

Iga Machnik 

Jagiellonian University, Kraków, Poland
i.machnik@doctoral.uj.edu.pl

The Problem with a Peremptory Challenge— a Tool of Racial Discrimination Within American Jury Selection Process

Jury duty serves as one of the fundamental pillars of American democracy, for it encourages direct citizen participation. Yet, the process of selecting its members is characterised by a flaw in form of a peremptory challenge — a tool with considerable potential for abuse since it permits covert discrimination against members of visible minority groups. Despite not being a procedural right protected by the Constitution of the United States, peremptories have entered the canon of provisions thought to be necessary for preserving the fairness of trial due to their long history of employment in the legal system. In the late 1980s, the Supreme Court in *Batson v. Kentucky* ruled the exclusion of jurors solely on the basis of their race to be unconstitutional and established the first preventative procedural standard against dubious usage of peremptories in form of the *Batson Rule*. The effectiveness of the said standard remains questionable, for it did not successfully deal with racial discrimination during *voir dire* but only enabled to formally object to the questionable juror's strike. This paper aims to put racial discrimination within the American jury system into a historical perspective, analyze the arguments of both the supporters and the opponents of further peremptory challenge usage and consider probable alternatives that might be implemented to successfully prevent discriminatory practices within the American jury selection process.

Keywords: peremptory challenge, jury, racial discrimination, *Batson v. Kentucky*, *Batson claim*, criminal trial, *Batson Rule*

Introduction

While referring to peremptory challenges William Blackstone, a distinguished English jurist of the eighteenth century and an author of a seminal work in the field of common law theory titled *Commentaries on the Laws of England*, spoke of peremptory challenges as “a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous” (Morrison 3). The justifications for its usage at the time, which hold true in both modern and historical American contexts, included: protecting the right to exclude undesirable individuals from the jury pool, especially those towards whom one of the litigants developed a difficult-to-articulate feeling of dislike, but primarily peremptories served as a form of managing with the failed use of challenge for a cause (Morrison 11). However, Blackstone himself did also recognize the vagueness of those premises and the dangers they might pose while used carelessly. Despite the praise, he pointed out the arbitrary nature of peremptory challenges which usage depends mostly on the whim of one of the trial’s litigants (Hoffman 812). This disparity between theory and practice is especially well visible during the American voir dire. Peremptories appear to be a viable tool for assembling the impartial jury, although there were many instances of their questionable usage. The notorious striking of prospective jurors from particular minority groups proved it to be an actual threat to the fairness of the trial. In fact, peremptory challenges became a smokescreen for hiding discriminatory practices in the courtroom. Oftentimes the true reasons behind a litigant’s decision to strike a prospective juror are rooted mainly in stereotypes about a given minority group rather than based on actual conviction of hidden bias. With peremptories being embedded so deeply into both the American legal practice and tradition it became almost impossible to successfully eliminate the risk they pose, not to mention the abolition of their usage. Discussion on the significance of the peremptory challenge for the legal procedure became a polarizing issue in the United States but did not prompt any efforts to suggest nor implement substantive changes in order to curb discriminatory practices during the jury selection process other than the Batson Rule.

American Jury Composition in the Historical Overview

Although Founding Fathers were under the strong influence of the English common law while developing the new nation’s legal frames, they rejected regulations perceived as imperialistic, therefore unsuitable for the newly developing republic. The right to trial by jury was among few deemed as fundamental to secure a democratic and properly functioning society that values, above all, justice and liberty. The Declaration of Independence of 1776 as one of the grievances against the British King specified depriving colonists of the right to trial by jury (National Archives). During the 1789 Constitutional Convention in Philadelphia, the need to constitutionally secure the said right was supported by both the federalists and anti-federalists. Ultimately, the right to trial by jury was – and still is – expressed three times in the Constitution: Article III, section 2, and 6th and 7th Amendments (Alschuler 870-871).

At the early stage of the American statehood, the right to serve as a juror was strictly interlinked with the so-called property-holding requirement, therefore at the

time only a few could enjoy the said right. The Federal Judiciary Act of 1789 delegated state authorities to define its requirements for being qualified to serve as a juror. Although the then procedures for selecting a jury slightly differed between jurisdictions, they all had one in common – the right to sit on the jury was oftentimes connected with being eligible to vote, therefore former prospective jurors were predominantly white, property-holding men. Women, Afro-Americans, and even white unpropertied men were considered as not qualified to sit on the jury until they acquired voting rights (Alschuler 877-879). The motives behind the exclusion of Afro-Americans from the public sphere were of course much more complex. Due to the period of slavery, its societal implications, and the long history of persecution imposed through Jim Crow Laws, Black men and women were successively excluded from jury service for most of the American history. It was even viewed as controversial to have a Black person as a witness during criminal trials (Marder 70). The first anti-discrimination regulations were implemented after the Civil War. Both the 14th and the 15th Amendments to the U.S. Constitution served as a significant breakthrough in the field of civil rights. However, regarding the jury institution, the most federal regulation seems to be the Civil Rights Act of 1875 which formally prohibited racial discrimination during the jury selection procedure (Alschuler 885-886). Yet, deeply rooted prejudices, fueled by racial segregation, caused the exclusion of African Americans from jury service to persist. It was a common practice to have Black people formally deprived of the right to serve as jurors still in the 20th century (King 54-55). This harmful precedent was legitimized under the 1880 Supreme Court's decision in *Strauder v. Virginia*. While acknowledging the unconstitutionality of discrimination based on race, the Court made it possible to confine the selection to males and people of certain ages, educational qualifications, or a freeholder status. The possibility of establishing stringent requirements at the state level made jury selection more exclusive, hence formally inaccessible for Black people throughout most of the American history (Jonakait 115).

Even after the legislative achievements of the 1960s civil rights movement which put a formal end to racial segregation and discrimination, Black people dealt with the residues of racist policies and this situation continues. For example, in Louisiana state courts Black communities are still systematically underrepresented in the jury pools. Such disparity is believed to be statistically impossible, therefore its roots are rather the result of intentional actions carried out by the state's authorities (Aiello). Although Louisiana's Eastern District modified its rules for selecting jury candidates by including driver's licenses, and not only referring to the voter's registration data, it refused to include identification cards as an additional certificate of potential candidates (Simerman). Such cards oftentimes remain as a primary identification document for underprivileged community members, many of whom belong to minorities and they simply cannot afford a car. State officials, as one of the reasons for such troubling underrepresentation of minority groups, point to their high mistrust of the government that supposedly keeps them from registering as voters (Aiello). Remains of racist policies, which seem to neglect issues of economic disadvantage or historically motivated civic disengagement, are something that should be addressed rather than ignored or deemed inevitable. This example shows how deeply institutional racism pervaded the American justice system, consistently depriving Black people of a chance to actively engage in their civic duties. Having fewer minority

group members within the jury automatically makes the peremptory challenge even more dangerous, for it can almost guarantee an outcome in form of an all-white jury.

History of the Peremptory Challenge

The origins of peremptory challenges can be traced back to medieval England when trial by ordeal were rejected as a way of proving one's guilt or innocence. That is when the concept of the jury started to gain momentum and began forming into the contemporarily known sworn body of people convened to render a verdict based on the presented facts of the case (Hoffman 819). Simultaneously, the procedures of selecting prospective jurors and the set of expected qualifications started to crystallize. It is believed that the prototype of modern-day exclusion of jurors without stating a particular reason was the hybrid of two contemporarily separate provisions: the peremptory challenge and the challenge for a cause. The reason behind such simplification can be attributed to the fact that the population at the time was significantly dispersed and people living within a given community knew each other well. Therefore, the exclusion of a prospective juror without stating a particular reason might be simply pragmatic in its nature – litigants might have felt no need to give explanations assuming that in small communities such reasons seemed obvious. It means that one person's lack of qualifications to sit on the jury was a piece of common knowledge. The main difference between the historical and modern purpose of the discussed provision is rather subtle and lies mostly within its function. In England, during Middle Ages, striking jurors without giving a specific reason was similar to the present-day challenge for a cause – for it was used towards those people whose bias had been already exposed or constituted simply a well-known fact within a community. It was not a preventative tool based only on a suspicion of bias as it is today.

The royal authority serving as a prosecutor was believed to be infallible and hence had at its disposal an unlimited number of peremptory challenges, whereas the defense was entitled to strike only up to thirty-five jurors without stating a particular reason. These numbers started to decrease over time. Interestingly, litigants in England did not use such prerogatives eagerly – in the span of a few centuries they used them rather rarely. In the 1980s, after a series of controversial trials during which the potential for abuse arising from peremptories was exposed, The British Parliament decided to abolish the further usage of this provision (Hoffman 820-822). Meanwhile, in the United States, peremptory challenges flourished, permanently embedding into the American legal practice. Although peremptories were not the subject of the Founding Fathers' constitutional debate, challenges for a cause appeared in a draft of the Fourth Amendment to the Constitution. Eventually, they were not included in the ratified text of the Constitution, but the fact that this provision was considered to become a constitutionally protected right is significant. It was omitted in the final document due to the conviction that there was simply no need to additionally highlight its importance as the obvious rule. According to James Madison himself, such a provision was inextricably intertwined with the concept of the impartial jury (Hoffman 824). But is it truly the crucial provision for the jury selection process?

The Peremptory Challenge in the United States

The number of peremptory strikes that each side was entitled to slightly changed over the years and remains today ununified on state levels. Therefore, it is almost impossible to determine a universal pattern of its use from a historical perspective. Nevertheless, the use of peremptory challenges in the United States was more frequent than in England. The fact that peremptories were much more well-received in the American legal practice supports their continuous usage during the *voir dire* up to this day. However, what needs to be emphasized is the fact that peremptories are not a constitutionally rooted legal tool. The right to use peremptories was not explicitly provided by any legal document highly situated in the hierarchy of American norms – taking into account both the historical context and the English perspective. Its importance for the jury selection process was based solely on a custom specific to the Anglo-Saxon legal tradition, and this situation continues. Indications in state legislation are limited only to specifying the number of strikes assigned to each of the trial's litigants. Despite that fact, peremptory challenges are perceived as a crucial component of the American *voir dire*, enabling compliance with the requirement of jury impartiality, and helping to obtain the most favorable jury composition for a particular case. Legitimation of the peremptory challenge was accomplished through the cultivation of legal tradition rather than by legislative means. This instance serves as a perfect example of how oftentimes it is the historical meaning that supports the usage of a given practice rather than some actual functionality reaching beyond legal frames.

Nowadays, those who support further usage of peremptory challenges in the United States point mainly to their entrenchment within the American legal tradition. Among the supporters was the Associate Justice of the Supreme Court from 1975 to 2010 – John Paul Stevens. He manifested great commitment to preserving the peremptory challenge which supposedly reflects both the lawyer's respect for maintaining a useful litigation tool and the judge's regard for preserving legal traditions (Marder 1684). Due to the adversarial nature of American criminal trials, majority of trial lawyers also view peremptories as a crucial tool in obtaining the most favorable jury possible and winning the case. It is the strength of the arguments presented by both sides that matters the most, and as long as in theory litigants ought to select the most objective candidates for jurors, the practice shows that they search mostly for those whose opinions would align with the presented line of argumentation. Peremptories create among litigants, including the defendant, a sense of control over the jury selection by serving as a form of remedy for failed challenges for a cause (Marder 1685). They strengthen the idea of a fair trial where the verdict is obtained by a jury free of those deemed as "undesirable" (Morrison 12). Oftentimes peremptories are viewed as the main tool supporting the jury's impartiality requirement. The Supreme Court of the United States in *Swain v. Alabama* claimed them to be the key legal tool for ensuring the impartiality of the jury by making it possible for the lawyers to select people free from any bias and able to render a fair verdict based on presented facts. However, this argument is easy to rebut, especially having in mind the actual aim which guides the litigants through jury selection. Their main goal is to win a case, therefore obtaining the most favorable jury possible (Morrison 12). A lawyer's decision to strike a prospective juror without

providing an explanation is more often based on the shadow of suspicion that this particular person might be more sympathetic to the other party's line of argumentation rather than on the certainty of one's bias. Therefore, the impartiality requirement considering the jury selection seems to be a smokescreen for the true intentions of the litigants, not a firm legal guideline. Thus, it is safe to say that the opinion of the peremptory challenge supporters is based primarily on theoretical assumptions rather than a procedural practice that could expose the numerous dysfunctions of peremptories. Both the Justice Thurgood Marshall and Justice David H. Souter pointed to the fact that "to 'presume' that peremptories are exercised in a permissible manner is to turn a blind eye to the history of this practice as it has been highlighted in Supreme Court cases from *Swain v. Alabama* to *Batson* and now in recent cases *Johnson v. California* and *Miller-El*" (N.S. Marder). It means that believing in fairness and safeguarding against the bias of this legal tool is simply an unrealistic approach to the matter (Marder 1687).

Opponents of the further usage of peremptory challenges during the American *voir dire* seem to be divided over alternative solutions, but what they all share is a firm belief in defectiveness and a tendency to strengthen racist practices within the legal system caused by the said tool. The vast majority of the opponents are of the opinion that the United States should follow in the footsteps of Great Britain and abandon the further usage of peremptories. Amongst advocates of this concept was the Supreme Court Justice Thurgood Marshall who believed that the practice of excluding Black prospective jurors through peremptories became not only common but also notorious and that the anti-discrimination standard in form of the *Batson Rule* "will not end the racial discrimination that peremptories inject into the jury selection process" (*Batson v. Kentucky*). He deemed any attempts of altering the peremptories by constituting anti-discriminatory standards as insufficient and destined to fail. The need to establish such standards is considered to be the main proof of the peremptory challenge's faultiness and, by default, the admitting that racial discrimination within the American justice system exists. The *Batson Rule* seems to do nothing else than only create the appearance of dealing with the ongoing problem via implementing procedural changes. However, the *Batson* challenge is perceived as a tool creating the platform for those who may fall victim to racial discrimination by enabling them to raise a claim against the doubtful peremptory strike made by an opposing party. Therefore, minorities gained a voice of which they have been deprived so far (Herman 1813).

Batson v. Kentucky: Introducing an Anti-Discrimination Standard

Up to this point the only direct action taken towards curbing the dangers that peremptories pose, meaning discriminatory practices employed by the litigants, was the establishment of the *Batson Rule* by the Supreme Court of the United States in its landmark decision *Batson v. Kentucky*. The case of James Kirkland *Batson* proved to be a turning point, with a direct impact on the further usage of peremptory challenges (Price 1). In 1981, this Black man was indicted in the district court for Jefferson County, Kentucky on charges of second-degree burglary and receipt

of stolen goods. During the voir dire procedure, the prosecutor, using a peremptory challenge eliminated all Black persons from the pool of potential jurors. Under the provisions of the law in effect at the time, he could strike six potential jurors without giving a specific reason (*Batson v. Kentucky* 83). Consequently, not a single minority representative sat on the sworn panel. The defense, at the defendant's request, filed a motion questioning the objectivity of the jury thus completed, pointing to the probability of discrimination on the basis of race. However, the judge presiding over the proceedings found no violation of the law, stating that the requirement of representativeness applies to a group of potential jurors (a jury venire) and not to the jury itself, which is to decide the case. The jury, thus completed, found James Kirkland Batson guilty on all the charges and sentenced him to twenty years in prison (Brief for Petitioner, at 2). The Supreme Court held in its ruling that peremptory challenges used to exclude one or more prospective jurors from the pool, solely on the basis of their race, violate the constitutional rights of the defendant (Sixth Amendment right to an impartial jury and Fourteenth Amendment Equal Protection Clause). Therefore, the Batson Rule was established. It took the form of a three-step test and enabled one party to raise an objection towards the validity of a peremptory challenge whenever the suspicion of intentional juror exclusion on the basis of candidates belonging to a given minority group arises. The first step of a newly set standard requires the objecting party to establish prima facie by providing detailed evidence that a particular strike might have been based on one's race. It is required from the objecting party to demonstrate the grounds for such assumptions, for example by stating the fact that the other party successively eliminated representatives of a certain group from the jury pool, or that thorough questions were not asked during the voir dire to people later excluded via peremptory challenges, or that peremptories were used towards representatives of a certain minority group but yet representatives of other groups with shared character traits were struck from the pool (*Cabrera and Sundquist* 1-4). During the second step, once the filed objection and the arguments justifying it are acknowledged by the presiding judge, the burden shifts to the opposing party against whom Batson claim was raised. This party is obliged to present a neutral argument/justification for striking given individuals from the jury pool. Presenting at least one reason, which shows there was no discriminatory intent, is considered to be sufficient to rebut the initiating party's prima facie (*Cabrera and Sundquist* 5-6). Within the third step, the judge presiding over the case must decide whether the delivered justification meets the neutrality requirement and whether the party raising a claim successfully proved that racial discrimination occurred.

If the provided arguments are accepted as neutral, then the objecting party can seek to undermine such a decision by trying to prove the falsity and pretextuality of the reasons justifying strikes. If the Batson claim is denied then the strike is upheld, which later might create the ground for filing an appeal due to prosecutorial misconduct. When the Batson claim is granted, it has the effect of placing a previously eliminated person back on the jury (*Cabrera and Sundquist* 6-8). Over time, the Batson Challenge expanded to civil proceedings (*Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 1991), but also to protection from discrimination on the basis of one's gender (*J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127, 1994), or ethnicity (*Hernandez v. New York*, 500 U.S. 352, 1991).

A Problem with the Batson Challenge

The attempt to limit discriminatory usage of the peremptories towards minority groups through the establishment of the procedural standard in form of the Batson Challenge turned out to be insufficient. There are still ways to exclude with impunity prospective jurors deemed as “undesirable” due to the color of their skin. Anyway, shortly after *Batson v. Kentucky*, instructional programs were launched, teaching rookie prosecutors how to credibly present neutral arguments to fend off the Batson claim. These programs were carried out, among others, in North Carolina and Texas, and mainly came down to the distribution of leaflets containing a list of reasons which could be considered to meet the criteria of neutrality. The age, educational degree, or body language of a prospective juror were amongst provided reasons in question. Although one of the most controversial materials serving as evidence that many litigants aim to preserve discriminatory practices during the voir dire is a lecture given in 1987, just a year after *Batson v. Kentucky* was ruled, by the then assistant district attorney Jack McMahan. He presented various methods of effective elimination from the jury pool those deemed as undesirable, meaning persons who could contribute to reaching an unfavorable verdict in a given case. Moreover, he described the institution of the jury as the most important component of any criminal trial, which does not depart far from the truth, for it is primarily the factor deciding at whose side the scales of justice will be tipped. According to McMahan’s view, Black persons, coming from economically challenged neighborhoods, educated Afro-Americans and women are less likely to vote for conviction. Therefore, with regard to representatives of these groups, he recommended asking a series of additional questions in order to detect any hint of bias or lack of qualifications which might provide a basis for using challenge for a cause or rebutting Batson claim (Edelman). The supposed remedy for an arbitrary and potentially abusive tool in form of a peremptory challenge seems to carry the same traits as it is obvious that the precedent established in *Batson v. Kentucky* turned out to be a failure. The set standard rather ignores the eventuality of acknowledging a doubtful argument as sufficient. The final decision on whether provided reasoning meets the neutrality requirement and therefore whether a strike is to be upheld belongs to one person – a judge leading the case. Oftentimes the absurdity of provided arguments suggests different motives for excluding a prospective juror other than those which were articulated. The exposed defaults prove how important it is for the litigants to consider the race factor during the jury selection process. Striking prospective jurors without stating a particular reason carries great potential for abuse simply because it is almost impossible to assess the true intention for its use. Therefore, litigants against whom Batson claim was raised can provide almost any explanation as long as their arguments stay “neutral.” It means that they must simply state a reason which is not based on race, ethnicity, religion, or sex of the prospective juror. Sometimes even the most bizarre arguments, such as having facial hair (for it makes one look suspicious), can be ruled by a judge leading the case as sufficient to uphold the strike (*Purkett v. Elm*). The use of peremptory challenges during the voir dire perpetuates racial stereotypes, it almost feeds these beliefs, and deepens social divisions instead of curbing them. Such practices seem especially worrying in the area of justice, as they often lead to dishonesty and consolidation of society’s prejudice against minority groups.

If Not Batson, Then What?

The Batson Challenge seems to be a hollow guarantee of acknowledging and safeguarding equal protection of the laws within the American justice system. Its establishment did not make the system more inclusive or free of discriminatory practices. What is more, the claim raised on the basis of Batson can be easily rebutted due to the difficulty in proving a discriminatory motive/intent. Ultimately, the Batson Rule has more opponents rather than supporters. Although reasons for its faultiness should be given deeper thought. The source of the problem is the peremptory challenge itself – a tool that enables to unnoticeably blend of racial factors into the jury selection process. Therefore, it seems that the only solution would be to put a definite end to this arbitrary way of selecting jurors since it does nothing more but creates ground for malpractice and poses a danger to the trial's fairness, including pretrial one. Among postulates on dealing with racial discrimination, many voices are suggesting the discontinuation of negative juror selection in favor of affirmative procedure. The sworn-in jury is a product of the consecutive elimination of prospective jurors up to the point when twelve people are remaining. Whereas affirmative selection would be based on choosing the required number of jurors from the pool of qualified people, including both racial and ethnic minorities to meet the requirement that not only the jury pool be representative but also the bench itself (Fukurai and Krooth 113). Such a way of conducting the jury selection could ensure a fairer trial, on the procedural level and in the courtroom, and positively affect the assessment of a reached verdict in the public's eye (Cohn and Sherwood 329). Because, at least for now, discussed ideas remain purely in the theoretical sphere and it is not possible to determine their accuracy. Of course, one must admit that traces of racism have prevailed in the United States and they actively deepen social divisions and inequalities even nowadays. In terms of the justice system, racist attitudes are much more dangerous since piling up prejudices could be (and is) used by litigants to manipulate both the jury's composition and opinion. Therefore, the body meant to be an important component of the legal system, representing the society, and rendering an unbiased opinion based on the presented facts of the case, is somehow tainted with the possibility of implementing discriminatory practices via peremptory challenges.

Summary

Systemic racism within the structures of the American justice system should be of particular concern because the trial litigants, who should protect citizens' equal rights and just serve them, often use, incite, and preserve harmful stereotypes during the jury selection process to reach a desired verdict. When the ability to make an objective decision based on the presented facts ceases to be the main determinant while selecting a jury, and the color of one's skin moves to the forefront instead, the Sixth Amendment's "right to a speedy and public trial by an impartial jury" becomes nothing but an empty phrase. Any sign of racial discrimination manifested during criminal procedures strongly contradicts the rule of equality before the law and decreases society's trust in public institutions, especially the judiciary. History

made it clear that peremptory challenges provoke great potential for abuse, therefore it should be thoroughly analyzed whether they fulfill theoretical assumptions or are merely an outdated legal relic. Racial discrimination within the American justice system only deepens social divisions and diminishes the public's trust in institutions, almost benefiting from racial stereotypes. The issue of making the jury more inclusive by increasing the participation of minority groups gains importance in cases dealing indirectly with race relations – for example when a Black defendant is sued for the murder of a white person, or the other way around. In such a case, the focus oftentimes shifts from the crime itself to the skin color of all of the involved (victim, defendant, jury). Having in mind the history of racial persecution in the United States, the litigation during which a Black person is to be tried before an all-white jury seems really grotesque (Fukurai and Krooth 1-4). Unfortunately, such situations continue to occur. In 2019, the Supreme Court examined the case of *Flowers v. Mississippi*, regarding the systematic exclusion of Black people from the jury pool via peremptory challenges by a white prosecutor during six separate trials that took place in the span of almost twenty years. As long as practices which exclude minorities from active participation in the public life and disengage them from their civic duties are cultivated, the idea of equality, especially before the law, in the United States will remain a fiction. The criminal trial is bound to be fair only when the litigants will cease to view race as a factor that determines one's ability to render an objective decision and when the harmful tools enabling discrimination in the courtroom will be eradicated. Contemporarily, racism within the structures of the American justice system takes on a more indirect form than in the previous centuries. Nevertheless, it still poses a serious problem but the efforts to curb it are of inconsistent and superficial character. Due to this situation, a grim conclusion arises that the manifestations of racial discrimination serve as an ironic contrast to the set of praised national values. Those who should promote and safeguard equality under the law are often the same ones who uphold racial stereotyping. In this case, the United States seems to be at odds with the rule "practice what you preach."

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