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## **Striking Back Against Peremptory Strikes - By JAMESON B. CARROLL, WILLIAM A. FIXEL, WILLIAM MEYER and LAURA GARY**

The ability to challenge potential jurors for reasons other than possible bias has been an accepted part of jury selection since juries themselves became a part of the English legal system, some 800 years ago.<sup>1</sup> Peremptory challenges have been part of U.S. law since the 1790 Act.<sup>2</sup> All states allow peremptory challenges in some form.<sup>3</sup>

Yet, notwithstanding long history and wide use, could peremptory challenges be abolished? The U.S. Supreme Court has noted -- in a series of opinions stretching back almost 100 years -- that “[s]tates may withhold peremptory challenges ‘altogether without impairing the constitutional guarantee of an impartial jury and a fair trial.’”<sup>4</sup> Justice Marshall, in his concurrence in *Batson*, advocated “eliminating peremptory challenges entirely.”<sup>5</sup> Justice Breyer cited Marshall’s language in a recent concurrence: “I believe it is necessary to reconsider *Batson*’s test and the peremptory challenge system as a whole.”<sup>6</sup> Even Great Britain, which gave us the peremptory challenge system, has now abolished such strikes.<sup>7</sup>

The system of peremptory challenges could be changed. Less than 25 years ago, the Supreme Court -- in the seminal case of *Batson v. Kentucky* -- radically refashioned the manner in which peremptory strikes were handled. Prior to *Batson*, challenges could be exercised for any reason. *Batson* forbade the use of race as a basis for a peremptory strike. This prohibition was subsequently expanded to disallow gender-based strikes.<sup>8</sup> The system could be improved still -- as a Colorado state judge has noted, “lawyers may strike you from a jury because you are

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<sup>1</sup> Joseph A. Tringali, *The Challenge of Peremptory Challenges: A Brief Study in the Evolution of the Law*. FLA. BAR JO. (June 1997), available at [http://findarticles.com/p/articles/mi\\_hb6367/is\\_n6\\_71/ai\\_n28686924/](http://findarticles.com/p/articles/mi_hb6367/is_n6_71/ai_n28686924/).

<sup>2</sup> 1 STAT. 119 (1790).

<sup>3</sup> *Rivera v. Illinois*, 556 U.S. \_\_\_, 129 S. Ct. 1446, 1453 (2009).

<sup>4</sup> *Id.* at 1450 (quoting *Georgia v. McCollum*, 505 U.S. 42, 57 (1992)); see also *Frazier v. U.S.*, 335 U.S. 497, 505, n. 11 (1948); *Stilson v. U.S.*, 250 U.S. 583, 586 (1919).

<sup>5</sup> *Batson v. Kentucky*, 476 U.S. 79, 107 (1986).

<sup>6</sup> *Miller-El v. Dretke*, 545 U.S. 231, 273 (2005) (J. Breyer concurring).

<sup>7</sup> Criminal Justice Act 1988, s. 118 (1).

<sup>8</sup> See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).

Aries, but not because you are a female”<sup>9</sup> -- but we believe a better way to proceed would be to end the system of peremptory challenges. This would lower litigation costs, lessen the burden on the judiciary, and most importantly, safeguard against possible discrimination.

### **Peremptory Challenges Increase Litigation Costs**

Litigation is expensive.<sup>10</sup> To use asbestos litigation as an example, claimants recover only about 43% of the total award, with the rest going to legal fees and expenses.<sup>11</sup> Peremptory challenges contribute to high litigation costs by adding additional steps to what is often an already lengthy voir dire. In “high stakes” cases, jury consultants are often used to assist with voir dire, and these consultants work as much to shape the jury as they do to shape the message presented to the jury. These experts -- used by both sides -- increase costs. Adding costs as well, investigators are often employed in big cases to help determine who is likely to be receptive to a particular party’s message. If a potential juror’s background indicates he might not be receptive, lawyers then find a race- or gender-neutral reason that would allow the party to exercise a strike. Peremptory strikes thus spawn litigation about litigation -- and all of the attendant costs of trial are increased. Any seasoned trial lawyer who has sat through three days of voir dire or an hours-long *Batson* hearing can attest to this fact.

### **Peremptory Challenges Clog the Court System**

Litigants are not the only ones paying for peremptory-fueled delays. Taxpayers do too. This harm is magnified by the “litigation explosion” of the last two decades.<sup>12</sup> There has been a dramatic rise in per capita case filings, with federal civil case filings growing at roughly twice the rate of the national population from the period 1993-2002.<sup>13</sup> At a time when dockets should be moving faster, they move more slowly because of peremptory challenges:

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<sup>9</sup> Morris B. Hoffman, *Unnatural Selection*, New York Times (March 7, 2006), available at <http://www.nytimes.com/2006/03/07/opinions/07hoffman.html>.

<sup>10</sup> See, e.g., Jon O. Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 YALE L.J. 1643, 1643-45 (1985); Carrie E. Johnson, Comment, *Rocket Dockets: Reducing Delay in Federal Civil Litigation*, 85 CAL. L. REV. 225, 229-30 (1997).

<sup>11</sup> Stephen J. Carroll et al., *Asbestos Litigation Costs and Compensation*, RAND INST. FOR CIVIL JUSTICE 61 (2002), available at [http://www.rand.org/pubs/documented\\_briefings/2005/DB397.pdf](http://www.rand.org/pubs/documented_briefings/2005/DB397.pdf).

<sup>12</sup> Tracey E. George & Chris Guthrie, *Induced Litigation*, 98 NW. U.L. REV. 545, 571-72 (2004).

<sup>13</sup> *Id.* at 573. From the period 1980-1993, criminal case filings increased by 70% . During the same period, litigants were filing more, and more complex, civil cases. Patrick E. Longan, *The Shot Clock Comes to Trial: Time Limits for Federal Civil Trials*, 35 ARIZ. L. REV. 663, 672, 677 (1993).

- More potential jurors must be called in order to account for the peremptory challenges allowed each party -- and inevitably, each party uses *all* the challenges allotted;
- Proceedings are slowed while *Batson* challenges -- and defenses -- are argued;
- Peremptory strikes furnish grounds for appeal of adverse verdicts or criminal convictions; and
- Finally, while the true cost cannot be calculated, the shaping of juries by lawyers - - while legally and ethically proper -- doubtless contributes to the cynicism the public has for the judicial system.

### **Peremptory Challenges Are a Breeding Ground for Discrimination**

Despite the Supreme Court's efforts in *Batson* and its progeny, the specter of discrimination continues to cast a shadow on the practice of peremptory strikes. Although a judge can deny a peremptory challenge if he thinks it is being used to discriminate based on race, gender, or nationality, judges sparingly exercise this authority.<sup>14</sup> And if a judge does question an attorney's peremptory strike, the attorney can usually provide a benign reason for the strike.<sup>15</sup> In a 1997 case arising in the Second Circuit, a prosecutor dismissed the only African-American in the jury pool.<sup>16</sup> When questioned, the prosecutor said he did not strike her because of her race, but rather because she was obese.<sup>17</sup>

Most peremptory strikes affect minorities.<sup>18</sup> Peremptory strikes provide attorneys an excuse to strike a juror for any reason that does not implicate *Batson*, and a lawyer is rarely forced to put forth more than a colorable justification for a strike. We do not suggest attorneys always use peremptory strikes to discriminate against individuals, but the fact an attorney *could* use race as a reason for excluding a juror taints the entire process. Thus, "it is impossible to ferret out the striking lawyer's real motives, in a system that allows them to be completely irrational but not discriminatory."<sup>19</sup> The best way to eradicate possible discrimination -- and irrationality -- from jury selection would be to eliminate peremptory challenges.

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<sup>14</sup> Nathan Koppel, *Three Strikes and You're Out? Critics Seek Juror-Dismissal Cap*, THE WALL STREET JOURNAL, March 5, 2009, available at <http://online.wsj.com/article/SB123621836517136247.html>.

<sup>15</sup> *Id.*

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

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

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

<sup>19</sup> Hoffman, *Unnatural Selection*.

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