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Recent Cases

RECENT CASES

STATE CONSTITUTIONAL LAW—Peremptory Challenges by Defense—Racially Discriminatory Use of Peremptory Challenges by Defense Counsel Violates Both the Civil Rights Clause and the Equal Protection Clause of the New York State Constitution: *People v. Kern*, 75 N.Y.2d 638, 554 N.E.2d 1235, 555 N.Y.S.2d 647 (1990).*

In *People v. Kern*,[1] the New York Court of Appeals firmly rejected the defense counsel's use of peremptory challenges to exclude potential jurors on the basis of race in criminal trials.[2] Accordingly, the Court imposed upon New York defendants the restrictions set forth in *Batson v. Kentucky*[3] whenever the prosecution is able to establish that the defense counsel used peremptory challenges to exclude a particular racial group.[4]

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* To reward outstanding legal writing, the staff of the *Dickinson Law Review* has elected to publish annually one casenote submitted in the *Dickinson Law Review* Summer Casenote Writing Competition. Beth L. Winters, 1990-91 Notes Editor, conducted the research associated with this note.

1. 75 N.Y.2d 638, 554 N.E.2d 1235, 555 N.Y.S.2d 647 (1990).

2. Judge Alexander delivered the unanimous opinion of the court in which Chief Judge Wachtler and Judges Simons, Kaye, Titone, Hancock, Jr., and Bellacose concurred.

3. 476 U.S. 79 (1986).

4. *Kern*, 76 N.Y.2d at 657-58, 554 N.E.2d at 1246, 555 N.Y.S.2d at 658. Although the New York Court of Appeals became the first state high court to prohibit defense counsel's use of racially biased peremptory challenges in conjunction with the *Batson* rule, the court properly noted the prior decisions of three other state courts that are in accord with *Kern*. *See*

In *Batson*, the United States Supreme Court prohibited the prosecution from exercising its peremptory challenges in a racially discriminatory manner, but specifically left unanswered "whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel."[5] Under national publicity,[6] the Court of Appeals affirmatively answered that question for the State of New York[7] by applying the civil rights clause of the New York Constitution. The decision "ignit[ed] howls of protest from some in the legal community"[8] while drawing nods of approval from others.[9]

The Howard Beach incident[10] occurred in the early morning of December 20, 1986, when a group of twelve white teenagers wielding baseball bats and tree limbs attacked three black men.[11] One of the victims was struck and killed by an automobile while attempting to escape his assailants by running across a six-lane highway.[12] Three of the youths were subsequently arrested and indicted for the attack.[13]

On the first day of jury selection, the prosecution argued that the defense was attempting to empanel an all-white jury by exercising its peremptory challenges to exclude prospective black jurors.[14]

People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978) (prosecution's peremptory challenges violated the defendant's right to an impartial jury chosen from a cross-section of the community); State v. Neil, 457 So. 2d 481 (Fla. 1984) (Florida Constitution guarantees the right to an impartial jury); Commonwealth v. Soares, 377 Ma.. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979) (prosecution's peremptory challenges violated defendant's right to an impartial jury).

5. *Batson*, 476 U.S. at 89 n.12.

6. Known as the "Howard Beach Case," the racially motivated attack on three black men took place in 1986 in the predominantly white Howard Beach section of Queens, New York. *See* Anderson, *N.Y. Extends* Batson *to Defense*, A.B.A. J., June 1990, at 24 (referring to *Kern* as "the case that gained national attention"); Note, *Moving Closer to Eliminating Discrimination in Jury Selection: A Challenge to the Peremptory*, 7 N.Y.L. SCH. J. HUM. RTS. 204 nn. 1-4 (1989) (citing several New York Times articles that reported the incident).

7. People v. Kern, 75 N.Y.2d 638, 643, 554 N.E.2d 1235, 1236, 555 N.Y.S.2d 647, 648 (1990).

8. Anderson, *supra* note 6, at 24. For a discussion of the need to retain the peremptory challenge, see generally Gobert, *The Peremptory Challenge — An Obituary*, 1989 CRIM. L. REV. 528.

9. *See generally* Note, *supra* note 6, at 236-38 (suggesting that defendants' peremptory challenge use should be limited by *Batson* as is prosecutors' use); Note, *Discrimination by the Defense: Peremptory Challenges after* Batson v. Kentucky, 88 COLUM. L. REV. 359-61 (1988) (arguing for the extension of *Batson* to the defense).

10. *See supra* note 6.

11. *Kern*, 75 N.Y.2d at 643-46, 554 N.E.2d at 1236-39, 555 N.Y.S.2d at 548-51.

12. People v. Kern, 75 N.Y.2d 638, 645, 554 N.E.2d 1235, 1238, 555 N.Y.S. 2d 647, 650 (1990).

13. *Id.* at 646, 554 N.E.2d at 1238, 555 N.Y.S. 2d at 650. The defendants were Scott Kern, Jon Lester, and Jason Ladone.

14. *Id.* at 647, 554 N.E.2d at 1239, 555 N.Y.S.2d at 651.

This initial protest by the prosecution was rejected as premature.[15] After the prosecution's continued protests, however, the trial court ruled on the fourth day of jury selection that the procedures articulated in *Batson v. Kentucky* were applicable to defense counsel if peremptory challenges were exercised in a racially discriminatory manner.[16] As a result of these restrictions, the defendants were unable to categorically exempt black jurors, whom defense counsel claimed were much more prone to convict the white defendants.[17] The trial court entered convictions against all three defendants for second degree manslaughter and first degree assault, which the supreme court, appellate division "affirmed . . . in all respects."[18] The Court of Appeals emphatically agreed with the lower court's decision, stating that " '[j]ustice would indeed be blind if it failed to recognize that the [trial] court is employed as a vehicle for racial discrimination when peremptory challenges are used to exclude jurors on the basis of their race . . . .' "[19]

Kern instructs that purposeful racial discrimination in the selection of jurors is prohibited by both the civil rights and equal protection clauses of the New York State Constitution.[20] Hence, the prosecution may employ the *Batson* procedure for making an equal protection claim on behalf of the wrongfully excused jurors by demonstrating: (1) that the excused juror is a member of a cognizable racial group; (2) that the defense has exercised peremptory challenges to exclude members of that group from the petit jury; and (3) that " 'these facts and any other relevant circumstances raise an inference' of purposeful discrimination."[21]

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15. *Id.*

16. *Id.*

17. People v. Kern, 75 N.Y.2d 638, 647, 554 N.E.2d 1235, 1239, 555 N.Y.S.2d 647, 651 (1990). Defense counsel's belief that black jurors would inevitably be biased against the white defendants was evidenced by their statement that "the black jurors did not want to be excused," but instead were "volunteering" for jury duty. *Id.*

18. People v. Kern, 149 A.D.2d 187, 545 N.Y.S.2d 4 (App. Div. 1989), *aff'd* 75 N.Y.2d 638, 554 N.E.2d 1235, 555 N.Y.S.2d 647 (1990).

19. *Kern*, 75 N.Y.2d at 657, 554 N.E.2d at 1245, 555 N.Y.S.2d at 657 (quoting Edmonson v. Leesville Concrete Co., 860 F.2d 1308, 1313 (5th Cir. 1988), *rev'd on hearing*, 895 F.2d 218 (5th Cir. 1990)).

20. *Id.* at 650, 554 N.E.2d at 1241, 555 N.Y.S.2d at 653. N.Y. CONST. art. I, § 11 provides:

> No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

The first sentence of this section is the equal protection clause. The second sentence is the civil rights clause. *Kern*, 75 N.Y.2d at 650-51, 554 N.E.2d at 1241, 555 N.Y.S.2d at 653.

21. *Id.* at 649, 554 N.E.2d at 1240, 555 N.Y.S.2d at 652 (quoting Batson v. Kentucky,

Upon demonstration of a prima facie case of discrimination, the defense must in turn provide a racially neutral explanation for having challenged the jurors, or the court will reinstate those jurors on the venire.[22] Only by extending the restrictions of *Batson* to the defense, the Court of Appeals concluded, could the civil right to participate in the administration of justice and the integrity of the criminal trial process be preserved.[23]

Although not constitutionally mandated, peremptory challenges are of ancient origin in Anglo-Saxon jurisprudence.[24] Indeed, they have long been regarded as "one of the most important rights secured to the accused" in ensuring a fair and impartial jury.[25] Moreover, unlike challenges for cause, the essential nature of the peremptory challenge is that it can be exercised for any reason, without inquiry or control from the court.[26] Nevertheless, as early as 1879, the Supreme Court recognized that categorically excluding blacks from jury service violated the equal protection clause of the Constitution.[27]

The competing values of the constitutional right to equal protection and the statutory right to peremptory challenges first collided in *Swain v. Alabama*.[28] Although *Swain* recognized the equal protection infringement upon a defendant in the state's use of peremptory challenges to exclude members of the defendant's race, it denied re-

476 U.S. 79, 97 (1986)). The petit jury is "[t]he ordinary jury for the trial of a civil or criminal action, so called to distinguish it from the grand jury." BLACK'S LAW DICTIONARY 768 (5th ed. 1979).

22. People v. Kern, 75 N.Y.2d 638, 647, 554 N.E.2d 1235, 1240, 555 N.Y.2d 647, 652 (1990).

23. *Id.* at 652, 554 N.E.2d at 1242, 555 N.Y.S.2d at 654.

24. Swain v. Alabama, 380 U.S. 202, 212-21 (1965). Ironically, the English who created the peremptory challenge, have recently abolished it. *See generally* Gobert, *supra* note 8, at 528-36; Comment, *The Continued Use of Discriminatory Peremptory Challenges After* Batson v. Kentucky: *Is the Only Alternative to Eliminate the Peremptory Challenge Itself?*, 23 NEW ENG. L. REV. 221, 223-27 (1988).

25. *Swain*, 380 U.S. at 219 (quoting Pointer v. United States, 151 U.S. 396, 408 (1894)). By securing juries "which in fact and in the opinion of the parties are fair and impartial," the peremptory challenge assures confidence in our judicial system. *Id.* at 212.

26. *Id.* at 220.

27. Strauder v. West Virginia, 100 U.S. 303 (1879) (state statute prohibiting blacks from participating in jury service held unconstitutional). As Justice Strong poignantly explained:

> The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

Id. at 308.

28. 380 U.S. 202 (1965).

lief absent evidence that the prosecution was systematically excluding a particular race in cases other than the defendant's.[29] *Swain* endured for over twenty years until the Supreme Court decision in *Batson v. Kentucky*.[30] In *Batson*, *Swain's* high evidentiary standard was explicitly overturned and the Supreme Court reaffirmed the principle espoused in *Strauder v. West Virginia*.[31]

Batson involved a black defendant indicted for second degree burglary.[32] On the first day of Batson's trial, the prosecution used its peremptory challenges to remove four black people from the venire, which resulted in a jury composed only of white people.[33] Defense counsel objected, arguing that the defendant's sixth amendment right to a jury drawn from a cross section of the community, and fourteenth amendment right to equal protection, had been violated.[34] The trial court rejected this argument and Batson was convicted.[35] Relying on *Swain*, the Supreme Court of Kentucky affirmed.[36] The United States Supreme Court reversed, holding that the prosecutor's use of peremptory challenges to exclude all or most blacks from the jury established a prima facie violation of the equal protection clause.[37] Consequently, a new test was devised whereby the defendant need not prove the consistent and systematic exclusion of a minority group from petit juries. Instead, all that need be shown is that the defendant is "a member of a cognizable racial group" and that

29. *Id.* at 203-04, 221. Members of the Court severely criticized the burden placed upon the defense as too great.

30. 476 U.S. 79, 84 (1984).

31. *Id.* at 84-90 (1986). *See supra* note 27 and accompanying text.

32. *Id.* at 82.

33. *Id.* at 83. The venire is the panel of jurors summoned to serve as jurors. BLACK'S LAW DICTIONARY 1396 (5th ed. 1979).

34. *Batson*, 476 U.S. at 83. The sixth amendment provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. amend. VI. From this language the Supreme Court has concluded that the venire must be composed of a "fair cross section of the community." Taylor v. Louisiana, 419 U.S. 522, 528 (1975). *See also* Duren v. Missouri, 439 U.S. 357, 364 (1979). *But see* Holland v. Illinois, 110 S. Ct. 803 (1990) (white defendant has standing to raise a sixth amendment challenge to the exclusion of blacks from jury). In *Holland*, Justice Scalia delivered the majority opinion, stating that the right to a jury drawn "from a fair cross section of the community . . . has never included the notion that [peremptory challenges cannot be used by] both the accused and the State to eliminate persons thought to be inclined against their interests." *Id.* at 807. For an in-depth analysis arguing that the sixth amendment should limit the use of peremptory challenges, see generally, Massaro, *Peremptories or Peers? — Rethinking Sixth Amendment Doctrine, Images and Procedures*, 64 N.C.L. REV. 501 (1986).

35. *Batson*, 476 U.S. at 83.

36. Batson v. Kentucky, 476 U.S. 79, 83 (1986).

37. *Id.* at 96-97. The Court relied solely on Batson's equal protection claim, specifically stating, "We . . . express no view on the merits of petitioner's Sixth Amendment arguments." *Id.* at 85 n.4.

the prosecution has peremptorily challenged all or most of the members of the defendant's race in that case.[38] When these and other relevant factors raise an inference of discrimination, the prosecution must then assert a racially neutral explanation for its suspect use of peremptory challenges.[39]

Although *Kern* relies on the *Batson* rationale to restrict the defendant's use of peremptory challenges, *Kern* is distinguishable in several regards.[40] First, the Court adjudicated the case solely on the merits of the civil rights and equal protection clauses of the state constitution. Yet the Court astutely employed the *Batson* reasoning in establishing that the prosecutor had standing.[41] The prosecution's standing, the Court of Appeals echoed, was derived from two sources—the rights of the wrongfully excluded jurors and the rights of the community-at-large, whose confidence in the fairness of our legal system is greatly undermined by judicially reinforced discrimination.[42]

With respect to the prosecution's equal protection claim, however, the Court relied primarily on its own assemblage of outside authority to find the requisite state action needed to sustain such a claim.[43] Rejecting defense counsel's argument that *Polk County v. Dodson*[44] stood for the proposition that "action[s] performed by a defense attorney [can] never be attributable to the State," the Court held that the true test is "whether the degree of involvement by the State can be said to be substantial such that the coercive power of the State has been enlisted to enforce private discrimination."[45] Ap-

38. *Id.* at 96-97.

39. *Id.* at 97. Though the prosecution must provide racially neutral explanations once the defendant has made a prima facie showing of discrimination, the Court emphasized "that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause." *Id.*

40. Of course, the very fact that *Kern* addressed a question left unanswered by the Supreme Court in *Batson* caused it to be an important decision. This is especially true since the Supreme Court has given some indication of its disinclination to extend the *Batson* rule to the defense. *See* Alabama v. Cox, 109 S. Ct. 817 (1989) (mem.).

41. People v. Kern, 75 N.Y.2d 638, 654, 554 N.E.2d 1235, 1243-44, 555 N.Y.S.2d 647, 655-56 (1990) (citing *Batson*, 476 U.S. at 87-88).

42. *Id.* at 652. *Accord* People v. Gary, 138 Misc. 2d 1081, 1091-93, 526 N.Y.S.2d 986, 994-96 (1988) (both society and defendant are injured if peremptory challenges are executed in discriminatory manner).

43. *Kern*, 75 N.Y.2d at 654-57, 554 N.E.2d 1243-46, 555 N.Y.S.2d 655-58. The New York Constitution equal protection provision, like its federal counterpart, seeks to deter unlawful governmental conduct and thus requires a showing of state action.

44. 454 U.S. 312, 318-19 (1981) (a state funded public defender's traditional lawyer functions do not constitute state action in a criminal proceeding).

45. *Kern*, 75 N.Y.2d at 655-56, 554 N.E.2d at 1244-45, 555 N.Y.S.2d at 656-57. The "fair attribution" test utilized by the Court of Appeals is a two-prong test developed by the United States Supreme Court:

plying the facts before them, the Court specified three ways in which the State was "inevitably and inextricably" enforcing private discrimination as a result of the defendant's use of peremptory challenges:

> [First], [a] defendant's right to exercise the challenges is conferred by State statute (citation omitted). [Second], [t]he jurors are summoned for jury service by the State (citation omitted), sit in a public courtroom and are subject to voir dire at the direction of the State . . . . [Third], the Judge, with the full coercive authority of the State, . . . enforces the discriminatory decision by ordering the excused juror to leave the courtroom escorted by uniformed court officers.[46]

The United States Supreme Court reached an analogous result in *Shelly v. Kraemer*,[47] in its response to a racially restrictive covenant. In *Shelly*, the Court held that judicial enforcement of the covenant constituted state action, even though the discriminatory covenant was the result of a private agreement, because "the full coercive power of the government" had been enlisted to deny one's property rights on the basis of race.[48]

In addition, by recognizing the presence of state action when defense counsel excludes jurors through peremptory challenges, the Court of Appeals reinforced the parallel conclusions of the majority of New York's lower courts. For example, in the criminal case of *People v. Davis*,[49] the court found state action notwithstanding the question of whether defense counsel was state funded, because in granting the racially biased peremptory challenges, "the trial judge and other state officials . . . participate[d], facilitate[d], and acquiesce[d] in the . . . discrimination."[50]

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible . . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.

Lugar v. Edmonson Oil Co., 457 U.S. 922, 937 (1982).

For a discussion of other tests utilized by the courts to determine whether a private party qualifies as a state actor, see Note, *supra* note 9, at 359-61.

46. People v. Kern, 75 N.Y.2d 638, 656-57, 554 N.E.2d 1235, 1245, 555 N.Y.S.2d 647, 657 (1990). Peremptory challenges are granted by and stipulated in N.Y. CRIM. PROC. LAW § 270.25 (Consol. 1982).

47. 334 U.S. 1 (1948).

48. *Id.* at 19. *Accord Lugar*, 457 U.S. at 941.

49. 142 Misc. 2d 881, 537 N.Y.S.2d 430 (1988).

50. *Id.* at 888, 537 N.Y.S.2d at 434. *See also* People v. Piermont, 143 Misc.2d 839, 843, 542 N.Y.S.2d 115, 117-18 (1989); People v. Gary, 138 Misc. 2d 1081, 1089, 526 N.Y.S.2d 986, 992-94 (1988); People v. Muriale, 138 Misc. 2d 1056, 1062-63, 526 N.Y.S.2d 367, 371-72 (1988). *But see* Holtzman v. Supreme Court, 139 Misc. 2d 109, 117-19, 526 N.Y.S.2d 892, 896-98 (1988), *aff'd on other grounds*, 152 A.D.2d 724, 545 N.Y.S.2d 40 (1989) (state action

Perhaps the most significant aspect of *Kern* is the Court's primary reliance on the state constitution's civil rights clause.[51] State constitutions, "which protect fundamental rights independently of the United States Constitution," have increasingly been construed by state courts "as providing greater protection to . . . citizens' individual rights than accorded under the federal constitution."[52] The Court of Appeals continued this trend by relying on the civil rights clause, which, unlike the federal constitution's equal protection clause relied upon by the *Batson* court, "prohibits private as well as State discrimination as to 'civil rights.' "[53] Jury service is a civil right, the Court concluded, both as a "privilege of citizenship" under the state constitution[54] and as guaranteed by the New York Civil Rights Law, which provides:

> No citizen of the state possessing all other qualifications which are or may be required or prescribed by law, shall be disqualified to serve on a grand or petit juror in any court of this state on account of race, creed, color, national origin or sex . . . .[55]

Thus, although the Court bolstered its opinion by finding that defense counsel's discriminatory use of peremptory challenges constituted state action in violation of the equal protection clause, it could have restricted the defense solely on the basis of the civil rights clause. Moreover, *Kern*'s use of the civil rights clause in conjunction with the Civil Rights Law clearly implies that cognizable groups other than race will be recognized and that the private conduct of plaintiff and defense counsel in *civil* suits will fall within the parameters of *Batson*. Such an extension of *Batson* to civil suits was flatly rejected by the United States Court of Appeals in *Edmonson v. Leesville Concrete Co.*,[56] in which the Court was compelled to decide

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does not occur when statute merely permits but does not compel defense counsel's exercise of racially motivated peremptory challenges).

51. People v. Kern, 75 N.Y.2d 638, 650-53, 554 N.E.2d 1235, 1241-43, 555 N.Y.2d 647, 653-55 (1990).

52. State v. Gilmore, 103 N.J. 508, 523-24, 511 A.2d 1150, 1157 (1986) (holding that under the New Jersey State Constitution, the prosecution may not use peremptory challenges to discriminate on the basis of race, color, ancestry, national origin, religious principles or sex in the selection of jurors).

53. *Kern*, 75 N.Y.2d at 651, 554 N.E.2d at 1241, 555 N.Y.S.2d at 653 (citing Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 531, 87 N.E.2d 541, 548-49 (1949)). For the precise wording of the civil rights clause see *supra* note 20.

54. N.Y. CONST. art. I, § 1 ("No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof . . . .").

55. N.Y. CIVIL RIGHTS LAW § 13 (Consol. 1976).

56. Edmonson v. Leesville Concrete Co., 895 F.2d 218 (5th Cir. 1990), *rev'g on rehearing*, 860 F.2d 1308 (5th Cir. 1988). *But see* Fludd v. Dykes, 863 F.2d 822, *reh'g denied en banc*, 873 F.2d 300 (11th Cir. 1989) (*Batson* rule applies in civil cases if objecting party can

the case within the constraints of the equal protection clause.[57]

The Court of Appeals in *Kern* did not explicitly point to whom the *Batson* restrictions should be extended. The court's primary reliance on the civil rights clause of the New York State Constitution, however, implies a clear belief that *Batson* should apply to cognizable groups differentiated by factors other than race and to civil as well as criminal trials. More importantly, because neither *Batson* nor *Kern* abolished the peremptory challenge altogether, the defendant's perception of an impartial jury was safeguarded while preserving two compelling state interests — the need for balance between the prosecution and defense, and the continued confidence of the American people in the judicial process as embodied by the jury.

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show that the opponent has used its peremptory challenges in a racially motivated manner). Like the federal courts, state courts have also reached opposite conclusions as to whether there is state action in the use of peremptory challenges in civil suits. *Compare* Banks v. Lewis, 187 Ga. App. 218, 369 S.E.2d 537 (1988) ("*Batson* . . . clearly is limited in its application to criminal proceedings") *with* Chavous v. Brown, 299 S.C. 398, 385 S.E.2d 206 (Ct. App. 1989) ("the principles of *Batson* apply to a civil case").

57. Although section 1862 of the Jury Selection and Service Act of 1968 prohibits the exclusion of citizens from jury service for discriminatory reasons, an examination of its legislative history reveals that section 1862 applies not to the selection of the petit jury, but only to the selection of the venire. *See* 28 U.S.C. §§ 1862, 1866 (1988); 1968 U.S. CODE CONG. & ADMIN. NEWS 1792, 1979 ("[t]he proposed bill preserves the traditional right . . . to strike [a juror] peremptorily").