The Peremptory Challenge: A Racially Discriminatory Tool in the Criminal Legal System

"Ending racial discrimination in jury selection can be accomplished only by eliminating peremptory challenges entirely."

--Thurgood Marshall

Abby Zayyad and Tim Clarke

Contents

Introduction

The American legal system purports that criminal defendants are innocent until the evidence against them establishes their guilt. Criminal defendants also have a constitutionally protected right to demand a trial by a jury. However, the Constitution does not provide specific instructions for jury selection or for eliminating jury bias. The courts are responsible for determining the appropriateness of jury selection processes in the criminal system.

This paper examines the jury selection process in which courts eliminate potential jurors to create an unbiased and impartial jury. Specifically, this paper will analyze the use of the peremptory challenge and its racially discriminatory impact upon the service of minority jurors. This paper proposes that the racial biases and stereotypes of individuals can infiltrate the *voir dire* process, thereby creating a biased jury.

The peremptory challenge is a tool that permits attorneys to dismiss potentials jurors from service without cause. Further, the attorney employing the peremptory challenge is not required to provide the reason for striking the juror. The immense, unchecked power that is the peremptory challenge threatens the legitimization of a trial when the jury is entirely unrepresentative of the defendant.

The jury selection process analyzed in this paper is in the State of Massachusetts. In addition to understanding the discriminatory potential of the peremptory challenge, this paper examines several problems encountered in the jury selection process. These problems include jury summons process, summons response rates, and implicit human biases.

For the purposes of understanding the peremptory challenge properly, this paper reviews its history and evolution through the United States court system. The paper will move

on to focus on the benefits of the peremptory challenges and how it is used to help cure defects in the jury selection process. Finally, the paper will then turn to the burdens imposed on the parties and jurors from the continued discriminatory uses by both prosecutors and defenders.

Arguments

I. Sixth Amendment Right to a Trial by Jury

In 1791, the Founding Fathers signed the Bill of Rights of the United States Constitution, introducing numerous protections for criminal defendants of the Sixth Amendment[i]. One protection guaranteed by the Sixth Amendment is the right to a jury trial for criminal defendants[ii]. The Court[iii] held that any "diminishment of the jury's significance" would generally "raise a genuine Sixth Amendment issue."[iv] A jury is so significant to the administration of justice that the waiver of a jury trial must be by "the express and intelligent consent of the defendant . . . with the consent of the prosecution and the sanction of the court."[v] The language of the Sixth Amendment describes the jury guaranteed to criminal defendants as impartial[vi]. The Court requires two challenges be met by the trial system in procuring a sitting jury to ensure that criminal defendants receive "a fair and impartial jury[vii]".

The first challenge is finding jurors whom are representative of the community[viii]. The Court has held that the jury must be "a jury of his peers"[ix]. Although the specific phrase "a jury of one's peers" is absent from the language of the United States Constitution the idea is traced back to the Magna Carta of 1215[x]. Over one hundred years ago, in Strauder v. West Virginia[xi], the Court held that the jury should be "composed of the peers or equals [of the defendant]; that is, of his neighbors, fellows, associates, persons having the same legal status in society as he holds." The 1968 federal Jury Selection and Service Act[xii] only states that the jury must be from a "fair cross-section of the community". A jury of his peers does not mean that the criminal defendant is entitled to a jury with the same race[xiii], religion, ethnicity[xiv], gender[xv], or ideology as himself.

The second challenge is to subject each potential juror to the process of *voir dire*[xvi]. *Voir dire* is the process in which impartial jurors are identified and removed before a trial begins to preserve the partiality of the sitting jury[xvii]. Under the Sixth Amendment, "even one biased juror"[xviii] may not serve on the jury. In Massachusetts *Voir dire* is predominantly judge led, however, attorneys from both parties are permitted to question each potential juror. If the potential juror is found to have a bias which will prohibit the juror from hearing the facts of the case and making a judgment without predeterminations, then they are dismissed for cause. Each party in the trial is entitled to an unlimited number of challenges for cause because it is important to protect the impartiality of the jury and, thus, should not be limited by quantity.

II. Jury Selection Process in Massachusetts

A. Summons

Potential jurors are randomly selected each year from "resident lists" provided to the Office of the Jury Commissioner.[xix] Once a potential juror's name is randomly selected, their name remains on a list, for one year, which allows them to be randomly summoned for jury service[xx] at any time during that year. After jury selection, the potential "jurors are randomly assigned to courthouses within their judicial districts".[xxi] Then, the potential jurors present themselves on the day they are requested for service and are subjected to *voir dire*.

In Massachusetts, the use of resident lists to identify a juror pool is intended to "resolve the issue of minority jury underrepresentation."[xxii] However, this resolution relied on each municipality in the state to operate efficiently and update their residency lists annually[xxiii]. Evidence shows that poorer municipalities are not updating their residency lists in a timely

manner, whereas wealthier municipalities are submitting the updates annually.[xxiv] The wealthier municipalities have fewer African-Americans and minority representation from which to choose a jury[xxv]. Therefore, the resulting jury pools are more representative of wealthier municipalities and less of minorities which threatens the legitimacy of the jury trial.[xxvi]

In addition to the poor implementation of the selection process, low response rates to jury summons greatly diminish the value of a jury trial. There are several factors that impact the response rate[xxvii], including the court's operations and the jury notification process. Regardless of the reason jurors are not responding to their summons the result remains the same—a limited pool of viable jurors resulting in a higher probability that the sitting jury will be partial and unrepresentative. A very unfortunate result is that the jury system perpetuates a falsehood that a fair trial is the goal of the court, when "we allow trial after trial to proceed where large segments of communities of color are excluded from jury service while large segments of the communities of color are included as defendants in criminal cases.[xxviii]"

B. Elusiveness of an Impartial Jury

As mentioned previously, the court strives to seat an impartial jury. An impartial jury is "not biased in favor of one party more than another; indifferent; unprejudiced; disinterested."[xxix] An impartial juror is one whom does not favor one party "because of the emotions of the human mind, heart, or affections."[xxx] Achieving an impartial jury is an incredibly challenging endeavor because it relies on overcoming several obstacles. First, the potential jurors endure *voir dire*, which is intended to carefully eliminate partial jurors.

Second, the potential jurors are expected to ignore their "personality, characteristics, mind sets, values, and orientations"[xxxi] during the trial so that they remain unbiased. Finding and eradicating partiality requires lawyers and judges to identify the explicit and implicit biases of a juror. People have explicit and implicit biases that form over, and throughout, their lifetime. Explicit biases are attitudes "you deliberately think about and report."[xxxii] Through the process of *voir dire* explicit biases are investigated and eliminated by challenges for cause.

Implicit biases, however, are not easily eradicated. Implicit biases exist deep "within our subconscious, without our conscious permission or acknowledgement."[xxxiii] Implicit biases "are automatically activated by the mere presence of the attitude object."[xxxiv] Further, implicit biases are so ingrained in one's subconscious that a lawyer's "observation and interpretation of the information upon which she makes her decision"[xxxv] are likely affected. The problem is that lawyers and judges, not only jurors, "do not leave behind their implicit biases when they walk through the courthouse doors".[xxxvi] Each actor in the trial carries their biases as they administer justice and affect the outcome of the trial.

C. Attorney's Implicit Bias

Justice Thurgood Marshall said that "perhaps the greatest embarrassment in the administration of our criminal justice system"[xxxvii] is racial discrimination in jury selection. It is possible for an attorney to dismiss jurors of color without cause. The peremptory challenge is intended to "assure the selection of a qualified and unbiased jury,"[xxxviii] however, it only allows attorneys to act upon baseless logic in dismissing minority jurors. However, it is also possible

that an attorney is unaware of their implicit biases which lead them to strike particular jurors because of a stereotype or prejudice.

> "In practice ... lawyers have converted this ostensible search for impartial juries into a search for favorable juries. Their strategy is to use peremptory challenges to eliminate prospective jurors who have cultural characteristics or social perspectives which the attorney suspects will limit the jurors' receptiveness to their clients' claims."[xxxix]

An attorney is using the very tools provided to them by the judicial system when applying the peremptory challenge in a way which shapes a biased jury. This bias is subconscious and instinctual.

> "And even without 'knowing' these prosecutors it is probably fair to conclude that their peremptory challenges are racially asymmetrical in that no parallel attempts are made to exclude white jurors from trials involving white defendants."[xl]

In addition to an attorney's individual implicit biases, their purpose is in direct conflict with the goal of compiling an impartial jury. The lawyer's purpose is to aggressively advocate for their client. When selecting a jury through *voir dire,* a trial lawyer seeks to eliminate jurors who express any partiality to the opposition. The attorney is relying on "seat of the pants

instincts"[xli] to determine whether to eliminate a juror. Justice Marshall said that "seat of the pants instincts' may often be just another term for racial prejudice."[xlii]

Further, trial lawyers do not seek impartial jurors,"[xliii] because they desire the jury to be partial to their client. An attorney is not obligated "to excuse jurors believed to favor one's side."[xliv] If the skills of the opposing attorneys are equal, and they possess the same information about the potential jurors, then the jury may be equally partial to both sides. However, as is often the case, the opposing lawyers possess both different skill levels and amounts information that lead to a jury shaped to favor one side. Thus, the jury's impartiality is a goal aspired to but often unachieved.

III. The Peremptory Challenge

A. History

At this point, it is useful to differentiate the two types of challenges made during jury selection: challenges for cause and peremptory challenges. Challenges for cause are unlimited in number, but extremely limited in usage.[xlv] "Challenges for cause require the challenging party to articulate clearly on the record the precise reason for challenging the potential juror, but the decision whether to exclude a panel member for cause is vested in the trial court."[xlvi] The challenging attorney must point to some particular bias that has come out through voir dire that is race and gender neutral. If the attorney can show that the jury panelist has a bias and that, due to the bias the panelist will not be able to judge the case on its merits fairly, he may be able to exclude the panelist from the petit jury.

"While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable."[xlvii] All jury panelists carry with them certain biases, some more harmful than others. A panelist's bias in favor of police officers because the panelist's aunt is a police officer could prove just as harmful as a bias against an attorney because the attorney reminds the panelist of a childhood tormentor. The bias in favor of the police can more easily be drawn out, which would result in the juror's dismissal from service for cause. The cause is determined, apparent, and vocalized by the juror and is therefore a legitimate reason to dismiss the juror.

However, the peremptory challenge does not require a specific reason prior to the dismissal of a juror. The peremptory challenge offers attorneys an opportunity to remove the biases that are difficult to ascertain or enumerate. Although the attorney may interpret from the jury panelists' responses some disfavor, the attorney can hardly use that to excuse the juror for cause. "The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control."[xlviii]

This paper will now discuss the history and evolution of the peremptory challenge and the subsequent restrictions placed upon it by the United States judicial system. The peremptory challenge, though commonplace in the United States judicial system today, originated in English common law as a tool for the crown and was unlimited in number. Originally, these challenges without the need to show cause were only available to the crown. Also, the crown's avoidance of showing cause was not guaranteed.

Originally, by the common law, the crown could

> challenge peremptorily without limitation as to number. By act of parliament passed in the time of Edward I., the right to challenge was restricted to challenges for cause. But, by a rule of court, the crown was not obliged to show cause until the whole panel was called. Those not accepted on the call were directed to stand aside. If, when the panel was gone through, a full jury was obtained, it was taken for the trial. If, however, a full jury was not obtained, the crown was required to show cause against the jurors who had been directed to stand aside; and, if no sufficient cause was shown, the jury was completed from them.[xlix]

The earliest codification of peremptory challenges in the United States is in the Crimes Act of 1790. The Crimes Act of 1790 provides the right to peremptory challenges in jury selection for capital cases in the 29th section of the 9th chapter.[l] In 1865, congress enacted a statute providing 5 peremptory challenges for the United States and 20 peremptory challenges for the defendant in capital cases, and, for any other offense where the right to peremptory challenges already exist, 2 for the Unites States and 10 for the defendant.[li] This was the first time that peremptory challenges were officially regulated by number. The Government recognized the importance of the peremptory challenge and the advantages it offered. Statutes that followed the 1865 enactment increased the number of challenges available to the

government, drawing them equal to defendants in capital cases and up to 6 when the defendant is eligible for a over one year of prison time.[lii]

Shortly after the enactment of the 14th amendment, racially discriminatory jury selection practices were finally brought to light. In 1879, the Supreme Court decided that a " . . . defendant has a right to have a jury selected for the trial of his case without discrimination against all persons of his race or color, because of their race or color . . . "[liii] This extended some protection to minorities, but was limited in effect because of the enormous burden of proof placed on the anyone hoping to raise a claim; the claimant would have to show systematic exclusion from the jury process as a whole over a period of time. A showing of specific instances of discrimination against individuals was not enough to meet the burden; the decision only prohibited discrimination against *all persons* of defendant's race. The court elaborated on this idea in a subsequent case, *Carter v. State of Texas*, and stated:

> Whenever by any action of a state, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States.[liv]

Discriminatory practices in jury selection were, and remain today, the basis for most, if not all, regulation and restrictions placed upon the usage of peremptory challenges. *Swain v. Alabama*, decided in 1965, marked the beginning of restrictions on peremptory challenges. *Swain v. Alabama*, argued before the Supreme Court, revolved around the defendant's challenge of the prosecution's use of peremptory challenges on racial minorities during jury selection.[lv] The defendant, an African-American convicted of rape and sentenced to death, appealed his conviction invoking the " . . . constitutional principle announced in 1880 in Strauder v. State of West Virginia, 100 U.S. 303, 25 L.Ed. 664, where the Court struck down a state statute qualifying only white people for jury duty."[lvi] Swain attempted to argue that the jury selection and the prosecutor's use of peremptory challenges were racially discriminatory.[lvii] The court pointed to a presumption that the state uses the peremptory challenges properly, to attain a fair and impartial jury, in finding for the State on both these grounds, but Swain had one more claim to bring.

Swain also argued that the state systematically kept African-Americans off the jury. Defendants are not entitled to and can't feasibly expect a jury that accurately reflects the diversity of their respective communities at every jury trial.[lviii] The court here held that the defendant cannot challenge the prosecutor's use of peremptory challenges as racially discriminatory using only his actions in the case at bar. However, the court also held that the defendant could raise an inference of systematic discrimination by the state through a sufficient showing of " . . . the prosecutor's systematic use of peremptory challenges against Negroes over a period of time."[lix] In essence, the defendant would have to watch the prosecutor, who would eventually try his case, for a significant amount of time before his trial to gather

evidence of systematic discriminatory practice. While this decision offered more protection to minorities by allowing at least some claims of racial discrimination by the prosecutor through the use of peremptory challenges, the burden of proof remained so high for the defendant that prosecutors continued to discriminate based on race.

Batson v. Kentucky overruled Swain in 1865 and had 3 major holdings. First, the Court upheld *Strauder v. West Virginia*. The Court reaffirmed that a defendant has no right to a jury composed with any specific number of jurors that share his race, but the state may not exclude potential jurors solely because of their race.[lx] The court recognized the growing diversity and the limited number of seats available in any jury. There was no way that every race could be represented at every jury trial proportional to the demographics of their communities. The Court, in line with *Strauder*, also held that the principles that apply to the selection of the jury venire also apply to the state's use of peremptory challenges.[lxi]

Second, the Court rejected the evidentiary burden established in Swain and held that a defendant could show racial discrimination using only the facts about the selection of the jury in his case.[lxii] By allowing the defendant to show discrimination using only facts from the defendant's case, the Court brought the burden of proof on the defendant back into the territory of reasonableness. This did not totally solve the problem however as "[s]ometimes there's only one or two minority jurors in the box, so it's hard to point out a distinct trend toward striking minorities."[lxiii]

Third, the Court established a new burden required for the defense to establish a prima facie claim of purposeful discrimination in the jury selection.[lxiv] The court held the defendant must show: 1) he is a member of a cognizable racial group, 2) the prosecutor used his

peremptory challenges to exclude potential jurors of the same racial group, and 3) that the facts and other circumstances raise an inference that the prosecutor used his challenges to exclude those potential jurors because they were members of the same racial group.[lxv] If the defendant meets this burden, it shifts to the prosecutor who has a chance to offer a neutral explanation. Once the burden shifts, the prosecution's explanation must be more than merely stating the shared race makes the juror partial to the defendant, but " . . . need not rise to the level justifying exercise of a challenge for cause."[lxvi] Unfortunately, this left a fairly wide chasm for prosecutors to continue their discriminatory practices. As long as the prosecutor could come up with some reasonable, neutral explanation for his challenge, it would likely survive. Interestingly, while the court recognized the harm to the defendant in these cases, they failed to recognize harm to the jury panelist, so the Court limited the claims to instances where the excluded jury panelist was of the same race as the defendant.

The cases that followed expanded the protection against discrimination through the use of peremptory challenges. In *Powers v. Ohio*, the court modified the *Batson* ruling by removing the first requirement of establishing a prima facie claim of racial discrimination.[lxvii] The court, recognizing that the discrimination was against the excluded juror as well as the defendant who is raising the claim, held that "[a]n individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race."[lxviii] Now, a defendant could bring a claim of racial discrimination, with adequate showing that the prosecutor excluded a juror of a cognizable racial group and that the exclusion was because of the juror's race, even if the defendant was not of the same race as the excluded juror.[lxix] Eventually this would be extended to apply to Caucasians specifically. The

same year that the court decided *Powers v.* Ohio, the court extended *Batson* challenges to private litigants in civil cases in *Edmonson v. Leesville Concrete Co*., 500 U.S. 614, 631, (1991).[lxx] This left a strange imbalance in litigation. Defendants seemingly had a slight advantage in the process of jury selection, as they were not subject to all the equal protection violation claims that prosecutors were subject to.

Until the decision in *Georgia v. McCollum*, 505 U.S. 42, 48 (1992), the challenges on the uses of peremptory challenges were only available to defendants against the prosecution.[lxxi] In *McCollum*, the court established a 4-part test to determine " . . . whether the Constitution prohibits criminal defendants from exercising racially discriminatory peremptory challenges . . . "[lxxii]

> First, whether a criminal defendant's exercise of peremptory challenges in a racially discriminatory manner inflicts the harms addressed by *Batson.* Second, whether the exercise of peremptory challenges by a criminal defendant constitutes state action. Third, whether prosecutors have standing to raise this constitutional challenge. And fourth, whether the constitutional rights of a criminal defendant nonetheless preclude the extension of our precedents to this case.[lxxiii]

The court found that *Batson*-type harm was inflicted on the jurors no matter who was using their peremptory challenge.[lxxiv] After finding that harm occurred to the jurors, the court

also had to find that the defendant's action constituted state actions in order to find a violation of the equal protection clause occurred.[lxxv] The court found that the selection of a jury was in essence the forming of a government body and thus constituted an action of the state.[lxxvi] Now that the court determined a violation of the equal protections clause occurred, the court turned to the question of whether the prosecutors had standing to bring the claim.

Following *Powers*, the court found that the prosecutors had standing to raise the equal protections clause violation claim because they have a close relation to the jurors and because the jurors have the same hindrance against bringing there own claims here as they do when a defendant raises the claim for them.[lxxvii] Finally, after determining that a violation occurred and that the prosecution had standing, the Court had to examine whether the rights of the defendant precluded this type of prohibition. The court found that the rights of a defendant do not preclude a prohibition on discriminatory uses of peremptory challenges. The Court notied that a defendant does not have the right to discriminate against jurors based on race, so his rights are not really being violated.[lxxviii] The court also noted that this does not violate the defendant's 6th amendment right to effective assistance of counsel because the attorney is not allowed to challenge the jury panelist for removal in this way. The court additionally found that his 6th amendment right to a trial by an impartial jury had not been violated.[lxxix]

Batson claims, now available to both defendant and prosecution, then expanded outside of claims of raced-based discrimination. In *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) the court held that the use of peremptory challenges in jury selection to discriminate based on gender violates the equal protection clause.[lxxx] The uses and restrictions on peremptory

challenges have grown and transformed over time, drawing ever closer to the ideal system of fair and neutral jury selection.

B. Arguments for the Peremptory Challenge

Peremptory challenges have long been considered an essential part of the jury selection process. As discussed above, the jury selection process faces many hurdles before it reaches the prosecutors and defense attorneys with the ability to bring peremptory challenges. By the time the pool of potential jurors has been narrowed enough for voir dire, it has likely experienced instances of racial and gender discrimination. This calls into question the integrity of the judicial system. "Public confidence in the integrity of the criminal justice system is essential for preserving community peace in trials involving race-related crimes."[lxxxi] If the public cannot trust the finders of fact to give fair, unbiased decisions, they will not trust in the judicial system. "It's too difficult sometimes for people to weigh the facts without doing so through the lens of their own experiences, perceptions, and bias."[lxxxii] Availability of peremptory challenges can restore public confidence in the integrity of the judicial system by offering both parties the opportunity to attain a jury they both feel will be impartial.

The peremptory challenge can restore a defendant's confidence in the legitimacy of the jury. The peremptory challenge offers both advocates another opportunity to remove bias, especially that which is difficult to describe or demonstrate. When asked about the practical effects of peremptory challenges on the defendant's right to a trial by a jury of his peers, David Rossman a Professor of law at the Boston University School of Law replied:

> It gives the defendant a greater sense that the jury is legitimate. I've had clients in the past who did not want community members to sit on a jury because they felt that they would view the defendant negatively . . . . Being able to strike them made the defendant more accepting of the jury.[lxxxiii]

As discussed above, peremptory challenges are not the only challenges available to parties in jury selection. Both prosecutors and defendants also have the ability to challenge a juror for cause. The challenging party must clearly articulate a precise bias in the potential juror for the court to exclude the potential juror from the petit jury. When a party challenges a juror for cause and fails to meet the burden, some bias may be created as against the challenging party.[lxxxiv] The peremptory challenge offers an opportunity to remove any bias created by a failed attempt to challenge for cause. Everyone has the right to a trial by a fair and impartial jury, and, in these instances, one party feels that the juror is biased. Though they cannot meet the burden to exclude the juror for cause, the challenging party can use their peremptory challenges to overcome the potential error made by the court. The attorney can remove the perceived bias and ensure a fair and impartial jury without having to wait and risk their chances appealing the judge's decision to deny the challenge for cause.

In *United States v. Martinez-Salazar*, 528 U.S. 304 (2000), the defendant used a peremptory challenge to remove a potential juror, whom the defendant felt should have been removed for cause.[lxxxv] After losing the for cause challenge, the defendant perceived a bias and felt as though he needed to remove the juror for the perceived bias. The defendant used his

peremptory challenge to remove the bias but felt that he was effectively denied the full amount of peremptory challenges he was entitled to. The defendant argued that he should have been granted additional peremptory challenges equal to the number he used to remove jury panelists who should have been removed for cause.[lxxxvi] But for the courts mistake, not excusing the jury panelist for cause, the defendant would have had extra peremptory challenges to use. The court denied defendant's claims finding that he simply used all the peremptory challenges granted to him and was not denied any of his rights.[lxxxvii] However, in a concurring opinion, Justice Souter suggested that the case left open the issue whether it is reversible error if the challenging party could show that they used all their peremptory challenges and would have used another one if they were not forced to use the challenge curatively.[lxxxviii]

The benefits of restoring confidence to the public in the integrity of the judicial system, restoring confidence to individual defendants in the legitimacy of the jury, and curing errors by the court all stem from one of the main reasons for the existence of peremptory challenges: " . . . to help secure the constitutional guarantee of trial by an impartial jury."[lxxxix] Peremptory challenges remain as an essential tool of litigation and are most often beneficial for both parties, helping to ensure an impartial jury. Unfortunately, through the years, both prosecutors and defenders have used peremptory challenges to discriminate against jury panelists and defendants based on their race and gender. Although new regulations have been established to limit these negative effects, these problems persist today.

C. Arguments Against the Peremptory Challenge

In *Duncan v. Louisiana*, the Court held that one purpose of a jury trial is "to prevent oppression by the Government.'[xc] The framers of the Constitution intended for the jury to be a safeguard against "the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[xci] However, no system is perfect and in *Singer v. United States*,[xcii] the Court acknowledged that even the jury trial had weaknesses and "the potential for misuse". The peremptory challenge's greatest weakness is that it provides attorneys with an unchecked method of shaping a biased jury[xciii]. The peremptory challenge may be used to eliminate jurors for reasons as illogical as 'all African-Americans hate the police'. Further, the Court recognized in *United States v. Martinez-Salazar*[xciv], that the peremptory challenge is "not of federal constitutional dimension" and therefore not guaranteed by the United States Constitution.

The peremptory challenge is a tool that permits racially discriminatory dismissal of potential jurors from a pool of jurors already limited in racial diversity. The peremptory challenge is criticized for being undemocratic[xcv] and "prone to manipulation."[xcvi] In *Swain v. Alabama*[xcvii], the Court held:

> The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at

> hand all Negroes were removed from the jury or that they were removed because they were Negroes.[xcviii]

The Court in *Swain v. Alabama* focused on the rights of African-American jurors during venire and ignored the potential for racial discrimination during the jury selection process. In 1979, the Massachusetts Supreme Judicial Court allowed inquiry into the peremptory challenge and created uncertainty about the jury selection process, holding that "elimination of a discrete group from the petit jury through purposeful exercise of peremptory challenges, motivated solely by the assumption of shared, similar biases among members of a discrete group"[xcix] is a violation of rights guaranteed under the Massachusetts Constitution.[c]

In *Baston v. Kentucky*,[ci] Justice Thurgood Marshall stated that the elimination of racial discrimination in jury selection is possible "only by eliminating peremptory challenges entirely." The decision in *Baston* was intended to eliminate jury dismissal on the basis of race. However, Justice Breyer wrote that "the use of race and gender-based stereotypes in the jury-selection process seems better organized and more systematized than ever before."[cii]

In *Baston*, the prosecutor struck "four black persons" from the jury resulting in an all-white jury. The lower court stated that "the parties were entitled to use their peremptory challenges to 'strike anybody they want to'"[ciii]. However, the Court disagreed and overruled the precedent of *Swain v. Alabama* which required a "systematic pattern of discrimination."[civ]

> Misuse of the peremptory challenge to exclude black jurors has become both common and flagrant. Black defendants rarely have been able to compile statistics showing the extent of that

> practice, but the few cases setting out such figures are instructive. *See United States v. Carter,* 528 F.2d 844, 848 (CA8 1975) (in 15 criminal cases in 1974 in the Western District of Missouri involving black defendants, prosecutors peremptorily challenged 81% of black jurors), *cert. denied,* 425 U.S. 961 (1976); *United States v. McDaniels,* 379 F.Supp. 1243 (ED La.1974) (in 53 criminal cases in 1972-1974 in the Eastern District of Louisiana involving black defendants, federal prosecutors used 68.9% of their peremptory challenges against black jurors, who made up less than one-quarter of the venire); *McKinney v. Walker,* 394 F.Supp. 1015, 1017-1018 (SC 1974) (in 13 criminal trials in 1970-1971 in Spartansburg County, South Carolina, involving black defendants, prosecutors peremptorily challenged 82% of black jurors), *affirmance order,* 529 F.2d 516 (CA4 1975).[cv]

The practice of striking jurors strictly because of their skin color was blatantly practiced before the Court's ruling in *Baston*, and is now practiced through the implicit use of peremptory challenges. Despite the Court's attempts to eliminate the discriminatory use of peremptory challenges, studies reflect that demographics continue to be a strategy in jury selection[cvi]. For example, in 1983-1984, "the prosecutor's office in Dallas County, Texas, explicitly advised prosecutors that they conduct jury selection so as to eliminate "any member

of a minority group."[cvii] In *State v. Washington*[cviii], prosecutors admitted to routinely removing jurors on the basis of their race.

Twenty years after *Baston v. Kentucky* Justice Breyer stated that "the exercise of a peremptory challenge can rest upon instinct not reason"[cix] which allows the biases and stereotypes of an attorney to directly affect the jury selection process.

> "[W]here the prosecution strikes a prospective juror who is a member of the defendant's racial group, solely on the basis of factors which are facially irrelevant to the question of whether that person is qualified to serve as a juror in the particular case, the prosecution must at least articulate some plausible race-neutral reason for believing that those factors will somehow affect the person's ability to perform his or her duties as a juror. In the present case, the prosecutor's comments, `I don't like the way [he] look[s], with the way the hair is cut. . . . And the mustache[] and the beard[] look suspicious to me,' do not constitute such legitimate race-neutral reasons for striking juror 22."

Although peremptory challenges do not normally require a cause to be stated, when they are challenged the attorney needs only to provide a race neutral reason. "…clever lawyers can circumvent this requirement by proffering facially neutral explanations that have a

discriminatory impact on potential jurors."[cx] The reason does not need to be "persuasive or even plausible"[cxi] which leaves the challenge vulnerable to misuse and makes it nearly impossible to prove that misuse. Therefore, even although the opportunity to inquire into the reasons for a peremptory challenge exists, the barriers to proving misuse are nearly insurmountable.

In addition to being difficult to prove, the peremptory challenge is inherently a violation of the Equal Protection Clause.

> "The peremptory challenge necessarily conflicts with these equal protection rights because peremptory challenges are by their very nature arbitrary and unexplainable, based on the "seat-of-the-pants" instincts of the challenging attorney."[cxii]

The application of the peremptory challenge permits attorneys to strike jurors for "no more than unprovable hunches and instincts."[cxiii] The Court has addressed blatant and explicit discrimination in cases as they arise, however, the near impossibility in identifying implicit bias has allowed the "more concealed forms to flourish."[cxiv]

Conclusion

It is impossible to guarantee every defendant a jury that is true representation of his or her peers. In rural areas with little to no diversity this may be expected. As the diversity of the demographic increases however, usually closer to metropolitan areas and unfortunately increased rates of crime, this task becomes increasingly difficult. The courts and legislature

have placed safeguards in the judicial system aimed at combatting these difficulties and the system's tolerance for discrimination.

Voir dire was and remains the most crucial step in the jury selection process as it affords attorneys a chance to comb through the potential deciders of the parties' fates. No citizen would be able to sit on any trial; every person carries with them certain biases that may taint their ability to decide fairly based only on what is presented in court. Thus, no juror plucked from society and placed in the jury box can be trusted on blind faith. There must be an opportunity to discover biases and remove any and all jurors with them, but the biases discovered cannot be based on race, gender, or ethnicity.

Peremptory challenges are viewed as necessary to correct the imbalance left by the strict rules regarding for cause challenges. Attorneys are limited in their ability to question jury panelists. This makes it much harder to ferret out any biases the panelist may have for or against either party. Thus, to restore integrity, attorneys are allowed a limited opportunity to remove jurors without having to show cause.

Unfortunately, this left open ample opportunity to continue the racially discriminatory practices attorneys had been implementing for years. With the ability to challenge and remove jurors without any reason, they could continue to strike African Americans from juries after race was no longer recognized as a cause for which a panelist could be removed. The restrictions placed on the peremptory challenge are ineffective at preventing the misuse of the power. The existence of peremptory challenges threatens the integrity of the judicial system and the legitimacy of jury verdicts. The peremptory challenge threatens the legitimacy of the jury trial and should therefore be eliminated.

Questionnaires

Prosecutors

1. Have you participated in jury selection?
2. For what reasons do you use your peremptory challenges?
3. If you could select the ideal jury as a prosecutor, what would it consist of?
4. Can you describe the practical effects of having a jury that is more diverse?
5. What effect would you expect from adding peremptory *inclusions* to the tools of attorneys during jury selection? (used the same as a preemptory challenge, only it is used to secure a juror's position rather than to remove the juror)
6. What effect would you expect from eliminating the peremptory challenges from the jury selection process?
7. What improvements would you make to the jury selection process?

Defense Attorneys

1. Have you ever challenged an attorney's peremptory strike of a jury member?
2. Can you describe the challenges a defense attorney faces when he/she wishes to challenge a peremptory strike?
3. Can you describe the practical effects the peremptory challenge has on the defendant's right to be tried by a jury of his/her peers?
4. What is your strategy in making challenges to jury selection?
5. Can you describe the effect of increased/decreased diversity in a jury?
6. What is the effect of on your ability to challenge jury selection when representing a minority client in a jurisdiction where the jury pool consists of few/none who are of the client's ethnicity, or race, or religious beliefs, or social/economic class?
7. Do you feel/perceive any prejudice/unfairness in a defendant being tried by a jury on which sit no juror of the defendant's ethnicity? race? religious beliefs? social/economic class?
8. What effect would you expect from adding peremptory *inclusions* to the tools of attorneys during jury selection? (for example if an attorney of had 10 peremptory challenges, the attorney would have 5 strikes and 5 inclusions)
9. What effect would you expect from eliminating the peremptory challenges from the jury selection process?
10. What improvements would you make to the jury selection process?

Judge

1. What are the most challenging issues regarding fairness in attorneys' uses of peremptory challenges?
2. Do you feel/perceive any prejudice when a defendant is tried by a jury on which sit no juror of the defendant's ethnicity? race? religious beliefs? social/economic class?
3. Can you describe the practical effects the peremptory challenge has on the defendant's right to be tried by a jury of his/her peers?
4. Can you describe the effect of increased/decreased diversity in a jury/jury pool?
5. Do you think the current venire system adequately generates true/accurate representations of the communities from which the potential jurors are drawn?

    a. If so please explain.
    b. If not, how could this be improved and how do you work around this in the current system to ensure the fairest trials?
6. What effect would you expect from adding peremptory *inclusions* to the tools of attorneys during jury selection? (for example if an attorney of had 10 peremptory challenges, the attorney would have 5 strikes and 5 inclusions)
7. What effect would you expect from eliminating the peremptory challenges from the jury selection process?
8. What improvements would you make to the jury selection process?

Prior Jurors

1. When did you serve on a jury?
2. Are you non-white?
3. What is your gender?
4. What was the gender demographic of the jury?
5. What was the ethnic demographic of the jury?
6. If you remember, were any of the attorneys, on either side, non-white?
7. What was the defendant's ethnic demographic?
8. What was the general charge in the case?
9. What was the outcome of the case?
10. What role do you think the ethnic demographic of the jury played in the outcome?

Responses

Stuart hurowitz responses

1. Have you ever challenged an attorney's peremptory strike of a jury member?

Yes.

2. Can you describe the challenges a defense attorney faces when he/she wishes to challenge a peremptory strike?

The so called Batson challenge is easy enough to articulate. If a protected class is being stricken without a seemingly good reason, that is enough to put it back on the prosecutor to try and articulate a valid reason.

3. Can you describe the practical effects the peremptory challenge has on the defendant's right to be tried by a jury of his/her peers?

I would say it is less about the strikes that it is about the jury pool itself.

4. What is your strategy in making challenges to jury selection?

I mostly find the prediction of who should or should not be on a jury to be impossible. I need to study the questionnaire and make a determination from (if I get them) individual voire

dire about their personality and beliefs.

5. Can you describe the effect of increased/decreased diversity in a jury?

[did not answer]

6. What is the effect of on your ability to challenge jury selection when representing a minority client in a jurisdiction where the jury pool consists of few/none who are of the client's ethnicity, or race, or religious beliefs, or social/economic class?

[did not answer]

7. Do you feel/perceive any prejudice/unfairness in a defendant being tried by a jury on which sit no juror of the defendant's ethnicity? race? religious beliefs? social/economic class?

Not necessarily. But it is a risk and the lack of diversity on a jury at least supports the perception of unfairness.

8. What effect would you expect from adding peremptory inclusions to the tools of attorneys during jury selection? (used the same as a preemptory challenge, only it is used to secure a juror's position rather than to remove the juror)

Interesting idea. But I would rather risk losing a juror I like, than being forced to have a juror that I do not like.

9. What effect would you expect from eliminating the peremptory challenges from the jury selection process?

It would just mean that the first 12 people selected out of the hat would be the jury. It is a rare thing to be stricken for cause in most cases.

10. What improvements would you make to the jury selection process?

We need to widen the jury pool to capture more citizens.

David Rossman Responses

1.Have you ever challenged an attorney¹s peremptory strike of a jury

Member?

NO

2.Can you describe the challenges a defense attorney faces when

he/she wishes to challenge a peremptory strike?

IT¹S VERY EASY TO GIVE A PRETEXTUAL REASON TO OVERCOME A CHALLENG

3.Can you describe the practical effects the peremptory challenge has

on the defendant¹s right to be tried by a jury of his/her peers?

IT GIVES THE DEFENDANT A GREATER SENSE THAT THE JURY IS LEGITIMATE. I¹VE

HAD CLIENTS IN THE PAST WHO DID NOT WANT COMMUNITY MEMBERS TO SIT ON A

JURY BECAUSE THEY FELT THAT THEY WOULD VIEW THE DEFENDANT NEGATIVELY (IT

WAS ³CHURCH LADIES² THIS CLIENT DIDN¹T WANT). BEING ABLE TO STRIKE THEM

MADE THE DEFENDANT MORE ACCEPTING OF THE JURY.

4.What is your strategy in making challenges to jury selection?

I TRY TO GET PEOPLE WHO WILL UNDERSTAND THE THEORY OF THE CASE I¹M

PRESENTING. IF THAT MEANS PEOPLE WHO¹LL VIEW THE POLICE SKEPTICALLY, THEN

I DON¹T WANT JURORS WITH TIES TO LAW ENFORCEMENT OR IN JOBS WHERE THERE¹S

A STRICT HIERARCHY

5.Can you describe the effect of increased/decreased diversity in a

Jury?

AS A DEFENSE ATTORNEY, I WANT JURORS WHO ARE WILLING TO BELIEVE THE

CRIMINAL JUSTICE SYSTEM MIGHT NOT BE PERFECT, SO THAT MEANS THEY HAVE TO

COME FROM A BACKGROUND OR LIVE IN A COMMUNITY THAT EXPOSES THEM TO THIS

PHENOMENON

6. What is the effect of on your ability to challenge jury selection

when representing a minority client in a jurisdiction where the jury pool

consists of few/none who are of the client¹s ethnicity, or race, or

religious

beliefs, or social/economic class?

OBVIOUSLY, THE ABILITY TO SEE THE DEFENDANT AS A HUMAN BEING, NOT AS AN

³ACCUSED² IS VERY IMPORTANT TO A SUCCESSFUL DEFENSE. HAVING PEOPLE WHO

SHARE THE D¹S CHARACTERISTICS HELPS.

7. Do you feel/perceive any prejudice/unfairness in a defendant being

tried by a jury on which sit no juror of the defendant¹s ethnicity? race?

religious beliefs? social/economic class?

NOT AS A GENERAL MATTER. IT DEPENDS ON THE SPECIFIC JURY, THE DEFENDANT,

AND THE CRIME

8. What effect would you expect from adding peremptory inclusions

to the tools of attorneys during jury selection? (used the same as a

preemptory

challenge, only it is used to secure a juror¹s position rather than to

remove

the juror

I THINK IT IS EASIER TO IDENTIFY SOMEONE YOU DON¹T WANT THAN SOMEONE YOU

DO WANT

9.What effect would you expect from eliminating the peremptory

challenges from the jury selection process?

GIVEN THE OVERWHELMING OVERREPRESENTATION OF BLACK AND HISPANIC PERSONS

AMONG THE POPULATION OF DEFENDANTS, I THINK IT WOULD MAKE THE SYSTEM LESS

FAIR

10.What improvements would you make to the jury selection process?

PROVIDE EQUAL ACCESS TO BACKGROUND INFORMATION ABOUT JURORS BETWEEN

PROSECUTION AND DEFENSE

[redacted] responses:

I've responded to some of your questions below as best I can (for now). Anonymity would be my preference, and I'm happy to answer your questions generally without being quoted directly since I haven't had much time to think about all this.

1. I have participated in jury selection many times.

2. Prosecutors use peremptory challenges in order to ensure, as best as possible, that the jury consists of people who will keep an open mind, listen to the evidence carefully, apply the law to the facts as instructed, and be fair to both the prosecution and the defense. I cannot comment on specific instances in which I've exercised challenges, for confidentiality reasons.

3. An ideal jury would be one I described above as well as below.

4. This is a difficult one, as "more diverse" can take on many meanings. Race, ethnicity, gender, education, employment, marital status, and socioeconomics are just a few ways in which people may differ. Aside from characteristics that are relatively easy to identify, every juror brings his or her own beliefs and life experiences that may affect how he or she views the evidence.

5, 6 and 7 are questions I'd need to think more about before responding.

I hope that helps. I'm happy to take a look at your paper in draft form if you'd like.

Darrell Baker (juror) responses:

I served as foreman on a jury in Oakland County (a predominantly a white suburban county. The young white man in his mid twenties was charged with DUI.

When they questioned me, they asked whether I drank and how often. They knew that I was a young pastor in my early thirties.

When we got in the jury room, no one spoke so I engaged the group. They quickly made me

foreman.

After our guilty verdict was reported, they polled the jury. It was unanimous.

1) Fall of 1987

2) 5 women & 7 men

3) white

4) white lawyers on both sides

5) white defendant

6) DUI

7) Guilty

8) Little if any role

Judge Lu responses:

I have no problem with you disclosing my name to your instructor but please do not disclose it otherwise. Let me know if you want me to send it to the Superior court judges. Who is your instructor? See responses below.

**** This information may be confidential and/or privileged. Use of this information by anyone other than the intended recipient is prohibited. If you received this in error, please inform the sender and delete this message. Thank you. ****

1. What are the most challenging issues regarding fairness in attorneys' uses of peremptory challenges?

As long as the judge is vigilant I am not yet convinced that peremptories are used here unfairly. It might be that the appellate courts should give the judge more discretion to interven

2. Do you feel/perceive any prejudice when a defendant is tried by a jury on which sit no juror of the defendant's ethnicity? race? religious beliefs? social/economic class?

I see prejudice as to ethnicity and race but not as to the others. I do not have information sufficient to have an opinion as to whether a Muslim experiences racial prejudice

3. Can you describe the practical effects the peremptory challenge has on the defendant's right to be tried by a jury of his/her peers?

It can be negative.

4. Can you describe the effect of increased/decreased diversity in a jury/jury pool?

same.

5. Do you think the current venire system adequately generates true/accurate representations of the communities from which the potential jurors are drawn?

a. If so please explain. somewhat.

b. If not, how could this be improved and how do you work around this in the current system to ensure the fairest trials? Increase the trial judge's right to intervene to preserve minority judges.

6) What effect would you expect from adding peremptory *inclusions* to the tools of attorneys during jury selection? (for example if an attorney of had 10 peremptory challenges, the attorney would have 5 strikes and 5 inclusions)

Inclusions could be used for racially discriminatory reasons and have their own disadvantages.

7) What effect would you expect from eliminating the peremptory challenges from the jury selection process?

I am unsure.

8) What improvements would you make to the jury selection process?

Increase the judge's ability to intervene to preserve jurors from ethnic and racial minorities.

Larry Dubin (Juror) responses:

1. When did you serve on a jury?

   I was a member and foreman of a 12-person jury in 1989 in Philadelphia, PA. The trial started on a Monday and closing arguments were made on Friday. The Jury was sequestered for the weekend and verdict was read the following Monday.

2. What was the gender demographic of the jury?
   The jury consisted of 5 men and 7 women ages 21 to 65 (approximately). I was the youngest member of the jury.

3. What was the ethnic demographic of the jury?
   The jury was made up of 6 white, 5 Afro-American and one Asian

4. If you remember, were any of the attorneys, on either side, non-white?
   The DA and the defense attorney were both white.

5. What was the defendant's ethnic demographic?
   He was Afro-American

6. What was the general charge in the case?
   Ronald "Rock" Mason was a member of Philadlphia's Junior Black Mafia. He was charged with violation of the Pennsylvania Uniform Fireamrs Act, Drug Possession and (non-Capital) Murder-One (killing 3 people)

7. What was the outcome of the case?
   Mason was found guilty on all charges.

8. What role do you think the ethnic demographic of the jury played in the outcome?
   None. Early on, all but one juror, an older African-American female, was very certain of the guilt of the defendant. However, she did not feel the prosecution made their case for a Murder-One conviction. After a follow-up meeting with the judge and lawyers, and further deliberation over a sequestered weekend, she agreed with the rest of the jury. I do not believe any one person's ethnicity played into the verdict. Probably would not be the case today.

[i] U.S. Const. amend. VI.
[ii] U.S. Const. amend. VI.
[iii] United States Supreme Court
[iv] Jones v. United States, 526 U.S. 227 (1999).
[v] Patton v. United States, 281 U.S. 276 (1930).
[vi] U.S. Const. amend. VI.
[vii] Norton, M. I., Sommers, S. R., & Brauner, S. (2007). Bias in Jury Selection: Justifying Prohibited Peremptory Challenges. *Journal of Behavioral Decision Making,* 1-13. Retrieved December 12, 2016, from http://www.people.hbs.edu/mnorton/norton%20sommers%20brauner.pdf
[viii] Lockhart v. McCree, 476 U.S. 162 (1986).
[ix] Duncan v. Louisiana, 391 U.S. 145 (1968).
[x] Green, E. (n.d.). Finding a Jury of Your Peers Actually is Pretty Complicated. Retrieved December 17, 2016, from http://www.npr.org/2014/12/27/372916940/getting-tried-by-a-jury-of-your-peers-isn-t-as-simple-as-it-sounds
[xi] 100 U.S. 303 (1880).
[xii] Dreiling, G. L. (2006). Churning up the Jury Pool. *American Bar Association Journal*. Retrieved December 14, 2016.
[xiii] Commonwealth v. Fryar, 425 Mass. 237 (1997).
[xiv] Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991).
[xv] J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994).
[xvi] Holland v. Illinois, 493 U.S. 474 (1990).
[xvii] *See* footnote vii.
[xviii] United States v. Aguon, 813 F.2d 1413 (9th Cir. 1987).
[xix] http://www.mass.gov/courts/jury-info/mass-jury-system/
[xx] Id. http://www.mass.gov/courts/jury-info/mass-jury-system/
[xxi] Id. http://www.mass.gov/courts/jury-info/mass-jury-system/
[xxii] Page 12, Dreiling, G. L. (2006). Churning up the Jury Pool. *American Bar Association Journal*. Retrieved December 14, 2016.
[xxiii] *See* footnote xxii.
[xxiv] Page 13, Dreiling, G. L. (2006). Churning up the Jury Pool. *American Bar Association Journal*. Retrieved December 14, 2016.
[xxv] See footnote xxiv.
[xxvi] See footnote xxiv.
[xxvii] The State-of-the-States Survey of Jury Improvement Efforts Executive Summary. (n.d.). Retrieved December 13, 2016, from http://www.ncsc-jurystudies.org/~/media/Microsites/Files/CJS/SOS/sos_exec_sum.ashx
[xxviii] Page 13, Dreiling, G. L. (2006). Churning up the Jury Pool. *American Bar Association Journal*. Retrieved December 14, 2016.
[xxix] *Judicial and Statutory Definitions of Words and Phrases*. (1914). West Publishing Company.
[xxx] Curry v. State ex. Stenberg, 242 Neb. 695 (1993).
[xxxi] Gobert, J. J. (1988). In Search of the Impartial Jury. *Journal of Criminal Law and Criminology, 79*(2), summer, 271-272. Retrieved December 11, 2016, from http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=6590&context=jclc
[xxxii] Project Implicit. (n.d.). Retrieved December 14, 2016, from https://implicit.harvard.edu/implicit/faqs.html
[xxxiii] *See* footnote xxxii.
[xxxiv] Helping Courts Address Implicit Bias. (n.d.). Retrieved December 11, 2016, from http://www.ncsc.org/~/media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/Implicit%20Bias%20FAQs%20rev.ashx
[xxxv] Antony Page, Batson's Blind Spot: Unconscious Stereotyping and the Peremptory Challenge, 85 B.U. L. REV. 155, 228 (2005).
[xxxvi] Bennett, Mark W., Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problem of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions (2010). Harvard Law & Policy Review, Vol. 4, p. 149, 2010. Available at SSRN:https://ssrn.com/abstract=2505424

[xxxvii] Wilkerson v. Texas, 493 U.S. 924, 928 (1989).
[xxxviii] Batson v. Kentucky, 476 U.S. 79, 91 (1986).
[xxxix] Brent J. Gurney, The Case for Abolishing Peremptory Challenges in Criminal Trials, 21 HARV. C.R.-C.L. L. REv. 227, 230-36 (1986).
[xl] Williams, Christopher, Surveying the Battlefield: Reflections on the Reproductive Dynamics of Racism, International Journal of Criminology and Sociological Theory, Vol. 1, June 2008.
[xli] Batson v. Kentucky, 476 U.S. 79, 138 (1985) (Rehnquist, J., dissenting).
[xlii] Id. at 106 (Marshall, J., concurring).
[xliii] *See* xxxi.
[xliv] *See* xxxi.
[xlv] *See* United States v. Annigoni, 96 F.3d 1132, 1138 (9th Cir. 1996).
[xlvi] *Id.* (citing Gray v. Mississippi*,* 481 U.S. 648, 652 n. 3 (1987)).
[xlvii] Swain v. Alabama, 380 U.S. 202, 220, (1965)(citing Hayes v. State of Missouri, 120 U.S. 68, 70 (1887)).
[xlviii] *Id.* (citing State v. Thompson, 68 Ariz. 386 (1949); Lewis v. United States, 146 U.S. 370, 378, (1892)).
[xlix] Hayes v. Missouri, 120 U.S. 68, 71 (1887).
[l] *See* United States v. Marchant, 25 U.S. 480, 6 L. Ed. 700 (1827).
[li] 13 Stat. 500 (1865).
[lii] *See Swain*, 380 U.S. at 215.
[liii] Strauder v. State of W. Virginia, 100 U.S. 303, 305 (1879).
[liv] Carter v. State of Texas, 177 U.S. 442, 447 (1900) (citing *Strauder*, 100 U.S. 303; Neal v. Delaware, 103 U. S. 370, 397 (1880); Gibson v. Mississippi, 162 U. S. 565 (1896)).
[lv] *See generally Swain*, 380 U.S. 202, *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986).
[lvi] *Id.* at 203.
[lvii] *See id.* at 208.
[lviii] *See* Swain, 380 U.S. at 208.
[lix] *See id.* at 227.
[lx] *See Batson*, 476 U.S. at 85-88, *holding modified by* Powers v. Ohio, 499 U.S. 400 (1991).
[lxi] *See id.* at 85-89.
[lxii] *See id.* at 92-95.
[lxiii] Email from Joel Thompson, Staff Attorney, Prisoner's Legal Services of Massachusetts, to author (Dec. 20, 2016, 11:44 EST) (on file with author).
[lxiv] See id. at 80.
[lxv] *See id.* at 96 (citing Castaneda v. Partida, 430 U.S. 482 (1977)).
[lxvi] *Id.* at 97.
[lxvii] *See generally Powers*, 499 U.S. 400.
[lxviii] *Id.* at 409.
[lxix] *See generally id*.
[lxx] *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 631, (1991).
[lxxi] *See generally* Georgia v. McCollum, 505 U.S. 42 (1992).
[lxxii] *Id.* at 48.
[lxxiii] *Id.*
[lxxiv] *See id.* at 48-50.
[lxxv] *See id.* at 49-50.
[lxxvi] *See id.* at 50-54.
[lxxvii] *See id.* at 55-56.
[lxxviii] *See id.* at 57-59.
[lxxix] *See id.*
[lxxx] *See generally J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).
[lxxxi] *See McCollum*, 505 U.S. at 49 (citing Alschuler, The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts, 56 U.Chi.L.Rev. 153, 195–196 (1989) (describing two trials in Miami,

Fla., in which all African–American jurors were peremptorily struck by white defendants accused of racial beating, and the public outrage and riots that followed the defendants' acquittal).

[lxxxii] Email from Joel Thompson, Staff Attorney, Prisoner's Legal Services of Massachusetts, to author (Dec. 20, 2016, 11:44 EST) (on file with author).

[lxxxiii] Email from David Rossman, Professor of Law, Boston University School of Law, to author (Dec. 13, 2016, 10:35 EST) (on file with author).

[lxxxiv] *See* Lewis v. United States, 146 U.S. 370, 376 (1892) (citations omitted).

[lxxxv] *See generally* United States v. Martinez-Salazar, 528 U.S. 304 (2000).

[lxxxvi] *See id.*

[lxxxvii] *See id*.

[lxxxviii] *See id.* at 317-18.

[lxxxix] *Id.* at 316 (2000) (citing *J.E.B.,* 511 U.S., at 137, n. 8, 114 S.Ct. 1419 (purpose of peremptory challenges " 'is to permit litigants to assist the government in the selection of an impartial trier of fact' ") (quoting *Edmonson v. Leesville Concrete Co.,* 500 U.S. 614, 620, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991)); *Georgia v. McCollum,* 505 U.S. 42, 57, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992) (peremptory challenges are "one state-created means to the constitutional end of an impartial jury and a fair trial"); *Frazier v. United States,* 335 U.S. 497, 505, 69 S.Ct. 201, 93 L.Ed. 187 (1948) ("the right [to peremptory challenges] is given in aid of the party's interest to secure a fair and impartial jury").

[xc] Duncan v. Louisiana, 391 U.S. 145, 158-159 (1968).

[xci] Id. at 148.

[xcii] 380 U.S. 24 (1965).

[xciii] Lynch, T. J. (1980). Proprietorial Misuse of the Peremptory Challenge to Exclude Discrete Groups from the Petit Jury: Commonwealth v. Soares. *Boston College Law Review , 21*(5), 5th ser., 1200-1201. Retrieved December 13, 2016.

[xciv] 528 U.S. 304 (2000).

[xcv] Albert W. Alschuler, The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts, 56 U. CHI. L. REV. 153, 156 (1989).

[xcvi] Akhil Reed Amar, Reinventing Juries: Ten Suggested Reforms, 28 U.C. DAVIS L. REV. 1169, 1182 (1995).

[xcvii] Swain v. Alabama, 380 U.S. 202 (1965).

[xcviii] Id. at 222.

[xcix] Commonwealth v. Soares, 377 Mass. 461 (1979).

[c] Mass. Const. art. 12.

[ci] 476 U.S. 79 (1986).

[cii] Miller-El v. Dretke, 545 U.S. 231, 270 (2005) (Breyer, J., concurring).

[ciii] Id. at 83.

[civ] Swain v. Alabama, 380 U.S. 202 (1965).

[cv] Baston, at 102-103.

[cvi] Samuel R. Sommers & Michael I. Norton, Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the BatsonChallenge Procedure, 31 Law & HUM. BEHAV. 261, 263 (2007).

[cvii] Id. at 103.

[cviii] 375 So.2d 1162, 1163-1164 (La. 1979).

[cix] Rice v. Collins, 546 U.S. 333 (2006).

[cx] Felice Banker, Note, Eliminating a Safe Haven for Discrimination: Why New York Must Ban Peremptory Challenges from Jury Selection, 3 Journal of Law & Policy 605 (1995).

[cxi] Parkett v. Elem, 514 U.S. 765 (1995).

[cxii] Banker, F. (1995). Eliminating a Safe Haven for Discrimination: Why New York Must Ban Peremptory Challenges From Jury Selection. *Journal of Law and Policy ,3*(2), 612. Retrieved December 17, 2016, from http://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1477&context=jlp

[cxiii] See Swain v. Alabama, 380 U.S. 202, 219 (1965) (citing Lewis v. United States, 146 U.S. 370, 378 (1892)).

[cxiv] Chisolm v. State, 529 So. 2d 635, 639 (Miss. 1988).