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Taking The High Road: Why Prosecutors Should Voluntarily Waive Peremptory Challenges

MAUREEN A. HOWARD¹

ABSTRACT

A fundamental tenet of the American justice system is that an impartial jury is an essential component of a fair trial. In addition to a litigant's right to have his or her case decided by jurors free of bias or prejudice, individual citizens enjoy a separate right to be considered for jury service without the taint of improper discrimination. Scholars have called for the elimination of peremptory challenges in jury selection, arguing they lack utility and are exercised in an unconstitutionally discriminatory manner.

No one, however, has proposed that prosecutors should voluntarily waive peremptory challenges even if the general practice is retained. A prosecutor's ethical duty goes beyond advocacy; unlike other lawyers, the prosecutor is uniquely duty-bound to "seek justice." Prosecutors' use of peremptory challenges is an exercise of discretion to be evaluated against this distinct ethical standard. A prosecutor cannot deny that peremptory challenges may be exercised in violation of the Equal Protection Clause at least some of the time by some of the lawyers in her office. In addition, prosecutors cannot always elicit adequate information about prospective jurors to form rationally-based reasons for excusing jurors peremptorily, which raises a separate concern about a prosecutor's exercise of peremptory challenges as an irrational, arbitrary, and capricious governmental act.

Peremptory challenges are not themselves constitutionally guaranteed; rather, they are a prophylactic safeguard of the constitutional right to an impartial jury, subject to cost-benefit scrutiny. On the one hand, to what extent does the practice risk unconstitutional discrimination, damaging both the actual and perceived fairness and reliability of the prosecution process? On the other hand, to what extent does the practice actually increase the likelihood of a just conviction? In balancing the two, is the benefit of one outweighed by the detriment to the other?

1. Assistant Professor, University of Washington School of Law. The author served as a Deputy Prosecuting Attorney for King County in Seattle, Washington and dedicates this article to former King County Prosecutor Norm Maleng (1939–2007), one of the most brilliant and ethical lawyers of our time. It was he who planted the seed for this article. The author thanks the following people for their insightful comments on earlier drafts: Helen Anderson, Tom Andrews, Laura Appleman, Jeffrey Dobbins, Christopher Howard, W. H. (Joe) Knight, Deborah Maranville, Todd Maybrown, Dana Raigrodski, Hari Osofsky, Ellen Yaroshefsky, Mary Whisner, and Louis Wolcher.

In this Article, I review the efficacy of peremptory challenges and conclude that both empirical and anecdotal evidence confirm such challenges are of little utility. I contend that the marginal benefit of peremptory challenges to a criminal prosecutor is outweighed by the damage done to both the actual and perceived fairness of the system, and that imbalance should persuade prosecutors to consider a wholesale voluntary waiver of peremptory challenges.

INTRODUCTION

A fundamental tenet of the American justice system is that an impartial jury is critical to providing a fair trial to litigants.² In addition to a criminal defendant's right to have his case decided by jurors free of bias or prejudice, individual citizens enjoy a separate right to be considered for jury service without the taint of improper discrimination.³ Efforts to seat an impartial jury cannot infringe on the constitutional rights of prospective jurors.⁴

A number of scholars and commentators have criticized the use of peremptory

2. "Juries are supposed to serve a number of important functions. Formally their task is to engage in sound fact finding from the evidence produced at trial. However, juries are also supposed to represent the various views of the community, serve as a political body, and, through rendering fair and just verdicts, provide legitimacy for the legal system. A jury that is not representative of the community is likely to fail in these functions." NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* 66 (2007). See also American Bar Association, *Principles for Juries and Jury Trials* 3 (2005), available at <http://www.abanet.org/juryprojectstandards/principles.pdf> (last visited Feb. 11, 2010).

3. The Supreme Court in *Batson v. Kentucky*, 476 U.S. 79 (1986), held that the Equal Protection Clause of the Fourteenth Amendment prohibited the state prosecutor from exercising peremptory challenges based on race. This constitutional prohibition was extended to ethnicity in *Hernandez v. New York*, 500 U.S. 352 (1991), and to gender in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994). A party need not be of the same race as the challenged juror to raise the issue. *Powers v. Ohio*, 499 U.S. 400 (1991) (white defendant may object to prosecutor's challenge of minority jurors). The protection against discrimination in jury selection applies to private litigants in civil cases. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991). The prohibition against discrimination in exercising peremptory challenges extends to all parties, including a criminal defendant. *Georgia v. McCollum*, 505 U.S. 42 (1992) (holding racial discrimination in jury selection undermines public confidence in the fairness of the jury system regardless of who exercises the discriminatory challenge). This standard may eventually be extended to prohibit the exercise of peremptory challenges based on sexual orientation. See, e.g., *Romer v. Evans*, 517 U.S. 610 (1996) (finding Colorado constitutional amendment violated equal protection where it attempted to prohibit all legislative, executive, or judicial action designed to protect homosexual individuals from discrimination). In the federal system, The Jury Selection and Services Act prohibits discrimination as well. 28 U.S.C. § 1862 (2009) ("No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States on account of race, color, religion, sex, national origin, or economic status."). State constitutions and/or legislation may similarly broaden the protections afforded a prospective juror from discrimination in jury selection beyond those articulated in *Batson* and its progeny. For example, the Washington State Constitution provides that no person shall be incompetent as a juror "in consequence of his opinion on matters of religion." WASH. CONST. art. I, § 11. It remains unclear whether this constitutional provision triggers a *Batson* analysis. See Justin Dolan, *Thou Shall Not Strike: Religion-Based Peremptory Challenges Under the Washington State Constitution*, 25 SEATTLE U. L. REV. 451 (Fall 2001).

4. See citations and accompanying text, *supra* note 3. The thread of these cases is that citizens have a right to be considered for and participate in jury service, free of discrimination. See Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right is it, Anyway?*, 92 COLUM. L. REV. 725, 742-50 (1992).

challenges precisely because they are used discriminatorily and thus unconstitutionally.⁵ One commentator referred to the peremptory challenge as a “weapon of prejudice.”⁶ Another denounced peremptory challenges as being “probably the single most significant means by which . . . prejudice and bias [are] injected into the jury selection system.”⁷ Yet another referred to unrestricted peremptory challenges as “the last bastion of undisguised racial discrimination in the criminal justice system.”⁸ At least one federal judge voiced her concern about the abuse of peremptory challenges by banning them in her courtroom, calling them a violation of equal protection.⁹ Some U.S. Supreme Court justices have also questioned whether the detriments associated with the use of peremptory challenges outweigh the intended benefits, producing a net harm.¹⁰ Justice Thurgood Marshall, in his concurring opinion in *Batson v. Kentucky*,¹¹ grimly predicted that discriminatory use of peremptory challenges would continue, despite the constitutional prohibition against prosecutors’ use of peremptory challenges as pretexts for invidious racial discrimination. The cure for such discrimination, he wrote, was the elimination of peremptory challenges entirely.¹²

5. See, e.g., Jose Felipe Anderson, *Catch Me If You Can! Resolving The Ethical Tragedies In the Brave New World of Jury Selection*, 32 NEW ENG. L. REV. 343 (1998); Felice Banker, Note, *Eliminating A Safe Haven for Discrimination: Why New York Must Ban Peremptory Challenges From Jury Selection*, 3 J.L. POL’Y 605 (1995); Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL’Y REV. 149 (2010); Raymond J. Broderick, *Why Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369 (1992); Carol A. Chase & Colleen P. Graffy, *A Challenge For Cause Against Peremptory Challenges in Criminal Proceedings*, 19 LOY. L.A. INT’L & COMP. L. REV. 507 (1997); Brent J. Gurney, *The Case for Abolishing Peremptory Challenges in Criminal Trials*, 21 HARV. C.R.-C.L. L. REV. 227 (1986); Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge’s Perspective*, 64 U. CHI. L. REV. 809 (1997); Eric D. Katz, *Striking the Peremptory Challenge from Civil Litigation: “Hey Batson, Stay Where You Belong!”*, 11 PACE L. REV. 357 (1991); Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 GEO. L.J. 945 (1998); Nancy S. Marder, *Justice Stevens, The Peremptory Challenge, and The Jury*, 74 FORDHAM L. REV. 1683 (2006); Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099 (1994); Antony Page, *Batson’s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155 (2005); Amy Wilson, *The End of Peremptory Challenges: A Call For Change Through Comparative Analysis*, 32 HASTINGS INT’L & COMP. L. REV. 363 (2009); Hiroshi Fukurai & Edgar W. Butler, *Sources of Racial Disenfranchisement in the Jury and Jury Selection System*, 13 NAT’L BLACK L.J. 238 (1994).

6. Katz, *supra* note 5, at 361.

7. Carl H. Imlay, *Federal Jury Reformation: Saving a Democratic Institution*, 6 LOY. L. REV. 247, 270 (1973).

8. 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, 167 (1989).

9. Mark Hansen, *Peremptory-Free Zone: A Federal Judge Won’t Allow Such Challenges in Her Courtroom*, 82 A.B.A. J. 26 (Aug. 1996) (discussing *Minetos v. City University of New York*, No. 92 Civ. 8785 (May 9, 1996)).

10. See *Miller-el v. Dretke*, 545 U.S. 231 (2005) (Breyer, J., concurring); John Paul Stevens, *Foreword: Symposium on the Jury at a Crossroad: The American Experience*, 78 CHI.-KENT L. REV. 907 (2003).

11. 476 U.S. 79 (1986).

12. *Id.* at 103.

The fact that peremptory challenges have been widely indicted should sufficiently motivate a prosecutor to reevaluate the discretionary use of such challenges. This Article argues for an office-wide policy of peremptory waiver by criminal prosecutors, although some waiver arguments apply to civil prosecutors and defense counsel as well. The unique litigation role and ethical responsibilities of criminal prosecutors, however, make them particularly suited to a cost-benefit analysis of peremptory challenges.

In the criminal justice system, the relationship of the parties is unique. A prosecutor stands in the place of the sovereign with the full weight and powers of the government, including the power to investigate potential jurors. A prosecutor is a “minister of justice” whose duty is to seek justice, not merely to convict.¹³ Unlike any other lawyer, a criminal prosecutor has an affirmative duty to the opposing party.¹⁴ A criminal defense attorney has no reciprocal duty to the government; she is charged exclusively with her client’s well-being.¹⁵

A prosecutor’s goal should be a fair and constitutional conviction, not conviction by any means, even if those means are sanctioned by the legislature. The constitutional protections afforded to criminal defendants—such as the privilege against self-incrimination, the presumption of innocence, the stringent beyond a reasonable doubt standard, and the requirement of a unanimous jury verdict to convict—exist to counter the innate power imbalance that favors the government. The asymmetrical relationship between the prosecution and defense undercuts an argument for tactical parity with respect to peremptory challenges.¹⁶ Prosecutors should voluntarily abstain from using tools that are legal but risk seating a biased jury and denying individuals of a certain class, race, or gender the right to serve on juries.

These rationales do not apply to civil prosecutors. In addition to the fact that the constitutional and policy protections of criminal defendants do not apply to civil litigants,¹⁷ civil prosecutors often deal with corporate and other defendants

13. MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. 1 (2007) [hereinafter MODEL RULES]. See also STANDARDS FOR CRIMINAL JUSTICE, The Function of the Prosecution, Standard 3-1.2 (Am. Bar Ass’n 3d ed. 1992).

14. MODEL RULES R. 3.8. See also R. MICHAEL CASSIDY, PROSECUTORIAL ETHICS 3 (2005).

15. Although an exercise of peremptory challenges by a government defense lawyer might qualify as “arbitrary and capricious” if lacking rational basis, a discussion of the relative duties of defense counsel, both constitutional and not, is beyond the scope of this Article. The arguments in favor of prosecutors voluntarily waiving peremptory challenges weigh persuasively in favor of their elimination entirely.

16. In addition, because the purpose of the peremptory challenge is a back-up for the for-cause challenge and a further guarantee of juror impartiality, it is noteworthy that only the defendant, and not the government, has a constitutional guarantee of an impartial jury under the Sixth Amendment. See NANCY GERTNER & JUDITH H. MIZNER, THE LAW OF JURIES § 3:3 at 61 n.1 (2d ed. Thompson West 2009) [hereinafter THE LAW OF JURIES] (“[T]he government has no constitutional right to an impartial jury but, clearly, there is a strong policy basis for insuring that the jury the government receives is an impartial one as well.” (citing Stephen R. Diprima, Note, *Selecting a Jury in Federal Criminal Trials after Batson and McCollum*, 95 COLUM. L. REV. 888, 891 n.25 (1995))).

17. The constitutional guarantees of the Sixth Amendment in criminal cases, for example, have been extended to the states via the Fourteenth Amendment, whereas those of the Seventh Amendment affecting civil litigants have not. See *Swain v. Alabama*, 380 U.S. 202, 218-20 (1965). This reflects the greater qualitative

whose resources and stature more closely resemble those of the government prosecutor.

The fact that the government's role in civil litigation, especially as a defendant, can more closely mirror that of other civil litigants requires a different analysis of a civil prosecutor's role across various types of civil litigation and exceeds the scope of this paper.¹⁸ While arguments might be made that, in some civil cases, prosecutors should voluntarily limit their use of peremptory challenges, what is at stake in criminal cases is sufficiently qualitatively distinct. This Article will focus on the latter while remaining agnostic on its possible applicability to other situations.

Public perception of the fairness and trustworthiness of the prosecutorial process is critical to a healthy criminal justice system.¹⁹ In exercising the power of the government to prosecute criminal offenses, a prosecutor must balance many competing interests: protecting the public, demanding accountability from law breakers, obtaining psychological and financial redress for victims, deterring future criminal behavior, and maintaining both the actual integrity of the prosecutorial process as well as the public perception of process integrity. In an individual case, a prosecutor who has analyzed the facts and the law and concluded that a criminal defendant has committed a crime likely has conviction as a goal. On a broader stage, the goal of a prosecutorial office is a higher office-wide conviction rate across all such cases. Nonetheless, few, if any, prosecutors would be willing to forfeit public confidence in the fairness of the system in exchange for a higher criminal conviction rate.²⁰ The prosecutor's goal should be fair and constitutional conviction, not conviction by any means, even if those means are sanctioned by the legislature. After all, justice pursued at any cost is rarely just.

Prosecutors are generally held to a different standard than attorneys representing clients.²¹ Unlike other lawyers, a prosecutor is charged not merely with a duty

concern for the rights of criminal defendants (where life or liberty hangs in the balance) than those of civil litigants (where property rights are at stake).

18. In civil litigation, government prosecutors appear as defense counsel far more often than as plaintiff's counsel. In the federal system, of all civil cases commenced in 2008 where the United States was a party, the government was the plaintiff in 22% of cases and the defendant in 78%. Admin. Office of the U.S. Courts, Statistical Tables for the Federal Judiciary, Table C-2 (2007–2008), available at <http://www.uscourts.gov/stats/dec08/index.html>.

19. As noted by Thomas Jefferson (1743–1826) in a letter to George Hammond in 1792, "It is reasonable that everyone who asks justice should do justice." Letter from Thomas Jefferson, Secretary of State, to George Hammond, British Prime Minister to the United States (May 29, 1792) in 7 THE WORKS OF THOMAS JEFFERSON at 34 (Paul Leicester Ford ed., Federal ed. 1904–05), available at <http://oll.libertyfund.org/title/804/86391>.

20. Sadly, several lawyers who read earlier drafts of this article heatedly disputed this proposition. Their collective belief is that prosecutors on the whole seek to "win at any cost" with little regard for the actual or perceived fairness of the system. This perception provides additional evidence why prosecutors should carefully weigh the decision to exercise discretionary peremptory challenges. See *infra* Part III.

21. See, e.g., Kenneth Bresler, "I Never Lost a Trial": When Prosecutors Keep Score of Criminal Convictions, 9 GEO. J. LEGAL ETHICS 537 (1996); Ross Galin, *Above the Law: The Prosecutor's Duty to Seek*

to advocate for her client, but an ethical duty to “seek justice.”²² This constitutes a unique ethical standard against which prosecutors’ discretionary use of peremptory challenges must be evaluated. Peremptory challenges are not constitutionally guaranteed²³; rather, they are a prophylactic safeguard of a constitutional right to an impartial jury. Such safeguards are subject to cost-benefit scrutiny²⁴ prompting an assessment of the extent to which the practice risks unconstitutional discrimination, damaging both the actual and perceived fairness of the prosecution process, as well as the extent to which the practice actually increases the likelihood of a just conviction. And in balancing the two, is the benefit of one outweighed by the detriment to the other?

A prosecutor cannot deny that peremptory challenges may be exercised in an improper discriminatory manner at least some of the time by some of the lawyers in her office.²⁵ In addition, prosecutors are sometimes unable to elicit adequate information about prospective jurors to form rationally-based reasons for excusing jurors peremptorily. This raises an entirely separate concern about the unconstitutionality of a prosecutor’s exercise of peremptory challenges as an

Justice and the Performance of Substantial Assistance Agreements, 68 FORDHAM L. REV. 1245 (2000); Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259 (2001); Samuel J. Levine, *Taking Prosecutorial Ethics Seriously: A Consideration of the Prosecutor’s Ethical Obligation to “Seek Justice” in a Comparative Analytical Framework*, 41 HOUS. L. REV. 1337 (2004).

22. MODEL RULES R. 3.8 cmt. 1 (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”); STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE STANDARD 3-1.2 (“The prosecutor is an administrator of justice.”); MODEL CODE OF PROF’L RESPONSIBILITY EC 7-13 (1998) [hereinafter MODEL CODE].

23. See *Georgia v. McCollum*, 505 U.S. 42, 57 (1992).

24. See *New York v. Quarles*, 467 U.S. 649, 657 (1984) (concluding that public safety may outweigh need for a prophylactic rule protecting the Fifth Amendment’s privilege against self-incrimination, i.e., Miranda warnings). See generally David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988).

25. I am speaking here of subconscious discrimination or “implicit bias” based on gender and racial stereotypes in the absence of juror-specific information. As federal judge Mark Bennett explains, “Implicit biases are the plethora of fears, feelings, perceptions, and stereotypes that lie deep within our subconscious, without our conscious permission or acknowledgement. Indeed, social scientists are convinced that we are, for the most part, unaware of them. As a result, we unconsciously act on such biases even though we may consciously abhor them.” Bennett, *supra* note 5, at 149. (Judge Bennett presents an excellent review of the social science research regarding implicit bias, and concludes that peremptory challenges should be eliminated entirely. In furtherance of his argument, the judge challenges all members of the legal profession to visit www.implicit.harvard.edu and perform an implicit bias “Demonstration Test.”).

In addition to implicit bias, there exists the possibility that some prosecutors, despite good training and supervision, will intentionally engage in discrimination. In the federal system alone, prosecutorial misconduct of various forms, as documented by the U.S. Department of Justice’s Office of Professional Responsibility, has tripled during the last decade. See Jim McGee & Brian Duffy, *Truth and Consequences: How the Department of Justice Really Works*, U.S. NEWS & WORLD REP., July 1, 1996, at 28. As noted by one commentator, even “highly moral prosecutors, emotionally committed to the imperative of getting the ‘bad guys’ off the street might deem evading [ethical rules] a small price to pay to accomplish this goal.” Randall Grometstein, *Prosecutorial and Noble-Cause Corruption*, 43 NO. 1 CRIM. L. BULL. 2 (2007).

irrational, arbitrary,²⁶ and capricious²⁷ governmental act.²⁸ These risks of perceived and actual misuse of peremptory challenges in violation of the Equal Protection Clause should persuade a prosecutor to rethink her office policy on the practice. The fact that the perceived value of peremptory challenges rests on several assumptions of questionable validity should ultimately convince a prosecutor that the costs of peremptory challenges in most situations outweigh any benefit.

In this Article, I review the efficacy of peremptory challenges and conclude that both empirical and anecdotal evidence confirm such challenges are of little utility. I contend that the marginal benefit of peremptory challenges to a criminal prosecutor is outweighed by the damage done to both the actual and perceived fairness of the system. I argue for an office policy directing prosecutors to waive peremptory challenges except in narrowly defined circumstances, such as curing a failed challenge for cause by either party or excusing a juror who demonstrates an unwillingness to deliberate in good faith.

I. ASSESSING THE VALUE OF THE PEREMPTORY CHALLENGE

The starting point for assessing the net value of peremptory challenges to a prosecutor is an evaluation of the usefulness of peremptory challenges.²⁹ The perceived value of peremptory challenges rests on several assumptions of questionable validity. To conclude that peremptory challenges are useful, one must first assume that during the selection process lawyers can, and do, ask questions and make observations that unearth information that effectively informs them about the potential jurors' biases, attitudes, beliefs, and preconcep-

26. "Arbitrary" is defined as action done "in an 'arbitrary manner, as fixed or done capriciously or at pleasure. Without adequate determining principle; not founded in the nature of things; nonrational; not done or acting according to reason or judgment, depending on the will alone" BLACK'S LAW DICTIONARY 96 (5th ed. 1979). See generally Solomon M. Fulero & Steven D. Penrod, *Attorney Jury Selection Folklore: What Do They Think and How Can Psychologists Help?*, 3 FORENSIC REP. 233, 241-43 (finding lawyers' decisions during voir dire to be arbitrary by scientific standards); Valerie P. Hans & Neil Vidmar, *Jury Selection*, in THE PSYCHOLOGY OF THE COURTROOM 39, 73 (Norbert L. Kerr & Robert M. Bray eds., 1982) (finding lawyers' assessment of prospective jurors to be arbitrary).

27. "'Capricious' *adj.* 1. (Of a person) characterized by or guided by unpredictable or impulsive behavior." BLACK'S LAW DICTIONARY (8th ed. 2004).

28. See Note, *Due Process Limits on Prosecutorial Peremptory Challenges*, 102 HARV. L. REV. 1013 (1989) (arguing that prosecutorial peremptory challenges, as potentially arbitrary and capricious government actions, violate the Due Process Clause of the Fourteenth Amendment).

29. Within the scope of this Article, the discussion of the utility of peremptory challenges is limited to the intended purpose of identifying and excusing prospective jurors whose attitudes and beliefs render them incapable of sitting as an impartial and fair juror. Some scholars have noted that the exercise of peremptory challenges, subjected to the scrutiny of a *Batson* inquiry, has a separate utility in terms of legal ethics. See, e.g., Laura I. Appleman, *Reports of Batson's Death Have Been Greatly Exaggerated: How the Batson Doctrine Enforces a Normative Framework of Legal Ethics*, 78 TEMP. L. REV. 608 (2005) ("The *Batson* procedure enforces a normative framework of legal ethics, providing an aspirational standard for the legal profession . . . fostering a nondiscrimination norm as part of the norm of professionalization . . .").

tions. Second, one must assume that a lawyer can perform an effective calculus on the information obtained and assess, on the spot, the relative merits of these experiences and biases. Based on this calculus, it must be further assumed that the lawyer can accurately deselect those few jurors (frequently only three) who would be the least amenable to—or the most biased against—the case, the client, or the lawyer herself.

In appraising the value of the peremptory challenge, I first provide an overview of the American jury selection system and discuss the intended purpose and role of the peremptory challenge within it. Then, I briefly examine the history of the peremptory challenge in England and the English valuation of the peremptory challenge based on seven hundred years' experience. Last, I evaluate the effectiveness of the challenge, relying on both empirical studies and anecdotal evidence from my own 20+ years of experience in the courtroom as a civil litigator, a criminal prosecutor, and a judge.

The purpose of the jury selection system is to empanel a final, petit jury³⁰ composed of impartial jurors free of bias or prejudice with respect to the parties or issues in the case, selected without discrimination from a representational cross-section of society. Peremptory challenges, exercised at the last stage of the jury selection process, are supposed to provide an additional layer of nondiscriminatory scrutiny to the proposed panel of jurors, further ensuring impartiality.³¹ The goal of impartiality is driven by the Sixth Amendment to the U.S. Constitution, which guarantees criminal defendants the right to "an impartial jury of the State and district where the crime shall have been committed."³²

An impartial jury is considered critical to providing a fair trial to litigants in the American justice system.³³ In addition to a litigant's right to have his or her case decided by a jury of individuals free of bias or prejudice, individual citizens enjoy a separate right to be considered for jury service without the taint of improper discrimination.³⁴ The concept of a constitutionally sound jury as one that is representational—that is, selected from a cross-sectional venire—is tied to democratic principles associated with jury service in this country.³⁵ For a petit

30. The petit jury is defined as the group of jurors ultimately impaneled to sit and decide the case.

31. See *Swain v. Alabama*, 380 U.S. 202, 218-19 (1965).

32. U.S. CONST. amend. VI. Although the Sixth Amendment concerns only criminal cases, the expectation of an impartial jury has been extended to civil litigants under the Seventh Amendment. See Stephen R. Diprima, Note, *Selecting a Jury in Federal Criminal Trials after Batson and McCollum*, 95 COLUM. L. REV. 888, 891 n.25 (1995).

33. See *supra* note 2. Juror impartiality is required throughout the proceedings, not just at the outset of the trial. *Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1998) (en banc).

34. See *supra* note 3 and accompanying text.

35. See *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946) ("The American tradition of trial by jury . . . necessarily contemplates an impartial jury drawn from a cross-section of the community. This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political, and geographical groups of the community; frequently prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than

jury to meet this latter constitutional threshold of impartiality, the selection system employed must pass two tests. First, the methodology the court uses to identify and summon citizens for jury duty (selection of the grand venire) must be free of discrimination. Second, the method by which individual members of a case-specific venire are included or excluded from service on the petit jury must also be free of discrimination.³⁶ The requirement that the larger venire from which the petit jury is ultimately selected be *impartial* has been interpreted to require a venire drawn from a fair cross-section of the community selected without systematic exclusion of any group.³⁷ In the federal system, there are also additional statutory rights to a venire composed of a fair cross section of the community.³⁸

Jury selection procedures vary,³⁹ but they generally consist of three stages:⁴⁰ (1) identifying and summoning potential jurors to the courthouse for service⁴¹; (2) selecting smaller groups of those summoned potential jurors for inclusion in a case-specific venire; and (3) selecting from the case-specific venire those individuals who ultimately serve on the petit jury in an individual case. Although challenges have been raised to the first two stages of the system,⁴² the vast majority of criticism has been

a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.”)

36. See *Taylor v. Louisiana*, 419 U.S. 522, 530-31 (1975) (citing *Thiel v. S. Pac. Co.*, 328 U.S. 217, 227 (1946)); *Batson v. Kentucky*, 476 U.S. 79, 87 (1986); *THE LAW OF JURIES*, *supra* note 16, at 34-48.

37. See *Duren v. Missouri*, 439 U.S. 367 (1979); *Taylor*, 419 U.S. at 530-31.

38. Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861-1878 (2006).

39. See, e.g., Gerald T. Wetherington, Hanson Lawton, & Donald I. Pollock, *Preparing for the High Profile Case: An Omnibus Treatment for Judges and Lawyers*, 51 FLA. L. REV. 425 (1999).

40. In federal courts, the Jury Selection and Service Act (JSSA) requires each district to “devise and place into operation a written” plan specifying how it will select jurors. 28 U.S.C. § 1863(a).

41. In federal courts, identifying and summoning potential jurors to the courthouse for service requires both random identification of potential jurors and evaluation of those randomly selected jurors for disqualification, exemption, or excuse from jury service. See JODY GEORGE, DEIRDRE GOLASH & RUSSELL WHEELER, *HANDBOOK ON JURY USE IN THE FEDERAL DISTRICT COURTS* 24-28 (1989). The JSSA requires the jury selection plan specify how a district is to create a master jury wheel from names randomly drawn from source lists. 28 U.S.C. § 1863(b)(3). Potential jurors on the master jury wheel are randomly selected to receive qualification questionnaires which aid the court in identifying in advance those citizens who are either not required to serve or are not qualified to serve as jurors. 28 U.S.C. § 1869(h). A judge reviews the completed questionnaires and determines whether any potential jurors are “unqualified for, or exempt, or to be excused from jury service.” 28 U.S.C. § 1865(a). The JSSA sets forth eight grounds for disqualifying a potential juror from service (U.S. citizenship, minimum age, residence in the district for at least one year, English literacy, mental and physical soundness, and criminal record), and the court must disqualify an individual meeting any one of the eight grounds, even if the individual wishes to serve. Some qualified jurors may nonetheless be statutorily exempt from jury service if they are active members of the military, members of a fire or police department, or are a “public officer.” 28 U.S.C. § 1863(b)(6). As with an unqualified potential juror, an exempt potential juror may not serve on a jury even if he or she wishes. Last, the JSSA provides that a court may excuse some potential jurors based on individual requests. *Proceedings of the Judicial Conference of the United States*, H.R. Doc. No. 97-18, at 107 (1980).

42. See, e.g., *Taylor*, 419 U.S. at 530-31 (striking down exemption of women from jury pool); see also *State v. Lanciloti*, 201 P.3d 323 (Wash. 2009) (challenging juror distribution in the grand venire).

levied at the third stage of jury selection: voir dire.⁴³

Voir dire is the final stage of jury selection when the members of a case-specific venire are questioned about their ability to be a fair and impartial juror. Voir dire procedures vary from state to state, between federal and state courts, among judges within a court, and sometimes from case to case in one judge's courtroom. The length of time allotted to questioning the venire is usually left to the sound discretion of the judge and also varies widely from court to court. The questioning may be conducted exclusively by the judge, exclusively by the attorneys, or by both.⁴⁴ The average time for questioning in felony criminal cases

43. See, e.g., Abraham Abramovsky, *Juror Safety: The Presumption of Innocence and Meaningful Voir Dire in Federal Criminal Proceedings—Are They An Endangered Species?*, 50 *FORDHAM L. REV.* 30 (1981-1982); Albert Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 *U. CHI. L. REV.* 153 (1989); Jose Felipe Anderson, *Catch Me If You Can! Resolving The Ethical Tragedies In the Brave New World of Jury Selection*, 32 *NEW ENG. L. REV.* 343 (1998); Karen Bray, *Reaching the Final Chapter in the Story of Peremptory Challenges*, 40 *UCLA L. REV.* 517 (1992); Raymond J. Broderick, *Why Peremptory Challenge Should Be Abolished*, 65 *TEMP. L. REV.* 369 (1992); Carol A. Chase and Colleen P. Graffey, *A Challenge For Cause Against Peremptory Challenges in Criminal Proceedings*, 19 *LOY. L.A. INT'L & COMP. L.J.* 507 (1997); Joseph A. Colquitt, *Using Jury Questionnaires: (Ab)using Jurors*, 40 *CONN. L. REV.* 1 (2007); James R. Gadwood, *The Framework Comes Crumbling Down: JuryQuest in a Batson World*, 88 *B.U. L. REV.* 291 (2008); Reid Hastie, *Is Attorney-Conducted Voir Dire an Effective Procedure for the Selection of Impartial Juries?*, 40 *AM. U. L. REV.* 703 (1991); Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 *GEO. L.J.* 945 (1998); Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 *TEX. L. REV.* 1041 (1995); Nancy S. Marder, *Justice Stevens, the Peremptory Challenge, and the Jury*, 74 *FORDHAM L. REV.* 1683 (2006); Jim McElhaney, *Rejiggering Jury Selection: Angus Argues for Giving Opening Statements Before Conducting Voir Dire*, *A.B.A. J.*, April 2008 at 30; Kenneth Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 *NOTRE DAME L. REV.* 447 (1996); 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 (1996); Charles J. Ogletree, *Just Say No! A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 *AM. CRIM. L. REV.* 1099 (1994); Antony Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 *B.U. L. REV.* 155 (2005); Rachael A. Ream, *Limited Voir Dire: Why It Fails to Detect Juror Bias*, *CRIM. JUSTICE* (Winter 2009); Andrew Weis, *Peremptory Challenges: The Last Barrier to Jury Service for People with Disabilities*, 33 *WILLAMETTE L. REV.* 1 (1997); Amy Wilson, *The End of Peremptory Challenges: A Call for Change Through Comparative Analysis*, 32 *HASTINGS INT'L & COMP. L. REV.* 363 (2009); Marvin Zalman & Olga Tsoudis, *Plucking Weeds from the Garden: Lawyers Speak About Voir Dire*, 51 *WAYNE L. REV.* 163 (2005); NINTH CIR. JURY TRIAL IMPROVEMENT COMM., SECOND REPORT: RECOMMENDATIONS AND SUGGESTED BEST PRACTICES 8 (2006).

44. There is generally less attorney participation in voir dire in federal court. Bennett, *supra* note 5, at 159. In federal court, wide discretion is given the trial judge on the method and scope of voir dire. "The Constitution, after all, does not dictate a catechism for voir dire, but only that the defendant be afforded an impartial jury. Even so, part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors." *Morgan v. Illinois*, 504 U.S. 719, 729 (1992). Rule 47 of the Federal Rules of Civil Procedure and Rule 24 of the Federal Rules of Criminal Procedure both authorize the court (a) to conduct the examination of prospective jurors or b) to permit the parties to supplement it by such further inquiry as it deems proper, or submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper. In a 1994 Federal Judicial Center survey of federal judges, approximately 54% of judges reported they allowed some questioning by attorneys in criminal cases: 29% conducted the initial questioning and then allowed follow-up questioning by the attorneys, 18% allowed extensive time for follow-up questioning by the attorneys, and approximately 7% allowed counsel to conduct most or all of the voir dire. JOHN SHAPARD & MOLLY TREADWAY JOHNSON, FED. JUDICIAL CTR., MEMORANDUM TO THE ADVISORY COMM. ON CIVIL RULES, AND

has been reported as 3.6 hours in federal courts and 3.8 hours in state courts.⁴⁵ While some studies find these average times consistent whether the questioning is conducted by the lawyers, the judge, or both,⁴⁶ others conclude that judges are more efficient.⁴⁷

A. CHALLENGES FOR CAUSE

The purpose of questioning prospective jurors is to enable the lawyers to make informed decisions when exercising for-cause and peremptory challenges.⁴⁸ At the conclusion of the questioning phase, an attorney may ask the court to excuse a potential juror “for cause” where the attorney believes the juror has demonstrated an inability to serve impartially in the case.⁴⁹ These challenges for cause have been held to be constitutionally guaranteed to a criminal defendant as the primary method by which the court endeavors to seat an impartial jury in satisfaction of the Sixth Amendment.⁵⁰ The number of for-cause challenges is unlimited in both state and federal courts.⁵¹

In exercising a for-cause challenge, an attorney must identify a specific basis

THE ADVISORY COMM. ON CRIMINAL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (1994), available at [http://www.fjc.gov/public/pdf.nsf/lookup/0022.pdf/\\$file/0022.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/0022.pdf/$file/0022.pdf). Another survey of 450 federal judges revealed that in almost 67% of federal courts, the judge alone conducts all the questioning during voir dire. KEVIN F. O'MALLEY, JAY E. GRENIG & HON. WILLIAM C. LEE, 1 FEDERAL JURY PRACTICE AND INSTRUCTIONS: JURY TRIAL § 4:7 n. 8, at 184-85 (6th ed. 2006) (citing J. Stratton Shartel, *Federal Judges Employ Wide Variety of Jury Procedures* 8 No. 8 INSIDE LITIG. 1, 15-17 (1994)). For this reason, judge-conducted voir dire is sometimes referred to as “the federal method.” See V. HALE START & MARK MCCORMICK, JURY SELECTION § 9.01, at 273 (3rd ed. 2001). In state courts, voir dire questioning is conducted by both the judges and the attorneys in 43 states. Valerie P. Hans & Alayna Jehle, *Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 CHI.-KENT L. REV. 1179, 1184 (2003). In six states, only judges conduct the questioning. *Id.* In some of those states, judges permit some attorney questions. *Id.* Questioning is conducted only by attorneys in four states, as well as in New York in civil trials. *Id.*

45. VIDMAR & HANS, *supra* note 2, at 89.

46. Scott W. Howe, *Juror Neutrality or an Impartiality Array? A Structural Theory of the Impartial Jury Mandate*, 70 NOTRE DAME L. REV. 1173, 1185 (1995).

47. See, e.g., Susan E. Jones, *Judge- Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor*, 11 LAW & HUM. BEHAV. 131 (1987); David Suggs & Bruce D. Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis*, 56 IND. L.J. 245, 251-52 (1981). See also M.A. Costantino, *Abolish Lawyers' Voir Dire of Juries*, 8(3) LITIG. 5 (1982) (surveying 420 district courts and finding that judge-conducted voir dire lasted less than one hour in 65% of criminal cases).

48. See V. HALE START & MARK MCCORMICK, JURY SELECTION § 8.01, at 237 (3rd ed. 2001). A few states employ a struck jury system instead of exercising peremptory challenges. Under this system, the attorneys take turns “striking” jurors until the statutorily prescribed number of jurors remain. See, e.g., ALA. CODE § 12-16-100 (2009); VA. CODE ANN. § 8.01-359 (2009).

49. An attorney exercising a “for cause” challenge must build a record to satisfy the judge that the juror is unable to be an unbiased fact finder, either because the juror is likely to decide the case on personal bias, would likely ignore relevant arguments of counsel, or would be improperly influenced by extrajudicial information regarding the case, such as media coverage. See Howe, *supra* note 46, at 1183.

50. *Batson v. Kentucky*, 476 U.S. 79, 91 (1986); *Swain v. Alabama*, 380 U.S. 202, 219 (1965).

51. Although only a criminal defendant has a constitutional guarantee of an impartial jury, jury composition is viewed as a fairness issue for other parties, raising due process considerations. Consequently, all litigants, in civil and criminal trials, have an unlimited number of for-cause challenges available to them.

for the challenge and the judge then rules on the validity of the reason given.⁵² Most states have narrowly drawn statutes that delineate specific grounds for such challenges, usually failure to meet statutory qualifications, actual bias, or implied bias.⁵³ Although narrow state statutes may provide additional grounds for such challenges, the threshold analysis of a for-cause challenge is governed by the Sixth Amendment, which “prescribes no specific tests” for determining impartiality.⁵⁴

A for-cause challenge must be based on specific, demonstrable, and legally cognizable evidence of juror partiality.⁵⁵ A juror’s own admission of bias is sufficient evidence of partiality supporting a for-cause challenge.⁵⁶ Life experiences, associations, or attitudes can also provide sufficiently specific evidence of partiality warranting a for-cause challenge. Even after such partiality is demonstrated, however, a judge need not excuse a juror challenged for cause as long as the juror promises to put aside any biases.⁵⁷ A judge has broad discretion in assessing whether a juror can, in fact, be fair,⁵⁸ and different judges may come to different conclusions based on the same information.⁵⁹

B. PEREMPTORY CHALLENGES

The narrow definition and application of for-cause challenges may limit their effectiveness in ensuring an impartial jury.⁶⁰ For this reason, each party also has a

52. Examples of specific reasons justifying a for-cause challenge include conflict of interest, potential bias, or lack of candor. The Supreme Court has stated in the context of a capital case that a trial judge should not excuse a potential juror for cause unless the juror’s views will “prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.” *Wainwright v. Witt*, 469 U.S. 412, 423 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)).

53. *See, e.g.*, N.Y. CRIM. PROC. LAW § 270.20 (McKinney 1995). There is no corresponding federal statutory enumeration. Rather, the Sixth Amendment governs the standard for such a challenge.

54. *United States v. Wood*, 299 U.S. 123, 133 (1936). “Impartiality is not a technical conception. It is a state of mind. For the ascertainment of the mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.” *Id.* at 145-46.

55. There are three types of partiality, or bias: actual bias, implied bias, and inferred bias. *See United States v. Torres*, 128 F.3d 38, 43-47 (2d Cir. 1997) (“Actual bias [is established when] the juror admits partiality. . . . Implied or presumed bias is ‘bias conclusively presumed as a matter of law’ [when it] is attributed to a prospective juror regardless of actual partiality [when a juror meets the statutory criteria for automatic challenge for cause and is legislatively disqualified, such as the juror being related to one of the parties]. Disqualification on the basis of implied bias is mandatory. . . . On the contrary, there exist a few circumstances that involve no showing of actual bias, and that fall outside of the implied bias category, where a court may, nevertheless, properly decide to excuse a juror. We call this third category ‘inferred bias’ Bias may be inferred when a juror discloses a fact that bespeaks a risk of partiality sufficiently significant to warrant granting the trial judge discretion to excuse the juror for cause, but not so great as to make mandatory a presumption of bias”).

56. Theoretically, a judge could refuse to believe a juror’s admission of bias, such as when the judge believes the admission is pretextual to avoid jury duty.

57. *See Mu’Min v. Virginia*, 500 U.S. 415 (1991).

58. Christopher A. Cospser, *Rehabilitation of the Juror Rehabilitation Doctrine*, 37 GA. L. REV. 1471 (2003).

59. *See, e.g.*, *Uttecht v. Brown*, 127 S. Ct. 2218 (2007) (five members of the Court found that the trial judge did not err in dismissing a juror for cause, while four justices dissented, concluding the opposite).

60. *See Mary R. Rose & Shari Seidman Diamond, Judging Bias: Juror Confidence and Judicial Rulings on Challenges for Cause*, 42 LAW & SOC’Y REV. 513, 514-15 (2008) (citing studies suggesting that judges tend to

limited number of peremptory challenges,⁶¹ where an attorney may excuse a juror without a stated reason, and without leave of the court, as long as the basis for the decision is not discriminatory.⁶² The number of peremptory challenges varies from jurisdiction to jurisdiction. In non-capital felony cases, the number of peremptory challenges ranges from three to twenty.⁶³ In several states and in the federal system, the defense is allotted more peremptory challenges than the prosecution.⁶⁴

Prospective jurors are most typically questioned collectively in open court in a case-specific venire rather than individually.⁶⁵ In some cases, especially those with intense media coverage or involving sensitive issues such as sexual abuse or extreme violence, prospective jurors may have filled out case-specific jury questionnaires prior to voir dire in order to assist the attorneys in this process.⁶⁶ The number of potential jurors assigned to a case-specific venire and the total time spent on voir dire varies from court to court.⁶⁷ The number of potential jurors dispatched as a venire to a courtroom for a particular case is usually larger when the court anticipates a high number of challenges for cause (due to pretrial media coverage, for example) or when the trial is expected to be particularly lengthy.⁶⁸ In a longer trial, the court will usually seat one or two alternate jurors,

accept at face value jurors' claims of impartiality even when jurors' experiences pose "substantial threats to their abilities to be impartial." This is so even though research demonstrates that juror self-assessment of fairness is not reliable.).

61. In criminal cases in state courts, the defense may be afforded a greater number of peremptory challenges. See, e.g., JURY TRIAL INNOVATIONS (G. Thomas Munsterman, Paula L. Hannaford-Agor & G. Marc Whitehead eds., 2d ed. 2006) [hereinafter JURY TRIAL].

62. See citations and accompanying text, *supra* note 4.

63. See, e.g., JURY TRIAL, *supra* note 61.

64. See Jon M. Van Dyke, *Jury Selection Procedures: Our Uncertain Commitment to Representative Panels* app. D (1977).

65. In death penalty cases, a court may employ both methods, questioning potential jurors in two phases, first as a group and then individually outside the presence of the other potential jurors. See, e.g., David C. Baldus, George Woodworth, David Zuckerman, Neil Alan Weiner & Barbara Broffitt, *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3 (2001).

66. Jury questionnaires are commonly used in two ways: a preliminary questionnaire to determine threshold eligibility for service and a more detailed, case-specific questionnaire to assist the court and lawyers to prepare and conduct voir dire. The "qualifications questionnaire" is often sent out with the summons for jury duty. It requests basic data that allows the court to determine if the juror meets the minimum qualifications for service.

67. See J. Clark Kelso, *Final Report of the Blue Ribbon Commission on Jury System Improvement*, 47 HASTINGS L.J. 1481 (July-August 1996); Zalman & Tsoudis, *Plucking Weeds from the Garden: Lawyers Speak About Voir Dire*, 51 WAYNE L. REV. 163, 274-83 (Spring 2005). Courts attempt to estimate the number of jurors needed with some precision, so as not to waste citizens' time when reporting for jury duty. In the federal system, the national goal is to limit to thirty percent the number of jurors de-selected for service. DIR. OF THE ADMIN. OFFICE OF THE U.S. COURTS, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 88 (Sept. 1984). Many state courts have a one-day/one-jury trial system, whereby jurors serve for only one day unless they are seated on a trial. J. Stratton Shartel, *Large States Should Implement One-Day/One-Trial Jury Systems*, 7 No. 9 INSIDE LITIG. 2 (Sept. 1993).

68. See 1 JURYWORK SYSTEMATIC TECHNIQUES § 7:37 NATIONAL JURY PROJECT DATABASE (Nov. 2009). In addition to the length of the trial and media coverage, more mundane factors may be considered in estimating the number of jurors needed, including the road conditions affecting juror travel and the number of absent, ill,

triggering additional peremptory challenges for each party.⁶⁹ A longer trial will likely inconvenience more prospective jurors such that there will be more juror hardship requests to be excused from jury duty.⁷⁰ On balance, for a non-death penalty criminal felony case, a common venire size in federal court is upwards of thirty prospective jurors, depending on the anticipated need.⁷¹

While most scholars and judges agree that questioning prospective jurors during voir dire is indispensable to a fair trial,⁷² there is a general acknowledgment that the current system is flawed. Criticism is wide-ranging, and includes: (1) unnecessary increase in cost of litigation, including attorneys' fees and jury consultant costs⁷³; (2) frustration with some judges' narrow construction of "for cause," which forces attorneys to exercise peremptory challenges against those potential jurors whose answers have indicated a likelihood of partiality with respect to some aspect of the case⁷⁴; (3) tension between the legitimate purpose of voir dire (insuring an impartial jury) and some lawyers' goals to indoctrinate and pre-persuade the jury to the themes and theory of their case (trying to obtain,

and visiting judges. *See, e.g.*, KEVIN F. O'MALLEY, JAY E. GREINIG & HON. WILLIAM C. LEE, *FEDERAL JURY PRACTICE AND INSTRUCTIONS* (6th ed. 2006) (citing JODY GEORGE, DEIRDRE GOLASH & RUSSELL WHEELER, *HANDBOOK ON JURY USE IN THE FEDERAL COURTS*, 1989 WL 270241, at *20 (1989)); *see also* Zalman & Tsoudis, *Plucking Weeds from the Garden: Lawyers Speak About Voir Dire*, 51 WAYNE L. REV. 163, 275 (Spring 2005) (finding that increased media coverage lengthens voir dire).

69. *See* FED. R. CRIM. P. 24(c) (providing for additional peremptory challenges where the court allows alternate jurors); 2 FRED LANE, *GOLDSTEIN TRIAL TECHNIQUE* § 9:22 (3) (3d ed. 2007) (stating, as part of a description of how some states deal with alternate jurors, that [i]f alternate jurors are called each side shall be allowed one additional peremptory challenge, regardless of the number of alternate jurors called; HARRY LEVINE, *LEVINE ON TRIAL ADVOCACY*, Jury Selection Ch. 2-A; Practising Law Institute PLI Order No. 18315, 217 PLI/Crim 59, Ninth Annual Municipal Law Institute JURY SELECTION Edward L. Birnbaum Carl T. Grasso Herzfeld & Rubin, P.C. Hon. Ariel Belen Supreme Court, State of New York, Ch. 20, §20.10 (July 22, 2009).

70. *See* Joanna Sobol, Note, *Hardship Excuses and Occupational Exemptions: The Impairment of the "Fair Cross-Section of the Community"*, 69 S. CAL. L. REV. 155, 168-73 (1995) (noting that longer trials may cause hardship for many more prospective jurors, prompting requests to be excused from service).

71. In California, the number of jurors summoned for an ordinary felony case is forty-two. J. Clark Kelso, *Final Report of the Blue Ribbon Commission on Jury System Improvement*, 47 HASTINGS L.J. 1481 (July-August 1996). The number of citizens summoned for possible jury service on the two trials arising out of the Oklahoma City federal building bombing case was 351 (McVeigh) and 400 (Nichols). *A New Bombing Trial For McVeigh*, NAT'L L.J., July 28, 1997, at A6, in KEVIN F. O'MALLEY, JAY E. GREINIG & HON. WILLIAM C. LEE, *FEDERAL JURY PRACTICE AND INSTRUCTIONS* (6th ed. 2006).

72. *See, e.g.*, Gregory E. Mize, *On Better Jury Selection: Spotting UFO Jurors before They Enter the Jury Room*, CT. REV., Spring 1999, at 10 (taking as accepted the use of general, open-court questioning of jurors, and discussing the value of individual questioning of venire panel members).

73. *See, e.g.*, Carol A. Chase and Colleen P. Graffey, *A Challenge For Cause Against Peremptory Challenges in Criminal Proceedings*, 19 LOY. L.A. INT'L & COMP. L. J. 507, 519-520 (1997).

74. Defenders and critics of peremptory challenges generally agree that challenges for cause are both defined and applied unrealistically narrowly. Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 486 (1996) (citing Stephen A. Saltzburg & Mary Ellen Powers, *Peremptory Challenges and the Clash between Impartiality and Group Representation*, 41 MD. L. REV. 337, 355 (1982); Frederick L. Brown et al., *The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse*, 14 NEW ENG. L. REV. 192, 235 n. 244 (1978); Roger S. Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235, 243 (1968)).

in fact, a jury biased in favor of their case)⁷⁵; (4) truncation of the time allowed for questioning during voir dire⁷⁶ (often as a result of a judge's reaction to lawyers' misuse of the time allotted for questioning); (5) recognition that most attorneys are very poor at crafting questions on voir dire to elicit the information needed to adequately evaluate the prospective jurors, making the exercise unlikely to further the goal of seating an impartial jury⁷⁷; (6) damage to public perception of the justice system⁷⁸; and (7) realization that many peremptory challenges are likely to be based on discriminatory beliefs, however subconscious, and thus are unconstitutional.⁷⁹

The various points of criticism can be summed up as skepticism about how much attorneys can learn in less than four hours about the experiences, attitudes, beliefs, preconceptions, biases, and prejudices of seventy-five or more different individuals across a number of complex issues that may be highly sensitive, such as those involving racial bias. This skepticism is further magnified by the additional expectation that the attorneys be able to analyze the interplay of these attitudes and beliefs and identify which few prospective jurors are the most likely to harbor negative biases or prejudices against their client, their case issues, or themselves as attorneys. In addition to a collective skepticism that this endeavor can be done well, there is widespread disbelief that, with respect to the exercise of peremptory challenges, it can be done constitutionally without discrimination.

75. A 1973 Dallas County prosecutor manual advised:

You are not looking for a fair juror, but rather a strong, biased and sometimes hypocritical individual who believes the Defendants are different from them in kind, rather than degree; you are not looking for any member of a minority group which may subject him to oppression—they almost always empathise [sic] with the accused.

PAULA DiPERNA, JURIES ON TRIAL: FACES OF AMERICAN JUSTICE 154 (1981). About voir dire, Gerry Spence has written: "The professed purpose of the exercise is to determine whether the juror can be fair and impartial. In truth, the lawyers on both sides are looking for jurors who will decide the case for *them*." GERRY SPENCE, WIN YOUR CASE: HOW TO PRESENT, PERSUADE, AND PREVAIL—EVERY PLACE, EVERY TIME 13 (2005).

76. Research confirms what common sense suggests: the shorter the time allocated to questioning the jury during voir dire, the less information can be gathered by the attorneys, making them less able to effectively (and constitutionally) exercise peremptory challenges. Rachel A. Ream, *Limited Voir Dire: Why It Fails to Detect Juror Bias*, CRIM. JUST., Winter 2009, at 22; see also Clarke, *Voir Dire and Jury Selection*, in 1A CRIMINAL DEFENSE TECHNIQUES § 21.08, at 21-58 (rev. perm. ed. 1980) (noting the trend among judges to restrict voir dire such that it becomes a "perfunctory process which fails completely in attaining its objectives" (footnote omitted)); THE LAW OF JURIES, *supra* note 16, at 60 ("The overwhelming trend in recent years is to make this part of jury selection quicker, and as a consequence, increasingly superficial and perfunctory."). See also NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 91-91 (2007) (citing empirical studies suggesting that limited time for voir dire is ineffective).

77. See, e.g., NATIONAL JURY PROJECT, JURYWORK: SYSTEMIC TECHNIQUES § 9.01, at 9-2 (2d ed. 1985).

78. See, e.g., Reid Hastie, *Is Attorney-Conducted Voir Dire an Effective Procedure of the Selection of Impartial Juries?*, 40 AM. U. L. REV. 703, 725 (1991).

79. See, e.g., Gurney, *supra* note 5.

1. THE ENGLISH EXPERIENCE WITH PEREMPTORY CHALLENGES

The practice of peremptory challenges in the United States grew out of the English common law system, debuting in England⁸⁰ between the years 1250 and 1300, and ending in 1989. As is true in the United States,⁸¹ the number of peremptory challenges was determined legislatively. Over the centuries the system was in use, the allotted number of challenges per side waxed and waned based on the prevailing policies of the government, with prosecutors losing the peremptory challenge in 1825.⁸² In the two decades before its demise, the system of peremptory challenges was debated ever more heatedly, until Parliament ultimately abolished the practice in 1989. As noted by two commentators on the evolution and abolition of the peremptory challenge in England:

The fears and concerns expressed during the debate surrounding the abolition of the peremptory challenge never came to fruition. Challenges for cause did not increase, jurors did not suffer embarrassment due to challenges for cause, and defendants were not robbed of a sense of justice. Barristers adjusted, and many were surprised to discover that their long-held perception of the perfect jury composition was wrong.⁸³

The detailed history of the rise and fall of the peremptory challenge in England has been handily documented by several commentators.⁸⁴ The unavoidable core lesson of the history of the English system of peremptory challenges is that the British lived with the system for over seven hundred years and, having failed at modifying it into something worth saving, they abandoned the system *in toto*.⁸⁵ That the practice was discontinued two decades ago with no ill effects is

80. An earlier incarnation of the peremptory challenge was used in Rome. *Batson v. Kentucky*, 476 U.S. 79, 119-20 (1986) (Burger, C.J., dissenting) (tracing the history of peremptory challenges to the Romans in 104 B.C.).

81. Although the threshold number of peremptory challenges is established legislatively, a judge may grant additional peremptories under local court rule or within the broad discretionary powers of the court to manage litigation.

82. *Juries Act, 1825*, 6 Geo. 4, c. 50, § 29 (Eng.); *Criminal Justice Act, 1948*, 11 & 12 Geo. 4, c. 58, § 83, sched. 10, part I (Eng.); *Courts Act 1971*, c. 23, § 40(7), sched. 4, ¶ 3(2) (repealed); *Juries Act 1974*, c. 23, § 12(5).

83. Carol A. Chase & Colleen P. Graffy, *A Challenge For Cause Against Peremptory Challenges in Criminal Proceedings*, 19 LOY. L.A. INT'L & COMP. L. REV. 507, 535 (1997).

84. *See id.*

85. The British have rarely been accused of being knee-jerk reactionists or trend-setters. As noted social historian Raymond Postgate (1896–1971) observed:

Deploring change is the unchangeable habit of all Englishmen. If you find any important figures who really like change, such as Bernard Shaw, Keir Hardie, Lloyd George, Selfridge or Disraeli, you will find that they are not really English at all, but Irish, Scotch, Welsh, American or Jewish. Englishmen make changes, sometimes great changes. But, secretly or openly, they always deplore them.

Famousquotesandauthors.com, *Unchangeable Quotes*, http://www.famousquotesandauthors.com/keywords/unchangeable_quotes.html (last visited Feb. 18, 2010).

instructive for would-be reformers of the American system.⁸⁶

2. PEREMPTORY CHALLENGES DEPEND ON LAWYERS' ABILITY TO GET INFORMATION

The utility of peremptory challenges depends on a lawyer's ability to effectively gather and analyze information from prospective jurors. This ability is influenced by several factors, including: 1) a lawyer's ability to craft information-eliciting questions; 2) candor by potential jurors in responding to questions; 3) adequate time to collect *enough* juror data; and 4) a lawyer's ability to analyze the data gathered. Although I have listed them in the order they come into play during voir dire, the factors are interdependent such that discussion of one frequently necessitates consideration of another. A lawyer cannot control all these factors, and if any one of the factors is weak or missing, the results can be disastrous. The following account of an actual jury selection gone awry is illustrative and provides a contextual background for more detailed discussion.

i. A Cautionary Tale of Jury Selection Gone Wrong

In the summer of 1986, consumers nationwide were afraid someone was tampering with their over-the-counter medicines, with deadly results. Four years earlier, seven people had been killed in the Chicago area when they ingested Tylenol capsules that had been laced with cyanide and placed on drugstore shelves for unsuspecting shoppers to purchase.⁸⁷ On the heels of the Chicago Tylenol murders, reports of product-tampering and attendant consumer fear skyrocketed around the country. In 1982 alone, the FDA documented 270 cases of suspected product tampering.⁸⁸ In February 1986, a New York woman was murdered under circumstances remarkably similar to the 1982 Chicago Tylenol deaths when she died within minutes of swallowing two cyanide-laced Extra-Strength Tylenol capsules from an allegedly tamper-proof sealed bottle.⁸⁹ In March 1986, just one month after the New York Tylenol murder, tampering

86. Having inherited the system from England, a quick look at the English experience is instructive, although the purpose, utility, and effects of the peremptory challenge system in the United States must still be evaluated against the backdrop of the U.S. Constitution and the sociological idiosyncrasies of the American people. A parallel in literature was noted by the American poet Wallace Stevens (1875-1955) when he wrote "Nothing could be more inappropriate to American literature than its English source since the Americans are not British in sensibility." Thinkexist.com, Wallace Stevens Quotes, http://thinkexist.com/quotation/nothing_could_be_more_inappropriate_to_american/298568.html (last visited Feb. 18, 2009).

87. The Chicago Tylenol case remains unsolved. A \$100,000 reward, posted by Johnson & Johnson for the capture and conviction of the "Tylenol Killer," has never been claimed. JOHN DOUGLAS, *THE ANATOMY OF MOTIVE: THE FBI'S LEGENDARY MINDHUNTER EXPLORES THE KEY TO UNDERSTANDING AND CATCHING VIOLENT CRIMINALS* 103-04 (Scribner 1999).

88. George J. Church, Lee Griggs, & Rita Healy, *Copycats Are on the Prowl*, TIME, Nov. 8, 1982, available at <http://www.time.com/time/magazine/article/0,9171,925827,00.html>.

89. Melinda Beck & Susan Agrest, *Again, A Tylenol Killer*, NEWSWEEK, Feb. 24, 1986, at 25.

complaints nationwide again significantly increased,⁹⁰ alarming consumers and catching the murderous imagination of would-be copycat killers.

In June of 1986, Stella Nickell duplicated this deadly product-tampering scheme in the Seattle area by lacing Excedrin capsules with cyanide in a successful attempt to kill her husband, Bruce. She also killed another unsuspecting Excedrin user hoping to obscure her connection to her husband's death by creating the illusion of a larger, random product-tampering plan.⁹¹ Bruce Nickell's death was initially attributed to natural causes, but six days after the other death and one day after a highly-publicized massive product recall,⁹² Ms. Nickell told police she suspected her husband had also been poisoned.⁹³ Investigators confirmed that he had been poisoned by cyanide and recovered two tainted Excedrin bottles from the Nickells' home. Initially, they believed that the drugs were likely taken from area stores, filled with cyanide, and then returned to the stores. The FBI and Washington law enforcement agencies began a joint effort to find the murderer and prevent further deaths.⁹⁴ Media coverage of the deaths, the medicine recall, and the investigation was comprehensive.

This was the backdrop for a smaller drama that played out in Seattle on July 31, 1986⁹⁵ involving a real estate agent, a package of crackers, and an ibuprofen pill. The agent, Laurel Holliday, was holding an open house and went into the homeowner's cupboards for a snack. There she found an open, half-eaten package of Pepperidge Farm Goldfish crackers. As she nibbled on the crackers, she realized she had bitten into and swallowed half of an orange-coated pill.

80. Park Dietz, Product Tampering, Foundation for American Communications, Apr. 23, 1999, revised Feb. 14, 2000, http://www.facsnet.org/index.php?option=com_content&view=article&id=193:product-tampering-02-00&catid=75:archives&Itemid=100003.

91. Rachael Bell, *The Tylenol Terrorist: Death in a Bottle*, TRUTV.COM, http://www.trutv.com/library/crime/terrorists_spies/terrorists/tylenol_murders/index.html (last visited Feb. 18, 2010).

92. In response, the manufacturer of the drug, Bristol-Myers, nationally recalled the product hoping to avert any more deaths. Two of the recalled bottles also contained cyanide. *Id.* See also GREGG OLSEN, BITTER ALMONDS: THE TRUE STORY OF MOTHERS, DAUGHTERS, AND THE SEATTLE CYANIDE MURDERS 45 (2006).

93. Although Stella Nickell told responding paramedics as many as six times that her husband had taken some Excedrin capsules "just before he fell," the preliminary cause of death was attributed to emphysema. GREGG OLSEN, BITTER ALMONDS: THE TRUE STORY OF MOTHERS, DAUGHTERS, AND THE SEATTLE CYANIDE MURDERS 4, 49 (St. Martin's Paperbacks 2006). Almost two weeks after the death, Ms. Nickell telephoned the police, saying her husband had recently died and she had discovered some Excedrin pills that matched the lot number of the cyanide-tainted recalled pills. *Id.* One might wonder why, after successfully killing her husband and having the death found to be of natural causes, Ms. Nickell would alert the police to the fact he had been poisoned. *Id.* at 49. The reason was insurance: a death from natural causes would produce a payout of approximately \$80,000 whereas an accidental death fetched an additional \$100,000. *Id.* at 238, 257. Ms. Nickell patiently waited until *after* receiving an amended death certificate before filing her insurance claim. *Id.* at 238.

94. Tragically, the murderous plan was copied yet again in the Seattle area in 1991 by Joseph Earl Meling in an unsuccessful attempt to kill his wife. Three people were poisoned and two of them died after ingesting Sudafed capsules laced with cyanide by Mr. Meling. *United States v. Meling*, 47 F.3d 1546, 1558 (9th Cir. 1995).

95. *Nickell's Lawyer Moves for Mistrial*, SPOKESMAN-REV., May 21, 1988, at C7; *Retrial Denied in Stella Nickell Poisoning Case*, SEATTLE TIMES, Aug. 29, 1989, at D2; *Stella Nickell Loses Appeal in Cyanide Case*, SEATTLE TIMES, Aug. 30, 1989, at D2.

Given the recent highly-publicized deaths from poisoned pills within the greater Seattle area, the agent was terrified. Had she just become the most recent victim of a mass murderer? She called Poison Control and followed instructions to purchase and drink syrup of ipecac, which quickly caused her to violently expel the suspect pill. The half-noningested pill was later analyzed and confirmed to be non-poisonous ibuprofen. Nonetheless, Ms. Holliday sued the cracker manufacturer, seeking damages based in part on the emotional distress she experienced because of the recent Nickell murders.⁹⁶ I represented the defendant, Pepperidge Farm. During the course of the case, I proved that the pill could not have left the manufacturer in the pristine condition that the agent stumbled upon it, due to the particular production process at the manufacturing plant. Instead, the pill likely came to rest in the open package of crackers during the course of the homeowner's busy family life. The case ultimately settled in 1988 for \$500.

Imagine my shock a few months after the settlement when I discovered that the cracker-eating real estate agent had been seated as a juror when Stella Nickell was finally brought to trial in federal court for fatal product tampering.⁹⁷ How did this woman, a recent plaintiff in a product-tampering personal injury lawsuit, get seated on the jury *of the very same case* that formed the basis of her mental distress claim?⁹⁸ I found it impossible to believe the lawyers had not asked about product tampering during jury selection, and I was skeptical that she would have been seated if she had relayed her experience. I consulted with another lawyer at my firm and we contacted the trial judge.⁹⁹ We learned that Ms. Holliday had indeed been asked during voir dire whether she had any experience with product tampering, but did not report the cracker incident or the lawsuit she filed.¹⁰⁰

96. Complaint, *Holliday v. Pepperidge Farm, Inc.*, (K.C.S.C. 1987) (No. 87-2-10810-4).

97. Ms. Holliday's service on the jury became the subject of news coverage when, four days into jury deliberation, she reported to the court that she had received an anonymous telephone call reporting that the defendant Stella Nickell had failed an FBI lie detector test. *Stella Nickell Asks for New Trial; Juror's Conduct a Key to Appeal*, SEATTLE TIMES, Jan. 10, 1989, at D12. At the time of the anonymous call, Ms. Holliday was the holdout juror in a four-day long 11-1 deadlock. After the phone call, she changed her vote on the fifth day and Ms. Nickell was convicted on five counts of product tampering. *Nickell's Lawyer Moves for Mistrial*, SPOKESMAN-REV., May 21, 1988 at C7. She told the judge about the call before continuing as a juror, but said she could disregard the information and deliberate fairly and the judge allowed her to remain on the jury. The post-trial motion with the issue of possible juror tampering was reported in the newspapers, and it alerted me that Ms. Holliday had been seated on the jury.

98. In her 1987 deposition, Ms. Holliday said, "I pretty much figured I was dead" after biting into the cracker. *United States v. Nickell*, 883 F.2d 824, 826 (9th Cir. 1989). She went on to explain that "[t]his was right after the cyanide poisonings in Auburn," the same poisonings involved in the Nickell case, and caused "a real paranoia that I'd never had before about eating packaged products." *Id.* In addition to paranoia, she said in her deposition that the event caused her trauma and anxiety. *Id.*

99. The court was also notified by a newspaper reporter whose research about the juror in connection with the anonymous telephone call revealed that she had recently settled her own product contamination lawsuit.

100. During voir dire, Ms. Holliday was asked by the court: "Have you yourself, by chance, or anyone you know, been the victim of a product tampering incident?" and she responded, "No." *Nickell*, 883 F.2d at 826. She also said that there was nothing in her life experience that would affect her ability to be an impartial juror. *Id.* This despite the fact that the day before being seated on the jury, Ms. Holliday had discussed with Seattle Times

When questioned about this discrepancy by the judge, she maintained that she had answered the questions put to her truthfully and fully. Ms. Holliday insisted that she did not, in fact, have any experience with “product tampering” because I had proven to her during the course of the lawsuit that no one had tampered with the crackers!

This anecdotal account is but one illustration of the unpredictability of jury selection. Studies suggest that, with respect to juror candor, the vast majority of jurors take seriously the oath to answer questions truthfully, although there are those jurors who under—or over—report hoping to be dismissed or seated on a jury.¹⁰¹ Many potential jurors thus manage to do what few civil litigants can accomplish in deposition: they construe the questions narrowly, literally, and they answer the question and only the question asked. Even the most honest, forthright juror can unintentionally give misleading answers on voir dire as a result of shyness, embarrassment, eagerness to please, inaccurate or incomplete memory, inattention, misunderstanding of the concept being discussed, or use of alternative definitions.

ii. Obstacles to Eliciting Information from Prospective Jurors

Ideally, the judge and the attorneys would be able to gather all relevant information needed from potential jurors during voir dire in order for the judge to competently (and constitutionally¹⁰²) rule on challenges for cause and for the attorneys to effectively (and nondiscriminatorily¹⁰³) exercise peremptory challenges. This ideal, however, presupposes adequate time allotted for questioning of potential jurors, skill by judges and lawyers in crafting voir dire questions, candor by jurors in responding, and a common lexicon with shared definitional terms. If any one of these prerequisites is lacking, the exercise becomes flawed, producing incomplete information. If more than one of these foundational elements is missing, the information elicited may actually be affirmatively misleading. The faulty voir dire not only fails to further the goal of empanelling an impartial jury, but also thwarts it.

At least two of the required conditions for effective voir dire questioning (and thus effective exercise of challenges) are missing in the majority of trials: adequate time for questioning and adequately-constructed questions. The time

newspaper reporter Kristen Jackson the possibility of writing an article about her jury experiences and her concern about whether the Pepperidge Farm case would come up during jury selection. OLSEN, *supra* note 92, at 535-36 (2006).

101. Broeder's research found that some jurors deliberately hid or distorted information during voir dire. Dale W. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503, 513 (1965).

102. The judge is charged with ensuring the jury ultimately impaneled to decide the case is composed exclusively of impartial jurors. U.S. CONST. amend. VI.

103. Peremptory challenges may not be exercised discriminatorily. *Batson v. Kentucky*, 476 U.S. 79, 88 (1986).

allotted for voir dire is often too brief to develop sufficient information about any individual prospective juror to adequately evaluate his or her qualifications to sit as an impartial juror,¹⁰⁴ threatening the constitutional make-up of the jury. Limited information from a limited number of jurors due to limited voir dire time makes it difficult to confirm juror impartiality and build a record for challenges for cause where impartiality is lacking. Accomplishing the more complicated task necessary to effectively exercise peremptory challenges becomes nearly impossible: construction and analysis of a rubric of subtly communicated attitudes and beliefs held by multiple jurors across a number of case-specific issues that may affect the outcome of the trial.

Judges in state and federal court have become increasingly unwilling to allocate significant time to the jury selection process.¹⁰⁵ Possible reasons for judicial truncation of voir dire include judges' frustration with lawyers' misuse of the voir dire process and an attempt to manage the courts' schedules in light of increasing caseloads. At the least restrictive end of this trend are judges who significantly truncate the time given to advocates to interface directly with the jury and ask questions on voir dire.¹⁰⁶ At the most restrictive end are judges, including a fair number of federal trial court judges, who have suspended the lawyer-venire interaction in favor of a bench-venire model whereby lawyers submit their questions in advance to the judge and the judge, if he or she approves of the question, will pose it to the venire.¹⁰⁷ In either case, commentators have criticized the allotted time for voir dire as being too brief to elicit a threshold amount of information from the venire to make informed decisions on the exercise of challenges, both peremptory and for-cause.¹⁰⁸ Even when given adequate questioning time, however, the exercise is of little utility if the lawyers ask bad questions. Judges, commentators, and empirical researchers agree that lawyers, generally, are unskilled in the type and manner of questioning that elicits useful information from potential jurors.¹⁰⁹ The majority of trial lawyers

104. See generally Rachael A. Ream, *Limited Voir Dire: Why It Fails to Detect Juror Bias*, 23 CRIM. JUST. 22 (2009).

105. *Id.*

106. *Id.* at 25.

107. *Id.*; see also Bennett, *supra* note 5, at 150 (concluding that judge-dominated voir dire severely hampers effective elimination of biased jurors).

108. *Id.*

109. Some conclude that lawyers are operating near chance levels (i.e., 50% accuracy) in predicting juror verdicts. See generally Reid Hastie, *Is Attorney-Conducted Voir Dire an Effective Procedure of the Selection of Impartial Jurors?*, 40 AM. U. L. REV. 703, 726 (1991). "Attorneys disagree substantially about what information to rely on, which jurors to select, and they consistently produce low levels of accuracy in judging juror verdict preference prejudices." *Id.* at 722; see also Michael O. Finkelstein & Bruce Levin, *Clear Choices and Guesswork in Peremptory Challenges in Federal Criminal Trials*, 160 J. ROYAL STAT. SOC'Y (PART TWO) 275 (1997); Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in Federal District Court*, 30 STAN. L. REV. 491 (1978).

themselves acknowledge this sad state of affairs.¹¹⁰ In one study, approximately 75% of lawyers confessed that they gained no predictive power at all, or very little in a small number of cases, about how jurors would receive evidence in a given case as a result of the voir dire process.¹¹¹ Lawyers' "gut feeling" that voir dire questioning did not help them better "select" a jury has been confirmed by a large body of empirical research.¹¹²

One of the most frequently cited comments on the inefficacy of peremptory challenges was made by Dale W. Broeder, who conducted an early systematic study of the voir dire process:¹¹³ "*Voir dire* was grossly ineffective not only in weeding out 'unfavorable' jurors but even in eliciting the data which would have shown that particular jurors are likely to prove 'unfavorable.'"¹¹⁴ Broeder conducted 225 post-trial juror interviews and determined that a number of jurors failed to reveal potentially prejudicial views or relevant information during the questioning process.¹¹⁵ Other research studies confirm lawyers' common failure to get prospective jurors to reveal information that would suggest potential bias, such as whether the juror had been convicted of a crime, knew the defendant, or had a relative who had been a victim of a similar crime.¹¹⁶ Researchers Zeisel and Diamond studied the effectiveness of peremptory challenges in twelve federal trials and concluded that "voir dire . . . did not provide sufficient information for attorneys to identify prejudiced jurors. The average score of the prosecution was

110. Marvin Zalman & Olga Tsoudis, *Plucking Weeds from the Garden: Lawyers Speak About Voir Dire*, 51 WAYNE L. REV. 163, 383 (2005); see also Ernest Hawrish & Eugene Tate, *Determinants of Jury Selection*, 39 SASK. L. REV. 285 (1974); Kallen, *Peremptory Challenges Based Upon Juror Background: A Rational Use?*, 13 TRIAL LAW. GUIDE 143 (1969).

111. Zalman & Tsoudis, *supra* note 110, at 383.

112. See, e.g., Dale W. Broeder, *supra* note 101; Solomon M. Fulero & Steven D. Penrod, *Attorney Jury Selection Folklore: What Do They Think and How Can Psychologists Help?*, 3 FORENSIC REP. 233 (1990); Hawrish & Tate, *supra* note 110; George Hayden, Joseph Senna & Larry Siegel, *Prosecutorial Discretion in Peremptory Challenges: An Empirical Investigation of Information Use in the Massachusetts Jury Selection Process*, 13 NEW ENG. L. REV. 768 (1978); Susan E. Jones, *Judge Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor*, 11 LAW & HUM. BEHAV. 131 (1987); Kallen, *supra* note 110; William H. Levit, Dorothy W. Nelson, Vaughn C. Ball & Richard Chernick, *Expediting Voir Dire: An Empirical Study*, 44 S. CAL. L. REV. 916, 940-46 (1970-71); Robert MacCoun, *Experimental Research on Jury Decision-Making*, 30 JURIMETRICS J. 223 (1989); David Suggs & Bruce D. Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis*, 56 IND. L.J. 245, 251-52 (1981). See generally Reid Hastie, *Is Attorney-Conducted Voir Dire an Effective Procedure of the Selection of Impartial Juries?*, 40 AM. U. L. REV. 703, 726 (1991). Contra 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, 528 (1978) (finding attorneys succeeded to a limited extent).

113. See generally Broeder, *supra* note 101.

114. *Id.* at 505.

115. *Id.* at 503.

116. See, e.g., Richard Seltzer, Mark A. Venuti & Grace M. Lopes, *Juror Honesty During the Voir Dire*, 19 J. CRIM. JUST. 451, 460 (1991), reprinted in THE JURY TRIAL IN CRIMINAL JUSTICE 214-32, 220 (Douglas D. Koski ed., 2003).

near the zero point . . . [and] defense counsel performed only slightly better.”¹¹⁷ These findings were confirmed by Selzer, Venuti and Lopes when they compared the answers of 190 potential jurors during voir dire with their answers in post-trial interviews.¹¹⁸ Although the jurors had each been seated on a criminal trial (of 31 studied), the lawyers failed to elicit information that would be potentially important in exercising peremptory challenges. For example, more than 50% of the jurors did not disclose that they had been a crime victim themselves; 29.6% did not disclose they had close friends or relatives who were in law enforcement; and 47% did not share their belief that if the defendant testifies at trial he must prove his innocence.¹¹⁹

iii. Failure to Confirm Shared Definitions Produces Misinformation

As the Laurel Holliday case illustrates, the problem of definitional disconnects during voir dire cannot be overestimated.¹²⁰ Attorneys too often craft questions telegraphically, where the language employed has a specific meaning for the questioning attorney, without ensuring that the jurors share the definition. As a result, jurors may believe they are answering truthfully, but, in fact, may be answering an entirely different question than the one intended by the attorney. Although anecdotal evidence alone makes a vulnerable platform for an argument with respect to any aspect of jury trial work,¹²¹ an account or two from the real world of trial practice can illustrate the severity of a problem well-documented by empirical research.

One example comes from a civil lawsuit where a mid-level manager of Arab descent filed a Title VII action against his former employer, a fast food restaurant, claiming he had been fired because of his race. The restaurant replied that he had been terminated in response to complaints that he had sexually harassed his subordinates and created a sexually hostile working environment. I represented the restaurant. Shortly after filing an answer in the lawsuit, we received almost a dozen affidavits signed by female restaurant employees attesting that none of

117. 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, 528 (1978).

118. See Seltzer et al., *supra* note 116.

119. *Id.* at 458-60.

120. This is especially true considering the Ninth Circuit ruled that a new trial was not required in the Stella Nickell case because Holliday's answers on voir dire were not false. The court cited *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), saying that to obtain a new trial based upon less than truthful answers during voir dire, “a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause.” *Id.* at 556. In the case of Ms. Holliday, the Ninth Circuit found there to be a significant difference between a product contamination case and a product tampering case. “Holliday was asked only whether she, or any member of her family, had been involved in a product tampering case. It is difficult to understand what response by the juror would have been more appropriate than her denial.” *United States v. Nickell*, 883 F.2d 824, 827 (9th Cir. 1989).

121. NEIL VIDMAR & VALERIE HANS, *AMERICAN JURIES: THE VERDICT* 17 (2007).

them had ever been subjected to or witnessed any sexual harassment by the plaintiff. This was curious in light of the complaints by the assistant manager about the plaintiff's inappropriate behavior.

I interviewed the young women, all between the ages of 16 and 18, and I asked them about the work environment at the restaurant. They told me that the plaintiff was a "funny guy" who liked to "joke around" and that his "joking" included, among other behaviors: snapping their bra straps, twisting their nipples, holding a banana between his legs while shooting whipping cream from his crotch, and telling an employee he would "teach her how to do the books if she would give him a blow job."¹²² I asked the women why they didn't consider this behavior to be sexual harassment. They answered, "It's not like he meant it, he was just joking around, like all the boys at high school."

This story underscores the need to explore and confirm speakers' definition of terms and concepts when eliciting and analyzing information, both those used by the questioner and the responder. This confirmation of shared definitions, while critical, is rarely done during voir dire. This may be because lawyers are generally under-trained (if not untrained) in effective questioning techniques and thus fail to appreciate the dangers of misconstrued terminology. It also might be a matter of trial strategy on the part of the lawyer to skip the process of defining terms in the interest of time if she believes the risk of misunderstanding is relatively slight. A lawyer may believe, for example, that "everyone knows" the meaning of a commonly used term such as "assault" or "domestic violence" and thus there is no need to explore the jurors' subjective understanding. If wrong, however, this assumption can be fatal to accurate information gathering and analysis.

Another example comes from my own experience as a juror while I was still a state prosecutor. During the voir dire on one case, the prosecutor asked if anyone in the venire had ever been assaulted or witnessed an assault. I did not raise my hand. I truthfully could not recall any assault, of any kind, and so I sat silent while others talked of their various experiences over the next half hour. As voir dire progressed, we learned that the case involved a woman accused of stabbing a man in a downtown low-rent hotel. She claimed self-defense, saying the man she stabbed had attacked her. The man denied the event entirely. The defendant argued the man was a chronic alcoholic who suffered frequently from blackouts, and that he was drunk and operating in a blackout at the time he came at her with a knife.

As we moved to the second round of voir dire, both the prosecutor and defense counsel having explored our experiences (not our attitudes or beliefs) with assaults, the prosecutor asked an entirely different type of question: "Has anyone

122. At one point I must have appeared rather taken aback because one young woman asked me, "Would that bother you?" to which I replied, "Call me a prude, but, yes, if my boss were twisting my nipples at work, that would bother me."

here ever had anyone raise a knife, or any other tool towards them that they felt was threatening?" What a difference a single question made. I immediately recognized this experience as one I had lived through. In fact, as I thought back on it, the facts of my own experience were eerily similar to the facts of the case: when I was a young teenager, an alcoholic relative¹²³ who suffered from blackouts came after me with a knife. I hid in a bathroom, holding a pair of scissors, ready to defend myself if need be. What a great witness I would have been for the defense in the jury deliberation room! A shadow advocate if not an invisible expert witness. But why hadn't I raised my hand when asked if I had been assaulted? I was a lawyer. I was a criminal prosecutor. I well knew that menacing another with a knife constituted assault. Why did I not tell the court I had been assaulted? The answer, I realized, was that as a teenager in the 1970s, long before domestic violence became the subject of movies of the week or after-school specials, I had not learned anything of 'assaults,' and thus I had not labeled the event as one. When asked to retrieve 'assault' experience, I checked under "assault" in my mental databank and came up empty-handed. It was only when the prosecutor abandoned the label "assault" and *factually* described the behavior did I recognize it as a life experience.¹²⁴

Another "real world" example of the danger of using shorthand definitions comes from the O.J. Simpson murder trial. In that case, the prospective jurors were asked to complete a written juror questionnaire before coming into the court for voir dire, due to the highly publicized nature of the case and the issues involved. The questionnaire was 75 pages long and contained over 300 questions, including the following:

162. Have you ever experienced domestic violence in your home, either growing up or as an adult? Yes? No? Please describe the circumstances and what impact it has had on you:

163. Have you ever had a relative or close friend experience domestic violence? Yes? No? If yes, please explain the circumstances and what affect it has had on you:

These questions, undoubtedly crafted with care by some very motivated and experienced trial lawyers, are potentially fatally flawed in their use of telegraphic

123. My brother, Christopher P. Howard (J.D. 1990, Stanford Law School, M.B.A. 2000, Harvard Business School), when reading earlier drafts of this article, thought it prudent to note that, although he has many vices, he is not this alcoholic relative.

124. Interestingly, when I realized I had in fact been assaulted—and was a victim of domestic violence, no less—I was slightly reluctant to discuss the details with the court. Although the judge had assured us we could request an opportunity to answer any questions that made us uncomfortable in chambers, this was not a helpful solution in my particular situation. I did not care that a roomful of strangers learned the details of a chapter of my childhood; my hesitation was about telling the judge, the bailiff, the prosecutor, the defense lawyer, and the court reporter—all my co-workers on some level—and all who would be in chambers with me during any "private" questioning. I reported what had happened to me, and I was thanked and excused summarily.

terms such as “domestic violence” and “abusive relationship.” For instance, imagine a prospective juror responding to Question 162. “Have you experienced domestic violence in your home . . . ?” What if she defines “domestic violence” to include only physical violence that produces an injury or requires medical assistance? She may have been shoved or slapped by a husband or boyfriend, but would still answer, truthfully, “No.” What if she defines “domestic violence” to include only violence that the actor intended, and thus if he were drunk it would not qualify? And what about the limitation, “Have you ever experienced domestic violence *in your home*?” (emphasis added). Presumably, the questioner intended to reference violence in the context of a familial relationship by adding the words “in your home.” However, the words act as a limitation to the scope of the question. The prospective juror may think back and recall that her husband has hit her in the car, in the park, at the bar, but never *in the home*, prompting her to truthfully respond “No.”

Similar problems are found in the wording of Question 163, “Have you ever had a relative or a close friend experience domestic violence?” The questioner presumably wants to know what the prospective juror’s attitudes, beliefs, experiences, and preconceptions are with respect to domestic violence. Limiting the question, however, to the juror’s experience vis-à-vis close friends and relatives may well provide misinformation to the questioning lawyer. For example, a juror with strong views about domestic violence as a result of living next door to a battered woman would not respond affirmatively to this question if the neighbor was neither a relative nor close friend.¹²⁵ The same is true if the strong opinions were developed from experience with a co-worker, a teacher, or a classmate as long as the juror did not categorize them as a “close friend.”

The failure to confirm shared definitions is one reason why voir dire does not reliably produce adequate information for attorneys to effectively exercise peremptory challenges. This failure could be remedied to some extent through education of both judges and lawyers in effective questioning techniques.¹²⁶ Even if this flaw in the voir dire process were corrected, however, there are additional reasons peremptory challenges lack utility.

iv. Educating the Jury Doesn’t Produce Information

Although the legitimate purpose of voir dire is to obtain information from prospective jurors in order to make a record for a challenge for cause or to inform the lawyer on how best to exercise her peremptory challenges, many lawyers instead use their allotted time to try to educate or indoctrinate the jury with

125. And who constitutes a relative? Is an ex-sister-in-law related to you? How about an ex-wife?

126. Presumably it would be easier to accomplish the widespread education of judges than of lawyers, both because the court could more easily control the requirement and provision of the training and because judges would have more frequent opportunities to practice the skill.

respect to the themes and theories of their case.¹²⁷ This misuse of voir dire¹²⁸ does not assist a lawyer in making informed decisions when exercising peremptory challenges because the lawyer is dispensing information to, and not gathering information from, the jurors. Because of this, “educational” voir dire is usually characterized by stretches where the lawyer does a disproportionate amount of the talking. In an early study, attorneys spent about 80% of the voir dire indoctrinating the jurors by “commenting on points of law, preparing jurors for the trial, and ingratiating themselves” with the jury.¹²⁹ In another study, researchers also discovered this pattern of attorneys talking *to* jurors, rather than eliciting information *from* jurors:

[O]nly forty-one percent of all statements during the *voir dire* were made by prospective jurors. Even this figure is misleadingly high because it does not reflect either the nature or the length of the statements. Less than one percent of all comments by jurors were unsolicited. The remainder were rather perfunctory replies to questions by the attorneys. Most juror statements consisted of only a single word, usually yes or no. The attorneys, in other words, clearly dominated the *voir dire*.¹³⁰

Prospective jurors do not generally volunteer information during jury selection. This is understandable given the unfamiliarity and the formality of the courtroom setting, which can be intimidating to many prospective jurors.¹³¹ Although research establishes that the majority of potential jurors are truthful,¹³² they are also highly motivated to put their best image forward when subjected to public questioning.¹³³ They are understandably guarded and cautious in both interpreting the questions put to them and in formulating their responses. They

127. See Broeder, *supra* note 101, at 522; see also Randolph N. Jonakait, *THE AMERICAN JURY SYSTEM* 130 (Yale Univ. Press 2003) (Attorneys seek to “indoctrinate, socialize, and educate prospective jurors”). See generally Levit, et al., *supra* note 112, at 940-46.

128. Not all commentators consider education and indoctrination of the jury a poor use of voir dire, noting that it performs a socialization function for the venire. See, e.g., Robert W. Balch et al., *The Socialization of Jurors: The Voir Dire As a Rite of Passage*, 4 J. CRIM. JUST. 271, 272, 280 (1976), reprinted in *THE JURY TRIAL IN CRIMINAL JUSTICE* at 203 (Douglas D. Koski ed., 2003). The time is misused, however, if the goal is to elicit information upon which challenges will be based. In addition, such efforts to educate the jury risk improperly exposing the jury to facts, law, or argument that would be impermissible in opening statement.

129. Reid Hastie, *Is Attorney-Conducted Voir Dire an Effective Procedure for the Selection of Impartial Juries?*, 40 AM. U. L. REV. 703, 708 (1991) (citing Professor Broeder’s research findings in the late 1950’s).

130. Balch et al., *supra* note 128, at 276.

131. *Id.* Given that voir dire is the first dialogue between attorneys and prospective jurors, in a highly authoritarian and formal setting in the presence of the judge, jurors may perceive they are being “interrogated.”

132. See, e.g., Broeder, *supra* note 101, at 510-14 (noting that researchers found seven to fifty percent of jurors gave inaccurate responses during jury selection, but they did not conclude the inaccurate responses were due to intentional deception).

133. See, e.g., Robert Helmreich & Barry Collins, *Situational Determinants of Affiliative Preference Under Stress*, 6 J. PERSONALITY & SOC. PSYCHOL. 79 (1967); Paul McGhee & Richard Teevan, *Conformity Behavior and Need for Affiliation*, 72 J. SOC. PSYCHOL. 117 (1967); Irving Sarnoff & Philip Zimbardo, *Anxiety, Fear and Social Affiliation*, 62 J. ABNORMAL & SOC. PSYCHOL. 356 (1961).

want to give answers that are socially acceptable and noncontroversial.¹³⁴ They want to avoid looking mean-spirited, unfair, biased, prejudiced, uneducated, or unintelligent.¹³⁵

Thus, it is unsurprising that some questions, simply by the way they are phrased, lead jurors to answer in ways that make them “look good.” These are questions that have a predictable “right” answer. Asking jurors in a criminal case, “Do you believe that you could be a fair and impartial juror?” will predictably produce the socially acceptable answer “yes.”¹³⁶ Jurors are very reluctant to admit that they could not be fair. So, although perhaps not technically leading in phrasing, the question is in essence a leading one because there is only one “right” answer. Jurors are also quick to agree with the judge or examining lawyer when the “question” is presented as a statement of law or legal procedure. For example, it is difficult to imagine a juror who has grown up in the United States, not knowing the “right” answer to the question “do you understand the defendant is presumed innocent unless the government proves he is guilty beyond a reasonable doubt?” Not only is the mantra familiar to anyone who has watched any American films or television, the introductory phrase “do you understand” strongly telegraphs that the mantra is, in fact, true. A far better method to test the juror’s actual understanding of this concept of innocence would be to present a hypothetical question such as, “If you were to go into the jury deliberation room right now, how would you vote, guilty or innocent, on the charges facing my client?”¹³⁷

In educational voir dire, “questions” posed to the venire are really statements presented to the venire with a demand for juror agreement. Frequently these mantras are prefaced with the phrase, “Do you understand that . . . ,” “Would you be able to follow the law that . . . ,” or “You appreciate the fact that” For example, a criminal defense lawyer may ask, “Do you understand that the defendant is presumed innocent unless and until the government proves beyond a reasonable doubt that he committed the crime?” Implicit in the wording is the

134. See SEYMOUR SUDMAN & NORMAN M. BRADBURN, *ASKING QUESTIONS* (Jossey-Bass 1982); see also Mary R. Rose & Shari Seidman Diamond, *Judging Bias: Juror Confidence and Judicial Rulings on Challenges for Cause*, 42 L. & SOC’Y REV. 513, 516 (2008) (citing Gary Moran & Brian Cutler, *The Prejudicial Impact of Pretrial Publicity*, 21 J. APP. SOC. PSYCHOL. 345, 345-67 (1991)); Neil Vidmar, *Generic Prejudice and the Presumption of Guilt in Sex Abuse Trials*, 21 L. & HUM. BEHAV. 5, 5-25 (1997).

135. “Voiur dire was grossly ineffective not only in weeding out ‘unfavorable’ jurors but even in eliciting the data which would have shown that particular jurors are likely to prove ‘unfavorable.’” Broeder, *supra* note 101, at 505. The Supreme Court recognized this phenomenon in saying “[n]o doubt each juror was sincere when he said that he would be fair and impartial . . . but the psychological impact [of] requiring such a declaration before one’s fellows is often its father.” *Irvin v. Dowd*, 366 U.S. 717, 728 (1961).

136. This phenomenon has been identified by social scientists as the “social desirability effect.” Hazel Markus & R. B. Zajonc, *The Cognitive Perspective in Social Psychology*, in *THE HANDBOOK OF SOCIAL PSYCHOLOGY* 137, 184 (Gardner Lindzey & Elliot Aronson eds., 3d ed. 1985).

137. In over twenty years in the courtroom, I have yet to hear a juror answer anything but a variation of “I don’t know, I haven’t heard the evidence yet.” This response provides a great platform to explore juror preconceptions and assumptions with respect to the presumption of innocence.

“right” answer—that this is a correct statement of the law—and the answer will be a non-reflective “yes.” It is a self-confident juror, indeed, who will disagree publicly with a trained lawyer as to what the “law” is, especially when the lawyer “tells” the juror it is so. Instead of inviting the jurors to open up and express their attitudes and beliefs, this method of “force-feeding” the venire tends to browbeat them into facially agreeing with the “right” statement, whether they even understand it, let alone agree.¹³⁸

This “agreement” phenomenon is documented by the empirical research. In one study, 43% of lawyers’ “questions” were actually instructional statements like these, which the researchers referred to as indoctrination remarks.¹³⁹ The research suggested that this “educational” voir dire was unlikely to separate biased and unbiased jurors because jurors tended to provide the expected answers.¹⁴⁰ In answers to over 2,000 questions that were “leading” in nature (suggesting the desired response), only two responses (.1%) failed to match the attorney’s suggested “right” response.¹⁴¹ The finding has been attributed to the virtual demand of the attorneys for juror agreement—all in a public setting.¹⁴²

When lawyers use their limited questioning time to try to educate or indoctrinate jurors on issues, themes, and the law by using long, leading questions that end with a request for confirmation that the juror “understands” or “agrees,” the lawyer is not gathering information about the jurors. It is also doubtful that such browbeating provides much of an “education.” Even experienced attorneys misuse limited voir dire questioning time in this way. Consider, by way of example, a series of questions put to a prospective juror in the trial of NFL football player Ray Lewis.¹⁴³

In 2000, Mr. Lewis and two friends were charged with the stabbing deaths of two men outside an Atlanta bar after a Super Bowl party.¹⁴⁴ The trial began in

138. See Balch et al., *supra* note 128, at 271 (“Upon entering the strangely formal world of the courtroom . . . most prospective jurors are anxious and ready to be led. They are prepared to be molded into the juror’s role by anyone willing to offer direction.”); see also Bennett, *supra* note 5, at 160.

139. Balch et al., *supra* note 128, at 276.

140. *Id.* at 278. The researchers noted that during educational voir dire, the attorneys’ leading questions “virtually demanded a public commitment to the ideal norms of fairness and impartiality” such that only one percent of jurors expressed any disagreement. Balch et al., *supra* note 128, reprinted in *THE JURY TRIAL IN CRIMINAL JUSTICE* at 211 (Douglas D. Koski ed., 2003). Although “personal-biographical information should have occupied most of the attorneys’ attention since the purpose of voir dire is to ascertain the relevant feelings and experiences of the prospective jurors . . . most of the information appeared to be of little use.” Balch et al., *supra* note 128, reprinted in *THE JURY TRIAL IN CRIMINAL JUSTICE* at 209 (Douglas D. Koski ed., 2003).

141. *Id.*

142. *Id.*

143. Mr. Lewis is a linebacker who plays for the Baltimore Ravens. Thomas George, *On Pro Football; From Threat of Prison to Exultation*, N.Y. TIMES, Jan. 20, 2001, at D1, available at <http://www.nytimes.com/2001/01/30/sports/on-pro-football-from-threat-of-prison-to-exultation.html>.

144. Despite the double homicide charge and the accompanying media coverage in 2000, Mr. Lewis went on that year to win Super Bowl XXXV MVP honors, Defensive Player of the Year honors, a unanimous All-Pro selection, and another start in the Pro Bowl. *Id.*

May of 2000 at the Fulton County Courthouse before Judge Alice Bonner.¹⁴⁵ Prosecutor Paul Howard¹⁴⁶ and two assistants represented the People. Each of the three defendants was represented in court by two attorneys. Due to the pretrial publicity, the prospective jurors had been asked to complete questionnaires and were brought into court individually to be questioned. One potential juror came into the courtroom, seemingly nervous as she climbed into the empty jury box to be questioned. The juror looked to be in her sixties, reported being retired from her work as a custodian, and confirmed she had limited formal education. One of the defense attorneys engaged in the following voir dire dialogue¹⁴⁷ with the juror:

Q: You're not opposed to someone defending themselves?

A: Huh?

Q: You're not opposed to someone defending themselves?

A: Huh?

Q: You're not opposed to someone defending themselves?

A: What does "opposed" mean?

Q: Well, you're not saying you don't think people can't defend themselves. You're not saying that because others say they did something that you think so?

A: Uh, . . . okay.

The defense lawyer gathered absolutely no information about the prospective juror as a result of this exchange, nor was he trying to. It is also doubtful that the woman was "educated" as a result of the lawyer's repeated mantra. Further, as she was questioned in the absence of other potential jurors, the lawyer could not have been trying to educate the rest of the venire, even if the "education" was lost on this particular juror. Empirical evidence and anecdotal accounts both confirm that this misuse of questioning time during voir dire is the rule, and not the exception.

v. Relying on Demographics Is Untrustworthy

During voir dire, a lawyer aspires to discover the jurors' attitudes, beliefs, preconceptions, and biases that will shape not only their interpretation of evidence, but their very willingness to receive, process, and store information.¹⁴⁸ In

145. I was in Atlanta teaching the Emory Law School's Annual Trial Skills program when the trial began. The day before the students' mock trial the faculty had the afternoon off, and I went down to observe jury selection.

146. No relation to the author.

147. I have reported the colloquy to the best of my recollection. Although I have not been able to review a transcript of the voir dire, I took copious notes, which I have to this day.

148. See, e.g., Valerie P. Hans & Alayna Jehle, *The Jury in Practice: Avoid Bald Men and People with Green Socks?*, 78 CHI.-KENT L. REV. 1179, 1180 (2003) ("Life experiences and preconceptions contribute to the

the absence of particular information about individual prospective jurors, however, a lawyer is forced to fall back on demographics such as educational background, race, age, gender, and occupation when exercising peremptory challenges. A large amount of empirical research suggests, however, that demographics are poor predictors of the underlying attitudes, beliefs, preconceptions, and biases that shape jurors' perception of the evidence.¹⁴⁹ As such, demographics are associated weakly and unreliably with juror verdicts.¹⁵⁰ In fact, the empirical research "calls into question the premise that jurors' votes during deliberation can be reliably predicted from juror characteristics that are observable before the trial."¹⁵¹

In a particular venue or case, there may be a useful relationship between an attitude and a demographic characteristic such as occupation or educational level, but the relationship is often weak. Attitudes and biases often cut across demographic lines. For example, a lawyer might assume, based on demographics alone, that a juror who is a white, male, conservative corporate executive will be pro-management in an employment discrimination case. But that assumption would be wrong if the juror's underlying belief is that the political climate of most companies makes it easier for management to deny that a discrimination problem exists than to take corrective action, or if that juror had relevant personal experience, such as a wife or daughter who had been discriminated against in the workplace.

Another example from my experience may be instructive as to the lack of predictive power of demographics. While I was a prosecutor, I was part of a venire assigned to a criminal trial where the defendant stood accused of car theft and attempting to elude the police. During jury selection, we learned the police had called in the license plates of a "suspicious" car and, learning it had been reported stolen, they activated their emergency lights and sirens. The driver took off, and a high-speed chase ensued. Several other police cars joined the pursuit, following the suspect's car through multiple red lights and populated retail parking lots. The chase was extended and occurred at night.

The police finally stopped the suspect, boxing his car with their police cruisers. The suspect was black and the officer who went up to the car for his identification was white. When the suspect handed over his driver's license, the officer went to call in his information, and the suspect took off. The police went to the address on the driver's license, where a black man matching the picture on the license

narrative or story that jurors develop as they listen to evidence and decide the case. Evidence that is inconsistent with jurors' preconceptions and the developing story may be discounted or ignored. . . . Attitudes tend to be more powerful predictors of verdict choices than demographic characteristics.").

149. See, e.g., Robert J. MacCoun, *Experimental Research on Jury Decision-Making*, 244 *Sci.* 1046, 1047 (1989).

150. *Id.*

151. *Id.*

answered the door. They arrested him, although he staunchly maintained it was a case of mistaken identity and that his cousin had taken his driver's license. It was clear the issue in the case was going to be the reliability of the cross-racial eyewitness identification of the defendant by the police. I was one of the first twelve members of the venire, and so presumptively on the petit jury. When it came time for exercising challenges, defense counsel conferred with his client, who glared at me and shook his head. I was excused. The jury came back with a guilty verdict in under an hour.

I spoke to the defense lawyer later to discuss the case. He admitted that as a white prosecutor there was no way I would have been allowed to serve on the jury. My demographic profile (white,¹⁵² prosecutor) strongly suggested I would be hostile to the defense. The reverse, however, was true. My experience—my *individual* profile—suggested I would be a liability for the prosecution. As a psychology major in college I had read several empirical studies by Dr. Elizabeth Loftus¹⁵³ on the unreliability of eyewitness identification in general,¹⁵⁴ and cross-racial eyewitness identification in particular.¹⁵⁵ Because of that, I found it hard to imagine, based on what I had heard in voir dire, that the state would have been able to prove to me beyond a reasonable doubt that a white officer, at night, for a few minutes, after a high-speed chase, with his adrenaline pumping, holding the suspect's identification and believing that they had the suspect in firm custody, would have had the motivation or ability to accurately record the salient

152. Race is a common demographic considered by attorneys exercising peremptory challenges. A 1984 jury study in Chicago documented that in a single month "prosecutors eliminated blacks at more than double the rate that they excluded whites in selecting juries for trials of black defendants," despite the fact that the both groups had similar backgrounds. Douglas Frantz, *Many Blacks Kept Off Juries Here*, CHI. TRIB., Aug. 5, 1984, at 1. This is not to say that race is not a predictive demographic: empirical evidence strongly suggests that it is. See, e.g., John Monahan & Elizabeth F. Loftus, *The Psychology of Law*, 33 ANN. REV. PSYCH. 441, 448 (1982). However, the fact that a peremptory challenge based on race might be well-grounded makes it no less unconstitutional.

153. Dr. Loftus is a Distinguished Professor in the Department of Psychology and Social Behavior, the Department of Criminology, Law, and Society, and the Department of Cognitive Sciences, and a Fellow of The Center for the Neurobiology of Learning and Memory at the University of California, Irvine. She is also an Affiliate Professor of Law at the University of Washington. She has been recognized for over a decade as the preeminent expert in the field, "amassing a clear and brilliant body of work showing that memory is amazingly fragile and inventive." Monahan & Loftus, *supra* note 152, at 448.

154. See, e.g., EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES (Gary L. Wells & Elizabeth F. Loftus eds., Cambridge Univ. Press 1984); ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY (1979); ELIZABETH F. LOFTUS & JAMES M. DOYLE, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL (Lexis Law Publishing 3rd ed. 1977); ELIZABETH LOFTUS & KATHERINE KETCHAM, WITNESS FOR THE DEFENSE (1991); Jane Goodman & Elizabeth F. Loftus, *Judgment and Memory: The Role of Expert Psychological Testimony on Eyewitness Accuracy*, in PSYCHOL. & SOC. POL'Y (Peter Suedfeld & Philip E. Tetlock eds., 1992); Paul M. Camper & Elizabeth F. Loftus, *The Role of Psychologists as Expert Witnesses in the Courtroom: No More Daniels in the Lions Den*, 9 LAW & PSYCHOL. REV. 1 (1985); Elizabeth F. Loftus, *Reconstructing Memory: The Incredible Eyewitness*, 15 JURIMETRICS J. 188 (1975); Elizabeth F. Loftus, *The Eyewitness on Trial*, 16 TRIAL 1, 30-35 (Oct. 1980).

155. Dr. Loftus maintains that cross-racial identifications are "notoriously difficult" and "disproportionately responsible for wrongful convictions." ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 136-39 (Harvard Univ. Press 1979) (citing, in addition to her own research, that of Bringham & Barkowitz (1978), Scott & Foutch (1974), and Malprass & Kravitz (1969)).

features of the black man in the car such that he could definitively distinguish him later.¹⁵⁶

II. ASSESSING THE HARM OF PEREMPTORY CHALLENGES

A. GENDER AND RACE-BASED DEMOGRAPHICS ARE UNCONSTITUTIONAL

In addition to lacking predictive power, the exercise of peremptory challenges based on group affiliations, stereotypes, and demographic profiles risks violating constitutional, legislative, and ethical prohibitions against discrimination in jury selection.¹⁵⁷ Ironically, research suggests that the two demographics that actually have some empirical validity (and are thus “rational” bases for peremptories), are those that are specifically prohibited by the Constitution: race and gender.¹⁵⁸ As noted in the Introduction, a number of scholars and commentators have criticized the use of peremptory challenges precisely because they are used discriminatorily, and thus unconstitutionally.¹⁵⁹ Some have echoed Justice Thurgood Mar-

156. “Although some scientists debate about certain emerging areas of identification confusion, they appear to be in consensus about this basic perception-storage-recall problem.” Wayne T. Westling, *The Case for Expert Witness Assistance to the Jury in Eyewitness Identification Cases*, 71 OR. L. REV. 93, 101-02 (1992) (citations omitted). Moreover, “[t]he fallibility factors which are built into the human mind are accentuated when the observer is asked to be a formal witness in court.” *Id.*

157. See Batson, *supra* note 3 and accompanying text. Several states also have ethical rules prohibiting discrimination in jury selection, expanding the constitutionally prohibited bases to include: disability, age, sexual orientation, and socio-economic status. MODEL RULES R. 8.4 cmt. 3 (deeming such bases as “prejudicial to the administration of justice”).

158. For example, studies have shown that the absence of black citizens on juries results in increased convictions. See, e.g., Monahan & Loftus, *supra* note 152. However, the fact that a peremptory challenge based on race might be well-grounded makes it no less unconstitutional.

159. See, e.g., Albert Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153 (1989); Jose Felipe Anderson, *Catch Me If You Can! Resolving The Ethical Tragedies In the Brave New World of Jury Selection*, 32 NEW ENG. L. REV. 343 (1998); Felice Banker, Note, *Eliminating A Safe Haven for Discrimination: Why New York Must Ban Peremptory Challenges From Jury Selection*, 3 J.L. & POL’Y 605 (1995); Bennett, *supra* note 5, at 150; Karen Bray, *Reaching the Final Chapter in the Story of Peremptory Challenges*, 40 UCLA L. REV. 517 (1992); Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369 (1992); Carol A. Chase and Colleen P. Graffy, *A Challenge For Cause Against Peremptory Challenges in Criminal Proceedings*, 19 LOY. L.A. INT’L & COMP. L.J. 507 (1997); Gurney, *supra* note 5; Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge’s Perspective*, 64 U. CHI. L. REV. 809 (1997); Eric D. Katz, *Striking the Peremptory Challenge from Civil Litigation: “Hey Batson, Stay Where You Belong!”*, 11 PACE L. REV. 357 (1991); Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 GEO. L.J. 945 (1998); Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041 (1995); Nancy S. Marder, *Justice Stevens, The Peremptory Challenge, and The Jury*, 74 FORDHAM L. REV. 1683 (2006); Kenneth Mellilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447 (1996); Charles J. Ogletree, *Just Say No! A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099 (1994); Antony Page, *Batson’s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155 (2005); Amy Wilson, *The End of Peremptory Challenges: A Call For Change Through Comparative Analysis*, 32 HASTINGS INT’L & COMP. L. REV. 363 (2009); Hiroshi Fukurai & Edgar W. Butler, *Sources of Racial Disenfranchisement in the Jury and Jury Selection System*, 13 NAT’L BLACK L.J. 238 (1994).

shall's call for the abolition of peremptory challenges entirely.¹⁶⁰ The concern is that, even after *Batson*, lawyers still exercise peremptory challenges unconstitutionally, based on race or gender, whether consciously or not.¹⁶¹ Even commentators who agree with the Supreme Court¹⁶² that the net value of the peremptory challenge supports their retention acknowledge that the risk of discrimination under the current *Batson* system is too high and call for system reform.¹⁶³ The holding of *Batson* may prohibit discrimination, they contend, but the *Batson* test does not root it out. Attorneys may still use peremptory challenges discriminatorily as long as, when challenged, they can identify any race-neutral or gender-neutral reason.¹⁶⁴ This is widely known by trial lawyers, who have learned by experience (or sometimes deliberate training) to be prepared with any reason, as

160. See, e.g., David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3 (2001); Bennett, *supra* note 5, at 150; Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809 (1997); Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041 (1995).

161. See, e.g., Bennett, *supra* note 5, at 150 (“[J]udge-dominated voir dire and the *Batson* challenge process are well-intentioned methods of attempting to eradicate bias from the judicial process, but they actually perpetuate legal fictions that allow implicit bias to flourish.”); B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809 (1997).

162. In *Swain v. Alabama*, 380 U.S. 202, 219 (1965), the Supreme Court accepted the “widely held belief that [the] peremptory challenge is a necessary part of [the] trial by jury” and necessary to eliminate the “extremes of partiality” from the jury.

163. Proposed reforms are wide-ranging and include: modification or elimination of the *Batson* test, exercise of peremptory challenges exclusively on “blind” questionnaires before the lawyers view the prospective jurors, and expansion of for-cause challenges to include inconsistent juror answers to questionnaire and in-person questioning. See, e.g., Jeb C. Griebat, *Peremptory Challenge by Blind Questionnaire: The Most Practical Solution for Ending the Problem of Racial and Gender Discrimination in Kansas Courts While Preserving the Necessary Function of the Peremptory Challenge*, 12 KAN. J.L. & PUB. POL'Y 323 (2003); 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 (1996).

164. A *Batson* analysis has three steps: challenge, rebuttal, and determination by the judge. The burden of production is initially on the party making the *Batson* challenge, then shifts to the other party to provide a non-discriminatory reason for the challenge. In general, the complaining party need meet a very low threshold to make a prima facie case suggesting an inference of discrimination, thereby shifting the burden of production. See, e.g., *Johnson v. California*, 545 U.S. 162, 162-168 (2005); *U.S. v. Collins*, 551 F.3d 914, 919 (9th Cir. 2009); *Aspen v. Bissonnette*, 480 F.3d 571, 574-575 (1st Cir. 2007), *cert denied*, 552 U.S. 934 (2007) (prima facie burden is not intended to be substantial); *U.S. v. Hendrix*, 509 F.3d 362, 370 (7th Cir. 2007). That being said, the threshold for rebutting a prima facie case is equally low. See, e.g., *Purkett v. Elem*, 514 U.S. 765 (1995) (suggesting burden is quite insubstantial). The *Batson* analysis has been severely criticized. “Because *Batson*'s framework is flawed, it has produced the lingering and tragic legacy that the courts almost always do not find purposeful discrimination, regardless of how outrageous the asserted race-neutral reasons are.” Bennett, *supra* note 5, at 150. Not only is a “facially” objective neutral reason sufficient in most jurisdictions, but some state and federal courts have accepted a subjective neutrality test. In *People v. Algarin*, the court refused to require the prosecutor to provide an objectively neutral reason for the juror challenge. 558 N.E.2d 457 (Ill. App. Ct. 1990). See also William T. Pizzi, *Batson v. Kentucky: Curing the Disease But Killing the Patient*, 1987 SUP. CT. REV. 97, 135 (1987) (footnote omitted) (“In the world of peremptory challenges, where it is acceptable to challenge jurors based on hunches, body language, pop psychology, political preferences, and economic status, and where lawyers are encouraged to strike jurors on the basis of their subjective feelings and impulses, there is no content to the notion of a ‘neutral explanation.’”).

long as it does not involve race or gender.¹⁶⁵ Prosecutors are not immune from resorting to facially discrimination-free reasons when challenging jurors based on race or gender. One prosecutor's office is reported to have distributed, as part of the materials for its 2004 Prosecutor Trial Skills Course, a list of race/gender-neutral reasons to provide the court in response to a *Batson* challenge.¹⁶⁶ An Illinois judge even created a list of such Illinois-case-law-acceptable reasons and suggested that prosecutors distribute it under the title of "Handy Race-Neutral Explanations" or "20 Time-Tested Race-Neutral Explanations."¹⁶⁷

B. LIMITING THE BREADTH OF COMMUNITY PARTICIPATION HARMS THE SYSTEM

Americans have a negative view of trial lawyers as truth manipulators.¹⁶⁸ A 2001-2002 poll by the Litigation Section of the American Bar Association suggests that the public believes lawyers "manipulate both the system and the truth."¹⁶⁹ Every lawyer should be concerned about contributing to this perception, because, to some extent, perception is reality.¹⁷⁰ There are more derisive

In short, both the burdens to successfully make and defend against an initial *Batson* challenge are quite insubstantial. For an excellent discussion of the jurisdiction-dependent and ever-evolving legal standards for a successful *Batson* challenge, see *THE LAW OF JURIES*, *supra* note 16, at 144-157.

165. It has never been true that *any* reason will suffice. The truly ridiculous and inane may be acknowledged as such. One prosecutor, for example, gave the following "race-neutral" reason: "I have a P rule, I never accept anyone whose occupation begins with a P. [The juror] is a pipeline operator." *United States v. Romero-Reyna*, 867 F.2d 834, 837 (5th Cir. 1989). The court saw this for what it was and rejected it. *Id.* In addition, there is arguably a trend in recent cases is to take a harder look at race- or gender-neutral reasons offered for challenges and to reject those which are found to be pretextual. *See, e.g., Snyder v. Louisiana*, 552 U.S. 472 (2008); *Ali v. Hickman*, 571 F.3d 902 (9th Cir. 2009), *opinion amended and superseded on denial of rehearing*, 2009 WL 3401452 (9th Cir. 2009); *Reed v. Quarterman*, 555 F.3d 364 (5th Cir. 2009); *U.S. v. Williamson*, 533 F.3d 269 (5th Cir. 2008); *Green v. LaMarque*, 532 F.3d 1028 (9th Cir. 2008), *opinion modified*, 2008 WL 2952801 (9th Cir. 2008), *and as amended*, (Aug. 4, 2008); *U.S. v. Thompson*, 528 F.3d 110 (2d Cir. 2008), *as amended*, (July 1, 2008), *and cert. denied*, 129 S. Ct. 218 (2008), *and cert. denied*, 129 S. Ct. 1359 (2009).

166. *Reasons To Exclude a Juror*, DALLAS MORNING NEWS, <http://www.dallasnews.com/s/dws/spe/2005/jury/strikes.html> (last visited Feb. 18, 2010); *see also Wilson v. Beard*, 426 F.3d 653, 656 (3d Cir. 2005) (prosecutors encouraged to strike black jurors because "blacks from the low-income areas are less likely to convict").

167. *People v. Randall*, 671 N.E.2d 60, 65-66 (Ill. App. Ct. 1996).

168. National Law Journal polls confirm that "lawyers' prestige has plummeted at a pace unmatched by that of other professions during the past 20 years." Chris Klein, *Poll: Lawyers Not Liked*, NAT'L L.J., Aug. 25, 1997, at A6. Specifically, Americans perceive that lawyers "manipulate the legal system without regard for right or wrong." Randall Samborn, *Anti-Lawyer Attitude Up*, NAT'L L.J., Aug. 9, 1993. In a 1995 poll, three-fourths (seventy-five percent) of those polled believed average Americans have "less" or "much less" access to justice in the legal system than rich people. Stephen Budiansky et al., *How Lawyers Abuse the Law*, U.S. NEWS & WORLD REPORT, Jan. 30, 1995, at 50 et seq. *See generally* HARVEY R. LEVINE, *LEVINE ON TRIAL ADVOCACY: JURY SELECTION*, Ch. 6-B (The Rutter Group 2004).

169. *Public Perceptions of Lawyers: Consumer Research Findings*, 2002 A.B.A. LITIG. SEC. 8-9 (2002), available at <http://www.abanet.org/litigation/lawyers/publicperceptions.pdf>. The poll used both national telephone interviews and focus groups. *Id.*

170. Abraham Lincoln appreciated the significance of public perception, saying, "public sentiment is everything. With [it], nothing can fail; without it nothing can succeed." *THE COLLECTED WORKS OF ABRAHAM LINCOLN*, Vol. III 27 (Roy P. Basler ed., Rutgers Univ. Press 1953).

jokes about lawyers than there are about any other profession.¹⁷¹ Frequently, losing parties in civil lawsuits complain that justice was not done and that the wrong person won—all because he had the “better” lawyer. The collective lay perception is that trial lawyers are gladiators.¹⁷² The party with the most aggressive, tenacious, clever—and maybe unethical—warrior wins the battle, truth and justice notwithstanding.¹⁷³

The majority of Americans consider juries to be the most important part of the American justice system, according to a 1999 American Bar Association poll.¹⁷⁴ The exercise of a peremptory challenge against a prospective juror who is not vulnerable to a for-cause challenge is difficult to explain to a non-lawyer citizen who responds to a summons for jury service and who does not demonstrate an inability to be impartial—at least not to the satisfaction of the judge. A juror so excused might resent the denial of the right to participate without explanation.¹⁷⁵

The Supreme Court noted the importance of a prospective juror’s right to enjoy and benefit from the education that accompanies jury service, free of discrimination.¹⁷⁶ To have served on a jury, in essence, is a “badge of citizenship.” This concept was recognized and embraced almost 170 years ago by Alexis de Tocqueville, who saw jury service as a free education for citizens, teaching them first-hand about the principles of democracy.¹⁷⁷

Peremptory challenges also injure the community’s interest in having a truly representative cross-section of the community.

171. See generally MARC GALANTER, *LOWERING THE BAR: LAWYER JOKES AND LEGAL CULTURE* (2005).

172. This perception as lawyers as combatants is not new, nor is it positive. In 1906, Roscoe Pound, later Dean of the Harvard Law School, spoke at the annual convention of the American Bar Association on “The Causes of Popular Dissatisfaction with the Administration of Justice.” He maintained that “contentiousness inherent in the adversary system” fostered public dissatisfaction with the justice system and public perception of lawyers as “arbitrary, full of technicality, favoring the rich and lagging behind current public opinion and changed cultural values.” Judge J. Thomas Greene, *Some Current Causes for Popular Dissatisfaction With the Administration of Justice*, 14 UTAH B.J. 35, 36 (May 2001).

173. Commentators suggest that this negative view of trial lawyers is, in part, what prompted The American Trial Lawyers’ Association (ATLA) in 2006 to change its name to The American Association for Justice (AAJ). See, e.g., Al Kamen, *Just Don’t Call Them the Suers*, WASH. POST, July 14, 2006, at A19, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/07/13/AR2006071301505.html>.

174. *Perceptions of the U.S. Justice System*, App. Table 4 A.B.A. Survey (1999), <http://www.abanet.org/media/perception/perceptions.pdf>. Sixty-nine percent of respondents viewed juries as the most important part of the justice system. *Id.*

175. Reid Hastie, *Is Attorney-Conducted Voir Dire an Effective Procedure for the Selection of Impartial Juries?*, 40 AM. U. L. REV. 703, 725 (1991). (“[T]he exercise of peremptory challenges during voir dire produces a negative impression on the typical member of the jury pool. For example, a substantial number of potential jurors react to the impanelment process with comments about the ‘arbitrariness’ of the justice system and the ‘waste of time’ involved in the voir dire proceedings. Only a few . . . jurors interviewed noted that the procedure probably increases the defendant’s impression of fairness of the trial process.”).

176. See generally *Powers v. Ohio*, 499 U.S. 400 (1991).

177. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 275 (J.P. Mayer ed., George Lawrence trans., Anchor Press 1969) (1840).

[T]he elimination of minority viewpoints discredits the criminal justice system. Broad societal participation on juries is critical to maintaining public confidence in the fairness of trials. . . . Community participation in the determination of guilt and innocence promotes confidence in the justness of the system. The use of peremptory challenges, however, undermines these values by giving lawyers unfettered discretion to manipulate jury composition for tactical advantage.¹⁷⁸

In *Taylor v. Louisiana*,¹⁷⁹ the U.S. Supreme Court emphasized the importance of community participation in the jury process.¹⁸⁰ Noting that a jury representative of the community better ensures impartiality by placing the common sense of the community between the defendant and both an overzealous prosecutor and “the professional or perhaps over conditioned or biased response of a judge,” the Court was confident that the cross-section requirement would promote public participation in the system and thereby increase public confidence in the fairness of the system.¹⁸¹ Moreover, scholars have recently begun to re-examine the constitutional jury trial right and conclude that it is actually a collective, community right.¹⁸²

The jury is not merely a symbol of the community. The jury “brings community consciousness, community values, and culture into the trial system.”¹⁸³ If the venire is randomly drawn from the community (meeting the constitutional cross-section requirement), it is presumably representative of the wider community’s attitudes, biases, and beliefs regarding issues in the case, and consideration of the defendant’s guilt or innocence will likewise reflect the community’s collective values.¹⁸⁴ Without evidence that a particular juror is unable to sit impartially and decide that case, the exercise of peremptory

178. Gurney, *supra* note 5, 227, 236. (“If the community, through its jury representatives, participates in reaching a verdict, acceptance of that verdict and of the justice system in general will be enhanced. But if the verdict is the product of a select part of the community, respect for, and acceptance of, the verdict delivered by such a group will suffer.”).

179. 419 U.S. 522 (1975) (holding that a defendant enjoys Sixth and Fourteenth Amendment rights to a jury selected from a representative cross-section of the community). The right is to a representative jury pool, not a representative petit jury.

180. *Id.* at 530.

181. *See id.* at 530 (citation omitted).

182. *See, e.g.*, Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 IND. L.J. 397, 398 (2009) (arguing the Sixth Amendment jury trial right, although grammatically structured as a right of the accused, is actually a restatement of the collective right to trial in Article III); Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 196-97 (2005) (arguing that Article III was intended to protect the right of the people to administer justice, and is thus not an individual right to be waived); Steven A. Engel, *The Public’s Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. REV. 1658 (2000) (arguing the public has a constitutional right to locally administer justice and adjudicate criminal trials). *See generally* AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998).

183. Gary Goodpaster, *On the Theory of American Adversary Criminal Trial*, 78 J. CRIM. L. & CRIMINOLOGY 118, 146 (1987).

184. Gurney, *supra* note 5, at 245.

challenges distorts the representative nature of the jury.

It is generally easy for judges and lawyers to agree on those prospective jurors who are extremely biased. However, once a trial judge has determined that a juror's views will not impair her ability to follow instructions on the law and evidence, i.e., once the judge has rejected a cause challenge, no reason exists for excusing the juror. Indeed, if the jury pool is representative, and cause challenges have already eliminated the extremes of partiality, further tampering will only muzzle the community's various voices in exchange for a doubtful increase in the quality of the jury. . . . The message of Taylor is that this diversity is the genius of the jury system.¹⁸⁵

The reality is that *all* jurors are biased in that they bring their own set of life experiences and values to their jury service.¹⁸⁶ Furthermore, jurors are instructed by the judge to draw on their life experiences and common sense in deciding the case.¹⁸⁷ The collective bias of the jury is what ensures community representation and participation in the verdict. It is only extreme bias, not the "light impressions" or modest preconceptions that all citizens bring with them into the jury box, that undermines the constitutional guarantee of an impartial jury.¹⁸⁸ Neither are the "gentle biases" something to fear.

III. BALANCING THE VALUE OF PEREMPTORY CHALLENGES TO PROSECUTORS AGAINST THE DAMAGE TO ACTUAL OR PERCEIVED FAIRNESS OF THE SYSTEM

Peremptory challenges are not constitutionally guaranteed. Rather, they are a prophylactic safeguard of a constitutional right to an impartial jury. In performing a cost-benefit analysis, one must ask: what *exactly* is the value of the peremptory challenge to a prosecutor? Why do prosecutors (and all trial lawyers) maintain a white-knuckle grip on the right to exercise peremptory challenges, even in the face of evidence that they lack utility? The answer seems to be a belief that being able to "kick off" the jurors a prosecutor "feels" are problematic, even if she cannot identify a justifiable for-cause reason, makes the prosecutor feel more in control. But this "feeling" of an appearance of fairness, or confidence in the verdict is a luxury that should be afforded individual litigants, not public "quasi-judicial officers."

185. *Id.* at 246-47 (footnotes omitted).

186. See Comment, *The Sixth Amendment: Limiting the Use of Peremptory Challenges*, 16J. MARSHALL L. REV. 349, 360 (1983); Note, *Peremptory Challenges and the Meaning of Jury Representation*, 89 YALE L.J. 1177, 1189 (1980).

187. Angela J. Davis, *The People v. Orenthal James Simpson: Race and Trial Advocacy*, in TRIAL STORIES 283, 301 (Michael E. Tigar & Angela J. Davis eds., 2008).

188. See Mark Cammack, *In Search of the Post-Positivist Jury*, 70 IND. L.J. 450 (1995).

A. THE OFFICE OF THE PROSECUTOR: A HIGHER DUTY?

Although the American trial system has been likened to an arena in which mental combatants fight “to the death” (the verdict), each warrior similarly skilled and equally committed to vanquishing the other in a forum with formal rules of engagement enforced by a learned and impartial judge, the role of the prosecutor is qualitatively different than that of other lawyers.¹⁸⁹ Prosecuting attorneys are generally held to a different, and some have said higher, standard than attorneys representing clients.¹⁹⁰ The roles of prosecutor and defense counsel are not symmetrical.¹⁹¹ The defense attorney is charged only with her client’s well-being; she has no corresponding “duty” to the government during the course of the case.¹⁹² Not so for the prosecutor. The ethical duty of the prosecuting attorney goes beyond advocacy; unlike other trial lawyers, the prosecutor is duty-bound to “seek justice.”¹⁹³ This responsibility to seek justice includes a duty “to see that the defendant is accorded procedural justice.”¹⁹⁴

In the forward to the first edition of Joseph Lawless’ *Prosecutorial Misconduct*, Harvard Law School Professor Alan Dershowitz notes that “[d]espite the theoretically adversarial nature of our system, the prosecutor is among the most important arbiters of justice” due to her discretion in investigating and resolving criminal matters, thus elevating her to a “quasi-judicial” role.¹⁹⁵ The fact that the use of peremptory challenges has been indicted on several scores, not the least of which is the perpetuation of unconstitutional discrimination in the courtroom, should be enough to make a prosecutor reconsider the discretionary use of such

189. MODEL CODE EC 7-13 (“The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.”) (citation omitted).

190. See, e.g., Ross Galin, Note, *Above the Law: The Prosecutor’s Duty to Seek Justice and the Performance of Substantial Assistance Agreements*, 68 *FORDHAM L. REV.* 1245, 1265 (2000); Leslie C. Griffin, *The Prudent Prosecutor*, 14 *GEO. J. LEGAL ETHICS* 259 (2001); Samuel J. Levine, *Taking Prosecutorial Ethics Seriously: A Consideration of the Prosecutor’s Ethical Obligation to “Seek Justice” in a Comparative Analytical Framework*, 41 *HOUS. L. REV.* 1337, 1347 (2004).

191. See R. MICHAEL CASSIDY, *PROSECUTORIAL ETHICS* 3 (2005) (footnote omitted) (“Unlike other advocates, who have a duty to pursue their clients’ interests vigorously within the bounds of the law, the prosecutor has obligations of even-handedness precisely because he does not represent an individual but rather the collective good. Procedural and substantive fairness to persons accused of crime is one element of a just society. Therefore, by nature the prosecutor’s loyalties are *not* undivided. . . . Because the defendant is one member of the society that the prosecutor ‘represents,’ the prosecutor must take the defendant’s interests into account in assessing the validity of the prosecution.”).

192. As discussed *supra* note 15, while the actions of a government defense lawyer who exercises peremptory challenges without rational basis might qualify as “arbitrary and capricious,” the discussion of defense counsel duties is outside the scope of this Article. Note, however, that arguments in favor of prosecutors voluntarily waiving peremptory challenges weigh persuasively in favor of their elimination entirely.

193. See MODEL RULES R. 3.8 cmt. 1 (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”); ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION STANDARD 3-1.2(b) (3d ed. 1993) (“The prosecutor is an administrator of justice”); MODEL CODE EC 7-13 (1998) (“[A prosecutor’s] duty is to seek justice.”).

194. MODEL RULES R. 3.8 cmt. 1.

195. Alan M. Dershowitz, *Foreword* to JOSEPH F. LAWLESS, JR., *PROSECUTORIAL MISCONDUCT*, at ix (1985).

challenges. The legitimate purpose of peremptory challenges is to enable the court and the attorneys to ensure that the final petit jury is unbiased and fair.¹⁹⁶

Attorneys, however, even criminal prosecutors, misuse peremptory challenges: they strive not to empanel an impartial jury, but to seat a jury that will render a verdict for their side. Some prosecutors believe that if each side aggressively pursues a jury biased in its favor, then each side will thwart the other and the jury will end up somewhere in the middle, and thus "impartial." This concept of attorneys as warriors, fiercely battling each issue with the belief that, in the end, truth and justice will prevail is perverse in the context of criminal prosecution. A prosecutor stands in the place of the sovereign "whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."¹⁹⁷

The prosecution enjoys the full weight and power of the government as it enters a criminal trial. As such, a prosecutor is a "minister of justice" whose duty is to seek justice, not merely convict.¹⁹⁸ Jurists and scholars have opined on the meaning of the prosecutor's role as a "minister of justice." Justice Douglas asserted that the prosecutor's role is "to vindicate the rights of people as expressed in the laws and give those accused of crime a fair trial."¹⁹⁹ In *Berger v. United States*, the Court emphasized that the prosecutor's interest in a criminal case is not to win but to see that justice is done:

He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.²⁰⁰

Not only is the ethical duty of the prosecutor weightier, but commentators have called for a "moral standard" as well, given the immense, unregulated discretionary power of the prosecutor's office:²⁰¹

Why a standard of moral certainty? Such a standard fits the reality that the prosecutor is the gatekeeper of justice. It requires the prosecutor to engage in a rigorous moral dialogue in the context of factual, political, experiential, and ethical considerations. It also requires the prosecutor to make and give effect to the kinds of bedrock value judgments that underlie our system of justice—that

196. See *Swain v. Alabama*, 380 U.S. 202, 218-20 (1965).

197. *Berger v. United States*, 295 U.S. 78, 88 (1935).

198. MODEL RULES R. 3.8 cmt. 1; see also STANDARDS FOR CRIMINAL JUSTICE 3-1.2 (1993).

199. *Donnelly v. DeChristoforo*, 416 U.S. 637, 649 (1974) (Douglas, J., dissenting).

200. *Berger*, 295 U.S. at 88.

201. See, e.g., Bennett L. Gershman, *A Moral Standard for the Prosecutor's Exercise of the Charging Discretion*, 20 FORDHAM URB. L.J. 513, 514 (1993).

the objective of convicting guilty persons is outweighed by the objective of ensuring that innocent persons are not punished.²⁰²

A prosecutor cannot deny that peremptory challenges may be exercised discriminatorily and unconstitutionally at least occasionally by some of the lawyers in her office. In addition, prosecutors routinely fail to elicit adequate information about prospective jurors to form rational reasons for excusing jurors peremptorily, which raises an entirely separate concern about the unconstitutionality of a prosecutor's exercise of peremptory challenges as a non-rational, arbitrary,²⁰³ and capricious act by the government.²⁰⁴ The prosecutor's goal should be fair and constitutional conviction, not conviction by any means, even if those means are sanctioned by the legislature.²⁰⁵

B. A VIEW OF PROSECUTION WITHOUT PEREMPTORIES: A RESPONSE TO ANTICIPATED CONCERNS

Prosecutors presented with a proposal of life without peremptory challenges have asked: "What would voir dire without prosecutorial peremptories look like?" The answer is: "It would look very much the same." Like other trial lawyers, as documented in study after study,²⁰⁶ prosecutors likely use a good deal of the time allotted for questioning to educate, indoctrinate, and build rapport with jurors rather than to seek out information across the entire venire adequate to evaluate the potential jurors' biases.²⁰⁷ This may be the "highest and best use" of

202. *Id.* at 522. Some have called for all attorneys "to accept moral responsibility for the consequences of their professional actions . . . [and] consider all the societal interests at issue . . ." DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 51 (2000).

203. See BLACK'S LAW DICTIONARY, *supra* note 26.

204. See Note, *Due Process Limits on Prosecutorial Peremptory Challenges*, 102 HARV. L. REV. 1013 (1989) (arguing that "prosecutorial peremptory challenges, as potentially arbitrary and capricious government action, violate the due process clause of the Fourteenth Amendment").

205. As Law Professor and Rabbi Samuel Levine notes, when a lawyer is faced with an ethical challenge of choosing between conflicting harms (here, a prosecutor's worry that a voluntary and unilateral waiver of peremptory challenges may result in a reduced probability of conviction versus a realization that an exercise of peremptories may result in an increased probability of unconstitutional discrimination), Jewish law may be instructive:

Because they present a choice between conflicting harms, these situations require considerations beyond the range of ordinary normative ethical analysis. Instead, under such exceptional circumstances, the analysis may include a careful balancing of the relative degree of benefit and harm resulting from each of the alternatives. The resolution of such analysis may prescribe action that, although generally prohibited, may qualify in rare cases as ethically proper conduct.

Samuel J. Levine, *Taking Prosecutorial Ethics Seriously: A Consideration of the Prosecutor's Ethical Obligation to "Seek Justice" in a Comparative Analytical Framework*, 41 Hous. L. REV. 1337, 1363 (2004).

206. See *supra* notes 128 and 131 and accompanying text. See, e.g., Balch, *supra* note 128, at 271-83; Broeder, *supra* note 101, at 522.

207. This is consistent with my own training as a prosecutor in the King County Prosecuting Attorney's Office in Seattle, Washington. At a training by the Washington Association of Prosecuting Attorneys, prosecutors were instructed that the "primary purpose of voir dire" was to (a) "[a]lert [jurors] to Legal and

the truncated time available for voir dire, given lawyers' poor ability to gather and cross-correlate information about scores of individuals over a multitude of issues in a meaningful way that produces reliably predictive results. A waiver of peremptory challenges, however, would not affect a prosecutor's use of voir dire to gather information for challenges for cause, to build rapport and credibility with the jurors, or to sensitize jurors to themes and issues in the case.²⁰⁸ Prosecutors would still engage in active voir dire questioning. They would just refrain from employing peremptory challenges. To this extent, then, the voir dire would look very much the same as it does now.

One concern voiced by prosecutors in opposition to a voluntary waiver of peremptory challenges is that such waiver would constitute an abrogation of the duty owed to the citizenry to zealously prosecute to the full extent of the law. Why, they ask, should a prosecutor give up a weapon in her arsenal when the defense will retain it? Would that not result in an unequal playing field? This argument carries weight when applied to civil litigants with symmetrical roles at trial.²⁰⁹ In the case of governmental prosecution, however, it erroneously buys into a view of the courtroom as a playing field or battlefield²¹⁰ that ignores both the prosecutor's higher duty to "seek justice"²¹¹ as well as the absence of any

Factual Issues they will be facing; (b) Impress on them the equities of your case." Chuck Lind, *LAWYERS ARE FROM MARS, JURORS ARE FROM EARTH I*, WAPA District Court Training Program, CJTC (June 5-6, 1998). Of the top five points of "General Strategy for Voir Dire," number two was "Think about the best demographic group for your case," (a technique social science has established is unreliable and scholars roundly criticize as employing unconstitutional discriminatory stereotyping), and number five was "Trust your Instincts" (the "hunch" factor, which by necessity is premised on the preconceptions, biases, and prejudices of the examining attorney). *Id.* Prosecutorial training materials for a neighboring county, however, caution that "Voir dire questions should be asked 'solely to obtain information for the intelligent exercise of challenges . . . A prosecutor should not argue the prosecution's case to the jury during the jury selection process.'" Jeffery J. Jahns, *THE QUEST FOR JUSTICE: PROSECUTORIAL ETHICS AND PROFESSIONALISM* (3d ed. 2008). Jahns cites Washington state rules CrR 6.4(b), and CrRLJ 6.4(b), which provide that a voir dire examination shall be conducted "for the purpose of discovering any basis for challenge for cause and for the purpose of gaining knowledge to enable an intelligent exercise of peremptory challenges." *Id.* (citing Wash. Super. Ct. Crim. R. 6.4 (2000); Wash. Ct. Ltd. Jur. 6.4 (1987)). The materials note that "a trial court is granted great discretion in determining how best to conduct the scope and content of voir dire." *Id.* (citing *State v. Davis*, 10 P.3d 977, 995 (2000)).

208. Assuming this is permitted in a particular jurisdiction. Some judges exercise judicial discretion and prohibit such use of voir dire, while in some jurisdictions this use of voir dire may be barred by court rule.

209. When private citizens challenge each other in a civil lawsuit there is also, as the Supreme Court noted in the criminal case of *Swain v. Alabama*, 380 U.S. 202, 219 (1965) (quoting *In re Murcheson*, 349 U.S. 133, 136 (1955)), a value in permitting the parties to assure themselves the jury is impartial, thus furthering the "appearance of justice."

210. "The competitive and combative nature of modern adversary proceedings . . . has changed many prosecutors from champions of justice to advocates of victory." Catherine Ferguson-Gilbert, Comment, *It is Not Whether You Win or Lose, It is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?*, 38 CAL. W. L. REV. 283, 289 (2001) (citing JOSEPH LAWLESS, JR., *PROSECUTORIAL MISCONDUCT* § 1.17 (2d ed., Matthew Bender & Co. 1999)).

211. MODEL RULES R. 3.8 cmt. 1.

corresponding duty on the part of the defense.²¹² A prosecutor shall “strive not for ‘courtroom victories’ . . . but for results that best serve the overall interests of justice”²¹³ She has a duty to “seek to reform and improve the administration of criminal justice.”²¹⁴ She is also duty-bound to try to correct substantive and procedural inadequacies or injustices.²¹⁵ These duties do not extend to the defense, creating an asymmetrical relationship between the parties that undercuts any argument for tactical parity with respect to peremptory challenges.

Moreover, within the criminal law there exist rules and standards that manifest a public policy that the prosecution is not entitled to the same benefits and protections available to the defense. Most pertinent to a prosecutor’s concern about having unequal access to peremptories is the fact that, with respect to non-capital felonies, the prosecution already has fewer peremptory challenges than the defense in many states²¹⁶ as well as in the federal system.²¹⁷ Thus, there is already an acceptance in some jurisdictions that there need not be an equal number of peremptory challenges afforded the prosecution and the defense.²¹⁸ The disparity in the allocated number of peremptories between prosecution and defense may well recognize the fact that although jurors may be summoned across all sectors of society, not all citizens are willing to respond for duty when called. No jurisdiction has a one-hundred percent response rate to its jury summonses, and in many jurisdictions the response rate is less than fifty

212. JOSEPH F. LAWLESS, 1-1 PROSECUTORIAL MISCONDUCT § 1.17 (LexisNexis 2009); *see also* R. MICHAEL CASSIDY, PROSECUTORIAL ETHICS 3 (Thompson/West 2005).

213. STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-1.3 cmt. 9 (3d ed. 1993).

214. *Id.* at § 3-1.2.

215. *Id.*

216. *See* Gurney, *supra* note 5, at 228-29; *see also* JURY TRIAL, *supra* note 61. States providing more peremptories to the defendant than to prosecutors include: Arkansas (six State; eight Defense), ARK. CODE ANN. § 16-33-305 (West 2009); Maryland (ten State, twenty Defense for crimes punishable by life imprisonment; five State, ten Defense for crimes punishable by at least twenty years imprisonment; four State, four Defense for all other crimes), MD. CODE ANN., [CTS. & JUD. PROC.] § 8-420 (West 2009); Minnesota (nine State, fifteen Defense for crimes punishable by life imprisonment; three State, five Defense for all other crimes), MINN. STAT. ANN. § 26.02 (West 2009); New Jersey (ten State, twenty Defense for an indictment for kidnapping, murder, aggravated manslaughter, manslaughter, aggravated assault, aggravated sexual assault, sexual assault, aggravated criminal sexual contact, aggravated arson, arson, burglary, robbery, forgery if it constitutes a crime of the third degree as defined by subsection b. of N.J.S.2C:21-1, or perjury; ten State, ten Defense for all other crimes), N.J. STAT. ANN. § 2B:23-13 (West 2009); New Mexico (eight State, twelve Defense for crimes punishable by life imprisonment; three State, five Defense for all other crimes), N.M. STAT. ANN. § 5-606 (West 2009); South Carolina (five State, ten Defense, for indictment of murder, manslaughter, burglary, arson, criminal sexual conduct, armed robbery, grand larceny, or breach of trust when it is punishable as for grand larceny, perjury, or forgery; five State, five Defense for all other crimes), S.C. CODE ANN. § 14-7-1110 (2008); West Virginia (two State, six Defense), W. Va. R. Crim. P., Rule 24 (b) (2009).

217. In the federal system, the government is allotted six, compared to the defense’s ten peremptory challenges. FED. R. CRIM. P. 24(b) (2009).

218. This policy has existed for decades. *See* Gurney, *supra* note 5, at 228-29. *See also* JURY TRIAL, *supra* note 61. It was recognized in the English system as well, which eliminated peremptory challenges for prosecutors in criminal actions in 1825.

percent.²¹⁹ Logic suggests that individuals who self-select and obediently respond to the court's direction to appear and serve on jury duty are more likely to be law-abiding citizens than anarchists or constitutionalists who are hostile to the government, the police, and/or the judicial system. One might argue, then, that the venire is already stacked against the defendant, entitling him to a disproportionate number of peremptory challenges.

In other areas of criminal law practice, the prosecution carries a disproportionate burden as a matter of public policy. One example is the duty to produce exculpatory evidence to the defense—voluntarily and without request.²²⁰ The prosecutor may also have a duty to search for evidence that may potentially damage her case.²²¹ The defense has no corresponding duty, and yet this disparity is not criticized by prosecutors as unfair. Likewise, prosecutors have a different duty than defense counsel with respect to witness examination. A prosecutor cannot cross-examine a defense witness to attack his credibility for truthfulness when she knows the witness is truthful.²²² A defense attorney, however, is not likewise so clearly prohibited.²²³ Nor can a prosecutor call a witness to the stand whom she knows is likely to perjure himself. In some jurisdictions, however, a defense lawyer may allow the defendant to testify in the narrative, even when aware the testimony will be false.²²⁴

219. Nationally, the response to summons for jury duty for one-step courts is reported to average 45.8%. GREGORY E. MIZE, PAULA HANNAFORD-AGOR & NICOLE L. WATERS, *THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT* (Apr. 2007). In Washington State, the rate of response across multiple jurisdictions ranges from 23% to 40%. *Jury Research Project: Report to the Washington State Legislature*, Washington State Center for Court Research, Dec. 24, 2008. In King County, Washington (where Seattle is located), the response rate has plummeted as low as 15%. Darrell Glover, *More and More Guilty of Shirking Jury Duty Low Pay May Explain the 15% Turnout*, SEATTLE POST-INTELLIGENCER, Feb. 5, 1998. In 1996, Polk County, Iowa (where Des Moines is located) had a similar response rate. In a given month, only 180 citizens were available for jury duty of 750 summoned to serve. See V. HALE START & MARK McCORMICK, *JURY SELECTION* § 9.06, 296 (3d ed. 2001) (citing Frank Santiago, *THE DES MOINES REGISTER*, Apr. 21, 1996); see also J. Clark Kelso, *Final Report of the Blue Ribbon Commission on Jury System Improvement*, 47 HASTINGS L.J. 1433 (July-Aug. 1996) (reporting that in Los Angeles, of the almost 4 million juror affidavits mailed in 1994-95, only ten percent were qualified and summoned and only half of those, a total of 172,154 persons, actually served on juries, representing an "overall yield" of about five percent for Los Angeles County).

220. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

221. *STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION* § 3-3.11 (3d ed. 1993).

222. See *id.* at § 3-5.7 ("A prosecutor should not use the power of cross-examination to discredit or undermine a witness if the prosecutor knows the witness is testifying truthfully.")

223. MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* 306-07 (3d ed., 2004). Mr. Freedman and Ms. Smith give several explanations for the defense's unilateral ability to impugn the truthfulness of a prosecution witness at trial and then write: "None of those rationales . . . would justify a prosecutor in making a defense witness appear to be testifying inaccurately or untruthfully when the prosecutor knows that the witness is testifying accurately and truthfully." *Id.*

224. In many jurisdictions, a criminal defense lawyer may put her client on the stand to give narrative testimony, even if she knows it is false. In 1971, the ABA approved Standard 7.7 of the ABA Standards for Criminal Justice, allowing a criminal defendant to testify in narrative fashion without the assistance of direct examination and without the lawyer's arguing the false testimony in closing argument. In a widely cited 1978

There also exists precedent for such a voluntary unilateral waiver of an advantageous trial tactic: instances in which prosecutors have implemented waivers of a “right” afforded them in furtherance of actual or perceived fairness. One example is a blanket waiver by a prosecutorial office of the right to file an

Ninth Circuit decision approving the use of this narrative approach, Standard 7.7 was described as representing an “authoritative consensus.” *Lowery v. Cardwell*, 575 F.2d 727, 730 n.1 (9th Cir. 1978). However, there is contrary dictum in the majority opinion in *Nix v. Whiteside*, 475 U.S. 157 (1986), suggesting that, under the relevant *Model Code* and *Model Rules* provisions, a criminal defense lawyer must disclose the proposed perjury to the judge if the lawyer is not permitted to withdraw. In *Nix*, the Supreme Court appeared to condemn the narrative testimony approach as passive tolerance of perjury. 475 U.S. at 163 n.6. After *Nix*, the ABA advised that a lawyer’s conduct should be consistent with the confidentiality protections of Model Rule 1.6, and yet not violate Model Rule 3.3. If a lawyer can neither dissuade her client from testifying falsely nor effectively withdraw, and the client wants to testify, the lawyer must disclose the client’s intention to commit perjury to the court. ABA Formal Ethics Op. 87-353 (1987). Some authority suggests a lawyer should tell the court only that her client insists on testifying but that counsel will be unable to conduct an examination. Connecticut Informal Ethics Op. 91-13 (1991). Despite the *Nix* dictum and the ABA’s decision to no longer approve the practice in the Defense Function Standards, the narrative approach has continued to receive acceptance in criminal trials. *See, e.g.*, *Benedict v. Henderson*, 721 F. Supp. 1560 (N.D.N.Y. 1989), *aff’d mem.*, 904 F.2d 34 (2d Cir. 1990) (asserting in dicta that the Sixth Amendment right to counsel is not violated if lawyer who believes client will commit perjury requests narrative form of testimony); *Shockley v. State*, 565 A.2d 1373 (Del. 1989) (holding narrative form of testimony may be used even after *Nix*); *People v. Guzman*, 248 Cal. Rptr. 467 (Cal. 1988) (concluding narrative approach was not inconsistent with defendant’s constitutional rights and did not violate lawyer’s duty to refrain from offering false evidence); *People v. Gadson*, 24 Cal. Rptr. 2d 219 (Cal. Ct. App. 1993) (approving use of narrative testimony by two defense witness as well as by criminal defendant); *State v. Waggoner*, 864 P.2d 162 (Idaho Ct. App. 1993) (holding that mistrial was properly denied after counsel disclosed to court that defendant would testify in narrative form; counsel avoided assisting perjury by presenting narrative form of testimony); *People v. Taggart*, 599 N.E.2d 501 (Ill. App. Ct. 1992) (holding that defendant not denied his Sixth Amendment right to counsel by being required to testify in narrative form); *Reynolds v. State*, 625 N.E.2d 1319 (Ind. Ct. App. 1993) (holding that defendant not entitled to mistrial where trial court permitted lawyer to present defendant’s testimony in narrative form); *Commonwealth v. Jermyn*, 620 A.2d 1128 (Pa. 1993) (holding that lawyer who believed client would lie on stand acted reasonably within constraints of ethics requirement by telling client he could testify in narrative fashion but that lawyer would not ask him questions); *State v. Layton*, 432 S.E.2d 740 (W. Va. 1993) (concluding that when criminal defendant indicates that he is contemplating committing perjury during his testimony, it is not error or denial of his constitutional right to assistance of counsel for trial court to direct attorney to refrain from examining defendant and to rule that defendant must testify in narrative fashion). *But see* *Stephenson v. State*, 424 S.E.2d 816, 818 n.1 (Ga. Ct. App. 1992) (asserting in dicta that narrative testimony would constitute participation in fraud). The narrative testimony approach is codified in District of Columbia Rule of Professional Conduct 3.3(b) and in Tennessee Rule of Professional Conduct 3.3(b). *See also* MODEL RULES R. 3.3 cmt. 7 (acknowledging that some courts embrace narrative approach). This approach garnered the approval of several ethics committees and commentators in the decade following *Nix*. *E.g.*, Connecticut Formal Ethics Op. 42; Connecticut Informal Ethics Op. 91-13 (1991); District of Columbia Ethics Op. 234 (1993); Norman Lefstein, *Legal Ethics—Reflections on the Client Perjury Dilemma and Nix v. Whiteside*, 1 CRIM. JUST. 27 (Summer 1986) (arguing that narrative testimony approach is best solution to client perjury dilemma); Norman Lefstein, *Client Perjury in Criminal Cases: Still in Search of an Answer*, 1 GEO. J. LEGAL ETHICS 521 (1988) (endorsing narrative approach after comparing its merits relative to option of informing court). *See also* John Wesley Hall, *Handling Client Perjury After Nix v. Whiteside: A Criminal Defense Lawyer’s View*, 42 MERCER L. REV. 769, 808 (1991) (contending that while free narrative is not a perfect answer, it is constitutionally protected when conscientious counsel deems it necessary; suggesting that client could also be questioned carefully to avoid perjury); ABA/BNA Lawyers Manual on Professional Conduct 61:419-29.

affidavit of prejudice²²⁵ against an assigned judge, causing the case to be reassigned to a different judge.²²⁶ And although unable to find a prosecutor's office with a formal policy waiving peremptory challenges, I found several individual prosecutors who routinely waived peremptory challenges throughout their careers for many of the reasons discussed above, even if it wasn't an "official office policy" to do so.

One such prosecutor was Rex Bell, the elected prosecutor of Clark County, Nevada, who had a career-long policy against using peremptory challenges. He recounted to me²²⁷ that in the 133 jury trials he tried over 24 years as a prosecutor, he never once exercised a peremptory challenge.²²⁸ He explained that if the prospective juror showed up for jury duty and swore he could be fair, who was Mr. Bell to call him a liar? He found such a waiver, in his opinion, did not harm his cases. To the contrary, he believes it made the jury like him more.²²⁹

Another prosecutorial concern is "[w]hat happens if the judge refuses to excuse a juror challenged by the prosecution for cause?" The conventional wisdom is that peremptory challenges are needed as "back up" because challenges for cause are overly narrow, both in statutory definition and judicial application. Commentators have noted judicial reluctance to grant challenges for cause.²³⁰ This may be particularly true in jurisdictions where judges are subject to reelection, and arguably function as quasi-politicians.²³¹ Prosecutors maintain

225. In most jurisdictions, a party may seek the disqualification of an assigned judge, usually by filing an affidavit attesting to a belief the judge could not be fair to the party or the party's attorney. *See, e.g.*, WASH. REV. CODE § 4.12.050 (2009).

226. This was the policy of the King County Prosecuting Attorney's Office as explained to me in my initial training in 1998.

227. Telephone Interview with Rex Bell (October 14, 2009).

228. Curiously, and in further indictment of attorney skill with the use of peremptory challenges, Mr. Bell recounts the singular time he feared he would be forced to use a peremptory to excuse a prospective juror. Upon entering the courtroom for a criminal trial, he saw a woman in the venire who had been the wife in a hostile divorce case wherein Mr. Bell had represented the husband *pro bono*. It was his belief that the woman despised him, and he predicted he would have no choice but to excuse her from the jury. When the judge, however, asked if anyone was acquainted with the defendant or the attorneys, the woman raised her hand and dutifully admitted that she knew the prosecutor, Mr. Bell. Defense counsel, without inquiring further, used a defense peremptory challenge to excuse her, quite to Mr. Bell's relief and amusement.

229. While Mr. Bell was too humble to allow me to report his win/loss record in this article, let me say that although it does not match Gerry Spence's perfect trial record, *see infra* note 258, it is pretty darned close. Mr. Bell is not only well known for his trial skill; he is also known for his accomplishments as a rodeo cowboy. His father, also Rex Bell, was a cowboy in early motion pictures, when he met Mr. Bell's mother, movie star Clara Bow, the "It" girl of the 1920's. *Clara Bow*, Encyclopedia Britannica Online, <http://www.britannica.com/EBchecked/topic/76054/Clara-Bow> (last visited Feb. 18, 2010).

230. *See, e.g.*, Gurney, *supra* note 5, at 266; Barat S. McClain, Note, *Turner's Acceptance of Limited Voir Dire Renders Batson's Equal Protection a Hollow Promise*, 65 CHI.-KENT L. REV. 273, 282-283 n.64 (1989); Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099, 1134 (1994); Mary R. Rose & Shari Seidman Diamond, *Judging Bias: Juror Confidence and Judicial Rulings on Challenges for Cause*, 42 LAW & SOC'Y REV. 513, 517 (Sept. 2008).

231. Researchers Rose and Diamond found judges experience a "distinctive social relationship with jurors" that increases a judge's discomfort when dismissing a juror for cause because it is "a public declaration about a

that it is only the availability of peremptory challenges that allows them to remove a juror who has demonstrated a likelihood of bias, but who has been aggressively rehabilitated by the judge, agreeing to “put aside” his or her feelings or life experiences in the course of jury duty.²³²

Commentators have observed that some judges engage in “aggressive rehabilitation,” asking challenged jurors if they could set aside their experiences and feelings and follow the judge’s orders to look only at the facts of the case and apply the law as given to them by the judge.²³³ Just as in the case of educational voir dire²³⁴ the judge’s questioning telegraphs to the juror that if the juror is to maintain any semblance of intelligence and fairness the juror is expected to answer, “yes, I can set aside my feelings.” When a trial lawyer faces a prospective juror who has been “rehabilitated” by the judge in this manner, there lingers, understandably, a concern that the juror may have been publicly cowed into a commitment of neutrality that will not survive the trial and into the jury deliberation room. In such cases, lawyers routinely fall back on a peremptory challenge to do that which the judge should have done: excuse the juror from service. The ability to fall back on a peremptory challenge and excuse a juror who has been unsuccessfully challenged for cause is particularly attractive when the court requires such challenges to be made publicly in the courtroom, rather than at sidebar. The juror, now aware she has been challenged, may harbor some resentment towards the prosecutor.²³⁵

This concern argues for a broader definition and application of a challenge for cause, not necessarily retention of the current peremptory challenge practice.²³⁶ Some scholars who have called for the abolition of peremptory challenges have also proposed an expanded definition of a for-cause challenge to include “any sound, strategic, nondiscriminatory reason why trial counsel might doubt a

person’s fitness to serve, and they do so as the official arbiters of bias.” Rose & Diamond, *supra* note 230, at 539-40.

232. A judge’s refusal to dismiss a juror for cause despite a party’s or attorney’s belief that the prospective juror is biased is not exclusively limited to the case of judicial rehabilitation. Researchers Rose and Diamond found that judges’ decisions to deny a for-cause challenge may be based on a number of factors, including uncertainty about the decisions, consideration of the appellate record, and a reluctance to be perceived as rejecting the juror as untruthful. *See id.* at 539.

233. *See generally* Christopher A. Cospel, *Rehabilitation of the Juror Rehabilitation Doctrine*, 37 GA. L. REV. 1471, 1488 (2003); Valerie P. Hans & Alayna Jehle, *Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 CHI.-KENT L. REV. 1179, 1194 (2003); Roger Shuy, *How a Judge’s Voir Dire can Teach a Jury What to Say*, 6 DISCOURSE & SOC’Y 207 (1995); Marvin Zalman & Olga Tsoudis, *Plucking Weeds from the Garden: Lawyers Speak about Voir Dire*, 51 WAYNE L. REV. 163 (2005). *See also* Susan E. Jones, *Judge- Versus Attorney-Conducted Voir Dire*, 11 LAW & HUM. BEHAV. 131, 142 (1987) (jurors altered responses more when questioned by the judge).

234. *See supra* note 139 and accompanying text.

235. Where, for example, the judge has the attorneys make their challenges for cause in open court before the venire.

236. *See, e.g., Note, Due Process Limits on Prosecutorial Peremptory Challenges*, 102 HARV. L. REV. 1013 (1989).

juror's impartiality' or capacity to perform."²³⁷ A prosecutor's office known to have adopted a blanket waiver of peremptory challenges would be well-situated to lobby the legislature with respect to an expanded statutory definition of a for-cause challenge. Judges, too, once aware of a prosecutorial policy against exercising peremptory challenges, would likely have incentive to relax the in-court application of the for-cause challenge, abstaining, for example, from aggressive rehabilitation of a challenged juror. The adoption of a "no peremptory" policy by a prosecutor's office might then set in motion what two decades of scholars could not achieve: the reevaluation of the definition and application of the for-cause challenge by lawmakers and judges. This is arguably the exact service a prosecutor is duty-bound to attempt when charged with the task "to reform and improve the administration of criminal justice."²³⁸ It does not, however, address a prosecutor's immediate concern about what to do in the interim, until the for-cause challenge is finally broadened. To understand the concern, one must appreciate the practical interrelationship of the two types of challenges.

As discussed above, a for-cause challenge must be based on specific, demonstrable, and legally cognizable evidence of juror partiality.²³⁹ In federal court, a for-cause challenge is "narrowly confined to instances in which threats to impartiality are admitted or presumed from the relationship, pecuniary interest, or clear biases of a prospective juror."²⁴⁰ State statutes may provide additional enumerated bases for such a challenge. A prospective juror is presumed impartial, and the party raising the for-cause challenge bears the burden of proving bias.²⁴¹ When ruling on the validity of the challenge, a judge excuses the juror for cause only if she agrees the juror cannot serve impartially.

A judge enjoys great discretion regarding voir dire, and her decision to deny a for-cause challenge is given great deference on appeal.²⁴² Justice Rehnquist stated:

Despite its importance, the adequacy of voir dire is not easily subject to appellate review. The trial judge's function at this point in the trial is not unlike

237. See, e.g., Elaine A. Carlson, Batson, J.E.B., and Beyond: *The Paradoxical Quest for Reasoned Peremptory Strikes in the Jury Selection Process*, 46 BAYLOR L. REV. 947, 1003 (quoting *Alen v. Florida*, 596 So. 2d 1083, 1090 (Fla. Dist. Ct. App. 1992)).

238. A.B.A. CRIM. JUST. SEC. PROSECUTION FUNCTION STANDARDS § 3-1.2.

239. See *supra* notes 52-55 and accompanying text. Examples of specific reasons justifying a for-cause challenge include conflict of interest, potential bias, or lack of candor. The Supreme Court has stated that a trial judge should not excuse a potential juror for cause unless the juror's views will "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 424 n.5 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)).

240. *Darbin v. Nourse*, 662 F.2d 1109, 1113 (9th Cir. 1981).

241. See *United States v. Jones*, 608 F.2d 1004, 1007 (4th Cir. 1979), cert. denied, 444 U.S. 1086 (1980).

242. This broad discretion has been criticized by some judges and scholars. See, e.g., THE LAW OF JURIES, *supra* note 16, at 111-14 ("It could be argued that even if a trial judge's determination of 'actual bias' or lack thereof is entitled to deference that not be the case with issues of 'implied bias' . . .").

that of the jurors later on in the trial. Both must reach conclusions as to impartiality and credibility by relying on their own evaluations of demeanor evidence and of responses to questions.²⁴³

Although a challenge for implied bias lies within the sound discretion of the judge, a judge must grant a challenge for cause if the juror in question has demonstrated actual prejudice or bias.²⁴⁴ The judge must excuse a juror who demonstrates actual bias because it may force the parties to unnecessarily use a peremptory challenge on the juror, “abridging the purpose behind . . . peremptory challenges.”²⁴⁵ Actual bias, however, is rarely established because it requires direct rather than circumstantial evidence; as a practical matter, this means the juror’s own admission of bias.²⁴⁶

A trial judge’s finding of impartiality may only be overturned for “manifest error.”²⁴⁷ Where the reviewing court finds such error, which is rare given the great deference given to the trial court, it may still be subject to a traditional “harmless error” analysis.²⁴⁸ Generally, a judge’s erroneous refusal to excuse a biased juror is not reversible error unless it “causes a prejudicial diminution of peremptory challenges.”²⁴⁹ In many jurisdictions, this means that a judge’s denial of a for-cause challenge—even if wrong—will not generally be overturned on appeal unless the challenging party both exercises a peremptory challenge against the challenged juror and exhausts all his peremptories.²⁵⁰ In practice, a lawyer who fails to win a for-cause challenge usually excuses the challenged juror with a peremptory challenge. Having removed the juror, that particular juror can no longer be a designated “harm” on appeal. The “harm,” then, must be the reverberating effect of the forced use of the peremptory challenge: the “prejudicial diminution” of peremptories that leaves the challenging party with an unfavorable juror seated during the trial for lack of a peremptory challenge

243. *Mu’Min v. Virginia*, 500 U.S. 415, 424 (1991) (quoting *Rosales-Lopez v. U.S.*, 451 U.S. 182, 188 (1981)).

244. *United States v. Apodaca*, 666 F.2d 89, 94 (5th Cir.), *cert. denied*, 459 U.S. 823 (1982).

245. *United States v. Daly*, 716 F.2d 1499, 1507 (9th Cir. 1983), *cert. dismissed*, 465 U.S. 1075 (1984).

246. *See, e.g.*, Sharon R. Gromer, Note, *Sixth Amendment – The Demise of the Doctrine of Implied Juror Bias*, 73 J. CRIM. L. & CRIMINOLOGY 1507, 1516 (1982); Dean A. Stowers, Note, *Juror Bias Undiscovered During Voir Dire: Legal Standards for Reviewing Claims of a Denial of the Constitutional Right to an Impartial Jury*, 39 DRAKE L. REV. 201, 203 (1989), *cited in* Joshua S. Press, *Untruthful Jurors in the Federal Courts: Have We Become Comfortably Numb?*, 21 ST. THOMAS L. REV. 253, 264 (2009).

247. *Mu’Min*, 500 U.S. at 428.

248. If the denial constitutes a constitutional violation integral to a fair trial, it cannot be treated as harmless error. *See Gray v. Mississippi*, 481 U.S. 648, 668 (1987).

249. *Daly*, 716 F.2d at 1507.

250. *Id.*; *cf. State v. Fire*, 34 P.3d 1218 (Wash. 2001) (noting that a criminal defendant can win reversal on appeal after conviction if he can show that the trial judge abused discretion in denying the for-cause challenge even without using peremptory challenge to remove juror in question); *State v. Gonzales*, 45 P.3d 205 (Wash. 2002), *rev. denied*, 62 P.3d 890 (Wash. 2003) (finding that where a potential juror admits bias, a criminal defendant need not exhaust all peremptory challenges and remove the juror to preserve the issue for successful appeal if the judge erred in denying defendant’s for-cause challenge to the juror).

option. An unfavorable verdict alone will not establish prejudice; the challenging party must show that a biased individual ended up serving on the jury because the party ran out of peremptory challenges.

Prosecutors argue that this appellate standard is problematic for a prosecutor adopting a blanket waiver of peremptory challenges. Any questionable denial of a for-cause challenge would force the prosecutor to consider an interlocutory appeal because if the jury acquits, double-jeopardy attaches and the issue is not subject to appeal. Even if the interim appeal request is granted, the standard of review would still prove a substantial impediment. In evaluating the magnitude of this potential problem, it would be useful to know the number of for-cause challenges a prosecutor exercises, on average, and the percentage of those challenges that are denied by the court. Unfortunately, there is scant data on the percentage of jurors challenged for cause and the percentage of those excused by the court.²⁵¹

One response to this appellate concern would be an amendment to the blanket peremptory waiver proposal allowing the use of peremptory challenges exclusively as a fall back when a for-cause challenge is not granted by the court. This "waiver—except" policy would force a prosecutor to resort to peremptory challenges only when she had built a record demonstrating some objective issue concerning a prospective juror's ability to serve, and was willing to challenge a juror for cause by articulating to the court the juror's unfitness for service. This would dramatically reduce the risk of impermissible exercises of peremptory challenges because it would exclude those challenges based on the prosecutor's hunches, gut instincts, or other feelings not subject to objective identification.

Where a citizen has responded to a summons for jury duty and not demonstrated a mental infirmity or an inability to hear the case impartially, the government should take that citizen as part of a fair cross-section of society. Not only is this the "right" thing to do, but accepting the jurors without challenge may actually help the prosecutor build credibility and rapport with the final petit jury. Acknowledging that every potential juror has opinions and "light impressions," a prosecutor should embrace the diversity of opinion that a community cross-section brings to a venire, and, ultimately, the jury. This is the philosophy of trial lawyer Gerry Spence,²⁵² whose trial track record²⁵³ confirms he's doing something right:

251. One study found that approximately five percent of prospective jurors are excused for cause. See VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 71 (1986). I conducted an informal national survey of current and former criminal trial lawyers and judges and asked them to share their observations about the incidence of for-cause challenges by prosecutors. The responses ranged from "once per year" for one busy prosecutor to "once per trial" for another. As to the percentage of those challenges granted by the court there was more uniformity: on average, lawyers and judges reported that about half of the challenges were granted.

252. Gerry Spence has won several high-profile cases, including the Karen Silkwood case, the defense of Randy Weaver at Ruby Ridge, the defense of Imelda Marcos, the case against *Penthouse* for Miss Wyoming, and the murder defenses of Ed Cantrell and Sandy Jones. He is the founder and director of the non-profit Trial

[A] person without an opinion on most things is an idiot . . . I begin with the proposition that everyone has an opinion, but everyone is basically fair. The questioning takes on the flavor of friends talking, accepting the other's opinions and feelings with respect. . . . I've finished many a voir dire examination not wanting to strike a single person from the original jury panel.²⁵⁴

A prosecutor confident in the strength of the evidence in her case should approach voir dire with respect for and acceptance of the divergent experiences and attitudes of citizens who have responded to a call for service. This acceptance sends a strong message that the government can confidently meet its burden of proof and persuade a jury representational of the community without resorting to manipulation of the makeup of the jury.²⁵⁵

CONCLUSION

The use of peremptory challenges has questionable value and risks violating the constitutional rights of both defendants and prospective jurors. A defendant is guaranteed an impartial jury; a prosecutor attempts to thwart this constitutional guarantee when trying to seat a jury biased in her favor. The prosecutor is adequately protected from prospective jurors with "extreme" biases by exercising challenges for cause, especially under an expanded definition and application of a for-cause challenge. Instead of waiting for judges and legislators to respond to the decades of criticism levied at the use of peremptory challenges and the narrow definition and application of for-cause challenges, the prosecutor should "take the high road" and waive peremptories.

Juror questioning during voir dire routinely fails to produce adequate useful information about individual jurors' biases, attitudes, opinions, and experiences. In the absence of such information, prosecutors cannot effectively and constitutionally exercise peremptory challenges. Without individual juror information, prosecutors are forced to exercise peremptory challenges based on group affiliations, stereotypes, and demographic profiles. Not only does reliance on demographics such as race and gender risk unconstitutional discrimination, it

Lawyers College. Trial Lawyers College, About Gerry Spence, <http://www.triallawyerscollege.com/gerry/bio.html> (last visited Feb. 11, 2010).

253. Mr. Spence has not lost a jury trial since 1969 and has never lost a criminal case in the fifty years he has practiced law. See Terry Carter, *Spence's No-Loss Record Stands With Fieger Acquittal*, A.B.A. J., June 2, 2008, available at http://www.abajournal.com/news/spences_no_loss_record_stands_with_fieger_acquittal.

254. GERRY SPENCE, WIN YOUR CASE: HOW TO PRESENT, PERSUADE, AND PREVAIL—EVERY PLACE, EVERY TIME 112-13 (2005).

255. King County Superior Court Judge William Downing, a former state prosecutor, tells the story of a *pro se* litigant who, when given the opportunity to exercise peremptory challenges, took to his feet, smiled warmly toward the jurors and said, "Gee, they all seem so nice, I'm just sorry we can't keep them all. I have no challenges." The gentleman did not win his case but the judge told him it was one of the classiest moves he had seen in his courtroom. When telling this tale to prosecutors, the judge has suggested they should project that same confidence in their cases and respect for the community.

does so without a documentable offsetting benefit to the prosecutor. There is little evidence that the exercise of peremptory challenges by prosecutors increases the likelihood of conviction, while there is ample evidence that such challenges are routinely exercised unconstitutionally. For nearly two decades, legal scholars, researchers, judges,²⁵⁶ and even prosecutors²⁵⁷ have advocated for the wholesale elimination of peremptory challenges, acknowledging their lack of efficacy and risk of discrimination. Despite legislative reluctance to abolish them, it is time for prosecutors to take the high road and, exercising their prosecutorial discretion, voluntarily waive peremptory challenges.

256. E.g., Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369 (1992); Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809 (1997). *But see* Christopher E. Smith & Roxanne Ochoa, *The Peremptory Challenge in the Eyes of the Trial Judge*, 79 JUDICATURE 185, 186 (1996).

257. One such prosecutor was my former boss, King County Prosecutor Norm Maleng (1939-2007) to whom this article is dedicated. On September 30, 2006, Mr. Maleng attended a lecture I delivered at the University of Washington law school on the American jury system wherein I argued for the elimination of peremptory challenges. He approached me afterward and told me that he heartily agreed that peremptory challenges should be eliminated.