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Batson Challenges in Civil Litigation: The Underestimated Potential

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Recent studies show that despite efforts at ferreting out racial discrimination in the process of jury selection, racial biases are still "widespread" and "apparent" in the selection of juries.[1] For instance, in August 2010, the Equal Justice Initiative reported that it had uncovered "shocking evidence of racial discrimination" in jury selection procedures in each of the eight Southern states.[2] Recent behavioral studies have also produced empirical evidence that "a prospective juror's race can influence the peremptory challenge use"[3] and that even egalitarian-minded people are prone to exhibiting implicit racial biases.[4]

Exclusion of prospective jurors on account of their race, ethnicity, or gender violates the litigant's right of trial by an impartial jury and the jurors' constitutional equal protection rights.[5] Consequently, one of the ways to challenge an unfavorable jury verdict in a civil or criminal case is to assert that, in peremptorily striking prospective jurors during *voir dire*, the opposing counsel discriminated against them based on their race, ethnicity, or gender. These challenges are often called "*Batson* challenges," in reference to the U.S. Supreme Court's decision in *Batson v. Kentucky*,[6] which prohibited racially-motivated peremptory strikes. Since its *Batson* decision, the Supreme Court has extended this prohibition to the peremptory strikes based on jurors' ethnicity and gender.[7]

Research suggests that the overwhelming majority (94 percent) of *Batson* challenges take place in criminal cases.[8] Counsel in civil cases, however, also should keep a *Batson* challenge in their arsenal. In *Edmonson v. Leesville Concrete Co.*,[9] the Supreme Court ruled that a private litigant in a civil trial may not use racially-motivated peremptory strikes any more than a government prosecutor may during a criminal trial: "Racial discrimination has no place in the courtroom, whether the proceeding is civil or criminal." The Supreme Court explained that, for the limited purpose of jury selection, private litigants act as "government actors" and thus cannot violate the jurors' constitutionally-guaranteed equal protection rights.

The Same Three-Part Batson Test Applies in Criminal and Civil Trials

In *Edmonson*, a personal injury case brought by an African-American construction worker, the defendant construction company used two of its three peremptory challenges to remove African-American venire persons from the jury. After erroneously concluding that civil litigants can peremptorily strike jurors for any reason, including the jurors' race, the district court disregarded defendant's pattern of strikes against African-Americans, and the case proceeded to trial. On appeal from a jury verdict in defendant's favor, the Supreme Court ruled that the same legal framework it set forth in *Batson* for determining whether intentional discrimination occurred also applies in civil trials. It therefore remanded the case to the district court.

The *Batson/Edmonson* framework involves a three-part analysis.[10] First, the party raising the *Batson* challenge must establish a prima facie case of discrimination. This can be done by relying solely on the facts in the particular case, by, for instance, showing a pattern of strikes against minority venire persons. After the complaining party makes a prima facie showing of discrimination, the burden shifts to the opposing party to offer a neutral explanation for challenging the jurors. The reasons given need not rise to the level justifying exercise of a challenge for cause but cannot amount to a mere denial of a discriminatory intent. Rather, the explanation has to be clear and reasonably specific and relate to the particular circumstances of the case. As a final step, the trial court must decide if the complaining party has established purposeful discrimination. A trial court may not simply accept a given reason at face value but rather has to examine the lawyer's justifications for the challenges to ensure that the reasons are not merely pretextual.

As *Edmonson* demonstrates, a racial or ethnic bias in exercising peremptory strikes may be present not only in racially-charged criminal trials, but also in tort cases involving minority parties. To raise a *Batson* challenge, however, a litigant does not have to share the same race or ethnicity with the excluded jurors.[11] Additionally, a racial, ethnic, or gender bias may be present in business litigation involving foreign or minority-owned corporations, or foreign or minority officers and employees, as well as in the full range of employment discrimination and civil rights cases.[12] Indeed, *Batson* challenges may be appropriate in any case in which the race or ethnicity of a party's key witness differs from the racial or ethnic composition of the jury because it may affect credibility determinations. Racial issues, however, do not have to be at the forefront of the litigation to raise a successful *Batson* challenge. For instance, in *Ashabraner v. Bowers*,[13] a negligence case arising from an auto collision, the Indiana Supreme Court reversed a jury verdict and remanded for a new trial where a defendant peremptorily struck the only African-American prospective juror, even though the plaintiff was Caucasian and race did not play an obvious role in the case.

Batson Challenges Are Most Likely to Succeed When Prospective Jurors Are Stricken for Demeanor-Based Reasons or for Reasons Unsupported by the Record

Batson challenges are notoriously difficult to win, as demonstrated by a number of recent decisions upholding peremptory strikes that had rather unpersuasive explanations. For instance, in *People v. Jones*,[14] California's highest court upheld a prosecutor's peremptory strike against an African-American bus driver, even though the prosecutor accepted bus drivers who were Caucasian. The court also affirmed the exercise of a peremptory challenge against another minority juror who, the prosecutor asserted, had a relative who was convicted of a murder or attempted murder, even though the record provided no support whatsoever for the prosecutor's contention.[15]

Still, there are a number of favorable *Batson* decisions in the civil context that may be used by civil counsel. These decisions demonstrate that *Batson* challenges are most likely to succeed if opposing counsel peremptorily strikes prospective jurors based on their demeanor, their body language, or counsel's own "gut feeling", or where the record does not support the justifications that opposing counsel proffers for the strikes.[16]

For instance, in *Alex v. Rayne Concrete Service*,[17] a personal injury case, defense counsel struck an African-American female from the jury based on a "gut feeling" that she did not like the company, but liked the plaintiff. The Supreme Court of Louisiana ruled that defense counsel's explanation that "[s]he and I just didn't get good vibes" did not constitute a legitimate race-neutral reason for striking the juror, noting that "such a reason as 'gut feeling' is most ambiguous and inclusive of discriminatory intent."[18] Despite acknowledging that "gut feelings may factor into the decision to utilize a peremptory challenge," the court ruled that this reason alone does not satisfy *Batson* in the absence of any follow-up

questioning of the prospective juror or contemporaneous observations by the trial judge.[19]

Likewise, in *Zakour v. UT Medical Group, Inc.*,[20] a medical malpractice case arising out of the alleged failure to timely diagnose breast cancer, defendants used six out of eight peremptory strikes to remove females from the jury, including three African-Americans. Defendants' counsel attempted to justify the strikes, stating that they were "all based on experience and body mechanics," meaning the stricken jurors' body language.[21] On appeal from a jury verdict in defendants' favor, the Tennessee Supreme Court upheld plaintiff's *Batson* objection and remanded the case for a new trial. The court ruled that, even though lawyers routinely take note of venire persons' body language during *voir dire*, to avoid a *Batson* violation, counsel should "specifically state the particular body language that forms the basis for a peremptory challenge."[22] Because here, defendants failed to describe particular displays of body language—such as scowling at attorneys, failing to make eye contact, falling asleep during *voir dire*, or crossing one's arms—their justification for excluding female jurors was too vague and a pretext for gender discrimination.

Similarly, in *Davis v. Fisk Electric Co.*,[23] an employment discrimination case, the Texas Supreme Court reversed a jury verdict and remanded the case for a new trial after concluding that the explanations of the defendant company for peremptorily striking minority venire persons from the jury were too vague and unsupported by the record. Specifically, defendant used all six of its peremptory strikes to remove five African-Americans and one Asian-American from the venire.[24] Defense counsel stated that it removed one of the prospective jurors because, based on his non-verbal demeanor, counsel believed that he favored punitive damages.[25] The Texas Supreme Court ruled this reason to be pretextual because it was not borne out by the record—i.e., the company did not provide any detailed explanations of the juror's alleged behavior—and "merely stating that a juror nonverbally 'reacted' is insufficient to justify a peremptory strike."[26]

The Ninth Circuit also has recently upheld a *Batson* challenge in a civil case, where the counsel's justifications for peremptorily striking minority jurors found no support in the record. In *Rivera v. Nibco, Inc.*,[27] an employment discrimination case, a defendant company used three of its four peremptory challenges to strike Hispanic prospective jurors. Defendant claimed that one of the stricken jurors stated during *voir dire* that she enjoyed working in a multi-lingual environment and that her sister previously filed a discrimination claim.[28] The record demonstrated, however, that the counsel's observations were "completely unfounded and had no support in the record."[29] The stricken juror did not make these statements. The Ninth Circuit remanded the case for a new trial, ruling that the faulty reasons given by defendant's counsel for striking the minority juror undermined counsel's credibility.

Of course, a successful *Batson* challenge may be lodged not only when jurors are stricken for their demeanor or for the reasons contradicted by the record. Other well-established ways of demonstrating the opposing counsel's bias include comparing jurors who were peremptorily stricken with jurors who were accepted to serve on the jury and examining statistical patterns in the opposing counsel's strikes (such as when the percentage of peremptory strikes against minority jurors far exceeded the percentage of minority jurors on the venire).[30] Statistical patterns, however, may be difficult to demonstrate in federal civil trials, where litigants usually have only three peremptory strikes.[31] Statistical patterns may be easier to demonstrate in state civil trials, where each party may have a higher number of peremptory challenges. For instance, California and Texas allow each party six peremptory challenges in civil cases.[32] Further, while comparisons of the stricken and accepted jurors are useful in undermining the credibility of the "race-neutral" reasons proffered by the opposing counsel, appellate courts are often reluctant to find, on the cold record, any two jurors

truly comparable because accepted jurors may have a range of additional characteristics which are not shared by the stricken juror.[33]

Significance of the Detailed Record of Jury Selection for Appeal

As the above discussion demonstrates, raising a *Batson* claim on appeal is very fact intensive. Consequently, it is important to ensure that proper materials are a part of the record, including the racial, ethnic, and gender composition of the venire and the petit jury, the juror information cards, the jurors' questionnaires, the complete transcript of the *voir dire*, counsel's contemporaneous notes, if any, and any other relevant materials. The lack of this information may work a serious disadvantage to the counsel challenging the peremptory strike or to the counsel defending the strike. For instance, in *Moeller v. Blanc*,[34] a medical malpractice case, a Texas appellate court reversed a jury's verdict in defendants' favor and remanded the case for a new trial, where defendant's counsel struck an African-American juror simply because he "[knew] nothing about that person. And based on that, was not comfortable putting that person on the jury." The opponent of the peremptory strike argued that the lack of information in the record regarding the stricken juror pointed to only one conclusion—that she was removed on account of her race. The appellate court agreed, ruling that the lack of objective observations about the juror's demeanor and appearance during *voir dire*, as well as the counsel's failure to question her, made the reason for the strike "legally indistinguishable from the cases holding that a 'bad feeling' about a panelist is not an adequate race-neutral reason."[35]

Therefore, counsel in civil trials would be well advised to keep a watchful eye on the reasons opposing counsel proffers for striking any minorities from the jury, to make timely objections to the peremptory strikes that raise an inference of racial, ethnic, or gender discrimination, and to keep detailed documentation of the jury selection process to preserve a potential *Batson* claim for appeal.

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1*Illegal Racial Discrimination in Jury Selection: A Continuing Legacy* (Equal Justice Initiative, August 2010).

2*Id.*

3Samuel Sommers & Michael Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and and Batson Challenge Procedure*, 31 LAW & HUM. BEHAV. 261, 269 (2007).

4Mark Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, The Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149 (Winter 2010).

5*Miller-El v. Dretke*, **545 U.S. 231**, **237** (2005).

6 476 U.S. 79 (1986).

7*See Hernandez v. New York,* **500 U.S. 352**, **355** (1991) (extending *Batson* to ethnicity-conscious challenges); *J.E.B. v. Alabama*, **511 U.S. 127**, **146** (1994) (extending *Batson* to gender-conscious challenges).

8*See Davis v. Fisk Electric Co.*, **268 S.W.3d 508**, **519** (Tex. 2008) (citing Kenneth Melilli, *Batson in Practice: What We Have Learned about Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 458 (1995)).

9500 U.S. 614 (1991).

10*See Snyder v. Louisiana*, **552 U.S. 472**, **476**-**77** (2008); *Hernandez*, 500 U.S. at **362-63**.

11*Powers v. Ohio*, **499 U.S. 400**, **402** (1991).

12*See* Bennett, *supra* note 4, at 161.

13753 N.E.2d 662 (Ind. 2001).

14247 P.3d 82 (Cal. 2011).

15*See also Felkner v. Jackson*, **131 S.Ct. 1305** (2011) (affirming denial of *Batson* challenges).

16 For the Supreme Court's discussion of a peremptory strike based on a juror's demeanor, *see Snyder v. Louisiana*, **552 U.S. 472**, **479** (2008). In *Snyder*, the court refused to credit the prosecutor's assertion that an African-American prospective juror was nervous during *voir dire*, where the trial judge did not make a finding or an observation on the record, which would have corroborated the prosecutor's statement.

17951 So. 2d 138, **148** (La. 2007).

18*Id.* at **153**.

19*Id*.

20215 S.W.3d 763, **765** (Tenn. 2007).

21*Id*. at **773**.

22*Id*. at **774**.

23268 S.W.3d 508 (Tex. 2008).

24*Id*. at **516**.

25*Id*. at **516-17**.

26*Id*. at **519**. The court also found that striking another prospective juror on the ground that he was a musician, and thus was allegedly prone to sympathize with the plaintiff, demonstrated a group bias. The court pointed out that there were a number of accepted Caucasian jurors who were either unemployed or whose relatives were laid off, but whom the company nonetheless accepted.

27372 Fed. Appx. 757, **758** (9th Cir. 2010).

28*Id*. at **759**.

29*Id.*

30For instance, in *Miller-El v. Dretke*, **545 U.S. 231**, **241** (2005), the Supreme Court found racial discrimination in jury selection where, among other things, prosecutors "used their peremptory strikes to exclude 91% of the eligible African-American venire members . . . . Happenstance is unlikely to produce this disparity." The Supreme Court explained that "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination . . . ." *Id.* at 241. *See also Snyder*, 552 U.S. at 472 (refusing to credit prosecutors' explanation that he struck an African-American juror because of his conflicting school obligations, where he "accepted white jurors who disclosed conflicting obligations that appear to have been at least as serious as [the stricken juror's]").

3128 U.S.C. § 1870.

32*See, e.g.*, CAL. CIV. PROC. § **231(c)**; TEX. R. CIV. P. 233.

33*See United States v. Farhane*, **634 F.3d 127** (2d Cir. 2011) (even though a stricken juror shared one trait with several accepted jurors, neither of the accepted jurors "demonstrated the range of concerns presented" by the stricken juror).

34276 S.W.3d 656, **663**-**65** (Tex. App. 2009).

35*Id*. at **665**.