Diversity in Jury Selection

and the Evolving Limitations on Peremptory Challenges

by Victor A. Afanador

What is a true jury of one's peers, and does a diverse trial team achieve it?

The Sixth Amendment states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury of the state and district wherein the crime shall have been committed,* which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.[1]

The Seventh Amendment states:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of *trial by jury shall be preserved, and no fact tried by a jury,* shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.[2]

Do these amendments entitle a criminal or civil litigant to a jury of their "peers" or a "diverse jury"?

Technically, a litigant or criminal defendant is not entitled to a diverse jury; he or she is only entitled to an impartial one.[3] This confusion is commonly brought to the forefront during high-profile jury trials like the recent Bill Cosby sexual assault criminal trial that was held in Allegheny County

Courthouse, Pennsylvania.[4] During the pretrial motion stage, the prosecution in the Cosby trial was accused of excluding jurors based on race, despite the fact that the prosecution articulated non-biased reasons to the court for striking black jurors.[5] Ironically, the defense also struck white jurors and wanted more black jurors on the panel.[6]

Although racial diversity is a noble goal in all settings, there is no legal right to a racially diverse jury panel.[7] As the Cosby trial demonstrates, a trial attorney's decision to strike a juror may be subject to scrutiny regardless of whether a juror was removed for a nefarious reason because, as it stands today, discrimination in the jury selection process is not eliminated.[8] Some critics have even argued for the eradication of preemptory challenges because too much deference is provided to a lawyer in its use.[9] In today's world, the courtroom is not free from racial and diversity scrutiny.[10] Consequently, the craft of jury selection, apart from focusing on traditional trial themes, must now also be anchored with a diverse trial team that is conscious and aware of diversity issues during the trial and especially in the jury selection process.[11]

There is enormous benefit to trial counsel bringing their own background and experiences to assist the trial team in collectively evaluating jurors.[12] For example, a white, able-bodied, middle-class male may only know his own background, and benefit from the varied background and experiences of members of the team.[13] To this end, some trial teams use jury consultants who believe there is a mastered science that requires viewpoint and psychological analysis.[14]

In addition to the long list of skills a trial attorney must possess to be successful, a modern trial attorney cannot ignore diversity.[15] At a minimum, a trial attorney should consider the importance of a diverse jury and selection pool, and whether being too sensitive to diversity is an asset or a detriment.[16]

The *Batson* Framework

Even from their days in law school lawyers know they may not use race to strike a juror from a prospective jury panel.[17] Similarly, a lawyer may not exercise peremptory challenges solely based on gender.[18] As a result, the lawyers that handed the Cosby trial should have focused on non-biased reasons for striking prospective jurors without losing their desire for a racially diverse jury or losing track of their overarching trial themes.[19] Often, this goal can be accomplished within the confines of the law so long as lawyers are willing to employ outside of the box creativity that will produce the results they ultimately seek.[20] Significantly, trial attorneys must also remember that diversity does not begin and end with gender and race.[21] How does a trial team navigate the new wave of diverse jury panel concerns that go beyond gender and race?

The Hypothetical Trial Set-Up

The stage is set for the trial of a federal civil rights excessive force case involving five police officers of mixed race and ethnicities: Officer John (a black male of Jamaican descent), Officer Martinez (born and raised in New Jersey and identifying as a white Puerto Rican), Officer

Sanchez (a female of Mexican-American descent from California), Officer Jetson (an Irish-Italian American male), and Officer Smith (who is Russian-Ukrainian, of the Jewish faith, and is missing a right hand from a childhood injury). The plaintiff is a dark-skinned male from Puerto Rico with a thick Spanish accent who identifies as being black and gay.

How does one pick a jury? What should be the strategy with respect to playing up or downplaying race, ethnicity and disability? Is there one? What are the trial themes? Have these been considered? Should they be considered? Who should be impaneled in the jury? Are the sensitivities or insensitivities of the judge known? What about those of the trial team and the adversaries' trial team? Are they diverse as a team and sensitive to handicap issues? Does a transgender juror affect any prejudice against a gay plaintiff? Are these points not being considered because of perceived ethical concerns or the belief they will not play a part in prosecuting or defending the case? Does impartiality have to mean diversity?

The Evolving Peremptory Challenge Framework for Other Protected Classes

The United States Supreme Court has not yet been given the opportunity to extend the *Batson* framework to other protected classes. In 2014, however, the Ninth Circuit Court of Appeals, in *SmithKline Beecham Corp. v. Abbott Labs*, extended the prohibition to peremptory challenges made solely on the basis of sexual orientation.[22] The Ninth Circuit's extension of *Batson* in *SmithKline*, for instance, explicitly stated that it was building on the Supreme Court's decision in *United States v. Windsor*.[23]

The Ninth Circuit decision indicated: "*Windsor* requires that when state action discriminates on the basis of sexual orientation, we must examine its actual purposes and carefully consider the resulting inequality to ensure that our most fundamental institutions neither send nor reinforce messages of stigma or second-class status. In short, *Windsor* requires heightened scrutiny."[24]

The panel ultimately concluded that peremptory challenges solely on the basis of sexual orientation were impermissible because heightened scrutiny applied to discrimination on the basis of sexual orientation and sexual orientation has been the basis of systematic exclusion from "the most important institutions of self-governance...."[25] Similarly, New Jersey courts have suggested that peremptory challenges may not be made solely on the basis of religious affiliation.[26]

These challenges have been rendered impermissible because "discrimination in jury selection...causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process."[27] "It merits attention that groups receiving heightened protection against discrimination in other contexts may also receive protection against peremptory challenges, even if the protection affects the trial rights of the litigant."[28] If bias was used to improperly compose a jury, an appellate court could overturn the jury verdict.[29]

It is unclear whether the courts will focus on other protected classes to expand protections against discrimination and further extend the *Batson* framework.[30] Will state legislatures look to extend their own statutory protections against discrimination to mirror the protected status that exists in each state, like all those protected status conditions available under the New Jersey Law Against Discrimination?[31]

Diversity is a hot button topic in American society.[32] Now, more than ever, diversity plays a central role in the jury trial process of American jurisprudence.[33] While the legal profession understands that a diverse trial team may provide insight into the ideologies of prospective jurors and the sensitive themes within a trial, the craft of jury selection is continuing to be tempered by the *Batson* framework.[34] There is no exact craft or science, but three of the core things that form one's perspective on issues are race, gender and religion.[35]

Trial attorneys must bring diversity to the jury selection process and be allowed to explore a person's actual perspectives regardless of how formed, while making sure bias does not offend the dynamic peremptory challenge framework.[36] One must be sensitive that his or her own background, which adds strength to a trial team, balances with the limitations the courts and laws set.[37] ⚖

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Endnotes

1. U.S. Const. amend. VI. (emphasis added).
2. U.S. Const. amend. VII. (emphasis added).
3. *See* U.S. Const. Amend. VI.
4. *See* Ron Allen and Tracy Connor, Twelve Jurors Selected for Bill

Cosby Trial Amid Race Claim, NBC News, (May 24, 2017), https://www.nbcnews.com/storyline/bill-cosby-scandal/twelve-jurors-selected-bill-cosby-trial-amid-race-claim-n764176.

5. *Id.*
6. *Id.*
7. *See generally* Jaren Nichole Wieland, A Jury of One's Peers: What it is; How it is Changing; and Why it is Important, 57 *Advocate* 24, 25–26 (May 2014) (outlining the history of the jury selection process, racial challenges, and the common law framework, which never provides for a clear right to a diverse jury but bars the use of peremptory challenges in a discriminatory manner).
8. *See Id.* at 25–26 (standing for the proposition that discrimination in the jury selection process is still a significant issue).
9. *See* James Lobo, Behind the Venire: Rationale, Rewards and Ramifications of Heightened Scrutiny and the Ninth Circuit's Extension of Equal Protection to Gays and Lesbians During Jury Selection in *SmithKline v. Abbot*, 56 *B.C. L. Rev. E-Supplement* 106, 120–121 (2015).
10. Wieland, *supra* note 7, at 25–26.
11. Telephone interview with William P. Flahive, principal, William P. Flahive, LLC (June 1, 2018).
12. *Id.*
13. *Id.*
14. *See* Matthew Hutson, Unnatural Selection, *Psychology Today*, (March 1, 2007), https://www.psychologytoday.com/us/articles/200703/unnatural-selection.
15. Telephone interview with Ricardo Solanoi Jr., partner, Friedman Kaplan, LLP (June 1, 2018).
16. *Id.*
17. *See Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (establishing that the equal protection clause forbids peremptory challenge to jurors solely on account of their race by a prosecutor); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 624–625 (1991) (holding that the Seventh Amendment precluded peremptory strike against juror by private litigant on the basis of race in federal jury trial).
18. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140 (1994) (holding that peremptory strikes on the basis of gender are likewise precluded by the federal Constitution).
19. Telephone interview with Frank Crivelli, Partner, Crivelli & Barbati, LLC (June 1, 2018); *See generally* Allen and Connor, *supra* note 4.
20. Telephone interview with Frank Crivelli, Partner, Crivelli & Barbati, LLC (June 1, 2018).
21. *Id.*
22. *SmithKline Beecham Corp. v. Abbot Lab,* 740 F.3d 471, 483 (9th Cir. 2014).
23. *United States v. Windsor*, 570 U.S. 744 (2013); *see SmithKline Beecham Corp.*, 740 F.3d at 483.
24. *SmithKline Beecham Corp.*, 740 F.3d at 483.
25. *Id.* at 484.
26. *See, e.g., State v. Fuller*, 862 A.2d 1130, 1147 (N.J. 2004) ("To turn a blind eye to the discriminatory impact of peremptory challenges exercised on religious grounds would leave trial courts unequipped to scrutinize prosecutors' explanations for pretext.").
27. *J.E.B.*, 511 U.S. at 140.
28. Telephone interview with Michael Martinez, Partner, Kramer Levin Naftalis & Frankel, LLP (June 4, 2018); *see also* Eric L. Muller, Solving the Batson Paradox: Harmless Error, Jury Representation, and the Sixth Amendment, 106 *Yale L. J.* 93, 96 (1996-1997).
29. *See, e.g., J.E.B.*, 511 U.S. at 146.
30. *See* Matthew J. Crehan, The Disability-Based Peremptory Challenge: Does it Validate Discrimination Against Blind Prospective Jurors?, 25 *N. Ky. L. Rev.* 531, 547 (1998) (positing that the Americans with Disabilities Act may require "disability-neutral" reason for peremptory challenge although there may not be a reason to expand constitutional analysis of *Batson* or *J.E.B.*); *see also* Julia C. Maddera, comment, *Batson* in Transition: Prohibiting Peremptory Challenges on the Basis of Gender Identity or Expression, 116 *Colum. L. Rev.* 195, 197 (2016) (arguing that Courts should read peremptory challenge jurisprudence to prohibit challenges on the basis of gender identity or expression).
31. *See* N.J.S.A. 10:5-1 *et seq.*
32. Telephone interview with William P. Flahive, principal, William P. Flahive, LLC (June 1, 2018).
33. *Id.*
34. Telephone interview with Dawn Attwood, member of the firm, Pashman Stein Walder Hayden, P.C. (June 8, 2018).
35. Telephone interview with Ricardo Solano Jr., partner, Friedman Kaplan, LLP (June 1, 2018).
36. *Id.*
37. *Id.*