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# The (Im)Partial Jury

## A TRIAL CONSULTANT'S ROLE IN THE VENIRE PROCESS

*“Jury selection is strictly an emotional process. They’re looking for people they can manipulate. Both sides are.”<sup>1</sup>*

### INTRODUCTION

On October 3, 1995, “more than 150 million viewers”—accounting for fifty-seven percent of the nation’s population—turned on their televisions to watch twelve jurors deliver a verdict.<sup>2</sup> The nation fixated on the defendant’s and the victims’ fame, the gruesome nature of the crime, and ultimately, the unpredictable verdict.<sup>3</sup> O.J. Simpson, a former American football star, was indicted for the murder of his ex-wife and her friend.<sup>4</sup> The “televised case . . . transfixed the nation,”<sup>5</sup> but at the time, a woman sitting among Simpson’s “Dream Team”<sup>6</sup> was not the subject of common conversation. She did not speak in open court, but she has since been recognized as one of Simpson’s “secret

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<sup>1</sup> In an interview on May 17, 2002, Joseph Wambaugh, an author who writes about the criminal justice system, was asked about his novel, *The Fire Lover*. Wambaugh discussed his concerns about the jury selection process and told the interviewee he believes “[t]he time has come for professional jurors.” Interview by Ann Bruns, The Book Report Network, with Joseph Wambaugh, Former Los Angeles Police Dep’t Detective (May 17, 2002), <https://www.bookreporter.com/authors/joseph-wambaugh/news/interview-051602> [<https://perma.cc/ZR8T-DRH3>].

<sup>2</sup> Julia Zorthian, *How the O.J. Simpson Verdict Changed the Way We All Watch TV*, TIME (Oct. 2, 2015), <http://time.com/4059067/oj-simpson-verdict/> [<https://perma.cc/LW7A-W3CG>].

<sup>3</sup> *Id.*

<sup>4</sup> O.J. Simpson’s ex-wife, Nicole Brown Simpson, and Ronald Goldman were stabbed to death and found outside Nicole Brown Simpson’s home. *O.J. Simpson Trial: Where Are They Now?*, ABC NEWS (June 12, 2014), <http://abcnews.go.com/US/oj-simpson-trial-now/story?id=17377772> [<https://perma.cc/BX8J-CM7N>].

<sup>5</sup> *Id.*

<sup>6</sup> The media coined the term “Dream Team,” referring to the team of lawyers that represented O.J. Simpson during the criminal trial. Lorraine Adams & Serge F. Kovalski, *The Best Defense Money Could Buy*, WASH. POST (Oct. 8, 1995), [https://www.washingtonpost.com/archive/politics/1995/10/08/the-best-defense-money-could-buy/368091dd-b72a-4d9b-a88d-248e726849ca/?utm\\_term=.44063450913e](https://www.washingtonpost.com/archive/politics/1995/10/08/the-best-defense-money-could-buy/368091dd-b72a-4d9b-a88d-248e726849ca/?utm_term=.44063450913e) [<https://perma.cc/7GBJ-QJJU>].

weapons.”<sup>7</sup> Jo-Ellan Dimitrius, the trial consultant working among O.J. Simpson’s “Dream Team,” offered a psychological perspective on the case.<sup>8</sup>

Prior to jury selection, Dimitrius advised the team that “the perfect juror was a female African American with a high school education or less.”<sup>9</sup> Moreover, she “noted that her pre-trial research for the case indicated that women over thirty ‘would not necessarily believe spousal abuse leads to murder’”<sup>10</sup> and would likely be more sympathetic to Simpson. The prosecution’s trial consultant gathered the same data, but the prosecutor assigned to Simpson’s case doubted the validity of his findings and fired him after two days of jury selection.<sup>11</sup> After weeks of *voir dire*,<sup>12</sup> ten women—eight of whom were African American and seven of whom were over the age of thirty—sat on the twelve-person panel that acquitted Simpson.<sup>13</sup> Dimitrius was “the first person . . . thanked at [a] victory news conference,”<sup>14</sup> but she was also “personally blamed for letting O.J. walk the streets.”<sup>15</sup>

Admittedly, many other factors were at play during the O.J. Simpson trial that led to the verdict, but Dimitrius’s admission that she focused on age, sex, and race when selecting a jury raises red flags. Unfortunately, this practice is not uncommon. In 2017, a trial consultant commented on the tactics he expected the attorneys for Bill Cosby, an actor-comedian

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<sup>7</sup> Inside Edition, *The Secret Weapon Who Told O.J. Simpson’s Attorneys How to Pick a Jury*, YOUTUBE (Mar. 15, 2016), <https://www.youtube.com/watch?v=k8ce6U3I6nE> [<https://perma.cc/73UN-3XJF>].

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Rachel Hartje, Comment, *A Jury of Your Peers?: How Jury Consulting May Actually Help Trial Lawyers Resolve Constitutional Limitations Imposed on the Selection of Jurors*, 41 CAL. W.L. REV. 479, 494 (2005) (quoting Stephanie Yarbrough, *The Jury Consultant: Friend or Foe of Justice*, 54 SMU L. REV. 1885, 1892 (2001)).

<sup>11</sup> “[The prosecutor] had disagreed with her expert’s advice to excuse several women from the jury, and instead acted on the gender-based hunch that female jurors would respond well to her courtroom style and identify with her as a woman. She could not have been more wrong.” Collin P. Wedel, Note, *Twelve Angry (and Stereotyped) Jurors: How Courts Can Use Scientific Jury Selection to End Discriminatory Peremptory Challenges*, 7 STAN. J. C.R. & C.L. 293, 312 (2011) (footnote omitted).

<sup>12</sup> *Voir dire* is “the act or process of questioning prospective jurors to determine which are qualified (as by freedom from bias) and suited for service on a jury.” *Voir dire*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/voir%20dire> [<https://perma.cc/852E-AFPN>]; see also Daniel Hatoum, *Injustice in Black and White: Eliminating Prosecutors’ Peremptory Strikes in Interracial Death Penalty Cases*, 84 BROOK. L. REV. 165, 168 (2018).

<sup>13</sup> Hartje, *supra* note 10, at 494; see also Inside Edition, *supra* note 7.

<sup>14</sup> Adams & Kovaleski, *supra* note 6.

<sup>15</sup> Matthew Hutson, *Unnatural Selection*, PSYCHOL. TODAY (Mar. 1, 2007), <https://www.psychologytoday.com/articles/200703/unnatural-selection> [<https://perma.cc/V8SK-8KGY>].

charged with sexual assault, to employ.<sup>16</sup> He predicted that “[t]he defense [would] likely seek jurors who are black, male, older and perhaps celebrity worshippers.”<sup>17</sup> Instead of focusing exclusively on the jurors’ personalities or personal experiences, attorneys and trial consultants sometimes consider immutable characteristics, such as race, age, and gender.<sup>18</sup>

The Supreme Court has been actively installing safeguards into the jury selection process to remove those exact discriminatory biases because deliberate “prejudice is antithetical to the functioning of the jury system.”<sup>19</sup> In *Batson v. Kentucky*, the Supreme Court forbade State prosecutors from challenging potential jurors solely on account of their race.<sup>20</sup> A line of cases following *Batson* expanded its holding to apply to a wide array of unfounded prejudices that may seep into the courtroom.<sup>21</sup> To further restrict discriminatory behavior in the jury system, the Supreme Court recently held in *Peña-Rodriguez v. Colorado* that jury deliberations are no longer insulated from judicial inquiry if jurors exhibit racial biases, regardless of whether a verdict had already been entered.<sup>22</sup> Despite the Supreme Court’s decisions attempting to curtail discrimination in the jury system,<sup>23</sup> attorney-conducted *voir dire* often allows biased jurors to sit on the panel. To remedy the situation, trial consultants—individuals often hired specifically to select juries—may be retained to offer expert services during jury selection.<sup>24</sup> Trial consultants are in a

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<sup>16</sup> Maryclaire Dale & Dake Kang, *3 White Men, 2 White Women 1st Picks for Bill Cosby Jury*, NBC10 (May 22, 2017, 9:18 PM EDT), <https://www.nbcphiladelphia.com/news/local/QA-Cosby-Jury-A-look-At-What-To-Expect-During-Selection-423439634.html> [<https://perma.cc/HZ5J-C89X>].

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*; see also Jeff Frederick, *Evaluating Potential Jurors*, AM. BAR ASS’N (June 28, 2017), [https://www.americanbar.org/groups/gpsolo/publications/gpsolo\\_ereport/2012/december\\_2012/evaluating\\_potential\\_jurors/](https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2012/december_2012/evaluating_potential_jurors/) [<https://perma.cc/6Z3N-UJXY>].

<sup>19</sup> *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 871 (2017).

<sup>20</sup> *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (attorneys are prohibited from striking a juror solely on account of the juror’s race).

<sup>21</sup> *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616 (1991) (race-based exclusions are impermissible in the civil context); *Powers v. Ohio*, 499 U.S. 400, 416 (1991) (race-based challenges can be made irrespective of the defendant’s race); *Georgia v. McCollum*, 505 U.S. 42, 56 (1992) (criminal defendants, in addition to prosecutors, are prohibited from excluding jurors on the basis of race); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994) (gender-based exclusions are impermissible).

<sup>22</sup> *Peña-Rodriguez*, 137 S. Ct. at 867 (“The duty to confront racial animus in the justice system is not the legislature’s alone. Time and again, this Court has been called upon to enforce the Constitution’s guarantee against state-sponsored racial discrimination in the jury system.”).

<sup>23</sup> See *supra* notes 19–20; see also *Peña-Rodriguez*, 137 S. Ct. at 869 (the no-impeachment rule does not bar judicial inquiry into racially charged jury deliberations).

<sup>24</sup> Franklin Strier & Donna Shestowsky, *Profiling the Profilers: A Study of the Trial Consulting Profession, Its Impact on Trial Justice and What, If Anything, to Do About It*, 1999 WIS. L. REV. 441, 452 (1999).

better position to elicit juror biases, but regardless of *Batson* and its progeny, they are free to conduct trial research based on ageism, sexism, and racism.

This note argues that because trial consultants are integral members of the jury system, the field of trial consulting must be significantly more regulated in order to align with the Supreme Court's holdings in *Batson v. Kentucky* and *Peña-Rodriguez v. Colorado*. Part I reviews the implementation of psychology into the legal system, detailing the origin of the trial consulting field, the job description of the modern trial consultant, and the critiques often associated with the profession. This Part also includes a brief overview of the venire<sup>25</sup> process, highlighting the controversial nature of peremptory challenges. Part II addresses the evolution of *Batson v. Kentucky*, holding that discriminatory biases have no place in the courtroom. This Part also discusses the recent Supreme Court holding in *Peña-Rodriguez v. Colorado*, further iterating the need to remove discrimination in the modern jury system but focusing on the biases of jury members rather than the biases of attorneys. Part III explores the lack of formal regulations governing the trial consulting field and the subsequent effects of the profession's limitless boundaries. Finally, to address the deliberate impaneling of an impartial jury, Part IV proposes that trial consultants should offer services during the jury selection phase only when appointed by the court rather than by one of the adversarial parties. Trial consultants can improve the constitutional fairness of a jury trial, but to combat the consultants advertising as experts without any formal training—including those relying solely on unfounded prejudices—this Part also suggests the creation of a state licensing body.

## I. INFUSING PSYCHOLOGY INTO THE LEGAL SYSTEM

### A. *The Origin of Trial Consulting*

Scientific jury selection, a sub-category of trial consulting, dates back to the early 1970s from the infamous case *United States v. Ahmad*, better known as the “Harrisburg Seven” trial.<sup>26</sup> The government indicted seven individuals who actively opposed

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<sup>25</sup> The venire is the “panel from which a jury is to be selected.” *Venire*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/venire> [https://perma.cc/7P7P-UJ5H].

<sup>26</sup> See *United States v. Ahmad*, 347 F. Supp. 912 (M.D. Pa. 1972); see also VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 81 n.3 (1986); Jeremy W. Barber, Note, *The Jury Is Still Out: The Role of Jury Science in the Modern American Courtroom*, 31 AM. CRIM. L. REV. 1225, 1232–33 (1994).

the Vietnam War “for conspiring to blow up heating tunnels in Washington, smuggling letters in and out of prison, and various other counts.”<sup>27</sup> Although there were multiple venues where the case could have been tried, the government brought the indictment in Harrisburg, Pennsylvania, a notably conservative city unlikely to sympathize with the defendants.<sup>28</sup> “Jay Schulman, a . . . sociologist and anti-war activist . . . believed the ‘scales of justice were by no means balanced in this case.’”<sup>29</sup>

To balance the scales, Schulman offered to assist the defense, “introduc[ing] the notion of a partnership between the social sciences and the law.”<sup>30</sup> Typically, the prosecutor and defense counsel pose questions to a pool of jurors, and based on prospective jurors’ responses, the attorneys strike the jurors they believe will be unfair or unsympathetic to their position.<sup>31</sup> Schulman doubted the accuracy of a lawyer’s gut instinct and surveyed the local community to study the correlations between a person’s demographic and their view on the case.<sup>32</sup> Although “[c]rude pretrial surveys showed an eighty percent likelihood that a random jury would convict,”<sup>33</sup> Schulman narrowed in on “characteristics of the individual jurors” and “potential group dynamics” to identify ideal jurors.<sup>34</sup> “[T]he jury hung on all of the most serious charges,” and the verdict is often attributed to the incorporation of social science in the *voir dire* process.<sup>35</sup>

The field of trial consulting was born with the Harrisburg Seven trial, and now, “[i]t’s gotten to the point where if the case is large enough, it’s almost malpractice not to use [trial

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<sup>27</sup> See Barber, *supra* note 26, at 1232.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* (quoting Jay Schulman et al., *Recipe for a Jury*, in *IN THE JURY BOX* 13, 16 (Lawrence S. Wrightsman et al. eds., 1987)).

<sup>30</sup> *Id.* at 1232–33.

<sup>31</sup> For a thorough discussion on attorney-conducted voir dire, including an overview of the strategies commonly employed by attorneys and the criticisms associated with those techniques, see Reid Hastie, *Is Attorney-Conducted Voir Dire an Effective Procedure for the Selection of Impartial Juries?*, 40 AM. U. L. REV. 703, 704 (1991).

<sup>32</sup> Barber, *supra* note 26, at 1233 (Schulman “interviewed 840 people over the telephone and followed up with an additional 252 in-depth face-to-face interviews. Schulman and his associates questioned the respondents about their attitudes towards such issues as religion, education, books and magazines, government, and war resistance. They then rated the potential jurors on a scale of desirability from one to five. The defense then sought to remove the ‘fives’ during voir dire, either for-cause or by using its peremptory strikes.” (footnotes omitted)).

<sup>33</sup> Wedel, *supra* note 11, at 310.

<sup>34</sup> See Barber, *supra* note 26, at 1233.

<sup>35</sup> *Id.*; see also Homer Bigart, *The Nation*, N.Y. TIMES (Apr. 9, 1972), <https://www.nytimes.com/1972/04/09/archives/a-strategy-that-backfired-berrigan-case.html> [<https://perma.cc/397W-GQDE>].

consultants].”<sup>36</sup> Despite its inception nearly four decades ago, there are barely any regulations monitoring the formal implementation of psychology into this legal proceeding.

### *B. An Overview of Trial Consultant Services and its Critiques*

Since the Harrisburg Seven trial, an entire field has emerged.<sup>37</sup> Attorneys now hire trial consultants to “replace . . . guesses and intuitions about members of the venire [for] empirical studies that connect expected biases with actual data about the jury pool.”<sup>38</sup> Professional trial consultants are often “non-lawyers who have acquired their expertise in the social sciences.”<sup>39</sup> Instead of focusing on their client’s legal theory, consultants offer a psychological perspective by “focus[ing] on the central issues and recogniz[ing] the differences between the lawyer’s approach (the ‘legalities’) and the juror’s perspective in which facts, motives and juror experiences are even more important than the ‘law’ per se.”<sup>40</sup> This perspective, however, comes with a high price tag. Trial consultants often charge “\$1,000 to \$5,000 per day depending on [their professional] experience.”<sup>41</sup> But if services include the creation of a focus group or a mock trial to analyze the effects of the case on a random pool of individuals, services can cost as much as \$25,000 to \$50,000.<sup>42</sup> Despite the high price, “[n]o self-respecting trial lawyer will go through the process of jury selection in an important case without the assistance of highly paid trial consultants.”<sup>43</sup>

Trial consulting services often fall into one of four categories, depending on the stage of litigation: (1) pretrial research, (2) jury selection, (3) courtroom presentation and strategy, and (4) post-trial services.<sup>44</sup> To gather pretrial research, the consultant assesses the community from which the jury will be selected in order “to get a sense of the prevalent values and views,” often through “community attitude surveys,

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<sup>36</sup> Strier & Shestowsky, *supra* note 24, at 443 (alteration in original) (quoting Stephen J. Adler, *Litigation Science: Consultants Dope out the Mysteries of Jurors for Clients Being Sued*, WALL ST. J., Oct. 24, 1989, at 1).

<sup>37</sup> Barber, *supra* note 26, at 1234.

<sup>38</sup> *Id.* at 1231.

<sup>39</sup> ROBERT L. HAIG, 4 N.Y. PRACTICE SERIES—COMMERCIAL LITIGATION IN NEW YORK STATE COURTS § 37:11 (4th ed. 2017).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Strier & Shestowsky, *supra* note 24, at 443 (alteration in original) (internal quotation marks omitted).

<sup>44</sup> *Id.* at 451–55.

focus groups, and mock trial simulations.”<sup>45</sup> The second category, jury selection, involves intense scrutiny of prospective and actual jurors.<sup>46</sup> Trial consultants investigate prospective jurors’ backgrounds, craft *voir dire* questions likely to deliver unguarded responses, and observe jurors’ candid courtroom demeanor.<sup>47</sup> The goal is to ascertain how the jurors will respond to the details of the case.<sup>48</sup>

The third category of trial consulting services, “courtroom presentation and strategy,” concerns the overall impression that the lawyers’ case leaves on the jurors.<sup>49</sup> Services include “assistance with opening and closing arguments, witness preparation, courtroom observation, shadow juries, developing case theory and presentation, and demonstrative evidence.”<sup>50</sup> The last category, post-trial services, is typically composed of “post-trial juror interviews.”<sup>51</sup> Although the interviews do not affect the trial at hand, these sessions “provide valuable feedback to the consultants as to hypothesis-testing and validation or rejection of trial tactics and strategy.”<sup>52</sup> Trial consultants offer an array of services, but their role during the jury selection process, also known as the *venire* process, sparks debate.

The controversy regarding a trial consultant’s role during the jury selection phase hinges on the field’s effectiveness and the overall fairness of allowing the practice to exist.<sup>53</sup> “[B]oth lawyers and social scientists . . . have expressed skepticism regarding the ability of psychologist consultants to be of any real assistance in winning cases.”<sup>54</sup> Many factors are at play during a trial, such as the evidence presented, the credibility of the witnesses, and the attorneys’ approaches.<sup>55</sup> Indeed, it is impossible “to isolate the effectiveness” of these factors against the importance of the jurors selected to serve.<sup>56</sup> As one scholar stated, “Although jury consultants claim high success rates,

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<sup>45</sup> *Id.* at 452 (footnotes omitted).

<sup>46</sup> *Id.* at 453–54; see Hartje, *supra* note 10, at 493–94.

<sup>47</sup> See Hartje, *supra* note 10, at 494; see also Strier & Shestowsky, *supra* note 24, at 453–54.

<sup>48</sup> See Hartje, *supra* note 10, at 494.

<sup>49</sup> Strier & Shestowsky, *supra* note 24, at 454–55.

<sup>50</sup> *Id.* at 455.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> See Dennis P. Stolle et al., *The Perceived Fairness of the Psychologist Trial Consultant: An Empirical Investigation*, 20 L. & PSYCHOL. REV. 139, 142 (1996); see also Audrey Cleary, *Scientific Jury Selection: History, Practice, and Controversy*, 28 CONCEPT: AN INTERDISC. J. OF GRADUATE STUD. 1, 5 (2005) <https://concept.journals.villanova.edu/article/viewFile/255/219> [<https://perma.cc/29T9-WGE5>].

<sup>54</sup> Stolle et al., *supra* note 53, at 143.

<sup>55</sup> See Cleary, *supra* note 53, at 5.

<sup>56</sup> Cleary, *supra* note 53, at 6.

little research has been conducted on the actual effect jury consultants have in the outcome of a case.”<sup>57</sup> Nevertheless, the field of trial consulting has been “thriv[ing] in the marketplace” over the last few decades, suggesting that many lawyers trust that the field is effective.<sup>58</sup>

Debate also centers on the field’s ethics.<sup>59</sup> Critics argue that consultants diminish the “appearance of justice” and instead instill an “appearance of manipulation” because they appear to be tampering with the impartiality of the random jury.<sup>60</sup> Furthermore, because trial consultant services can be expensive, only select litigants have access: large corporations and the wealthy.<sup>61</sup> It is a tale as old as time that wealthy litigants are at an advantage,<sup>62</sup> but turning a blind eye to imbalances in the jury selection phase raises serious constitutional concerns, such as the right to a fair trial by an impartial jury. This note asserts that a trial consultant’s role during the venire process should be reevaluated.

### C. *The Venire Process*

The Sixth Amendment to the United States Constitution guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed.”<sup>63</sup> Jurors are to be randomly selected from “a fair cross section of the community.”<sup>64</sup> To determine which jurors are

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<sup>57</sup> See Hartje, *supra* note 10, at 492.

<sup>58</sup> Stolle et al., *supra* note 53, at 146.

<sup>59</sup> See *id.* at 147.

<sup>60</sup> Hartje, *supra* note 10, at 502–03. Examples of particularly problematic juror tampering include the “poison pill” strategy,” by which trial consultants deliberately select jurors who will hate each other in order to secure a mistrial. See Hartje, *supra* note 10, at 502–03; see also Strier & Shestowsky, *supra* note 24, at 444 (The trial consultant “deliberately picked jurors ‘who would explode, who would hate each other. That’s what you want to do in a criminal case when it is obvious that people are guilty. You go for personalities.’ Then, ‘you hope the personalities will combust.” (quoting Christine Evans & Don Van Natta, Jr., *The Verdict on Juries: Only Human*, MIAMI HERALD, May 2, 1993, at A1)).

<sup>61</sup> See Stolle et al., *supra* note 53, at 147 (“The argument against trial consulting typically put forth by journalists is that if the use of a trial consultant can provide a litigant with an advantage, only large corporations and wealthy individuals will have access to this high-priced advantage, leaving the average litigant with some form of second-class justice.”).

<sup>62</sup> See Albert Yoon, *The Importance of Litigant Wealth*, 59 DEPAUL L. REV. 649, 650 (2010) (“[L]itigation favors the ‘haves’ over the ‘have-nots.’ . . . [T]he haves, typically wealthy litigants, are often repeat participants who understand the nuances of litigation; the have-nots are less wealthy litigants, often ‘one-shotters’ who are much less sophisticated. In litigation that pairs the haves against the have-nots, the former are more likely to prevail.” (footnotes omitted)).

<sup>63</sup> U.S. CONST. amend. VI.

<sup>64</sup> 28 U.S.C. § 1861 (2012) (“It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries

qualified to sit on a particular case, the prosecution and the defense question potential jurors, sometimes with the assistance of a trial consultant, in a process known as *voir dire*.<sup>65</sup>

While questioning potential jurors, the prosecution and the defense have the right to challenge a juror's candidacy either by (1) a challenge for cause or (2) a peremptory challenge.<sup>66</sup> Litigants are often offered an unlimited number of challenges for cause, but a specified number of peremptories.<sup>67</sup> When exercising a challenge for cause, "the party must state the specific reason for the challenge, and the court must find the challenge warranted."<sup>68</sup> A peremptory challenge, on the other hand, is essentially "the right of a disputant to veto an otherwise qualified juror"<sup>69</sup> *without* providing a concrete explanation indicating why the candidate is unfit to serve.<sup>70</sup> Despite the peremptory challenge's longstanding history in the United States, critics argue that the peremptory challenge welcomes unconstitutional conduct.<sup>71</sup>

Because the jury selection stage is just as adversarial as any other part of a trial,<sup>72</sup> instead of exercising peremptory challenges to remove impartial candidates from the jury, parties often utilize these challenges as an opportunity to seat a favorable

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selected at random from a fair cross section of the community in the district or division wherein the court convenes."); *see also* N.Y. CT. R. § 128.6 (McKinney 2018) ("Trial jurors and grand jurors shall be selected for summoning at random from prospective jurors previously qualified for service.").

<sup>65</sup> *See supra* note 12.

<sup>66</sup> Carol A. Chase & Colleen P. Graffy, *A Challenge for Cause against Peremptory Challenges in Criminal Proceedings*, 19 LOY. L.A. INT'L & COMP. L.J. 507, 507 (1997); *see also* Hatoum, *supra* note 12, at 169 ("If a juror is unable to objectively weigh the evidence due to a bias, one of the sides would ask that the juror be struck for 'cause.' . . . Peremptory strikes are discretionary strikes that attorneys use to prevent *any* potential juror from serving on the panel, within constitutional limits." (footnotes omitted)).

<sup>67</sup> *See* Hatoum, *supra* note 12, at 169 ("Lawyers have an unlimited number of strikes for cause, provided the lawyer can show a particular bias of a potential juror.") In federal court, there is a fixed number of peremptory challenges depending on the type of case. FED. R. CRIM. P. 24(b). In capital cases, "Each side has [twenty] peremptory challenges." *Id.* In other felony cases, "The government has [six] peremptory challenges and the defendant or defendants jointly have [ten]." *Id.* In misdemeanor cases, "Each side has [three] peremptory challenges." *Id.* "While the number of challenges for cause is unlimited, the number of peremptory challenges allowed to each side is usually fixed by statute." JAMES J. GOBERT, ET AL., *JURY SELECTION: THE LAW, ART AND SCIENCE OF SELECTING A JURY* § 8:2 (2018).

<sup>68</sup> Chase & Graffy, *supra* note 66, at 507–08.

<sup>69</sup> Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 814 (1997).

<sup>70</sup> Chase & Graffy, *supra* note 66, at 508.

<sup>71</sup> Hoffman, *supra* note 69, at 835 n.142 (noting various constitutional arguments against peremptory challenges).

<sup>72</sup> Barber, *supra* note 26, at 1227–28 ("Despite the Sixth Amendment's edict, the adversarial climate of our legal system encourages neither defense nor prosecution attorneys to truly seek an impartial jury. Instead, our system assumes that the adversarial struggle itself will foster a climate that produces impartial juries." (footnote omitted)).

jury that is likely to sympathize with their client.<sup>73</sup> That being said, without having to provide an explanation for the challenge, “prejudices and biases go largely unchecked,”<sup>74</sup> possibly violating the Fourteenth Amendment.<sup>75</sup> A law professor at the University of Chicago believes “we have captured the worst of two worlds, creating burdensome, unnecessary and ineffective jury controls at the front end of the criminal trial while failing to implement badly needed controls at the back end.”<sup>76</sup> To illustrate this point, he notes, “The Equal Protection Clause<sup>77</sup> says in essence, ‘When the government treats people differently, it has to have a reason.’ The peremptory challenge says in essence, ‘No, it doesn’t.’”<sup>78</sup> One trial judge, advocating for the complete abolition of peremptory challenges, asserted that “the very notion of peremptory challenges is in hopeless conflict with our ideals of what an impartial jury is and how it should be selected.”<sup>79</sup>

Modern studies support the notion that peremptory challenges are often motivated by discriminatory biases. One study analyzed whether the average capital jury represents the locale’s population, with regard to race and gender, and whether the use of peremptory challenges directly affected this representation.<sup>80</sup> Regrettably, the study was “consistent with many previous studies’ findings indicating that capital jury selection procedures serve to systematically siphon off women and African-Americans.”<sup>81</sup> Researchers determined that the “prosecutors’ use of peremptory strikes was motivated by race, and to a lesser extent, gender.”<sup>82</sup> The Equal Justice Initiative, a non-profit law organization, also reviewed literature and data

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<sup>73</sup> Chase & Graffy, *supra* note 66, at 508 (“Indeed, it is now evident that trial attorneys primarily use peremptory challenges to ‘stack the deck’ and seat a favorable, rather than an impartial, jury. Attorneys exercise peremptory challenges in order to ‘de-select’ jurors who, while not biased, appear difficult to persuade. These peremptory challenges . . . are often based on ethnic, religious, cultural, or socioeconomic factors . . .”).

<sup>74</sup> *Id.*

<sup>75</sup> U.S. CONST. amend. XIV.

<sup>76</sup> 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, 154–55 (1989).

<sup>77</sup> “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

<sup>78</sup> Alschuler, *supra* note 76, at 203.

<sup>79</sup> Hoffman, *supra* note 69, at 812. Peremptory challenges lie at the center of debate “in the academy and in the courts.” *Id.* at 809. In 1995, a survey of federal trial judges revealed that “[fifteen] percent of all respondents [preferred] the [complete] abolition of peremptory challenges . . . [Nineteen] percent favored some modification of [the] current rules.” *Id.* at 810, n.2.

<sup>80</sup> Ann M. Eisenberg, Amelia Courtney Hritz, Caisa Elizabeth Royer & John H. Blume, *If It Walks Like Systematic Exclusion and Quacks Like Systematic Exclusion: Follow-Up on Removal of Women and African-Americans in Jury Selection in South Carolina Capital Cases, 1997–2014*, 68 S.C. L. REV. 373, 380–81 (2017).

<sup>81</sup> *Id.* at 388.

<sup>82</sup> *Id.* at 389.

focusing specifically on the exclusion of qualified racial minorities.<sup>83</sup> They found that “[f]rom 2005 to 2009, in cases where the death penalty has been imposed, prosecutors in Houston County, Alabama . . . used peremptory strikes to remove 80% of the African Americans qualified for jury service.”<sup>84</sup> The Supreme Court addressed the unconstitutionality of this type of conduct in the mid-1980s in the landmark case, *Batson v. Kentucky*.<sup>85</sup>

## II. THE SUPREME COURT ADDRESSES ABUSE WITHIN THE COURTROOM

### A. *Batson v. Kentucky: Confronting Attorney Biases*

In 1986, the Supreme Court delivered an opinion condemning the use of racially discriminatory peremptories. After being convicted by an all-white jury, *Batson*, a black man, argued that by exercising “peremptory challenges to strike all” African Americans from the venire, the prosecutor violated *Batson*’s constitutional rights.<sup>86</sup> The Supreme Court agreed.<sup>87</sup>

The majority opinion, written by Justice Powell, addressed the overarching dangers that arise when the government dismisses citizens from jury service merely because of their race.<sup>88</sup> The Court attributed such practice to be the precise “evil the Fourteenth Amendment was designed to cure.”<sup>89</sup> Allowing discrimination into the courtroom—the forum credited to the pursuit of justice—blatantly infringes on the rights of defendants and jurors, and greatly “undermine[s] public confidence in the fairness of [the] system.”<sup>90</sup> The defendant loses the right to be tried by a fair cross section of peers.<sup>91</sup> Jurors are reduced to nothing but the color of their skin, despite the fact that “[a]

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<sup>83</sup> *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, EQUAL JUSTICE INITIATIVE, 14 (2010) <https://eji.org/sites/default/files/illegal-racial-discrimination-in-jury-selection.pdf> [<https://perma.cc/8MSK-T9PA>].

<sup>84</sup> *Id.*

<sup>85</sup> *Batson v. Kentucky*, 476 U.S. 79, 83–84 (1986).

<sup>86</sup> *Id.* at 83.

<sup>87</sup> *Id.* at 84.

<sup>88</sup> *Id.* at 82, 85–87. In 1880, the Supreme Court addressed many similar concerns and ultimately held that racial discrimination in jury selection violates the Equal Protection Clause. *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880). “[T]he Court invalidated a state statute that provided that only white men could serve as jurors” and “laid the foundation for the Court’s unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn.” *Batson*, 476 U.S. at 85, 88.

<sup>89</sup> *Batson*, 476 U.S. at 85.

<sup>90</sup> *Id.* at 87.

<sup>91</sup> *Id.* at 86.

person's race simply 'is unrelated to his fitness as a juror.'<sup>92</sup> And members of the community doubt that constitutional rights are actually "secure[d] to all."<sup>93</sup> In an attempt to preserve the integrity of the judicial system, "enforce[] the mandate of equal protection and further[] the ends of justice,"<sup>94</sup> the Court adopted a new standard to apply to all criminal trials.

The Court developed a three-part test to unveil discrimination masked by peremptory challenges. First, the defendant must show that he or she belongs to "a cognizable racial group" and that the prosecutor used peremptory challenges to remove other members of that group from the jury.<sup>95</sup> The defendant must establish that the relevant facts and circumstances suggest that the prosecutor used peremptory challenges to exclude potential jurors merely because of their race.<sup>96</sup> Second, "[o]nce the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors."<sup>97</sup> As stated by the Court, "Though this requirement imposes a limitation in some cases on the full peremptory character of the historic challenge, we emphasize that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause."<sup>98</sup> Third, the trial judge determines whether the defendant has demonstrated the State removed jurors based on purposeful discrimination.<sup>99</sup> The majority's attempt to modernize peremptory challenges was a step in the right direction, but Justice Marshall immediately questioned its applicability in his concurring opinion.

In a famous concurrence, Justice Marshall doubted the practicality of the majority's three-part test and, instead, urged the complete abolition of peremptory challenges.<sup>100</sup> Marshall stated that, "Merely allowing defendants the opportunity to challenge the racially discriminatory use of peremptory

<sup>92</sup> *Id.* at 87 (quoting *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)).

<sup>93</sup> *Id.* at 87-88.

<sup>94</sup> *Id.* at 99.

<sup>95</sup> *Id.* at 96. The *Batson* test originally only applied to impermissible discrimination on account of race, but has since been considerably expanded. See Hoffman, *supra* note 69, at 834-35.

<sup>96</sup> *Batson*, 476 U.S. at 96.

<sup>97</sup> *Id.* at 97.

<sup>98</sup> *Id.* Many critics find that this step "render[s] *Batson*'s constitutional protections illusory" because of how easy it is for a prosecutor to "assert facially neutral reasons for striking a juror." See, e.g., Paul H. Schwartz, Comment, *Equal Protection in Jury Selection? The Implementation of Batson v. Kentucky in North Carolina*, 69 N.C. L. REV. 1533, 1549 (1990).

<sup>99</sup> *Batson*, 476 U.S. at 98.

<sup>100</sup> *Id.* at 102-03 (Marshall, J., concurring) ("The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely.").

challenges in individual cases will not end the illegitimate use of the peremptory challenge.”<sup>101</sup> Indeed, the majority’s three-part test only protects defendants from “flagrant” challenges that support a finding of “a prima facie case.”<sup>102</sup> If a prosecutor strikes only a *few* jurors on account of race, the defendant will struggle to establish the first step of the test.<sup>103</sup> Thus, discrimination can go unremedied so long as prosecutors “hold that discrimination to an ‘acceptable’ level.”<sup>104</sup>

Justice Marshall also cast doubt on the second step of the test. Marshall expounded that a prosecutor can effortlessly assert a facially neutral reason for striking a juror and it is unlikely trial courts will question any reasons provided.<sup>105</sup> “If such easily generated explanations are sufficient to discharge the prosecutor’s obligation to justify his strikes on nonracial grounds, then the protection erected by the Court today may be illusory.”<sup>106</sup> Although Justice Marshall “applaud[ed] the Court’s holding,” according to him, the only way to expose racial biases masked by peremptory challenges is to ban peremptories entirely.<sup>107</sup> The dissenting justice, on the other hand, opposed the notion in its entirety that peremptory challenges inspired unjust discrimination.

Justice Rehnquist took a very different approach and found “simply nothing ‘unequal’ about the State’s using its peremptory challenges to strike [African Americans] from the jury in cases involving [African American] defendants.”<sup>108</sup> He claimed that his proposition was supported so long as such use “applie[s] across-the-board to jurors of all races and nationalities.”<sup>109</sup> Justice Rehnquist’s reasoning has been deeply criticized.<sup>110</sup> “[G]iven the unfortunate

<sup>101</sup> *Id.* at 105.

<sup>102</sup> *Id.*

<sup>103</sup> *See id.*

<sup>104</sup> *Id.* Justice Marshall also addresses the subtle ways that State officials kept African Americans off juries throughout history. To further his point, he includes statistics mentioned in several cases. *See id.* at 103 (citing several cases in which “Black defendants . . . compile[d] statistics showing the extent of [the] practice”).

<sup>105</sup> *Id.* at 106.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 108.

<sup>108</sup> *Id.* at 137 (Rehnquist, J., dissenting).

<sup>109</sup> *Id.* at 138. His justification was that “[t]he use of group affiliations, such as age, race, or occupation, as a ‘proxy’ for potential juror partiality, based on the assumption or belief that members of one group are more likely to favor defendants who belong to the same group, has long been accepted as a legitimate basis for the State’s exercise of peremptory challenges.” *Id.*

<sup>110</sup> *See Powers v. Ohio*, 499 U.S. 400, 410 (1991) (“We reject as well the view that race-based peremptory challenges survive equal protection scrutiny because members of all races are subject to like treatment, which is to say that white jurors are subject to the same risk of peremptory challenges based on race as are all other jurors. The suggestion that racial classifications may survive when visited upon all persons is no more authoritative today than the case which advanced the theorem, *Plessy v. Ferguson*, 163 U.S. 537 (1896). This idea has no place in our modern equal protection jurisprudence. It is

history of racism in our country, it is naïve to suggest that the unencumbered use of peremptory challenges will result in equal discrimination against everyone.”<sup>111</sup> Turning a blind eye to the abuse that goes hand-in-hand with racially motivated peremptory challenges would permit, and likely invite, invidious discrimination to enter the courtroom. After the entire opinion was published, the majority’s test only applied to criminal defendants alleging that the State used peremptories in a racially discriminatory fashion, but the test is now triggered in an array of contexts.<sup>112</sup>

### B. *Batson’s Progeny*

Since the inception of the *Batson* test in 1986, courts expanded its scope considerably. Immediately following the *Batson* decision, the test only applied in criminal cases where the State used a peremptory challenge to strike a juror of the same race as the defendant. In the early 1990s, however, application of the test “flourished”<sup>113</sup> and now may be employed (1) in civil proceedings,<sup>114</sup> (2) by either the prosecution or the defense,<sup>115</sup> (3) irrespective of the race or gender of the defendant,<sup>116</sup> and (4) to confront discrimination based on race *or* gender.<sup>117</sup>

In 1991, the Supreme Court held in *Edmonson v. Leesville Concrete Co.* that the *Batson* test applies in the civil context.<sup>118</sup> A private litigant’s use of peremptory challenges in civil cases constitutes state action because it implicates and requires the assistance of the court.<sup>119</sup> Thus, *Batson* applies with equal force in civil proceedings and “courts must entertain a

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axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree.”); see also Karen M. Bray, Comment, *Reaching the Final Chapter in the Story of Peremptory Challenges*, 40 UCLA L. REV. 517, 562–63 (1992) (“In reality, members of minority races would more often be peremptorily excused because of misperceptions about their qualifications to serve as jurors.”).

<sup>111</sup> Bray, *supra* note 110, at 562–63.

<sup>112</sup> See Section II.B.

<sup>113</sup> Hoffman, *supra* note 69, at 835.

<sup>114</sup> *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 616 (1991).

<sup>115</sup> *Georgia v. McCollum*, 505 U.S. 42, 59 (1992).

<sup>116</sup> *Powers v. Ohio*, 499 U.S. 400, 402 (1991).

<sup>117</sup> *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994).

<sup>118</sup> “Thaddeus Donald Edmonson, a construction worker, was injured in a jobsite accident . . . [and] sued Leesville Concrete Company for negligence.” *Edmonson*, 500 U.S. at 616. “Leesville used two of its three peremptory challenges authorized by statute to remove black persons from the prospective jury.” *Id.* “[T]he [final] jury included 11 white persons and 1 black person.” *Id.* at 617. When Edmonson requested that the court “require Leesville to articulate a race-neutral explanation for striking the two [African American] jurors,” the Court denied the request, holding that “*Batson* [did] not apply in civil proceedings.” *Id.*

<sup>119</sup> *Id.* at 620–21.

challenge to a private litigant's racially discriminatory use of peremptory challenges in a civil trial."<sup>120</sup>

The following year, the Supreme Court expanded the parameters of the *Batson* test even further in *Georgia v. McCullum*.<sup>121</sup> The Court held that the Constitution prohibits defendants from employing discriminatory peremptory challenges, permitting the State to raise a *Batson* challenge just as a criminal defendant would.<sup>122</sup> The Court firmly held that "the exercise of a peremptory challenge must not be based on either the race of the juror or the racial stereotypes held by the party."<sup>123</sup>

Applying the basic premise that peremptories cannot be grounded in racial stereotypes, in *Powers v. Ohio*, the Supreme Court held that "a criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded jurors share the same race."<sup>124</sup> The Court unambiguously rejected the State's argument that "the race of the objecting defendant constitutes a relevant precondition for a *Batson* challenge."<sup>125</sup> The Court reasoned that "[t]o bar petitioner's claim because his race differs from that of the excluded jurors would be to condone the arbitrary exclusion of citizens from the duty, honor, and privilege of jury service."<sup>126</sup>

In 1994, the Supreme Court held in *J.E.B. v. Alabama* that "gender, like race, is an unconstitutional proxy for juror competence and impartiality."<sup>127</sup> The State argued that "gender

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<sup>120</sup> *Id.* at 624, 630.

<sup>121</sup> In *Georgia v. McCollum*, two white defendants were indicted for "aggravated assault and simple battery" for allegedly beating two African Americans. *Georgia v. McCollum*, 505 U.S. 42, 44 (1992). Before *voir dire*, the State "moved to prohibit respondents from exercising peremptory challenges in a racially discriminatory manner." *Id.* at 44–45. "The trial judge denied the State's motion, holding that [the law does not] prohibit[] criminal defendants from exercising peremptory strikes in a racially discriminatory manner." *Id.* at 45.

<sup>122</sup> *Id.* at 59.

<sup>123</sup> *Id.*

<sup>124</sup> *Powers v. Ohio*, 499 U.S. 399, 402 (1991). "Larry Joe Powers, a white man, was indicted . . . on two counts of aggravated murder and one count of attempted aggravated murder." *Id.* at 402. "The record [did] not indicate that race was somehow implicated in the crime or the trial." *Id.* at 403. Nevertheless, during *voir dire*, the State used six out of nine peremptory challenges to strike African Americans from the prospective jury. *Id.* Powers objected each time, requesting that the court compel the prosecutor to provide a race-neutral justification for the challenge, but the trial judge overruled each objection. *Id.*

<sup>125</sup> *Id.* at 406.

<sup>126</sup> *Id.* at 415.

<sup>127</sup> *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994). On behalf of a mother, the "State of Alabama filed a complaint for paternity and child support against petitioner J.E.B.". *Id.* During *voir dire*, "[t]he State . . . used [nine] of its [ten] peremptory strikes to remove male jurors." *Id.* The petitioner protested the State's use of peremptory challenges, arguing that "they were exercised against male jurors solely on the basis of gender" and therefore did not follow *Batson's* "logic and reasoning." *Id.* The court denied

discrimination in this country . . . has never reached the level of discrimination against African-Americans, and therefore gender discrimination, unlike racial discrimination, is tolerable in the courtroom.”<sup>128</sup> The Court directly rejected this argument and found that “the similarities between the experiences of racial minorities and women, in some contexts, overpower those differences.”<sup>129</sup> The opinion highlighted the damaging effects of the State’s argument:

Discrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process. The litigants are harmed by the risk that the prejudice that motivated the discriminatory selection of the jury will infect the entire proceedings. . . . The community is harmed by the State’s participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders.<sup>130</sup>

Ultimately, the Court held that “[f]ailing to provide jurors the same protection against gender discrimination as race discrimination could frustrate the purpose of *Batson*,”<sup>131</sup> and expanded the *Batson* test to apply to peremptories grounded in gender discrimination.<sup>132</sup> The Supreme Court articulated the flexibility of *Batson* but has only formally addressed racial and gender discrimination.<sup>133</sup>

In the decade following *Batson*, the Supreme Court stretched the doctrine’s confines significantly, but in 1994 missed the opportunity to bar peremptory challenges discriminating against religion and other classifications ordinarily subjected to heightened scrutiny. Edward Lee Davis, an African American, was indicted for aggravated robbery.<sup>134</sup> The State exercised a peremptory challenge to strike an African

the objection on the grounds that *Batson* did not protect gender-based challenges and “empaneled [an] all-female jury.” *Id.*

<sup>128</sup> *Id.* at 135 (alteration in original) (internal quotations omitted).

<sup>129</sup> *Id.* (internal quotations omitted).

We need not determine, however, whether women or racial minorities have suffered more at the hands of discriminatory state actors during the decades of our Nation’s history. It is necessary only to acknowledge that ‘our Nation has had a long and unfortunate history of sex discrimination,’ a history which warrants the heightened scrutiny we afford all gender-based classifications today.

*Id.* at 136 (citations omitted).

<sup>130</sup> *Id.* at 140 (citations omitted).

<sup>131</sup> *Id.* at 145.

<sup>132</sup> *Id.* at 146; see also Wedel, *supra* note 11, at 302.

<sup>133</sup> See Wedel, *supra* note 11, at 302 (“[C]ourts permit lawyers to excuse a potential juror because of her religion, astrological sign, or even smile as long as doing so does not subject her to racial or gender discrimination.”).

<sup>134</sup> *Davis v. Minnesota*, 114 S. Ct. 2120, 2120 (1994) (Thomas, J., dissenting) *denying cert. to State v. Davis* 504 N.W.2d 767 (Minn. 1993).

American man from the venire and Davis “objected on *Batson* grounds.”<sup>135</sup> “The prosecutor responded that she had struck the venireman because he was a Jehovah’s Witness and explained that “[i]n my experience Jehovah Witness [sic] are reluctant to exercise authority over their fellow human beings in this Court House.”<sup>136</sup> The prosecutor admitted that she used her challenge solely because of a religious stereotype she believed in. Nevertheless, the trial judge accepted the explanation.<sup>137</sup> The Supreme Court of the United States denied the petition for a writ of certiorari, but Justice Thomas filed a dissenting opinion.<sup>138</sup> Applying the logic of *Batson* and *J.E.B.*, Justice Thomas questioned why a *Batson* challenge does not apply to all classifications that merit heightened scrutiny, including religion.<sup>139</sup> The Supreme Court has yet to address this inconsistency, but the law of many states now prohibit peremptory strikes grounded in discrimination against classifications accorded heightened scrutiny.<sup>140</sup>

### C. *Batson’s Influence on Trial Consulting Services*

*Batson* and its progeny limit lawyers from employing discriminatory peremptory challenges, but the Supreme Court has not addressed the impact of these holdings on the trial consulting field. Specifically, it is unclear whether a lawyer would be compelled to disclose research performed by trial consultants if an opposing party raises a *Batson* challenge.<sup>141</sup> To rebut the

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<sup>135</sup> *Id.* at 2120–21.

<sup>136</sup> *Id.* at 2121 (errors in original) (citing *State v. Davis*, 504 N.W.2d 767, 768 (Minn. 1993)).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 2120.

<sup>139</sup> *Id.* at 2121. Judicial review refers to the duty of the judiciary “to decide whether a law conflict[s] with the Constitution.” Jennifer L. Greenblatt, *Putting the Government to the (Heightened, Intermediate, or Strict) Scrutiny Test: Disparate Application Shows Not All Rights and Powers Are Created Equal*, 10 FLA. COASTAL L. REV. 421, 426 (2009) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 177–78 (1803)). Strict scrutiny and intermediate scrutiny are types of “heightened review.” *Id.* at 432. Strict scrutiny requires that the classification be narrowly tailored to serve a compelling government interest. To pass intermediate scrutiny, “the government must put forth an important interest (end) and show that the law at least bears a substantial relation to that interest (means).” *Id.* at 434.

<sup>140</sup> *State v. Purcell*, 18 P.3d 113, 122 (Ariz. Ct. App. 2001) (“*Batson* and *J.E.B.* . . . prohibit the use of peremptory strikes based upon one’s religious affiliation but not based upon one’s relevant opinions, although such opinions may have a religious foundation.”); *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.”); *People v. Langston*, 641 N.Y.S.2d 513, 513–14 (Sup. Ct. 1996) (*Batson* applied when peremptory challenge excluded juror because of his Islamic religion).

<sup>141</sup> Allan D. Krezminski, *Peremptory Challenges After Edmonson v. Leesville Concrete*, 65 WIS. LAW. 19, 50 (1992).

*Batson* challenge, the lawyer may seek to rely on the evidence gathered from its consultant. The lawyer will argue that there was no prejudicial influence because the lawyer simply followed the results produced by the consultant's research. Introducing this type of evidence, however, raises two issues. First, counsel has an ethical duty *not* to disclose a client's confidential communications.<sup>142</sup> Second, work product—including research performed by consultants—detailing trial preparation and strategy enjoys certain protections.<sup>143</sup>

Although these questions remain unanswered, the logic and reasoning behind the Supreme Court's holdings in *Batson* and the cases broadening *Batson* suggest a strong intolerance of bias as a reason to challenge a juror. If the data gathered from the trial consultant is rooted in prejudice, the lawyers relying on client confidentiality or work product protection are taking advantage of longstanding ethical rules. Indeed, using ethical rules to mask unethical conduct undermines the rules' entire spirit.<sup>144</sup> Recently, in *Peña-Rodriguez v. Colorado*, the Supreme Court expressed its willingness to expose discriminatory biases, even if doing so compromises seemingly inflexible courtroom procedure.

#### D. Peña-Rodriguez v. Colorado: *Exposing Jurors' Biases*

In 2017, the Supreme Court took a radical departure from precedent to further restrict biases within the jury system. *Batson* and its progeny focused on removing a litigant's biases when selecting a jury,<sup>145</sup> but *Peña-Rodriguez* targeted

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<sup>142</sup> Rule 1.6 of the ABA's Model Rules of Professional Conduct prohibits counsel from "reveal[ing] information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure" falls into an enumerated exception. MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 2018). [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_6\\_confidentiality\\_of\\_information/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information/) [<https://perma.cc/3CP2-82VA>].

<sup>143</sup> "[T]he general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order." *Hickman v. Taylor*, 329 U.S. 495, 512 (1947).

<sup>144</sup> This type of conduct directly conflicts with Rule 8.4(g) of the Model Rules (defining misconduct as "engag[ing] in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law"). MODEL RULES OF PROF'L CONDUCT r. 8.4 (AM. BAR ASS'N 2018).

<sup>145</sup> See *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (attorneys are prohibited from striking a juror solely on account of the juror's race).

the actual jurors.<sup>146</sup> By holding that jury deliberations may be subject to judicial review if there is evidence of biases,<sup>147</sup> the Supreme Court has narrowed in on another critical part of the jury system: the jury itself.

This case arose after a jury convicted a Hispanic defendant.<sup>148</sup> Although all jurors confirmed that they could be impartial,<sup>149</sup> it was immediately brought to the court's attention that this was not the case. Peña-Rodriguez's attorney spoke with several jurors after the trial and "two jurors remained to speak with counsel in private."<sup>150</sup> The two jurors informed counsel that one of the other jurors "expressed anti-Hispanic bias toward [the defendant] and [the] alibi-witness."<sup>151</sup> Specifically, the juror stated that "Mexican men . . . believe they could do whatever they wanted with women."<sup>152</sup> Among other anti-Hispanic statements, the juror explicitly said, "I think he did it because he's Mexican."<sup>153</sup> Counsel informed the court and obtained sworn affidavits from the two jurors.<sup>154</sup> Nevertheless, the court denied the motion for a new trial, reasoning that the juror deliberations were protected

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<sup>146</sup> See Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 869 (2017) (the no-impeachment rule does not bar judicial inquiry into racially charged jury deliberations).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 863.

<sup>149</sup> During *voir dire*, the judge and the attorneys "repeatedly asked whether [the prospective jurors] believed that they could be fair and impartial in the case." *Id.* at 861. The court distributed "[a] written questionnaire, ask[ing] if there was 'anything about you that you feel would make it difficult for you to be a fair juror.' . . . None of the empaneled jurors expressed any reservations," doubts or hesitations before or during the trial. *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

According to the two jurors, [the juror] told the other jurors that he "believed the defendant was guilty because, in [his] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women." The jurors reported that [the juror] stated his belief that Mexican men are physically controlling of women because of their sense of entitlement, and further stated, "I think he did it because he's Mexican and Mexican men take whatever they want." According to the jurors, [he] further explained that, in his experience, "nine times out of ten Mexican men were guilty of being aggressive toward women and young girls." Finally, the jurors recounted that [he] said that he did not find petitioner's alibi witness credible because, among other things, the witness was "an illegal." (In fact, the witness testified during trial that he was a legal resident of the United States.)

*Id.* at 862 (internal citations omitted).

<sup>152</sup> *Id.* at 862.

<sup>153</sup> *Id.* (internal quotation marks omitted).

<sup>154</sup> *Id.* at 861–62.

from inquiry under the Colorado Rule of Evidence<sup>155</sup> and “its federal counterpart.”<sup>156</sup>

Under the Federal Rules of Evidence, “[d]uring an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury’s deliberations.”<sup>157</sup> This rule, also known as the no-impeachment rule, has the ability to mask discriminatory biases, raising similar problems associated with peremptory challenges.<sup>158</sup> A primary objective of the no-impeachment rule is “to give substantial protection to verdict finality and to assure jurors that, once their verdict has been entered, it will not later be called into question based on the comments or conclusions they expressed during deliberations.”<sup>159</sup> The rule “promotes full and vigorous discussion” and “gives stability and finality to verdicts.”<sup>160</sup> Although there are well-founded reasons behind adopting the rule, there are also compelling reasons to relax it.

One such reason is that by providing such rigid insulation over the deliberation, the no-impeachment rule encourages jury verdicts to survive even in situations that appear to infringe on a defendant’s right to a fair trial. For example, in 1987, the Supreme Court allowed a jury verdict to stand even though jurors were under the influence of drugs and alcohol, and, consequently, “sleep[ing] through the afternoons”<sup>161</sup> while the trial was in session. Two jurors informed counsel that jurors were consuming alcohol, smoking marijuana, and ingesting cocaine during the trial’s lunch breaks.<sup>162</sup> The District Court concluded that the jurors’ testimony was inadmissible under the no-impeachment rule and denied the defendant an evidentiary hearing at which

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<sup>155</sup> *Id.*; COLO. REV. STAT. ANN. § 606(b) (West 2017) (“Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury’s deliberations or to the effect of anything upon his or any other juror’s mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith.”).

<sup>156</sup> *Peña-Rodriguez*, 137 S. Ct. at 862.

<sup>157</sup> FED. R. EVID. 606(b)(1).

[T]hree exceptions to this general exclusionary rule are listed in the text of the rule. The exceptions provide that jurors may testify about: (A) “extraneous prejudicial information” improperly brought to their attention, (B) “outside influences” improperly brought to bear on any juror and (C) a mistake on the verdict form.

Terrence W. McCarthy & Callie D. Brister, *The Newly-Created Racial Bias Exception to the General Rule That Precludes Jurors from Offering Testimony to Impeach Their Own Verdict*, 78 ALA. LAW. 284, 286 (2017) (citing FED. R. EVID. 606(b)(2)).

<sup>158</sup> See *supra* Section I.C.

<sup>159</sup> *Peña-Rodriguez*, 137 S. Ct. at 861.

<sup>160</sup> *Id.* at 865.

<sup>161</sup> *Tanner v. United States*, 483 U.S. 107, 113, 127 (1987).

<sup>162</sup> *Id.* at 113, 115.

the jurors would testify about the misconduct.<sup>163</sup> The Supreme Court affirmed because there are “long-recognized and very substantial concerns support[ing] the protection of jury deliberations from intrusive inquiry.”<sup>164</sup> Diverting from precedent, however, the Supreme Court developed an exception to the no-impeachment rule in *Peña-Rodriguez* to keep a tight rein on racial biases infiltrating the courtroom.

In *Peña-Rodriguez*, the Court acknowledged that the behavior in *Tanner* was “troubling and unacceptable,” but distinguished the two cases.<sup>165</sup> The Court justified the holding in *Tanner* because addressing *all* “irregularit[ies]” in the jury system would “expose it to unrelenting scrutiny,” acknowledging some of the advantages of the no-impeachment rule.<sup>166</sup> Nevertheless, “[t]he same cannot be said about racial bias, a familiar and recurring evil that, if left unaddressed, would risk systematic injury to the administration of justice.”<sup>167</sup> The Supreme Court yet again stressed the need to rid racial discrimination from the courtroom.

The Court made it clear, however, that “[n]ot every offhand comment” stemming from racial prejudice removes “the no-impeachment bar.”<sup>168</sup> To overcome the no-impeachment rule and allow for further judicial inquiry, there are a few hurdles to jump. First, “there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury’s deliberations and resulting verdict.”<sup>169</sup> Second, these statements “must tend to show that racial animus was a significant motivating factor in the juror’s vote to convict.”<sup>170</sup> It is then within the trial court’s discretion to determine whether the threshold has been met, but “[w]hen jurors disclose an instance of racial bias as serious as the one involved in [*Peña-Rodriguez*], the law must not wholly disregard its occurrence.”<sup>171</sup>

The *Peña-Rodriguez* court only harped on the need to rid *racial* discrimination from entering the courtroom. Although this holding is a step in the right direction, *all* unfounded prejudices should be grounds for an evidentiary hearing if the bias “cast[s] serious doubt on the fairness and impartiality of the jury’s

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<sup>163</sup> *Id.* at 113, 116.

<sup>164</sup> *Id.* at 127; *see also* McCarthy & Brister, *supra* note 157, at 287.

<sup>165</sup> *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 869.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 869–70.

deliberations and resulting verdict.”<sup>172</sup> Indeed, in his dissenting opinion, Justice Alito addressed this “sort of hierarchy of partiality or bias”<sup>173</sup> the majority appears to embrace:

Imagine two cellmates serving lengthy prison terms. Both were convicted for homicides committed in unrelated barroom fights. At the trial of the first prisoner, a juror, during deliberations, expressed animosity toward the defendant because of his race. At the trial of the second prisoner, a juror, during deliberations, expressed animosity toward the defendant because he was wearing the jersey of a hated football team. In both cases, jurors come forward after the trial and reveal what the biased juror said in the jury room. The Court would say to the first prisoner: “You are entitled to introduce the jurors’ testimony, because racial bias is damaging to our society.” To the second, the Court would say: “Even if you did not have an impartial jury, you must stay in prison because sports rivalries are not a major societal issue.”<sup>174</sup>

The evolution of *Peña-Rodriguez* will hopefully follow *Batson*’s footsteps: applying first to a limited circumstance grounded in racial bias and eventually expanding to a wider array of biases in a wider array of circumstances.<sup>175</sup>

The jurors’ biases in *Peña-Rodriguez* only came to light because two jurors felt compelled to inform the court.<sup>176</sup> The jurors easily could have remained silent. This raises another fundamental issue with the jury selection process: are lawyers able to successfully elicit the biases of potential jurors?

The effectiveness of attorney-conducted *voir dire* must be questioned when overtly biased jurors are still being selected to sit on the jury, even after being questioned by the lawyers. The outcome of a case relies on the jury selected.<sup>177</sup> That said, in 2016, the National Registry of Exonerations named 1,900 defendants in the United States convicted of crimes they did not commit.<sup>178</sup> Forty-seven percent of these defendants were African American.<sup>179</sup> One explanation for this staggering statistic is the “defense attorneys’ lack of resources to pay for expert

<sup>172</sup> *Id.* at 869.

<sup>173</sup> *Id.* at 883 (Alito, J. dissenting).

<sup>174</sup> *Id.*

<sup>175</sup> See *supra* Section II.B. Although it should be recognized that the Supreme Court has expanded *Batson* to target select biases, “many classes of people are stereotyped and discriminated against.” Wedel, *supra* note 11, at 307 (emphasis added).

<sup>176</sup> Peña-Rodriguez, 137 S. Ct. at 861.

<sup>177</sup> See, e.g., Steven C. Serio, Comment, *A Process Right Due? Examining Whether a Capital Defendant Has a Due Process Right to a Jury Selection Expert*, 53 AM. U. L. REV. 1143, 1147 (2004) (“Many scholars believe that most capital cases are won or lost during jury selection.”).

<sup>178</sup> SAMUEL R. GROSS ET AL. RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES 1 (2017) [hereinafter NAT’L REGISTRY OF EXONERATIONS].

<sup>179</sup> *Id.*

services.”<sup>180</sup> Lawyers often rely on gut instincts when selecting a jury and critics question their techniques.<sup>181</sup> Unlike lawyers, many trial consultants are specifically trained to evaluate a broader scope of potentially influential factors that may indicate the presence of bias.<sup>182</sup> Thus, hiring a trial consultant during the jury selection phase could elicit juror biases that would have otherwise gone undetected.

Every defendant should be entitled to a fair jury, but the stakes are raised for capital defendants.<sup>183</sup> The American Bar Association strongly urges defense counsel representing capital defendants to “seek[] expert assistance in the jury selection process.”<sup>184</sup> If for some reason counsel does not retain a trial consultant, he should nevertheless be familiar with strategies:

- (1) for exposing those prospective jurors who would automatically impose the death penalty following a murder conviction or finding that the defendant is death-eligible, regardless of the individual circumstances of the case;
- (2) for uncovering those prospective jurors who are unable to give meaningful consideration to mitigating evidence;
- and (3) for rehabilitating potential jurors whose initial indications of opposition to the death penalty make them possibly excludable.<sup>185</sup>

Although the American Bar Association notes that counsel should be familiar with these techniques, it is unclear how lawyers can master them. Thus, “[t]he challenge of capital cases has lawyers turning increasingly to consultants.”<sup>186</sup> Although there is an expectation that consultants are experts in jury selection, the field’s lack of regulations raises serious concerns.

### III. LIMITLESS BOUNDARIES FOR TRIAL CONSULTANTS

A trial consultant’s advice can be as critical as the presentation of a case by the attorney or the conversation among jurors during deliberation. A trial consultant’s use of discriminatory biases can be just as destructive as an attorney’s

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<sup>180</sup> Serio, *supra* note 177, at 1144.

<sup>181</sup> *Id.* at 1175–76; *see also* Hastie, *supra* note 31, at 708 (an observational study analyzing twenty-three jury trials led the researcher to determine “voir dire procedures [were] . . . ‘grossly ineffective’ in separating favorable from unfavorable jurors”).

<sup>182</sup> Strier & Shestowsky, *supra* note 24, at 445.

<sup>183</sup> “[S]takes are . . . high[]” because “it is not the defendant’s liberty, but his or her very life on the line.” Hatoum, *supra* note 12, at 185–86.

<sup>184</sup> Am. Bar Ass’n, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 1049 (2003).

<sup>185</sup> *Id.*

<sup>186</sup> James V. Grimaldi, *Runaway Jury’ Aside, Consultants Are a Fact of Life in Courtrooms*, WASH. POST (Oct. 20, 2003), [https://www.washingtonpost.com/archive/business/2003/10/20/runaway-jury-aside-consultants-are-a-fact-of-life-in-courtrooms/40852e5d-f667-41b5-8039-2ae73954350f/?utm\\_term=.2d6b72e9f2d6](https://www.washingtonpost.com/archive/business/2003/10/20/runaway-jury-aside-consultants-are-a-fact-of-life-in-courtrooms/40852e5d-f667-41b5-8039-2ae73954350f/?utm_term=.2d6b72e9f2d6) [https://perma.cc/G7T8-L6DH].

or a juror's, but the safeguards installed by the Supreme Court do not directly affect trial consultant conduct like they affect attorney or juror conduct. The Supreme Court has not addressed the field's limitations and the states have not created formal licensing bodies.<sup>187</sup> Relying on social sciences during trial preparation and practice adds a new dimension to the case, but the field of trial consulting is barely regulated.<sup>188</sup>

#### A. *The Lack of Entry Requirements*

There are minimal qualifications to become a trial consultant. "The incidence of professional incompetence increases when, as with trial consultants, the field of practice has no entry requirements or monitoring."<sup>189</sup> Trial consultants are not required to undergo any formal training. Indeed, consultants come from an assortment of fields "with backgrounds in clinical psychology and the other social sciences (e.g., sociology and anthropology), as well as those with backgrounds in law, communications, marketing, business, sales, education, military, law enforcement, handwriting analysis, astrology, phrenology, and tea leaves. *In short, anyone can be a trial consultant or jury consultant.*"<sup>190</sup> The concern, however, is not that many consultants have diverse academic backgrounds. The concern is that virtually anyone can advertise as a trial consultant, even though a consultant's advice can have very powerful effects.<sup>191</sup> Trial consultants are often offering services when their clients have a lot at stake, whether it be their freedom or a high sum of money, and clients deserve a sense of security that the consultant is competent to provide the rendered service. The current system allows an individual to be hired as a trial consultant, without any proof of competency.

The lack of a state licensing procedure clashes with the fact that "many professions applying principles from academics, including law and psychology, are closely regulated to protect public interests."<sup>192</sup> Without a state licensing body, consultants do not have to demonstrate that they fully understand the law in the jurisdiction they plan to practice in or the psychological principles necessary to expose a juror's bias. The fields of law and

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<sup>187</sup> See Strier & Shestowsky, *supra* note 24, at 488–89.

<sup>188</sup> See *id.* at 488–89.

<sup>189</sup> *Id.* at 488.

<sup>190</sup> Joy Stapp, *Trial Consultant* PSYCHOL. SCI. AGENDA (Am. Psychol. Ass'n Sci. Directorate, D.C.), Jan./Feb. 1996, <http://www.apa.org/careers/resources/profiles/stapp.aspx> [<https://perma.cc/63GF-FRSV>] (emphasis added).

<sup>191</sup> Strier & Shestowsky, *supra* note 24, at 489.

<sup>192</sup> Cleary, *supra* note 53, at 10; see also Strier & Shestowsky, *supra* note 24, at 488–89.

psychology are both highly regulated, so it logically follows that a profession blending both fields should be regulated as well.<sup>193</sup>

The birth of trial consulting was only a few decades ago, yet the field has transformed into a booming business. The current regime, however, is unrestricted and unstructured. Standards must be established to set the limits. State regulations should account for the level of skill required to register and advertise as a trial consultant. They should also include ethical guidelines that evolve with time. Recently, for example, the Internet sparked new changes in the trial consulting field that must be immediately addressed.

### B. *The Internet's Influence on the Venire Process*

The field of trial consulting needs judicial or legislative guidance regarding the degree to which consultants can investigate jurors on the internet. The American Bar Association issued a formal opinion on April 24, 2014, allowing litigants to run internet searches on prospective jurors.<sup>194</sup> Despite the ABA's approval, individual judges define the scope of review of a potential juror's online presence.<sup>195</sup> For example, in 2016, a United States District Judge presiding over the case between Google and Oracle gave the litigants "the choice between agreeing to a ban on conducting Internet and social media research on jurors until trial concluded or agreeing to disclose details as to the scope of their intended online research."<sup>196</sup> The judge ultimately decided to ban Internet searches because "it must pain [trial judges] to contemplate that, in addition to the sacrifice jurors make for our country, they must suffer trial lawyers and jury consultants scouring over their Facebook and other profiles to dissect their

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<sup>193</sup> See Strier & Shestowsky, *supra* note 24, at 488–89 ("If the experience of professionals in the related fields of law and psychology were a reliable barometer, the eventual state licensing of trial consultants would seem inevitable.").

<sup>194</sup> ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 466 (2014) ("Unless limited by law or court order, a lawyer may review a juror's or potential juror's Internet presence, which may include postings by the juror or potential juror in advance of and during a trial.").

<sup>195</sup> "[E]ach judge in state and federal court may set different rules, because judges are typically accorded broad discretion in setting proper courtroom behavior, including the examination of jurors." Eric P. Robinson, *Virtual Voir Dire: The Law and Ethics of Investigating Jurors Online*, 36 AM. J. TRIAL ADVOC. 597, 610–11 (2013) (alteration in original) (quoting Duncan Stark, *Juror Investigation: Is In-Courtroom Internet Research Going Too Far?*, 7 WASH. J.L. TECH. & ARTS 93, 96 (2011)).

<sup>196</sup> Joseph C. Orlet & Mark A. Pratzel, *Social Media and Jury Selection*, LEXOLOGY (Apr. 25, 2016), <https://www.lexology.com/library/detail.aspx?g=eff05461-18a3-4168-8a0e-13197b211f35> [<https://perma.cc/BH6Q-9GCZ>].

politics, religion, relationships, preferences, friends, photographs and other personal information.”<sup>197</sup>

Permitting internet research of jurors has unearthed an abundance of information, thus changing the entire *voir dire* landscape.<sup>198</sup> In 2008, one jury consultant commented on how the Internet—which has since evolved exponentially<sup>199</sup>—influences his job.<sup>200</sup> “In the age of MySpace, Facebook, cyberspace sales pitches and blogging, the Internet is proving a treasure trove of insight into the thinking and values of those called for jury duty.”<sup>201</sup> This “treasure trove of insight,” however, opens the door for misconduct that has been recognized in many different contexts, including, for example, the employment sector. Employers may not ask a prospective employee about his “religion, sexual preference, or political affiliation,” but it is no secret that employers “use social media to filter out job applicants based on their beliefs, looks, and habits.”<sup>202</sup> Similarly, trial consultants can scan the internet for information that makes the prospective juror sympathetic towards their client, or biased against opposing counsel’s arguments, without ever addressing these matters in court. Then, if the juror’s online profile does not align with the trial consultant’s “ideal juror,” the attorney can strike the juror from the panel using a preemptory challenge.

Statutory guidance is much needed to assess the appropriate parameters of prospective juror internet searches. As it currently stands, trial consultants and attorneys have significant leeway to conduct as much research as they feel is sufficient.<sup>203</sup> In fact, the New

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<sup>197</sup> Order Re Internet and Social Media Searches of Jurors at 1, Oracle Am., Inc. v. Google Inc., No. 3:10-cv-03561-WHA (N.D. Cal. Mar. 25, 2016), ECF No. 1573 <https://s3.amazonaws.com/pacer-documents/27/231846/035114016886.pdf> [<https://perma.cc/3CKL-PPLS>].

<sup>198</sup> Carol J. Williams, *Jury Duty? May Want to Edit Online Profile*, L.A. TIMES (Sept. 29, 2008), <http://articles.latimes.com/2008/sep/29/nation/na-jury29> [<https://perma.cc/N8LX-ZYKU>].

<sup>199</sup> Vivek Wadhwa, *Laws and Ethics Can't Keep Pace with Technology*, MIT TECH. REV., (Apr. 15, 2014), <https://www.technologyreview.com/s/526401/laws-and-ethics-cant-keep-pace-with-technology/> [<https://perma.cc/Z3CB-ZEKC>].

<sup>200</sup> Williams, *supra* note 198.

<sup>201</sup> *Id.*

<sup>202</sup> Wadhwa, *supra* note 199; *see also* Press Release, CareerBuilder, Number of Employers Using Social Media to Screen Candidates at All-Time High, Finds Latest CareerBuilder Study (June 15, 2017), <http://press.careerbuilder.com/2017-06-15-Number-of-Employers-Using-Social-Media-to-Screen-Candidates-at-All-Time-High-Finds-Latest-CareerBuilder-Study> [<https://perma.cc/7D4W-ZU6K>] (“[Seventy] percent of employers use social media to screen [employees],” with “more than half [finding] content on social media that caused them not to hire a candidate.” Common reasons include candidates posting provocative or inappropriate photographs, videos or information, and commenting about alcohol or drug use).

<sup>203</sup> Despite this leeway, one important limitation is that “all of the committees and associations that have commented on the issue noted that attorneys cannot evade the ethics rules simply by having a non-attorney with a name unrecognizable to the juror initiate communication, as this would violate rules prohibiting deception and misrepresentation, as

York City Bar Association suggests it may be an ethical violation *not* to conduct this type of research.<sup>204</sup> While limited internet searches of potential jurors may prove to be quite useful, it is not hard to imagine how this practice could be abused, particularly when only one party has the resources to hire a trial consultant.

C. *An Uneveled Playing Field: When Only One Party Can Afford a Consultant*

No federal or state statutes govern *when* a litigant may hire a trial consultant, so constitutional and ethical concerns arise when only one party can afford a consultant during the jury selection phase. “[I]t is presumed each side will eliminate those prospective jurors most favorable to the other side and that the end result will be an impartial jury.”<sup>205</sup> Alternatively, even if both litigants hire professional trial consultants to find the most *sympathetic* jurors to their position, the end result should still be an impartial jury. “Yet [both scenarios] assume[] equal resources and skills for the two sides.”<sup>206</sup> As mentioned earlier, however, trial consulting services are expensive and have been criticized to only be affordable for the government, successful corporations and wealthy individuals.<sup>207</sup> These services have been labeled as a “service for the rich and a disservice for justice.”<sup>208</sup> The wealthy have an immediate advantage.<sup>209</sup>

Although many trial consultants will contend that their goal is to select an *impartial* jury, the reality is that they are hired by adversarial parties. And when one party rejects theories

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well as rules that prohibit the attorney from violating rules through the act of a third party.” Christina Marinakis, *Is It Ethical to Research Jurors Online During Jury Selection*, LITIGATION INSIGHTS (Mar. 9, 2016), <http://www.litigationinsights.com/ethical-research-jurors-online/> [https://perma.cc/CX3L-L9N7]. While using a trial consultant to initiate a contact is technically a violation, it is not clear how a violation can be detected or enforced.

<sup>204</sup> N.Y.C. Bar Ass’n, Formal Op. 2012-2 (2012) (“Just as the internet and social media appear to facilitate juror misconduct, the same tools have expanded an attorney’s ability to conduct research on potential and sitting jurors, and clients now often expect that attorneys will conduct such research. Indeed, standards of competence and diligence may require doing everything reasonably possible to learn about the jurors who will sit in judgment on a case.”). Although the NYC Bar opinion recognizes the usefulness of the internet, it also limits social media and internet research to prevent impermissible *ex parte* communications (no friend requests, no deception, etc.). *Id.*

<sup>205</sup> Strier & Shestowsky, *supra* note 24, at 475.

<sup>206</sup> *Id.*

<sup>207</sup> See discussion *supra* Section I.B; see also Cleary, *supra* note 53, at 9; Strier & Shestowsky, *supra* note 24, at 474.

<sup>208</sup> Stolle et al., *supra* note 53, at 147.

<sup>209</sup> “Trial consultants would likely counter this argument by noting that it is no more unfair for the wealthier clients to hire more and better trial consultants than it is for them to hire more and better attorneys and expert witnesses.” Strier & Shestowsky, *supra* note 24, at 476.

articulated by a trial consultant while the other party embraces them, “the results are often lopsided.”<sup>210</sup> Attorneys are obligated to be resourceful as they zealously advocate for their clients, but “at some point the *cumulative* effect of resource-based litigation advantages available only to the wealthy must give pause.”<sup>211</sup>

Some judges have appointed trial consultants to indigent defendants, but this is far from typical.<sup>212</sup> Following the acquittal of four white Los Angeles police officers pursuant to the Rodney King beating,<sup>213</sup> riots erupted in Los Angeles, and Reginald Denny, a Caucasian truck driver, was pulled from his truck and beaten.<sup>214</sup> Denny’s attack gained national attention as millions of viewers of live television watched him get “hit with a brick, a tire iron and a fire extinguisher until he was beaten into unconsciousness.”<sup>215</sup> Two African American men were indicted for attempted murder.<sup>216</sup> A Los Angeles Superior Court judge appointed Jo-Ellan Dimitrius, later recognized as O.J. Simpson’s trial consultant, to represent the two defendants.<sup>217</sup> The jury, which was changed more than once since deliberations began, acquitted the two men on most charges.<sup>218</sup> The judge leveled the playing field by providing the defense with a trial consultant, but many courts hesitate to deem the hiring of trial consultants “necessary to meet the requirement of effective assistance of counsel.”<sup>219</sup> Trial consultants can offer invaluable insight into the jury selection phase, but the principal problem is that they are currently performing work solely in an adversarial context.

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<sup>210</sup> Wedel, *supra* note 11, at 312.

<sup>211</sup> Strier & Shestowsky, *supra* note 24, at 476.

<sup>212</sup> “For example, in *Spivey v. State*, the Supreme Court of Georgia upheld a trial court’s refusal of an indigent defendant’s request for funds to hire an expert to assist in jury selection, finding that the denial of funds did not violate the defendant’s ‘rights to due process, equal protection of the laws, and effective assistance of counsel.’” Stolle et al., *supra* note 53, at 170. Said simply, “most efforts by an indigent defendant to have the court appoint a jury consultant on his behalf have failed.” See Hartje, *supra* note 10, at 503.

<sup>213</sup> Jo-Ellan Dimitrius was the trial consultant in the Rodney King case, representing the defense (the Los Angeles police officers) in both state and federal court. See Adams & Kovaleski, *supra* note 6.

<sup>214</sup> Jim Newton & Henry Weinstein, *3 Suspects Seized in Beating of Truck Driver During Riot*, L.A. TIMES (May 13, 1992), [http://articles.latimes.com/1992-05-13/news/mn-1668\\_1\\_reginald-denny](http://articles.latimes.com/1992-05-13/news/mn-1668_1_reginald-denny) [<https://perma.cc/4VWD-Q7D2>].

<sup>215</sup> *Id.*

<sup>216</sup> See Stolle et al., *supra* note 53, at 169–70; see also Seth Mydans, *Jury Acquits 2 on Most Charges in Beatings in Los Angeles Riots*, N.Y. TIMES (Oct. 19, 1993), <http://www.nytimes.com/1993/10/19/us/jury-acquits-2-on-most-charges-in-beatings-in-los-angeles-riots.html?pagewanted=2> [<https://perma.cc/RZU9-CSDE>].

<sup>217</sup> See Stolle et al., *supra* note 53, at 169–70; see also Barber, *supra* note 26, at 1234.

<sup>218</sup> Seth Mydans, *Jury Acquits 2 on Most Charges in Beatings in Los Angeles Riots*, N.Y. TIMES (Oct. 19, 1993), <http://www.nytimes.com/1993/10/19/us/jury-acquits-2-on-most-charges-in-beatings-in-los-angeles-riots.html> [<https://perma.cc/RZU9-CSDE>].

<sup>219</sup> Stolle et al., *supra* note 53, at 170.

#### IV. ERADICATING TRIAL CONSULTANT BIAS AND ELICITING JUROR BIAS

Said simply, the jury selection phase of a trial should not be adversarial. “Trial consultants claim that their goal is to seat *less* biased juries, juries that are more likely to deliver a fair verdict.”<sup>220</sup> In spite of this aspirational goal, trial consultants do not work for the court; they are hired by the parties.<sup>221</sup> To best serve the interests of justice, trial consultants should assist in the jury selection phase of a criminal trial by working directly for the court. Not only will this eliminate the concerns that arise from attorney-conducted *voir dire*, if a trial consultant is employed solely by the court, the consultant will be more motivated to fulfill the overarching goal of impartiality, decreasing bias within the proceedings.

Jury selection should bear no resemblance to drafting a sports team. The goal is not to empanel star jurors, yet the current system enables, and even encourages, the adversarial parties to recruit the best.<sup>222</sup> As coaches exercise due diligence before a draft, trial consultants gather data to determine the types of people that will be most sympathetic toward their client’s case.<sup>223</sup> Not only does data collection sometimes interfere with the jurors’ privacy, e.g. when conducted on the Internet, but the objective is against the constitutional premise that defendants are entitled to *impartial* juries.<sup>224</sup> Therefore, trial consultants should not be hired to offer services in connection to jury selection in an adversarial context. Alternatively, if trial consultants are employed by the court, they can focus exclusively on the psychological reasons why a juror may be unfit to serve on a particular panel.

Placing the duty on the courts to appoint trial consultants will likely be met with some backlash. On the one hand, some may argue that the court lacks the resources to employ a trial consultant in every case. On the other hand, consultants with high price tags will likely receive a large salary cut. In both situations, the underlying concern involves money. When the wrongful conviction rate in the United States is as high as it is, however, money should not be the top concern.<sup>225</sup> As mentioned above, one explanation of wrongful convictions—including

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<sup>220</sup> Cleary, *supra* note 53, at 13 (emphasis added).

<sup>221</sup> See Barber, *supra* note 26, at 1234.

<sup>222</sup> See *id.* at 1227–28.

<sup>223</sup> Barber, *supra* note 26, at 1227–28.

<sup>224</sup> U.S. CONST. amend. VI.

<sup>225</sup> See NAT’L REGISTRY OF EXONERATIONS, *supra* note 178, at 1.

convictions that sentence defendants to death—is that juries are selected without the assistance of expert services.<sup>226</sup> The jury selection stage is critical, but its importance is being overlooked. Meaningful change needs to be radical. Delegating jury selection to a trained professional will enhance the system.

Trial consulting may revolutionize the way an American courtroom functions, but the field must be significantly more regulated to align with *Batson* and its progeny.<sup>227</sup> Because trial consultants are offering services grounded in psychology and the law, there should be “professional qualifications and binding ethical restrictions.”<sup>228</sup> Trial consultants, as opposed to other types of consultants, provide their expertise under vulnerable circumstances. Unlike a consultant offering business advice, for example, a trial consultant may be retained for a client facing the death penalty. A state licensing body will not only protect the credibility of the field, but more importantly it will protect the public from retaining incompetent services.<sup>229</sup>

In 2016, one economist “testified to Congress . . . that the argument for licensing ‘is strongest when low-quality practitioners can potentially inflict serious harm, or when it is difficult for consumers to evaluate provider quality beforehand.’”<sup>230</sup> Trial consultants fit the bill in both regards. First, if a trial consultant’s client loses a case because the trial consultant failed to elicit the biases among the jury pool, the client may serve jail time or be sentenced to death. Second, despite the power of the consultant’s advice, it is difficult for clients to evaluate a consultant’s quality before the trial.

The state licensing body should demand that a person not advertise as a trial consultant until they are licensed to do so. Like any other state licensing scheme, there is a concern that the state regulations may vary too significantly. Since the field is still relatively young, however, the states will have the opportunity “to learn from one another as they adopt and refine

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<sup>226</sup> Serio, *supra* note 177, at 1144.

<sup>227</sup> See generally *Batson v. Kentucky*, 476 U.S. 79 (1986) (attorneys are prohibited from striking a juror solely on account of the juror’s race); see also *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616 (1991) (*Batson* challenges apply in the civil context); *Powers v. Ohio*, 499 U.S. 400, 402 (1991) (*Batson* challenges can be made irrespective of the defendant’s race); *Georgia v. McCollum*, 505 U.S. 42, 55–56 (1992) (*Batson* challenges can be raised against a criminal defendant, rather than just the State); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994) (*Batson* challenges may apply when a juror is eliminated on account of his or her gender); *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017) (the no-impeachment rule does not bar judicial inquiry into racially charged jury deliberations).

<sup>228</sup> See Strier & Shestowsky, *supra* note 24, at 478.

<sup>229</sup> See *id.* at 491–92.

<sup>230</sup> NAT’L CONFERENCE OF STATE LEGISLATURES, THE STATE OF OCCUPATIONAL LICENSES: RESEARCH, STATE POLICIES AND TRENDS 4 (2017).

regulatory practices.”<sup>231</sup> Although the states may develop slightly different regulations, the overall licensing requirements should resemble each other.

The licensing requirements should include educational standards, including courses on the current legal landscape and the social science behind jury selection. This will ensure that consultants are selecting jurors without relying on the unfounded prejudices articulated in *Batson* and its progeny. Scientific jury selection should focus on the personal experiences that may render a person impartial to a particular case, rather than a juror’s race or gender. As the Supreme Court has repeatedly held, a juror’s immutable characteristics do not render the juror competent or incompetent.<sup>232</sup> The trainings will also emphasize the strategies to elicit juror bias. Skilled trial consultants should be able to prevent the juror misconduct highlighted in *Peña-Rodriguez v. Colorado*. Clients relying on trial consultants should be confident that the consultant is qualified to perform the services and is doing so in accordance with Supreme Court precedent.

## CONCLUSION

By removing the adversarial nature of jury selection and implementing entry requirements in the trial consulting field, trial consulting becomes a powerful tool in achieving an impartial jury. This note asserts two solutions to resolve both the constitutional and policy issues with the current system. First, one of the overarching concerns about the jury selection phase is its adversarial nature.<sup>233</sup> The current system does not align with the Sixth Amendment’s guarantee that all criminal defendants are entitled to an impartial jury.<sup>234</sup> Prosecutors and defense counsel seek jurors that tilt the scales.<sup>235</sup> By assigning court appointed trial consultants to conduct this phase of the trial, the scales do not tilt. Instead, the “appearance of justice” is restored because the consultant no longer targets jurors receptive to one side.<sup>236</sup>

This practice will reduce abuse masked by peremptory challenges and will eliminate the problem arising when only one party can afford a professional trial consultant.<sup>237</sup> That being said, this recommendation does not affect the other services offered by

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<sup>231</sup> *Id.* at 15.

<sup>232</sup> *See, e.g.,* *Batson v. Kentucky*, 476 U.S. 79, 87 (1986); *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 867 (2017).

<sup>233</sup> Barber, *supra* note 26, at 1227–28.

<sup>234</sup> U.S. CONST. amend. VI.

<sup>235</sup> Barber, *supra* note 26, at 1227–28.

<sup>236</sup> Hartje, *supra* note 10, at 503.

<sup>237</sup> *See* discussion *supra* Section III.C.

trial consultants.<sup>238</sup> Consultants offering advice about “courtroom presentation and strategy” do not interfere with a criminal defendant’s constitutional right to an impartial jury.<sup>239</sup> This proposed regulation therefore only applies during the jury selection phase of the trial.

The second solution resolves an outstanding policy problem. Trial consultants act as professionals in the legal and psychology sectors, but the profession’s current entry requirements do not demand the same level of proficiency that the legal field nor the psychology field require.<sup>240</sup> Consultants should not base their analyses on speculative stereotypes and there should be a stronger guarantee that they can efficiently elicit a prospective juror’s biases. Indeed, trial consultants should be held to quite a high standard. Implementing entry requirements guaranteeing that consultants are skilled in the application of psychology in legal proceedings ensures that the professionals are competent to practice in a field where a person’s liberty may be at stake.<sup>241</sup> Trial consultants applying social science should remove only those with objectively impartial experiences. If a state-certified trial consultant employed by the court conducts *voir dire*, in the presence of the judge and the attorneys, and focuses on a juror’s personal experiences or habits rather than his immutable characteristics, the empaneled jury may actually be “impartial.”<sup>242</sup>

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<sup>238</sup> See discussion *supra* Section I.B.

<sup>239</sup> See discussion *supra* Section I.B.; see also Strier & Shestowsky, *supra* note 24, at 454–55.

<sup>240</sup> See Strier & Shestowsky, *supra* note 24, at 478–79; see also Cleary, *supra* note 53, at 10.

<sup>241</sup> See Strier & Shestowsky, *supra* note 24, at 489.

<sup>242</sup> U.S. CONST. amend. VI.

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