Excusing Peremptory Challenges: A Critique of Modern Jury Selection

Honors Capstone Project

By: Jacob Lewis

Faculty Mentor: Dr. Kimberly Schwitzer

University of Wyoming

Honors College

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Abstract

Peremptory challenges have had a long history in the Courts of England and the United States. Multiple different types of demographics are frequently and indefensibly exploited during this process of jury selection including race, gender, age, religion, and criminal history. For any given defendant, the obstruction of a fair jury based on any of these challenged demographics results in a violation of the defendant's rights under the Sixth Amendment of the United States Constitution and also the Equal Protections Clause of the Fourteenth Amendment of the United States Constitution. However unclear the purpose of the peremptory challenge process, there are solutions that very likely could result in fairer juries and fewer discriminatory legal practices. One such solution would be the discontinuance of peremptory challenges entirely.

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A truly fair criminal trial system in America seems impossible. This is an implicative statement about a problem so systematically driven into American society that it seems unsolvable. It is not at all a stretch to suggest that issues in American justice reach into each corner of the field from initial police contact all the way through trial and sentencing. Voir dire, or jury selection, is one of the spokes in the wheel of our Criminal Justice system that is meant to, but fails to, provide a mechanism that ensures fairness; specifically, the peremptory challenge process of jury selection diminishes that fairness. This paper aims to explore the implications of the peremptory challenge and whether the American Criminal Justice system needs it at all.

Throughout the Voir dire process, potential jurors who are called to their civil duty may be excused from service by the trial court for reasons of cause. Some of these reasons include a previous and prejudiced knowledge of the case at hand, a prejudiced connection to the court or any of the actors within, or a previous and prejudicial experience with the justice system as a defendant or victim. When either attorney of an adversarial criminal courtroom wishes to challenge a juror for cause as previously discussed, they must articulately state those reasons for the court. However, there is another type of challenge that threatens the theoretical net neutrality of the court called a peremptory challenge. This challenge, while limited for both sides during the process, requires no explanation from an attorney as to why a particular juror should be excused. This essentially allows for the profiling of potential jurors. For example, if a young adult is on trial for the possession of marijuana in a state that its possession and consumption are illegal, the prosecuting attorneys may seek to excuse younger jurors who may choose to be lenient on the individual. On the contrary, a defense attorney might wish to excuse as many older, more stereotypically “anti-drug” jurors as possible. Great legal strategy is involved in the

peremptory challenge process of jury selection. In fact, a relatively new genre within the field of law is that of a jury consultant who reviews the venire (relevant jury pool) and makes suggestions based on profiling and stereotypes that may help a given lawyer reach their desired case outcome. Yet, from the example given, age is not the only demographic that is observed and figuratively preyed upon. More implicative issues stem from the profiling within peremptory challenges including racial and gender bias. This, then, begs the question of the importance of peremptory challenges and the prejudicial problems they pose to criminal defendants.

Batson's Background

Two important United States Supreme Court (SCOTUS) cases that aimed to correct the prejudicially manipulative effect of essentially rigging jury pools in order to get a desired case outcome include *Batson v. Kentucky (1986)* and *J.E.B. v. Alabama (1994)*. The more well-known of the two, *Batson,* entered the Court for Mr. James Batson after he was tried and convicted of burglary. On appeal, the Kentucky Supreme Court affirmed the conviction. Yet, SCOTUS agreed to hear the case based on the actions of the prosecutor during the peremptory challenge process of jury selection. Throughout the entire venire there were only four Black potential jurors. The prosecutor, using his peremptory challenges, excused each and every one of the four. Batson's challenge to SCOTUS consisted of the argument that the removal of these jurors was solely based on race and that it violated his Sixth Amendment right to an impartial jury and the Equal Protection Clause of the Fourteenth Amendment (*Batson v. Kentucky*, 1986). The Court ruled that the State was not permitted to use its peremptory challenges to exclude potential members of the jury based on race. Justice Powell delivered the opinion citing the Equal Protection Clause as the main basis for the ruling, but he also importantly described the implications of prejudicially motivated peremptory challenges:

"' The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice'" (*Batson v. Kentucky*, 1986).

Interestingly, Chief Justice Warren Burger was one of the two dissenters in *Batson*. He suggested that peremptory challenges have had a long history in England and America, and that their main purpose was to allow the exclusion of jurors without having to give a particular reason. Clearly, it is that same thinking in the case of *Batson* that allows for the unfair prejudicing of a jury under racial pretenses.

Yet, race is not the only demographic by which a jury might be prejudiced. *J.E.B. v. Alabama* became a type of progeny, a descendent, of *Batson* some eight years later. In an entirely similar environment, *J.E.B.* developed through the isolated and discriminatory use of peremptory challenges. In a complaint of paternity and child support for plaintiff J.E.B., the state used it's peremptory challenges to strike 9 of the 10 male jurors in the potential juror pool. The defense used a challenge of its own to strike the final male juror resulting in an entirely female jury. For the same reasons as *Batson*, the Supreme Court found that dismissing potential jurors based on their gender is a violation of the Equal Protections Clause of the Fourteenth Amendment (*J.E.B v. Alabama*, 1994). The opinion of the Court and other concurring opinions cited many of the same reasons that the *Batson* Court used. Further, the *J.E.B* Court rather valiantly concluded that "Discrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process" (*J.E.B v. Alabama*, 1994). This ruling, consistent with the *Batson* rule, indicates to those who study the Law some of the issues

revolving around peremptory challenges and begs the question of whether any peremptory challenge can truly be neutral and non-discriminatory.

Batson and *J.E.B.* were meant to address and prevent systematic exclusion within the jury selection process. Understanding that race, and assuredly gender, have some impact on a panel of jurors, it can be expected that peremptory challenges raise a fairness issue within the Criminal Justice system. This issue persisted long before and leading up to *Batson.* The American Bar Association (ABA) Journal recognized this issue in 1983, shortly before SCOTUS decided *Batson*. Interestingly, the ABA discusses multiple cases that had come up decades before addressing the same issue. They begin a sort of timeline with *Swain v. Alabama* (1965); a case in which SCOTUS stated that excluding Black jurors is not a violation of the Equal Protection provision unless "a pattern of such challenges in several cases can be shown" (ABA, 1983). Initially, the perception that this is a relevant and reasonable decision may seem to some to be a good one. However, further research to be discussed in this paper demonstrate that it may not be that much of a solution.

Similar cases arise at SCOTUS throughout the subsequent years. For even one of these issues to come to light, it only makes sense that a pattern within the scope of a given case is shown. Likely, that is the exclusion of most, if not all, of the minorities within a set of potential jurors. This has to be demonstrated, according to the *Swain* court, by the same attorney or office throughout the span of some number of cases. This "pattern" idea is truly important throughout the births of *Swain*'s progeny. A seemingly important, but overall worthless, case to follow *Swain* was *California v. Wheeler* (1978) in which the California Supreme Court ruled that "the use of a peremptory challenge can be questioned if an opposing lawyer suspects that it was racially motivated" (ABA, 1983, p. 1767). If there is a challenge, the opposing lawyer must

simply show the court that there were reasons relevant, other than race, as to why the juror was removed (Flanagan, 2018). The problem here is that assumably any reason other than race will suffice and thus create a constitutionally correct peremptory challenge. While race still may be the primary motivation for removing a juror, for instance, an attorney might simply suggest that the juror dog-sat for the prosecutor's nephew's friend, and that very well could be reason enough to remove that juror. Once a minority was excluded following the *Wheeler* decision, lawyers became cautious by, just as the above example demonstrates, carefully articulating a race-neutral reason for removing the juror.

Impact of Peremptory Challenges

Attorneys have always, and likely will always, base peremptory challenges on demographics such as race along the psychological motivation of own-race bias, the social identity theory, and in-group leniency effect by which a given juror might act more leniently toward a member of their own race (Maeder & Yamamoto, 2019) . "Lawyers say prosecutors often strike blacks through peremptory challenges for fear they will automatically favor black defendants" (ABA, 1983). It is suggested, though, that this is simply a stereotype. A study by Evelyn Maeder and Susan Yamamoto looked specifically at this issue while attempting to demonstrate the effects that race and juries have on each other. The purpose of their study was to determine if negatively held stereotypes of white and non-white jurors impacted their decision making in the end of the trial process (Maeder & Yamamoto, 2019). Notably, this study stems from Canada and has nothing to do with the peremptory challenge process. Rather, the importance of this study and its inclusion in this paper lies in the effect that race has on juror decision making which may be further prejudiced by the peremptory challenge process. Again, while this is an illustration from the Canadian criminal system, the researchers begin their entire

analysis by noting similar issues of race as with their Southern neighbors: heavily disproportionate rates of incarceration between indigenous and Black populations. To be specific, they state that indigenous peoples in Canada make up 4% of the Canadian population and 23% of the incarcerated population (Maeder & Yamamoto, 2019). These proportions are entirely similar to that of the United States. “In 2017, blacks represented 12% of the U.S. adult population but 33% of the sentenced prison population” (Gramlich, 2020). This clearly identifies that every aspect of a criminal justice system is sharply aimed toward minorities, including even the jury.

The researchers in this study predicted that mock jurors who held generally negative racial stereotypes would be more likely to generate a guilty vote and a harsher sentence on other-race defendants (Maeder & Yamamoto, 2019). While these researchers suggest more research must be conducted on the matter, the statistics they gathered ended up rejecting their hypothesis. They found that white jurors were in fact more lenient for non-white defendants, but they caution against interpreting their results as absolute fact due to a number of comorbid variables including self-image and a desire to appear non-racist (Maeder & Yamamoto, 2019). Regardless of this, the researchers strive to demonstrate that race, and further the race composition of a jury, does affect the jury’s decisions and how those “juror characteristics may be significantly related to how they process trial information” (Meader & Yamamoto, 2019). Almost as if the researchers were citing directly from the concurring opinion of *Batson*, they suggest that “if targeting certain groups for inclusion threatens the fairness of a trial, then the court has an obligation to enact stronger policies to prevent systematic exclusion” (Maeder & Yamamoto, 2019). Imagine, then, that the following findings are a de facto progression of racially motivated discrimination.

Recall the position of the ABA in their thought that Black jurors will automatically favor Black defendants (ABA, 1983). Subsequent studies have found that to be true; in fact, Black jurors are more likely to favor the defense entirely (Trevino, 2019). This is not entirely surprising. Not only are Black jurors favorable to the defense, it is also true that juries composed of Black men are less likely to convict any defendant, especially Black defendants (Flanagan, 2018). Yet, Black male defendants are typically found without a jury consisting of many other Black male jurors (Trevino, 2019). This demonstrates the sheer lack of impartiality that these defendants achieve with their juries and begs the question whether the individual accused even gets to be tried by a jury of his peers. Even more than that, it is still factual that Black jurors are disproportionately struck by the state (Trevino, 2019). In fact Black venire members are 4.51 times more likely to be excluded than White venire members by the prosecution (Decamp & Decamp, 2020). The research presented by Decamp and Decamp are consistent with the findings of these and other studies in that they all produced evidence of racial discrimination in the prosecutorial use of peremptory challenges (Decamp & Decamp, 2020). This is not impartial. This is not a cross-sectioned sample of their community. This is not adhering to the promise of certain inalienable rights for American citizens under the Sixth Amendment.

Other Instances of Discrimination

Unfortunately, this whole idea of discrimination is not only limited to race and gender. A variety of other research exists on different demographic types that are discriminated against throughout the adjudication process, and in particular, the peremptory challenge process of jury selection. It is vital to this project to briefly bring attention to this assemblage of deliberate discrimination. One of the most recent deep explorations into this topic examines whether juror sexuality is preyed upon by attorneys. Further, it describes the case for extending *Batson* to

protect Queer jurors. Here again another study suggests that in discriminating against a large group of individuals and removing them systematically from a court room what really occurs is the removal of "qualities of human nature and varieties of human experience" (Tayman, 2020). While some may not see the Queer community as particularly large, the author of this paper cites a court decision that shows an increase in people who at least knew a gay individual from 25% in 1985 to 75% in 2000 (Tayman, 2020). Certainly it is reasonable to assume that number is even higher now. What that might indicate is a more open and diverse population, thus potentially giving attorneys the bias-based ammunition they need to remove these jurors unconstitutionally.

Another frequent and arguably unconstitutional instance of discrimination within peremptory challenges is a jurors age. Age, in modern society, has become increasingly relevant with many important court rulings and publications citing "ageism" as the unfair treatment of individuals based on their age. As that is the case, it is becoming ever more clear that individuals of a certain age range can comprise a "group" that can then be systematically removed by attorneys during peremptory challenges; specifically younger individuals being removed by the State and older individuals being removed by the defense (Flanagan, 2018). The presumptions set by attorneys and absolved by the court are entirely unfair; yet, it seems impossible, or very difficult in any event, to challenge that the "youth" in general are being systematically removed from service.

The final two discriminatory removals this paper contemplates are seemingly tied to *Batson* in that they are based upon religion and criminal history. Religion and religious affiliation, while supposedly separated by the idea of Church and State, have been argued in the Court quite frequently. Attorneys have removed jurors because of the way they dressed and because they were "demonstrative about their religions" in that, in a case, one juror worked as a

missionary and one had dressed in Muslim attire (Miller & Bornstein, 2006). The assumption is that religion and affiliation may affect juror decision making in some settings, and there is evidence to support that (Miller & Bornstein, 2006). Arguably anything can affect juror decision making, resulting in any argument for that juror's removal to be rooted in discrimination. Those jurors who might decide a case against an attorney might then be discriminated against by that attorney, just as the ABA suggested (ABA, 1983).

Criminal histories, specifically misdemeanors, are also under heightened scrutiny in peremptory challenges (Johnson, 2016). As a matter of fact, an individual's race greatly affects the likelihood that they will have a criminal history (Johnson, 2016) Many potential Black jurors never make it to jury selection based on their prior criminal convictions (Decamp & Decamp, 2020). For the purposes of this paper, there exist two trains of thought for why criminal history may violate *Batson* and be entirely discriminatory. The first is that jurors with a criminal history are more likely to be a minority of a marginalized population (Johnson, 2016). Thus, the removal of that juror based on their criminal history alone may simply be a circumvention of a *Batson* challenge, while race still may be the main motivator. The second idea as to why individuals with criminal histories may be removed as a whole is that criminals may be entirely more lenient toward defendants, depending on the accused crime (Johnson, 2016). Regardless of which reason, these aspects of discrimination are enveloped by assumptions and bias.

Biases

Each of the aforementioned topics of discrimination have something in common. Each is embedded in implicit and social biases that are indefensibly intrinsic to human nature (Gabriel, n.d.). Because of its intrinsic nature, when the court tries to cut away bias to create an impartial jury it opens up room for discrimination. Importantly, the Court bases its objective use of any

and all challenges on three conditions; that a juror knows they have biases, that a juror knows the extent of their biases, and that a juror has conscious control over that bias (Gabriel, n.d.). In a for-cause challenge, a juror in that very same order may be asked whether he knows anyone in the courtroom, how well they know that individual, and whether that connection or relationship would affect their ability to judge the matter fairly. While that may seem entirely reasonable, that level of scrutiny is not applied in peremptory challenges, nor is it plausible for most to outwardly acknowledge implicit biases they might hold. Unfortunately, the Ninth Circuit Court has stated the opposite. "Actual bias is found where a prospective juror states that he cannot be impartial, or expresses a view adverse to one party's position and responds equivocally as to whether he could be fair and impartial despite that view" (Gabriel, n.d.). That is not entirely what "actual bias" is, because actual bias can still be implicit and hidden, and it is not entirely reasonable to assume that everyone is willing to acknowledge that bias (Gabriel, n.d.). Recall the warning given by Maeder and Yamamoto in which they suggest that individual jurors may not acknowledge bias because they don't want to appear racist or that they want to preserve their self-image. This idea applies to a vast variety of cases within the courtroom, resulting in, in this paper's opinion, an impenetrable wall of bias and prejudice that the discrimination of peremptory challenges inherently reinforces.

Conclusion

Under the Sixth Amendment of the United States Constitution, American citizens have the right to an impartial jury. In the eyes of this author, true impartiality is impossible. Under the current system, it is expected that jurors will express their bias openly and fully and that those who demonstrate major bias will be removed from jury service by a for-cause challenge. Yet that bias is not always caught, arguably because for-cause challenges are not in-depth enough. This

results in the need for peremptory challenges, as their primary purpose is to remove the prejudice that for-cause challenges cannot. It appears, though, that this is not how they are used; but rather as a means for discrimination. Because of this, jury pools are either left with individual jurors who carry implicit biases that greatly affect the outcome of a given case or the discrimination against potential jurors.

It is important that the public become increasingly aware of the discrimination brought about by peremptory challenges. Discrimination against race within peremptory challenges may be the most important and alarming of the discriminatory topics discussed in this paper; yet, *Batson* challenges are hardly ever utilized because of the level of proof needed. Professor Lauren McLane of the University of Wyoming, College of Law, suggested that in her time as a trial attorney, she had only ever argued *Batson* once or twice (McLane, personal communication, 19 April, 2022). Further, the overall success of a *Batson* challenge is rare and even more rare that they work for the defense (Flanagan, 2018). “The University of North Carolina School of Government, in its Indigent Defense Manual Series, finds just two successful Batson challenges in North Carolina since the Batson decision, both in favor of state prosecutors objecting to the exclusion of white potential jurors” (Flanagan, 2018).

Peremptory challenges confound the issue of prejudice in jury selction by adding discrimination disguised as legal strategy by attorneys. Because of the implications of bias within jurys, there is a perpetual animosity toward the Criminal Justice system (Trevino, 2019). This is a problem that must be fixed. The targeted discrimination within peremptory challenges results in less racially diverse juries (Decamp & Decamp, 2020). This paper argues that one solution would be to remove peremptory challenges as a whole so that a part of the Court system that promotes discrimination, too, is removed and theoretically a more impartial jury might be

obtained. An alternative to removing peremptory challenge from allowable processes could be a more in-depth and intellectually critical for-cause judiciary challenge that dives deeper than expecting a juror to acknowledge their own bias but rather tests their bias and uses that as the reason for removal. Some suggestions that this paper might offer for this might be to implement an implicit bias test as part of jury service and to be more strict against potential prejudices that exist between jurors, actors within the Court, and the Court itself.

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