CHICAGOLAWBULLETIN.COM

Serving Chicago's legal community for 158 years

MONDAY, NOVEMBER 4, 2013

Chicago Daily Law Bulletin®

Volume 159, No. 216

# Is it time to abolish peremptory challenges in criminal cases?

Is it possible to have a system of peremptory challenges that is not marred by racial bias?

At least one judge does not think so.

A justice of the Washington Supreme Court has recently written an extraordinary 60-page opinion setting out the reasons why peremptory challenges in criminal cases should be abolished. Justice Steven Gonzalez's impeccably researched opinion should be read by anyone involved in the American criminal justice system. *State of Washington v. Saintcalle*, Wash. Sup. Ct., decided Aug. 1, 2013.

To understand why the current system for dealing with race and peremptories is so flawed, let's first look at a recent 7th U.S. Circuit Court of Appeals case that ordered a new trial in an Illinois murder case. The case is *Hooper v. Ryan*, No. 12-1980, decided Sept. 9, 2013.

*Hooper* is controlled by *Batson v. Kentucky*, 476 U.S. 79 (1986), which held that racial discrimination in jury selection could be shown by the misuse of peremptories in a single case. *Batson* set up a three-part test. First, the defendant must establish a prima facie case of purposeful discrimination. At this point, the burden then shifts to the prosecutor to offer a race-neutral reason for the strike. Finally, the judge must weigh the evidence and decide whether the strike was made unconstitutionally.

Because Murray Hooper's murder case was still on direct appeal in 1986, the Illinois Supreme Court remanded the case and ordered the trial judge to hold a hearing to determine whether the prosecutor had improperly used race as a basis for his peremptories. Following the hearing, the trial judge found nothing improper. The Illinois Supreme Court affirmed his finding.

The 7th Circuit reversed because it held that this holding was an unreasonable application of *Batson*. Moreover, it held that the Illinois Supreme Court made not one, but four different legal errors.

Out of 63 members of the venire, seven were black. All seven were excused: two for cause and five through the state's peremptories. The Illinois Supreme Court first erred by holding that a trial judge is forbidden to infer a prima facie case of discrimination based only on the racially disproportionate use of peremptories.

It next erred by holding that the data did not support a finding of discrimination in this case. The 7th Circuit noted that since the prosecution used five of its 11 peremptories to exclude 100 percent of the potential black jurors, it would be reasonable to conclude that race must have played a role in its decisions.

Third, the Illinois Supreme Court erred by believing that race was not at issue because the defendant, victims and witnesses were also black. The 7th Circuit called this a "serious legal blunder."

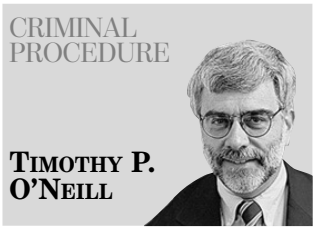
Fourth, the Illinois Supreme Court erred by believing that a prosecutor's explanations can defeat the finding of a prima facie case. Under *Batson*, a finding of a prima facie case must precede consideration of the prosecutor's explanations.

When a court makes four errors in applying a three-part test, you might question the usefulness of a *Batson* analysis. But some courts and commentators are now contending that the problem is not *Batson*; the real problem is with the nature of the peremptory challenge itself.

Gonzalez's concurrence in *Saintcalle* masterfully brings together both case law and legal commentary from the last 25 years that argue for the abolition of the peremptory challenge.

Gonzalez begins by positing that the actual use of peremptory challenges "presents a divergence between theory and practice." In theory, peremptories are supposed to help obtain an impartial jury. But in practice, of course, the goal is simply to use them to exclude any juror perceived to be unfavorable to the party's position.

And because attorneys have so little information about prospective jurors, they automatically rely on the hoariest of stereotypes and generalizations.




*Timothy P. O'Neill is a professor at The John Marshall Law School. In 2012 he was awarded the Chicago Bar Association's Herman Kogan Meritorious Achievement Award for legal journalism. Readers are invited to visit his Web log and archives at jmls.edu/oneill.*

And this brings us to the heart of the problem. Decided a quarter-century ago, *Batson* is concerned with intentional racial discrimination. But we now know that unconscious racial discrimination bias is equally pernicious. The opinion surveys various social science studies showing the prevalence of objective racial bias in situations where people subjectively insist otherwise.

This is why the *Batson* framework is ineffective. First, unconscious racial bias affects not only those attorneys who exercise the peremptories; it also affects opposing counsel and judges. Thus, many racially discriminatory peremptories are simply never challenged.

Second, even if a peremptory is challenged, it is easy for an attorney to come up with a plausible race-neutral reason regardless of whether the racial bias is conscious or unconscious.

> ***"(E)mpirical studies have shown that even properly used peremptories contribute to the underrepresentation of minorities on juries."***

Third, there is no way for a judge to accurately determine whether a particular peremptory challenge is racially discriminatory or not.

Fourth, appellate courts are in an even worse position to determine whether or not bias has improperly affected the use of the peremptory.

And *Batson* aside, Gonzalez avers that there are other reasons why peremptories should be abolished.

First, empirical studies have shown that even properly used peremptories contribute to the underrepresentation of minorities on juries. Mathematically, the use of a peremptory against a minority person has a greater exclusionary effect, since each such challenge removes a greater percentage of that minority group from jury service.

Second, peremptories add to administrative and litigation costs by eliminating otherwise proper jurors from service.

Third, peremptories have a tendency to exclude more diverse jurors who would add to a jury's perspective.

Fourth, the use of juror consultants to aid in the exercise of peremptories results in a division between rich and poor defendants.

In sum, Gonzalez contends that peremptories should be abolished.

Gonzalez is not alone. Although peremptories go back to England in the 13th century, that country abolished them in 1988. Both Justices Thurgood Marshall and Stephen G. Breyer have argued that the peremptory challenge should be eliminated. Garrett Epps has recently contended that a system that included only "for cause" challenges would result in a fairer cross-section of the community as jurors and recommended abolition of the peremptory. Garrett Epps, "American Epic: Reading the U.S. Constitution" (2013), 131.

As of today, no state has eliminated the peremptory. Yet this just may be a major 21st century reform in criminal procedure.