

Journal of Civil Rights and Economic Development

Volume 10
Issue 2 *Volume 10, Spring 1995, Issue 2*

Article 2

March 1995

"And Then There Were None": The Fate of Peremptory Challenges in New York

Herald Price Fahringer

Follow this and additional works at: <https://scholarship.law.stjohns.edu/jcred>

Recommended Citation

Fahringer, Herald Price (1995) ""And Then There Were None": The Fate of Peremptory Challenges in New York," *Journal of Civil Rights and Economic Development*: Vol. 10 : Iss. 2 , Article 2.
Available at: <https://scholarship.law.stjohns.edu/jcred/vol10/iss2/2>

This Article is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in Journal of Civil Rights and Economic Development by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

“AND THEN THERE WERE NONE”: THE FATE OF PEREMPTORY CHALLENGES IN NEW YORK

HERALD PRICE FAHRINGER*

Agatha Christie, in her chilling mystery novel *And Then There Were None*,¹ used the poem “Ten Little Indians” metaphorically to characterize the murder of a small group of people one by one.² In New York, a defendant, in most felony trials, has at least ten peremptory challenges.³ But soon there may be none.

One of the most serious threats to the integrity of the jury system in New York, as well as in other places of the country, is the movement afoot to reduce the number of peremptory challenges afforded a defendant in criminal cases.⁴ A task force created by Chief Judge Judith Kaye, of the New York Court of Appeals, to investigate ways of improving jury selection has recommended, among other things, that the number of peremptory challenges in

* Senior Partner, Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, Buffalo, New York and New York, New York; B.A., Pennsylvania State University; M.A., Pennsylvania State University; J.D., University of Buffalo Law School. Mr. Fahringer is a criminal defense lawyer practicing in New York City and specializing in the defense of white collar criminal cases. Mr. Fahringer was the recipient of the Thurgood Marshall Award presented by the New York State Association of Criminal Defense Lawyers for outstanding contribution to Criminal Law in 1995.

¹ AGATHA CHRISTIE, *AND THEN THERE WERE NONE* (1940).

² *Id.*

³ N.Y. CRIM. PROC. LAW § 270.25(2) (McKinney 1993).

Each party must be allowed the following number of peremptory challenges: (a) Twenty for the regular jurors if the highest crime charged is a class A felony, and two for each alternate juror to be selected; (b) Fifteen for the regular jurors if the highest crime charged is a class B or class C felony, and two for each alternate juror to be selected; (c) Ten for the regular jurors in all other cases, and two for each alternate juror to be selected.

Id.

⁴ See Jere W. Morehead, *When a Peremptory Challenge is no Longer Peremptory: Batson's Unfortunate Failure to Eradicate Invidious Discrimination from Jury Selection*, 43 DEPAUL L. REV. 625, 641 (1994) (arguing that repeated use of peremptory challenges for discriminatory purposes warrants their elimination); Karen M. Bray, Comment, *Reaching the Final Chapter in the Story of Peremptory Challenges*, 40 UCLA L. REV. 517, 568-69 (1992) (advocating elimination of peremptory challenges since Supreme Court has been unable to remove discriminatory intent from their use).

criminal cases be reduced.⁵ On October 24, 1994, the Chief Judge proposed that the New York State Legislature adopt the task force's recommendation.

I. HARROWING IMPLICATIONS

The proposal to reduce peremptory challenges in criminal cases is harrowing in its implications. Such a suggestion calls radically into question our deepest assumptions concerning an accused's meaningful right to an impartial jury trial.⁶ Any coherent examination of this issue requires a brief review of some basic constitutional principles that form the backdrop for this discussion. The Sixth Amendment⁷ guarantees to all persons accused of a crime the right to a trial by an *impartial* jury.⁸ The principal way impartiality is achieved is through a system of challenges exercised during voir dire. A challenge may be asserted either for cause or peremptorily.

A juror may be removed for cause if the trial judge is satisfied that he or she "has a state of mind that is likely to preclude him [or her] from rendering an impartial verdict based on the evidence adduced at the trial."⁹ No specific reason need be assigned for a peremptory challenge.¹⁰ The court *must* excuse a person so challenged. On the other hand, the peremptory challenge "allow[s] [the] parties to exclude a given number of persons who otherwise would satisfy the requirements for service on the petit jury."¹¹ To ensure that a jury is purged of suspected prejudices, a full complement of peremptory challenges is essential.

⁵ THE JURY PROJECT, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK, Mar. 31, 1994, at 67. The committee recommended that peremptory challenges be reduced in class A felonies from 20 to 15; in class B and C felonies from 15 to 10; and in class D and E felonies from 10 to 7. *Id.* The committee also recommended that the number of peremptory challenges in civil trials be reduced as well. *Id.*

⁶ See *Pointer v. United States*, 151 U.S. 396, 418 (1894) (noting that peremptory challenges are "one of the most important rights secured to the accused").

⁷ U.S. CONST. amend. VI. The Sixth Amendment provides in relevant part: "[I]n 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 . . ."

⁸ See Michael J. Desmond, Note, *Limiting a Defendant's Peremptory Challenges: Georgia v. McCollum and the Problematic Extension of Equal Protection*, 42 CATH. U. L. REV. 389, 389-90 (1993) (discussing importance of jury system to ensure fair trial).

⁹ See N.Y. CRIM. PROC. LAW § 270.20(1)(b) (McKinney 1993).

¹⁰ *Id.* § 270.25(1). "A peremptory challenge is an objection to a prospective juror for which no reason need be assigned. Upon any peremptory challenge, the court must exclude the person challenged from service." *Id.*

¹¹ *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991).

II. THE PEREMPTORY CHALLENGE'S ANCIENT LINEAGE

The peremptory challenge is of ancient lineage, stretching back over 200 years of English common law and even into Roman times.¹² The use of peremptory challenges in this country dates as far back as the founding of the Republic—and its common-law origins go back even farther.¹³ Although no constitutional right to a peremptory challenge exists, it has always been a widely held belief that it is an essential part of a trial by jury. In other words, the right of an unqualified challenge is needed to help insure that the jury selected is free from bias and prejudice.

More than two centuries ago, Blackstone eloquently described the virtues of the peremptory challenge:

[The peremptory challenge is a] provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous. This is grounded on two reasons. As everyone must be sensible, what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another; and how necessary it is, that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him; the law wills not that he shall be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike.¹⁴

Every trial lawyer knows that the exercise of a peremptory challenge is often without logic and is usually based on feelings and instincts. Ours is a human system, and there are signs and symptoms that a lawyer can see in jurors that cannot, and perhaps should not, be articulated. These indicators tell us that a particular individual may not be right for a given case. For example, there are otherwise qualified jurors whose life experience, by virtue of their age, intellect, or other circumstances, places them in a poor position to analyze a sophisticated defense or prosecution theory. The only way such a juror can be removed from the jury is peremptorily.

¹² See J. PETTINGAL, *AN ENQUIRY INTO THE USE AND PRACTICE OF JURIES AMONG THE GREEKS AND ROMANS* 115, 135 (1769) (discussing ancient history of peremptory challenges).

¹³ See *Holland v. Illinois*, 493 U.S. 474, 481 (1990).

¹⁴ 4 WILLIAM BLACKSTONE, *COMMENTARIES* 353 (15th ed. 1809).

III. JURORS TODAY ARE OVERBURDENED WITH PREJUDICES

What must be taken into account, when discussing peremptory challenges, is the alarming increase in prejudices that pose a constant threat to the integrity of jury verdicts. The disruptive forces of unemployment, overcrowding, growing economic inequality, and meaningless violence have combined to polarize our society. It seems that hate, not hope, springs eternal in our new world. And when hatred establishes itself as habit, it passes beyond the power of reason to understand it, or words to explain it. Today, this species of prejudice is chronic. Simply put, as times grow worse, prejudices deepen. And sadly, some of these prejudices have gained a high gloss of plausibility.

Moreover, as crime in major cities becomes more rampant and ruthless, fear is slowly paralyzing the public. There are people in New York City who walk with death every day. Jurors caught in the grip of these forces, and held hostage to these fears, are filing into our courts overburdened with prejudices that can easily wreck a criminal trial if not attended to. Because challenges for cause are incapable of effectively dealing with this serious problem facing litigants, the only practical instrument available to remove these corrosive prejudices from jury panels is the peremptory strike.

IV. "AND MAKE NO MISTAKE ABOUT IT: THERE REALLY IS NO SUBSTITUTE FOR THE PEREMPTORY."

In his dissent in *J.E.B. v. Alabama ex rel. T.B.*,¹⁵ Justice Scalia declared: "And make no mistake about it: there really is no substitute for the peremptory."¹⁶ Challenges for cause will not solve the problem of jury prejudice because most jurors are reluctant to acknowledge their biases. No matter how hard lawyers try to uncover prejudice, many jurors will disavow it. Research in social psychology has established that the behavior and attitudes of jurors are influenced by the ceremonial flavor of the selection process.¹⁷ Under the circumstances of uncertainty and unfamiliarity that exists in a courtroom, jurors become very sensitive to "social

¹⁵ 114 S. Ct. 1419, 1438 (1994) (Scalia, J., dissenting).

¹⁶ See *id.* at 1439.

¹⁷ See, e.g., W. MISCHEL, PERSONALITY AND ASSESSMENT *passim* (1968); T. Sarbin, *Contextualism: A World View for Modern Psychology*, in NEBRASKA SYMPOSIUM ON MOTIVATIONS 16-17 (J. Cole, ed. 1976) (focusing on social scientists' theory of role enactment).

comparison information," i.e., signs from other people around them indicating the appropriateness of their behavior, attitudes, and feelings.¹⁸

Thus, during voir dire, jurors may attempt to answer in what they think is a socially appropriate manner instead of being honest.¹⁹ Opinions expressed in public often differ from opinions expressed in private.²⁰ Even the most conscientious juror's ability to candidly express their feelings, particularly on sensitive or controversial issues, is inhibited by a need to appear acceptable to other jurors.²¹ As the "right" or socially correct responses become clear during voir dire, answers from jurors become less and less reliable.²² In a word, jurors quickly learn the paraphernalia of pretense and become shamelessly eager to please.²³

Experienced trial lawyers, using their well-honed senses, can often detect this lack of candor and recognize deep-seated prejudices that remain unspoken.²⁴ Seasoned attorneys can sense an undertone of hostility in expressions and movements that are illegible to others. Without the power of a peremptory challenge, these antagonisms will remain on the jury and may ultimately taint the verdict.

Furthermore, on the few occasions when biases *are* unmasked during the voir dire, disarming or defusing them lies beyond the appliances of our profession. Often jurors will understandably try to convince the court and counsel that their prejudices can be set aside.²⁵ Pledges of fairness in the courtroom are alluring but unre-

¹⁸ See generally STANLEY SCHACTER, *THE PSYCHOLOGY OF AFFILIATION passim* (1959); Leon Festinger, *A Theory of Social Comparison Processes*, 7 *HUM. REL.* 117 *passim* (1954).

¹⁹ See John L. Carroll, *Speaking the Truth: Voir Dire in the Capitol Case*, 3 *AM. J. TRIAL ADVOC.* 199, 200 (1979). "[Jurors] refuse to reveal their own prejudice either because they are unaware that it exists or because the verbal acknowledgment of their prejudice would be embarrassing or socially unacceptable." *Id.*

²⁰ See PAUL A. HARE, *HANDBOOK OF SMALL GROUP RESEARCH* 35 (1962). As a general matter, those opinions expressed in public, or with the known possibility of being made public, are more conforming to the majority or prevalent opinion. *Id.*

²¹ See Neal Bush, *The Case for Expansive Voir Dire*, 2 *LAW & PSYCHOL. REV.* 9, 19-20 (1976) (suggesting that private voir dire is more appropriate than group voir dire in certain instances to prevent jurors from consciously fabricating "acceptable" answers).

²² *Id.* at 11, 13-14 (noting that jurors will either give affirmative answer or will lie when asked about possible prejudices).

²³ *Id.* at 13 (asserting that some jurors will manipulate their answers to remain on jury panel).

²⁴ *Id.* at 17 (stating that voir dire is most effective in obtaining impartial jury when attorneys from both sides are allowed to question potential jurors).

²⁵ *Irvin v. Dowd*, 366 U.S. 717, 727-28 (1960); *United States v. Williams*, 523 F.2d 1203, 1209 (5th Cir. 1975). Assurances of impartiality from prospective jurors, despite known and unknown prejudices, are best met with healthy skepticism. *Id.*; James J. Gobert, *Criminal*

liable.²⁶ Such assurances are inherently suspect.²⁷ The plain fact is that today most of the profound prejudices that afflict many jurors are incorrigible.²⁸ The only effective way to dispose of them is through the use of a peremptory challenge.

On the rare occasion when prejudice *is* uncovered by counsel, the trial judge has the authority to remove the juror for cause.²⁹ Although many believe that trial judges should lean toward disqualifying jurors of dubious impartiality rather than testing the bounds of their discretion by permitting such a questionable juror to serve, it does not always work that way.³⁰ In most cases, successful challenges for cause are rare because few jurors are so plainly prejudiced that judges feel obliged to exclude them.

Moreover, invoking the court's authority to excuse a juror for cause involves an exercise of discretion that is rarely overruled.³¹ If the juror in question convinces the court that he or she can be fair, the challenge is rejected. But such a judgment involves an evaluation of the juror's credibility. Since the judge is no better

Law: In Search of the Impartial Jury, 79 J. CRIM. L. & CRIMINOLOGY, 269, 307 (1988) (noting difficulty of determining whether juror's preexisting knowledge will effect his interpretation of case).

²⁶ See *Dowd*, 366 U.S. at 723 (vacating death sentence as notoriety of defendant's crime in community prevented selection of impartial jury); *Williams*, 523 F.2d at 1209 (reversing and remanding conviction because pretrial publicity and closing argument prevented fair trial).

²⁷ See *Dowd*, 366 U.S. at 725 (noting that pretrial publicity can make it impossible for juror to render unprejudiced decision); *Williams*, 523 F.2d at 1209 (same).

²⁸ See generally Gobert, *supra* note 25, at 309 n.178 (suggesting that once formed, impressions or beliefs are extremely difficult to challenge, even when individuals are confronted with objective facts that tend to refute them).

²⁹ *People v. Culhane*, 33 N.Y.2d 90, 110, 305 N.E.2d 469, 482, 350 N.Y.S.2d 381, 400 (1973) (holding reversible error for failure by court to remove jurors for cause after prejudicial biases were revealed, thus causing defense attorney to exhaust all peremptory challenges for their removal).

³⁰ *Id.* at 108, 305 N.E.2d at 480, 350 N.Y.S.2d at 398. The court stated:

It is almost always wise for a trial court to err on the side of disqualification. . . . Even if a juror is wrongly but not arbitrarily excused, the worst the court will have done in most cases is to have replaced one impartial juror with another impartial juror.

Id. Despite this clear admonition, most trial judges are far too miserly in granting challenges for cause.

³¹ See, e.g., *Ross v. Oklahoma*, 487 U.S. 81, *reh'g denied*, 487 U.S. 1250 (1988). The Court held that the defendant's right to an impartial jury was not violated when he was required to use a peremptory challenge to excuse a juror who clearly should have been excused for cause. *Ross*, 487 U.S. at 88. The Court concluded that an improper denial of a challenge for cause is not error requiring a reversal of the conviction unless the defendant can show that the jurors who actually sat on his case were not impartial. *Id.* at 89. Thus, this brand of error, which in the past had always called for an automatic reversal, has now been relegated to the harmless error rule. *Id.* at 91.

equipped to detect dishonesty than the trial lawyer,³² the peremptory challenge provides the only means of ridding the jury of a person whom counsel intuitively knows is biased.³³

In the real world of selecting jurors, there is yet another more subtle reason why the peremptory challenge is very important. It is one that Blackstone astutely observed:

Because, upon challenges for cause shown, if the reason assigned proves insufficient to set aside the juror, perhaps the bare questioning of his indifference may sometimes provoke a resentment; to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases, peremptorily to set him aside.³⁴

If a challenge for cause should fail, a peremptory challenge is needed to remove the juror who, in all probability, has come to resent the examining attorney.

V. ACCELERATED JURY SELECTION HAS INCREASED THE NEED FOR PEREMPTORY CHALLENGES

The need for an ample allotment of peremptory challenges is reinforced by an alarming trend in New York of accelerating the process of jury selection.³⁵ Many judges view voir dire as a central drain of the court's time, and have launched a movement to severely restrict it.³⁶ Indeed, across the state, trial judges are imposing harsh limits on the amount of time permitted for voir dire.

The practice of accelerating jury selection was recently approved in *People v. Jean*,³⁷ where defense counsel was limited to fifteen minutes on his voir dire in the first two rounds and ten minutes in the third round.³⁸ As a result of these severe constraints, counsel was unable to question many of the prospective

³² See N.Y. CRIM. PROC. LAW § 270.15(1)(c) (McKinney 1993) (permitting both parties and court to examine prospective jurors).

³³ See V. HALE STARR & MARK McCORMICK, JURY SELECTION: AN ATTORNEY'S GUIDE TO JURY LAW AND METHODS § 10.4.3 (1985) (explaining that peremptory challenge permits attorney to dismiss jurors whom he believes to fit common stereotype, without making statement as to why dismissal should occur).

³⁴ See BLACKSTONE, *supra* note 14, at 353.

³⁵ See *People v. Pepper*, 59 N.Y.2d 353, 358-59, 452 N.E.2d 1178, 1180, 465 N.Y.S.2d 850, 852 (1983) (noting that trial court has broad discretion to prevent voir dire from being unduly protracted).

³⁶ *Id.*

³⁷ 75 N.Y.2d 744, 551 N.E.2d 90, 551 N.Y.S.2d 889 (1990).

³⁸ *Id.* at 745, 551 N.E.2d at 91, 551 N.Y.S.2d at 890.

jurors individually, but instead was forced to address the panel as a group.³⁹ Nevertheless, the conviction was affirmed.⁴⁰ Trial judges throughout New York, armed with the *Jean* case, are imposing formidable time limits on jury selection.⁴¹

Those who go to trial today, in the pervasive climate of law and order sweeping this country, face the risk of conviction, even when innocent. Consequently, now more than ever, it is imperative that sufficient care be taken in choosing those who will judge an accused in this hostile environment. The hurried selection of jurors that some defendants must endure today represents an indefensible departure from the constitutional safeguards established long ago to insure that an accused receives a fair trial.⁴²

An even more disconcerting consequence of this rushing of jury selection is the impact that it has on the exercise of challenges. Identifying prejudices that might give rise to a challenge for cause requires an in-depth and searching inquiry, performed by attorneys who are sensitive to the peculiar biases that will affect their case.⁴³ This task takes more time than is being afforded lawyers today. With less time to examine jurors, and thus less time to build a factual record for a challenge for cause, lawyers are required to rely more and more on instinctive judgments. In other words, as the range of information that may be discovered about a prospective juror is reduced, the need for peremptory challenges increases. This important factor fortifies the need for a full quota of peremptory challenges and argues against decreasing their number.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See, e.g., *People v. Rampersant*, 182 A.D.2d 373, 374, 581 N.Y.S.2d 784, 785 (1st Dep't 1992) (allowing court discretion to set time constraints on voir dire); *People v. Lawrence*, 159 A.D.2d 518, 518, 552 N.Y.S.2d 385, 386 (2d Dep't 1990) (holding that court did not commit error by fixing time limits on attorneys during voir dire).

⁴² See *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981). The court recognized the importance of voir dire in stating that: "voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored." *Id.*

⁴³ See *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1429 (1994). The Court held that: "voir dire provides an essential means of discovering actual or implied bias and a foundation upon which the parties may exercise their peremptory challenges intelligently." *Id.*; *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 602 (1976) (Brennan, J., concurring) (stating that voir dire "facilitate[s] intelligent exercise of peremptory challenges and . . . [helps] uncover factors that would dictate disqualification for cause"); see also *United States v. Whitt*, 718 F.2d 1494, 1497 (10th Cir. 1983) (noting that "without an adequate foundation [laid by voir dire], counsel cannot exercise sensitive and intelligent peremptory challenges").

VI. THE *BATSON* ISSUE DOES NOT REQUIRE THAT PEREMPTORY CHALLENGES BE EITHER ELIMINATED OR REDUCED

Nothing stated here is incompatible with the view that peremptory challenges cannot be used to strike jurors based solely on their race or gender. The Supreme Court's recent inoculation of peremptory challenges against their use in a racially discriminatory manner does not argue for their reduction.⁴⁴ In the wake of *Batson*,⁴⁵ some people have come to believe that the peremptory challenge's inherent potential for corrupting the selection process by excluding jurors on racially motivated grounds calls for its elimination entirely.⁴⁶

This would be a terrible mistake. An institution with such a long and venerable history should not be depreciated merely because a few lawyers have misused peremptory challenges in a discriminatory manner—any more than a lawyer's misuse of cross-examination would be cause for its elimination.⁴⁷

Research shows that *Batson* issues arise in less than five percent of the cases litigated throughout all of New York State.⁴⁸ In the other ninety-five percent of cases tried, the orthodox exercise

⁴⁴ See *Batson v. Kentucky*, 476 U.S. 79 (1986).

⁴⁵ *Id.* at 89 (holding that discriminatory exercise of peremptory challenges by prosecutor against members of defendant's racial class violated Equal Protection Clause); *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1422 (1994) (holding intentional discrimination on basis of gender in peremptory challenges violates Equal Protection Clause); *Edmondson v. Leesville Concrete Co.*, 500 U.S. 614, 631 (1991) (extending *Batson* to civil cases); *Powers v. Ohio*, 499 U.S. 400, 415 (1991) (holding white defendant has standing to assert right of black jurors not to be removed from jury for racial grounds).

⁴⁶ *Batson*, 476 U.S. at 107 (Marshall, J., concurring). The late Justice Thurgood Marshall urged the elimination of peremptory challenges because the potential for their illegitimate use taints the process of jury selection. *Id.*; see also Morehead, *supra* note 4, at 625 (arguing that even after *Batson*, peremptory challenges can still be used to exclude minorities from juries). Two judges on the New York Court of Appeals, in a concurring opinion, have embraced Justice Marshall's contention and have recommended that the New York Legislature reexamine the curriculum of peremptory challenges with the view toward eliminating them. See *generally* *People v. Bolling*, 79 N.Y.2d 317, 328, 591 N.E.2d 1136, 1141, 582 N.Y.S.2d 950, 957 (1992).

⁴⁷ See *Bray*, *supra* note 4, at 521-22 (describing development of peremptory challenges in English common law); BLACKSTONE, *supra* note 14, at 352-53 (describing why peremptory challenges are required to reach just results in criminal cases).

⁴⁸ See NEW YORK COUNCIL OF CRIMINAL DEFENSE LAWYERS, COMMITTEE FOR THE PRESERVATION OF PEREMPTORY CHALLENGES 12-13 (June 27, 1994). An investigation of the pending briefs in the New York County District Attorney's office revealed that of the more than 1600 briefs prepared in 1992 and 1993, there were only 32 cases involving *Batson* claims which results in a calculation of roughly 1% each year or 2% of all the cases appealed. *Id.* In 1993, there were 4,137 cases tried to a conclusion in the Supreme Court of New York. *Id.* In appeals from the resulting convictions, only 29 cases, or .07% raised *Batson* issues. *Id.* Of course, a number of variables are contained in this difficult statistical analysis. But these numbers are certainly some indication of the scarcity of litigated *Batson* claims. *Id.*

of peremptory challenges provides a valuable and legitimate means of minimizing prejudice on jury panels. One set of commentators has observed that in the vast majority of cases, the question of improperly exercised peremptories does not even arise, and accordingly, there is no extra litigative cost.⁴⁹ When *Batson* issues do arise, most claims are immediately dismissed by the judge because the defense has failed to establish a prima facie basis for believing that any improper challenge has been exercised.⁵⁰ Some authors suggest that, typically "*Batson* hearings are a 5-to-15-minute interlude during the jury selection process."⁵¹ On the rare occasion when a peremptory challenge is abused, it can be remedied by invoking the corrective measures so carefully calculated in *Batson*.

To cast out the peremptory challenge with the bathwater of such a small circle of cases would be an awful miscalculation. It would be unthinkable to reduce the number of peremptory challenges to counteract a situation that might arise in less than five percent of the cases tried in New York. Moreover, it appears that the *Batson* doctrine has crested and will not expand beyond race and gender.⁵²

VII. THE REDUCTION OF PEREMPTORY CHALLENGES WILL HARM DEFENDANTS MUCH MORE THAN THE PROSECUTION

The reduction of peremptory challenges will harm the defense far more than the prosecution because the defendant in a criminal case has a greater need for peremptory challenges than the state. It is generally acknowledged that the prosecution in most criminal

⁴⁹ Alyssa Helland et al., *An Asymmetrical Approach to the Problem of Peremptories: A Rebuttal*, 29 CRIM. L. BULL. 242 *passim* (1992).

⁵⁰ See David D. Hopper, Note, *Batson v. Kentucky And the Prosecutorial Peremptory Challenge: Arbitrary and Capricious Equal Protection?*, 74 VA. L. REV. 811, 821 (1988) (noting that many courts have not found prima facie cases when prosecutors removed several blacks from juries, but could have removed more); Joshua E. Swift, Note, *Batson's Invidious Legacy: Discriminatory Juror Exclusion and the "Intuitive" Peremptory Challenge*, 78 CORNELL L. REV. 336, 357-58 (1993). Since *Batson*, prime facie cases of discriminatory peremptory challenges have been established in only seventy-six federal circuit cases. *Id.* In only three of those cases did the courts find that the attorney's race-neutral reasons for juror exclusion were pretextual, therefore requiring reversal under *Batson*. *Id.*

⁵¹ See Helland et al., *supra* note 49, at 242.

⁵² See *Davis v. Minnesota*, 50 N.W.2d 767 (Minn. 1993), *cert. denied*, 114 S. Ct. 2120 (1994). On May 23, 1994, the Supreme Court declined to hear a case which presented the issue of whether *Batson* should be extended to religious bias *Id.*

cases has a decided advantage over the defendant.⁵³ Studies have shown that a preponderance of jurors come to court bearing beliefs that are more antagonistic to the defendant than to the state.⁵⁴ A number of states have acknowledged this disparity of prejudice by allowing a larger ration of peremptory challenges for the defense than for the prosecution.⁵⁵

Years ago the National Jury Project, an organization that conducted some of the most authoritative research in the field of jury dynamics, found that two-thirds of the jurors were unsympathetic to the defendant.⁵⁶ Their studies showed that thirty-one percent of the people selected for jury duty believe that an accused person is guilty simply because a charge has been made.⁵⁷ In addition, more than fifty percent believe that it is the defendant's responsibility to prove his or her innocence rather than the state's burden to prove the case.⁵⁸

We must assume that the public's deep skepticism regarding a defendant's rights has reached an even higher level today.⁵⁹ As a consequence, a much greater burden rests upon the defense, than upon the prosecution, to remove biased jurors. Any reduction in the number of peremptory challenges will slight the defense far more than the prosecution and will inevitably lead to an imbalance of prejudice on the jury. However, and most significantly, the District Attorney's Association of New York also opposes the reduction of peremptory challenges in criminal cases.⁶⁰ Certainly,

⁵³ See, e.g., Jay S. Silver, *Equality of Arms and the Adversarial Process: A new Constitutional Right*, 1990 WIS. L. REV. 1007, 1009 (noting that Rehnquist Court lacked faith in process by which criminal charges are adjudicated).

⁵⁴ See, e.g., *What Empirical Research Tells Us, and What We Need to Know About Juries and the Quest For Impartiality*, 40 AM. U. L. REV. 547 *passim* (1991) (discussing potential jurors' beliefs that defendants are guilty).

⁵⁵ See JON M. VAN DYKE, *JURY SELECTION PROCEDURES* 282-83 (1977). Significantly, the defendant is given more peremptory challenges than the prosecutor in eleven states. States that allow more challenges to the defendant than the prosecution are: Alaska, Arkansas, Georgia, Kentucky, Maryland, Michigan, Minnesota, New Mexico, South Carolina, Tennessee, and West Virginia. *Id.* See also FED. R. CRIM. P. 24. Under rule 24, a defendant is given 10 peremptory challenges to the Government's six. *Id.*

⁵⁶ See NATIONAL JURY PROJECT, INC., *JURYWORK: SYSTEMATIC TECHNIQUES* § 2.04[2][a] n.16 [hereinafter NATIONAL JURY PROJECT, INC.] (Elissa Kauss & Beth Bonora eds., 2d ed. 1994); see also NATIONAL JURY PROJECT AND NATIONAL LAWYERS GUILD, *THE JURY SYSTEM 2* (1975) (finding 60% of prospective jurors unable to follow court instructions that defendant is presumed innocent and prosecution has burden of proof).

⁵⁷ See NATIONAL JURY PROJECT, INC., *supra* note 56, § 2.04[2][a] n.16.

⁵⁸ *Id.* § 2.04 [2][a] n.15.

⁵⁹ *Id.*

⁶⁰ See Gary Spencer, *Proposals on Jury System Elicit Unease in the Courts*, N.Y. L.J., Apr. 11, 1994, at 2.

this position, coming as it does from such a formidable group, lends force to the arguments presented here and indicates that they are bipartisan.

Finally, those who advocate reducing the number of peremptory challenges argue that it will save costs and expedite trials.⁶¹ During times inhospitable to delay, public officials, in an attempt to modernize, are constantly negotiating the tensions that exist between time consuming procedural safeguards and ways to more efficiently administer justice. Admittedly, the exercise of peremptory challenges does delay the selection process somewhat and calls more jurors into service.⁶² Nevertheless, such a small cost and modest delay must be endured if impartial juries are to be secured. Jury selection is one of the most important aspects of any criminal trial. This critical safeguard should not be sacrificed for a small measure of judicial economy.

CONCLUSION

A fair determination of an individual's guilt or innocence is one of the most cherished policies of our civilization.⁶³ The right to a trial by jury has occupied a central place in our system of justice because it safeguards the accused from arbitrary exercises of power by the government. To successfully fulfill this important constitutional objective, a jury must, of necessity, be impartial. Thus, the traditional means of minimizing prejudice through the peremptory challenge must be left intact. It is as simple as that. Such an important safeguard should not be sacrificed for mere expediency. Without an adequate accompaniment of peremptory challenges, fair trials in this state—and indeed throughout the country—will be seriously jeopardized.

⁶¹ See 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, 157 (1989). "[I]n the United States, the process of selecting a jury is often prolonged, sometimes consuming as much time as the trial." *Id.*

⁶² *Id.* at 155.

⁶³ See 3 WILLIAM BLACKSTONE, COMMENTARIES § 379 (Cooley ed., 1899) (describing trial by jury as "the glory of the english law").