The Challenge of Peremptory Challenges

Justice Charlie Wiggins

This handout supplements the discussion on Race and Jury Selection. It summarizes various jurisdictions’ approaches to peremptory challenges and describes changes suggested by academics.

The use of peremptory challenges during jury selection has long sparked debate and controversy because such challenges permit the removal of a venire person without justification, creating the possibility of discriminatory abuse. The United States Supreme Court recognized the potential abuse of the litigation tool in *Batson v. Kentucky*. In an effort to prevent discriminatory peremptory challenge abuses, the Court created a mechanism for challenging a suspicious peremptory challenge. The so-called *Batson* challenge proceeds in three steps: (1) the party raising the *Batson* challenge must “make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts give rise to an inference of discriminatory purpose,” (2) “the burden shifts to the State to come forward with a [race-]neutral explanation” for the challenge, and (3) the “trial court then [has] the duty to determine if the defendant has established purposeful discrimination.” While *Batson* challenges provide a mechanism for quelling discriminatory peremptory challenges, its gears are rusty and grinding for two reasons. First, the burden of providing a race neutral reason is easy to satisfy. Second, in order to grant the *Batson* challenge, the judge must find that the attorney’s race-neutral explanation is untruthful, determining instead that the attorney is purposefully discriminating. For these two reasons, *Batson* challenges are rarely successful.

The Washington State Supreme Court recently spent significant time and effort discussing the discriminatory impact of peremptory challenges in *State v. Saintcalle*.

---

1 Charlie Wiggins has been a justice of the Washington State Supreme Court since 2011 and is the author of the lead opinion in *State v. Saintcalle*, 178 Wn.2d 34, 308 P.3d 326 (2013). Justice Wiggins holds a J.D. from Duke Law School, an M.B.A. from the University of Hawaii, and a B.A. from Princeton University. Justice Wiggins acknowledges the substantial contribution of his extern Ryan Thomas, a 2L from UW School of Law, and thanks him for his efforts.


3 *Batson*, 476 U.S. at 93–94.

4 Id. at 97.

5 Id. at 98.

degree felony murder. During voir dire, the prosecution struck the only black venire member via peremptory challenge. Defense counsel then raised a *Batson* challenge. The challenge was denied and the black juror was struck. While the Supreme Court held that the trial judge correctly denied the *Batson* challenge, it discussed at length the issues of discrimination in jury selection.

This summary looks primarily at two areas: (I) how various states are responding to peremptory challenges and (II) what solutions the academy suggests.

I. JURISDICTIONAL VARIATION

Many jurisdictions acknowledge the issues surrounding the discriminatory effect of peremptory challenges, but remain unsure how to make meaningful changes. Some litigators highly value peremptory challenges—both defense attorneys and prosecutors advocate for peremptory challenges, arguing that they serve an irreplaceable role in serving their clients. Some litigators and commentators, however, take a more critical standpoint. They draw a distinction between an *impartial* jury and a *favorable* jury, arguing that while the politically correct justification for peremptory challenges is bias removal, litigators often seek to create a favorable jury. In light of the high value many litigators place on peremptory challenges, state reforms generally involve expanding the protected categories or expanding the number of challenges (generally to defense).

Little empirical research exists regarding the use of peremptory challenges, at least not in recent years. Some states have studied their peremptory challenge system, revealing discriminatory application of this voir dire tool. Ten years ago the Bureau of Justice Statistics (BJS) conducted a thorough study of state court organization. This study gathered court rules from the states and compiled a table showing the number of peremptory challenges available in each court in each jurisdiction. According to this study, forty-two states, the District of Columbia and Puerto Rico afford parties an equal number of peremptory challenges. Eight states provide the defense with more challenges. The BJS conducted a similar study in 2011, but it did not include information pertaining to peremptory challenges. No state has abolished peremptory challenges.

---


9 Id. Arkansas, Delaware (only in capital cases), Georgia, Maryland (defense receives twice as many challenges), New Hampshire, New Jersey, New Mexico, and South Carolina.
Justice Charlie Wiggins
Washington State Supreme Court
Race and Jury Selection – Implications of Saintcalle
Friday, March 7, 2014

Some states are expanding the categories protected by Batson. While Batson addressed only race, the Court later prohibited juror exclusion on the basis of gender. J.E.B. v. Alabama, ex rel. T.B., 511 U.S. 127, 114 S. Ct. 1419 (1994). States have begun to eliminate exclusion of jurors on the basis of religious affiliation\textsuperscript{10} and sexual orientation.\textsuperscript{11} Several courts have considered including age, but none have taken the step.\textsuperscript{12} Some courts base this expansion on the Equal Protection Clause, while others rely on their state constitution.

Some states have begun updating their jury databases in order to provide attorneys with a more detailed picture of the potential jurors, a practice described in section (II)(A), infra.

II. ACADEMIC RECOMMENDATIONS

Suggestions for reforming peremptory challenges continue to fill law reviews. Abolition recommendations pervade the articles, though states, prosecutors, and defense attorneys seem reticent to do away with peremptory challenges. Leaving aside abolition (for a robust abolition argument, see Justice González’s concurrence in Saintcalle), scholars promote various methods for reducing discrimination during jury selection. Some suggestions deal directly with peremptory challenges; others aim at reducing discrimination in the jury system writ large. The leading suggestions seem to be (A) pre-voir dire information gathering, (B) the Implicit Association Test (IAT), (C) interactive blind questioning, (D) a “peremptory block” system, (E) juror affirmative action, and (F) the use of § 1983 claims by struck jurors.

(A) Pre-Voir Dire Information Gathering

Some suggest that discriminatory peremptory challenges are a function of misinformation. Due to the lack of information about the jurors and litigators’ time constraints, parties often rely on stereotypes. The information gathering argument suggests that attitudes and lifestyle are the best predictors of how a juror will view

\textsuperscript{10} States that prohibit exclusion solely on the basis of religious affiliation include Arizona, California, Colorado, Florida, Hawaii, Mississippi, New Jersey, New York, and North Carolina.

\textsuperscript{11} California and the Ninth Circuit prohibit exclusion solely on the basis of sexual orientation. CAL. CIV. PROC. CODE § 231.5; SmithKline Beecham Corp. v. Abbott Laboratories, 740 F.3d 471 (9th Cir. 2014). In dicta, the Eighth Circuit suggested Batson and its progeny do not protect sexual orientation. U.S. v. Blaylock, 421 F.3d 758 (8th Cir. 2005).

\textsuperscript{12} Ohio found that categorically excluding 18-20 years olds from the venire violated the defendant’s right to a fair trial. Ohio v. Willis, 293 N.E.2d 895, 896 (Akron Mun. Ct. 1972). Each federal court of appeals that considered the issue found that striking a juror on the basis of age does not violate equal protection.
the case, not race, gender, or any other broad category. A thorough questionnaire could provide attorneys with reliable and non-discriminatory (at least in the negative sense) information through which to apply their peremptory challenges. One author suggests that

With more data, scientific jury selection provides precisely the predictive power needed to overcome reliance on stereotypes. A combination of data, including a juror’s education level, church attendance, occupation, frequency and type of media exposure, type of car driven, number of children, employment status, income, and whether the juror owns or rents a home, provides a much more reliable basis for discerning juror bias than do name, age, race, and gender. With access to information yielding increased predictive power, lawyers would quickly abandon any reliance on crude stereotypes. Indeed, lawyers heretofore not savvy to this new data’s usefulness would be forced to leave behind old stereotypes after losing case after case to a less troglodytic opponent.13

This author suggests that such information would be gathered by the court and standardized across cases. Some critique this approach because it does not do away with stereotyping; it merely increases its sophistication. Such gathering may find opposition due to privacy concerns. One could argue that using such questionnaires would only further discrimination because attorneys would nonetheless base their decisions on stereotypes, even if slightly more informed. An attorney could easily judge a venire person by what kind of car they drive, whether they are educated, and where they live.

(B) The Implicit Association Test

For the past fifteen years, psychologists have been using an implicit association test (IAT) in order to determine people’s subconscious biases toward various groups. By measuring response times to word associations linked to these groups, these tests assess whether one has an implicit bias toward one group compared to another. Harvard, the University of Washington, Yale, and University

of Virginia teamed up to scale the testing and associated research.\textsuperscript{14} Tests include subjects such as race, gender, sexual orientation, disability, and weight.\textsuperscript{15}

Scholars suggest that this test could be used for jury selection in one of two ways: screening or educating. The test could be administered to the venire and used to eliminate those showing above a threshold amount of implicit bias. Some proponents of the IAT find this approach rather problematic, arguing that excluding simply on the basis of the test places significant weight on a relatively new project. Using test results as a basis for exclusion similarly assumes that jurors are unable to counteract their biases.

Other scholars suggest that the IAT could be used to educate jurors. Scholars argue that awareness of a bias aids in its elimination, claiming that research helping jurors see their subconscious preferences could help them determine the facts of the case more fairly. Researchers used the test with physicians and found positive results, arguing that similar outcomes may be found when using the IAT with jurors:

\begin{itemize}
\item [R]esearch into the effects of implicit bias, and implicit bias education, on doctors, offers support for the use of IATs to educate jurors. As mentioned above, in a recent study a group of physicians were given a Race IAT, and asked whether they would recommend state-of-the-art treatment for patients with coronary artery disease. For those who were unaware of the nature of the study, the greater their implicit anti-black bias, the less likely they were to recommend the treatment for black patients. For those who were aware of the nature of the study, however, the greater their implicit anti-black bias, the more likely they were to recommend the treatment for black patients. In addition, after the IAT was administered, the percentage of participants who believed that subconscious racial biases affected their treatment decisions increased from sixty to seventy-one. Three quarters of the participants felt that education about unconscious bias, and specifically taking the IAT, offered benefit to physicians. The study's authors interpreted their results as suggesting “implicit bias can be recognized and modulated to counteract its effect on treatment decisions,” and suggested the use of
\end{itemize}

\textsuperscript{14} Tony Greenwald, Mahzarin Banaji & Brian Nosek, Project Implicit, https://implicit.harvard.edu/implicit/.
\textsuperscript{15} Other tests include response to weapons, gender-science, age, gender-career, presidents, Arab-Muslim, disability, native, and skin-tone.
“securely and privately administered IATs to increase physicians' awareness of unconscious bias.”16

Some scholars argue that while the use of the IAT could prove positive for creating awareness and educating the venire, its use would not eliminate the discriminatory use of peremptory challenges. They claim that for the IAT to have a positive effect on this part of jury selection, the attorneys arguing the case should similarly take the IAT. The hope in requiring the lawyers to take the test is that they would increase their self-awareness and begin to counteract these biases.

(C) Interactive Blind Questioning

This method focuses on restructuring the voir dire process by placing greater weight on information provided by the jurors rather than interpersonal interaction. The attorneys would conduct a blind voir dire from a room adjacent to the venire, using a computer system to pose questions to the venire. Questions would be posed to the jurors electronically or orally and the attorneys would receive their responses in electronic written form (so as to avoid conclusions from handwriting, grammar, spelling, etc.). Questions pertaining to race, gender, or religious affiliation would be prohibited. Attorneys could exercise their peremptory challenges based solely on this information. Once the blind questioning ended, attorneys would then interact with the jurors and be able to challenge for cause. One scholar described the process like this:

[L]itigants would not be able to see or hear the jurors respond to the questions. It would be conducted by identifying jurors by number instead of name. Questions pertaining to the juror’s race or gender would be prohibited from the blind questionnaire. Interactive software could be used to read the questions to the jurors and record and type their responses, or jurors could respond to questions by speaking into a tape recorder and having a court reporter type the recorded answers. Jurors should be advised before responding that certain language or dialect used in responding to the questionnaires could indicate race and/or gender. Litigants would exercise peremptory challenges based on the juror’s typed responses without confronting the juror.17

This method, like the pre-voir dire information gathering method,\textsuperscript{18} seeks to remove discriminatory challenges by focusing the challenges on concrete information. While such rationale has merit, some argue that it excludes the necessary ability to remove jurors due to subtly poor interactions or gut feelings. Lawyers could strike members of the venire without justification during the blind questioning, but after viewing the jury, the court would only permit challenges for cause.

\textbf{(D) Peremptory Block System}

This system would continue to permit peremptory challenges, but would give each attorney the ability to place some jurors off limits. This would give opposing counsel a countermeasure to the peremptory challenge, possibly preventing the removal of minority jurors. The system would work this way:

\begin{quote}
[A]fter challenges for cause have been completed but before peremptory challenges occur, each attorney would submit to the judge the names of a certain number of venire members to be blocked. These members of the jury pool, whose names would remain secret, would be immune from removal by peremptory challenge. Each attorney would exercise peremptory challenges in the usual manner, except that only those challenged venire members who were not previously protected by blocks would be excused. The jury would be chosen randomly from the remaining venire members, with one exception—if the prosecution exercised a peremptory challenge on a blocked member, that member would automatically be seated on the jury.\textsuperscript{19}
\end{quote}

The author argues that the automatic seating of a blocked juror would disincentivize misconduct. Some criticize such a rule because it may also punish an attorney who exercises a peremptory challenge without discriminatory intent.

\textsuperscript{18} See section II(A), \textit{supra}.

(E) Juror Affirmative Action

Juror affirmative action breaks into two subcategories: (i) jural districting and (ii) category-conscious jury selection.

(i) Jural districting

While not addressing peremptory challenges, this proposed solution seeks to ensure that juries actually represent the community of the defendant. Taking cues from electoral districting, this approach would divide the jury district into twelve subdistricts. Demographic information such as race, occupation, socioeconomic status, and religion may be taken into consideration when drawing the district lines. A person from each district must sit on the jury.

Proponents argue that this method would likely create more representative juries, ensuring that various parts of the jury district are represented. The defendant might possess a heightened chance of receiving a trial judged by his or her peers. Critics point to several problems with such an approach. Subdividing along demographic lines could bump into Sixth Amendment and equal protection issues, though dividing the districts by geography or socioeconomic status rather than considering race and religious belief may sidestep these issues. Also, jurors pulled from the district and kept on the jury because of their representation may see their duty as promoting an outcome their district would approve rather than finding what they deem right and true.

For a thorough look at the pros and cons of such an approach, see Kim Forde-Mazrui’s article “Jural Districting: Selecting Impartial Juries Through Community Representation.”

(ii) Category-Conscious Jury Selection

Like jural districting, this approach attempts to create a jury composition that represents the surrounding community. Rather than pulling from twelve districts, this approach uses quotas to ensure that the racial makeup of the jury represents that of the jury district.

Hennepin County in Minnesota uses a variation of this approach with its grand juries. In that county, minorities make up roughly ten percent of the population, so the county requires that each grand jury, which is comprised of twenty-three

---

Justice Charlie Wiggins  
Washington State Supreme Court  
Race and Jury Selection – Implications of Saintcalle  
Friday, March 7, 2014

members, contain at least two minorities.\textsuperscript{21} The county does not dictate from which part of the minority population these two jurors come, it simply requires minority presence. The process works like this:

\textquote[If], after randomly selecting the first 21 grand jurors either only one or no minority persons appear on the panel, selection [shall] continue down the list of 55 randomly selected and qualified persons until there are at least two minority persons out of 23 on the grand jury. If no minorities appear in the list of 55 potential grand jurors, another 55 qualified persons should be selected until the goal of at least two minority jurors is obtained. If random selection of the first 21 grand jurors yields two or more minority persons, the selection should simply proceed to the next two persons on the list.\textsuperscript{22}

Hennepin County’s approach applies only to grand juries. Proponents herald the controversial approach as the future of jury selection.


\textbf{(F) § 1983 Claims by Jurors}

This possible solution approaches the problem of discriminatory peremptory challenges from the position of the excluded juror rather than the defendant. Some scholars suggest that were a struck juror to bring a discrimination claim, more light would be shed on the methodology of \textit{Batson} challenges and would require substantive changes. They argue that this approach would allow for a more accurate understanding of the harms inflicted and could adequately remove discriminatory juror challenges. Nancy Leong makes the following argument:

Peremptory challenges are usually adjudicated in a highly idiosyncratic context: a criminal defendant, appealing his conviction by a jury, seeks the strong medicine of reversal for a harm that was perpetrated against a juror—not against the defendant directly—and that may not even have affected the outcome of the trial. Because parties almost always


\textsuperscript{22} Id.

assert Batson claims on appeal and in criminal proceedings, courts are likely disinclined to formulate expansive versions of the Batson right. Likewise, the unsympathetic proponents courts see—criminal defendants—and the nebulous harm these proponents have suffered—indeed, it is difficult to prove that even a blatantly racist peremptory strike had an impact on the ultimate jury verdict in any individual case—dissuade courts from construing Batson generously. And finally, the fact that Batson proponents have, by definition, already been convicted encourages narrow construction of the Batson right. As a result, courts tend to reach conclusions unfavorable to the Batson proponent, affecting not only the results in individual cases, but also the evolution of doctrine.\footnote{Civilizing Batson, 97 IOWA L. REV. 1561, 1654 (2012).}

Proponents of such an approach claim that because of the nearly insurmountable obstacles facing a criminal defendant, asserting the rights of the excluded jurors may provide a better vehicle for combating discriminatory peremptory challenges.

**CONCLUSION**

Since Batson, reformation of jury selection has focused on two areas: increased coverage and increase challenges for the defense. Litigators enjoy the latitude afforded by peremptory challenges and want to keep them in their toolbox. The academy proposes several interesting solutions to reducing discrimination in jury selection, including pre-voir dire information gathering, the use of the Implicit Association Test, interactive blind questioning, a “peremptory block” system, juror affirmative action, and the use of § 1983 claims by struck jurors.