

AN EXPERIMENTAL ATTEMPT TO MITIGATE THE ILLEGAL PRACTICE OF USING RACE AS A DETERMINISTIC VARIABLE IN PROSECUTORIAL PEREMPTORY CHALLENGES

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Abstract

Before a person becomes a juror, they are a venire person who must clear voir dire, the process by which attorneys pare the original pool of potential jurors down to the standard twelve. There is much research that exists supporting the posit that White jurors are harsher toward minority defendants than they are to White defendants (Mitchell, Haw, Pfeifer & Meissner, 2005). Furthermore, group polarization is a common occurrence that has been studied since James Stoner's paper entitled "Risky and cautious shifts in group decisions: The influence of widely held values" (1968), suggesting that a group (jury) will have more bias as an aggregate than the individual (jurors) will themselves exhibit. Thus, heterogeneity of race in a jury would likely mitigate the potential for racial bias to be a consideration in jury decisions. In fact, in *Batson v. Kentucky* 476 U.S. 79 (1986), the Supreme Court ruled that race must not be a factor when attorneys consider whether a venire person will or will not eventually become a juror during voir dire. However, recent cross-disciplinary research conducted by Sommers and Norton (2007) has applied experimental social psychology methods to explore this important legal issue. These experiments indicate that a more homogenous jury may still be the outcome of voir dire, regardless of the *Batson* decision. The paper that follows is a summary of the theoretical basis for an

ongoing study.

Variable in Prosecutorial Peremptory Challenges

The Sixth Amendment in the Bill of Rights guarantees that, should an American citizen be prosecuted for a crime, they will be tried by an impartial jury (U.S. Const. amend. VI). The presence of an impartial jury is crucial in ensuring a fair trial for a defendant facing criminal charges. For defendants of color, however, many researchers have found that a jury populated by White venire persons (potential jurors) is decidedly not impartial (Sommers & Ellsworth, 2001). According to a meta-analytic review of previous studies regarding the effect of race on jury decision, "minority groups experience a distinct disadvantage with regard to the American criminal justice system" (Mitchell, Haw, Pfeifer & Meissner 2005, pg. 1). However, minority jurors do not exhibit such racial bias against their own ethnic groups. Moreover, since everyone has some type of bias, explicit or not, against groups of which they are not members (Sumner, 1959), and that bias is exacerbated when individuals are grouped with others who share the same bias (Stoner, 1968), extralegal information such as the defendant's race should be mitigated by diversifying the race of the jurors. Therefore, a racially diversified jury ought to promote impartiality.

Voir dire is a preliminary process to a jury trial by which

a large pool of potential jurors is pared down to the final twelve persons who will act as jurors (Suggs & Sales, 1978). As mentioned above, a heterogeneous jury would likely provide the defendant with a more impartial jury than one filled with members of only one race. However, a prosecutor trying a case with a minority defendant would have an apparent tactical interest in homogenizing the jury by attempting to eliminate all minorities from the jury pool to improve his or her conviction rate. This is to say, that prosecutors who are aware of the effects of race bias in juries may attempt to improve their chances of earning a conviction by eliminating all venire persons of color from the jury pool when trying a minority defendant. This, however, would be in direct violation of *Batson v. Kentucky* 476 U.S. 79 (1986).

The *Batson* decision ruled that, to ensure the rights of the defendant and that of the venire persons, a venire person's race must not be a factor in attorney's decisions during voir dire (Bellin & Semitsu, 2011). Yet, according to Bellin and Semitsu (2011), the *Batson* ruling is practically ineffectual. They reviewed all 269 *Batson* challenges that occurred between January 1, 2000 and December 31, 2009, and found that in 229 cases, or 85.1%, the court rejected the *Batson* claim altogether. In only 18 cases, a mere 6.69%, the *Batson* claim resulted in a new trial (Bellin & Semitsu, 2011). The question I ask then is this, is race still a deterministic variable in prosecutors' decisions regarding voir dire despite the court's ruling that it should not be?

During voir dire, attorneys may remove a venire person deemed undesirable through the use of two different challenges, peremptory and for cause (Johnson & Haney, 1994). "The challenge for cause is exercised whenever it can be shown that the juror does not satisfy the statutory requirements for jury service (e.g., age, residency, and occupational requirements), or when it can be shown that the prospective juror is so biased or prejudiced that he/she cannot render a fair and impartial verdict based on the law and evidence as presented at trial" (Suggs & Sales, 1978, pg. 2) and can be used by either side an unlimited number of times. Conversely, peremptory challenges are limited by either a statute or the presiding judge and require no justification. Thus, peremptory challenges are exercised when an attorney feels it would be tactically advantageous to eliminate the potential juror in question (Suggs & Sales, 1978). For example, an attorney may exercise one of his or her remaining peremptory strikes if they think that the defendant may be favorable to their opposition. This creates an adversarial system such that attorneys will attempt to remove any and all potential jurors they believe will jeopardize their chances of winning the case. The intention of this adversarial system is to ensure a fair trial by having each

side strike potential jurors whom the attorneys believe are prejudiced against their case. However, a recent study by Sommers and Norton in 2006 has shown that this system may produce unfavorable consequences for minority defendants.

It is through the use of peremptory challenges that allow prosecutors to attempt to homogenize the jury pool by eliminating all minorities. Sommers and Norton (2006) conducted an exploratory study in an attempt to verify the above hypothesis that prosecutors do indeed strike minority venire persons more often than White venire persons by having law students, undergraduates and practicing attorneys play the part of a prosecutor with one peremptory challenge, one seat on the jury remaining, and two potential jurors available for strike that differed only in race. To accomplish this, Sommers and Norton created two jurors, Juror #1 and Juror #2. "Juror #1 was a 43-year-old married male with no previous jury experience. He was a journalist who, several years earlier, had written articles about police misconduct. Juror #2 was a 40-year-old divorced male who had served on two previous juries. He was an advertising executive with little scientific background who stated during voir dire that he was skeptical of statistics because they are easily manipulated" (Sommers & Norton, 2006). The researchers go on to explain that the juror backgrounds were selected from seven juror profiles because of their undesirability for a prosecutor. Half of the participants were shown a condition where Juror #1 was Black and Juror #2 was White; the other half of the participants were shown the condition wherein Juror #1 was White and Juror #2 was Black. The participants were then instructed to strike whichever juror they believed would be most detrimental to their case as the prosecution.

The results of their research confirm the hypothesis; Black potential jurors were struck significantly more often than White potential jurors even after all other variables (i.e. job of juror) were held constant. This, with the evidence cited above regarding White juror's biases, indicates that defendants of color are not getting the fair and unbiased jury that they deserve and were promised. A biased jury for minorities would likely cause a differentiation between minority members' chances of being sentenced to prison and that of majority members. From a report cited by Eitzen, Zinn and Smith in their twelfth edition of *Social Problems* (2011, pg. 350) "Of Black males born in the United States, 28.5 percent go to state or federal prison for a sentence of more than one year[;] [t]he corresponding chance for... White males [is] 4.4 percent," it follows that the implications of Sommers' and Norton's findings are extensive, so the purpose of this study is to attempt to replicate and extend the data collected by Sommers and Norton (2006).

Proposed Follow-Up Research

Based on the information above, the tendency for prosecutors to eliminate persons of color from a potential jury pool appears to disturb the careful balance that must be maintained for our legal system to be fair. Therefore, among the extensions to the previous research is an attempt to mitigate the rate at which prosecutors strike minorities. Previous studies have indicated that making the race of the defendant salient reduces White juror's tendencies to convict minorities at a higher rate, so it seems logical that a similar effect should be witnessed when the illegality of using race as a factor in peremptory challenges is made salient to the prosecution as they exercise peremptory strikes (Bucolo & Cohn, 2010; Crocker & Kovera, 2010). Thus, the author's hypothesis is H: Making the illegality of using race as a factor in peremptory challenges to the prosecution will reduce the rate at which minorities are stricken from the jury pool.

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