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VITIATION OF PEREMPTORY CHALLENGE IN CIVIL ACTIONS: CLARK v. CITY OF BRIDGEPORT

A primary concern of the American system of jurisprudence is the constitutionally guaranteed right to a fair trial.\(^1\) Inherent in this concept is the right to an impartial jury of one's peers.\(^2\) The

\(^1\) See U.S. CONST. amend. VI. The sixth amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ." Id. The Supreme Court has consistently held that "[a] fair trial in a fair tribunal is a basic requirement of due process." In re Murchison, 349 U.S. 133, 136 (1955); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 551 (1976) (quoting Murchison, 349 U.S. at 136 (1955)). The Court has also stated that "[i]n essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." Irvin v. Dowd, 366 U.S. 717, 722 (1961); see also Press-Enterprise Co. v. Superior Court of California, 106 S. Ct. 2735, 2741 (1986) (assurances of fairness to accused); Shepherd v. Florida, 341 U.S. 50, 51 (1951) (abuse may jeopardize right to fair trial).


The petit jury is an important extension of the public's right to be involved in the judicial process. See Imlay, Federal Jury Reform: Saving a Democratic Institution, 6 Loy. L.A.L. Rev. 247, 259 (1973). The jury system has been described as a power which encourages compliance with the law. See Green v. United States, 356 U.S. 165, 215-16 (1958) (Black, J., dissenting) ("The jury injects a democratic element into the law."), overruled, Bloom v. Illinois, 391 U.S. 194 (1968); see also 1 A. DE TOQUEVILLE, DEMOCRACY IN AMERICA 283 (Reeves trans. 1961).

Conversely, limitations on the jury system have been proposed by its critics. See H. KALVEN & H. ZEISEL, THE AMERICAN JURY 5 (1966) (citing HARVARD LAW SCHOOL DEAN DEAN'S REPORT 5-6 (1962-63)). In that report, Dean Griswold voiced his apprehension towards the

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peremptory challenge has long been recognized as an effective mechanism in the selection of an impartial jury. A fundamental conflict arises, however, when a peremptory challenge is exercised in a manner which discriminatorily excludes a member of a particular racial group from a jury. In Swain v. Alabama, the Supreme Court system and called for its abolition in civil cases. See id. The jury system has been further criticized for its “inherent defects,” and been called “a cumbersome process, not only imposing great cost in time and money on both the State and the jurors themselves, but also contributing to delay in the machinery of justice.” Duncan v. Louisiana, 391 U.S. 145, 188 (1968) (Harlan, J., dissenting) (footnotes omitted).

A peremptory challenge is defined as “[t]he right to challenge a juror without assigning a reason for the challenge.” BLACK’S LAW DICTIONARY 1023 (5th ed. 1979); see Swain v. Alabama, 380 U.S. 202, 220 (1965) (“The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court’s control.”) (citing Lewis v. United States, 146 U.S. 370, 378 (1892)); see also Batson v. Kentucky, 106 S. Ct. 1712, 1718-19 (1986) (prosecutor entitled to exercise permitted peremptory challenges for any legitimate reason). A peremptory challenge may be used by an attorney who suspects that a potential juror might not be impartial when considering the evidence. See J. Van Dyke, Jury Selection Procedures: Our Uncertain Commitment to Representative Panels 146 (1977) (general discussion of challenges).

In a federal civil action, a party is allowed an unlimited number of challenges for cause, and three peremptory challenges. See 28 U.S.C. § 1870 (1982); see also K. Sinclair, Federal Civil Practice 820 (2d ed. 1986) (statutory right to three peremptory challenges).

The peremptory challenge has been traced back to the English common law. See Swain v. Alabama, 380 U.S. 202, 212-13 (1965). All state and federal jurisdictions currently allow for peremptory challenges. See J. Van Dyke, supra, at 282-84.


“The purpose of challenges is to eliminate jurors who may be biased about the defendant, the prosecution, or the case, and who thus might threaten the jury’s impartiality.” J. Van Dyke, supra note 3, at 139; see also Babcock, Voir Dire: Preserving “Its Wonderful Power”, 27 STAN. L. REV. 545, 551 (1975) (peremptory challenges part of constitutional requirement of impartial juries); Saltzburg & Powers, Peremptory Challenges and the Clash Between Impartiality and Group Representation, 41 MD. L. REV. 337, 341 (1982) (peremptory challenge is “one of the most effective means of securing an impartial jury”); Comment, Survey of the Law of Peremptory Challenges: Uncertainty in the Criminal Law, 44 U. Pitt. L. Rev. 673 (1983) (peremptory challenge recognized as essential component of fair jury trial).

PEREMPTORY CHALLENGE

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Court held that such prosecutorial use of the peremptory challenge may violate a criminal defendant's constitutional right to equal protection. Nevertheless, the Swain Court placed the burden on the defendant to demonstrate that such challenges were systematically employed over a period of time to exclude members of a racial group from sitting on the jury. Two decades later, in Batson v. Kentucky, the Court eased the evidentiary burden for criminal defendants claiming discriminatory abuse by the prosecutor, and held that "purposeful discrimination" could be established solely upon the facts of the defendant's case. Recently, in Clark v. City

In Swain, Justice White alluded to the fact that continuous systematic exclusion of blacks from juries through the use of peremptory challenges might violate the Equal Protection Clause. See Swain v. Alabama, 380 U.S. 202, 226-27 (1965); see also J. Van Dyke, supra note 3, at 150-51. But see Swain, 380 U.S. at 228 (Harlan, J., concurring) (emphasizing that constitutionality of such systematic exclusion not decided by court).

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1 380 U.S. 202 (1965).
2 See id. at 223. The plurality in Swain stated that there is a presumption that the prosecution will utilize its peremptory challenges in a fair and impartial manner. See id. at 222. In order to rebut such a presumption, the criminal defendant was required to show that:

[T]he prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries.

Id. at 223. Under the facts of Swain, the Court found that the defendant had not met the burden of showing invidious discrimination violative of the fourteenth amendment. See id. at 223-24. Justices Goldberg and Douglas, along with Chief Justice Warren, dissented, arguing that continuous exclusion of black citizens from the jury for over fifteen years was sufficient to establish a prima facie case of unconstitutional use of the peremptory challenge. See id. at 228-47 (Goldberg, J., dissenting); see also Wihick, Prosecutorial Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis, 81 Mich. L. Rev. 1, 21-39 (1982) (discussion of difficulty of rebutting presumption of propriety in context of capital case).

The holding in Swain, a criminal case, was based upon the sixth and fourteenth amendments. The fourteenth amendment provides that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. A criminal defendant's equal protection rights are comprised of the entire character of the judicial process, including what occurs before the trial begins. See Kuhn, supra note 5, at 289. "The equal protection clause guarantees that similar individuals will be dealt with in a similar manner . . . ." J. Nowak, R. Rotunda & J. Young, supra note 1, § 14.2, at 525.

8 See Swain, 380 U.S. at 224. The Court recognized that the exclusion of blacks from all juries might rebut the presumption of proper use of the challenge which had protected the prosecutor from scrutiny. See id.


10 See Batson v. Kentucky, 106 S. Ct. 1712 (1986). Prior to Batson, the Swain standard had been quite burdensome and almost insurmountable during the two decades following
of Bridgeport, the United States District Court for the District of Connecticut extended the test enunciated in Batson to encompass civil as well as criminal trials.

In Clark, three individual plaintiffs brought a section 1983 civil rights action against two police officers and the City of Bridgeport (the “City”). During jury selection, the attorney for the defendants used his peremptory challenges to eliminate every available black venireman from serving on the juries selected. Counsel for the plaintiffs argued that the defendants had discriminatorily exercised their peremptory challenges. The court consid-

the decision. See Batson v. Kentucky, 106 S. Ct. 1712 (1986); McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984); United States v. Boyd, 610 F.2d 521 (8th Cir. 1979), cert. denied, 444 U.S. 1089 (1980); United States v. Durham, 587 F.2d 799 (6th Cir. 1979); United States v. Newman, 549 F.2d 240 (2d Cir. 1977); see also J. Van Dyke, supra note 3, at 151 (general discussion of challenges); Brown, McGuire & Winters, The Peremptory Challenge as a Manipulation Device in Criminal Trials: Traditional Use or Abuse, 14 New Eng. L. Rev. 192, 202 (1978) (near total failure of defendants attempting to meet required standard of proof); Johnson, supra note 5, at 1658 (twenty years later, no reported cases demonstrating discrimination); Saltzburg & Powers, supra note 4, at 345 (although not insurmountable, few, if any, defendants have been able to meet standard).

In two cases at the state level, courts determined that the defendant had successfully established his prima facie case. See State v. Washington, 375 So. 2d 1162 (La. 1979); State v. Brown, 371 So. 2d 751 (La. 1979). 645 F. Supp. 890 (D. Conn. 1986). Clark consisted of three consolidated cases: Clark v. City of Bridgeport; Rizzoli v. Muniz; and Simmons v. Formichella. Id. at 890, 891. See id. at 893.

See id. at 891. Section 1983 states:

Every person who, under color of any statute . . . subjects . . . any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . . 42 U.S.C. § 1983 (1982).

Clark, 645 F. Supp. at 891, 892-93. In Clark, the plaintiff was a black woman and the defendants exercised their peremptory challenges to remove all three blacks from the sixteen prospective jurors. See id. at 891-92. In Rizzoli, the plaintiff was a white man and the defendant excluded the one black potential juror. See id. at 892. In the action brought by Benjamin Simmons, a black man, the assistant City attorney used all of his peremptory challenges to remove the four black members who had been selected as possible jurors. See id. In addition, counsel for the City claimed that the prospective black juror was removed because she lived in the housing project in which the incident occurred. Id.

The selection of members to serve on the petit jury is governed by 28 U.S.C. §§ 1861-74 (1982). The petit jury is “[t]he ordinary jury for the trial of a civil or criminal action.” Black's Law Dictionary 768 (5th ed. 1979). The venire is “[t]he list of jurors summoned to serve as jurors for a particular term.” Id. at 1385.

Clark, 645 F. Supp. at 891. Counsel for purposes of jury selection was the same for Clark and Rizzoli. Id. In Simmons, the plaintiff was represented by separate counsel. Id. at 892. In Clark and Rizzoli, plaintiffs, on the record at sidebar, indicated to the court that the defendants had exercised their peremptory challenges to exclude the black jurymen. Id. at 891-92. Counsel for the plaintiffs in Simmons also indicated that the defendants appeared
eried whether the individual trials could begin in light of the plaintiffs' equal protection objections to the City's apparent systematic exclusion of black jurors.\(^6\)

Chief Judge Daly required the City to show "acceptable reasons" for their use of peremptory challenges against all potential black jurors.\(^7\) The defendants' counsel explained that the prospective jurors were removed because counsel instinctively believed that they were incapable of rendering a fair and impartial decision.\(^8\) Although unable to produce any data to confirm these beliefs, the assistant City attorney further asserted that the defendants should not be placed at the "mercy of the people . . . who make the most civil rights claims."\(^9\) The court found this explanation insufficient,\(^10\) and held the defendants' use of peremptory challenges unconstitutional.\(^11\)

Although the defendants in \textit{Clark} may have questionably exercised their peremptory challenges, it is submitted that the court's application of the \textit{Batson} test was incorrect. The court erred in extending the standard developed in \textit{Batson} for criminal
to be using their challenges to deprive her clients from having any blacks on the jury. \textit{Id.} at 892.


\(^7\) See \textit{id}. The requirement of an "acceptable reason" is the embodiment of the standard stated in \textit{Batson}. See \textit{Batson} v. Kentucky, 106 S. Ct. 1712, 1723 (1986).

\(^8\) \textit{Clark}, 645 F. Supp. at 893-94. It was admitted that the "prospective jurors were 'knocked off' because [the assistant City attorney] didn't think they would give him a fair trial, they were biased, and he thought they would show prejudice." \textit{Id.} at 893. Counsel for defendants further stated that he "thought that [his] client would get a much fairer trial if [he] could get people who came from surrounding circumstances and who had no feeling of kinship by race, color, or creed." \textit{Id}. The assistant City attorney also stated that he was concerned with the feelings which "permeated" the black community in Bridgeport concerning the city government and the police department. \textit{Id.}

\(^9\) \textit{Id.} at 894.

\(^10\) See \textit{id}. at 893-94. The peremptory challenge is based upon an attorney's instincts and perceptions concerning a potential juror; the attorney need not state any reason for exclusion of that person. See \textit{Swain} v. Alabama, 380 U.S. 202, 220 (1965); Lewis v. United States, 146 U.S. 370, 376 (1892); Babcock, \textit{supra} note 4, at 550; Brown, McGuire & Winters, \textit{supra} note 10, at 193; Johnson, \textit{supra} note 5, at 1656; see also J. \textit{Van Dyke}, \textit{supra} note 3, at 145 (challenge need not be defended nor approved by judge).

By comparison, the challenge for cause "permit[s] rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality." \textit{Swain}, 380 U.S. at 220. See \textit{generally} J. \textit{Van Dyke}, \textit{supra} note 3, at 139-75 (discussion of challenging prospective jurors for bias).

\(^11\) \textit{Clark}, 645 F. Supp. at 894. The court held that the "defendants exercised their peremptory challenges to exclude at least seven of the eight black prospective jurors from jury service simply because they are black. . . . Such exercise of one's peremptory challenges is constitutionally impermissible." \textit{Id}.
cases to the civil context. It will be demonstrated that equal protection considerations which restrict the discriminatory use of peremptory challenges against criminal defendants are less compelling in civil litigation. This Comment will examine the Supreme Court’s effort to balance equal protection against the right to an unhindered exercise of peremptory challenges. Finally, this Comment will propose that a more exacting standard should be adopted in the civil context when only private parties are involved.

PEREMPTORY CHALLENGES

The right to bar prospective jurors without justification from the final jury panel has long been acknowledged in the Anglo-American judicial process. Although the Constitution requires that a party receive a fair trial by an impartial jury, the Supreme Court has held that in a criminal trial this necessitates the selection of a jury from a representative cross-section of the community. Congress, however, has cut back on this principle by allowing both parties in federal jury trials the right to exercise peremptory challenges.

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22 See Swain, 380 U.S. at 212-15 (history of peremptory challenge); J. Van Dyke, supra note 3, at 147-50 (history of peremptory challenges since introduction into English common law).

23 See supra notes 1, 2, and 4.

24 See Taylor v. Louisiana, 419 U.S. 522 (1975). In Taylor, the Court found that "the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." Id. at 528; see also Peters v. Kiff, 407 U.S. 493, 500 (1972) (jury should reflect representative cross section of community); Thiel v. Southern Pac. Co., 328 U.S. 217, 220 (1946) (cross-section of community necessary for impartial jury); Smith v. Texas, 311 U.S. 128, 130 (1940) (jury as truly representative body of the community).

25 See 28 U.S.C. § 1870 (1982). Section 1870 provides: "In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly." Id. The peremptory challenge is not guaranteed by any provision in the Constitution. See Stilson v. United States, 250 U.S. 583, 586 (1919). In federal criminal trials, peremptory challenges are governed by the Federal Rules of Criminal Procedure. See Fed. R. Crim. P. 24(b). Rule 24(b) states:

If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

Id.
These challenges significantly aid in the selection of an impartial jury and allow an attorney to exclude bias from the jury panel by "eliminating extremes of partiality on both sides." Unlike challenges for cause, peremptory challenges require no justification. A peremptory challenge is an indispensable tool for trial attorneys, and is used when they "instinctively" believe that a potential juror possesses negative feelings or preconceived beliefs concerning their client's case which do not quite rise to the level of a "removal for cause." Peremptory challenges, therefore, help to insure that the jury will be impartial and will decide the case based upon the evidence presented.

In Swain v. Alabama, the Supreme Court held that the systematic and discriminatory use of peremptory challenges to exclude members of certain racial groups from petit juries violated a criminal defendant's right to equal protection. However, in order to preserve the peremptory nature of the prosecutor's challenges, the Swain Court relied on a presumption that the state's challenges were constitutionally exercised. To overcome this presumption, the burden lay on the defendant to show a continuous, purposeful, and systematic exclusion of members of a specific race by that prosecutor. This approach has been criticized as presenting too burdensome a test for the defendant to overcome.

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26 See Swain, 380 U.S. at 219. The peremptory challenge is one of the most important tools used by the trial attorney in fulfilling the obligation to represent the client's best interests. See Pointer v. United States, 151 U.S. 396, 408 (1894).

27 See supra notes 3 and 20.

28 See supra notes 3 and 26.

29 See Swain, 380 U.S. at 219; see also W. Forsyth, History of Trial by Jury 175 (1852) ("The right of challenge is almost essential for the purpose of securing perfect fairness and impartiality in a trial").

30 See Swain, 380 U.S. at 223-24. The Court based its holding in Swain, a criminal case, upon the sixth amendment and the Equal Protection Clause. Id. at 219, 223-24; see supra note 7.

31 See Swain, 380 U.S. at 223.

32 See id. at 227.

33 See, e.g., J. Van Dyke, supra note 3, at 166-67 (burden of proof sustained only if accused has had associate sitting in courtrooms throughout jurisdiction over long period); Imlay, supra note 2, at 288-70 (peremptory challenge system due for examination and study); Kuhn, supra note 5, at 283-303 (systematic exclusion test is blind to realities and theoretically unsound); Note, Rethinking Limitations on the Peremptory Challenge, 85 Colum. L. Rev. 1337, 1338 (1985) (Swain imposes insurmountable burden on defendant's proof of equal protection violation).

Prior to Batson, five members of the Supreme Court apperared ready to reconsider the Swain decision. See McCray v. New York, 461 U.S. 961 (1983), denying cert. to People v.
In *Batson v. Kentucky*, the Supreme Court relaxed the burden imposed on a criminal defendant by *Swain.* Under *Batson*, a criminal defendant can rely upon the particular facts of his own case to establish a prima facie case of illegitimate use of peremptory challenges by the state. Once the defendant establishes a prima facie case, the burden shifts to the prosecution to give a “neutral explanation” for the challenges. If the reasons set forth by the prosecutor do not satisfy the court, the peremptory challenge is not allowed and the jury is dismissed.

Although *Batson* affords a criminal defendant a more realistic opportunity to thwart discriminatory trial practice than *Swain*, it is submitted that the Supreme Court’s balancing of a defendant’s equal protection guarantees with the right to exercise peremptory challenges in *Batson* has in effect emasculated the legitimate use and power of the peremptory challenge. The explanatory requirement could well effect the abrogation of the peremptory challenge even in situations where it is utilized in a valid manner.

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McCray, 57 N.Y.2d 542, 443 N.E.2d 915, 457 N.Y.S.2d 441 (1982), People v. Miller, 104 Ill. App. 3d 1205, 437 N.E.2d 945 (1982) (mem.), and State v. Perry, 420 So. 2d 139 (La. 1982) (mem.). Justices Marshall and Brennan dissented from the denial of certiorari because “it is difficult to understand why several must suffer discrimination ... before any defendant can object.” Id. at 965 (Marshall, J., dissenting). Justice Stevens, joined by Justices Blackmun and Powell, while agreeing with Justice Marshall’s opinion of the underlying issue, felt that further consideration of the issue in state courts should precede a Supreme Court decision. See id. at 961 (Stevens, J., concurring); see also McCray v. Abrams, 576 F. Supp. 1244, 1247 (E.D.N.Y. 1983), aff’d in part, vacated in part, 750 F.2d 1113 (2d Cir. 1984) (*Swain* holding may no longer be good law). In addition, some state courts had circumvented the *Swain* holding by basing decisions on their respective state constitutions. See People v. Wheeler, 22 Cal. 3d 258, 265, 583 P.2d 748, 754, 148 Cal. Rptr. 890, 895 (1978); Commonwealth v. Soares, 377 Mass. 461, 467, 387 N.E.2d 499, 508, cert. denied, 444 U.S. 881 (1979).

34 See *Batson*, 106 S. Ct. at 1722-23. In contrast to *Swain*, the Supreme Court in *Batson* decided the case based solely upon an equal protection analysis. See id. at 1716 n.4 (no views expressed on merits of sixth amendment argument).

35 See id. at 1722-23.

36 Id. at 1723.

37 See *Clark v. City of Bridgeport*, 645 F. Supp. 890, 898. In *Clark*, the court dismissed the jury when it concluded that the defendants had used their peremptory challenges to illegitimately remove the black jurors. Id.

38 For example, if a criminal defendant can establish a prima facie case and the court does not accept the prosecution’s explanation as reasonable, it is possible that, if the prosecutor subsequently attempts to use a peremptory challenge on a member of the same racial group, the court will disallow the challenge. As a result, the prosecutor might be denied the valid use of a peremptory challenge even in a situation where the challenge is not discriminatory.

Peremptory challenges are “exercised without a reason stated, without inquiry and without being subject to the court’s control.” See *Swain*, 380 U.S. at 220; see also *Lewis v. United States*, 146 U.S. 370, 378 (1892) (“arbitrary and capricious right”). The effect of
INAPPROPRIATE USE OF CRIMINAL STANDARD IN CIVIL CASES

Although there is an inherent right to equal protection guarantees, there is also an integral prerogative to exercise peremptory challenges in an unfettered manner. The Supreme Court has circumscribed the use of peremptory challenges in criminal cases when such challenges are “clearly” based on discriminatory intent. Although such a restriction may be necessary to protect a criminal defendant’s equal protection interests, it is submitted that there is a fundamental difference between civil and criminal jury trials which diminishes the propriety of extending the Batson test to civil litigation.

Denial of peremptory challenges may be justified in the criminal context because of the nature of the interests involved. The defendant’s freedom, which is at stake in criminal cases, is not at risk in civil litigation. Therefore, the burden imposed upon the criminal defendant to demonstrate an abuse of peremptory challenges should be less than that placed on the civil litigant. Accordingly, it is proposed that the inherent differences between civil and criminal trials dictate that separate and distinct tests should be applied to each.

requiring a “neutral explanation” directly abrogates the purpose of a peremptory challenge. See Batson, 106 S. Ct. at 1739 (Burger, C.J., dissenting). The Court in Swain stated that “[t]o subject the prosecutor’s challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge . . . [th]e challenge . . . would no longer be peremptory. . .” See id. at 221-22. Any imposition of an explanatory requirement renders the challenge non-peremptory. See id. at 222.

It is submitted that the peremptory challenge is an important instrument for the trial attorney, the use of which is essential in obtaining the best possible jury for his client. See King v. County of Nassau, 581 F. Supp. 493, 500 (E.D.N.Y. 1984) (party may legitimately pursue goal of maximizing his own chances of winning).

See Batson, 106 S. Ct. at 1717-19; Swain, 380 U.S. at 223-24.

See J. Friedenthal, M. Kane & A. Miller, CIVIL PROCEDURE § 1.1, at 4 (1985); K. Sinclair, supra note 3, at 31. See generally D. Dobbs, HANDBOOK ON THE LAWS OF REMEDIES (1973) (survey of various remedies available in civil litigation). Civil litigants, however, also have an interest in seeking an impartial jury even though “[l]ife and liberty may not be involved . . . important property rights frequently are.” Kuhn, supra note 5, at 244.

It is submitted that the distinction between the potential consequences of civil and criminal trials is so sharp that any alleged abuse should be scrutinized in a different manner. In a civil trial, any implication of misuse should be weighed against a strong presumption of legitimacy. Therefore, a heavier burden must be met to offset this added weight in order to rebut the presumption that the peremptory challenge is constitutional.
PROPOSED SOLUTION FOR CIVIL CASES

The Supreme Court's promulgation of a more lenient test for proving discriminatory use of peremptory challenges in a criminal trial setting may result in the vitiation of the peremptory challenge. The effect of the Clark court's interpretation of Batson has been to allow this restricted form of peremptory challenge to spill over into civil cases in which there has been state action. It is suggested that the Supreme Court did not intend to extend this restriction on peremptory challenges into the "civil arena". This view is supported by the Court's silence concerning a standard for its use. It is submitted, however, that while the test enunciated in Batson might be applicable to civil cases where state action is involved, the more rigorous standard of Swain should be the test in cases involving only private parties.

In civil cases involving only private litigants, no equal protection claim arises when one of the parties uses a peremptory challenge discriminatorily. Constitutionally guaranteed rights of the individual ensure protection from governmental interference.

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43 See supra note 38 and accompanying text; see also Swain v. Alabama, 380 U.S. 202, 222 (1965) (challenges open to examination are no longer peremptory).
45 See Batson, 380 U.S. at 1724. The Supreme Court explicitly referred to the effect which this standard would have on the criminal justice system, stating "[i]n view of the . . . public respect for our criminal justice system . . . we ensure that no citizen is disqualified from jury service because of his race." Id.; see also id. at 1724, n.22 (reference to prosecutors' duty to use challenges legitimately).
47 See Swain, 380 U.S. at 223-24; see also King, 581 F. Supp. at 499 (Swain applicable to both civil and criminal cases).
48 See King, 581 F. Supp. at 499. It is more difficult to prove the discriminatory nature of a peremptory challenge by a private litigant or show that the court's acceptance of discriminatory challenges constitutes governmental action. See id.; see also infra note 50 (discussing court conduct as equivalent of state action).
Under the *Swain* standard, the burden of proving discriminatory intent would be substantial, and if “apparently overcome” and unreasonably rejected by the court, such conduct by the trial court might be deemed, on appeal, to constitute the “state action” required in the averment of an equal protection violation. Consequently, both party’s equal protection rights would be upheld without impairing the practical use of the peremptory challenge.

In addition, requiring the party asserting discrimination to prove that his adversary has over a period of time used peremptory challenges to purposefully exclude a cognizable racial group from juries insures that such challenges are raised only in clear cases of abuse. Consequently, the function of peremptory challenges will not be undercut in civil litigation between private parties where equal interests are at issue. Furthermore, in a civil jury trial neither of the private parties’ liberty interests are jeopardized, yet denial of the peremptory challenge may in fact adversely affect one of the litigants’ constitutional right to a fair trial. The peremptory challenge is recognized as one of the traditional mechanisms for procuring an impartial jury. A rigid test, similar to that of *Swain*, would be consistent with the equal protection doctrine and still preserve the peremptory challenge.

It is submitted that in cases like *Clark*, where the state is a party, the *Batson* approach to discriminatory peremptory challenges may be appropriate because of the implication of equal pro-
tection interests arising out of state action. The danger is, however, that courts will apply Batson to all civil cases regardless of the parties involved, and thus undercut the value of peremptory challenges.

CONCLUSION

Although the facts in Clark may be satisfactory to show purposeful discrimination by a defendant who exercised peremptory challenges in a matter involving state action, the court’s application of the Batson standard does not appear to be as meritorious as in a criminal action. In a civil case, the peremptory challenge is an invaluable right which should not be cast aside on the mere suspicion that a discriminatory purpose underlies an attempt at excluding a potential jurymen. The standard formulated by the Supreme Court in Batson should not be extended to civil cases involving only private litigants because it would appear to allow a party to readily abrogate an adversary’s rights. Establishing a more rigid criterion would preserve the peremptory challenge and still provide for equal protection under the law.

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