* did not call the court's attention specifically to the equal protection clause embodied in either the state or federal constitution, it is replete with references to *Batson*. Brief for Appellant at 4-9, 17, 18. The court easily could have construed the brief as an argument for extension of *Batson* to the civil arena.

Although the equal protection clause extends only to state action, jury selection in civil trials does implicate the equal protection clause of both the federal and state constitutions: state action exists when "the state calls together the individuals that form the jury, instructs them as to their task, and then relies upon their conclusions." Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1682-83 (1985); *see* Edmonson v. Leesville Concrete Co., 860 F.2d 1308, 1311-13 (5th Cir. 1988), *reh'g en banc granted*, 860 F.2d 1317 (5th Cir. 1989), discussed *supra* at notes 111-21 and accompanying text; Fludd v. Dykes, 863 F.2d 822, 828 (11th Cir. 1989), discussed *supra* at notes 122-27 and accompanying text; *cf.* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Reitman v. Mulkey, 387 U.S. 369 (1967); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); Shelley v. Kraemer, 334 U.S. 1 (1948) (all holding that when the state actively encourages or otherwise participates in discriminatory conduct, state action exists and the equal protection clause is implicated).

175. *See supra* notes 110-27 and accompanying text.

176. *See* N.C. CONST. art I, § 26.

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

178. *Jackson III*, 321 N.C. at 585, 364 S.E.2d at 416.

nizes "discrimination" as a constitutional violation.[179] The distinction is subtle, yet crucial. *Jackson* proscribes peremptory challenges against distinct groups even though there may be a reason *relevant to the particular case* to doubt the ability of members of such groups to remain impartial. The opinion fails to recognize that "group affiliation can be relevant to identifying situation-specific bias."[180] *Batson*, on the other hand, does not prohibit peremptory challenges against members of a particular group if their exclusion is "related to the particular case to be tried."[181] In short, *Batson* proscribes invidious discrimination—striking jurors because of their race, without regard to the importance of racial issues in the case to be tried—but allows peremptory challenges to be used effectively to achieve impartial juries.[182]

If the North Carolina Supreme Court intended *Jackson* to be a message that racial discrimination will not be tolerated in North Carolina's civil justice system, the court should be applauded for its intent. By choosing article I, section twenty-six of the state constitution as the medium to deliver that message, however, the court not only contravened the intent of that provision's drafters, and its own treatment of article I, section twenty-six between 1971 and 1986, but seriously intruded upon the centuries-old statutory right of parties to a civil suit to exercise peremptory challenges. The implications of *Jackson* on the impartiality of civil juries are profound. If the supreme court wanted to eliminate racial discrimination in civil trials, it could have done so by extending *Batson* to the civil setting without seriously encroaching on the use of peremptory challenges.

STEVEN B. EPSTEIN

179. *See Batson*, 476 U.S. at 93-100.

180. Note, *supra* note 29, at 1371.

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

182. The *McCray* analysis, set forth *supra* at notes 92-99 and accompanying text, has the same shortcomings as *Jackson III* in that it: 1) constitutionally prohibits peremptory challenges against a wide array of demographic groups (even wider than the groups protected by *Jackson III*); and 2) fails to recognize that there may be instances in which group affiliation is so central to a particular case that peremptory challenges on the basis of such affiliations are absolutely necessary for the acquisition of an impartial jury.