PEREMPTORY CHALLENGES AS A SHIELD FOR THE PARIAH

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I. INTRODUCTION

By an ideologically neutral process, I have been selected as the bête noire of this symposium. I accept that challenge and, whatever your reaction, I will always love you.

After the Rodney King verdict,¹ I was appointed to a New Jersey Supreme Court committee² charged with making recommendations about jury selection in New Jersey. The group included a cross-section of the legal community. When the committee debated these issues, it eventually reached the issue of peremptory challenges; the dividing line in the committee was fascinating. It was not left vs. right; it was not black vs. white; it was not male vs. female; it was not heterosexual vs. homosexual. There were trial lawyers on one side, and judges and academics on the other. Under the “strange bedfellows” test, I am not sure which of those two latter groups should be more concerned or horrified.

Criminal defense lawyers, prosecutors, and civil lawyers for both plaintiff and defense were unanimous in their opposition to losing the peremptory challenge because it is necessary to effectively represent their clients. Obviously, one could raise the criticism that this is merely the wailing and crying of a group afraid of being deprived of its favorite toy. Consequently, we need to take a much deeper look to see whether there is any legitimacy to the almost universal claim by those “in the pits” every day that the peremptory challenge is an important tool to protect litigants at trial.

II. DISCUSSION

My approach is simply that of a trial lawyer. I am not a scholar. I am not an intellectual, so I will not engage in the admirable and fancy intellectual

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* This essay is based on a speech presented to the American Criminal Law Review’s symposium, “Race Gender, Juries and Justice,” at the Georgetown University Law Center, March 5, 1994. No attempt has been made to correct “anomalies” that emerge when producing a written text from the spoken word. The speaker-author is a criminal defense lawyer in Newark, New Jersey, a Certified Criminal Trial Lawyer, a Director of the National Association of Criminal Defense Lawyers, and a Fellow of the American College of Trial Lawyers.

1. The reference is to the April 29, 1992 verdict in the trial of California v. Powell. Four police officers were acquitted of assault charges in connection with their videotaped arrest and beating of black motorist Rodney King. The matter received great attention in both electronic and print media. My views on that trial were expressed in Raymond Brown, It’s Just Not Right: Reflections on Rodney King and His Case, CHAMPION, July 1992.

2. New Jersey Supreme Court Ad Hoc Committee on Jury Selection.
footwork that has gone on since the decision in *Batson v. Kentucky.* I am, however, someone who deals with these issues on a day-to-day basis and who also has, as ideological baggage, a concern about what happens in our criminal courts and who is being tried there.

There are really two things we need to analyze to get to the bottom of this debate and to test the practitioners’ claim. I think we must first consider how we treat the least fortunate, the pariahs in our society. I imagine you will accept that the treatment of those defendants who are least popular and most likely to be hated or despised is a test of the effectiveness of the system. How does the system work for them?

Second, I assume you are willing to question whether the *Batson* analysis is an honest one. Is there any such thing as a racially neutral “anything” in America, or is that a ruse and an invitation to hypocrisy? Ultimately, I think you will be forced to the conclusion that the group being injured includes young blacks, Chicanos and Latinos, the usual pariahs who nobody wants and to whom we are being absolutely dishonest in our analysis. As a result, I believe the only solution is to eviscerate *Batson,* and focus our social engineering on changing the jury venire and stopping the pretense that somehow we can elevate the mythical right of jurors over that of defendants. Talk about living in an unreal world!

What do W.E.B. DuBois and Hans Christian Anderson have in common? DuBois tells us that race is the dominant question of the 20th century, and Hans Christian Anderson tells us of the little child who stood at the parade and was the only one willing to say “the emperor has no clothes.”

Candor and honesty require us to admit there is not a decision that we make in terms of social grouping that does not involve an analysis of race, a quick look at gender, and perhaps a glance at sexual orientation—a look at the very factors that we are now sweeping under the rug. In this regard, I suggest that you think about something that has been a significant experience in my life. For the past twenty years, I have been talking to black kids in high schools and colleges about black history, because blacks know too little of our history. The question that I have posed to every high school and college group to whom I have spoken is a simple one: What was the principal issue facing civil rights groups at the beginning of World War II? To this day, after speaking to thousands of students, not one has answered the question

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4. “The problem of the twentieth century is the problem of the color line, the question as to how far differences of race—which show themselves chiefly in the color of the skin and the texture of the hair—will hereafter be made the basis of denying to over half the world the right of sharing to their utmost ability the opportunities and privileges of modern civilization,” W.E.B. DuBois, Address to the Nations of the World, First Pan-African Conference, London (1900) (emphasis added).
5. HANS CHRISTIAN ANDERSEN, THE EMPEROR’S NEW CLOTHES (1837).
6. The speaker-author is an African-American male.
correctly. The answer is "lynching." Lynching was the issue that preoccupied
the African-American community at the beginning of World War II.7

Blacks are still being lynched in large numbers. I suggest it as a troubl-
some metaphor because carried to its ultimate and logical conclusion, con-
cern about the community's attitude about the pariah is toleration of the
lynch mob. That is not to suggest that the Supreme Court is a lynch mob, but
to suggest that at one end of that extreme exists some very, very dangerous
territory.8

I find that popular culture is always a good way for me to get insight into
deep questions because, although there has been a lot of fancy intellectual
sleight-of-hand, I feel the need to put the fodder where the lambs can reach
it. I recall not long ago—and I take some risk in telling you this story because
it reveals some of my own sexism, which I am still in the process of trying to
eradicate with much help from Wanda, who is my love—my sixteen-year-old
daughter overheard me say to a friend that I hoped that her first sexual
experience would be in her second marriage. She was horrified and took me
to see a movie called "Father of the Bride" for punishment and rehabili-
tation. So I began to see there is pedagogical value in popular culture.

Last January, I was listening to National Public Radio and a commentator
said that for the first time in the history of America, the top twenty musical
hits on the charts were all by non-white groups. Look at the fact that the
young people of America are listening to music predominantly by non-white
groups.9 Furthermore, one week, all of the top twenty songs were by
non-white groups, and the top song was "I Will Always Love You," a
Whitney Houston "cover" of a Dolly Parton song. This clearly reflects a
reversal in the normal dynamics of our culture. What does that mean? What
does that have to do with Batson?

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definitive work on the subject remains Ida Wells Barnett, On Lynchings (1969), a volume
containing her pamphlets written in the 1890's. Also of historical interest is Walter White, Rope
and Faggot, A Biography of Judge Lynch (1929) and Clarence Norris, The Last of the
Scottsboro Boys (1979). (Clarence Norris is the last surviving defendant from Powell v. Alabama,
287 U.S. 45 (1932).) The most recent work on this famous case is James Goodman, Stories of
Scottsboro (1994). Those under the impression that lynching was a purely racial affair are directed
to Frank v. Mangum, 237 U.S. 309 (1915) and Robert Frey & Nancy Frey, The Silent and the

derive a third party standing argument permitting a litigant (in Powers, a criminal defendant) to raise
the claims of jurors improperly excluded from service. This legal sophistry is compounded by the
assertion that the right of jurors to serve is justified by De Tocqueville's view that juror service reflects
the "magistry" of democracy. Little thought is given to the reality that some of those anxious for jury
service resemble vigilantes more than magistrates.

9. On reviewing a draft of this speech, my friend and colleague Alan Dexter Bowman, who
disagrees with my views on Batson, reminded me that "Black music is the soundtrack of American
directly.
There is a profound change taking place in America. If you are thoughtful and care about the future, if you sit somewhere in an ivory tower or in a court where your job is to pontificate about these questions, you have to think about the future and look at the last two census counts and see that the only group in America whose percentage in the population has not changed are those people we insensitively call “white people.”

By the middle of the next century, more than half of all Americans will claim their place of origin from some place other than western Europe. By the middle of the next century, there will be more Muslims than Jews in America. Two months ago a man was mugged in New Jersey by a Vietnamese gang. This would have been unthinkable when I was a child—not a mugging, but a Vietnamese gang in New Jersey. These are profound changes, and they do not even begin to deal with the less empirically verifiable changes relating to the role of women in American society, and our acceptance or non-acceptance of homosexual activity and different kinds of cultures. (Of course, if you listen to Pat Buchanan you know the response to that.)

These profound changes affect the Court. As Professor King suggests when she talks about Shaw v. Reno,\(^\text{10}\) the Court is engaging in a bit of social engineering (we like it when it goes our way; we all object to it when it goes the wrong way). The democratic institution the Court unfortunately chose to tinker with is not jury selection as a whole or even the venire process, which could use some tinkering, but the peremptory challenge.

This tinkering, done in the name of an amorphous right to jury service, subordinates the defendant’s rights to some perceived need of the community. Talk about Hans Christian Anderson! How many people get that little slip about jury service and say, “Please judge, let me serve an extra term?” What they really do is call you and say, “If you’re worth your salt as a lawyer, you will get me out of jury service.”

The reality is not a public clamoring to be on juries, but a fiction designed to cure another problem. That problem is the real concern of the Court: What is going to happen to the new racial mix of America, and how will that affect the integrity and the perception of the jury system in the future? Therefore, the Court begins to tinker, but it tinkers in a very dangerous way and in a very dangerous area, and it is not always honest about its tinkering.

Back at the time when I was debating with my friends about Clarence Thomas’ Supreme Court nomination (there were one or two people to whom I was still speaking who favored his nomination), I tried to suggest to them my “strange bedfellows” test: If you are in bed with Strom Thurmond you ought to be worried, and therefore you should agree with me.

Since then I have abandoned the “strange bedfellows” test because I am

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now in bed with Justice Scalia and Justice Thomas, and am opposed to Justice Marshall and Justice Blackmun on the Batson issue. I am in the middle of this mix because the Justices to whom Americans have been turning for racial sensitivity, and perhaps even sensitivity to the rights of criminal defendants, are off on a crusade. They have tried to communicate that "I will always love you" and they are doing it through the peremptory challenge.

I suggest that there are three passages that are worth examining to clarify this debate. One is Justice Powell's opinion in Batson: "In view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race." This foreshadows the tortured logic of Justice Kennedy, but does not really address jury selection or peremptory challenges. Rather, it raises the policy question of a changing America. It is not about the dynamics of trial, about which nobody has thought or seems to care. That is a bit strong, but it certainly leads us in the right direction.

On the other side, Justice Scalia, who is always a rather pointed fellow, talks in Georgia v. McCollum about the real issues being considered:

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

What is most important about the dissent is that Justice Scalia is pulling the covers off the debate and effectively saying, "Look, what you're really talking about is some higher good. You're not concerned about the dynamics of this delicate thing called a trial. You're not concerned about the black criminal defendant in Bergen County, New Jersey, who is going to get a trial in front of a jury where there may be two blacks in the whole venire, and the lawyer may have to use racially conscious strikes to get one of them on the jury. You are not concerned about that."

Finally, there is Justice Blackmun—a man I have grown to admire more and more as time goes on—who wrote (in an unrelated case dealing with a

13. 112 S. Ct. at 2365 (Scalia, J., dissenting) (emphasis added).
14. In a sarcastic aside, the New Republic noted that "Rehnquist, Scalia and Thomas have managed to restrain their concern for black criminal defendants on most other occasions." Jeff Rosen, Jurymandering: A Case Against Peremptory Challenges, NEW REPUBLIC, NOV. 30, 1992, at 15. Well, my "strange bedfellows" test has to be thrown out.
hate crime statute):

[1]n the second instance is the possibility that this case will not signifi-
cantly alter First Amendment jurisprudence, but, instead, will be re-
garded as an aberration—a case where the Court manipulated doctrine to
strike down an ordinance whose premise it opposed, namely, that racial
threats and verbal assaults are of greater harm than other fighting words.
I fear that the Court has been distracted from its proper mission by the
temptation to decide the issue over “politically correct speech” and “cultural
diversity,” neither of which is presented here. If this is the meaning of today’s
opinion, it is perhaps even more regrettable.15

Interestingly enough, Justice Blackmun wrote this opinion four days after
Justice Scalia wrote his dissent in McCollum. Justice Blackmun’s opinion
dramatizes the policy issue here.

Unfortunately, what we have is a policy debate about race, a profoundly
important question that may go to the heart of the survival of this republic,
taking place on the metaphorical field of the peremptory challenge. Ironi-
cally, the peremptory is one of the few tools we have to try to right the
imbalance faced by a defendant who is unpopular, who nobody likes, who
jurors start out hating because of the color of his skin, or because of some
other thing over which that person has no control. We must be concerned
about whether all these very important intellectual policy debates are upset-
ting an apple cart that was delicately balanced in the beginning. We also have
to ask ourselves if Batson is a Maginot Line we are constructing against this
evil of racism while ignoring an enemy invasion of the jury system.

Am I the only person in America who looks at political campaigns and
realizes that the first step in planning a campaign is to find out where the
black folks live, where the Chicanos live, where there are many people in
households with incomes of a certain amount, and where there are single
mothers raising children and, only then, on the basis of these findings, do you
formulate policy and strategy? Am I the only one who recognizes that only
when the chips are really down, and we are talking about whether we are
going to steal money for the B-1 bomber or give it to Head Start, that
demographic issues get talked about? Of course these are real issues, and
they are infinitely more complex than saying, “She’s black so she should go,”
but you must start there and not ignore that reality.

Then, of course, there are the administrative problems of Batson. Profes-
sor Ramirez’s ideas constitute interesting variations on the jury system. They
are worth talking about and they are worth examining. However, my experi-
ence suggests that the general quality of the judiciary is not what you expect

judgment) (emphasis added).
once you emerge into the real world and find the judiciary uninterested in debates about *Pennoyer*\(^\text{16}\) or the refined points of the Constitution.

In fact, if you go into state courts, they do not want to know about the Supreme Court. In New Jersey, the state supreme court’s reporters are a distinctive shade of vanilla yellow. One does not bring reporters containing Third Circuit or Supreme Court opinions into court.

You will find that many judges are there not because they are known for sagacity and wisdom, but because they had bad backs and could not get to any other practice or they have some relationship with someone important. This is the truth, and if we’re going to have candor, let’s have candor. There ought not to be an intellectual test for the judiciary, because the question of intellect leaves out the question of character.

Therefore, though the case suggests otherwise, *Batson*’s complex requirement for establishing a prima facie case of race based challenges, theoretically involving statistics, voir dire, and questions and comments of counsel, is reduced to: “Mr. Brown, you’ve just excused three Asians in a row. That is obviously a prima facie case.”

Most judges have a bright-line test of three, four, or seven people of a cognizable group. Once the magic number is reached, a prima facie case is established and then you are tempted to engage in that thing which is absolutely horrible: lying in a courtroom.\(^\text{17}\) You have an ethical duty to be candid to the court, and yet we all know that pretext is the name of the game here. The courts do not recognize the pretext because, of course, we are back to Hans Christian Anderson! They have to pretend it really is not going on and yet it is the critical issue in most of the personal and social decisions we make in our lives. This myth of color blindness is leading us into a place where the consequences are terrible.

I mentioned Bergen County, and those of you not from New Jersey will not know what it means, but there is a string of roads that goes up Interstate 95, and one of the important links is called the New Jersey Turnpike. Several empirical studies have shown that, if you are black and you drive on the Turnpike, your chances of being stopped by the constabulary are infinitely increased. If they happen to stop you in Hunterdon County or they happen to stop you in Bergen County, where very few blacks live, you are going to be tried in a venue where the jury pool contains nobody who even remotely looks like you or likes you. That is a profound problem. It is a serious, serious problem for the Supreme Court to take away challenges so that, when choosing from people who are alien in culture and ideas, your chance to select those who might be more favorable to you or who might be less prejudiced against you is reduced.

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\(^{16}\) *Pennoyer v. Neff*, 95 U.S. 714 (1877).

\(^{17}\) See, *e.g.*, *Model Rules of Professional Conduct* Rule 3.3 (1983).
There also must be some real changes in terms of voir dire. Voir dire tends, especially when it is judicially administered, to be a hollow mockery. "Are you going to be prejudiced against this snort-nosed defendant over here or are you going to give him a fair trial?" Then for that potential juror who was asleep and gave the wrong answer, there is what I call the Lazarus syndrome. You rehabilitate that juror by saying, "When you said you would be unfair you really thought I meant fair because you didn’t hear me very well because the acoustics in the room were temporarily bad."

This process goes on because there is an emphasis in the administrative apparatus of the state and federal courts on moving cases. It involves a quantitative assessment of justice. In most of the vicinages in America, judges are evaluated not on the Solomonic content of their opinions, but on how many cases they move. If you take too much time, especially in jury selection— "Because you know counsel, I could take the first twelve people and try this case"—then you have offended that sense of progress required by a public understandably frightened by crime.

Opponents of the unbridled peremptory challenge cite Justice Marshall’s opposition to it as support for their opposition.\textsuperscript{18} The problem with using Justice Marshall in this way is that his analysis was a historical one. Justice Marshall, who litigated cases in the South, was the conscience of this country with respect to the judicial system as it affected litigation in the South at a time when blacks were overtly excluded from the entire franchise. It is not surprising that a person with that kind of historical legacy is going to criticize anything that is a potential tool for discrimination.

I have had potential jurors say to me in Union County, New Jersey during voir dire: "I don’t like blacks." One day it happened and my co-counsel said, "That juror is really honest—we should keep him." I said, "Are you out of your mind? Jurors do not get points for candor." But the fact of the matter is that a searching voir dire can elicit much, and can ultimately create something which I suspect all of you embrace even if you embrace nothing else.

In the last analysis, I do not want a jury of blacks to judge my black defendant. I want a jury who likes me, is going to like him and then render a verdict of not guilty at the end. Therefore, if you let me know more about those assembled individuals, about their kids and their grandparents, about their ideas, feelings, thoughts and nuances, then I am less likely to stereotype them as women, blacks or other labels with which we work, which have some basis in reality, but in practice distort our perceptions. As a defense attorney, I can begin to focus on real things, on real feelings about the nature of the trial, and then begin to participate in the process that may have a racial element and a gender component.

\textsuperscript{18} See Justice Marshall’s concurring opinion in \textit{Batson}, 476 U.S. at 102.
For example, one of the experiences I have had in twenty years of trying cases is that women are stronger than men. If I have a choice between women jurors who I think will go my way and men, I want the women. My experience has been that almost every hung jury I have had involved one or two women, usually of good size, who sat in the corner, folded their arms and said, “I am not convicting this defendant.” I cannot explain those dynamics. Women are superior to men in many contexts and so I want to make gender-based decisions. The fact of the matter is that gender and race and all of these things we pretend to eschew lie at the heart of all of the political and social decisions we make in our lives.

While many aspects of the jury system horrify me, if or when they indict me, I want to be tried in America by a jury. I have seen a few verdicts that went the way I did not like them to go, especially—and I know you should not admit this in a symposium—when I lost a case. However, I very seldom come away feeling that the jurors were not serious. I very seldom come away feeling that the jurors totally disregarded their duty. It is an amazing system, infinitely preferable to one judge sitting and making the judgment, subject to all the political pressures that may force him to take that bad back out and actually earn a living.

When we tinker with how the system functions, we tinker with it at our peril. Yes, there are things that have to be done. There are jury selection and venue questions that have not been examined hard. The judge who sent the first Rodney King trial to Simi Valley said, in effect, “I do not believe black and Latino jurors will give these white cops a fair trial. I do not believe in the minority members of our community.” That is troublesome to me. We must talk about judicial attitudes and the very complex, but important questions about how venue is selected and how the venire can be broadened. Can we comb the welfare rolls to make sure there is economic and racial disparity among the venire? There are some federal limitations on the use of public assistance information to inform and affect the way in which a venire is chosen.

III. Conclusion

There are all kinds of things we can do if we are genuinely concerned about expressing to this entire polyglot republic, “I will always love you.” However, we cannot do it by taking away something important from the people who need it most; the ability to say, “I grew up in this town and I know what bigotry is and I know how that guy over there with the blue tie feels about us.

19. This speech was delivered prior to the Supreme Court’s ruling in J.E.B. v. Alabama ex rel. T.B., 114 S. Ct. 1419 (1994).
not about the facts of my case, but about us.” I want a shot to be judged by those who are at least going to look at me and see my humanity.

The important policy debates that have led the Supreme Court to the mistaken application of important doctrines have taken us down a very dangerous road. Both sides of the Court—Justices Thomas, O'Connor, Marshall, and Scalia, and Chief Justices Burger and Rehnquist—have predicted\(^\text{20}\) the thing about which trial lawyers have been screaming—that abolition of the peremptory challenge lies at the end of this road. To take away that tool, especially from that most benighted soul—the unpopular criminal defendant who is black, who is Latino, who is a pariah—is, in and of itself, a criminal and amoral act. I hope in some way this essay has discharged the responsibility that I accepted as “bête noire,” and I will always love you.

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20. A few of the Cassandra-like predictions include: “The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely.” *Batson*, 476 U.S. at 102-03 (Marshall, J., concurring). “[I]f conventional equal protection principles apply, then presumably defendants could object to exclusions on the basis of not only race, but also sex, age, religious or political affiliation, mental capacity, number of children, living arrangements, and employment in a particular industry, or profession.” *Batson*, 476 U.S. at 124 (Burger, C.J., Rehnquist, J., dissenting) (citations omitted). “I am certain that black criminal defendants will rue the day that this court ventured down this road that inexorably will lead to the elimination of peremptory strikes.” *McCollum*, 112 S. Ct. at 2359 (Thomas, J., concurring in the judgment).