

# ASTC Position Paper on the Elimination of Peremptory Challenges: And Then There Were None...<sup>†</sup>

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Position Paper Written and Produced by the  
American Society of Trial Consultants\*

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# ASTC Position Paper on the Elimination of Peremptory Challenges: And Then There Were None . . .

The American Society of Trial Consultants opposes efforts to eliminate peremptory challenges. We believe that the arguments for making such changes are unsubstantiated and concerns about potential bias in their use are better addressed by alternative solutions.<sup>1</sup>

## BACKGROUND

In the 36 years since the United States Supreme Court first appropriately prohibited the discriminatory use of peremptory challenges (*Batson v. Kentucky*, 1986), calls to significantly reduce or eliminate peremptory challenges have been ongoing for a variety of reasons (*People v. Brown*, 2002). As practitioners and academicians who are active researchers and participants in jury selection – in state and federal courts throughout the nation – members of the American Society of Trial Consultants are obliged to enter into the public discussion of these issues.

Our members have been working to improve and teach effective jury selection procedures for over 40 years. We advocate for procedures designed to help the court and counsel elicit jurors' attitudes, opinions and beliefs, to increase juror candor, and to improve conditions under which jurors can comfortably and safely express opinions and biases. As experts in social science and the law, we reject using stereotypes based on race, gender, sexual orientation, or ethnicity; they are invalid and improper bases for the exercise of peremptory challenges (ASTC Professional Code, 2004).<sup>2</sup> Instead we encourage attorneys to focus on case-specific factors that could cause jurors to prejudge a case or prejudice one or more of the parties. The goal of trial consultants' professional efforts is to promote the gathering of reliable information by attorneys in order that they may make informed, non-discriminatory decisions during jury selection.

As professionals engaged in assisting trial attorneys during voir dire and jury selection we agree with members of the bar who note that jury selection is a misnomer. Instead, the voir dire

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<sup>1</sup> In this paper, we do not address the reduction in the number of peremptory challenges. ASTC will continue to monitor states' efforts to both eliminate and reduce the number of permitted peremptory challenges.

<sup>2</sup> "Trial consultants shall not recommend the discriminatory use of peremptory challenges on the basis of race, gender, or any other factor deemed improper by applicable law in the trial jurisdiction." (ASTC Professional Code, July 2021, p. 44. The code was originally adopted at the American Society of Trial Consultants Annual Conference, June 2004.)

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process actually leads to deselecting jurors who each party feels cannot be impartial, for whatever reason, in a given case.

We, as trial scientists, have a unique vantage point from which to evaluate current practices in the exercise of peremptory challenges. Our members are constantly involved in jury research designed to identify areas of case-specific bias. We regularly create voir dire questions that seek to effectively elicit useful information from prospective jurors, and we assist counsel in the jury selection process at trial. We promote approaches to voir dire that are designed to increase the quality and reliability of information jurors provide in order to improve our clients' abilities to make intelligent decisions. We help our clients develop non-discriminatory criteria for exercising peremptory challenges that are squarely aligned with the requirements of *Batson* and its progeny. And, we often have the opportunity to learn from jurors' opinions about the jury selection process after trial through post-trial juror interviews.

## A BRIEF HISTORY OF PEREMPTORY CHALLENGES

...not only have peremptory challenges served to preserve actual juror impartiality, but their existence and use also help to preserve the perception of juror impartiality...

Understanding the history of peremptory challenges helps us see their necessity. Like much of the American justice system, the use of peremptory challenges to help secure jurors' impartiality was adopted from the English common law legal system. Courts in England incorporated the use of peremptory challenges in the 13th Century,

first by prosecutors, and later by defense counsel (Wilson, 2009). According to Anderson (2020), peremptory challenges were rarely used and were not permitted in civil trials. However, Anderson notes that prosecutors did take advantage of their right to "stand aside" a certain number of jurors who they deemed opposed to their case, particularly in the 18th and 19th Centuries, as jury pools increased in size and diversity.

The American colonies adopted peremptory challenges with the rest of English common law procedures, but according to Anderson's (2020) description of the history of peremptory challenges in the United States, while the right to peremptory challenges was not codified in this country until 1790, they were permitted in many jurisdictions to eliminate biased jurors from the venire in criminal cases. They were rarely used at first, but their use expanded over time and was written into law with the Crimes Act of 1790, primarily for the benefit of defendants. The prosecutorial right to "stand aside" jurors was mostly abandoned, and prosecutors were typically permitted none or fewer peremptory challenges than defense counsel. The use of peremptory challenges expanded further in the 19th Century, including to misdemeanor defendants, prosecutors, and counsel for plaintiffs and defendants in civil cases. In conjunction with the expanded use of peremptory challenges, more extensive voir dire practices also began to emerge in the 19th Century, to enlighten both judges' decisions regarding cause challenges and counsel's decisions regarding peremptory challenges. At the

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same time, the qualifications for jury service were also expanding and allowed for more diverse venires (first economically and later by other demographic factors).

Historically, not only have peremptory challenges served to preserve actual juror impartiality, but their existence and use also help to preserve the perception of juror impartiality and a sense that the process is fair. In 1894, the Supreme Court wrote, “Any system for the empaneling of a jury that prevents or embarrasses the full, unrestricted exercise by the accused of th[e] right [to peremptory challenge], must be condemned” and that the peremptory challenge is “one of the most important of the rights secured to the accused.”

## THE USE OF VOIR DIRE TO DETECT BIAS

Some biases are explicit – we are aware we have them – such as favor for a local sports team, or against people who hold differing political beliefs. However, the greater concern when it comes to juror impartiality is bias that operates on an unconscious level and is difficult to identify. And once bias is identified, making a person aware of it may help them mitigate the bias, but the awareness alone does not cure it. People cannot just “set aside” a bias or “put it out of their mind,” despite assurances given by others or their own belief that they are able to do so. Jurors – like all other humans – are often unaware of their own biases, proclaiming impartiality but rendering biased decisions (Winter & Vallano, 2014).

Juror bias can come from many sources, both internal (e.g., personally held beliefs or attitudes) and external (e.g., experiences and outside sources of information). For example, considerable research has shown regarding pretrial publicity that (a) it can lead to juror bias, and (b) efforts to eliminate or mitigate it through judicial instruction are insufficient (e.g., Frederick, 2018; Hoetger, Devine, Brank, Drew, & Rees, 2022; Moran & Cutler, 1991).

Typical voir dire procedures wrongly assume the presence of bias as a dichotomy (i.e., a juror is either biased or not). However, everyone has bias: jurors, judges, and attorneys. It is not whether a juror, attorney, or judge *is* biased; but *whether* or *how* one or more forms of bias might affect a potential juror’s analysis, judgment, or decision-making in a particular case. The opportunity for attorneys to explore questions of “what,” “whether,” and “how” is critical for seating an impartial jury.

Parties do not have a constitutional right to peremptory challenges, but they do have a constitutional right to an impartial jury. The most obvious process for empanelment of an impartial jury is voir dire, where attorneys ask jurors about their experiences, attitudes, and beliefs, and use cause or peremptory challenges to remove those who express a degree or type of bias that could interfere with their ability to be impartial. The jury selection process (including juror questionnaires and in-court voir dire) is the only opportunity to uncover juror bias (both explicit and unconscious) before the jury is seated. Moreover, challenges for cause are not often sustained, and thus the exercise of peremptory challenges remains the primary and critical means for empaneling an impartial jury (Suggs & Sales, 1980).

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The intelligent, non-discriminatory use of both cause and peremptory challenges requires that counsel and the court have a meaningful opportunity to hear jurors describe their views about basic legal principles, case-specific issues and attitudes, and life experiences related to the issues in dispute. The absence of meaningful information about jurors too often forces counsel to exercise challenges based on stereotypes.<sup>3</sup> Peremptory challenge decisions based on jurors' attitudes and life experiences, rather than on unreliable and inappropriate demographic stereotypes such as race or gender, are only possible when jurors are encouraged to be entirely candid during voir dire. Some jurors can aptly identify their own biases; many cannot. When trial counsel feels they observe bias but lack the juror's articulation of bias, cause challenges are often difficult to articulate and defend. We will revisit this issue later in this paper.

The jury selection process is intended to uncover bias, and cause challenges are an appropriate way to excuse jurors who express bias that would interfere with their ability to be impartial.



Unfortunately, however, judges vary widely in when they grant (or do not grant) cause challenges and even whether they will allow enough voir dire to establish the basis for a cause challenge. Judges have different thresholds for what warrants a cause challenge. Judges (and counsel) also vary in the extent to which they attempt to head off jurors' expressions of bias during voir dire (called "prehabilitation") and in the extent to which they attempt to rehabilitate jurors after

expressions of bias are made (Hamilton, Linden, Pitt, & Robbins, 2014). Recent research shows rehabilitation is not effective at mitigating bias, despite judges' and jurors' best intentions (Salerno et al. 2021). Research also shows judges, like many people in various other settings, rely on inaccurate cues (such as confidence) in determining how well potential jurors can set aside their bias (Rose & Diamond, 2008).

Many courts have moved toward more restrictive voir dire, often conducted by the judge alone, thereby limiting the ability of counsel and the court to uncover juror bias. In fact, research has found that jurors lack candor twice as often when questioned by judges as they do with attorney-conducted voir dire (Jones, 1997). Further, most people – including jurors – are not

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<sup>3</sup> Practitioners note that the restricted nature of voir dire forces defenders to use stereotypes in exercising peremptory challenges. See, for example, *Powers v. Ohio* (1991). The Court noted that the use of instincts to render judgment about other people's thought processes and beliefs has historically opened the door to implicit and explicit bias. The parties and the jurors themselves have the right to a trial process free from discrimination, and mistakenly allowing a party to dismiss a juror for reasons of race or ethnicity requires reversal and remand for a new trial.



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adept at identifying what affects them and their decision making, and the typical limited and/or court-conducted voir dire is highly reliant on jurors self-reporting their own biases. For example, most judges ask jurors whether some experience or attitude would “prevent them from being an impartial juror” or whether they can “set aside” an experience or belief. This assumes potential jurors will know when they are being partial or are able to predict how an experience or attitude will affect how they perceive the evidence. This level of self-awareness is very rare and asks more of jurors than most are able to do (Yoakum, Robinson, & Palmer, 2019).

## WHEN JURY SELECTION HAS GONE WRONG: THE DISCRIMINATORY USE OF PEREMPTORY CHALLENGES

Multiple studies have shown that peremptory challenges have been used to strike jurors because of their race or gender, both pre-Batson and post-Batson (e.g., Baldus, Woodworth, Zuckerman, Weiner, & Broffitt, 2001; Diamond, Ellis, & Schmidt, 1997; Mellili, 1996; Rose, 1999). The three-step process described in *Batson* has proved inadequate in preventing the discriminatory use of peremptory challenges, in part because attorneys who know they are violating *Batson* can simply generate race- or gender-neutral explanations (Sommers & Norton, 2007), but also because later court decisions such as *Purkett v. Elem* (1995) gave counsel very wide berth in what would be considered an acceptable race-neutral explanation.<sup>4</sup> A later case, *Miller-El v. Dretke* (2005), helped to put some teeth back into *Batson*, but even then Justice Breyer noted in his concurrence, “[t]he law's antidiscrimination command and a peremptory jury-selection system that permits or encourages the use of stereotypes work at cross-purposes.” (*Miller-El v. Dretke*, 2005, p.271)<sup>5</sup>

The best way to cure the problem of discriminatory strikes is to expand the number and type of voir dire questions attorneys are allowed to ask, so that a thorough discussion of the case-specific issues can provide a clear record of whether there is sufficient bias to justify the use of a cause or peremptory challenge. Absent a fully developed record of bias, a judge is prone to accept an attorney’s cursory explanation for exercising a strike that potentially violates *Batson* (e.g., “I struck her because she is a member of the defendant’s church”). When attorneys are given the opportunity for more expansive voir dire that focuses on jurors’ attitudes and beliefs, they will develop a record that supports a legitimate cause challenge instead (e.g., “She has been a member of the defendant’s church for 37 years, taught Sunday school to the defendant and his siblings for 10 or more years, she attends a weekly devotional with the defendant’s mother whom she describes as a close, personal friend, and would have a difficult time not

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<sup>4</sup> In *Purkett v. Elem* (1995), the Supreme Court found that a legitimate reason from the strike proponent is not one that always makes sense – rather its indicative of a proffered reason that does not deny equal protection under the law.

<sup>5</sup> The Supreme Court held that if a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step.

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taking into consideration that relationship when deliberating on a verdict.”). Such a record also satisfies the question for the court of whether a peremptory strike was used in a discriminatory way that violates *Batson* or its progeny.

## THE CASE FOR ELIMINATING PEREMPTORY CHALLENGES

Many rationales have been advanced for eliminating peremptory challenges. The two major rationales, aside from pure efficiency, are: (1) their elimination prevents any discriminatory use of them, and (2) their elimination increases diversity on juries. We question whether eliminating peremptory challenges would address these concerns

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balanced against the benefit of fully vetting jurors on case-specific sources of bias that could interfere with our constitutional right to an impartial jury. Instead, we believe there are alternative, and more effective, approaches to ensure that cause and peremptory challenges serve their intended purpose. As the first argument is true by definition (i.e., if they do not exist, they cannot be used in a discriminatory manner), we will turn to the second question of whether the elimination of peremptory challenges, in fact, would ensure greater diversity.

## JURY DIVERSITY

Diversity among decision making groups is important and beneficial for many reasons. A large body of research shows diverse teams deliver such benefits as more efficient results and higher quality decisions; and juries are no exception. From a purely decision-making perspective, a large body of multidisciplinary research shows diverse groups simply make better decisions. (For a brief review, see Rock & Grant, 2016). Within the legal context, research shows racially diverse groups remember and discuss more evidence and make fewer factual errors in their deliberations (e.g., Devine, Clayton, Dunford, Seying, & Pryce, 2001; Peter-Hagene, 2019; Sommers, 2006).

In addition, research has shown that public perception of juries, trials, their outcomes, and the court in general is more positive when juries are racially diverse (e.g., Ellis & Diamond, 2003; King, 1993).

Unfortunately, structural and human factors within the legal system result in decreased diversity and under-representation of large portions of the jury-eligible population across venues nationwide. One human factor has been the discriminatory use of peremptory challenges to strike venire members of one race or gender. This has led to a longstanding debate about the elimination of peremptory challenges and recently the state of Arizona decided to do just that, for just that reason, even though the proposition of more expanded use of *Batson* was before the Arizona Supreme Court (Arizona Supreme Court Order No. R-21-0020,

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2021). The national trend continues, as evidenced by the UC Berkeley Law School Death Penalty Clinic, which tracks the progress and status of *Batson* reform proposals across the nation (UC Berkeley School of Law, n.d.).

However, many structural factors that are “upstream” in the jury selection process also result in reduced representativeness and diversity in the jury pool, albeit not intentionally.<sup>6</sup> For example, inaccurate, outdated, and limited source lists, difficult-to-access summons procedures, inadequate juror pay, and burdensome jury duty procedures and service terms all work to restrict who is included in source lists, who gets called for jury duty, and who can report for jury duty in ways that disproportionately impact minorities and women. The result is a venire that starts out being unrepresentative of the population from which it was drawn.

Further, it is unclear that eliminating peremptory challenges will necessarily improve jury diversity. One field study found – in a review of jury selection procedures and jury composition in 227 civil juries using data collected by the presiding judge – that both plaintiffs and defendants disproportionally struck jurors of different races such that the discriminatory challenges canceled each other out and the demographic composition of the empaneled juries did not differ from the demographic composition of the venires from which they were drawn (Diamond, Peery, Dolan, & Dolan, 2009).



Other studies have shown a similar “balancing” effect of countervailing discriminatory peremptory challenges (e.g., Diamond, et al., 2009; Rose, 1999). This does not mean to say two wrongs make a right; both sides’ discriminatory challenges were unlawful. But the data indicate that simply eliminating peremptory challenges does not improve diversity. The authors did find that the demographic makeup of six-person juries was notably less diverse than the overall venire and, as a result, the authors conclude that restoring the size of juries to twelve would do more to improve jury diversity than eliminating peremptory

challenges, particularly when peremptory challenges are small in number. They also note a limited number of peremptory challenges are an important “safety valve” for seating an impartial jury, for the reasons discussed above.

The dual goals of jury diversity and the detection and elimination of bias can be promoted by both structural and conceptual changes. In terms of structural elements, a few examples of

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<sup>6</sup> For a comprehensive review, see Hans (2021).



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effective upstream practices that improve diversity are: (1) improved and expanded source lists and summons procedures, as Connecticut is attempting to do (Connecticut Jury Selection Task Force, 2020); (2) measures to reduce the negative impact of jury service on under-represented communities through improvements such as shorter service terms, better pay, and eJuror systems that work on mobile phones so that potential jurors can call in to check on service status; (3) virtual jury selection that includes more people in the selection process (and, in fact, judges have reported greater venire diversity with virtual jury selection compared to in-person jury selection) (Mulcahy, Rowden, & Teeder, 2020); and (4) expanding the use of juror questionnaires, completed in advance of trial, that ask about hardship, schedule conflicts, knowledge of the parties, and a list of case-specific questions that can identify in advance jurors who would be excused for cause, if stipulated to by counsel (Frederick & Friedman, 2022).

## INADEQUACIES IN CURRENT VOIR DIRE PROCEDURES USED TO UNCOVER BIAS

Strengthening Batson... more directly addresses the problem of discriminatory peremptory challenges than does eliminating peremptory challenges altogether.

Unfortunately, there exist in most court systems both an inadequate understanding of bias and a lack of appropriate procedures to assist attorneys and judges in their assessment of how jurors' experiences, attitudes, and beliefs can influence jury decision-making. As a result, a number

of faulty jury selection practices have evolved over the decades. Law schools do not specifically teach the art of asking open-ended questions in voir dire which invite jurors to disclose various sources of bias. Instead, attorneys are trained to be strong advocates, which often leads to giving speeches, making arguments, or exacting promises from jurors during voir dire, rather than helping jurors feel comfortable disclosing relevant information. As a result of their training, many attorneys conduct voir dire in the style of cross-examination (i.e., asking closed-ended questions) or oath-taking, neither of which allows for full disclosure and discussion of potentially biasing personal experience.

Given the techniques attorneys deploy during voir dire described above, most judges in federal court and many judges in state court do not allow or strictly limit attorney-conducted voir dire. This problem is compounded by the judge's desire for efficiency. All of these circumstances result in the attorneys and the courts having insufficient information about jurors and how their experiences or beliefs may affect their ability to be impartial. As a result, counsel often feel they are left to rely on demographic information such as race, gender, age, education as (too often inaccurate) proxies for bias, which leads to use of peremptory challenges.

In response to a growing concern about the pernicious effect of discriminatory peremptory challenges on jury diversity, as noted above, the Arizona Supreme Court eliminated peremptory challenges in criminal and civil trials, effective January 1, 2022 (Arizona Supreme Court Order

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No. R-21-0020, Aug. 30, 2021). In contrast, rather than eliminating peremptory challenges in order to prevent their being used in violation of *Batson*, Washington and California changed their *Batson* procedures in an attempt to make it more difficult to get around *Batson*, by placing the burden on the challenged party to show a peremptory challenge was *not* based on race, rather than on the challenger to show that it was. Several other states are considering similar measures (Conklin, 2022). Strengthening *Batson* to make it more difficult to exercise peremptory challenges because of race, gender, or other protected characteristics more directly addresses the problem of discriminatory peremptory challenges than does eliminating peremptory challenges altogether.

## PEREMPTORY CHALLENGES ARE STILL AN IMPORTANT TOOL

Peremptory challenges still provide a valuable benefit even with all of their problems, particularly because there are other ways to mitigate the problems. As previously noted, voir dire is very limited in federal and most state courts, which dramatically limits the opportunity to uncover bias held by potential jurors. The fact that people are very poor at identifying their own unconscious bias means that whatever questions are asked will not dig nearly far enough below the surface to expose it. But even when jurors are aware of their own bias, judges and counsel often prehabilitate jurors through the way in which they word their voir dire questions, which prevents jurors from sharing. (Prehabilitation is the practice of making clear to jurors in preliminary comments or voir dire questions that the expected “correct” response is that they can be impartial and set aside any previous knowledge, experiences, or attitudes that would affect their opinions about the case, which discourages any expressions of bias in their responses.) Judges often attempt to rehabilitate jurors who do open up about their biases. Both of these judicial practices inhibit the disclosure of bias, which would allow for the appropriate dismissal of jurors by cause or peremptory challenge.

A recent experimental study compared the ability of limited voir dire questioning, which is typical in federal courts and some state courts, to that of more effective voir dire to uncover bias that affects case outcomes and measured the effect of judicial rehabilitation in mitigating the bias (Salerno et al., 2021). The researchers found that none of the minimal voir dire questions or demographics predicted juror case judgments. When asked if they could name “any personal prejudices, biases or reasons they might not be impartial” – which is one version of what many judges ask to “rehabilitate” jurors at trial – less than 2% of all respondents said they could. By contrast, all but two of the extended voir dire questions (11 out of 13) predicted verdict outcomes in each type of case. Further, mock jurors who were rehabilitated by a judge via observing a pre-recorded rehabilitation were just as likely to decide the cases consistent with their pre-existing bias as those who did not view the rehabilitation message. The rehabilitation messaging did not reduce the impact of bias on verdict outcomes.

Further, research indicates that videos well-intended to increase awareness of implicit bias – such as the one developed and used in Washington State – may be ineffective at mitigating implicit bias. Extensive research shows implicit scores are not reliably correlated with behavior

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(e.g., see meta-analysis by Oswald, Mitchell, Blanton, Jaccard, & Tetlock, 2013), and, while implicit bias training might lead to small and short-lived changes in implicit bias measures, it does not lead to changes in behavior or long-term measures of implicit bias. Additionally, Forscher et al. (2019) found that simple efforts to mitigate bias such as a video or preliminary instruction might even open the door to increased levels of implicit bias because jurors who have seen the video think they are immune to any bias they may have previously had by virtue of watching the video. Indeed, participants in the Salerno, et al. (2021) study who watched the judicial rehabilitation video reported being less impacted by their own biases, which gave them a sense of perceived impartiality even though there was no actual difference in bias held by those who did and did not watch the rehabilitation video.

Another consideration is that counsel is more familiar with the issues and nuances of the case and are therefore better able to ask questions about the issues, experiences, and opinions that are relevant to the case and could affect decision making. Many judges fear counsel will take advantage of expanded voir dire and venture into inappropriate subjects but – with education and training – counsel can be very effective at asking relevant questions targeted at identifying bias. Given the proper time and training, counsel can be much more effective than the court at eliciting candid responses and relevant bias. Effective voir dire with no judge or attorney prehabilitation and limited rehabilitation is far better for creating an environment where jurors will feel comfortable sharing the kinds of personal attitudes, opinions, experiences, or beliefs that can affect their ability to be impartial. As important as expanded voir dire is, however, there will still be those in the venire who cannot articulate their own biases in a way counsel can cite to establish a challenge for cause. Peremptory challenges are critical for that situation.

Once relevant implicit or unconscious (and explicit) biases are uncovered, some jurors will continue to honestly believe and declare that their bias will not affect how they will evaluate the evidence in the case. It is at this point that judicial discretion comes into play, in whether the judge will recognize the inherent difficulty of all humans to set aside bias and grant a cause challenge to remove a partial juror. To complicate matters, judges are influenced by inaccurate indicators of accuracy, such as confidence (Rose & Diamond, 2008). The more confidently jurors express their ability to be impartial, the more likely judges are to believe them, even though there is no relationship between confidence and actual ability to set aside bias. This results in judges denying cause challenges that should be granted, requiring the use of peremptory challenges to remove a partial juror from the venire.

Finally, as noted earlier, the perception of procedural fairness is critical to public trust in the justice system. When people believe a process to be fair, they are more likely to accept the outcome, even if it is unfavorable, including within a legal setting (Munsterman, Hannaford-Agor, & Whitehead, 2006). A party's ability to actively participate by

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observing a thorough voir dire, which allows the identification of possible bias in the venire, and hopefully removal of the bias through either cause or peremptory challenge, will lead to less dissatisfaction with the jury selection process, even if a jury returns an unfavorable verdict (Lind & Tyler, 1988).

## RECOMMENDATIONS FOR PEREMPTORY CHALLENGES

While the discussion of peremptory challenges often revolves around procedural issues, such as how challenges are issued and whether they are being used properly, there is rarely much dialogue about how peremptory challenges could be used more ethically and effectively. For this, ASTC recommends a shift in how judges and lawyers traditionally think about the jury selection process. Normally, jury selection revolves around *whether* a prospective juror has a known bias or conflict that would prevent them from being a fair and impartial juror, and whether they could set aside that known bias.

Instead, ASTC recommends that the courts and counsel focus on *how* prospective jurors' life experiences, attitudes, preconceptions, and beliefs, known or unknown, might affect how they listen to the case. With this shift, jury selection becomes an inquiry, engaged in by the judge, attorneys, and the jurors themselves into their state of mind rather than a confirmation or disconfirmation of their qualifications to serve.

Toward that end, following are a number of practices that ASTC recommends the court and counsel adopt to be more fully informed about a juror's background and beliefs in order to exercise cause and peremptory challenges without resorting to biased stereotypes (e.g., race, gender, religion, age, education, or other demographic generalizations) that can result in the discriminatory use of peremptory challenges.

1. In a pre-trial conference prior to the beginning of selection, the court and counsel should thoroughly discuss the jury selection and voir dire process to allow for a discussion of best practices and the most efficient way to use them. In looking at jury pool diversity, the use of online jury selection procedures should be considered, as King County, Washington has noted anecdotal evidence that these procedures have increased the diversity of their venires (Anderson, 2020; Gabriel & Broda-Bahm, 2022).
2. In a pre-trial conference, have the court and counsel identify the issues in the case that may give rise to a juror's partiality or bias. This discussion of partiality should include case-relevant life experiences, opinions, beliefs, attitudes, values, philosophies, and personal preconceptions, expectations, and standards.
3. Whenever appropriate, allow jurors to fill out supplemental juror questionnaires in advance of voir dire. Online questionnaires can facilitate the attorneys' ability to plan for voir dire and to use their time in voir dire more efficiently. Allow counsel time in advance of voir dire to review the completed jury questionnaires to prepare follow-up questions

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for the prospective jurors. This also allows the judge to consider in advance hardship requests and cause challenges that may be appropriate based on the information gathered in the questionnaire, thereby making more efficient use of time in court.

4. Instead of setting arbitrary time limits on attorney-conducted voir dire, the nature of the case, the bias identified, and the quality of juror responses to questioning should determine the appropriate amount of time allowed for voir dire. This process will be made more efficient through use of the pre-trial conference described in point two above.

5. Judges may also contact an ASTC trial consultant for an independent evaluation of potential case-specific bias that should be explored during the voir dire process.

6. In the voir dire process, it is advisable for a sitting judge to create an environment that encourages full disclosure and candor by jurors. Jurors should not be judged negatively for their life experiences, beliefs, or biases, but should be treated with respect and compassion. This may include permitting attorney-conducted voir dire, as some research indicates jurors disclose more to attorneys than they do to judges in voir dire (e.g., Jones, 1987).

7. Judge and attorney voir dire should be conducted in the spirit of inquiry and curiosity rather than attempts to indoctrinate, to gain favor, or to compel compliance or obedience to legal principles.

8. The court and counsel should consider utilizing mini-opening statements prior to voir dire to provide context for the voir dire questioning in order to allow jurors to articulate experiences or opinions that may give rise to bias. This allows the judge and the attorneys to have more accurate information about a prospective juror when they are considering cause and peremptory challenges.<sup>7</sup>

9. Whenever possible, the court and counsel should ask open-ended questions (e.g., “What is your opinion about...”, “When have you had similar experiences in your own life...”, “How do you feel about...”) to encourage jurors to articulate their views in their own words as opposed to asking close-ended (e.g., agree/disagree, yes/no) questions to

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<sup>7</sup> See Munsterman, et al. (2006). A mini-opening is an opportunity for counsel for each side to briefly describe the contentions and issues from their side’s point of view before the voir dire. Mini-openings can eliminate complex and argumentative voir dire questions describing the nature of the dispute and the evidence. The ABA Commission on the American Jury also recommended mini-opening statements to help improve juror comprehension in its Principles for Juries and Jury Trials (ABA Commission on the Jury, 2016).



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extract agreement/disagreement with attorney or judicial statements or confirmation/disconfirmation in response to attorney or judicial questions.

10. Whenever appropriate, the court and counsel should ask follow-up questions to encourage jurors to elaborate on relevant experiences or beliefs that could give rise to a bias. Asking additional questions or prompts such as, "Can you tell me a little more about that?" allows a juror who may be reluctant to fully share an experience or opinion to disclose more about a potential bias.

11. As previously described in this paper, jurors may not know that a life experience or belief may have given rise to a particular bias. Therefore, in a pre-trial conference, the judge and the attorneys should discuss specific case issues and questions that may need to be included in a supplemental juror questionnaire or in the voir dire process. Open-ended and follow up questions will be particularly useful in uncovering biases that are not easily recognized by a juror.

12. Avoid using the word "bias" when speaking with jurors. That word can automatically inhibit a person's willingness to disclose their true feelings. Using language like "opinion" or "feeling" is helpful or a discussion of "filters" can be useful as a context for bias.

13. Model the impact of bias by giving examples that show how experience creates predispositions and prejudgments and acknowledge that we all have difficulty evaluating the impact of our opinions and experiences. Explicit bias means a juror knows they have an opinion that could impact their decision-making and they express it openly in response to appropriate voir dire questions (e.g., "I think people can be awarded money for hospital bills, but they should not be awarded money for pain and suffering").

Unconscious bias requires additional questioning by counsel because, by definition, jurors are unaware of their unconscious bias. Consider the example of a prospective juror who says, during voir dire, "In my own car accident the insurance company declined my claim and I had to pay for the damage to my car and my own medical bills." The juror's statement reflects an experience alone, not a bias. Counsel on both sides will need the opportunity to explore whether the experience is favorable or unfavorable to their case. Is the prospective juror partial because they think a lot of money should be awarded to "make up" for their own claim? Or is the prospective juror partial because they think no money should be awarded ("no one ever gave me a handout")? Or perhaps the juror has an opinion based on personal experience that does *not* render them partial at all. Where effective voir dire is allowed, counsel could further inquire: "Tell us how your experience would be important to you in a case where you would be asked to consider awarding money to pay for damage to a car, medical bills, and pain and suffering." By allowing questions that uncover both experiences *and* beliefs that may affect a juror's ability to be fair and impartial (in ways known or unknown to the juror), attorneys can make a record to argue challenges for cause and for the exercise of non-discriminatory peremptory strikes.

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14. When asking jurors about biases, opinions, or feelings, focus on the principles of length, strength, and frequency. In other words, how long ago was the experience, how long have they held the belief, how strongly do they feel about the experience or belief (e.g., “How would you rate that belief on a scale of 1 to 10 with 10 being the strongest?”), and how often they think about or express their feelings. It is also useful to focus on the manifestations of bias, such as a juror who may require more evidence to prove an element or one who says they would need a higher standard of proof than the law requires. This focus will help separate an experience that would not necessarily be a reason for a cause challenge from an actual bias that would cause a juror to be partial.

15. The court and counsel should realize that the *possession* of a particular biasing experience or belief does not make a prospective juror unfit to serve. Rather, what matters is *how* that experience or belief affects their judgment and decision-making process and whether it *impairs* their ability to be fair and impartial. Instead of asking whether a juror can “set aside” a particular experience or belief, it is recommended that judges and attorneys ask questions such as, “How do you think that experience or belief might affect you as a juror as you are listening to the case?” Questions that dig deeper should better help the judge and attorneys to evaluate the self-awareness of the juror and their ability to separate their prior experience or belief from the evidence they will hear in court.

16. Eliminate prehabilitation and limit rehabilitation. This would allow jurors to more freely admit they would have difficulty setting aside bias (Hamilton, Lindon, Pitt, & Robbins, 2014; Hamilton & Zephyrhawke, 2015).

17. Eliminate requirements that peremptory challenges must be exhausted to preserve the right to appeal on jury selection issues. Because of this requirement, counsel is sometimes forced to exercise challenges in order to preserve a client’s appellate rights. Eliminating this requirement would save time for jurors and the courts.

18. Fairness and impartiality are two separate concepts. A juror’s prior experiences, beliefs, preconceptions, attitudes, values, and opinions can affect their ability to be impartial and may lead to biased decision-making. Fairness relates to jurors’ willingness to hear both sides of the case, and fairness can exist even where jurors have prior experiences, opinions, or beliefs that do not result in case-specific bias and partiality.

19. Consider the cumulative responses and background of a prospective juror as well as their self-awareness about how their particular life experiences, beliefs, or opinions might affect how they listen to evidence and the law. While some jurors may have the awareness and skill to recognize how a prior attitude can affect their impartiality, others may not.

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20. Consider modifications like those Washington (General Rule 37) and California (AB 3070) have implemented to Batson challenges in order to assist the courts and counsel to implement better procedural safeguards against the use of discriminatory challenges.

These recommended jury selection practices will give the courts and counsel a system to better understand jurors' mindsets and better exercise cause and peremptory challenges. The system, in turn, will greatly reduce the reliance on demographic and discriminatory stereotypes, improve the overall fairness of the justice system, and preserve and improve the jury pool's diversity far more effectively than the dangerous practice of eliminating peremptory challenges.

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