Black Defendant, White Jurors: The Use and Misuse of the Peremptory Challenge in the U.S. Legal System

Dana Van De Walker
Illinois Conference for Students of Political Science
April 8, 2004

Outline

I. Introduction
- A. Statistics
- B. Definition
- C. Thesis
- D. Preview

II. The History of Peremptory Challenges
- A. Ancient Rome
- B. English Common Law

III. The Theory of Challenging
- A. Arguments protecting the peremptory challenge
  1. Tradition
  2. Defendant's Rights
  3. Deliberation and hung juries
- B. Arguments against the peremptory challenge
  1. Decrease in costs and time
  2. Stereotyping and the Cross-Sectional Ideal
  3. Public Perception of the Judicial System
  4. Confidence in the Verdict

IV. A Few Pertinent Cases
- A. Batson v. Kentucky
- B. Hernandez v. New York
- C. Georgia v. McCollum

V. Current Status and Progress Being Made
- A. Summary
- B. Batson's 3-Step Process
- C. Reform

VI. Conclusion

Introduction

Over 80 million Americans alive today have been called to jury duty at some point in their lives (Henley 5). Out of these 80 million individuals, roughly 30% (or 24 million) have been eliminated from the jury selection process due to the use of peremptory challenges (5). According to Black's Law Dictionary, a peremptory challenge is a challenge that "need not be supported by any reason." Although these challenges are commonplace in today's courts, several Supreme Court cases have questioned the constitutionality of their place in the legal system. This paper will explore the history of peremptory challenges, theories behind them, a few pertinent cases, and reform progress.

The History of Peremptory Challenges

What many American do not realize is that the concept of peremptory challenges has been around since the Roman era, but controversy over the topic in America did not come about until the twentieth century (Henley 1). Under Roman law, each litigant was allowed to select 100 jurors and then strike as many as 50 people from the jury pool (1). English Common law allowed the defendant 35 peremptory challenges, while the prosecution had an unlimited amount (1). This system was alive in England until 1305 when Parliament outlawed the prosecution's right to peremptory challenges (1). It took over 600 years for Parliament to do the same with the rights to challenges for defendants in 1988 (1). The American legal system, being based on British common law, has always allowed for the use of peremptory challenges. One reasoning behind this fact is the

American tradition of challenges (6). To be exact, the reason we continue to use peremptory challenges today is that we have always used them. Many of them also note an important point: Peremptory challenges are not guaranteed by the U.S. Constitution (2).

Arguments For and Against Peremptory Challenges

Arguments supporting the peremptory challenge

As mentioned above, although the Constitution makes no note of it, the peremptory challenge has always existed in the United States (Henley 1). Thus, one of the many arguments protecting the use of peremptory challenges is that of tradition (6). Simply put, the U.S. legal system has always used peremptory challenges, so why stop now? That same question could have been asked of slavery in the mid 1800s, and I think it's safe to say most Americans today would oppose slavery, despite any "tradition."

Another argument against eliminating peremptory challenges is that it would seemingly make the challenged juror appear more important and bearing more rights than the defendant (Henley 6). It is important to note, however, that the U.S. Constitution does not label many specific rights of the defendant, compared to the equal protection rights bestowed to the jurors in the Equal Protection Clause (6). Despite not having many rights in the Constitution, defendants may still exercise their right to use challenges based on cause (6).

A third argument for the protection of peremptory challenges is that if the challenges are eliminated, the result will be longer jury deliberations and a greater

number of hung juries, or juries not unanimously deciding on a verdict (Henley 6). Many attorneys are against the elimination of peremptory challenges for this reason. Although this would result in a greater amount of time spent on cases for the judges, attorneys, and the rest of the courtroom work group (those members of the court working together on a daily basis), is it really such a bad thing? After all, increased deliberation and more hung juries would simply represent a more diverse jury, and hopefully one that better represented the demographics of the community (6). Better representation of the community may include views that are unusual and differ from traditionally accepted views, ones, which could make it difficult for the jury to come to any kind of a consensus (6). Yet, excluding these unusual views could still be classified as a type of discrimination (6).

Arguments Against the Peremptory Challenge

One of the prominent arguments for eliminating or limiting the use of peremptory challenges is that of cost and time reduction (Henley 4). Without peremptory challenges jury consultants and advisors may not be needed, saving time and money for the litigants (4). In addition, because of the fewer number of jurors being challenged, a fewer number of individuals would need to be called to jury duty (4). Most Americans dread jury duty and claim that it does nothing but create obstacles at their jobs and at home. Because of this dislike, many individuals are also willing to try just about anything to get out of jury duty. So for obvious reasons, having fewer people being called for jury duty could do nothing but improve the atmosphere and attitude of the community.

Another argument in support of eliminating peremptory challenges is the obvious stereotypical aspect of peremptory challenges (Frederick 2). Nearly all of the misuses of peremptory challenges, including the cases discussed below, are examples of discrimination, racially or otherwise. Thoughts like "All African Americans will support fellow African Americans," or "Women are too sympathetic" are the breeding grounds for discrimination in the jury selection process. What kind of views are the courts sending the public when they accept such stereotypical measures (2)? In a way, they are saying that stereotyping and discrimination are not allowed in our work places or schools, but it's okay in the judicial system. The "cross-sectional ideal" is a theory regarding diversity that is widely discussed by both the U.S. Supreme Court and the California Supreme Court (Henley 5). In short, the theory states that bias and prejudice will always be present and that the only sufficient way to deal with the two is to balance them out (5). The California Supreme Court describes the function of the ideal as being "to achieve impartiality through the interaction of the diverse beliefs and values the jurors bring from their group experiences (5)."

Discussed in the introduction was the number of Americans called for jury duty, and the number of those Americans dismissed as a result of a peremptory challenge. Studies have shown that these potential jurors often leave the courtroom with a very negative opinion of the judicial process (Henley 5). In a series of informal interviews with dismissed jurors in Los Angeles, it was found that near 95 percent felt that the current jury selection process was biased and unfair due to their experiences (5). It is reasonable to assume that with the elimination of peremptory challenges, there would be a significant change for the better in the opinions of the public towards the judicial

process and jury selection (5). Going along with this idea is the argument that the elimination of peremptory challenges would allow for the public's greater confidence and acceptance of the verdict (5). Simply put, with the elimination of the challenges, the jury would be able to better represent the demographics of the community. With his concurring opinion in the case of Batson v. Kentucky, Justice Thurgood Marshall stated "the 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 (5)."

A Few Pertinent Cases

In the last 50 years quite a few cases have emerged regarding the topic of the use of peremptory challenges. Several cases, however, have taken a forefront and are continually used today as case law. This is a look at some of those cases.

Batson v. Kentucky

This was, and continues to be, one of the most prominently talked about cases in the history of peremptory challenges. At a criminal trial in Kentucky a black man named Batson was being tried on charges of second-degree burglary. During the case, the judge conducted a voir dire examination of the potential jury members and struck several based on cause. The prosecutor then decided to use several of his allowed peremptory challenges to remove all four black jury veniremen, citing no reason. Because of the prosecutor's use of peremptory challenges, the jury was left to be all white. The defense

attorney then asked to remove the jury due to the fact that the removal of the black men from the jury was robbing the defendant of his Sixth and Fourteenth Amendment rights. The case was brought to Kentucky Supreme Court, where the defendant's conviction was upheld. Still seeking justice, the case was appealed to the U.S. Supreme Court in 1986. The Justices of the Court reversed the conviction of the defendant and overruled the case of *Swain v. Alabama,* 380 U.S. 202 (1965), which required a "systematic pattern of discrimination" for defendants to appeal their case to a higher court due to an error in the use of peremptory challenges. The case of *Batson v. Kentucky* was not the first case dealing with the misuse of peremptory challenges, but was the first to seriously draw attention to the problems of discrimination in jury selection in the U.S. legal system. Although this case was a step in the right direction, as time passed, the Supreme Court would discover the gaping holes in the decision of *Batson v. Kentucky* (476 U.S. 79).

Hernandez v. New York

This case also had many similarities to that of *Batson v. Kentucky*; but the Batson claim in this case was not upheld. The difference lies in the circumstances. In this case, two Spanish-speaking jurors of Latino descent were dismissed before the trial of a Latino man. One may be thinking that this is apparently racial discrimination and the opinion of Batson should be upheld, but the difference in this case is that the prosecutor had race-neutral reasoning behind striking the two men (or so he claimed). He stated that he questioned the ability of the men to listen to the official translation of the testimony (which was to be in Spanish) as opposed to listening to the defendant directly. There have been several cases like that of *Hernandez v. New York*, which appear to be racial

discrimination, but a more thorough look must be given to these cases. However, it is important to note that there are individuals who believe that this case itself allows for racial discrimination. Are the translators always accurate? Is the removal of Spanish-speaking jurors not racial discrimination? Is it possible that the court might be removing the most qualified jurors?(500 U.S. 352).

Georgia v. McCollum

The final case I will be discussing is the case of *Georgia v. McCollum*. This case served as a sort of addition to the opinion of a similar case, *Edmonson v. Leesville Concrete Co.* The case of *Georgia v. McCollum* was one in which the two white defendant were accused of having assaulted two African Americans. Before the trial had started, the prosecution made a motion to prohibit both of the defendants from making peremptory challenges based on race. The trial court judge denied the motion, citing that the case of *Edmonson v. Leesville Concrete Co*. had already resulted in law stating that "private litigants" did not have the right to use peremptory challenges in a racially discriminatory way. When brought to the U.S. Supreme Court, a significant difference was found between the two cases. *Edmonson v. Leesville Concrete Co*. merely stated that "private litigants" could not use the challenges in to discriminating manner. In the case of *Georgia v. McCollum*, however, the respondents were not "private litigants" in a civil case, but rather criminal defendants. Three Supreme Court Justices wrote about the case stating that criminal defendants using peremptory challenges based on race is in violation of the U.S. Constitution. This case brought about the idea that peremptory challenges based on race are always unconstitutional, even when the defendant and the dismissed

jurors are of different races. In addition, it was made aware that racially based peremptory challenges violate the rights of the people to serve on juries.(505 U.S. 42).

The Current Status and Progress Being Made

In the past 100 years, the U.S. Supreme Court has heard numerous cases involving the use of peremptory challenges. The opinions of the Court for these cases are gradually taking steps towards the abolishment of racially based challenges. It is also important to note that in addition to the abolition of challenges based on race, various court cases, including those in the U.S. Supreme Court, have also abolished peremptory challenges based on gender, religion, and national origin, among other group identities (Frederick 1). All of these cases and opinions of the Court are in an attempt to create a more honest and non-stereotypical method of jury selection, and to better represent the equal protection rights of both the defendant(s) and the potential jurors (1).

Despite previous court cases, it would be completely false to say that our courts today are without flaw on this subject matter. Cases are continually arising in state supreme courts across the nation, however, there are now guidelines for these petitioners to follow. According to the Batson 3-Step Process first the defendant or defense counsel will need to create a prima facie case which explains how the prosecutor used peremptory challenge based on race (Frederick 1). Secondly, the prosecution will have to provide an explanation for the challenge which excludes racial factors (1). Finally, the court must accept or deny the defendant's claim of racial discrimination. In the event that the case falls under the case law of *Batson v. Kentucky*, the use of the peremptory challenge in that

instance would be declared unconstitutional and in violation of the defendant's equal protection rights (1).

The steps toward any sort of reform are creeping along at a slow, but steady pace. The Oklahoma legislature has been the only one thus far to propose the idea of complete abolishment of the peremptory challenge (Henley 7). Rather, it seems more likely that the public will see legislation proposing ideas to limit further the number of peremptory challenges a litigant can use (7). Presently, New York, California, and Montana have such bills going through their legislatures(7). How will these bills fair in the legislatures of these states? Will other states jump on the bandwagon and offer reform proposal in their state legislatures? Only time will tell . . .

Conclusion

The peremptory challenge over the course of history has evolved greatly, from a once commonly accepted tradition to a more highly controversial matter these days. No matter what your opinion of this so-called "tradition," the traditional aspects of the peremptory challenge are most definitely outdated and are in need of reform. Cases such as Hernandez v. New York, Georgia v. McCollum, and Batson v. Kentucky have begun to pave the way for reform in jury selection, but the judicial system is still a long way from completely abolishing the discrimination that plagues our jury trials

Works Cited

Allen v. Hardy, 478 U.S. 255; 106 S. Ct. 2878, 92 L.Ed.2d 199 (1986).

Batson v. Kentucky, 476 U.S. 79; 106 S. Ct. 1712 (1986).

Garner, Bryan A. *Black's Law Dictionary*, 7th ed. St. Paul, Minnesota: West Group, 1990.

Georgia v. McCollum, 505 U.S. 42; 112 S. Ct. 2348, 120 L.Ed.2d 33 (1992).

Hernandez v. New York, 500 U.S. 352; 111 S. Ct. 1859, 114 L.Ed.2d 395 (1991).

Jury Research Services. Ed. Jeffrey T. Frederick, Ph.D. YEAR. National Legal Research Group. 14 January 2004 <http://www.nlrg.com/jrsd/jrupdates/peremchall.html>

National Constitution Center. Ed. Sara Hoffman. 2004. "Third Circuit Upholds Faith-Based Peremptory Challenge." 21 February 2004 <http://www.constitutioncenter.org/explore/ConstitutionNewswire/3897.shtml>

Public Law Research Institute. Ed. Patricia Henley. 1996. "Improving the Jury System: Peremptory Challenges." University of California, Hastings College of Law. 11 January 2004 <http://www.uchastings.edu/prli/spr96tex/juryper.html>