Peremptory Challenges: A System In Need Of Reform

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I. INTRODUCTION

Peremptory challenges are an essential tool for both the state and the defendant in selecting a jury that will produce a fair and just verdict. Peremptory challenges are one part of a two-tier system that also includes what are referred to as "for cause" challenges. In order to be dismissed for cause, there must be evidence that a juror is a friend or family member of the victim, has a connection to the judge or one of the attorneys, or some other instance of a juror having such an obvious bias that they cannot be counted on to render a fair, impartial verdict.[2] Peremptory challenges allow attorneys to remove jurors with little or no explanation, usually based on gut instinct or first impression.[3] The reason for this is that most jurors do not know their own biases or are unwilling to admit them. Both sides have a limited number of peremptory challenges that they can use to remove jurors that they believe will not be impartial, but who do not reach the level of bias required for a for cause challenge.[4] The peremptory challenge system should be reformed because it deprives some citizens of their right to participate in the jury system based on their race or gender, and while it purports to safeguard a defendant's right to an impartial jury, it enables the state to shape the jury based on race or gender in a way that makes them partial to their case.

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[2] 2 Crim. Prac. Manual § 53:1 (West 2015).
[3] Id., at § 54:1.
[4] Id., at § 54:2.

II. PEREMPTORY CHALLENGES AND THE CONSTITUTION

A. The Sixth Amendment.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."[5] The double edged sword of peremptory challenges is that along with the benefit of eliminating jurors without having to give any sort of explanation is that it potentially undermines the rationale behind the system itself: that a true cross section of the population be allowed to hear the facts of a case and determine guilt or innocence impartially. In theory, peremptory challenges could be a useful tool in identifying which jurors will be biased and removing them without having to reach the high standard of a for cause challenge. In practice, using peremptory challenges becomes an exercise in strategy and creativity to build a jury that will be sympathetic to one side or the other. Ironically then, it has become a process which encourages the creation of a jury that is partial to one side or the other, not impartial as is guaranteed a criminal defendant under the constitution.

It could be argued that because both the prosecution and the defense get an equal number of peremptory challenges, there is no unfairness in the system. Both sides have the ability to make things as unfair in their favor as possible. There are some flaws with this line of reasoning. First, is the reality for the defendant that there is a lot more at stake than winning a strategic battle; they are risking their life, liberty and property. While prosecutors do not want to see guilty defendants walk free, they are not the ones who will end up in a prison cell if their jury selection strategy does not pay off. Second, the purpose of the Sixth Amendment is to provide an impartial jury, not one that is partial one way or the other. The underlying value is not which attorneys do a better job of getting the right jurors, but having all the facts put before a group of

[5] U.S. Const. Amend. 6, §1.

twelve citizens who render a verdict based only on those facts. When used properly, peremptory challenges enhance this goal; without a reliable rule in place, they become a tool to circumvent the same goal.

B. The Fifth and Fourteenth Amendment and the Jury.

"No state shall... nor deny to any person within its jurisdiction the equal protection of the laws."[6] While the specific issues presented here are not intended to make laws that deny equal protection, the potential end result of peremptory challenges is to deny a citizen their right to participate in the democratic process by serving as a juror, on the basis of immutable characteristics, qualities that a person cannot change. Often, attorneys will not hesitate to exclude a juror based on an immutable characteristic like race or gender, due to a superficial belief that these traits will have a substantial impact on the decision-making process of the juror. This diminishes people, presuming that they are incapable of forming thoughts and opinions based on individual analysis of the facts of the case or looking beyond simple constructs of race or gender. As discussed below, the Supreme Court has created tests to allow these practices to be challenged and invalidate peremptory challenges made for these reasons, but the rules are easy to work around, making them inadequate.

III. LEGAL HISTORY

A. Pre-*Batson*.

In *Swain v. Alabama*, the Supreme Court held that a black juror could not be excluded "for reasons wholly unrelated to the outcome of the particular case on trial" or to deny to blacks "the same right and opportunity to participate in the administration of justice enjoyed by the white population."[7] In order to make out a case, the defendant needed to show that a pattern of

[6] U.S. Const. Amend. 14, §1
[7] Swain v. Alabama, 380 U.S. 202 (1965).

systemic racial bias over many cases, creating an almost unreachable burden. This had the effect of rendering *Swain* impotent in rooting out abusive use of peremptory challenges.

B. The *Batson* Test.

Swain was overruled in 1985 by *Batson v. Kentucky*, when the Supreme Court held that Swain's requirement of systemic abuse was too heavy a burden for defendants to carry.[8] The Court set forth a standard for determining discrimination in peremptory challenges. First, the defendant must make a primia fascia case for discrimination, meaning a case that is so obvious, it can be recognized as discrimination at first glance. To make a prima fascia case the defendant must show that: 1) they are a member of a cognizable class; 2) that the prosecutor has exercised peremptory challenges to remove members of the defendant's race from the first group of potential jurors, called the venire; and 3) these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude individuals from the jury on account of their race.[9] Once the defendant makes a prima facie case, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors.[10] The challenged party must articulate a reason for the exclusion not based on race or gender, referred to as a neutral reason. The defense must then show that the neutral reason given by the prosecutor was mere pre-text, an excuse to justify their discriminatory practice. Finally, the trial judge will have the duty to determine if the defendant has established purposeful discrimination.[11] Batson was furthered modified by the Court in *Powers v. Ohio*, holding that defendants may object to race-

[8] Batson v. Kentucky, 476 U.S. 79 (1986).
[9] Id. at 89,1722.
[10] Id. at 91,1724.
[11] Id.

based exclusions of jurors effected through peremptory challenges whether or not defendant and excluded jurors share same race.[12]

The Supreme Court severely limited the scope of Batson with their ruling in *Purkett v. Elem*, when they held that race-neutral explanation tendered by proponent of peremptory challenge need not be persuasive, or even plausible.[13] The court reasoned, "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination...But to say that a trial judge may choose to disbelieve a silly or superstitious reason at step three is quite different from saying that a trial judge must terminate the inquiry at step two when the race-neutral reason is silly or superstitious."[14] The Court then upheld the trial court's ruling, that prosecution's reason for excluding a black defendant because he had long hair and a mustache and a beard was an acceptable racially-neutral reason.[15]

D. The Negative Effect of *Purkett*.

The first part of the Court's reasoning seems only to establish that the procedure had to be properly followed and the time to shoot down a weak explanation was in the third prong or requirement and within the purview of the court. However, by accepting the unpersuasive and implausible reason given by the prosecutor, they essentially created a formula for getting around the rule they created in *Batson*, rendering it useless. Now, as long as the prosecutor could come up with anything that did not reflect an immutable characteristic, their explanation would be valid. Instead of setting a standard and allowing both parties to strike jurors and challenge strikes within that standard, the Court set a rule that has no teeth, and effectively said "eliminate whoever you want, and then give a transparently false reason that we can accept."

[12] Powers v. Ohio, 499 U.S. 400 (1991).
[13] Purkett v. Elem, 514 U.S. 765, 768 (1995).
[14] Id. at 768.
[15] Id. at 775.

The decisions made in *Batson* and its subsequent narrowing in *Purkett*, underline the difficult balancing act the courts are faced with: encouraging the benefits of peremptory challenges to both parties against the desire to exclude unwanted discrimination. There is a reality that there are a number of potential jurors that will not approach their role of a trial with impartiality, and it is incumbent upon the state to make decisions about who they do not believe will give their side a fair, unbiased hearing. Prosecutors are incapable of reading minds and only have a limited amount of information about each juror to go along with their own experience and insight. To expect a prosecutor to offer a long, detailed explanation for each and every strike that they make would place too heavy a burden on them, and would take away a critical tool that attorneys use to create a jury they believe will be fair.

This school of thought continues to bump up against that true reason that the United States uses a jury system, which is to allow the greater community to play an active role in the carrying out of the laws of their country in a fair and impartial way. If prosecutors are using peremptory challenges in order to further that worthy goal, then all the protections in the world should be afforded to them. When they are excluding a juror simply based on the individuals' race or gender, their motives are not in line with the Constitution or American equality. Working around this disfavored behavior should not be as simple as pointing out something else readily available and attributing the decision to that trait, when it is clearly a pretext. If the courts are going to make rules prohibiting certain conduct, it makes little sense to tie the rules to a test that is almost impossible to fail.

III. REMEDIES

A. Abolishing Peremptory Challenges.

There have been calls to eliminate peremptory challenges from a number of different quarters, dating back to *Batson* itself. In a concurring opinion, Justice Marshall agreed that *Batson* represented "a historic step toward eliminating the shameful practice of racial discrimination in the selection of juries," but still believed it "will not end the racial discrimination that peremptories inject into the jury-selection process...[t]hat goal can be accomplished only by eliminating peremptory challenges entirely."[16] Others have characterized peremptory challenges as "not necessarily an instrument of neutrality, but instead a weapon to adjust the outcome of a case. Limited only in number, the peremptory challenge perpetuates invidious stereotypes, as each party applies both limited knowledge of the jurors and generalizations shaped by experience to eliminate jurors seemingly unsympathetic to a litigant."[17]

While it is true that peremptory challenges can have ill-favored side effects, it would also be wrong to simply abolish them completely. It is not surprising that most of the calls for abolition come from either judges or from those in academic circles. These members of the legal community have the luxury of not participating in the adversarial system. Attorneys who have to go into the trenches of a trial on behalf of their client, be it the defendant or the citizens of the state, want all the tools they can get to achieve the result that they desire. Prosecutors are supposed to be on the side of justice, but a desire to create rules that eliminate discrimination are going to be tempered by the obligation they have to ensure that the guilty are brought to justice. The goal of reform should be to strip out disfavored conduct (discrimination) as much as

[16] Batson, 476 US at 102.
[17] Redefining the Harm of Peremptory Challenges, 32 Wm. & Mary L. Rev. 1027, 1032 (1991).

possible while leaving intact the value of weeding out potentially hostile or biased jurors. Put another way, the goal should be to create rules that truly work, but allow attorneys to operate freely within those rules.

B. Reform Options

If abolition is not the most favorable option, then reforming the system to promote fairness should be the priority.

1. Affirmative Selection

Under affirmative selection, each side may exercise as many challenges for cause as are warranted by the responses evoked on voir dire. The parties would then draft separate lists of names, which designate in order of preference members of the venire who should sit on the jury. Regardless of the order presented, those individuals appearing on both lists would sit on the jury; their inclusion on both lists indicates that both parties have confidence in their impartiality. The court would fill vacant seats by taking alternately, and in descending order, the names on the two lists until there is a full jury.[18]

The benefits to this approach are obvious: they would automatically seat a number of jurors that were not in conflict, and then eliminate at least a few unfavorable jurors on each side. Presumably, the least favorable jurors would be towards the bottom of the respective lists and would not get reached by the court after all the mutual picks and the higher priorities are taken. This model would ensure that both sides get a say on which jurors get on, but also have to accept some of the choices of the other side. The best result is that even if one side puts all the women for example at the bottom of their list, the other side will have included some at the top, and due to the alternating of lists, will still get on the jury.

[18] Affirmative Selection: A New Response to Peremptory Challenge Abuse, 38 Stan. L. Rev. 781 (1986).

The drawback to this model is how it undermines the fundamental purpose of peremptory challenges: the ability of the attorneys to remove a juror that, as an individual, will be hostile or bias towards that attorney's side. Take a case of racially motivated homicide. During the jury selection process called voir dire, a black juror indicates that they will vote to convict no matter what. A defense attorney will want this person off the jury because he has communicated that he will be bias against their side. As long as the prosecutor puts this person high enough on his list, there is nothing the defense attorney can do to keep this obviously bias juror off the jury. In an effort to combat the ills of peremptory challenges this model has open the door for bias jurors to remain on the jury, even though it is arguably more fair to both parties. This might still be a viable alternative to the current system if a *Batson* type challenge was available as a fall back option.

2. Reforming *Batson*: *People v. Wheeler*

In California, the State Supreme Court devised a test in *People v. Wheeler* that placed a heavier burden on the challenged party to explain their nonbiased reason than *Batson* and *Purkett*. "First, the challenging party must establish that the persons excluded are members of a cognizable group. Then, they must show...a strong likelihood that such persons are being challenged because of their group association rather than because of any specific bias. If the court finds that a prima facie case has been made, the burden shifts to the other party to show... the peremptory challenges in question were not predicated on group bias alone. [T]o sustain his burden of justification, the allegedly offending party must satisfy the court that [they] exercised such peremptory challenges on grounds that were reasonably relevant to the particular case on trial or its parties or witnesses i.e., for reasons of specific bias as defined. If the court finds that

the burden of justification is not sustained as to any of the questioned peremptory challenges, the presumption of their validity is rebutted or effectively disputed by the challenged party."[19]

This test was rejected by the Supreme Court[20], but is still valid law in California. Unlike in *Batson* and the subsequent narrowing in *Purkett*, the challenged party cannot simply provide any conceivable reason why the challenge was not based on discrimination no matter how implausible that claim may be. This in effect, requires the challenging party to provide an explanation based on actual evidence that the juror they are dismissing has demonstrated signs of bias, and would not simply give the challenged party an easy out, as long as they could articulate any reason whatsoever. By placing a slightly heavier burden on the challenged party, *Wheeler* attempts to more effectively balance the needs of the attorneys to exercise peremptory challenges while recognizing the need to prevent discrimination.

3. Reject *Purkett*

Finally, the Supreme Court could restore the heavier burden that was required under *Batson* before the narrowing language in *Purkett*. In reversing the trial court's holding in favor of the prosecutor, the Eighth Circuit held, "the prosecution must at least articulate some plausible race-neutral reason for believing those factors will somehow affect the person's ability to perform his or her duties as a juror."[21] At the very least, this minimal showing of a valid purpose for a peremptory strike should be required before the burden shifts back to the challenging party to prove it is pretextual. As stated many times, a burden that can be overcome with an implausible explanation is no burden at all.

[19] People v. Wheeler, 22 Cal.3d 258 (1978).
[20] Johnson v. California, 545 U.S. 162 (2005).
[21] Purkett v. Elem, 514 U.S. 765, 768, (1978).

IV. CONCLUSION

There are no easy answers to this issue, mainly because there are compelling reasons based on fairness to give attorneys as much freedom as possible in using peremptory challenges, and compelling reasons, also based in fairness to prohibit their use when the purpose behind such use is discriminatory. Since the Supreme Court seems content to hold to an ineffective rule, it is up to those in state courts and legislatures to recognize the need to look thoughtfully at these issues and try to make rules that will be fair to the parties and the jurors. It is not a proper exercise of democracy if the practical need to pick a favorable jury outweighs the fundamental principles behind having a jury. Juries exist because in a democracy, the people should not view their system of justice as something above them that makes decisions about crime and punishment without their participation or knowledge. That is only valuable if all get the same opportunity.