Law and Human Behavior, Vol. 23, No. 6, 1999

The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County

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Some view the peremptory challenge as crucial to a fair jury selection process, whereas for others, it is a tool for invidious race or gender discrimination. Nevertheless, debates utilize little empirical data regarding uses of this challenge. Data are reported from observation of a small number of criminal trials in one, largely biracial southeastern county. In the aggregate, there was no association between race and selection for a jury, and only a modest relationship for gender and selection. However, the null finding for race masks a pattern of strikes by each party: When dismissed, Whites were likely to be excused by the defense, and African Americans by the state. A trial-by-trial analysis showed that when disparities between venire and jury composition existed, the direction usually pointed to overrepresentation of African Americans and women on juries. Despite limited generalizability, the data suggest the need for a more informed debate about the peremptory challenge's use in modern criminal trials.

In the last decade, members of the judiciary (*Alen v. State,* 1992; Broderick, 1992; Hoffman, 1997; *People v. Bolling,* 1992) as well as legal commentators (e.g., Bray, 1992; Marder, 1995) have all expressed concerns about the merits of eliminating citizens from petit juries through the peremptory challenge. Supreme Court rulings have established the Equal Protection rights of prospective jurors in jury selection (e.g., *Powers v. Ohio,* 1991; *Edmonson v. Leesville Concrete Co.,* 1991; *Georgia v. McCollum,* 1992; *J.E.B. v. Alabama, ex rel T.B.,* 1994). Thus, some have suggested that constitutional violations to eliminated jurors are of greater import than potential harms to litigants resulting from abandoning or drastically limiting the peremptory (which is not grounded in the Constitution; see Bader, 1996; Leipold, 1998; Underwood, 1992). Recently, a sizable faction of a panel convened to suggest jury reforms in the District of Columbia favored eliminating the peremptory, although this reform was not ultimately adopted (Council for Court Excellence, 1998).

Supporters of the peremptory challenge, such as former Chief Justice Burger (*Batson v. Kentucky,* 1986) have argued that it is essential to a fair jury selection

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0147-7307/99/1200-0695$16.00/1

process. An early article by Babcock (1972) outlined four functions the peremptory serves, including the appearance of fairness engendered by litigants' having control over choosing a jury, the ability to leave unstated any concerns about jurors'[2] biases, the ability to overrule jurors' natural reluctance to admit partiality, and, finally, as a "shield for the exercise of the challenge for cause" (1972, p. 554)—that is, a mechanism to excuse a juror one may have alienated during intensive voir dire questioning. As these rationales suggest, the peremptory can serve as a check on judicial control of the jury selection process.

These alleged advantages notwithstanding, critics posit several harms engendered by the peremptory (for a recent overview, see Hoffman, 1997). The primary dissatisfaction revolves around the doctrinal goal of having juries that are representative of the community. In this regard, the peremptory has been called "the last best tool of Jim Crow" (Hoffman, 1997, p. 827). Indeed, it was not until the Supreme Court's ruling in *Batson v. Kentucky* (1986) that any reasonable legal mechanism prohibited the state from using the peremptory to systematically exclude African Americans from serving on juries (cf. *Swain v. Alabama,* 1965). The Supreme Court has likewise prohibited race-based peremptories by the defense (*Georgia v. McCollum,* 1992) and in civil trials (*Edmonson v. Leesville Concrete Co.,* 1991). Race-based peremptories are illegal irrespective of the race of the defendant (*Powers v. Ohio,* 1991), and gender-based peremptories are forbidden (*J.E.B. v Alabama, ex rel T.B.,* 1994).

Despite these rulings, there is concern that, aided by pretext, discrimination against jurors continues (Charlow, 1997; Sutphen, 1995). Melilli (1996) reviewed reasons proffered by attorneys who must account for challenges and deemed many "silly, if not offensive" (Melilli, 1996, p. 499). For example, when accused of *Batson* violations, lawyers have asserted that the jurors were challenged because they were "from New York," "from Texas," were the "same build as the opposing party," or had "too much education" (Melilli, 1996, p. 498). A Maryland appellate court upheld a trial court's ruling against the peremptory dismissal of a set of White jurors; according to the defense, one juror reminded the attorney of her Catholic school teacher and another dressed well and "seemed rather studious" (*Gilchrist v. State,* 1993, pp. 47–49; see Raphael and Ungvarsky, 1993, for a review of appellate rulings on allegedly "neutral" explanations). Additionally, the procedures in place to oversee peremptory challenges (which are no longer "peremptory") have been termed a burden on the courts (e.g., *Alen v. State,* 1992, p. 1088; *Gilchrist v. State,* 1993, p. 55). Thus, it is argued, given its potential for abuse and problems with enforcement, the peremptory challenge should be eliminated (see *Batson v. Kentucky,* 1986, p. 103, Marshall, J., concurring).

Banning the peremptory would constitute a revolution in jury selection procedures. Nevertheless, debates over the challenge have generally proceeded in the absence of empirical data bearing on the current use of the peremptory. Instead, as evidence, critics sometimes rely upon assertions by other commentators (e.g., Bray, 1992, p. 564, quoting Altman, 1986, who summarizes others, n. 8) or upon

[2]For ease of description, I use the term "juror" to refer to persons both selected for and excused from a jury panel.

the fact that a number of *Batson*-type cases have reached the appellate levels and the Supreme Court (e.g., Marder, 1995, n. 189).

Available social science data on voir dire and the peremptory do not directly address issues of jury representativeness. Instead, such research has focused on the extent to which lawyers successfully identify biased jurors (Broeder, 1965; Johnson & Haney, 1994; Seltzer, Venuti, & Lopes, 1991) or even potentially favorable jurors (Finkelstein & Levin, 1997; Zeisel & Diamond, 1978); juror disclosure to judges versus attorneys (Jones, 1987); and voir dire as a remedy for pretrial publicity exposure (Kerr, Kramer, Carroll, & Alfini, 1991). In the pre-*Batson* era, lawyers reported using race in decision making about potential jurors (Diamond, Ellis, & Schmidt, 1997), and a post-*Batson* study also found that prosecutors disproportionately eliminated African-American mock jurors (Kerr *et al,* 1991). Nevertheless, data on jury selection outcomes in recent trials are largely unavailable.

Thus, modern, systematic records of how the peremptory challenge is used—on whom and by whom—are lacking. What effect does the peremptory have upon the racial or gender composition of petit juries in criminal trials? This paper presents data gathered through trial observation in a North Carolina courthouse. I investigate how prosecutors and defense attorneys use the peremptory challenge and how characteristics of seated jury panels compare to those of the venire.

METHOD

The data come from a larger study investigating jurors' perceptions of voir dire questioning, especially their concerns about privacy. A portion of the research entailed court observation and record keeping about who was excused and who was selected for trials. Thirteen noncapital, felony criminal jury trials in a single North Carolina county were observed. Cases were selected after consulting with court officials about which cases, if any, were likely to proceed to trial in a given week. From these, the most serious felony charge slated for trial was selected for observation. Due to the small size of the courthouse, usually only one trial would be held in a given week. Hence, although not randomly selected, the cases represent a sizable proportion of all felony jury trials held during the study period.

The 13 criminal trials involved 4 cases of homicide (3 second-degree murder and 1 involuntary manslaughter); 1 case of felonious assault (which included first-degree sex offenses); 2 cases of robbery with a dangerous weapon (1 of which was a car-jacking, the other an armed robbery); 2 felony drug offenses; 2 accusations of breaking and entering/possession of stolen goods; and 2 cases of obtaining property by false pretenses. There were 18 defendants: one trial had 4 defendants, one had 3, and the rest had a single defendant. All but 1 of the accused were African American (the other was White); only 2 defendants were female.

In this jurisdiction, lawyers conducted the majority of voir dire questioning. Customarily, the judge introduced the nature of the case and the parties, obtained basic information on the jurors (e.g., employment, marital status), and sometimes assessed whether there were clear hardships or obvious conflicts among the panel. The judge then oversaw voir dire questioning but was largely passive. For example,

although one judge informed attorneys that he disapproved of open-ended questions (e.g., "How do you feel about . . ."), he did not forbid inquiries framed in this manner unless one of the parties objected.

Three hundred and forty-eight people called for jury service in the 13 trials were questioned during voir dire. The county used a "sequential method" of questioning (Bermant & Shapard, 1981), in which the prosecutor asked all of his or her questions and exercised challenges; new jurors replaced those excused. Once the prosecution had passed a panel of 12, the defense questioned the remaining set of jurors and exercised challenges. Decisions at each round were final: When jurors were passed by each side, they could not be excused later through the peremptory. The process was repeated until 12 jurors and at least 1 alternate were seated. In noncapital cases, each side was allowed six peremptory challenges (per defendant), with one additional peremptory per alternate. There were no *Batson* claims asserted by any party during these cases.

This county has a high proportion of African Americans, who were 32% of those questioned (and, according to 1990 census data, are 37% of the population). In addition, the county is essentially biracial, as 97% of residents are either White or African American; 2% are Asian or Pacific Islander. The sample largely reflects this composition: Only two jurors were Asian, and the remainder were African American or White. Fifty-three percent of the venire were female. Racial and gender categorizations of this sample were based upon researcher observation of jury selection.

RESULTS

Aggregate Analysis

The peremptory challenge was the most common means of excusing a juror: Only 19% of the 181 people excused were eliminated through a challenge for cause (38% of these people were African American and 74% were male). In 6 trials, lawyers made unsuccessful challenges for cause (n = 11 motions). All but one of these jurors were later excused through a peremptory challenge. In all, lawyers exercised 147 peremptory challenges (range: 5–33 per trial).[3] In the majority of trials (n = 10), neither side used all available peremptories (the defense did so in 2). The majority of peremptories came from the defense, which exercised 66% of all such challenges (range: 45%–100%).

Overall, compared to Whites, African Americans were no more likely to be excused from the jury via the peremptory challenge: 42% of African Americans were peremptorially excused compared 49% of Whites, χ^2 = 1.04, ns. However, when excused, African Americans were much more likely to be dismissed by the State: 71% of African Americans dismissed from service were excused by the prosecution. The reverse was true for Whites: 81% of White persons excused were

[3]The high figure of 33 peremptory challenges comes from the trial with four defendants. In this case, the prosecutor used 6 challenges, as did one of the defense attorneys. The remaining three defense attorneys each used their full complement of 7 strikes (6, plus 1 for the alternate).

dismissed by the defendant. This association between prosecution/defense and the race of the juror who was excused was highly significant, $\chi^2 = 36.20$, $p < .001$. Across cases, 60% of the state's peremptories were exercised on African Americans (range within trials: 0%–100%). In contrast, 87% of the defendants' challenges were used on Whites (range: 40%–100%).

In an analysis of gender, men were somewhat more likely to be excused through the peremptory than were women (54% of men vs. 41% of women), $\chi^2 = 5.67$, $p < .05$. However, this relationship was nonsignificant when one outlier case—in which women made up 85% of the final panel—was eliminated from analysis ($\chi^2 = 1.71$, ns). In addition, there was no association between gender of the juror and their likelihood of being excused by one side or the other through the peremptory, $\chi^2 = 0.003$, ns.

Trial-Level Analysis

The ruling in *Batson v. Kentucky* (1986) held that the appropriateness of any particular jury selection process is necessarily examined at the trial level. The following is a descriptive picture of the resulting juries in the 13 trials.

Although race was not associated with the likelihood of being selected when data are collapsed across trials, representation of African Americans on juries, given their representation in the venire, varied greatly across trials. In 5 trials, the percentage of African-Americans on the final panel differed from their representation in the venire by no more than 5 percentage points, usually in the direction of overrepresentation (e.g., 33% of the venire, 38% of the final jury panel). In another 6 cases, the difference ranged between 6 and 11 percentage points; 4 of these resulted in overrepresentation and 2 in underrepresentation. In the remaining 2 trials discrepancies between African-American representation on the venire and on the final jury were more stark. In one case, African Americans were 40% of the venire, but only 14% of the final jury. In another, they were 35% of the venire but were fully 71% of the final jury panel. Across cases, African Americans were underrepresented on jury panels to any extent in only 4 of the 13 trials observed and overrepresented in 5 of 13.

An analysis for gender reveals comparable results. In 7 trials, women's representation on juries paralleled their representation in the venire, differing by no more than 5 percentage points. In 3 trials, the number of women on the final panel exceeded their representation on the venire by between 7 and 14 percentage points. Finally, in the remaining 3 cases, there were marked differences, always resulting in overrepresentation of women on the final panels. Specifically, in one case women were 45% of the venire, but 79% of the final panel; in another, it was 46% of the venire and 69% of the jury; and in the third, it was 67% of the venire versus 85% of the jury panel.

DISCUSSION

According to this research, news about the peremptory is best seen as both good and bad. Aggregating across trials, in a county in which the minority group

is one-third of the jury-eligible population, African Americans were no more or no less likely to be excused from jury service than Whites. In this sense, the peremptory had no "disparate impact" upon the minority participation in juries in this county. On the other hand, a closer look reveals that this result comes about in large part because of the adversary system and "disparate treatment" by prosecutors and defense attorneys of both racial groups. If an African American was excused from the jury, it was more often than not the result of a prosecutor's peremptory challenge; if a White person was excused, it was likely attributable to the defense's strike.

These results are similar to New Mexico data reported by Van Dyke (1977, p. 159). However, in that study, White jurors appeared to be the primary focus of the adversaries: Prosecutors eliminated 6% of Whites, whereas the defense eliminated 27%. Members of the predominant minority group in that state (Hispanics) were eliminated by both sides at equivalent rates (just above 10%). With respect to gender, although the present data suggest women were slightly more likely to be selected, this was due largely to discrepancies in one particular trial. Of note, another study reported women as more likely than men to be selected for juries (Cipriani, 1994). However, in that study, as in this one, there was not strong evidence that the two parties showed contradictory preferences for female versus male jurors, rendering the result somewhat difficult to explain. Reviews of research suggest that gender usually provides little predictive utility for verdicts, despite much "folklore" (Fulero & Penrod, 1990); however, it may be that parties' ideas about which gender is better for its side tend to be case-specific and thus variable.

A trial-by-trial analysis of the present data indicates that minority-group and gender representation on juries mirrored the population profile in most cases. However, in approximately one third of the trials observed, the final panel showed marked discrepancies from the venire in terms of race, gender, or both. Interestingly, more often than not, the minority group members tended to be *overrepresented* on the petit jury compared to their numbers in the venire. When discrepancies were evident by gender, it was always in the direction of overrepresentation of women. Certainly such a result is likely to be of little solace to those who oppose peremptory challenges, as juries did not uniformly reflect the venire panels from which they were drawn. Nonetheless, it seems evident that the peremptory challenge's harm to jury composition is not a settled issue in this county.

There are several limitations to these data. First, they are derived from a single county, one with a fairly high proportion of jury-eligible African Americans (32%). Harm to jury representativeness and jury diversity certainly could be more acute in jurisdictions with lower base rates of minorities. In addition, defendants in the sample were primarily African American. Thus, with these data it was not possible to determine whether the defendant's race influences how peremptories are exercised. For instance, it could be that the adversary striking of African Americans and Whites is an indicator of attorneys' assumptions about defendant–juror similarity rather than of generalized views about the two groups' leniency or conviction proneness. Finally, the cases represent a nonrandom (albeit sizable) proportion of the total cases within a defined period, and the sample size is small.

The thrust of these limitations warrants explicitness: Standing alone, the data cannot and should not eliminate concerns about the peremptory challenge's effect

on jury composition. Instead, they provide an example of the type of empirical evidence lacking in the debates surrounding the peremptory. Jury selection in some criminal trials may result in panels that do not mirror the community, but how often does this occur? In what types of cases? Which groups tend to be overrepresented or underrepresented? Why? A large-scale survey of cases across jurisdictions would help shed light upon the legitimacy of charges that the peremptory harms jury representativeness.

Were the peremptory challenge eliminated, litigants would lose direct control over decision making regarding juror fitness—a situation that many attorneys fear, even as they advocate for greater jury representativeness (Brown, 1994). Without diminishing the importance of the principle established in *Batson*—namely, that an injustice in any individual case needs to be addressed—it seems unwise to make drastic policy changes without having substantially more information regarding the use of the peremptory challenge in the modern trial.

ACKNOWLEDGMENTS

The author gratefully acknowledges Neil Vidmar and the anonymous reviewers who commented upon previous drafts of this paper.

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