

January 2015

## The Peremptory Paradox: A Look at Peremptory Challenges and the Advantageous Possibilities They Provide

Laurel Johnson

Follow this and additional works at: <https://digitalcommons.du.edu/crimlawrev>



Part of the [Criminal Law Commons](#)

---

### Recommended Citation

Laurel Johnson, *The Peremptory Paradox: A Look at Peremptory Challenges and the Advantageous Possibilities They Provide*, 5 U. Denv. Crim. L. Rev. 215 (2015)

This Article is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in University of Denver Criminal Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact [jennifer.cox@du.edu](mailto:jennifer.cox@du.edu), [dig-commons@du.edu](mailto:dig-commons@du.edu).

---

## The Peremptory Paradox: A Look at Peremptory Challenges and the Advantageous Possibilities They Provide

### Keywords

Jury, Jury instructions, Peremptory challenges, Practice, Procedure, States

**THE PEREMPTORY PARADOX: A LOOK AT  
PEREMPTORY CHALLENGES AND THE  
ADVANTAGEOUS POSSIBILITIES THEY PROVIDE**

*Laurel Johnson*<sup>\*</sup>

---

<sup>\*</sup> Laurel Johnson, J.D., is a recent graduate of the University of Denver Sturm College of Law. Special thanks to Professor Ian Farrell for his suggestions and feedback throughout this article.

<b>INTRODUCTION.....</b>	<b>217</b>
<b>PART I.....</b>	<b>217</b>
A. RIGHT TO A JURY .....	217
B. VOIR DIRE .....	218
C. TYPES OF CHALLENGES.....	218
<i>i. Challenge for Cause .....</i>	<i>218</i>
<i>ii. Peremptory Challenge.....</i>	<i>219</i>
D. METHODS OF VOIR DIRE .....	221
<i>i. “Strike and Replace” Method.....</i>	<i>222</i>
<i>ii. “Struck” Method .....</i>	<i>222</i>
<b>PART II.....</b>	<b>222</b>
A. POSITIVES OF THE PEREMPTORY CHALLENGE.....	223
<i>i. Rooted in Tradition.....</i>	<i>223</i>
<i>ii. Provides Discretion to Litigants.....</i>	<i>223</i>
<i>iii. Fosters a “Middle Ground” Jury.....</i>	<i>224</i>
<i>iv. Perception of Fairness.....</i>	<i>224</i>
<i>v. Protection of Voir Dire .....</i>	<i>224</i>
B. NEGATIVES OF THE PEREMPTORY CHALLENGE.....	225
<i>i. Requires Many Resources.....</i>	<i>225</i>
<i>ii. Inhibits the Cross Section of Community Concept .....</i>	<i>225</i>
<i>iii. Prejudicial Element.....</i>	<i>225</i>
C. EFFECTS OF ELIMINATING PEREMPTORY CHALLENGES .....	226
<i>i. Effects on Judicial Efficiency.....</i>	<i>226</i>
<i>ii. Effects on the Fair and Impartial Jury.....</i>	<i>226</i>
<i>iii. Effects on the Defendant.....</i>	<i>226</i>
<i>iv. Effects on Deliberations.....</i>	<i>227</i>
<i>iv. Effects on Prejudice and Discrimination.....</i>	<i>227</i>
<b>PART III.....</b>	<b>227</b>
A. PRACTITIONERS’ OPINIONS REGARDING PEREMPTORY CHALLENGES .....	227
B. EFFECTIVENESS OF PEREMPTORY CHALLENGES .....	228
C. THE PEREMPTORY PARADOX .....	230
D. REASONS THE DEFENDANT OR PROSECUTION WOULD BE ADVANTAGED OVER THE OTHER .....	231
<i>i. Location .....</i>	<i>231</i>
<i>ii. Attorney Skill .....</i>	<i>231</i>
<i>iii. Presiding Judge.....</i>	<i>232</i>
<b>CONCLUSION .....</b>	<b>232</b>

## INTRODUCTION

Peremptory challenges to potential jury members are supported by an overwhelming majority of practicing lawyers. Criminal litigators of both stripes – prosecutors and defense attorneys – are nearly unanimous in their view that peremptory challenges should be retained, despite criticism of such challenges from judges and academics. Interestingly, both prosecutors and defense attorneys believe that one of the main advantages of peremptory strikes is that they provide an advantage over the trial opponent.

But as a matter of elementary logic, preemptory strikes cannot simultaneously provide both the prosecution and defense an advantage over the other. Rather, only three scenarios for systemic advantage exist: the prosecution is advantaged over the defense, the defense is advantaged over the prosecution, or neither party is systematically advantaged over another.<sup>1</sup>

In Part I, I will discuss voir dire as a whole and give an explanation of peremptory strikes. In Part II, I will discuss the positives and negatives of peremptory strikes and the effects of eliminating peremptory strikes. In Part III, I will discuss which party to a criminal case benefits from preemptory strikes, the paradox that peremptory strikes cannot simultaneously provide an advantage over the other side to both the prosecution and the defense, and factors that could influence which side peremptory strikes benefit.

## PART I

### A. Right to a Jury

Throughout history, the right to a trial by jury has held strong as a principle rooted in constitutional values. Thomas Jefferson stated, "I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of [its] constitution."<sup>2</sup> Trial by jury represents the ideals that framers brought to the constitution in forming this great nation. The Sixth Amendment right to a jury trial prevents oppression by the government. Trial by jury embodies the concept of a restrained government, in that disinterested and uninvolved persons must make objective decisions regarding fact before the government can convict an individual and as a result restrict the rights of that individual.

Article III of the United States constitution provides that unless otherwise waived, criminal prosecutions should be tried by a jury.<sup>3</sup> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.<sup>4</sup> The Honorable Judge Herbert J. Hutton characterized the right to a trial by jury of one's peers as "one of the cornerstones of the American judicial system" and "a birthright cherished

---

<sup>1</sup> The third option – neither party is systematically advantaged over the other – is consistent with peremptory strikes advantaging one party over the other in a particular case. A particular, rather than systemic, advantage might result from a particularly skilled attorney, the particular crime or defendant, or the members of the particular venire.

<sup>2</sup> Kenneth S. Klein, *The Myth of How to Interpret the Seventh Amendment Right to A Civil Jury Trial*, 53 OHIO ST. L.J. 1005, 1009 (1992) (citing 15 The Papers of Thomas Jefferson 267 (Julian P. Boyd ed., 1958) (letter to Thomas Paine dated Paris, July 11, 1789)).

<sup>3</sup> U.S. CONST. art. III, § 2, cl. 2.

<sup>4</sup> U.S. CONST. amend. VI.

by generations of American citizens.”<sup>5</sup> The Jury Selection and Service Act of 1968 outlined guidelines for juries, requiring that they be “selected at random from a fair cross section of the community in the district or division wherein the court convenes.”<sup>6</sup>

### B. Voir Dire

In order to ensure the constitutional guarantees surrounding trial by jury, litigants are permitted to voir dire the venire, which allows for exclusion from the venire those members that present a potential cause for disqualification so that the remaining members are capable of analyzing the facts without influence from extraneous considerations.<sup>7</sup> In *Hill v. State*, the court stated “Undergirding the voir dire procedure and, hence, informing the trial court’s exercise of discretion regarding the conduct of the voir dire, is a single, primary, and overriding principle or purpose: ‘to ascertain the existence of cause for disqualification.’”<sup>8</sup>

Voir dire is a French term meaning “to speak the truth.”<sup>9</sup> Put simply, voir dire is the examination of a potential juror to see if he or she is fit to serve.<sup>10</sup> Colorado Rule of Criminal Procedure 24(a) provides: “An orientation and examination shall be conducted to inform prospective jurors about their duties and service and to obtain information about prospective jurors to facilitate an intelligent exercise of challenges for cause and peremptory challenges.”<sup>11</sup> Trial courts are vested with discretion in conducting voir dire, which is not disturbed unless there is a clear showing of abuse.<sup>12</sup> Generally, both the prosecution and defense are permitted a certain amount of time to voir dire the venire; however, there is no constitutional right to voir dire, “so long as the court’s examination allowed counsel to determine whether any potential jurors possessed any beliefs that would bias them such as to prevent [the defendant] from receiving a fair trial.”<sup>13</sup> Jurors may be examined for multiple purposes, including to elicit grounds of challenge for cause and to ascertain the jurors’ state of mind with reference to the matter at hand in order to keep parties fully advised in the exercise of their right to peremptory challenges.<sup>14</sup>

### C. Types of Challenges

During the voir dire, litigants are permitted to strike jurors from the venire, or challenge them. There are two main types of challenges: challenges for cause and peremptory challenges.

#### *i. Challenge for Cause*

A challenge for cause is “a request that a prospective juror be dismissed because there is a specific and forceful reason to believe the person cannot be fair, unbiased or

<sup>5</sup> *In re Green*, No. 96-0002, 1996 WL 660949, at\*1 (E.D. Pa. Nov. 15, 1996).

<sup>6</sup> Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 (2014).

<sup>7</sup> *Williams v. State*, 904 A.2d 534, 539 (Md. 2006).

<sup>8</sup> 661 A.2d 1164, 1166 (Md. 1995) (quoting *McGee v. State*, 146 A.2d 194, 196 (Md. 1959)).

<sup>9</sup> BLACK’S LAW DICTIONARY 1710 (9th ed. 2009).

<sup>10</sup> *Id.*

<sup>11</sup> COLO. R. CRIM. P. 24(a).

<sup>12</sup> *Speak v. United States*, 161 F.2d 562, 563-64 (10th Cir. 1947).

<sup>13</sup> *People v. Rodriguez*, 914 P.2d 230, 255 (Colo. 1996) (quoting *People v. O’Neill*, 803 P.2d 164, 169 (Colo. 1990)).

<sup>14</sup> *Union Pac. Ry. Co. v. Jones*, 40 P. 891, 892 (Colo. 1895).

capable of serving as a juror.”<sup>15</sup> The judge makes the determination regarding whether the juror should be struck or dismissed. Colorado Rule of Criminal Procedure 24(b) provides that the court shall sustain challenges for cause for reasons including, but not limited to: incompetence in the absence of qualification prescribed by statute; relationship within the third degree to participants in the case, including attorneys; criminal complaint against the accused; service on grand jury, coroner’s jury, or investigatory body in relation to the case; previous jury service for trial arising out of same factual situation or involving same defendant; involvement in civil action against defendant arising out of the act charged as a crime; witness to any matter related to crime or its prosecution; fiduciary relationship to the defendant, person alleged to be injured by crime, or person whose complaint instituted the prosecution; bias for or against the defendant or prosecution.<sup>16</sup>

While courts are required to dismiss a juror for cause if the juror has a state of mind “manifesting bias for or against the defendant, or for or against the prosecution,” the test applied for a challenge for cause is not whether a potential juror merely expressed concern about some aspect of the case or jury service, but whether the juror “would render a fair and impartial verdict based on the evidence presented at trial and the instructions given by the court.”<sup>17</sup> This is because jurors’ concerns are often an effort to express “feelings and convictions about such matters of importance in an emotionally charged setting,” and the court “may give ‘considerable weight’ to a potential juror’s assertion that he or she can perform jury service fairly and impartially in the case.”<sup>18</sup> In contrast, a peremptory challenge allows litigants to challenge or dismiss a juror without stating a reason.<sup>19</sup>

#### *ii. Peremptory Challenge*

Peremptory challenges have existed for nearly as long as juries have existed.<sup>20</sup> In Roman criminal cases, the accuser and accused each proposed one hundred judges, each rejected fifty from the other’s list, and the remaining one hundred would try to alleged crime.<sup>21</sup> Peremptory challenges date back to the early days of the jury trial in England,<sup>22</sup> and are rooted in tradition of the jury trial in America.<sup>23</sup>

<sup>15</sup> Gerald Hill & Kathleen Hill, *challenge for cause*, PEOPLE’S LAW DICTIONARY, <http://dictionary.law.com/Default.aspx?selected=169> (last visited Nov. 11, 2014).

<sup>16</sup> COLO. R. CRIM. P. 24(b).

<sup>17</sup> *People v. Vigil*, 718 P.2d 496, 500-01 (Colo. 1986) (citing *People v. Abbott*, 690 P.2d 1263, 1267 (Colo. 1984); *People v. Wright*, 672 P.2d 518 (Colo. 1982)); *People v. Garrison*, 303 P.3d 117, 127 (Colo. App. 2012).

<sup>18</sup> *Garrison*, 303 P.3d at 127-28 (quoting *People v. Sandoval*, 733 P.2d 319, 321 (Colo. 1987)).

<sup>19</sup> Gerald Hill & Kathleen Hill, *peremptory challenge*, PEOPLE’S LAW DICTIONARY, <http://dictionary.law.com/Default.aspx?selected=1501> (last visited Nov. 11, 2014).

<sup>20</sup> *Batson v. Kentucky*, 476 U.S. 79, 119 (1986).

<sup>21</sup> *Id.*

<sup>22</sup> See *Swain v. Alabama*, 380 U.S. 202, 212-13 (1965) (White, J.) (“Thus The Ordinance for Inquests, 33 Edw. 1, Stat. 4 (1305), provided that if ‘they that sue for the King will challenge any . . . Jurors, they shall assign . . . a Cause certain.’ So persistent was the view that a proper jury trial required peremptories on both sides, however, that the statute was construed to allow the prosecution to direct any juror after examination to ‘stand aside’ until the entire panel was gone over and the defendant had exercised his challenges; only if there was a deficiency of jurors in the box at that point did the Crown have to show cause in respect to jurors recalled to make up the required number. Peremptories on both sides became the settled law of England, continuing in the above form until after the separation of the Colonies.” (footnotes omitted)) (tracing the development of preemptory challenges), *overruled by Batson*, 476 U.S. at 79.

<sup>23</sup> See *id.* at 214-16 (“In the federal system, Congress early took a part of the subject in hand in establishing that the defendant was entitled to 35 peremptories in trials for treason and 20 in trials for other felonies specified in the 1790 Act as punishable by death, 1 Stat. 119 (1790). In regard to trials for other offenses without the 1790 statute, both the defendant and the Government were thought to have a right of peremptory challenge, although the source of this right was not wholly clear. . . . The course in the States apparently paralleled that in the federal system. The defendant’s right of challenge was early conferred by statute, the number often corresponding to the

The right to peremptory challenges has been described as one of the most important rights of the accused,<sup>24</sup> despite the United States Constitution containing no language giving the right to peremptory challenges.<sup>25</sup> In a criminal proceeding, the function of a peremptory challenge is “to secure a more fair and impartial jury by enabling” litigants “to remove jurors whom they perceive as biased, even if the jurors are not subject to a challenge for cause.”<sup>26</sup> As Justice Byron White stated in *Swain v. Alabama*, “The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise.”<sup>27</sup>

Traditionally, litigants could exercise peremptory challenges “for any reason at all, as long as that reason is related to his view concerning the outcome of that case,”<sup>28</sup> and the decision to exercise a peremptory challenge was “left wholly within the discretion of the litigant.”<sup>29</sup> However, the Supreme Court has limited this discretion throughout time.

Constitutional limits are imposed on peremptory challenges through the equal protection clause. These limits have formed over time.

In 1879, the Supreme Court held excluding jurors “because of their color . . . amounts to a denial of the equal protection of the laws.”<sup>30</sup> The Court then went on to hold that “[a]lthough a Negro defendant is not entitled to a jury containing members of his race, a State’s purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause.”<sup>31</sup> The prosecutor’s “use of peremptory challenges against Negroes over a period of time” was described as “systematic discrimination on the part of the State.”<sup>32</sup> The Court outlined what a defendant must show in order to establish a prima facie case of purposeful discrimination in the prosecutor’s exercise of peremptory challenges: (1) the defendant “is a member of a cognizable racial group;” (2) “the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant’s race;” and (3) a showing that “these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.”<sup>33</sup>

In 1986, the Court held that once the defendant establishes a prima facie showing of purposeful discrimination in the prosecutor’s exercise of peremptory challenges, “the burden shifts to the State to come forward with a neutral explanation for challenging black

---

English practice, the prosecution was thought to have retained the Crown’s common-law right to stand aside, and by 1870, most, if not all, States had enacted statutes conferring on the prosecution a substantial number of peremptory challenges, the number generally being at least half, but often equal to, the number had by the defendant.” (footnotes omitted) (tracing the development of peremptory challenges).

<sup>24</sup> See *Pointer v. United States*, 151 U.S. 396, 408 (1894) (“The right to challenge a given number of jurors without showing cause is one of the most important of the rights secured to the accused.”).

<sup>25</sup> See *Stilson v. United States*, 250 U.S. 583, 586 (1919) (“There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges to defendants in criminal cases; trial by an impartial jury is all that is secured.”).

<sup>26</sup> *People v. Lefebvre*, 5 P.3d 295, 303 (Colo. 2000), *overruled by* *People v. Novotny*, 320 P.3d 1194 (Colo. 2014).

<sup>27</sup> 380 U.S. at 219.

<sup>28</sup> *United States v. Robinson*, 421 F. Supp. 467, 473 (D. Conn. 1976).

<sup>29</sup> *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 633 (1991).

<sup>30</sup> *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879), *abrogated by* *Taylor v. Louisiana*, 419 U.S. 522, (1975).

<sup>31</sup> *Swain*, 380 U.S. at 203-04.

<sup>32</sup> *Id.* at 227.

<sup>33</sup> *Batson v. Kentucky*, 476 U.S. 79, 96 (1986), *holding modified by* *Powers v. Ohio*, 499 U.S. 400 (1991).



jurors.”<sup>34</sup> In 1991 the Court extended the *Batson* protection to defendants of all races,<sup>35</sup> and in 1994 the Court extended the *Batson* protection to gender discrimination.<sup>36</sup> In *Edmonson v. Leesville Concrete Co., Inc.*, the Court extended *Batson* to civil juries because “the race-based exclusion violates the equal protection rights of the challenged jurors.”<sup>37</sup> In *Georgia v. McCollum*, the Court extended *Batson* even further and held “that the Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges.”<sup>38</sup>

Colorado Rule of Criminal Procedure 24, which governs peremptory challenges in criminal cases in Colorado, provides:

In capital cases the state and the defendant, when there is one defendant, shall each be entitled to ten peremptory challenges. In all other cases where there is one defendant and the punishment may be by imprisonment in a correctional facility, the state and the defendant shall each be entitled to five peremptory challenges, and in all other cases, to three peremptory challenges. If there is more than one defendant, each side shall be entitled to an additional three peremptory challenges for every defendant after the first in capital cases, but not exceeding twenty peremptory challenges to each side; in all other cases, where the punishment may be by imprisonment in a correctional facility, to two additional peremptory challenges for every defendant after the first, not exceeding fifteen peremptory challenges to each side; and in all other cases to one additional peremptory challenge for every defendant after the first, not exceeding ten peremptory challenges to each side. In any case where there are multiple defendants, every peremptory challenge shall be made and considered as the joint peremptory challenge of all defendants. In case of the consolidation of any indictments, informations, complaints, or summons and complaints for trial, such consolidated cases shall be considered, for all purposes concerning peremptory challenges, as though the defendants had been joined in the same indictment, information, complaint, or summons and complaint. When trial is held on a plea of not guilty by reason of insanity, the number of peremptory challenges shall be the same as if trial were on the issue of substantive guilt.<sup>39</sup>

#### D. Methods of Voir Dire

There are two main methods of jury selection: the “strike and replace” method and the “struck” method.<sup>40</sup> In both of these methods, parties are permitted to voir dire the venire before being required to exercise challenges. This practice is rooted in history and supports the due administration of justice.<sup>41</sup>

<sup>34</sup> *Id.* at 97.

<sup>35</sup> *Powers v. Ohio*, 499 U.S. 400, 415 (1991).

<sup>36</sup> *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143 (1994).

<sup>37</sup> 500 U.S. 614, 616 (1991).

<sup>38</sup> 505 U.S. 42, 59 (1992).

<sup>39</sup> Colo. R. Crim. P. 24(d)(2).

<sup>40</sup> *Jury Selection*, ARIZ. JUD. BRANCH, [http://www.supreme.state.az.us/jury/jury/jury1j.htm#N\\_3\\_](http://www.supreme.state.az.us/jury/jury/jury1j.htm#N_3_) (last visited May 16, 2014).

<sup>41</sup> *See Pointer v. United States*, 151 U.S. 396, 408-09 (1894) (“Any system for the impaneling of a jury that prevents or embarrasses the full, unrestricted exercise by the accused of that right must be condemned; and therefore he cannot be compelled to make a peremptory challenge until he has been brought face to face, in the

## i. “Strike and Replace” Method

In the “strike and replace” method, otherwise known as the “jury box” system, the jury box is filled with randomly selected venire members.<sup>42</sup> After examining the venire, counsel for each side may exercise their challenges.<sup>43</sup> Litigants “exercise challenges for cause and their allotted number of peremptory challenges in some prescribed pattern of alternation.”<sup>44</sup> As members of the venire are struck from the box, other venire persons are drawn to replace the empty seats.<sup>45</sup> When all challenges have been used or waived, the remaining individuals in the jury box become the jury.<sup>46</sup>

## ii. “Struck” Method

In the “struck” method, venire members are examined, and then challenged and excused for cause.<sup>47</sup> A panel is then created with the number of jurors who will hear the case, the number of alternates, and the combined number of peremptory challenges allotted to each side.<sup>48</sup> Litigants exercise their peremptory challenges on an alternating basis against the panel until they have used their allotted challenges and only the number of jurors and alternates needed remain.<sup>49</sup>

**PART II**

Research indicates that many scholars and academic commentators favor the abolishment of peremptory challenges.<sup>50</sup> Moreover, a growing number of judges have

---

presence of the court, with each proposed juror, and an opportunity given for such inspection and examination of him as is required for the due administration of justice.”)

<sup>43</sup> *United States v. Blouin*, 666 F.2d 796, 796 (2d Cir. 1981).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>48</sup> *Id.* at 796-97.

<sup>49</sup> *Id.* at 797.

<sup>50</sup> See generally 4 William Blackstone, Commentaries \*346 (stating that the peremptory challenge is “an arbitrary and capricious species of challenge”) available at [http://press-pubs.uchicago.edu/founders/documents/amendV-VI\\_criminal\\_process14.html](http://press-pubs.uchicago.edu/founders/documents/amendV-VI_criminal_process14.html); Barbara Allen Babcock, *Voir Dire: Preserving “Its Wonderful Power”*, 27 STAN. L. REV. 545, 545 (1975) (note 2 omitted) (“[T]he voir dire procedure is being attacked as a cumbersome, time-consuming, meaningless part of the jury trial.”); Brent J. Gurney, *The Case for Abolishing Peremptory Challenges in Criminal Trials*, 21 HARV. C.R.-C.L. L. REV. 227, 230 (1986) (“A more equitable legal system would eliminate peremptory challenges and would rely exclusively on cause challenges and on expanded voir dire to root out only those jurors unable to follow the judge’s instructions.”); Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 209 (1989) (highlighting the gains of eliminating peremptory challenges) (“[S]ubstantial economic savings, the effective control of racial and other widely condemned forms of group discrimination, and the control of countless other, less frequently employed, less generalized classifications that insult and diminish human beings.”); Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369, 420-23 (1992) (arguing for abolition of peremptory challenges); Professor Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099, 1148-49 (1994) (proposing that peremptory challenges should be abolished for all litigants except criminal defendants, and that the peremptory challenges for all litigants except criminal defendants be replaced with an expanded for-cause system); Mark Cammack, *In Search of the Post-Positivist Jury*, 70 IND. L.J. 405, 486 (1995) (“[T]he simplest way to eliminate discrimination . . . is to eliminate the peremptory challenge . . . .”); Amy Wilson, *The End of Peremptory Challenges: A Call for Change Through Comparative Analysis*, 32 HASTINGS INT’L & COMP. L. REV. 363, 363-64 (2009) (arguing that peremptory challenges should be abolished in the United States); Melynda J. Price, *Performing Discretion or Performing Discrimination: Race, Ritual, and Peremptory Challenges in Capital Jury Selection*, 15 MICH. J. RACE & L. 57, 97 (2009) (arguing that the best course of action to remove race and racism as factors in

expressed their disapproval of peremptory challenges,<sup>51</sup> including a few Supreme Court justices.<sup>52</sup>

Conversely, litigators are overwhelmingly in favor of peremptory challenges.<sup>53</sup> There are both positive and negative aspects of the peremptory challenge. Moreover, there would be both positive and negative effects of eliminating peremptory challenges.

### A. Benefits of the Peremptory Challenge

The Court has stated that peremptory challenges are “one of the most important of the rights secured to the accused.”<sup>54</sup>

#### i. Rooted in Tradition

Peremptory challenges have a long history in the American legal system.<sup>55</sup> The concept of an impartial jury has been aided by the peremptory challenge throughout time. While there are disadvantages associated with the use of peremptories, as discussed below, they have long been utilized as a valuable tool in the creation of impartial juries.

#### ii. Provides Discretion to Litigants

The peremptory challenge gives litigants discretion in arbitrary selecting potential jurors, in that “its exercise is left wholly within the discretion of the litigant,”<sup>56</sup> and litigants have the discretion to act upon prejudices conceived from “the bare looks and

---

discretionary challenges is to abandon peremptory challenges altogether); Maisa Jean Frank, *Challenging Peremptories: Suggested Reforms to the Jury Selection Process Using Minnesota As A Case Study*, 94 MINN. L. REV. 2075, 2077 (2010) (arguing that reform should include the elimination of the peremptory challenge in most cases, since the for-cause challenge provides an adequate avenue for party participation in jury selection); Roger Allan Ford, *Modeling the Effects of Peremptory Challenges on Jury Selection and Jury Verdicts*, 17 GEO. MASON L. REV. 377, 422 (2010) (“[C]ourts and legislatures should consider limiting or eliminating peremptory challenges”).

<sup>51</sup>See Nancy S. Marder, *Justice Stevens, the Peremptory Challenge, and the Jury*, 74 FORDHAM L. REV. 1683, 1713 (2006) (“The chorus of judges calling for the elimination of the peremptory, while still small, is nonetheless growing.”); see also *Alen v. State*, 596 So. 2d 1083, 1086 (Fla. Dist. Ct. App. 1992) (arguing to abolish the peremptory challenge as inherently discriminatory); *Com. v. Rodriguez* 931 N.E.2d 20, 44 (2010) (Marshall, C.J., concurring) (“[I]t is either time to abolish them entirely, or to restrict their use substantially.”); *State v. Buggs*, 581 N.W.2d 329, 347 (Minn. 1998) (Page, J., dissenting) (“[I]t is time for this court to consider seriously Justice Marshall’s admonition in his concurrence in *Batson* that the goal of ending ‘the racial discrimination that peremptories inject into the jury-selection process can be accomplished only by eliminating peremptory challenges entirely.’”); *Flowers v. State*, 947 So. 2d 910, 939 (Miss. 2007) (“[W]e would be well within our authority in abolishing the peremptory challenge system as a means to ensure the integrity of our criminal trials.”).

<sup>52</sup>See *Batson v. Kentucky*, 476 U.S. 79, 102-03 (1986) (J Marshall, concurring) (stating that the only way to end the racial discrimination that peremptories inject into the jury-selection process is to eliminate peremptory challenges entirely); John Paul Stevens, *Foreword*, 78 CHI.-KENT L. REV. 907 (2003) (arguing that peremptory challenges create significant costs and require the expenditure of valuable court time while producing “minimal benefits at best”); *Miller-El v. Dretke*, 545 U.S. 231, 266-67 (2005) (J Breyer, concurring) (stating the case “reinforces Justice Marshall’s concerns” regarding peremptories and racial discrimination); *Rice v. Collins*, 546 U.S. 333, 344 (2006) (J Breyer, concurring) (“I continue to believe that we should reconsider *Batson*’s test and the peremptory challenge system as a whole.”).

<sup>53</sup> See *infra* Part III.A.

<sup>54</sup> *Swain v. Alabama*, 380 U.S. 202, 219 (1965) (quoting *Pointer v. United States*, 151 U.S. 396, 408 (1965)), *overruled by Batson v. Kentucky*, 476 U.S. 79 (1986)

<sup>55</sup> See *infra* pp 6-8.

<sup>56</sup> *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 633 (1991).

gestures of another.”<sup>57</sup> The discretion surrounding peremptories “is a mechanism for the exercise of *private* choice in the pursuit of fairness. . . . an enclave of private action in a government-managed proceeding.”<sup>58</sup>

*iii. Fosters a “Middle Ground” Jury*

Peremptory challenges enable participants to exclude those jurors they believe will be most favorable to the other side, which provides a means of eliminating “extremes of partiality on both sides.”<sup>59</sup> Peremptory challenges allow participants to eliminate individuals who don’t meet the standard for challenge for cause but still propose a potential bias, even if minimal, which helps to assure “the selection of a qualified and *unbiased* jury.”<sup>60</sup> Essentially, peremptories can be seen as a supplement to the challenge for cause. In theory, the resulting jurors form a middle ground jury, capable of hearing both sides to come to a fair decision.<sup>61</sup>

*iv. Perception of Fairness*

Peremptory challenges provide a perception of fairness in criminal trials. They have “always been held essential to the fairness of trial by jury.”<sup>62</sup> By allowing litigants to participate in the selection of jury members through peremptory challenges, a perception of fairness is created because “the impartiality of the adjudicator goes to the very integrity of the legal system.”<sup>63</sup> Litigant involvement and a jury created to decide the case based on the evidence placed before them foster a perception of fairness among both the parties and the public.<sup>64</sup>

*v. Protection of Voir Dire*

While litigants are permitted to voir dire the venire before raising a challenge for cause, this voir dire may be more extensive in regards to peremptory challenges. If a litigant were to examine a venire person to the level of discomfort in the pursuit of a challenge for cause and subsequently lose that challenge for cause, the litigant can fall back on a peremptory challenge to remedy the potential for a damaged relationship between the litigant and venire person. Without the peremptory challenge to fall back on, litigants may be hesitant to pursue the elicitation of deeper biases on behalf of the venire person and a subsequent challenge for cause in fear of having to proceed with a juror who may develop negative feelings towards the litigant during that process. Moreover, the peremptory challenge requires a voir dire in order for litigants to make decisions regarding peremptory challenges. The peremptory challenge allows litigants to use voir dire to identify predisposed jurors and unreceptive jurors.<sup>65</sup>

<sup>57</sup> *Lewis v. United States*, 146 U.S. 370, 376 (1892).

<sup>58</sup> *Edmonson*, 500 U.S. at 633-34.

<sup>59</sup> *Holland v. Illinois*, 493 U.S. 474, 484 (1990) (quoting *Batson v. Kentucky*, 476 U.S. 79, 91 (1986)).

<sup>60</sup> *See id.* (emphasis added).

<sup>61</sup> *See Swain v. Alabama*, 380 U.S. 202, 219 (1965), *overruled by Batson v. Kentucky*, 476 U.S. 79 (1986) (“The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise.”).

<sup>62</sup> *Lewis*, 146 U.S. at 376.

<sup>63</sup> *Gray v. Mississippi*, 481 U.S. 648, 668 (1987).

<sup>64</sup> *See Swain*, 380 U.S. at 219.

<sup>65</sup> *See Jean Montoya, The Future of the Post-Batson Peremptory Challenge: Voir Dire by Questionnaire and the “Blind” Peremptory*, 29 U. MICH. J.L. REFORM 981, 1010 (1996). Survey respondents in favor of retaining

## B. Detriments of the Peremptory Challenge

### *i. Requires Many Resources*

The use of peremptory challenges requires many resources. First, enough jurors must be called to make up a jury pool large enough to allow litigants to exercise peremptory challenges. Second, litigants sometimes hire jury consultants to opine on the potential biases of venire persons. Lastly, the constitutional limits placed on peremptory challenges sometimes require that a separate hearing be held,<sup>66</sup> which requires significant judicial resources.

### *ii. Inhibits the Cross Section of Community Concept*

By using peremptory challenges “to eliminate extremes of partiality on both sides,”<sup>67</sup> the concept of having a jury of one’s peers or a jury representing a cross section of the community is inhibited. Justice White stated that “the Court has unambiguously declared that the American concept of the jury trial contemplates a jury drawn from a fair cross section of the community.”<sup>68</sup> Eliminating venire persons because of their personalities, experiences, background, beliefs, tendencies, or any other reasons decreases the probability that the jury will truly be a fair cross section of the community.

Moreover, because individuals with different backgrounds and experiences may bring a different perspective to the deliberations, the quality of verdicts is limited by peremptory challenges. Excluding certain groups of individuals makes it less likely that the verdicts are truly representative of the values of the community as a whole.

### *iii. Prejudicial Element*

In the pursuit of equal protection, constitutional limits have been imposed on how participants may exercise their peremptory challenges.<sup>69</sup> However, the peremptory challenge is still an “arbitrary and capricious species of challenge”<sup>70</sup> that allows litigants to act upon prejudices conceived from “the bare looks and gestures of another.”<sup>71</sup> Peremptory challenges require some sort of prejudice, in that litigants make a decision to remove venire persons based on an impression or short interaction. While this may be non-race based discrimination, there is still a level of discrimination involved, be it discrimination based on facial expression, area of origin, expressed preference towards a particular litigant, or any other reason that does not rise to a level of challenge for cause.

---

peremptory challenges stated the challenges were valuable to them because “peremptory challenges allowed them to assemble a fair jury because they could eliminate predisposed jurors and weed out unreceptive jurors.”  
*Id.*

<sup>66</sup> See, e.g., David H. Stacy & Brenda M. Sauro, *Edmonson: Dramatic Change in the Use of Peremptory Challenges*, 21 COLO. LAW. 687, 689-90 (1992) (discussing required hearings for *Batson* challenges).

<sup>67</sup> *Swain*, 380 U.S. at 219 (1965).

<sup>68</sup> *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975).

<sup>69</sup> See *supra* Part I.C.ii.

<sup>70</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES \*346.

<sup>71</sup> *Lewis v. United States*, 146 U.S. 370, 376 (1892).

### C. Effects of Eliminating Peremptory Challenges

#### *i. Effects on Judicial Efficiency*

Eliminating peremptory challenges would likely result in a flood of challenges for cause. Litigants will have to use challenges for cause to eliminate any bias. Because there is no peremptory challenge to fall back on for a semi-biased juror, litigants will be required to make challenges for cause for any perceivably biased juror. These effects will require additional use of judicial resources.

On the other hand, eliminating peremptory challenges could potentially require less time for voir dire. Because litigants are only seeking to identify partial or biased jurors on which to exercise a challenge for cause, no additional voir dire will be required other than to identify those partial or biased jurors. Litigants will have no reason to further probe the venire.

#### *ii. Effects on the Fair and Impartial Jury*

Demonstrably partial or biased jurors are eliminated through challenges for cause.<sup>72</sup> Jurors survive a challenge for cause if “the juror would render a fair and impartial verdict based on the evidence presented at trial and the instructions given by the court.”<sup>73</sup> Therefore, if challenges for cause work perfectly, abolishing peremptory challenges should not have an effect on the fair and impartial jury.

However, challenges for cause might not completely accomplish the goal of providing impartial and unbiased jurors. All venire persons will come through the door with some type of experiences and background that lend to biases. The challenge for cause sets a bar in which jurors who are demonstrably unable to separate their preconceived notions from the case at hand will be struck from the jury. The peremptory challenge allows litigants to strike jurors that fall below that line, but still present a concerning level of partiality or extremity.<sup>74</sup> Without the peremptory challenge, litigants will be required to rely solely on challenges for cause to secure a fair and impartial jury.

#### *iii. Effects on the Defendant*

Although the right to peremptory challenges “is one of the most important of the rights secured to the accused,”<sup>75</sup> there is no Constitutionally guaranteed right to peremptory challenges.<sup>76</sup> In contrast, “individual jurors themselves have a right to nondiscriminatory jury selection procedures.”<sup>77</sup> Individual jurors also have a right to equal protection under the laws,<sup>78</sup> which extends to discrimination surrounding peremptory

<sup>72</sup> *E.g.*, *United States v. Gonzalez*, 214 F.3d 1109, 1111 (9th Cir. 2000). *See also Skilling v. United States*, 561 U.S. 358, 442 n.8 (2010).

<sup>73</sup> *People v. Vigil*, 718 P.2d 496, 500-01 (Colo. 1986) (quoting *People v. Wright*, 672 P.2d 518, 520 (Colo. 1982)).

<sup>74</sup> *See Swain v. Alabama*, 380 U.S. 202, 219 (1965) (“The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise.”), *overruled by Batson v. Kentucky*, 476 U.S. 79 (1986).

<sup>75</sup> *Pointer v. United States*, 151 U.S. 396, 408 (1894).

<sup>76</sup> *E.g.*, *Stilson v. United States*, 250 U.S. 583, 586 (1919). *See also Rivera v. Illinois*, 556 U.S.148, 149 (2009).

<sup>77</sup> *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140-41 (1994).

<sup>78</sup> *See U.S. CONST. amend. XIV, § 1.*

strikes.<sup>79</sup> Eliminating peremptory challenges would deprive defendants of this important right to remove perceivably biased jurors who were not subject to a challenge for cause.<sup>80</sup>

*iv. Effects on Deliberations*

One of the functions of peremptory challenges is to “eliminate extremes of partiality on both sides.”<sup>81</sup> Abolishing the peremptory challenge would prevent these “extremes” from being excluded from the jury. A jury room that includes these “extremes” would undoubtedly increase the amount of opinions offered in deliberations, thereby resulting in increased deliberation times and increased number of hung juries.

*v. Effects on Prejudice and Discrimination*

Abolishing peremptory challenges and instead seating the first twelve jurors who survive challenges for cause is the simplest and most effective manner to eliminate prejudice and discrimination involved in peremptory challenges. Completely removing race and racism as factors in peremptory challenges could be accomplished at the source – by abandoning peremptory challenges altogether.<sup>82</sup>

### PART III

#### A. Practitioner Opinions Regarding Peremptory Challenges

Although peremptory challenges are not popular among judges<sup>83</sup> or academic commentators,<sup>84</sup> litigators are in favor of keeping them. In a survey conducted by Jean Montoya, “practitioners overwhelmingly described peremptory challenges as valuable.”<sup>85</sup> 81% of lawyers who answered a question regarding the value of peremptory challenges “described peremptory challenges as having great value,” “18% described peremptory challenges as having some value,” and “[f]ewer than 1% described peremptory challenges as having no value.”<sup>86</sup>

A question regarding the value of peremptory challenges revealed that 83% of the responding prosecutors, 80% of the responding defense attorneys, 82% of the responding state court practitioners, and 83% of the responding lawyers who had practiced in both federal and state courts believe peremptory challenges are of “great value.”<sup>87</sup> Conversely, only 56% of the responding federal court practitioners indicated that they

<sup>79</sup> See, e.g., *Batson*, 476 U.S. at 89 (“[T]he component of the jury selection process at issue here, the State’s privilege to strike individual jurors through peremptory challenges, is subject to the commands of the Equal Protection Clause.”).

<sup>80</sup> See *People v. Lefebvre*, 5 P.3d 295, 303 (Colo. 2000) (“The function of peremptory challenges in a criminal proceeding is to allow both the prosecution and the defense to secure a more fair and impartial jury by enabling them to remove jurors whom they perceive as biased, even if the jurors are not subject to a challenge for cause.”), *overruled by* *People v. Novotny*, 320 P.3d 1194 (Colo. 2014).

<sup>81</sup> *Swain v. Alabama*, 380 U.S. 202, 219 (1965), *overruled by* *Batson*, 476 U.S. 79.

<sup>82</sup> See *Batson*, 476 U.S. at 107 (Marshall, J., concurring) (“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.”).

<sup>83</sup> See *supra* notes 52-53 and accompanying text.

<sup>84</sup> See *supra* note 51 and accompanying text.

<sup>85</sup> Montoya, *supra* note 66, at 1000.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 1026 n. 102.

believed peremptory challenges had great value.<sup>88</sup> However, the exclusively federal court practitioners made up a small sample of respondents.<sup>89</sup> The main reasons lawyers cited in indicating why peremptory challenges are valuable are that “peremptory challenges allow litigants to exclude jurors with whom the attorney has “bad chemistry” or to exclude jurors on the basis of “gut feeling.””<sup>90</sup>

While respondents “felt that peremptory challenges had depreciated in value following *Batson* and *Wheeler*,” they indicated that an additional value peremptory challenges hold is a level of control on behalf of litigants over the composition of the jury because peremptories “allow litigants to exclude jurors on the basis of unprotected group membership (e.g., occupation), to skew the panel in the client's favor by excluding panelists in the opponent's favor, and to exclude the “screwballs” (the quirky, unpredictable jurors).”<sup>91</sup> Respondents who felt peremptory challenges were only of some value commented that their ability to discover biases was limited due to time and other limits on voir dire.<sup>92</sup> Both prosecutors and defense attorneys felt that peremptories have diminished usefulness due to inadequate voir dire; specifically, “they noted inadequate questioning of the jury panelists before the lawyers are called upon to exercise their peremptory challenges as a problem.”<sup>93</sup>

Prosecutors in particular found “peremptory challenges valuable to shape a working group of jurors” in the pursuit of obtaining a unanimous verdict.<sup>94</sup> The overwhelming weight of respondents support retaining peremptory challenges; “98% of attorneys who answered the questions said that peremptory challenges should not be eliminated.”<sup>95</sup> Prosecutors and defense attorneys alike shared the sentiment that peremptory challenges should not be eliminated: 99% of responding prosecutors and 99% of responding defense attorneys thought peremptory challenges should not be eliminated.<sup>96</sup>

## B. Effectiveness of Peremptory Challenges

While there is little evidence on the effectiveness of peremptory challenges, a study by Hans Zeisel and Shari Seidman Diamond examines the effect of peremptory challenges on the jury and verdict.<sup>97</sup> Zeisel and Diamond conducted the study to discover whether trial lawyers’ use of peremptory challenges affect the outcome of the case.<sup>98</sup> In this study, peremptorily excused jurors stayed in the courtroom as shadow jurors.<sup>99</sup> At the end of the trial, shadow jurors revealed how they would have voted in the case.<sup>100</sup> By combining that knowledge with posttrial interviews of the real jurors, Zeisel and Diamond were able to reconstruct the vote as it would have been had there been no peremptory strikes.<sup>101</sup> The reconstructed vote is what the result would have been if the first 12 jurors

---

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 1000.

<sup>91</sup> *Id.* at 1001 (emphasis added).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 1003.

<sup>94</sup> *Id.* at 1001.

<sup>95</sup> *Id.* at 1009-10.

<sup>96</sup> *Id.* at 1026 n. 139.

<sup>97</sup> Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in A Federal District Court*, 30 STAN. L. REV. 491, 491-92 (1978).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 492.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*



in the venire had formed the jury – if only challenges for cause were made and not peremptory challenges. Zeisel and Diamond then compared the result of the reconstructed jury with the real jury, enabling them to “gauge the effect, if any, of the peremptory challenges on the composition of the jury and its verdict.”<sup>102</sup>

The experiment was conducted with 12 criminal cases.<sup>103</sup> Each case had three juries: the real jury, the jury composed of peremptorily challenged jurors, and a jury selected randomly from the remaining venire.<sup>104</sup> Five out of the twelve cases produced notable shifts in the probability of a guilty verdict.<sup>105</sup> In the remaining 7, however, “the combined effect of challenges was minimal and did not produce the expectation that the verdict of the “jury without challenges” would have differed from that of the real jury.”<sup>106</sup> The full results were as follows.<sup>107</sup>

**COMPARISON OF THE RECONSTRUCTED “JURIES WITHOUT CHALLENGES” AND THE REAL JURIES AFTER CHALLENGES**

Case No.	Percentage Votes On Ballot	Guilty On First	Corresponding Percentage Probability That the Verdict Will Be Guilty <sup>a1</sup>	(4) Real Jury	(5) Actual Verdict	(4) - (3) Percentage Shift in Probability of Guilty Verdict as a Result of Challenges
	(1) “Jury Without Challenges”	(2) Real Jury	(3) “Jury Without Challenges”			
1 <sup>aa1</sup>	49	42	41	23	NG	- 18
2	88	83	96	94	G	- 2
3 <sup>aaa1</sup>	41	42	22	23	NG	+ 1
4	50	33	42	11	NG	-30
5	77	83	91	94	G	+ 3
6	53	50	55	42	NG	- 13
7	72	83	89	94	G	+ 5
8	100	100	100	100	G	0
9	50	50	42	42	Hung	0
10	72	92	89	97	G	+ 8
11	38	17	17	2	NG	-15
12	67	33	84	12	NG	-72

<sup>a1</sup>Percentages are interpolated from Graph 1. See note 23 *supra* and accompanying text.

<sup>aa1</sup>Assuming an initial vote of 5 to 7. See note 20 *supra*. If an initial vote of 6 to 6 is assumed, (1) becomes 54% and (2) becomes 50%; if 4 to 8 is assumed, (1) becomes 44% and (2) becomes 33%.

<sup>aaa1</sup>Assuming an initial vote of 5 to 7. If an initial vote of 6 to 6 is assumed, (1) becomes 46% and (2) becomes 50%; if an initial vote of 4 to 8 is assumed, (1) becomes 36% and (2) becomes 33%.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 499.

<sup>105</sup> *Id.* at 507.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

The data was then used to obtain an idea of how well the litigants used their allotted peremptory challenges to excuse jurors who would have voted against their side if on the jury.<sup>108</sup> Zeisel and Diamond formulated a performance index for the attorneys, with +100 representing optimal challenge performance and -100 representing worst challenge performance.<sup>109</sup> The results were as follows:<sup>110</sup>

#### ATTORNEY PERFORMANCE INDEX

Case No.	Prosecutor	Defense
1	+23	+46
2	-59	+6
3	+44	+30
4	-20	+44
5	+31	+48
6	-61	-11
7	+9	-10
8	-32	-62
9	0 <sup>a1</sup>	+12
10	+58	+46
11	+62	+36
12	-61	+19
Average (Mean)	-0.5	+17.0
Average Fluctuation Around the Mean	±38	±25

<sup>a1</sup> The prosecutor exercised only one challenge, and the challenged juror did not participate in the study.

The collective scores do not indicate a particularly positive performance of the attorneys in their use of peremptory strikes.<sup>111</sup> The averages indicate that the prosecution made about as many good challenges as bad ones, and the defense did not score much better.<sup>112</sup> The averages are misleading however because the surrounding deviations from the average are so large.<sup>113</sup> While the average scores hover around zero, in some cases the attorneys performed very well, and in others they performed very poorly.<sup>114</sup>

### C. The Peremptory Paradox

As previously mentioned, one of the main reasons attorneys value peremptory strikes is that excluding jurors allows the attorney to “skew the panel,” which is done “by excluding panelists in the opponent’s favor.”<sup>115</sup> However, both sides get to exercise peremptory challenges. Therefore, both sides have an opportunity to “skew the panel” or exclude “panelists in the opponent’s favor.” The panel cannot be skewed in favor of both the prosecution and the defense at the same time. This paradox could potentially cancel out the benefits peremptory challenges afford each side.

<sup>108</sup> *Id.* at 513-14.

<sup>109</sup> *Id.* at 514.

<sup>110</sup> *Id.* at 516.

<sup>111</sup> *Id.* at 517.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> Montoya, *supra* note 66, at 1001.

While it is possible for peremptory challenges to hold value for both sides simultaneously, it is not possible for both sides to be simultaneously advantaged by peremptory strikes. Peremptory challenges could be *avored* simultaneously by both the prosecution and defense, for, say, resulting in more accurate jury decisions, or a fairer decision making process. But peremptories cannot provide the prosecution a systemic advantage over the defense and the defense a systemic advantage over the prosecution at the same time. Therefore, there are only three possibilities for advantage with regards to peremptory strikes: (1) the prosecution is advantaged, (2) the defense is advantaged, or (3) neither side is advantaged.

As shown through the deviations in Jean Montoya's study, there is no clear answer regarding which side benefits from the use of peremptory challenges. There are, however, a multitude of reasons why the use of peremptory challenges would benefit one side over the other.

#### **D. Reasons The Defendant or Prosecution Would be Advantaged Over the Other**

##### *i. Location*

The location of a criminal jury trial will likely affect which party will be advantaged by peremptory challenges. In a county that has a large group of a certain demographic, it may behoove one side to peremptorily challenge members of that demographic if that demographic is perceivably biased towards a party. While such use of peremptory strikes is potentially rooted in stereotypes, the strategy may be advantageous. For example, if a criminal case was being tried in a jurisdiction that contains a large majority of older, conservative individuals, a defendant charged with a drug crime relating to marijuana may benefit from peremptorily challenging individuals from that demographic. On the other hand, if the case was being tried in a jurisdiction that contains a large majority of younger, liberal individuals who have been exposed to a more tolerant view of marijuana use, the prosecution may benefit from peremptorily challenging individuals from that demographic.

However, both the prosecution and defense could take advantage of this jurisdictional situation. For example, in the conservative jurisdiction mentioned above, it seems as though the defendant would benefit most from peremptory challenges because he has the opportunity to strike members from the majority. But it only takes one juror to hang a jury – so the prosecution might benefit from using a peremptory to strike the one minority juror that could have hung the jury. On the same token, a defendant might benefit in the liberal jurisdiction mentioned above by using a preemptory to strike the one minority juror that would keep a jury from acquitting.

These fictitious jurisdictions highlight the peremptory paradox in that peremptory challenges hold value for both sides simultaneously, but cannot simultaneously advantage one side over the other.

##### *ii. Attorney Skill*

The attorneys' abilities will likely influence which side will be advantaged by the use of peremptory strikes. If an attorney is not able to effectively conduct voir dire and exercise meaningful peremptory challenges, the challenges will likely not be

advantageous. If an attorney is able to effectively conduct voir dire and exercise meaningful peremptory challenges, the results of such could be extremely advantageous. The skill with which the attorney conducts voir dire will dictate whether the attorney chooses the “right” venireman to excuse.

*iii. Presiding Judge*

The judge presiding over the criminal case will potentially play a role in what side is advantaged by peremptory challenges. If the presiding judge tends to grant one side’s challenges for cause more often than another’s, then the peremptory challenges will likely be more useful to the side that was less successful with the challenges for cause. The litigant for this side who was unsuccessful with the challenges for cause will then have to decide whether to use the peremptories on those who survived the challenges for cause. Conversely, the litigant who prevailed with challenges for cause will then have the autonomy to use the peremptories on other venire persons.

**CONCLUSION**

Peremptory challenges have a long history, rooted in tradition and constitutional values. While there are many benefits to the use of peremptory challenges in criminal jury trials, these benefits are potentially overstated because the challenges cannot simultaneously advantage both the prosecution and the defense. There are however, many factors that will influence which side is advantaged. Despite of the potential for the opposing side to be advantaged, peremptory challenges are overwhelmingly favored by practitioners and will likely continue to be in the future. A look at the potential advantageous possibilities of peremptory challenges will provide practitioners insight into how to most effectively use their challenges.

