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THE PURSUIT OF PERFECTION: JURY SELECTION'S
CONSTITUTIONAL PROMISE

MANDY ROTH

The Bill of Rights is intended to protect all citizens' rights and liberties. This includes the “right to a speedy and public trial, by an impartial jury” as stated by the Sixth Amendment. The United States Constitution is viewed as the “fundamental law” of the country. In order to maintain this reputation, the Constitution must be fairly and consistently applied. However, the current process of selecting jurors to uphold the Sixth Amendment’s promise of an “impartial jury” has several weaknesses. These shortcomings in the jury selection process, voir dire, may ultimately jeopardize an individual’s right to a fair trial. These weaknesses include the inadequacy of safeguards against discrimination in jury selection and the difficulty in ensuring that the jury is made up of a “fair cross section of the community.” Reform of the jury selection process is necessary to ensure that the system is continually progressing to achieve the trial mandated by the Constitution.

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1 The first ten amendments to the Constitution of the United States.
2 U.S. CONST. amend. VI.
I. INTERPRETATION OF THE SIXTH AMENDMENT

The Sixth Amendment guarantees an “impartial jury” and provides the implication for a “jury of peers.” However, the exact meaning of these terms was ambiguous until the Supreme Court defined them in *Lockhart v. McCree*:

The Constitution presupposes that a jury selected from a fair cross section of the community is impartial, regardless of the mix of individual viewpoints actually represented on the jury, so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case.6

Therefore, the Supreme Court has interpreted the word “impartial” to mean people capable of making informed decisions based on the law and facts of the case rather than previous experiences and events. Clearly, the Supreme Court does not consider a jury biased because its members have different viewpoints. It is inevitable that each juror will have previously established opinions, but the controversy is whether or not those opinions can keep the collective jury from being impartial. While this definition is considered law as far as the Supreme Court interprets it, the best way to ensure that the jurors can impartially “apply the law to the facts of the particular case” is still vague.

Additionally, an “impartial jury” is composed of the defendant’s peers. Although found nowhere in the Constitution, the inclusion of the term “jury of peers” was interpreted by the Supreme Court in *Batson v. Kentucky*. This “jury of peers” is intended to protect the accused from racial bias and other forms of discrimination. *Batson* defines the peers of the indicted as his or her “neighbors, fellows, associates, persons having the same legal status in society as that which he holds.”7 The jury of peers assists the accused’s rights to

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5 U.S. CONST. amend. VI.
6 *Lockhart*, 476 U.S. at 184.
be adequately represented, but voir dire is still applied to eliminate obvious biases.

II. Voir dire

"During jury selection, the [attorneys] . . . will question a pool of potential jurors generally and as to matters pertaining to the particular case—including personal ideological predispositions or life experiences that may pertain to the case."8 This process, called voir dire, is intended by the law to increase neutrality by uncovering the biases of potential panel members so that they can be exempt from serving on the jury. After questioning the potential jurors, lawyers have the ability to exercise several tactics to eliminate jurors who they feel would not be objective to the case.

Lawyers eliminate jurors through challenges for cause or peremptory challenges. Challenges for cause are unlimited for both the defense and the prosecution. Typically, these challenges would prove that there is a blood relationship between one party in the case and the potential juror, a money interest in the outcome, or an acknowledged prejudice toward either party.9 Peremptory challenges, on the other hand, need no explanation or approval at all. Even though their number of usage is limited to each party, they are still a guarantee to exclude a juror from serving on the panel.

III. Problems with Jury Selection Methods

The Jury selection system has never been flawless. Although the Magna Carta10 established the principle that it is “the right and duty

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10 Document adopted by the British Parliament in 1215, set the precedent for the English and then American constitutional law incorporating the jury system.
of juries to judge what are facts, what is the law, and what was the moral intent of the accused,” the current Constitution has not developed an infallible method to carry this out, even though attempts have been made. Alexander Hamilton, in an effort to influence American states to ratify the U.S. Constitution, asserts in Federalist Paper number 83 that the jury is a “valuable safeguard to liberty” and acts as “the palladium of free government” because the right to a trial by a jury essentially prevents authoritarian government practices by placing the ultimate decision of the accused in the hands of the people. Thus, the correct intent of the jury was intact from the onset of the United States' “fundamental law.” However, constant reforms have been necessary throughout the jury’s history to strive for the achievement of this goal.

The Sixth Amendment’s general wording has allowed for the jury to evolve over time and for the courts to interpret its working process. A jury can have the original greater number of members that define a grand jury, or can now have fewer members making a petit jury. The actual people allowed to serve have also changed over time; originally only white male citizens who owned property were able to serve, and now the service conditions include all adult citizens regardless of race and gender.

Furthermore, the establishment of the Seventh Amendment paved the road for Federal Rule of Civil Procedure number 47 in 1937. This Federal Rule provided the outlines for current voir dire practices in attempts to further guarantee a fair trial. While it is true that the purpose behind the jury system is to improve the fairness of the U.S. Constitution and the judicial system, it functions better in theory than in reality.

The legal intent of voir dire is to screen potential jurors of their biases towards the case. However, often the voir dire system can be

11 LYSANDER SPOONER, AN ESSAY ON TRIAL BY JURY 5 (De Capo 1971) (1852).
12 THE FEDERALIST No. 83 (Alexander Hamilton).
13 Supra note 3.
14 See Mousseau, supra note 9, at 13.
manipulated to anticipate a positive outcome. In *Mastering Voir Dire and Jury Selection*, Jeffrey T. Frederick states, “The goal of this book is to promote the skills needed to be successful in the area of voir dire and jury selection. It is through the sharpening of these skills that lawyers take a major step in improving the chances of a favorable verdict at trial.” 16 Attorneys may be well aware that the “objective man does not exist,” so they look for the man that will be most likely to vote in his or her favor when serving as a juror. 17 Dr. Bob Ridge, a psychology professor at Brigham Young University and experienced jury consultant commented, “I don’t believe you will ever find a lawyer who’s going to conduct voir dire without looking for a juror who will help him or her; it’s not going to happen.” 18

Learned Hand, a federal judge who sat on the Court of Appeals in the 1950s, describes the voir dire process as a “clumsy and imperfect way of detecting suppressed emotional commitments to which all of us are to some extent subject, unconsciously or subconsciously.” 19 He implies that by no means of jury selection can the inherent biases of human nature be detected. In Miami, certain lawyers prefer people who worked for either Burger King or Eastern Airlines because these companies promoted conformity. These people “would produce the perfect jury” in the eyes of these Miami lawyers. 20 They would not be a panel of “peers, but of pure blandness and homogeneity.” 21

The importance of a thorough and fair voir dire process is illustrated in the case of O.J. Simpson, who on October 3, 2008, was found guilty on twelve counts of criminal activity, including kidnapping. However, Simpson’s attorneys claim that voir dire resulted in a

17 THANE ROSENBAUM, THE MYTH OF MORAL JUSTICE; WHY OUR LEGAL SYSTEM FAILS TO DO WHAT’S RIGHT 158 (HarperCollins Inc. 2005).
18 Interview with Dr. Bob Ridge, Psychology Professor, BYU Psychology Department, in Provo, Utah (Nov. 19, 2008).
19 Id. at 159.
20 ROSENBAUM, supra note 17, at 146.
21 Id.
jury biased against their client. According to the defense, African Americans were intentionally excluded from the jury and attorneys were prevented from “pressing other prospective jurors on their opinions of [Simpson].” There were no African Americans on the jury, and several members of the jury admitted in a pre-service survey that they “disagreed with the 1995 Simpson murder verdict.”

Due to the popularity of the earlier, infamous O.J. Simpson case, finding jurors without former knowledge or opinions of the accused was immensely difficult; “a common joke revolving the case went something like, ‘Knock knock.’ ‘Who’s there?’ ‘O.J. Simpson.’ ‘O.J. Simpson who?’ ‘Ok, you’re serving on the panel.’” Though Simpson’s case is clearly atypical, it points to troubling issues within the legal system, specifically to the lack of impartiality of juries and the potential for the accused to receive an unfair trial. Simpson’s true guilt or innocence aside, his trial shows that the reality of an individual receiving his or her right to a trial “by an impartial jury” is not always certain.

The screening of jurors to eliminate obviously biased persons from serving on the panel is essential, yet needs to be reformed. The current voir dire process has many limitations and inadequacies that must be rectified. The first of these can be seen through a misuse of the peremptory challenge. Secondly, challenges for cause also have a history of abuse. Lastly, the difficulty in ensuring that a proper cross section of the community serves on the jury is another flaw in the voir dire system.


23 Id.

24 Id.

25 Ridge, supra note 18.

26 U.S. CONST., supra note 2.
Peremptory challenges are designed to be used without reason and to not be “subject to the court’s control.” Consequently, abuse of the peremptory challenge for the purpose of discrimination is inevitable. In 1985, James Batson, an African American man, appealed his conviction to the U.S. Supreme Court. He claimed that prosecutors used the peremptory challenge to purposely eliminate other blacks from the jury pool, resulting in a jury that was not “drawn from a cross-section of the community.” Therefore, he felt that his rights under the Sixth Amendment had been violated. The Kentucky Supreme Court denied his appeal, citing that the defendant did not meet the standard of evidence needed to prove purposeful discriminatory use of peremptory challenges as established in Swain v. Alabama. The U.S. Supreme Court, however, ruled that the state’s use of peremptory challenges had indeed violated Batson’s rights, and the conviction was overturned. The Batson decision overturned Swain v. Alabama, making the Swain Standard invalid. It also established a new standard precedent when determining whether or not a peremptory challenge is used in a discriminatory manner.

Though an attorney’s ability to make a Batson challenge is supposed to be a safeguard against the misuse of the peremptory challenge, the standards that attorneys must meet to prove misuse are


29 In Swain vs. Alabama, Swain, an African American, argued that his rights under the Fourteenth Amendment had been infringed because the prosecution had used the peremptory challenge to strike all African Americans from the jury pool in his criminal case.


31 The Supreme Court’s ruling which decided that the free use of the peremptory challenge may be limited if it is proven to violate the Fourteenth Amendment.
too high in order to ensure that there will be no discrimination. To make a Batson challenge, a party must first be able to show, prima facie, that the peremptory challenges of the other party are systematically and purposely excluding jurors of a certain type from jury service.\(^{32}\) In order to defend its use of the peremptory challenge, the opposing party must make an explanation for their challenge of the jurors in question that cannot be based on race alone. The necessary justifications for a peremptory challenge can be as miniscule and unsubstantial as perceptions “based upon bare looks and gestures, hunches, and even arbitrary reasons.”\(^{33}\) The court then decides if the defendant’s claim is legitimate.\(^{34}\) Because the standard of acceptability for a prosecuting attorney to prove a non-racial motivation for peremptory challenges is low when compared to the burden of proof faced by the defense, the process itself is unfairly stacked against the defense. Such a situation overburdens the defense and, in cases such as capital offenses when one’s life is on the line, the burden is overwhelming and the defendant’s right to a truly fair trial is compromised.\(^{35}\)

The case of *Miller-El v. Dretke* demonstrates some of the issues surrounding the misuse of peremptory challenges and the difficulties of rectifying them through the Batson challenge alone:

When Dallas County prosecutors used peremptory strikes against 10 of the 11 qualified black venire members during jury selection for petitioner Miller-El’s capital murder trial, he objected, claiming that the strikes were based on race and could not be presumed legitimate since the District Attorney’s Office had a history of excluding blacks from criminal juries.\(^{36}\)

\(^{32}\) See *Batson*, 476 U.S. at 93–95.
\(^{34}\) See *Id.* at 98.
Despite evidence supporting his claim, lower courts repeatedly denied his appeal until it reached the U.S. Supreme Court. The Supreme Court ruled that there were legitimate grounds for a Batson challenge because discrimination did occur thus reversing the previous decisions. This case confirms that the discriminatory use of peremptory challenges does happen, presenting the need for the Batson challenge. However, the fact that Miller-El’s appeal had to go all the way to the U.S. Supreme Court before it was recognized as valid shows that even legitimate Batson challenges may not be effective in rectifying discrimination in jury selection. The validity of a Batson challenge will usually be determined by the trial court or an appeals court because most cases will not reach the Supreme Court. The failure of the lower courts to accurately rule on the validity of the Miller-El’s Batson challenge casts doubt on their ability to recognize and correctly decide instances where peremptory challenges are used to racially discriminate.

In addition to the procedural difficulties of successfully challenging a peremptory challenge, the Batson challenge generally only protects jurors from being dismissed simply for race, gender, or ethnicity. Therefore, use of the peremptory challenge to dismiss jurors on other grounds, discriminatory or not, is generally acceptable. Justice Stephen Breyer, commenting on the discriminatory use of peremptory challenges, said that in order to preserve the integrity of the impartial jury, it may be “necessary to reconsider Batson’s test and the peremptory challenge system as a whole.” Justice Thurgood Marshall has also said that the only way to completely eliminate the discrimination caused by peremptory challenges is to ban them entirely.

B. CHALLENGES FOR CAUSE

In regards to challenges for cause, Lisa Blue, in her book *Blue’s Guide to Jury Selection*, advises her attorney readers to view this

37 See id.
38 Id. at 274.
challenge as invaluable. “As you identify jurors who are bad for your case, your goal is to get as many of them stricken for cause as possible,” she recommends. “Peremptory strikes are precious, and you will never have enough of them. . . . Learning to get jurors stricken for cause is one of the most valuable skills a lawyer can have.”

Nevertheless, often a judge errs by refusing to strike a juror for cause when clear evidence exists that should exempt that juror. Such an error forces defendants to exercise their peremptory challenges, which are limited, to strike the juror. In State v. Doleszny, the court reversed the conviction of the defendant on charges of sexual assault on a child because the judge of the appellate court had refused to strike a juror who doubted his own impartiality. The juror in question doubted that he could be impartial because he knew a witness—a doctor that had examined the victim after the crime. The judge refused to strike this and another juror for cause and so the defendant was forced to exhaust his peremptory challenges.

Similar cases exist in which judges have inappropriately forced defendants to exercise peremptory challenges to strike jurors who doubt their own impartiality because they have a blood relation with a law enforcement official related to the case. People v. Macrander granted a new trial to the defendant because he was unable to excuse a juror, having exhausted a peremptory challenge on a juror whose son was a deputy district attorney in the area where the trial was to be held.

The potential for judges to erroneously refuse to strike jurors for cause is not the only problem with challenges for cause. While it is logical that lawyers would go to great lengths to protect the rights of their clients, it follows that they might try to strike jurors based on hunches or questionable behavior of prospective jurors. In Batson v. Kentucky, Justice Marshall expresses concerns that lawyers abuse challenges for cause:


How is the court to treat a prosecutor’s statement that he
struck a juror because the juror had a son about the same age
as the defendant, or seemed “uncommunicative,” or “never
cracked a smile” and, therefore “did not possess the sensitiv-
ities necessary to realistically look at the issues and decide
the facts in this case”? If such easily generated explanations
are sufficient to discharge the prosecutor’s obligation to jus-
tify his strikes on nonracial grounds, then the protection
erected by the Court today may be illusory.43

Challenges for cause are necessary to protect the rights of the de-
fendant, but lawyers should not use them recklessly to construct a
jury in favor of their clients. An impartial jury is not possible when
lawyers have arbitrarily constructed it according to their own ideals.
Challenges for cause will only produce results, however, if the judge
feels that the cause is worthy for a juror’s exemption from duty.44

C. POOL OF JURORS

Considering the Supreme Court’s interpretation of an “impartial
jury,”45 it is imperative to guarantee that a fair and equal cross sec-
tion of the community serves on the jury panel. Tocqueville wrote in
1835 that he “who punishes the criminal is therefore the real master
of society.”46 It is essential that this “master of society” is not limited
to certain citizens of the country but represents the nation as a whole
through a proper cross section of the community. However, as the
current system stands, this equal representation of the community
on juries does not exist. According to Neil Vidmar, a law professor
at Duke University, the claim that our judicial system is working
is an erroneous one because “[h]ow can we say our justice system

43 Batson, 476 U.S. at 106.
44 Morris B. Hoffman, Peremptory Challenges Should Be Abolished: A Trial
46 Alexis de Tocqueville, Democracy in America 272 (J.P. Mayer ed., George
is working when we see one class of people—older, white, upper-middle-class citizens—always sitting in judgment of other classes of people?"\(^{47}\)

It is especially difficult to extract jurors from a fair cross section of the community when a case is highly publicized, whether nationally or just within the jurisdiction of the court as seen in the O.J. Simpson case.\(^{48}\) Though Simpson's case is an extreme example of the way publicity can damage the possibility of an impartial jury, less extreme examples exist. In *Irwin v. Dowd*, the Supreme Court held that the appellate court had denied the defendant the right to a fair trial because two-thirds of the jurors on the case admitted to having made decisions about the defendant's guilt before they heard any testimony.\(^{49}\) Similarly, in the case of *Sheppard v. Maxwell*, the U.S. Supreme Court found that the defendant did not have a fair trial according to the Due Process Clause of the Fourteenth Amendment because the case happened near the time of a judicial election in the area, so it received massive publicity.\(^{50}\) In all of these cases, the press implied the guilt of the defendants, which significantly biased the public, and consequently, prospective jurors. When the media biases the public, it is nearly impossible for the voir dire process to produce an impartial jury.

Not only must a fair and impartial jury be unbiased by publicity, but it must also adequately represent the community—including minorities. The Supreme Court has overturned multitudinous cases because the juries had inadequately represented minorities. In the case of *Miller-El v. Dretke*, 11 of 12 black jurors were challenged from the jury, supposedly because they were opposed to the death


penalty. However, white jurors with similar viewpoints remained on the panel. The court held that the jury selection had been discriminatory and remanded the case.\textsuperscript{51} Similarly, in the Nevada case of Williams v. State, the court dismissed the venire several times because it did not adequately represent the racial makeup of the community.\textsuperscript{52}

Another disturbing issue is that it is exceedingly simple to be excused from jury duty. Summoned jurors can be excused by proving that they are more than seventy years old, have medical difficulties, are unable to be absent from work, or even that they have no means of reaching the courthouse because they lack a working vehicle.\textsuperscript{53} A jury then becomes a very poor representation of the community, and is instead a representation of the community that can and wants to serve.\textsuperscript{54} Thus, it is apparent that in order for juries to more accurately represent the community, the judicial system must make the exemption process more difficult.

IV. PROPOSED REFORMS

Many critics of the jury system have proposed to discard the practice of peremptory challenge while others have proposed completely new ideas. Brian Stoltz, author of Rethinking the Peremptory Challenge: Letting Lawyers Enforce the Principles of Batson proposes the idea of a Peremptory Block system. This would allow attorneys from both parties to place blocks on certain jurors. Then if the opposing party were to use peremptory challenges to strike those jurors, the challenge would be void and the juror would have an automatic seat on the panel.\textsuperscript{55}

Propositions for reformations guaranteeing a "jury of peers" through an equal cross section of the community are numerous. Some courts have turned to different means to select jurors such

\textsuperscript{51} Miller-El v. Dretke, 545 U.S. 231 (2005).
\textsuperscript{52} Williams v. State, 121 Nev. 934, 936 (2005).
\textsuperscript{54} Ridge, supra note 18.
\textsuperscript{55} Stoltz, supra note 26.
as through driver’s license registrations.\textsuperscript{56} Other courts, such as in Arizona and Georgia, have taken to dividing minorities into subsets to ensure equal representation of ethnicities that serve on a panel.\textsuperscript{57} Other ideas have included affirmative selection versus the exclusive selection which is used. “Their proponents believe that, by choosing rather than striking jurors, the problems of the selection system can be mitigated.”\textsuperscript{58}

Minnesota is currently using the Hennepin County Grand Jury Method which “operates on an ad hoc basis whereby the court asks potential jurors for enough information on the jury summons to determine the juror’s race and then, after randomly selecting twenty-one grand jurors from a pool of fifty-five, examines how many of the chosen jurors are minorities.”\textsuperscript{59} If one or fewer of the selected jurors is a minority, then the two final grand jurors will be selected from a minority-only jury pool. If two or more people from the original twenty possible panel members are minorities then the final jurors are randomly selected. Courts are also increasing incentives for citizens to fulfill their court summons when it is inconvenient to do so. New York City has issued legislation to increase juror pay and compensate travel. Robert C. Walters reports that “[j]ust five years after the reforms were instituted, the public participation rate of New York jurors jumped from 12% to 37%.”\textsuperscript{60}

Many states are also converting to judge conducted voir dire as opposed to attorney conducted voir dire in an effort to increase efficiency. The judge takes less time to conduct voir dire and avoids


\textsuperscript{57} See Id. at 366.

\textsuperscript{58} Edward S. Adams & Christian J. Lane, Constructing a Jury that is both Impartial and Representative: Utilizing Cumulative Voting in Jury Selection, 73 N.Y.U. L. Rev. 703, 728 (1998).

\textsuperscript{59} Id.

asking dilatory questions that often seem irrelevant to the case. The judge is already a trained member of society in the realm of law and is expected to enter every trial with an open, impartial mind thus eliminating biases that lawyers can present. The judge should have no personal motivations to exclude jurors for any other reason than to uphold the Sixth Amendment and aim for a fair verdict. However, sociologists have discovered that during judge-conducted voir dire, potential jurors are less likely to state their true beliefs but instead what they feel the judge wants to hear. Advocates of attorney-conducted voir dire also feel that the lawyer is more sensitive to the matters of the case and the interests of the clients and therefore will be able to more thoroughly carry out the process. Also, in response to the idea that the judge’s control of voir dire increases efficiency, Fred D. Howard, a partner at Howard, Lewis & Peterson and a previous deputy county prosecutor in Utah, claims that “[t]he urge for efficiency then, can detract from our ability to effect justice, contrary to the whole underlying objective of our judicial system.”

V. CONCLUSION

What exactly should be done, then, to advance the current jury selection system? How can voir dire be made more effective and true to the constitutional promises set forth by the Sixth Amendment? People have proposed numerous reforms, as previously mentioned, yet there are pros and cons to almost every one. It is true that the standing judicial process does have the means to protect both plaintiffs and defendants from natural biases panel members may present. This is apparent through voir dire’s standard of the peremptory challenges and challenges for cause. However, the system is not completely adequate. It has flaws, and therefore cannot afford to settle at its current mediocre state. It still falls short in ensuring a trial by a completely impartial jury.


62 Id.
That is not to say that the system should give up; it is important that the jury selection methods continually strive to achieve the standards the Constitution calls for. As long as this is a goal, the actual system will continue to improve. However, the law needs to realize the current flaws in voir dire and adjust accordingly. Even if the legal system cannot guarantee a completely unprejudiced jury, it should be able to guarantee continual progress to achieve the Sixth Amendment’s promise. If the legal system comes to understand that continual reform is needed to protect citizen’s rights under the Constitution, it will be that much closer to achieving actual justice.