

# Improving the Jury System: Peremptory Challenges

by Patricia Henley

The Sixth Amendment guarantees the defendant in a criminal case the right to an impartial jury. Although the goal of the jury selection process is to create an impartial jury, many critics argue that certain aspects of the process hinder, rather than, help achieve this goal.

One of the most controversial stages in the jury selection process is the lawyers' exercise of peremptory challenges. Peremptory challenges allow a party to remove a prospective juror from the jury panel without giving any reasons. The United States Supreme Court has held that the purpose of the peremptory challenge is "to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise." [1] It is often argued, however, and acknowledged by trial lawyers, that lawyers do not use peremptory challenges to achieve an impartial jury. Rather, their goal is to select jurors who will be favorable to their side of the case.

Critics of peremptory challenges claim peremptory challenges result in inaccurate verdicts, waste court resources, create a negative public perception of jury system, and reduce acceptance by the community of the jury's verdict.

## I. Background and Function of the Traditional Rule

Peremptory challenges date to Roman times. Under Roman law, both parties proposed up to one hundred jurors each. Then, each side could strike 50 jurors, leaving one hundred jurors to decide the case. Under English common law, the defendant was allowed to exercise 35 peremptory challenges; the prosecution's use of peremptory challenges was unlimited. In 1305, however, Parliament abolished the prosecution's right to peremptories. Finally, in 1988, Parliament abolished the defendant's right to peremptories, because it found that attorneys were using them to stack the jury with individuals biased towards the defendant.

The peremptory challenge system has always existed in the United States, and it survived virtually without question until the twentieth century. The preservation of this tradition is one of the reasons asserted by supporters of the peremptory challenge to continue its use.

Although the right to exercise peremptory challenges is not guaranteed by the Constitution, the Supreme Court has often held that peremptory challenges are an essential means for achieving an impartial jury. The primary functions of peremptory challenges are to ensure fairness (including the appearance of fairness), supplement



challenges for cause, and to protect voir dire.

### **Perception of Fairness**

The primary theory behind the use of peremptory challenges is that by allowing litigants to participate in the selection of the jury, the verdict will be more acceptable to the parties. In addition, the public should accept the verdict as impartial and fair. Peremptory challenges are used to assure the parties, and the public, that the case will be decided based on the evidence, not the personal biases of the jurors.

### **Supplement to Challenge for Cause**

Because of the strict limits on the use of challenges for cause, some jurors, even though biased, remain on the jury because the attorney is unable to prove that the juror is not impartial. The peremptory challenge is a valuable tool for screening out suspected, but unprovable bias.

### **Protection of Voir Dire**

Peremptory challenges are also essential in order to protect effective voir dire. An attorney does not know, until he asks questions, whether a particular juror is biased against his client. These questions may reveal suspected bias on the part of the juror, but there may not be sufficient proof of bias to satisfy a challenge for cause. However, as a result of this questioning of his impartiality, an otherwise impartial juror may be insulted and develop a bias against the attorney and his client. Without peremptory challenges, these people could not be excluded. An attorney may, therefore, choose to refrain from asking potentially offensive questions rather than risk insulting a prospective juror.

## **II. Limits on the Traditional Rule**

### **A. Statutory Limits**

Unlike challenges for cause, which are unlimited in number, an attorney's use of peremptory challenges is limited by statute. The number of peremptory challenges allowed varies from state to state. In California, each side is allowed the same number of challenges. In a criminal case where the offense is punishable by death or life imprisonment, each side is given 20 peremptory challenges. In other criminal cases, each side is limited to 10, except where the offense is punishable by a jail term of 90 days or less. In those cases, only 6 peremptory challenges are allowed per side. In civil cases, each side is given 6 peremptory challenges.

There are several bills pending in the California legislature which would further limit the number of allowable challenges. In civil cases, it is proposed that peremptories be reduced from 6 to 2. In criminal cases, where the term of imprisonment is 90 days or less, peremptories would be reduced from 6 to 5. Furthermore, the California Judicial Council's Blue Ribbon Commission of Jury System Improvement is also considering proposals to reduce the number of peremptory challenges in criminal cases.

### **B. Constitutional Limits**

Despite the long history and tradition of peremptory challenges, the Supreme Court has limited their use. These limits are based on both the equal protection rights of litigants and those of qualified jurors.

### Peremptory challenges based on race

In Batson v. Kentucky, [2] the Supreme Court held that the Equal Protection Clause is violated if the prosecution in a criminal case challenges potential jurors based solely on their race or on the assumption, that black jurors as a group are unable to impartially consider a case against a black defendant. The defendant in such cases is required to make a showing of intentional discrimination and the state must rebut that showing by demonstrating a race-neutral basis for the challenge.

While *Batson*, held that the defendant must be a member of the same cognizable racial group as the juror who was stricken, *Powers v. Ohio*, [3] held that the defendant could make a showing of intentional racial discrimination regardless of his race.

Finally, in *Georgia v. McCollum*, [4] the Court extended the prohibition on race-based peremptory challenges to all litigants. Because the court enforces the discriminatory peremptory challenge, it does not matter whether it is the prosecution or the defense who has engaged in the discrimination. The excluded jurors and the community will attribute the discrimination to the judicial process.

### Peremptory challenges based on gender

The Supreme Court has also declared that peremptory challenges based on gender violate the Equal Protection Clause. The Court in J.E.B. v. Alabama ex rel. T.B., [5] held that "gender, like race, [is] an unconstitutional proxy for juror competence and impartiality.

### Peremptory challenges based on other group identities

Peremptory challenges exercised on the basis of generalizations about the influence of religion, national origin, or occupation of jurors have not been held unconstitutional. However, based on the Supreme Court rulings on race and gender-based peremptory challenges, it can be argued that all group-based peremptory challenges should, and eventually, will be eliminated as well.

## III. Arguments in favor of limiting, or eliminating, peremptory challenges

### A. Efficiency

Eliminating or reducing the number of peremptory challenges would decrease the costs of the jury system. In determining how many individuals are necessary for a particular jury panel, the jury commissioner must take into account how many jurors could be dismissed using peremptory challenges. In capital cases this number may be as high as 40. If peremptory challenges were reduced or eliminated, fewer individuals would need to be called for jury service.

Eliminating peremptory challenges would also save the litigants the large amounts of

money and time spent with jury consultants who supposedly specialize in determining what jurors will be most favorable to each side. The utility of these consultants, moreover, is questionable. Studies have revealed that efforts to predict how a particular juror will decide a case, based on stereotypes, rarely succeed.

Finally, because of the limits on the use of peremptories imposed by the Supreme Court in *Batson* and *J.E.B.*, the trial judge must sometimes conduct hearings to decide if a challenge was exercised discriminatorily. These hearings consume one of the most valuable of court resources: time.

Thus, reducing or eliminating peremptory challenges would result in a more efficient and cost-effective jury selection process.

## **B. Quality of Verdicts**

Critics of the peremptory challenge system also argue that the use of peremptory challenges can harm the accuracy of the verdict. In jury deliberations, individuals with different backgrounds and perspectives can correct mistaken views or recollections of the evidence presented at trial. Peremptories which eliminate jurors who are minorities, for example, increase the chances that prejudices will go unchallenged during the deliberation process.

Because of the lack of information about the jurors available to attorneys when exercising peremptory challenges, peremptory challenges are often based on stereotypes. This is harmful because the exclusion of jurors on such basis perpetuates stereotypes and discrimination. This prejudging of individuals is inconsistent with democratic ideals such as equality and fairness.

Opponents also argue that peremptory challenges compromise the cross-sectional ideal. The California Supreme Court has said that the purpose of the representative cross-section requirement is "to achieve impartiality through the interaction of the diverse beliefs and values the jurors bring from their group experiences." The cross-sectional ideal is based on the idea that there is no way to escape from bias. The only way to deal with prejudice is to have a balance of various values and perspectives on the jury.

## **C. Improved Public Perception of Justice System**

Over 80 million living Americans have been called for jury duty. Because of the use of peremptory challenges, about 30 percent of those potential jurors were sent home. [6] The jurors who are sent home frequently leave with negative views of the justice system. Informal interviews with Los Angeles jurors dismissed as a result of peremptory challenges found that almost 95 percent of them left with an unfavorable view of the jury system. These individuals may conclude that since they were unfairly excluded from participating in that system, it is a system will not treat them fairly.

Those who do ultimately serve on the jury are also harmed. They learn that there is a hierarchy among citizens, rather than equality. Exclusions based on stereotypes and discrimination are acceptable in the courtroom, despite the fact that they are unacceptable in other walks of life.

## **D. Greater Confidence in Verdict**

When a certain group of individuals is systematically excluded from the jury process, it makes it less likely that the verdict will truly reflect the values of the community as a whole. As a result, the public will have less confidence in the jury's verdict. If peremptory challenges are eliminated, the jury will be more representative of the community and, therefore, reflect its values. The verdict, as a result, will be more widely accepted.

### **E. Only Way to Follow Constitutional Mandates**

Critics argue that the limits on peremptory challenges articulated by *Batson* and the like are not enough and that peremptory challenges should be eliminated completely, because *Batson's* antidiscrimination principles cannot be effectively enforced. Attorneys can easily assert other, nondiscriminatory reasons for striking a juror. Justice Thurgood Marshall articulated this view in his concurring opinion in *Batson*, in which he wrote that "[t]he inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal justice system." [7]

## **IV. Arguments against limiting, or eliminating, peremptory challenges**

### **A. Tradition**

The first argument presented against eliminating peremptory challenges is the fact that the right has existed, almost without question, throughout history. Proponents argue that peremptories have been successful in the past at achieving impartial juries and will continue to be successful in the future. Any disadvantages that may result from their use are outweighed by their value as a tool for creating an impartial jury.

### **B. Invasion of Defendant's Rights**

It is also argued that the elimination of peremptory challenges places the rights of the excluded juror above the right of the defendant to challenge impartial jurors.

However, critics of peremptory challenges point out that the equal protection rights of the jurors are guaranteed by the Constitution, whereas the defendant has no Constitutional right to exercise peremptory challenges. The defendant's right to an impartial jury can still be protected by exercising challenges for cause.

### **C. Extended deliberations would result in more hung juries.**

It is also argued that if peremptory challenges are eliminated, it will result in longer deliberations and more hung juries. One of the purposes of peremptory challenges is to remove from the jury individuals with extreme viewpoints. As a result, jurors are able to freely deliberate and come to a consensus about a proper verdict. This goal will be much more difficult if those with extreme views remain on the jury.

### **D. Harm to voir dire**

Elimination of the peremptory challenge may also lead to an either extended or

shortened voir dire. Voir dire may have to be extended to allow attorneys to gather more information about the jurors in order to satisfy the restrictive challenges for cause. This extension will delay the trial process and result in further court backlog.

In the alternative, attorneys will ask fewer questions during voir dire, because of a fear of antagonizing prospective jurors by questioning their impartiality. If the attorney is unable to prove the existence of bias, the juror will not be dismissed for cause and could thus adversely affect the verdict. The peremptory challenge is designed as protection for the parties against such a dilemma.

## V. Reform Proposals

Although the disadvantages of using peremptory challenges are widely recognized, the majority of those in the legal profession are against any proposal to eliminate them entirely. Instead, there have been many proposals aimed at reducing the harmful affects of peremptory challenges by limiting the number of challenges counsel may use. Several states, including California, New York, and Montana, have bills pending in the legislature which would reduce the number of peremptory challenges available to parties in civil and criminal cases. Currently, only one state, Oklahoma, is considering completely abolishing the use of peremptory challenges.

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## Sources and Further Information

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[1] *Swain v. Alabama*, 380 U.S. 202, 219 (1965). ([return to text](#))

[2] 476 U.S. 79 (1986). ([return to text](#))

[3] 499 U.S. 400 (1991). ([return to text](#))

[4] 112 S.Ct. 2348 (1992). ([return to text](#))

[5] 114 S.Ct. 1419 (1994). ([return to text](#))

[6] Stephen J. Adler, *The Jury: Disorder in the Court* 221 (1994). ([return to text](#))

[7] 476 U.S. at 107 (Marshall, J., concurring). ([return to text](#))