Introduction

With opposition and challenge comes the preparation for precision. This statement can be applied to the thinking of the Federalists when they drafted their series of eighty-five articles in support of the ratification of the United States Constitution. While a vast number of people doubted the Constitution’s need and capabilities, the authors under the pen name of “Philo-Publius”, or “friend of the common [man]” continued their ambitions to prove to the people that a Constitution was vital to the well-being of a state. However, how could men have predicted a necessity for a Constitution so ahead of their time? Was it truly that the Founding Fathers knew how imperative a detailed document was in ensuring the preservation of individual freedoms? It can be defended that the authors knew just how important it was going to be for a newly developed nation to be defined with regulations. The experiences these men encountered as Patriots during the American Revolution allowed them to understand how critical it was to refrain from an overzealous government in the new world. The creators of the Constitution also grasped that in order for a democracy to withstand it needed outlined regulations.

To conquer the resilient task at hand, Alexander Hamilton and James Madison produced the *Federalist Papers*, which were prompt responses to looming questions and arguments about the success and stability of a Constitution. Hamilton himself expressed how the Papers would attempt “to give a satisfactory answer to all the objections which shall have made their appearance” in regards to the drafting of the Constitution.¹ The effectiveness of the *Federalist Papers* in all states still remains unanswered due to the fact that some states, like Pennsylvania, had already ratified the Constitution. Nevertheless, the authors must be accredited for calming

most of the Anti-Federalists storm since the Constitution was adopted on September 17, 1787. The Federal Government, as it is known today, began two years later in 1789.

Although the complete ratification of the document took place at various times by similar conventions held in each individual state, the first Constitutional Convention took place in Philadelphia, Pennsylvania. The fight for the document to be approved was one until the finish. Even though it was decided that only nine out of the thirteen states needed to ratify the document in order for it to go into effect, Benjamin Franklin still argued that all states should deem this Constitution necessary. Debates grew heatedly in the states until June 21, 1788 when New Hampshire became the ninth states to ratify the document. Nine months later the new government, under the operation of the United States Constitution, began.

The historical formation of the United States Constitution is important because it lays the foundation for the laws set in the American nation. The Constitution was a new adventure the Founding Fathers were embarking upon. Many ideas at the time seemed ludicrous, but with the experiences taken from Great Britain the father’s knew change was needed. The Fathers agreed that a monarchy was not an ideal model for a government, but understood that some type of framework needed to be implemented in order to keep rule. As a result the authors of the Constitution created The Bill of Rights, also known as the first ten amendments to the United States Constitution. The first ten amendments were adopted by December of 1791 and at that time officially became a part of the new Constitution. The amendments were created, not only to lay down the law of the land, but more importantly to protect the states and its citizens from

---

3 Id.
5 Id.
tyranny. The power of the federal government was going to have limits in the new land and the Founding Fathers wanted to make sure there was a document that stated so.

The Founding Fathers felt it was duly important for *The Bill of Rights* to explicitly spell out citizens’ rights and freedoms to further avoid the possibility of an overbearing government. Some of the most important freedoms were to consist of freedom of speech, religion, press and the right to bear arms. Furthermore, the Founding Fathers intended for these rights to extend as far into the government as possible. Therefore, the authors made sure that there were amendments within *The Bill of Rights* that would protect citizens from oppression of the newly created federal government. The first of these amendments was the Fourth Amendment which reads:

> “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

This amendment protects citizens from unlawful searches and seizures. It is to ensure that probably cause must be met before any possessions or persons can be seized. Scholars believe that this amendment has taken ideologies from the Magna Carta.

The Framers were so concerned with the rights of citizens under the judicial system that they also dedicated the Sixth amendment to ensuring that Americans would have the right to an impartial jury. The Sixth Amendment reads:

> “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be

---

6 U.S. Const. art. VII, amend. VI.
informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."7

The most important aspect of a jury is to be impartial or unbiased. It is during the process of voir dire, or pretrial questioning, where attorneys are able to decipher whether or not a juror may be biased. The process of voir dire also allows jurors the opportunity to admit whether or not they feel they can be unbiased during a case. If jurors admit that they are unable to sit on a particular case because of a known bias they hold the juror is then dismissed as a “challenge for cause.”8 If an attorney feels that there are reasons why a prospective juror may not be impartial in a trial he or she may exercise what is known as a peremptory challenge, or a tool that allows an attorney to dismiss a juror without a written reason. Although the Constitution does not explicitly name peremptory challenges as an amendment or clause, they have been adopted as an implied power so as to ensure that juries remain as impartial as possible. The use of peremptory challenges is one of the most effective ways the United States juridical system has been able to protect its citizens under the court of law. As this thesis continues, the ideas of challenge for cause and peremptory challenges will be explained in more depth.

Today the courts have made sure that they have continued to uphold the original intentions of the Founding Fathers. In fact, the courts have even surpassed the novel expectations of the first ten amendments and have included additional practices to warranty the product of an impartial jury. Some of these additions include the possible changing of venue when hearing a case, the use of alternate jurors and the sequestering of jurors when needed. These tools, too, will be furthered discussed throughout this paper.

7 U.S. Const. art. VII, amend. VI.
Research Question

It is the court’s utmost responsibility to provide each and every litigant with the fairest possible trial. As a result, there are many procedures attorneys and the courts take in order to ensure that an impartial jury is gathered when bringing a defendant to trial. This thesis will address whether or not peremptory challenges are another mechanism attorneys, litigants, as well as the courts should continue to exercise in order to guarantee a proper trial. In short, this paper will ask if peremptory challenges justifiably, in light of their weaknesses or detractions, facilitate the United States courts in achieving the goal of obtaining an impartial jury.

At the conclusion of this research, the author will convey that peremptory challenges are, indeed, an important means of increasing impartiality in juries. This thesis also expects to satisfy claims against the fairness of peremptory challenges and reveal that their use shall remain continued in the United States of America.

Importance of Research

The importance of this paper’s research may be viewed from several perspectives. On the home front, it is important that this research be conducted since the very nature of juries and the use of peremptory challenges are a part of the United States democratic society. The Constitution was drafted with the very notion that citizens’ of the United States would be protected under the government and that there would be rights to ensure this. As a result, it is critical that the concept of peremptory challenges is examined. Do peremptory challenges act as a notable tool to choose the best jurors for a case? This question need to be answered in order to assure that America holds true to its promise of impartiality in juries, as well as the credit attorneys deserve for handling such a challenging task.
On a broad spectrum, the topic of peremptory challenges is one that should be acknowledged and understood by everyone. It is also essential that the importance and fundamental set up of the United States jury system be explained in this paper. Understanding the process of jury selection is an important one since the summoning of jury duty will affect almost everyone at some point in life. For civilians alone, juries are the main part of their right to an impartial jury. It is jurors who hear cases and render verdicts. Civilians, as litigants in a trial, need to be aware of how juries are chosen, their rights under juries and what to do if they feel they were presented with an unfair jury. After all, there does exist the possibility that a jury may not be chosen fairly and a litigant may need to take further action, as in the case of a Batson claim. Nothing in the legal system is perfect and each day brings about the possibility for a new procedure to be brought out into the courts.

Civilians as prospective jurors, themselves, need to be aware of research done regarding juries for the simple fact that at least once in a person’s life he or she will be summoned for jury duty. As a civilian, it is a duty to understand and be aware of the task that will be presented at hand. Civilians need to pay attention to research done on juries in order to be better equipped of legal processes, as well as the responsibility that will be expected of them. Although juries are a Constitutional right, when picked as a juror it is also a Constitutional duty.

Attorneys should recognize the importance of jury research since juries are a main actor in each trial. After all, it is a large part of an attorney’s job to select the greatest and most impartial jury for his or her client. If an attorney does not pick an efficient jury it could cost his or her client a case. The idea of mastering jury selection is one that attorneys work on for years and aspire to become better at with each trial. It would be in an attorney’s best interest to stay
abreast of new research so that he or she could master the art of impaneling an unbiased jury and seeing that justice is served.

It is also vital for foreign nations to recognize the impact and effectiveness of peremptory challenges since it is a legal system that, if considered, may benefit their nations as well. Although many countries today have restrained from using juries, their existence still remains in the United States. Thus, it is important that, if every working in conjunction with the United States, other countries acknowledge and understand the importance and relativity peremptory challenges have in the American nation.

**Schools of Thought**

There exists a tremendous amount of written material and opinions on the use of peremptory challenges. As a result, there remains a division in position when it comes to determining whether or not peremptory challenges should remain in practice within the United States courts. However, when all of the information is sorted through, three principal viewpoints emerge in regards to the use of peremptory challenges.

The first view is of those attorneys and scholars who believe that peremptory challenges are a necessary and useful tool in choosing an impartial jury. Contrastingly, there are those who oppose the very notion of peremptory challenges’ existence within the United States’ courts. Opponents of the use of peremptory challenges argue that these tools are unconstitutional since they are not explicitly written into the United States Constitution and do not prove effective in choosing an impartial jury. Finally, there is the view that only defense attorneys are those who should be allowed to exercise the use of peremptory challenges. These attorneys and scholars
argue that prosecutors should not be privy to the peremptory challenge tool since their job is to ensure that justice is served. If a juror swears to a United States court that he or she can, in fact, be unbiased and impartial in a particular case then he or she shall remain on the jury. Prosecutors do not need to exercise any further uses to challenges since their jurors have already survived voir dire and were not dismissed under challenges for cause. This viewpoint argues, however, that defense attorneys should be entitled to use peremptory challenges since their job is to prove that his or her client is innocent no matter what. In order to choose a jury the defendant’s peers, defense attorneys do need peremptory challenges so as to choose a jury that will identify the greatest with their client.

The University of Texas School of law published an article in the American Journal of Criminal Law in the fall of 1999 in which William G. Childs, a law clerk under United States District Judge James M. Rosenbaum of Minnesota, wrote how “the right of peremptory challenge is ‘one of the most important of the rights secured to the accused.’”\(^9\) Childs continues on to explain how the use of peremptory challenges are not only essential to the components of a trial, but also “essential to the impartiality” of a trial.\(^10\) This view is shared by all proponents of these challenges. The views are intact because it is believed that peremptory challenges are an effective measure to ensure that biased jurors who survive voir dire at least have one more chance at being dismissed. The final tool of peremptory challenges further sustains that a litigant will receive the fairest impaneling of a jury. In a Georgetown Law article, titled, \textit{Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation}, the author includes thoughts of a commentator: “it is part of the psychology of the venire of people to decide they want to be on the jury…such people will evade or misconstrue, unconsciously or deliberately.

\(^10\) Id.
general voir dire questions in order to avoid answering and possibly being struck.”

As a result, it has been proven through psychological research that voir dire and challenges for cause do not always eliminate those necessary. Proponents of peremptory challenges insist that the challenges have a desired need in the court system.

The sprite of these challenges has been so welcomed that, although they are not specifically outlined in the Constitution, every jurisdiction has made them available in their courts. Throughout this thesis the author will include other commentary by scholars who agree with the same terms and conditions as those just mentioned.

Those who oppose the use of peremptory challenges insist that this tool does not ensure impartiality and its use is unconstitutional. The greatest argument against the use of peremptory challenges is the fact that when used, these challenges do not require a written reason. Opponents of peremptory challenges argue that when there is no description needed for why a juror is dismissed then there leaves the possibility of racial, gender, religious or ethnic prejudices. These biases are undetectable and as long as an attorney articulates his reasoning well for dismissing a juror then there remains no repercussions for his or her misuse of actions. These scholars believe that is a reason cannot be clearly stated or written then it is a reason that may not be constitutional and thus, does not qualify to use against a juror.

Opponents of the challenges also argue that removing jurors nullifies the constitutional right of a “jury of peers” or a jury representative of a community. As an attorney may want to choose jurors that will identify with his or her client, this tendency may lead to selecting a particular type of person. As a result, this may dishearten some jurors in wanting to serve. In his book, The American Jury System, Randolph N. Jonakait writes that, “When challenges are

---

driven by a negative perception of a group, fewer members of that group will be on a jury." Although attorneys must refrain from stereotyping, if members of a community observe that a typical type of person is not chosen as a juror then less of those community’s members are going to be willing to serve. Even though the Supreme Court has ruled peremptory challenges acceptable, those against peremptory challenges argue in unison that the continual usage of these challenges to dismiss a particular type of juror does incur tensions within the jury system.

Furthermore, opponents of peremptory challenges also contend that when there does exist racial biases these cases evolve into Batson claims and could cause a case for mistrial and/or slow the judicial processes down. A Batson claim refers to a defendant’s right to argue that his or her jury has been impartially chosen based on race. This term derived from the 1986 Batson v. Kentucky case in which all of the African American jurors were struck from the defendant’s trial. Today, a defendant can call on his or her Batson claim and declare a mistrial if a prosecuting attorney is found guilty of racially impaneling a jury.

Aside from the two differing viewpoints there rests those scholars and attorneys who believe peremptory challenges do have a certain place in the courts, but do so with limitations. Defense attorney Mr. Paul Harris argues that peremptory challenges are necessary in order to choose the best possible jury for a litigant. However, Mr. Harris argues that these tools should only be available to defense attorneys since their main goal is to prove that their client is innocent. Harris states how, “Prosecutors are a part of the system to guarantee that justice is served. If a juror already admits to a court that he or she can be impartial then a prosecutor’s job is finished.” Paul Harris’s belief is supported by the Model Code of Professional

14 Batson v. Kentucky, 476 U.S.
16 Id.
Responsibility, where it is written that prosecutors’ main goal "is not [to] win a case, but [to ensure] that justice shall be done." As a result, prosecutors have no need for the use of peremptory challenges once jurors who have announced that they cannot be impartial have already been dismissed by challenges for cause.

Although all viewpoints construct valid points for discussion and research this thesis will attempt to convey that peremptory challenges are a beneficial tool in ensuring that justice is not only served, but that the selection of jurors is most effective when they are exercised. This thesis will side with the proponents of peremptory challenges and agree with the evidence that displays how effective of a tool they are when used properly. The use of peremptory challenges by all counsel allows attorneys to select the best possible jury for their client by eliminating those jurors who they believe to be biased. Even though jurors are legally obligated to admit when they feel they cannot be impartial in a case, they are still human. Unbiased jurors are still able to slip through the justice system even with the process of challenges for cause. The use of peremptory challenges allows attorneys, those who are believed and taught to uphold the legal system, to use their expertise and skill to remove from the jury any members who will not render a decision based on fact and representation of evidence and further the goal of an impartial jury. Peremptory challenges not only protect litigants (defendants, especially), but the court system as a whole.

**Methodology**

As this thesis mentions there are many important reasons why the issue of peremptory challenges needs to be explored. It is even more important that once these issues are explored

---

that the United States courts recognize that the use of peremptory challenges remain in effect. To understand the purpose of juries and the effectiveness of peremptory challenges this thesis will be sure to begin with a brief history of the purpose of the United States Constitution. The historical aspect of the Constitution is vital to acknowledge since it lies the groundwork for why the regulations originally set forth by the Founding Fathers is so imperative to uphold today. The importance of juries in the United States will also be addressed in the first chapter, while addressing the reasons other countries choose to no longer incorporate juries within their legal system. Chapter one will convey how juries work in some nations, but not in others.

In order to clearly outline the facts associated with juries and the impact peremptory challenges have on the courts, chapter two will begin with a brief history of how juries came in existence, how they are selected, while defining the terms associated with this topic, including when and why peremptory challenges are used, challenges for cause and other legal terms identified with this topic. Chapter two will include details of exemplary cases in which peremptory challenges were used and the reasons they existed. This chapter will also discuss whether or not peremptory challenges have shown to increase impartiality in juries or if they have proven to be disadvantageous in the courts. In order to candidly explain the history associated with peremptory challenges, this thesis will be sure to examine the Supreme Court cases in which peremptory challenges caused defendants to call on their Batson claims, or the term used to describe when litigants feel their juries have been picked in a racially discriminatory manner. This chapter will examine how these types of claims have existed in the courts, but also detail how they can be avoided. Chapter two will conclude in describing that when peremptory challenges are used properly they are earnestly an effective tool.
There are recent examples of thinking that weighs in favor of peremptory challenges and their ability in assisting jury impartiality. Chapter three considers the use of military tribunals for terrorism cases as a way of eliminating all civilian jurors. Terrorist crimes are some of today’s most high profile cases, and in order to assure civilians safety during these trials many believe that military officers are better equipped to assist in these situations. Military tribunals are a perfect example of the United States justice system creating specialized circumstances in order for the nation to better achieve impartiality. Chapter three will consider how the United States continues to re-evaluate methods needed in order to increase impartial juries.

There indeed exists a human element to achieving an unbiased jury. Whether it is through the use of peremptory challenges or not, humans cannot deny that there subsists a certain level of emotional or psychological influence when selecting a jury. Chapter four will discuss the recent phenomenon of the “Blink” effect, described in Malcolm Gladwell’s book in which the effect of thin-slicing real-life situations is examined. Gladwell, a notable author and researcher for the lay-reader, compiled several anecdotes of real-life situations in which people ranging from car salesman to scientists reveal how humans gut reactions are the best decisions. The book’s main point is that it is not entirely correct or in humans’ best interests to “think before we speak” and that often first instincts are the most valuable. This thesis applies the “Blink” effect to the thin-slicing attorneys perform when impaneling their juries. This thesis argues that the same emotional and psychological elements that move humans when making daily decisions are the same elements that impact attorneys when lining up a jury that is of a client’s peers.

The conclusion of this thesis will include recommendations for why the use of peremptory challenges should remain within the United States courts system and how truly valuable they are to society as a whole. The author will recommend that, when used properly,
peremptory challenges are the most effective tool attorneys today have in the courts and that these challenges are the perfect way to ensure that impartiality exists amongst American juries. This thesis will also leave room for further research into the depths of peremptory challenges in regards to future cases. However, until it is proven in the court of law that peremptory challenges are unconstitutional this paper argues that they are a must in the United States court system. To further support this conclusion, this thesis will also include interviews with experienced attorneys. Their insights will express that peremptory challenges do help serve justice and increase impartiality.

Before delving into the necessity of peremptory challenges and the efficiency they have in ensuring an impartial jury, it is imperative for this thesis to take a step back and outline juries and jury trials from the beginning. The following briefly delineates the history of jury trial procedures.

**Origins of the American Jury**

As much as television dramas would like Americans to believe that the conquest of truth and the reality of juries began with sitcom phenomena like Perry Mason, juries, in fact, began hundreds of thousands of years before. Historians are often in disagreement when it comes to which empire instilled more influence in the court of law than another. The roots of juries, or as it was recognized under Roman law as common citizens who were to find truth to stories can be traced back to the times of Ancient Athens and also the reign of Julius Caesar. Prior to 900 B.C. there existed no laws in Ancient Greece. Disputes were settled amongst families, which in turn created endless neighboring feuds. For example, a murder victim’s family sought their revenge by staking out the murderer and performing the same crime on him. These retaliations were quite
similar to the rules outlines in the Code of Hammurabi and the Hebrew religion. As the feuding grew it was determined that, in order to survive and adopt better lifestyles, the Greeks needed to undertake to a certain set of laws and legal punishments. Around 620 B.C., Draco, the lawgiver, created a law that named exile as the punishment for homicide in the land. This law inevitably became the first known written law of Ancient Greece. Draco continued to write many more laws, including family laws and tort laws and eventually set up a very informal procedure of holding trial. The Ancient Greek courts were in no manner professional or official. Much like the Roman Empire, two litigants would argue their case and an audience would vote for one side or the other. Once a guilty or not guilty decision was reached, another vote would determine the punishment. In Athens, trials for serious cases (those that involved death, seizure of property or possible exile) were tried in front of a “dikastai”, or the Greek form of a jury. The dikastai were put in place in 402 B.C. and are known as the first set of democratically selected jurors in Ancient Greece. Unfortunately, this just consisted of well over 1,000 people and had a difficult time coming to resolutions. As a result, this form of government did not succeed. Eventually trials went to tribunals, where Roman judges decided the fates of the accused.

The practices of the Ancient Greek and Romans filtered out into England, after Julius Caesar conquered the British Isle. Although it is argued that after the fall of the Roman Empire much of their traditions vanished, it may be possible that the customs did, indeed, survive and continue to England. Nevertheless, historians give greater credit to the traditional legal procedures of England to “William the Conqueror” or William I of England. It was his reign that introduced the cultures of Normandy to England, as well as the foundations for English law.

Further historical accounts suggest that the rise of English law could be attributed to the laws under the religion of Islam. Similar to English law, the “Lafiff” was a group of twelve
neighborhood people, sworn to tell the truth and decide a verdict under the school of Maliki. The difference here is that the twelve people consisted of neighbors who were somehow involved in the case at hand, as to testify to matters that they had “personally seen or heard.” The Lafif was consistent with English law on all grounds except the judicial writ and its duty to summon a jury. According to historian and author John Makdisi, “no other institution in any legal institution studies to date shares all of these characteristics with the English jury.” Because of this close distinction of customs, it is widely believed that the Islamic Lafif may have influenced England.

Later in the 12th century Henry II further developed the use of juries in England, in which he assigned twelve men to discover the truth on their own instead of listening to debates in a court room. The twelve men and their duties were somewhat of police officers, where the men were to report any crimes they had witnessed. A person accused by these twelve men was given a trial by ordeal. If the accused survived the ordeal without injury or death, then he was considered innocent. Trials by ordeal ended in 1215, once the Church banned their use. Later that year trials by jury became a citizen’s right stated in the Magna Carta. It read:

“No free man shall be captured, and or imprisoned, or disseised of his freehold, and or of his liberties, or of his free customs, or be outlawed, or exiled, or in any way destroyed, nor will we proceed against him by force or proceed against him by arms, but by the lawful judgment of his peers, and or by the law of the land.”

It is interesting to note how this right expressed in the Magna Carta greatly correlates with the Sixth Amendment to the United States Constitution. Although the Sixth Amendment does not

---

19 Id.
20 Id.
explicitly site the phrase “jury by peers” it does detail the right to an impartial jury, which over time, has evolved to also mean one of an accused person’s peers.

In time, the jury of twelve men began to rely more on testimonies given inside of the court rather than on their own investigative work. In the United States today, the role of juries is a fundamental right, explicitly stated in the Sixth Amendment of the Constitution and have been estimated to make up 95% of the world’s juries. Furthermore, today over 80 million Americans have been called for jury duty, while 30% of that group has been eliminated by peremptory challenges.

If juries are so beneficial in determining fair and honest verdicts then why are they not exercised in all nations? This question brings this thesis to a very good point. Although the United States has heavily involved itself into the preservation of jury systems, other countries’ judicial systems do not recognize juries and some have even shied away from them due to unfavorable outcomes. Whether it is as a result of faulty verdicts or the decision that a judge can render a decision as fairly and as honestly as a group of people, neighboring countries around the world do not all recognize the use of juries. The following information will briefly categorize countries with whether they exercise trials by juries or if they do not.

Juries in Foreign Nations

There is no other country in the world that relies on juries for civil and criminal cases exactly how the United States of America uses juries. In fact, most of the countries that use juries only use them for serious felony cases, where the victim of the crime has suffered death. Also,

---


22 Id.
there is no other country that exercises the same procedures in selecting juries just as the United States does. The two countries that come closest to using juries in a similar fashion to the U.S. are France and Scotland. In France, the jury resides over the case along with three judges. Together the lay men and the judges determine if there is a question of guilt. Then, if needed, the jury and the judges render an appropriate punishment. Scotland is one of the only other countries, besides America, that requires juries for civil trials. In these cases, twelve people sit on the jury. In the case of a criminal trial, fifteen jurors are gathered. Just as in the U.S., juries are reminded of the law and sent out to deliberate. Verdicts are reached by a majority and not a unanimous vote.

Germany, India and Spain are three countries that do not use juries at all. In March of 1924, the German government removed juries from their legal system due to the notion that verdicts were no longer perceived as honorable. Many high profile criminal cases lead to acquittals of the accused. These verdicts became more and more popular as cases became more and more complex. It had become an unexplainable theme. As a result, the legal system instead allowed for men, or Schoffe to sit alongside judges (as in France) and help reside over verdicts. Interestingly enough, the common men who sit on trials have as much influence and power during the trial as do the professional judges.

Juries were abolished in India in 1960 after the 1959 murder case of K. M. Nanavati v. State of Maharashtra. Defendant Kawas Manekshaw Nanavati was tried for murdering his wife, Sylvia Nanavai’s, confidant and believed lover. The case was so riveting since it involved an upper class family that it distressed the entire nation, while bringing tremendous and maddening

---


media interest to the courts. This crime of passion was one that India had never experienced before. As a result, the nation made sure it was the last trial to see a jury.  

Although Spain has no legal custom of exercising jury trials, it has since its 1978 Constitution, favored in the idea of a trial by jury. In section 125 of the Constitution, Spain’s “popular jury” right reads:

"Citizens may engage in popular action and take part in the administration of justice through the institution of the jury, in the manner and with respect to those criminal trials as may be determined by law, as well as in customary and traditional courts."  

The few cases Spain’s juries have heard have produced less than desirable outcomes. The courts in Spain have revealed that they are in no hurry to dramatically change the laws just yet.  

The lines are clear between the countries that do use juries and the countries that do not. However, there also lies the number of countries that use juries, depending on the type of charges brought against an accused and the penalties at stake. In countries such as Belgium, Greece, Austria, New Zealand, Russia and Brazil, juries are only used for cases that involve serious, criminal cases. These cases include those associated with murder (particularly first degree murder in countries such as Brazil) on those cases where the defendant faces the possibly punishment of death, as in cases in Russia. In these countries, those particular trials must include a jury since the sentence is great.

A twist is thrown in for countries such as Australia and Canada. In Australia, juries are present at all cases, but there is no voir dire, or questioning of jurors prior to trial. As a result, it is very difficult to dismiss a juror for challenge for cause. In this country, peremptory challenges are primarily used and used only used as a result of “hunches” from attorneys. Canadian

---

28 Id.
litigants, on the other hand, have the option of having a jury when being tried under serious criminal charges. Canada offers litigants the opportunity to have only a judge to preside over their case or a judge and jurors to render a decision. Rarely are juries used in civil trials.

In England and Wales, only serious crimes allow a defendant to choose a trial by jury. English juries consist of twelve people, between the ages of 18 and 70 and are selected by voter registration records, just as they are in the United States. Just like the legal system in England, Northern Ireland also allows defendants to elect juries during the trials of criminal cases. However, in cases of terrorist attacks, the defendant is tried by a judge alone, known as a “Diplock.” Diplock’s were put in place by the British government in Northern Ireland in 1972 in order to prevent juror intimidation. The Diplock Court also pays close resemblance to military tribunals in the United States, which are often held for terrorist cases in order to protect the safety of civilian jurors.

Even after numerous surrounding countries have abandoned the use of juries, the United States has continued to keep this right intact. It is inevitable that juries will long remain in America because they are a feature of the U.S. Constitution, securing the rights of all citizens. As mentioned many nations rely primarily on the sole opinion of a judge to render a fair verdict. Are judges capable of producing a fair and impartial outcome? In a federal case it is quite possible since the appointments of federal judges are for life so as to remove any personal vicissitudes. However, does it seem fair for any litigant to depend on the decision of one man or woman as opposed to the many opinions and decisions of twelve? Under the U.S. system, a defendant has the option of waiving his or her right to a jury trial. If a defendant waives this right it must also

be approved by the prosecution and by the sanction of the court. However, in practice, very few criminal defendants opt to waive their right to a trial by jury. It is safe to broadly assume that defendants generally prefer a deliberation amongst twelve men and women to come up with a fair judgment.

It must also be noted that some countries, like India, for example, abolished the process of juries as a result of media hype and attention. The nation felt it too agonizing to constantly have reporters covering the case at hand. In the United States, although the media does have its critics, the reporting of high profile cases and news breaking media is important to citizens. The revealing of legal procedures is what keeps freedom of speech and the balance of the government fresh. Media attention is also what uncovers unfair and improper procedures. It is media attention and notoriety that has allowed many defendants to be acquitted of crimes they did not commit.

Now that this thesis has represented an overview of the origins of juries it is now more feasible to review their influence in today’s courts. It is best to begin with reviewing how juries operate and how they are selected. As a result, in order to recognize the actual influence juries have on trials, it is vital to understand all of the processes that occur in order to set a jury in place. The following chapter will begin with detailing jury selection procedures, as well as defining the legal terms associated with impaneling a jury.

---

Today’s Jury Selection Procedures

“In England the trial begins when the jury is selected; in America, that is when the trial is over.”

-Professor Alschuler, “Explaining the Public Wariness of Juries.”

Americans are taught from a ripe, young age their rights and freedoms as citizens of the United States. Americans are raised to believe in the legal mantra of “innocent until proven guilty”, an axiom that penetrates American culture from aspects as fruitless as television sitcoms to situations as factual as everyday life. But what main component of the U.S. courts system upholds the strength of fairness and impartiality? What is the relief citizens of the United States know they have at their hands when forced to defend their innocence? This foundation of liberty represented by an undivided group of individuals is known as a jury.

Juries are used in civil and criminal trials, federal and state. In civil cases, juries are used in order to determine the type, if applicable, of restitution a person is granted. In criminal cases, cases this document will highlight, juries render the decision of guilty or not guilty. Juries are depended upon to give an opinion from an objective point of view. Jurors are instructed to view the evidence and hear the facts and work as “tri ers of fact” or those who determine what truth is.  However, before cases are brought to trial or decisions are made, it is important to understand the administration of juries, as well as the roles of jurors.

There has been much debate concerning the subsistence of juries. Proponents of juries insist that their existence is what keeps the United States government from taking complete control over the courts and having the final say. Over one hundred fifty years ago, a prominent

32 Jonakait, Randolph N. The American Jury System, P. XXI.
historical proponent for the use of juries, philosopher Alexis de Tocqueville, wrote, “...in America all citizens who are electors have the right to be jurors.”\textsuperscript{34} He argued that the very existence of juries allows citizens to exercise authority over their own freedoms. Tocqueville believed that serving on a jury provided citizens with an opportunity to experience how judicial functions take place and thus, understand the processes. This opportunity, he wrote, was one of great importance to the American judicial system. Contrastingly, opponents of juries express concerns for juries and their capabilities for rendering decisions in high-profile and terrorist cases. Those against juries argue that civilian jurors are too expensive, often ineffective and ill-prepared to decide verdicts for more serious cases.\textsuperscript{35}

Whatever the debate may be, and this document will further delve into the debate, juries, at this point in American history, are required by the Constitution and rule of law. Explicitly stated, the Constitution reads that all trials “\textit{except in cases of impeachment, shall be by jury.”}\textsuperscript{36} This mandate of jury trials has even evolved in the past decade to increased heights. The case of \textit{Apprendi v. New Jersey} in 2000 influenced the court to rule that a jury trial is necessary, not only to render a verdict of guilty or not guilty, but also when a defendant’s sentence is to be increased beyond a state’s “statutory maximums based on facts other than those decided by the jury.”\textsuperscript{37} In this case the defendant, Charles Apprendi, Jr., had fired several shots into the home of an African American family because “he did not want them in the neighborhood.”\textsuperscript{38} The ruling in this case declared that a judge is unable to increase a defendant's sentence without the jury’s agreement.


\textsuperscript{36} U.S. Const. art. III, §2, cl. 3.

\textsuperscript{37} Id.

\textsuperscript{38} \textit{Apprendi v. New Jersey}, 530 U.S. 466 (2000).
This statute was upheld four years later in the case of *Blakely v. Washington*, when the defendant, Blakely, kidnapped and brutally attacked his wife after she filed for divorce.\(^{39}\)

The idea of a jury takes on several forms when it comes to trials. In Federal Courts, two types of juries are referred to. They are trial juries and grand juries. Trial juries are the forms civilians are the most familiar. These juries consist of six to twelve members and are also referred to as “petit juries.”\(^{40}\) Grand juries are much larger, consisting of sixteen to twenty-three members. Grand juries do not meet in court during trial deliberations. Instead, grand juries meet in secret and are employed to decide whether or not there is probable cause to charge a person with a crime, also known as an indictment. Grand juries base their decisions on the information and evidence given to them by the U.S. Attorney’s Office.\(^{41}\)

The Constitution of the United States of America guarantees all citizens due process by an impartial jury under the Sixth Amendment, as well as equal protection of the law under the Fourteenth Amendment. The Equal Protection law under the Fourteenth Amendment reads that, “All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States…”\(^{42}\) As a result, the Constitutional right of a trial by jury is a fundamental characteristic that will forever remain a part of the United States’ judicial system.

According to the Jury Selection and Service Act of 1968, each court must have a documented plan detailing how it will go about selecting its jurors. As mentioned earlier, a jury’s


\(^{41}\) Id. P. 2.

\(^{42}\) U.S. Const. amend XIV, §1.
role in a trial has been identified as the leading role of weighing evidence and interpreting the truth.\textsuperscript{43} The jury’s job is to render a guilty or not guilty verdict, while the judge provides the sentence to the accused. After jurors are randomly selected from driver’s lists or voting registrations, the process of jury selection officially begins. The jury selection process includes five steps, but the exact process may vary from jurisdiction to jurisdiction. The process begins by: 1. Developing a jury plan, 2. Creating a “master jury wheel”, 3. Creating a “qualified jury wheel”, 4. Selecting=summoning prospective jurors from the qualified wheel and 5. Impaneling a jury. The second step listed includes a creation of a list of names, usually a computer file, which the court uses in selecting jurors. This list is commonly referred to as a “source list.”\textsuperscript{44} However, after a source list is created, it is then time to refine the master list and choose which jurors are eligible to serve. Next, the court must summons selected jurors and excuse those who are exempt (examples of exempt jurors include those who serve on local or volunteer fire departments and those who serve in local or state governments). Finally, a jury is impaneled and the process of voir dire occurs. Making sure this plan actually develops is the judge’s role.\textsuperscript{45}

The goals of the court when performing the jury selection process is to ensure that a sufficient number of jurors have been chosen and that they are eligible to serve on a case. A logical way to calculate the number of jurors needed on a panel is to add the number of jurors needed, in total, to sit on the jury (usually six to twelve), plus the number for an attorney’s challenge for a cause (one), plus the number of peremptory challenges allowed (usually six, but this varies in each case), plus the number of alternate jurors (at least one or two), along with the number of possible challenges for alternate jurors (one or two). Jury staff usually tacks on about


\textsuperscript{45} U.S. Const. § 1863 (a). Information detailing the Constitution’s amendment was taken from George, Jody, Deirdre Golash and Russell Wheeler. \textit{Handbook on Jury Use in the Federal District Courts}. P. 2.
ten percent to these numbers. This percentage allows for room if jurors have emergencies or have last minute exemptions from jury duty. However, the process also must satisfy the requirements of the Jury Selection and Service Act. In summary, the Act states that all litigants in federal courts have the right to a jury which has been selected fairly and at random. It also demands that all citizens of the United States have the right to be considered for jury duty, if eligible, and shall do so if summoned for duty. Finally, the Act states that no juror shall be discounted from jury duty as a result of racial, religious, gender, origin or economic discrimination.

The main idea to take from the process of jury selection is that the entire systematic make-up of selecting juries is based on the confidence that the juries chosen are the twelve most effective people to decide on a particular case. To make a mistake as early and fundamental as the selection of jurors could erode the confidence in American juries. It would be a crisis if verdicts were doubted as a result of the jury selection process.

After a jury is selected, there are still many more steps to take in order to prepare for a fair trial. Aside from all of the investigative work and provisions of evidence, there is a lot more background work done. The United States judicial system has taken great pains to provide for impartial juries. The process of voir dire, which is somewhat comparable to an interview, is one of the first steps taken to impanel a jury. Once the jury is complete there are other legal practices such as the sequestering of jurors and even change of venue that the nation has implemented to assure that juries are protected and kept honest.

---

47 28 U.S. Const. § 1861.
48 Id.
49 Id. § 1862.
Voir Dire

Once a jury pool is compiled, attorneys for the prosecution and for the defense are allowed to host what is called voir dire. Voir dire, a legal term derived from the Latin vidēre, meaning “to say”, is used in the United States to describe the questioning of jurors before they are chosen or dismissed for a trial.\(^50\) The questions asked of jurors help reveal information regarding jurors’ attitudes and/or backgrounds those attorneys and judges might not have previously known. Some courts do provide attorneys with jurors’ questionnaires, but the information presented on these documents is limited. As a result, counsel for both parties are allowed to conduct a prescreening questioning in order to make sure a jury was fairly picked. The main purpose of voir dire is to discover any attitudes that are not initially obvious and may not allow a juror to serve without bias or prejudice.\(^51\) Voir dire is seldom held in other countries. In fact, it is a process discouraged in most nations since it is believed to increase racial biases. However, although voir dire may be unable to flush out every bias of a potential juror, the process still serves valuable purposes in the United States.\(^52\)

In the federal system, voir dire may be conducted several ways. For example, a judge may allow an attorney to conduct the questioning. Another instance may include a judge questioning the jurors.\(^53\) In voir dire an attorney may also choose to ask jurors questions collectively or individually. An attorney may also ask jurors to answer by a show of hands or verbally.\(^54\) Examples of some questions that judges or attorneys may ask include whether or not

---


\(^52\) Jonakait, Randolph N. The American Jury System. P. 133.


any of the prospective jurors know or are familiar with the defendant or plaintiff. Jurors may also be asked where and by whom they are employed.

Besides deciding who questions the jurors, voir dire can also take on the forms of single voir dire or multiple voir dire, where a judge selects more than one jury that day, but for a separate trial. The more commonly held voir dire is single and occurs immediately before a trial.

Once the process of voir dire is completed, a judge may dismiss a juror through a “challenge for a cause.”55 When indicating that there is a ‘cause’ to dismiss a juror, the court is saying that there is a specific, identifiable reason why this particular juror will be unable to render an unbiased decision in a particular trial. Many examples of causes include if a juror knows the defendant or plaintiff, was a witness to the crime or if the juror displays prejudices of any kind towards the case.56 A great benefit of challenges for cause is that their number of uses is not limited. A judge can issue a challenge for cause or grant an attorney’s request for as many jurors as they feel necessary. However, the numbers of challenges for cause are not high and generally attorneys do not request many.57

**Jury Sequestration and the Change of Venue**

Although the Sixth Amendment to the Constitution guarantees defendants the right to a fair trial, there are no explicit means detailed in the Constitution to list how to a fair trial is developed. As a result, the United States judicial system gradually adapted methods to ensure that its citizens do receive the right to fair trials. As explained earlier, voir dire is one of the first processes jurors go through in order to make sure they are well-suited to sit in on a particular

---

55 28 U.S. Code § 1870.
57 Id.
case. However, what is continually done throughout the trial to ensure that jurors remain unbiased, as well as staying protected? There are many measures a judge may choose to take during specific trials. A very important measure, and the most drastic of safeguards, is the sequestering of jurors. According to the American Judicature Society, the sequestration of a jury is defined as the means for “keeping all the jurors together in a location separate from their normal abodes, under the care of court authorities, throughout some of all of the trial.” This measure is administered by statute in the federal and state judicial systems. There are several indications that juror sequestration is needed. Examples include those cases where media influence of the case is needed to be kept from jurors, to minimize pressure from the community to render a certain verdict, to ensure juror safety and the ability to promote fairness amongst the jury as a whole. It is very important that the litigants involved in a “sensational” case are sure their jurors are not exposed to any outside influences, such as newspapers, reporters or other media attention. As far as juror safety, it is vital that civilian jurors do not feel threatened during a trial. If at any point the safety of a jury is noticeable, the judge may order for the jury to be sequestered. At this point, jurors would need to be contained in unidentified locations, away from their family and friends, until the completion of trial.

The majority of federal jurisdictions do not require sequestration, but leave the discretion up to the judges. State court systems, however, each have their own requirements and mandates for when a jury needs to be sequestered. For example, some states require sequestration for death penalty cases, while other states leave the decision up to the specific judge. There are many reasons why these jurisdictions do not require all high profile cases to go to sequestration of

---

59 Id.
60 Id.
First and foremost, sequestration is expensive. Not only do jurors need to be put up into a hotel or other unidentified location, they also need to have security or police with them at all times. Sequestration also largely impacts the mental health of jurors. Jurors may feel compelled to render a speedy verdict so as to avoid any long periods of sequestration. If this were to occur, then the whole point of sequestering jurors would be at a loss. Fortunately, jury sequestration is not practiced in all high-profile cases. Examples of cases in which the jury was sequestered include the 1981 trial of Chandler v. Florida, in which two Miami police officers were charged with burglarizing a local restaurant, and the 1995 O.J. Simpson trial, in which defendant O.J. Simpson was tried for the murder of his ex-wife Nicole Brown in California and her lover, Ronald Goldman.  

Chapter three of this thesis will bring attention to other high profile cases and the effects they have on juries in its discussion of military tribunals.

Another mechanism the courts are able to use to ensure impartiality amongst a jury is to call for a “change of venue.” A change of venue is literally described as moving a trial to a new location. This tool is used when so much notoriety and publicity has been given to a case in a particular place. It is believed that a fairer verdict will be reached with an untainted jury picked from a different location. This way if a crime was committed in New Jersey, for example, it may be possible that civilians in Philadelphia have not yet heard of the case. Jurors could be picked from a neighboring state in order to avoid civilians that may have already passed judgment or are somehow tied to the case. Defendants in high profile cases may move for a change of venue in fear that “pretrial publicity” has already affected the pool of jurors. However, it is up to the defense to prove that the jury pool has been exposed to inaccurate media coverage and that this

---


coverage has already caused jurors to believe the defendant’s guilt. According to the American Judicature Society, research has shown that motions for a change of venue are rarely granted, due to the difficulty in proving that jurors do have pre-trial biases. Only in extreme cases do trial judges grant a change of venue. These cases are usually those where widespread media coverage has surrounded only the original area of the crime committed and it is proven that selecting an unbiased jury in the area is unlikely. For example, Timothy McVeigh’s trial for the Oklahoma City Bombing was moved out of Oklahoma and was held in Colorado as a result of juror exposure to the circumstances. The bombing of the Murrah Federal Building was such a horrific tragedy that it nearly affected almost everyone in the nation. To have held the trial in the exact state of the occurrence would have resulted in a jury composed of citizens who were either directly affected by the bombing (i.e. knew someone who was killed) or who would have felt pressure to comply with public sympathy. Jurors who dwelled in Oklahoma also may have felt uneasy about participating in such a high-profile case, fearful of who was also connected to the case. In this instance, it was better to hold the trial in a state more removed from the bombing. Other examples include the 1992 Rodney King trial, which was moved from Los Angeles County, California to Simi Valley, California. These two twentieth century cases were sensational trials that required a change of venue within the United States.

In more ordinary cases, even where the media has affected almost an entire nation, a change of venue is even less likely. This is due to the notion that there is almost no one that is left without knowledge of the crime. In these instances, judges believe that jurors outside of the area have heard an equal amount of information as the possible jurors within the area.

---

Peremptory Challenges

The United States of America has created many regulations throughout its judicial system in order to see that defendants are given a fair trial and that the intent of due process is always served. One of the main ways the goal of due process is met is through the use of peremptory challenges. This thesis will convey that, in addition to other statutes implemented by the U.S., the use of peremptory challenges continues as way to ensure that an impartial jury is selected.

Peremptory challenges are a unique tool attorneys may use to remove a juror if he or she feels a particular juror is biased. Unlike challenges for cause, a reason is not required for peremptory challenges. However, attorneys must be careful in using his or her peremptory challenges since there must be no evident reason of racial, gender, religious or origin discrimination. An attorney must only exercise this right when he or she truly feels a juror is not well-suited for their case.

Peremptory challenges serve as an asset to all courts. In Federal courts, judges may exercise two ways of permitting these challenges. These judges may either use the strike method or the sequential method. When using the strike method, both parties are aware of all of the characteristics of potential jurors. First challenges for cause are used and then a panel is seated. From this remaining panel attorneys are able to exercise their use of peremptory challenges. The sequential method is exactly the opposite. When using the sequential method, parties are unaware of characteristic of potential jurors. Instead, parties use their challenges one after another, running the risk of replacing a dismissed juror with one even more disagreeable.

---

65 Id. P. 53.
can dismiss the jurors on an individual basis, known as the individual method, or bring all of the jurors in at once and dismiss them in front of the group, known as group, or the box method.66

Table 1 on the following page is representative of how peremptory challenges may be distributed amongst differing types of cases. The purpose of this chart is to demonstrate the numerical value each challenge has and its weight in each type of case. It must be noted, however, that all cases are different and that special circumstances may be made, altering the amount of peremptory challenges allotted and/or used. This table conveys the allotted challenges designated to attorneys in 1989. Although this chart is reflective of the number of challenges allowed to attorneys in 1989, the allotted challenges have not been altered since this time.

The allotted number of peremptory challenges an attorney is granted depends on the type of case he or she is trying (criminal v. civil, state v. federal) and the state in which the trial is being held. An attorney is unable to use more challenges than he or she is allotted, but is not forced to use all of them. It is commonplace, nevertheless, that most attorneys use all of their challenges.67 Attorneys are forbidden to use peremptory challenges to discriminate against jurors as a result of their race, ethnicity, gender or religion biases.68 However, it is possible that these characteristics may play a role in a juror’s dismissal if these characteristics impair a juror from being impartial.69 Peremptory challenges, however, may be used in instances in which an attorney cannot verbally identify why he or she does not want the juror on his or her case.

---

Table 1: Number of Peremptory Challenges Allowed

<table>
<thead>
<tr>
<th></th>
<th>Plaintiff</th>
<th>Defendant</th>
<th>Rule</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Criminal Cases</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Capital Case</td>
<td>20</td>
<td>20</td>
<td>Fed. R. Crim. P. 24(b)</td>
</tr>
<tr>
<td>Felony Case</td>
<td>6</td>
<td>10</td>
<td>Fed. R. Crim. P. 24(b)</td>
</tr>
<tr>
<td>Misdemeanor</td>
<td>3</td>
<td>3</td>
<td>Fed. R. Crim. P. 24(b)</td>
</tr>
<tr>
<td><strong>Civil Cases</strong></td>
<td>3</td>
<td>3</td>
<td>28 U.S. Const. § 1870</td>
</tr>
<tr>
<td>If Alternate Jurors,</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1 or 2</td>
<td>1</td>
<td>1</td>
<td>Fed. R. Civ. P. 47(b)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Fed. R. Crim. P. 24(c)</td>
</tr>
<tr>
<td>3 or 4</td>
<td>2</td>
<td>2</td>
<td>Fed. R. Civ. P. 47(b)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Fed. R. Crim. P. 24(c)</td>
</tr>
<tr>
<td>5 or 6</td>
<td>3</td>
<td>3</td>
<td>Fed. R. Civ. P. 47(b)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Fed. R. Crim. P. 24(c)</td>
</tr>
</tbody>
</table>

The most common reasons an attorney would dismiss a juror include whether or not a particular juror would identify with and, therefore, sympathize with a defendant or if a juror displays visual signs of disgust or agreement as facts of the case are being read. As this paper mentioned, there are documented cases where attorneys have illegally used their peremptory challenges. In these unfortunate instances, defendants are encouraged by their attorneys to appeal their case under a Batson challenge. Batson challenges refer to a defendant’s claim that the jury was chosen illegitimately in order to yield a biased verdict. Such examples of these cases

---

resulted in juries where the jurors were all white, all male or even all American. However, when peremptory challenges are used properly their goal is to promote fairness, support reasons of cause when striking jurors and to defend voir dire.

It is noted that peremptory challenges are not explicitly provided for in the United States Constitution. However, as discussed previously, all courts have accepted and have permitted peremptory challenges of some form at one time or another. These challenges have been embraced as a form of court procedure. However, in order to be sure the peremptory challenges tool does not overstep its boundaries, the Constitution does, in fact, limit its use. These limitations rest within the equal protection rights of litigants. The following section will outline exemplary cases, describing the reasons peremptory challenges have been questioned in the past decades. These famous trials provide proof for why peremptory challenges are only justifiable when used appropriately. One of the cases defined, Batson v. Kentucky, details the origins of a defendant’s “Batson claim” and the ramifications that await if these challenges are used improperly. The term “Batson claim” refers to the case of Batson v. Kentucky, in which prosecutors unlawfully used peremptory challenges to remove all African American jurors from the jury, resulting in a verdict that was biased against the African American defendant. As a result, in today’s court of law the term “Batson claim” refers to a defendant’s questioning of whether or not the jury was properly selected based on race.

The following cases are prime examples of how the mandate for impartiality can be traced throughout the courts. Immediately following the explanation of Batson v. Kentucky, this thesis will examine the modern day case of Snyder v. Louisiana, in which the Supreme Court has again reviewed a defendant’s Batson claims in order to ensure that attorneys continue to effectively and lawfully use peremptory challenges. The Snyder v. Louisiana case also provides
greater demonstration that the courts are continually checking up on attorneys and reviewing the lawfulness of their use of judicial tools.

**Review of Peremptory Challenges**

The Sixth Amendment of the United States Constitution was created with not only the intent to protect citizens from an unfair trial, but also to protect citizens from the tyranny of a new government. The Founding Fathers had just escaped a monarchy in England and now were cognizant of how important it was for there to be regulations outlining the powers of a new government. Setting forth the requirements for a defendant to have a jury meant that, unless under special circumstances, Americans could not be sentenced by one man (in reference to a King) and instead, a group of men, or a jury, would have to deliberate on the appropriate sentence. The Framers knew it was imperative that more than one person decided the fate of an accused.  

The Sixth Amendment begins, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State...” The Framers of the Constitution made sure to specify that juries remain “impartial” or without prejudice, so as to assure a non-discriminatory verdict. Furthermore, impartiality, in reference to juries, is also guaranteed by the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

The Equal Protection Clause states how,

> “All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State

---

72 U.S Const. amend. VI.
shall make or enforce and law which shall abridge the privileges or immunities of citizens of the United States...”

The Due Process Clause immediately follows the Equal Protection Clause, stating that no, “State shall deprive any person of life, liberty, or property, without due process of law...” These clauses included in the Fourteenth Amendment further guarantee all Americans the right to a trial under due process, or the proper proceedings of a court hearing. However, as time has evolved, a tool that once seemed unreservedly beneficial has been demonstrated to have shortcomings when illegitimately used. This section will detail several influential cases that have had an immense effect on the use of peremptory challenges. Following this explanation will be the review of a similar case, Snyder v. Louisiana, which is the latest case decided regarding the use of peremptory challenges.

When peremptory challenges are used properly their goal is to promote fairness, support reasons of cause when striking jurors and to defend voir dire, or the process by which jurors are interviewed before being invited to sit on a jury. Courts in the United States have always permitted the use of peremptory challenges as a constitutional and effective means of promoting fairness in a jury. In accordance with peremptory challenges, the United States is one of the few countries that still heavily rely on the use of juries. When mathematically derived, the United States is estimated to make up 95% of the world’s juries. Included in this 95% are the 80

74 U.S. Const. amend. XIV §1
75 Id.
77 Id.

37
million Americans who have been called for jury duty, in addition to the 30% who have been eliminated by peremptory challenges.

The history of peremptory challenges dates as far back as 1305 and the Ordinance of Inquests. For hundreds of years the practices of these challenges were able to remain steadfastly, principally because the Supreme Court held that “peremptory challenges are an essential means for achieving an impartial jury.” However, in recent decades sturdy emphasis has surrounded peremptory challenges and their constitutionality. The first of these landmark cases to challenge a prosecution’s use of peremptory challenges was Swain v. Alabama in 1965, the leading until Batson v. Kentucky was decided in 1986. In Swain v. Alabama, the defendant, an African America man, was sentenced to death after he was convicted of rape. Once his sentence had been given, he appealed, challenging that the selection of jurors for his case was unfair, resulting in a violation of his right to Equal Protection under the Fourteenth Amendment. He argued that blacks were “substantially underrepresented on grand juries and petit juries, particularly his.” Swain proved his argument by discovering that no black juror had served on a petit jury in Talladega County, Alabama for over fifteen years and, in regards to his trial, no blacks sat on his jury. The prosecutor had used peremptory challenges to strike six of the eight blacks on the jury panel (the other two were exempted from service). The court’s response to Swain’s challenges was two-fold. Regarding blacks being underrepresented on grand and petit juries, the court agreed that the system was “somewhat haphazard and little effort was made to ensure that all

---


groups in the community were represented.” Still, the court did little to correct the problem since it concluded that the underrepresentation of blacks was minimal.

The latter part of the court’s decision concerned Swain’s challenge of the prosecution’s use of peremptory challenges. In answer to this, the court held that Swain’s challenge was not valid because the very “nature of peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court’s control.” The court stressed how prosecutors often use peremptory challenges against a juror due to the facial expressions, character traits or familiarizations of a juror. The court conceded that all of these reasons are justified under the rule of law. In Swain, the court did acknowledge that the striking of black jurors on account of race does violate the defendant’s right under the Equal Protection Clause, but the burden of proving the violation is entirely up to the defendant. As the court pointed out, it is often impossible to prove that a prosecutor’s reason for striking jurors is based on racial discrimination.

What is most interesting about the court’s ruling in this legendary case is that the court did recognized that peremptory challenges are often used “on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, national origin, occupation or affiliations of people summoned for jury duty.” Therefore, this case defined that in this particular instance the striking of blacks did not violate Swain’s Equal Protection Right.

---

84 Id.
86 Id.
However, the court vowed that it would review the prosecution’s use of peremptory challenges in order to ensure that the striking of black jurors was not a regular act.\textsuperscript{89}

Following the court’s decision in Swain v. Alabama, there was discourse over whether or not the court had made the best decision. At the conclusion of many discussions, the courts reminded commentators that it had not given up on reviewing the use of peremptory challenges. There were similar cases that followed Swain, but over the next twenty years not many cases involving the dismissal of black jurors proved jury discrimination when challenged by defendants.\textsuperscript{90}

The year of 1986 brought to the court the heavily cited case of Batson v. Kentucky. James Kirkland Batson, the petitioner, was an African American man convicted of burglary and receipt of stolen goods by a Louisville, Kentucky State Circuit Court. Just as in Swain v. Alabama, this jury consisted of all white jurors, which resulted in the defendant’s cause for appeal. Prosecutor, Joe Gutmann, peremptorily challenged six jurors, including all four black members, leaving an all-white jury to decide the case. The defense argued that this jury unfairly represented his client due to the prosecution’s removal of all African American jurors. The defense also argued that the striking of the African American jurors violated Batson’s rights under the Sixth and Fourteenth Amendments. The trial judge disagreed with the defense’s claim and denied its motion. As a result, James Batson was convicted.

Batson later appealed the conviction to the Kentucky Supreme Court. The Kentucky Supreme Court affirmed the appeal, citing Swain v. Alabama. It held that the defendant was permitted to appeal his case on the grounds of his Sixth and Fourteenth Amendment rights being


\textsuperscript{90} Id. For more information on similar cases involving Batson claims, read People v. Wheeler, People v. McCray and United States v. Childress.
violated, but only if he could convey to the court how the black jurors were systematically removed. Certiorari was granted in order to determine whether or not the petitioner, James Batson, was tried in “violation of constitutional provisions guaranteeing the defendant an impartial jury and a jury composed of persons representing a fair cross section of the community.”

In April of 1986, Justice Lewis Franklin Powell, Jr. delivered the court’s opinion. It reached new heights in this area of the law. The court ruled in favor of the petitioner, defendant James Kirkland Batson, overruling the landmarked case of Swain v. Alabama. It overruled Swain by requiring a lesser burden of proof a petitioner must show in order to present a prima facie case, or a case that does not require proof or reasoning, in regards to racial discrimination. The court overturned Swain and held that defendants must do three things in order to contend racial discrimination by peremptory challenges:

“The defendant must first show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the jury pool members of the defendant’s race. The defendant may also rely on the fact that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate. Finally, the defendant must show that such facts and any other relevant circumstances raise an inference that the prosecutor used peremptory challenges to exclude the veniremen from the petit jury on the account of their race. Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors.”

92 Id.
93 Id.
According to these three steps the petitioner must prove that he was discriminated against on the basis of his race. Although the courts deem this decision different due to the unique circumstances presented in Batson’s case, many of the headlining facts are similar to Swain v. Alabama. The reasoning behind the court’s decision in the Batson case is what will later lead to the courts to adoption of a “Batson claim.”

Batson v. Kentucky was a crucial turning point in the history of peremptory challenges and their effect on racial discrimination. The courts were forced to answer whether or not the prosecution’s use of peremptory challenges used to strike four African American jurors violated the defendant’s Sixth Amendment’s rights, as well as section one of a defendant’s Fourteenth Amendment rights. Section one of the Fourteenth Amendment, also referred to as the Equal Protection Clause, states, “…nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws.”94 The unfortunate fact that attorneys had misused their judicial powers also presented another issue to the courts. Now the courts were going to have to monitor the use of the peremptory tools and assure litigants that their use is a beneficial source. The judiciary was going to have to make sure that peremptory challenges were used for their main purpose and help to provide a fair and impartial jury. This case significantly proved that in order to uphold the Constitution, the courts were going to have to continue to provide a check on the use of peremptory challenges.

After the critical Batson v. Kentucky case the uses of peremptory challenges remained in the courts, but were kept under a close watch by justices. The courts continued to review peremptory challenges and the friction they imposed on the impartiality of race. In 1992 the courts firmly ruled that “a criminal defendant’s use of peremptory challenges to exclude jurors

94 U.S Const. amend. XIV, § 1.
on the basis of race constitutes ‘state action’ in violation of the Equal Protection Clause.”

Just as it would be disgraceful for an attorney to misuse his or her power against a litigant, it would also be dishonorable for a judge to be caught up in a racially discriminatory case. However, the ruling also stated that the limitation on peremptory challenges is not in violation of a defendant’s right to an impartial jury. This clause allows for there to be a mechanism to remove jurors, not based on their race, but as a mechanism for removing jurors “who would be incapable of confronting and suppressing their racism.”

Attorneys have a tough battle when exercising a peremptory challenge for these reasons. He or she must be sure to articulate his or her reasoning well so as to assure the court their use of a challenge is not prejudicial. As a result, it is easy to understand how judges would want to keep a close watch on attorneys and their uses of peremptory challenges so as to not discredit their name. However, less than ten years later the Supreme Court was once again faced with a case that violated a defendant’s rights. The case was Snyder v. Louisiana.

In August of 1995, defendant Allen Snyder attacked his estranged wife Mary Snyder and her companion Howard Wilson. Mr. Wilson was fatally stabbed nine times, while Mrs. Snyder was stabbed nineteen times, but miraculously survived the attack. In 1996, Allen Snyder, an African American, was convicted in Jefferson Parish, Louisiana, by an all-white jury for the murder of Howard Wilson. The defendant claimed that the state had racially discriminated against prospective jurors during voir dire, in violation of Batson v. Kentucky. The defense also questioned the appropriateness of the prosecutions’ racially discriminatory remarks to the media.

---

96 Id.
97 Id.
98 State v. Snyder, 942 So.2d 484 (1st Cir. 2005), petition for cert. filed. 75 U.S.L.W. 3694 (U.S. June 25, 2007) (No. 06-10119).
before a verdict was reached. While being interviewed by reporters, the prosecutor referred to
Allen Snyder’s case as the new “O.J. Simpson case” and how the jurors could not let Snyder “get
away with it.”99 The 1995 O.J. Simpson case was a murder trial in which Simpson was tried for
the murder of his ex-wife and her lover Ronald Goldman. Simpson was not convicted criminally,
but was convicted in a civil court. The remarks made by the prosecution were believed to have
infuriated jurors, since voting polls showed that a majority of white Americans believed O.J.
Simpson to have been guilty.

Defendant Allen Snyder was also suffering from depression, according to Dr. Richoux, a
psychiatrist who worked for the Jefferson Parish Correctional Center. The defense moved for “a
sanity commission to be appointed” in order to examine the defendant’s mental state before he
stood trial, as well as a five-week continuance so the defendant’s new medication could take
effect. The court denied the motion for a continuance, but on remand the defendant was
considered competent to stand trial. The jury reached a guilty verdict and Allen Snyder was
sentenced to death.100

Under the L.A. Const. art. V § 5, cl. D, any defendant convicted of a crime that risks the
sentencing of death may appeal his or her case. As a result, the Louisiana State Court reviewed
Mr. Snyder’s case under the defendant’s Batson claims, but, again, upheld the sentencing of
death. The court ruled that the trial court “did not abuse its discretion or err in its denial of the
claims.”101 However, in 2005 the United States Supreme Court granted Snyder’s petition for a
writ of certiorari, remanding the case for further review under precedent set in the Miller-El

---

99 State v. Snyder, 942 So.2d 484 (1st Cir. 2005), petition for cert. filed. 75 U.S.L.W. 3694 (U.S. June 25, 2007)
(No. 06-10119).
100 Id.
101 Id.
In order to understand the context in which the Supreme Court reviewed *Snyder v. Louisiana* it is important this section detail the case of *Miller El v. Dretke* and the new precedent this case set as a result of defendants’ Batson claims. The following is a brief description of the Miller-El case.

In 1986, Thomas Miller-El, his wife and another accomplice robbed a Holiday Inn. While robbing the hotel, Miller-El shot and killed one of the employees, as well as severely injuring another. Miller-El pled not guilty to the charges against him. He would be facing the death sentence. Once a jury was selected for his trial, the defendant challenged the prosecution on the grounds that his equal protection right had been violated. Miller-El believed his constitutional rights were violated when the prosecution struck ten out of the eleven eligible African America jurors. Fortunately for Miller-El, while he was awaiting his appeal, the courts had recently ruled on *Batson v. Kentucky*.

The *Miller-El* case is where the term “Batson claim” originated. Appellants who assert that prospective jurors for their case were struck for racially discriminatory reasons will appeal on the rights of their Batson claims, in reference to the decision in the *Batson v. Kentucky* case. On appeal, the courts held that Miller-El had not satisfied all three points of his Batson claim, particularly the third requirement showing that such facts in a case raise an inference that the prosecution improperly used peremptory challenges in order to exclude jurors from a jury on

---

account of their race. In this case, the appellate court affirmed and the Texas Supreme Court did not grant certiorari.

However, Miller-El petitioned the U.S. Supreme Court and it concluded in his first case that the “rejection of Miller-El’s Batson claim was debatable.” In 2003, the Supreme Court overturned its original holding and ordered that the Fifth Circuit grant a certificate of appealability to “further review the case.” The Supreme Court held that the Fifth Circuit based its decision upon evidence that was too “demanding.” The Supreme Court deciphered the state circuit court’s reasoning and interpreted the facts under the Anti-Terrorism and Effective Death Penalty Act of 1996. However, after review, the Supreme Court ruled that the Texas Court’s “finding of no discrimination” was “unreasonable.”

After nineteen years on death row, Miller-El was granted a new trial on June 28, 2004 and the Supreme Court granted certiorari for a second time. The court reviewed whether or not the Fifth Circuit erred again, in reviewing whether the prosecution “purposefully excluded African Americans from his capital jury”, violating Miller-El’s Batson claim. On June 13, 2005, the Supreme Court ruled in favor of the defendant, Thomas Miller-El, ruling that “his jury selection process had been tainted by racial bias.” Miller-El’s death sentence was overturned.

As a result of Miller-El pursuing his Batson claim, defendants today who believe their equal protection right has been violated are not required to provide as much evidence as they needed to forty years ago. This case also clarified the analysis of Batson’s third and final step.

---

104 *Miller-El v. Cockrell*, 537 U.S. 322 at 484 (2003). This was the first case of the Miller-El trilogy.
105 Id.
106 Id.
107 Id.
conveying the measures defendants must take in order to secure their argument. Although the new Miller-El claim may seem to present quite a bit of new information, the underlying themes of the inappropriate uses of peremptory challenges are the same as those in Swain v. Alabama and Batson v. Kentucky.

Alongside its ability to finally reach justice, the Miller-El v. Dretke case is a substantial link to the Supreme Court’s development in its monitoring of peremptory challenges. In this case, multiple courts continually checked and revisited the judicial tools used to select jurors. Although attorneys were originally able to perform misuse of their challenges, the court, through excessive debate and safeguards clearly defined that their uses were unconstitutional. Many experts will argue that this misuse of power should have never occurred. As this is true, it is also unrealistic. No matter which field of study there will always be those individuals who are untrustworthy and a disgrace to their career. However, it is through continual evolution and improvement that these people are corrected and/or replaced. As a result of the courts continued review, the judicial system was able to locate a problem and correct it. This thesis does not argue that the American judicial system is perfect, but it does ascertain that it has persisted to improve its functions each day. In this particular case, it was not the very use of peremptory challenges that were at fault. It was the attorneys who misused their tools who created the question. The case of Miller-El is a prime example of how peremptory challenges were traced through the courts and corrected.

In the Snyder v. Louisiana case, the Supreme Court of Louisiana was faced with three main issues relating to the constitutionality of equality questions. The court needed to decide whether the appeals court erred when it (1) did not rule against the prosecution’s reference to O.J. Simpson; (2) held that the defense did not prove discriminatory intent; and (3) held that a
Batson claim could not prove a mistrial. For the sake of length the author is unable to detail explanations to all three equality questions, but can make judgment that the majority did err when it did not associate the illegitimate striking of African American jurors from the jury, as well as the racially discriminatory comparison to O.J. Simpson. Certiorari was again granted in June of 2007 and was orally argued in December of 2007. Finally, on March 19, 2008, the Supreme Court rendered a decision in regards to the defendant’s allegation that the Louisiana Supreme Court rejected his claim that the prosecution had selected his jury based on race in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). After careful review and continued debate, the Supreme Court did, in fact, overturn the Louisiana State Supreme Court decision in a 7-2 majority opinion. Supreme Justice Samuel A. Alito delivered the opinion which stated that, “the trial court committed clear error in its ruling on a Batson objection, and therefore we reverse.”

The Supreme Court ruled that the Louisiana Supreme Court erred in its decision by not acknowledging the defendant’s Batson claims. The defense had argued that the prosecution had acted in appropriately when it struck two African American jurors, Mr. Jeffrey Brooks and Ms. Elaine Scott, from Snyder’s jury. Although the Supreme Court felt no need to consider the petitioner’s objection regarding Ms. Scott, the court did find it necessary to side with the defense and overturn the Louisiana Supreme Court decision in regards to Mr. Jeffrey Brooks.

Because of the minute details and tenuous details in this case the Supreme Court needed to do much evaluation. Often when cases are so complex judges tend to side with the original court decision since it is almost impossible to reach another opinion. However, the Supreme Court Justices were able to find reason in Snyder’s case. Through court transcripts the Justices were able to infer that racial prejudice had been a notable theme throughout the jury selection process. In his decision Justice Alito wrote that, “…once it is shown that a discriminatory intent

was a substantial or motivating factor in an action taken by a state actor, the burden shifts to the party defending the action to show that this factor was not determinative.”110 Justice Alito continued how once this racial temper is received by the jury it is hard to remove and believe that other actions of the attorney are not racially skewed.

The determinant factor in this decision rested within the legitimacy of the removal of juror Jeffrey Brooks. The prosecution defended its peremptory challenge by stating that the juror seemed nervous and thus unable to render a fair verdict. This juror was not struck until the day following his voir dire so it is fair to note that the original judge might not have remembered the juror’s demeanor and, therefore, might have been unable to recall the juror’s exact disposition. Judge Alito wrote that, “…nervousness cannot be shown from a cold transcript, which is why … the [trial] judge’s evaluation must be given much deference.”111 Although these considerations may be made, the Supreme Court thought it unusual to strike a juror merely on the fact of nervousness since all jurors are generally nervous before sitting on a murder trial. The prosecution did defend its original objection by stating that their removal of Mr. Brooks was due to his schedule as a teacher. With disbelief the Supreme Court determined that in any other case Mr. Brooks would not have been removed from the jury and that in this situation he was, in fact, removed as a result of racial discrimination.

The two dissenting justices, Justice Clarence Thomas and Justice Antonin Scalia, argued against the majority, asserting that, “the trial court did not clearly err in rejecting petitioner’s Batson challenge with respect to Mr. Brooks.”112 Justices Thomas and Scalia both believed that the original judge in the Louisiana Supreme Court was not at fault for accepting the prosecutions reasoning for striking Mr. Brooks. The dissenting Justices wrote that, “when the grounds for a

---

111 Id.
112 Id.
trial court’s decision are ambiguous, an appellate court should not presume that the lower court based its decision on an improper ground, particularly when applying a deferential standard of review.” They argued that the review of a Batson claim did not apply to juror Jeffrey Brooks.

This modern day case is exemplary of the negative effects that occur when attorneys misuse a judicial tool and when judges are unable to detect the indiscretion. Peremptory challenges were created to protect defendants and equipped them with the best possible jury. The United States Court duty is to uphold this mission. The prosecuting attorneys acted illegally, violating the defendant’s Sixth and Fourteenth Amendment rights, when he decreased the possibility of a fair jury and struck the five African Americans on the jury. The prosecution further damaged their case by making tasteless references to the infamous O.J. Simpson trial. By comparing defendant Allen Snyder to O.J. Simpson, a man who is believed to have been guilty of murder by a large proportion of Americans, the jury, as well as the public, was malevolently influenced even before the trial began. This tainting of the jury’s image should have originally called for a mistrial or should have resulted in a change of venue. Unfortunately the Louisiana courts failed in noticing the deficient counsel at hand. However, the judicial system should take great pride in the fact that it has the ability to perform appeals and not allow any one decision to be the final decision. Thanks to the arrangement of the American judicial system the defendant was able to question his sentence and have justice be served. The ill-fated instances displayed in the previous cases are the exact reasons why the United States courts have created the possibility of review, as well as additional statutes in order to protect the rights of litigants.

The Supreme Court of the United State’s ruling is historically very important to the courts. The court’s decision to overturn the Louisiana Supreme Court’s decision has allowed for the court’s process to be greater appreciated and will give rise to greater faith from the American

---

public. The ruling served as another reminder that the courts are aware of improper uses of peremptory challenges and that the court will review the case if these acts are reported. The decision also gives hope to defendants in that their wishes will be addressed if presented to the court. The possibility of a defendant calling on his or her Batson claim will now cause an attorney to be more conscious of how they exercise their peremptory challenges. If anything, the precedent Batson claims have set have heightened the awareness of selecting an impartial jury.

The Constitution of the United States of America guarantees all citizens due process by an impartial jury under the Sixth Amendment, as well as equal protection of the law under the Fourteenth Amendment. In conjunction with the powers vested to the judicial system of the nation, the laws outlined in the Constitution are provided to help secure due process to citizens and provide the public with just verdicts. It was vital that the court ruled in favor of defendant Allen Snyder in order to protect future citizens’ constitutional rights.

Although these cases have demonstrated that there have been cases of misuse of peremptory challenges, these cases also, more importantly prove that the courts have maintained a monitoring system for the challenges. The goal of this section was to describe the legendary cases so as to familiarize the reader with precedents set, as well as the transition into the court’s stance on peremptory challenges today. Through the details of the previous cases it is clear to see how and why the courts have made it a high priority to trace the uses of peremptory challenges throughout the courts. With each case the court displayed advance knowledge and credibility of improving the challenges role and seeing that their duty of assuring impartiality was upheld. The representation of these cases will also allow the reader to see how the courts have maintained a check and balance system with peremptory challenges and why these tools should remain a part of the United States judicial system.
Human Element of Jury Selection

The more research conducted on peremptory challenges and their effects on juries, the more it was certain to the author that there included a greater science to their existence. This section explains how peremptory challenges are not only fixtures in the legal system, but are also intertwined with common human behavioral patterns.

In recent years, psychologists have explored the phenomenon of human perceptions, gut reactions and impulsive instincts. Research has been conducted in order to decipher the reasons why humans have instinctual feelings and the reactive processes we go through when impulsive decisions are made. Malcolm Gladwell, a notable author, has compiled an assortment of real-life experiences and examples for the lay reader, offering explanations as to why humans doubt their gut instincts. In *Blink*, Gladwell supports impulsive decisions and counter-argues the “think before you speak” notion. *Blink* details the strength of the human “adaptive unconscious” or the section of the human brain that causes individuals to make “fast and frugal” decisions.114 This section will review the psychology literature associated with the concepts of rapid cognition, and will provide examples of each. This section will also link this body of research to interactions that can occur between attorneys and juries specifically, when exercising the use of peremptory challenges.115 As a reminder to the reader, peremptory challenges are the mechanisms by which counsel may remove a juror from a trial without a written reason. Peremptory challenges differ from a cause for challenge, where a definitive reason for removing a juror must be noted. Attorneys are designated a specific amount of challenges in each case. The author of this thesis was able to further defend how peremptory challenges are necessary in today’s court system and that it is vital for


attorneys’ to act on their impulsive decisions about jurors as a result of reviewing psychological literature. Again, it is important to note that this research only supports the use of peremptory challenges under legitimate and proper circumstances. In no way does this research confirm the use of peremptory challenges in cases where racial prejudice or other unconstitutional juror biases have been identified. This chapter will formulate suggestions, encouraging readers to conduct further research on the connections of peremptory challenges and rapid cognition.

**Importance of Rapid Cognition and its Effects on Jury Selection**

Up until this point, psychological research has not extended the “blink effect”, or the processes involved in rapid cognition, to the use of juries in a court room situation. The rapid cognition research has focused solely on the daily decisions humans make when, for example, meeting someone for the first time or conducting an interview. No research has suggested that the “blink effect” is what attorneys experience when constructing a jury suitable for his or her trial. This thesis is the first to suggest that all of the human behavioral subconscious reactions that humans experience daily may in fact apply to attorneys and their selection of jurors. It is critical the recent findings of the “blink effect” be applied to the selection of jurors since the reasons for peremptory challenges are often unexplainable. Peremptory challenges are the privileges attorneys have when they decide to remove a juror from a particular case. When using peremptory challenges, attorneys do not have to include a written explanation for dismissing the juror. As a result of these challenges, far too many cases have wound up in appellate courts, based on a “*Batson claim.*” Effective research may necessarily conclude that peremptory challenges serve a useful purpose in constructing appropriate juries, especially for high-profile

---

cases. Batson challenges, as previously noted, are extremely time-consuming and costly. If enough evidence is found to support this theory it may help to limit the number of cases brought under alleged Batson violations, thus lowering the court’s overload and budget.

**Principles Associated with Rapid Cognition**

In order for the blink effect to properly be applied to the selection of jurors it is important to begin from the principles associated with rapid cognition.

**Perception**

Individuals’ perceptions of others play a large role in how we categorize others and whether or not we are able to identify with another. In the process of identifying with others, humans are then able to decipher whether or not they like that individual, feel safe, or feel threatened when in that person’s company. This research has defined perception as “the act or faculty of apprehending by means of the senses or of the mind.” The dictionary goes on to detail that perception has to do with one’s own cognition, understanding, and insight. The definition seems to imply that an individual’s perception of something, whether it is another person or a situation, depends largely on what that individual’s senses pick up. Thomas Reid, a notable Scottish philosopher and idealist on human reasoning, made his own accusations about the concept of perception. In his book, *Thomas Reid’s Theory of Perception*, Ryan Nichols reveals that Reid characterized perception broadly. Reid argued that perception, “given proper

---


stimulus, produces certain kinds of sensations, beliefs, or judgments.”119 That is, perception of someone or something must stem from an original thought, or as Thomas Reid describes, a “law.” For example, as some point in time humans “learn about colors.” Humans then apply their knowledge about colors to other things in life, such as “visual figures.” Although individuals may not be taught about every single vision associated with colors, it is up to them, and as a result of their perceptions, that they are then able to apply the concept to other things in life. 120 Reid’s understanding of perception is valuable since it suggests that senses are an important source for predicting truth.

An excellent example of human perception stems from the duties of local police officers. As part of their job description, police officers are faced with challenges daily, causing them to make decisions as best as they can, sometimes with little information. As a result, a police officer’s perception of a situation or person is vital. On February 3, 1999, Amadou Diallo, an innocent resident on Wheeler Avenue in the Bronx, New York, was killed by four police officers.121 Diallo had been smoking a cigarette on his front steps, breaking no laws, but displayed all of the similar characteristics of drug dealers in New York. What convinced police officers of Diallo’s guilt as they moved closer to his residence was that he ran. One officer also reported that he “thought” he saw Diallo reaching for what he perceived as a gun. When the officer saw Diallo move his hands, the officer began firing, killing the suspect. When the firing brigade had ceased officers concluded that Diallo never had a gun; he was reaching for his wallet. The officers were acquitted on all charges of murder because they perceived the suspect reaching for a gun.

119 Nichols, R. Thomas Reid’s Theory of Perception. P. 86.

120 Id.

Perception is a valuable tool, but as Reid researched, it does have its limitations. A notable limitation relates to the subject of race. Keith Payne includes in his article that, “Racial primes may affect perceivers’ responses on other ways besides producing differences in response latencies…racial cues may cause perceivers to make stereotype-consistent errors” in regards to officer’s identifying weapons.\textsuperscript{122} It has been indicated that negative thoughts and “violent traits” are characteristics of white American’s stereotypes of black Americans.\textsuperscript{123} Payne also notes that race may heavily influence a white police officer’s judgment when distinguishing a weapon. There are many instances where police officers have perceived a weapon being pulled and were correct in their identifications. However, this section’s purpose for documenting the Diallo murder is to convey how large of a role an individual’s perception plays in real-life situations, as well as how dangerous it is when our perceptions are incorrect.

\textit{Instincts and Gut Reactions}

When examining the human perceptual processes, it is also important to understand how individuals process their instinctual drives and gut reactions. There are many coined definitions for the concept of instinct. For clarification, this research has referred to instinct as “a natural or innate impulse, inclination, or tendency.”\textsuperscript{124} Instincts are experienced by humans as a result of external stimuli. Examples of stimuli include, but are not limited to, feelings of emotion. Emotion, in the basic structure of a cognitive cause theory, is the final stage human’s reach after a perception of an object is made and an appraisal judgment is passed.\textsuperscript{125} However, examples

\textsuperscript{122} Gladwell, Malcolm. \textit{Blink}. P. 189.
\textsuperscript{123} Id. P. 190-191.
\textsuperscript{125} Prinz, J. \textit{Gut Reactions: A Perceptual Theory of Emotion}. P. 102.
will indicate that human instincts are reactions to stimuli that do not always correlate with an exact reason. It is these instincts that cause individuals to receive gut reactions.

Malcolm Gladwell opens up *Blink* with Stanley Margolis’s descriptive story of the Greek *kouros*. Twenty-four years ago Gianfranco Becchina, an art dealer, presented the J. Paul Getty Museum in California with a kouros statue.\(^{126}\) The art dealer was convinced this ancient statue was authentic and that the Getty should be honored to purchase and display it in its museum. The museum owners were amazed by the work, but were unsure of the authenticity of the statue since the kouros was in near-perfect condition. The museum hired Stanley Margolis, a marine geochemist, to help determine the age and authenticity of the kouros. Margolis’s studies suggested that the statue’s dolomite marble could have been altered in order to appear ancient.\(^{127}\) This conclusion was reached after Margolis noticed that the marble appeared light purple instead of amber when placed in front of fluorescent light.

The kouros example conveys that humans get this gut reaction to something and often cannot identify the exact reason why this feeling exists. The art connoisseurs knew that there was something incomplete about the statue, but were unable to detail exactly what did not add up.

**Impulsive Decisions or Automatic Responses**

Humans make perceptions, act on instincts and often make impulsive decisions. However, after repeatedly experiencing the same situation humans can begin to act on automatic responses. The scenario mentioned earlier, in which the four police officers from New York murdered Amadou Diallo, is also an excellent example of automatic responses. Repetitive

\(^{126}\) The example of the imitation Greek kouros was introduced my Malcolm Gladwell in his Introductory Chapter of *Blink* on P. 3. However, further research was collected through Stanley Margolis’s article, “Authenticating Ancient Marble Sculpture.” *Scientific American*, 260, No. 6 (June 1989), P. 104-110.

feelings and occurrences cause the human brain to call on mental short cuts, or heuristics, in order to process a reaction. Psychologists Eliot R. Smith and Miriam Lerner suggest automatism or the “repeated execution of a cognitive process” develops through consistent use. Once automatic responses begin working, less cognitive processing is done within the brain. As a result, not as much thought goes into a decision as if it were the first time something was encountered.

Bernd Wittenbrink, Charles M. Judd and Bernadette Park provide additional explanation of the automatic response concept. These researchers have specifically targeted the idea of spontaneous prejudice. Through two studies the experimenters tested whether or not automatic responses, specifically racial stereotypes, are vulnerable to situational factors. After testing the stereotypes of African Americans based on positive and negative thoughts (i.e. a family barbeque v. a robbery), their analysis concluded that “all automatic processing is conditional” and how different situational factors do a play a large role in determining how a person perceives another. The researchers suggested that the use of automatic responses was clearly disadvantageous since the subconscious activation of automatic responses “has the potential to lead well-intentioned perceivers to walk away with a prejudiced impression of their interaction partners.” The researchers argued that this effect could decrease respondents’ inaction to their responses because individuals are often unaware that they exhibit any type of subconscious bias.

Automatic responses are inevitable. It is difficult to think of a day where one did not make an automatic decision of some type. Heuristics also play a significant role within a

---

130 Id.
131 Id.
professional setting. Stockbrokers on Wall Street are a prime example of utilizing automatic responses at work.\(^{132}\) Little, if any, time rests between a stockbroker’s minute by minute decisions. If a particular stock shows resemblance to a previous experience, traders rely on their heuristics to make a decision. Automatic responses support this profession, and in fact, allow decision-making to be done more easily.

**Facial Expressions**

While there are many subconscious factual reasons why individuals pass judgment on another, there are also more blatant, visual reasons. After a thought is internalized human reactions are then displayed physiologically.\(^{133}\) Alexander Todorov suggests that “people are extremely efficient at making trait judgments from faces.”\(^{134}\) For example, Todorov explains that individuals can make a clear decision on whether or not they deem a person trustworthy or even competent, simply by viewing their facial features. Todorov describes how masculine facial features, whether on a male or female, denote higher levels of competence. Facial characteristics, such as eyebrow placement and nose size provide enough information for human subconscious minds to make judgments on whether or not a particular person can be trusted. Todorov argues that “physiognomy matters” because our mental life is guided by “rapid, snap decisions that may never appear on the conscious radar.”\(^{135}\) Todorov’s research revealed that the very definition of a competent face was a masculine face.


\(^{135}\) Id.
Arne Ohman, Daniel Lundqvist, and Francisco Esteves also conducted research involving human facial features. Particularly, the research performed by Ohman and his partners focused on the responses to threatening versus friendly faces in crowds. Through a series of studies, Ohman, Lundqvist and Esteves concluded that threatening faces are more quickly and easily identified than friendly faces in a public crowd. The experimenters asked the participants in their study to identify facial expressions implicative of sadness, anger or friendliness. The researchers summarized their study’s conclusions by stating that “humans can decode, learn and emotionally respond to threatening facial stimuli that they do not consciously perceive.”\textsuperscript{136} Much like the conclusions Alexander Todorov presented, Ohman and his partners interpreted that V-shaped eyebrows represented a threat expression.\textsuperscript{137}

In correlation with facial expressions/features conveying attitudes of trustworthiness, this is a major factor many attorneys use when reading their jurors. When interviewed, West Virginia Defense attorney Paul Harris revealed that when he is reading a juror he pays close attention to the juror. He and his client pay special attention to the focus of the client’s eyes, the way they hold their shoulders and whether or not they seem confident. Just as facial features reveal a great deal about a person’s feelings, so does body language. Harris will watch the juror as he or she walks from their seat up to the judge and will observe their movement. Harris will also take note of whether or not which particular juror seems to be the foreman for the jury.\textsuperscript{138} These characteristics may be positive or negative, depending on the attitudes of the jurors and the particular case at hand. However, all of these observations all key ingredients to selecting the most qualified jurors for a trial.


\textsuperscript{137} Id.

\textsuperscript{138} Paul Harris Interview. January 22, 2008.
Thin-Slicing

Individuals do not always need all of the facts in order to make a decision. This happening is known as thin-slicing, where humans are only presented with a piece of a puzzle and are able to make a judgment. Gladwell’s research defined thin-slicing as “the ability of our unconscious to find patterns in situations and behavior based on very narrow slices of experience.”

A great example of thin-slicing deals with students’ ability to determine the difficulty of a teacher. To test this belief, Nalini Ambady conducted a study determining how large of a role nonverbal behavioral patterns play amongst students and their teachers. She distinctly set out to prove whether or not “our consensual impressions of others, even when based on very brief observations of nonverbal behavior, can sometimes be unexpectedly accurate.”

Ambady’s experiment consisted of thirteen teachers from a private undergraduate university who were videotaped for about an hour. The teachers were aware that they were being videotaped and told that the tapes would be used to evaluate teaching effectiveness. Later, nine female judges were brought in to view the videotapes in segments of ten seconds and were told to watch for nonverbal behaviors such as head nods, lip biting, legs crossing and hands-crossing. Specifically for this experiment, female judges were used because research has shown that women are better decoders of nonverbal behaviors. The judges were instructed to rate the teachers from one (having no nonverbal behaviors) to nine (having a lot of nonverbal behaviors). However, the judges were unaware of the teacher evaluations Ambady had collected earlier from the actual undergraduate students in the thirteen teachers’ classes. The final test of this

141 Id. P. 432.
experiment was to see how well the students’ evaluations of the teachers stood up to the judges evaluations.

The study concluded that the majority of the teachers who were evaluated positively by their students were also evaluated positively by the female judges. Specific thoughts of the finding revealed that the highly rated teachers were more “optimistic, confident, dominant, active, enthusiastic, likable, warm, competent, and supportive on the basis of their nonverbal behavior.” Although this experiment is a small glimpse into thin-slicing, it is a fair representation of how humans can make a decision based on a tiny amount of information, or a ten second video clipping, as described in this experiment.

Although psychologists have evidence proving that people, in general, are able to make fitting judgments of people from first impressions, there are still many who are skeptical. Dr. Frank Bernieri explains that human personalities are made up of a number of traits. In a first impression, all of these traits may not be recognizable. Bernieri points out the infamous case of Ted Bundy, a serial killer of the 1970s, who showed no signs of threat to his victims. Although personality is identified within the first seconds of meeting someone, Dr. Bernieri notes that humans can often be “distracted” by different facets of one’s personality. Because of these distractions, humans may not be able to capture the entire package the first time around.


Id.


Id.
Applications of the “Blink Effect” to the Selection of Jurors

Malcolm Gladwell collected a series of informational anecdotes and experiences from professionals, varying from car salesman to medical doctors. All of the sources interviewed gave examples of experiences they had encountered when their snap judgments paid off. These anecdotes support researchers’ beliefs that not all impulsive decisions are bad and that the thoughts and instincts humans encounter within the first few seconds of meeting someone are not senseless. *Blink* suggests that the spontaneous impulses humans experience are a way of our subconscious filling us in on what we need to know, and quickly.

The research collected in *Blink* also suggests that snap judgments are sometimes more useful in situations where rapid decisions need to be made. This paper gives the example of stockbrokers on Wall Street. The stock trading profession is one where decisions *do* need to be made instantaneously. The author strongly suggests that the blink effect could also be applied to an attorney and his choosing of a jury, where a first impression is all an attorney gets before he or she makes a decision.

Within minutes of meeting a juror an attorney must be able to “thin-slice” the juror and determine the juror’s true motive for being involved in a particular case. An attorney must be able to look beyond age, race, religion, education and profession in order to decide whether or not to dismiss a juror. Attorneys must call on and trust their perceptions, instinctual drives and gut feelings in order to create the best jury. When an individual meets another for the first time, all of these same cognitive processes occur. During the process of voir dire an attorney relies upon his or her questioning. In this short period of time an attorney must be able to thin-slice the juror and make a snap judgment.
Instincts, caused by these snap judgments, are what attorneys rely on when selecting or dismissing potential jurors from a trial. These intuitive reactions let an attorney, much like they do to an average individual, aware of the dispositions jurors are giving off. At times attorneys may sense that a particular juror is not suited for this case and may be unable to be unbiased. To aid an attorney in removing a particular juror, the courts have relied on a judicial tool. This tool in the United States judicial system is known as a peremptory challenge. As previously mentioned, peremptory challenges are the perfect mechanism attorneys possess in order to satisfy their instinctual drives and put their perceptions at rest. After all, due process cannot be reached if the jury, the most important part of a trial, is ill-equipped.

As the art connoisseurs in the Getty museum experienced, sometimes we cannot put our finger on an incongruity. There is no room for mistakes of this nature in a trial. As a result, peremptory challenges are for those times when further investigations cannot be done. This defensive tool is what allows attorneys to act on their gut feeling and do what is best for his or her client. Attorneys only get once chance at a first impression so their rapid cognition mechanisms must be hard at work. Peremptory challenges are their tools to finalize this process.
Jury Consulting

“Never accept a juror whose occupation begins with a P. This includes pimps, prostitutes, preachers, plumbers, procurers, psychologists, physicians, psychiatrists, printers, painters, philosophers, professors, phoney, parachutists, pipe-smokers, or part-time anythings.”—William Jennings Bryan, 1973

To further suggest that there is a human psychological aspect to impaneling an impartial jury rests within the fairly-new phenomenon of jury consultants. A jury consultant is a person designated to work hand in hand with a lawyer (or a team of lawyers) to help select prospective jurors for trial, and even possibly work with the attorneys during and after a trial is complete. This technique was very publicly demonstrated during the 1995 O.J. Simpson trial, when Simpson’s defense team hired Dr. Jo-Ellan Dimitrius, a criminal psychologist, to assist them in selecting a jury. In a CBS news report, correspondent Troy Roberts informed viewers that jury consultants, like Dimitrius, are involved in many aspects of the trial, from helping to pick the jury, “to coaching witness” and “fine-tuning arguments.” When asked about her expertise, jury consultant Jo-Ellan Dimitrius admits that she is hired for her intuition. Dimitrius adds that, “Body language is extremely important.” When interviewing or examining prospective jurors, Dimitrius pays special attention to the way jurors face, how they sit and whether or not they make eye contact with the attorneys. These are just some of the ways she is able to read jurors, just as the case is with many jury consultants.

---

149 Id.
The work jury consultants perform is also referred to as scientific jury selection (SJS). Before the modern day cases, the method of SJS was first applied in the trial of Philip Berrigan and the “Harrisburg Seven.” Philip Berrigan, a former Catholic priest, was widely known as an American peace activist and a Christian anarchist, who was famous for his abhorrence to the Vietnam War and his rebellion against the United States military. His trial in 1971, dubbed the Harrisburg Seven trial, consisted of six anti-war activists under his following. Six of the seven activists were Irish Catholic nuns or priests and the remaining follower was a Pakistani journalist, who was schooled in America for political science. The group received federal notoriety when, in 1970, imprisoned Berrigan and his sister were caught exchanging correspondence that planned the kidnapping of National Security Advisor Henry Kissinger, as well as the plan of blowing up steam tunnels. Sociologists Jay Schulman, Richard Christie and Philip Shaver joined together with other scholars to aid the defense team in selecting a jury for the case. The sociologists and scholars agreed to aid the defense since they believed in the activists’ cause and disagreed with the prosecution’s choice of location for the trial. Many supposed the prosecutor in this case chose Harrisburg, Pennsylvania as the choice of venue due to its “rampant political conservatism” at the time.\textsuperscript{150} There was no way that an impartial jury was going to be comprised at this location. As a result, Schulman and his team dedicated their efforts of procuring a jury that would be fair to the defendants.

After surveying over one thousand residents of Harrisburg, PA, Schulman and his colleagues revealed that about eighty percent of voters already had preconceived biases against the defendants.\textsuperscript{151} The team devised a method to create a “demographic profile” of people most

\textsuperscript{150} Cleary, Audrey. \textit{Scientific Jury Selection: History, Practice, and Controversy}. Villanova University.
\textsuperscript{151} Kressel, N.J. and Kressel, D.F. \textit{Stack and Sway: The new science of jury consulting}. P. 100.
and least likely to be impartial to the defense.\textsuperscript{152} This first form of SJS contributed to the defense and its victory of a hung jury in the case of the Harrisburg Seven. Berrigan and his sister were only convicted for smuggling letters in and out of prison.

With the emergence of jury consultants, the trend has shown that consultants usually have their degrees either in behavioral science or psychology, as well as a dual degree in either law or criminal justice.\textsuperscript{153} The main goal of a jury consultant is to help attorneys pick the best jurors possible for that particular case. It would be incorrect to assume that no one person may embrace opinions about something based on previous life experiences. Often it is harbored, sub-conscious biases that many people do not even know they carry. Research has shown that when jurors are listening to a case they will often add elements of their own past experiences to stories, especially when they have questions about the order of events.\textsuperscript{154} As a result, it is important during a trial to select jurors that will be unbiased towards the case at hand. Consultants look for jurors who will be honest about their own background and thus, serve as an impartial person on a jury.

Jury consultants are there to provide attorneys with the best advice for choosing the most equipped jurors possible. Lawyers hire jury consultants to help them anticipate what jurors will say and how they will act to a particular case.\textsuperscript{155} For example, if a juror comes from a family of law enforcement agents, then he or she may very well identify and side with the law. These preconceived reservations may help or hurt a particular attorney’s case. Since time is often a sensitive element amongst attorneys, the research and support provided by jury consultants is

\textsuperscript{152} Kressel, N.J. and Kressel, D.F. \textit{Stack and Sway: The new science of jury consulting}. P. 100.
\textsuperscript{154} Trialology, LLC. This information was gathered from the organization’s FAQ sheet located at http://www.trialology.com/Jury-Focus-group-qa.html.
frequently needed. There is only so much research that can be done before jurors are picked or during the process of voir dire. The additional expertise is beneficial when attorneys do not have all of the answers they need to ensure that they have the best possible jury.

James Dobson, director of research and analytical graphics at DOAR, a litigation consulting firm, labels the jury consultant’s role as the one who delivers the message. Dobson notes that, “historically, lawyers came [to consultants] with the message they wanted to communicate and were looking for a scheme for getting it across.”156 In his field of operations, Dobson deals with commercial litigation. He reveals that his clients also look to their consultants to help them identify arguments. Dobson says, “Jury consultants teach lawyers how to teach...It’s the arts and science of visual storytelling.” The jury consultants become helpful because after an attorney has ironed out all of the facts of a case the jury consultant can come in and organize the best approach for that attorney and his selected group of potential jurors. The consultants serve as personality professionals since their expertise has allowed them to work with all types of people. Consultants can provide attorneys with the best strategies for all of the different personalities presented.157

Much like the anecdotes Malcolm Gladwell details in Blink on the phenomenon of thin-slicing are the very same methods jury consultants like Howard Varinsky use. Varinsky is a twenty-five year veteran of jury consulting, and is best known for helping the government impanel the jury that convicted Martha Stewart in 2004. Varinsky reveals that to begin his examining process, he will first take notice of a juror’s appearance. He explains, “I’ll look at what they are wearing. I’ll look at the quality of their clothes, their attention to detail. I’ll look at

157 Id.
their shoes to see whether they are shined or not.”

Howard Varinsky’s thin-slicing goes as far as asking a prospective juror who their favorite person is. This question, admits the jury consultant, is vital because it measures a person’s competency. Varinsky adds that it determines “whether a juror can grasp a complicated argument.”

Depending on how sophisticated or intelligent their favorite person is determines how mentally fit they are. Would the average civilian think to pay close attention to these details? Maybe not. It turns out that these certain physiological characteristics say a lot about what a person thinks and how they feel. All of these components are critical when selecting a jury and ensuring its impartiality.

Besides helping to select the jury, jury consultants may also be involved during the actual trial. Many consultants remain on a case in order to continually observe jurors and to see that attorneys are effectively stating their arguments. These observations can be helpful to attorneys and allow them to improve their arguments for future cases.

Jury consultants may also be useful in aiding attorneys with pretrial research. Howard Varinsky adds that pretrial research is just as important as the questions asked in voir dire. Voir dire is often completely controlled by the judge so it is not uncommon that an attorney will not be able to instantly make a judgment about a particular juror. It is with the further research performed before the selection process is held that clarifies this decision more thoroughly. When reviewed from this side of the spectrum, jury consultants are not only beneficial for attorney’s clients, but for the attorneys, themselves.

There are looming questions about whether or not the advice from jury consultants is legitimate. This thesis argues that the work of jury consultants is a valuable source in trials, especially those involving high-profile or complex cases. Consultants are employed to read the


159 Id.

behaviors of civilians who may or may not be best suited for a specific trial. Through the work of these psychologists and criminologists, jurors who have mistakenly survived voir dire and the allotted challenges may be well removed before a trial begins. The greater the attention on a particular defendant or case in its entirety, the harder it is going to be to find suitable, unbiased jurors. In these cases, particularly, it is important that all of the necessary aids be employed to achieve an impartial jury. The more research and investigation done before a jury is impaneled the better. Once a verdict is reached it is too late to turn back and lament over processes rendered.

Jury consultants are also useful for new attorneys who do not have much experience in the court room yet. The tips and hints lawyers receive from those who specialize in reading human behavior can be extremely benevolent to a case as a whole. After jury consultants have helped attorneys plan and strategize their arguments, the risk of uncertainty in front of a jury is greatly reduced. Research has shown that “seasoned lawyers do not employ a jury consultant” because their time spent in the court room has allowed them to already develop a feel for model jurors.\footnote{Christensen, Tricia Ellis. What is a Jury Consultant? 2003-2008. http://www.wisegeek.com/what-is-a-jury-consultant.htm} Novice attorneys more than likely do not have that developed slant. However, research has also suggested that in trials where a jury consultant is hired, it is the side that employs he consultants that usually winds up with the favorable verdict.\footnote{Frederick, J.T. Social science involvement in voir dire: Preliminary data on the effectiveness of “scientific jury selection.” Behavior Sciences and the Law. Vol. 2, P. 375-394.}

Historical cases, such as the trial of Mark David Chapman, the trials of Attorney General John Mitchell and defendant Maurice Stans, the Martha Stewart trial and the O.J. Simpson case have proven that jury consultants are efficient in aiding the process of selecting impartial
Their efficiency is measured in these cases since they were able to select a group of twelve persons who made a clear decision in a high-profile and complex case. Jury consultants are trained professionals, not in law, but in human psychology. These consultants have shown that it is just as important to understand the psyche of human behavior as it is to understand how the law works. In the March 2004 issue of The National Law Journal, staff reporter Leonard Post wrote that now, “Some reporters say it borders on malpractice not to use a jury consultant” if the counsel team can afford to do so. Cases today have caused counsel to reevaluate the procedures they use to select a jury.

Opponents of jury consultants have also raised important issues. Since the movement of jury consultants is so fresh there is not a tremendous amount of research conducted yet to truly evaluate their outcomes. Furthermore, Professor Steven Penrod from New York’s John Jay College of Criminal Justice, has added that the empirical evidence of jury consultants’ efficacy leaves much to be desired since “a lot of them are not very visible.” Sure, jury consultants are heard of when high-profile cases stand trial or when heavy media attention looms one particular case, but as far as daily appearances of them, they are aloof. Penrod adds that this style adds to the consultants “sophistication…They do not want to be “tipping their hands.” As a result, the public only has the evidence of apparent cases. Nevertheless, the decision of whether one agrees with the use of jury consultants also rests with whether one is satisfied with the verdict reached.

While conducting research for this thesis, one attorney interviewed by the author

165 Id.
166 Id.
167 Opponents of jury consultants may argue that the very science of jury consulting defies the philosophy of Alexis de Tocqueville, disallowing Americans the opportunity to embrace the citizen-juror role. As mentioned earlier in this thesis, Tocqueville advocated that all citizens are entitled to the right to serve on a jury. If consultants help to peremptorily remove citizens from a jury, then this process may very well deny citizens of a fundamental right.
remarked that jury consultants are only helpful if your side wins. One’s opinion could be quickly swayed if an undesirable outcome is reached.

Cost is an ominous disadvantage to the favoritism of jury consultants. This research was unable to officially quote any specific rate of pay. Jury consultants are highly aware of the doubt cast on much of their work, especially in regards to their work, so their payment scales are kept extremely quiet. However, an attorney at Proskauer Rose LLP, who used a jury consulting firm once before, estimated jury consultant’s costs for a highly politicized and covered trial to be anywhere from $30,000 for focus groups, at least $60,000 for one mock jury trial, about $100,000 for a shadow jury and $125,000 for a state of the art electronic presentation.168

According to a jury consulting firm based in Illinois named Trialology, focus groups are comprised of twelve simulated persons who represent the type of jury an attorney may receive in a particular trial. This focus group participates in a mock trial, where an imitation voir dire and opening statement are given, these “acting” jurors will respond to the attorney and reveal to him or her questions jurors are still pondering. These “jurors” will also help the attorney fill in gaps where they believed information to be missing. They will evaluate whether or not the attorney’s points were understandable and decipher how well the client’s story will be perceived.169

Although costly, the shadow jury effect is by far the most innovative, and perhaps effective, part of jury consulting. A shadow jury, according to DOAR, is a jury that will “sit in the courtroom whenever the real jury is present and listen to the same evidence and arguments the actual jury hears.”170 The shadow jury then reports back to the consulting firm and reviews

169 Trialology, LLC. Information about organization’s services was received from their homepage at http://www.trialology.com.
170 DOAR, Litigation Consulting Firm. Information about this organization’s services was received from their website at http://www.doar.com/litigation-consulting-services/jury-consulting/at-trial-research/shadow-juries.asp.
the information provided that day in court with the jury consultants. Jurors convey what aspects of
the attorney’s presentation that day were clear and/or need more emphasizing. Attorneys are then notified by the consultants what was effective and ineffective about their performances. This daily feedback can help an attorney evaluate where he may stand with the actual jury.

The additions of electronic presentations focus upon delivering messages in the most effective manner to the courtroom. Trial Graphix, a jury consulting firm that specializes in electronic presentations offers attorneys the ability to use animations, black and white diagram enlargements, photo enlargements and medical illustrations.\textsuperscript{171} Often in cases attorneys will want to make visual displays of important evidence in a case. Alongside a powerful opening or closing argument, props help send jurors a distinctive message. All of these presentation types provided by jury consulting firms are beneficial in proving facts to jurors. However, it is the high cost of these electronic presentations that are less than desirable.

It is the opinion of this author that jury consultants are an effective way to help ensure that impartial juries are created. Although this was considered as a crucial part of an attorney’s job up until the 1970’s, the use of jury consultants has proven to be beneficial. It is believed that attorneys tend to rely more so on stereotypes of group attitudes and, instead, jury consultants base their decisions on “established psychological and behavioral principles.”\textsuperscript{172} Jury consultants also provide attorneys with an extra hand in research when time is limited and they often provide a different insight into what may occur at trial. The benefit of consultants operating in a team fashion greatly assists the practice of trial attorneys, who often work alone. Substantial support is necessary when going to trial, especially if a case is complex. Jury consultants are able to concentrate their time and energy on developing effective ways to select an impartial jury so

\textsuperscript{171} Trial Graphix, Jury Consulting Firm. Information about this organization’s presentation services was received from their website at http://www.trialgraphix.com/SubPage.aspx?CatPageId=25&CurrentPageId=28.

attorneys can dedicate their time and efforts to other important aspects of the trial. Finally, proponents of jury consultants suspect that consultants bring an innovative thought process to the impaneling of a jury. Jury consultants analyze the human behavioral patterns in order to read and suggest how a juror may react to an opinion. Advocates of jury consultants agree that there are characteristics of humans that can predict possible verdicts. For example, a juror who is defined as having an authoritarian personality or who reserves the power of leadership is more likely to vote for a conviction in a criminal case. This additional information can only be beneficial to an attorney who needs to choose the best possible jury for his or her client.

Although the use of jury consultants is largely beneficial, especially when cost is no object, it is also accurate to point out that there are some cases and attorneys that work better with jury consultants than others. As scholars have stated, the influence and effectiveness of jury consultants is “situation.” The fact that the institution of jury consultants has grown so rampant today is evidence enough of their merits. However, it deems appropriate that jury consultants may not be necessary for attorneys who try similar cases on a regular basis. For cases that are not highly publicized or for trials that the views of the people are not already obvious there is less need to institute the practice of SJS. If a trial has a fair shot of going either way, an attorney should invest neither a great amount of money nor time the extensive time to perform this service. Furthermore, it must be noted that in no way does not hiring a consulting firm mean an attorney is disinterested in winning a case; it simply may mean that the attorney at hand is confident and well-seasoned enough to perform his or her own juror analyses.

Review of Heightened Judicial Powers

The Removal of All Civilian Jurors

This thesis has outlined landmark cases that have explained how there have been cases where attorneys misused their power of peremptory challenges. Although some may immediately discredit peremptory challenges usage, it is only fair to acknowledge that as a result of their malfunctions in previous years, courts in the United States are now more aware of how to control and limit these instances. The ability of the courts to check up on one another through appellate review is also a valuable mechanism that ensures that the improper use of peremptory challenges is discovered and amended.

It is important to remember that when used correctly, peremptory challenges are an effective and successful way of selecting the best possible jury for a particular case. Peremptory challenges allow an attorney to make final adjustments to the jury that may have not been detected in voir dire. With the allotted peremptory challenges an attorney may remove a juror from his or her trial that is neither well-suited nor favorable for that case. However, there are such cases in the United States courts when regardless of what is done to select an impartial jury, a fair and just verdict may not be reached by civilian citizens. Such special circumstances are far out of the reach of using peremptory challenges to legitimately select an impartial jury and no longer rely on jurors to render just verdicts. These are circumstances when no juror can possibly be impartial to a case. An example of these types of trials is those involving crimes of terrorism. This section will review the process by which juries are consulted and used in criminal terrorism cases. It will unveil the unknown potential harm to jurors involved in these horrific trials, as well as detail the ways these jurors may be protected. The focus here will be on describing the effects terrorism cases have on civilian jurors, what can be done to remedy the issues associated with
civilian jurors, as well as the advantages associated with implementing military tribunals for terrorism cases. This section will conclude that military tribunals are the best option for deciding these particular cases.

Approximately 150,000 jury trials are conducted in the U.S. state courts annually and an additional 5,000 jury trials are conducted in federal courts. As a result, the need for civilian jurors and the process of jury selection are significant functions of our judicial system. Juries will always exist unless a defendant waves his constitutional right to a jury. When a defendant waives his right to a jury, the trial is known as a bench trial, where the judge then renders a guilty or not guilty verdict and assigns punishment. Defendants may also enter into a plea bargain, which, too, would remove his or her right to a jury. However, it is safe to assume that the greater majority of trials will forever entail the use of jurors.

The introduction of this thesis described how most foreign nations have moved away from juries and operates their trial processes very differently, impaneling juries for only some crimes and not others. For example, in Canada jury trials are only prevalent for crimes which the maximum sentence exceeds five years, and are optional for crimes of which the maximum sentence exceeds two years, but less than five years. In other countries, like Brazil, trials by jury are applied in cases of first and second-degree murders, even if only attempted. In other countries, such as the United Kingdom, jury trials are only available for criminal cases and certain civil cases, such as defamation, fraud and false imprisonment.176

Not unlike those nations’ limiting the use of the jury system, the United States has recognized that unique trials, specifically terrorism cases, call for a group of peers far more experienced than those of civilian jurors. This thesis has relied on the American Heritage

---

Dictionary’s definition of terrorism as, “the unlawful use or threatened use of force or violence by a person or an organized group against people or property with the intention of intimidating or coercing societies or governments, often for ideological or political reasons.”¹⁷⁷ Some of the more prominent examples of flagrant terrorism include, but are not limited to, the attacks on the World Trade Centers in 1993, September 11th, 2001 and the damaging threats/actions of Saddam Hussein. It is important to note that terrorist attacks are not only committed by those from other nations. The Oklahoma City Bombing is a frightful effect of ‘home-grown’ terrorists, living right here in the United States. Readers must understand that terrorist attacks are not inflicted solely by foreign nations, as the term usually depicts, but can also be carried out by Americans against their own country and citizens.

The jury selection process described in chapter two of this thesis is the routine process for serious and less than serious crimes. Although terrorism is a crime, it is not an “ordinary crime” American civilians are used to dealing with. The very presence of jurors within a terrorism case may distort the conduct of terrorist trials in several ways. Of these, the three most identifiable ways are the threatening of jury members, the politicization of jury members themselves, and that the presence of jury members could limit the type of information provided by the state in the hearing.¹⁷⁸ Many may argue that it is not fair to limit measures against these juror effects only to the cases of terrorism. It very well may be true that jurors can be intimidated or coerced at any point in any type of trial, especially in the landmark murder cases mentioned earlier. Criminal syndicates may try to influence a jury into returning a verdict of not guilty no matter how large of a public outcry may come out of the decision. Whatever the case may be, it is logical to conclude that jurors in terrorism cases have the most at stake considering intimidation and

coercive behavior is almost the entire thought process of terrorists. That is, terrorists exist to inflict characteristics that coerce a population (or specific individuals) and to accomplish his or her groups’ demands. The challenge, itself, is a political one. These cases are so strikingly different from standard criminal trials that one may reasonably conclude that even the protective statutes of peremptory challenges no longer serve useful in ensuring an impartial jury. Military tribunals, in theory, provide a remedy to relieve the problems associated with using civilian jurors, primarily in high-risk cases.

It is dichotomous in nature to think of a jury trying a terrorist. As mentioned before, the simplest acts of terrorism are threats. The frightening additive to a terrorism case is that there is no democratic process truly worthy enough to stop a terrorist in his or her tracks. Jurors are selected to find truth in evidence and find the guilt or innocence of defendant. However, what is done when a juror is unable to fulfill his duty due to the fear of being targeted by a terrorist’s group or the terrorist himself? By its very nature, terrorism tends to polarize communities: there are those who want to get involved and those who do not. Many jurors may be hesitant to render certain verdicts as a fear of becoming a target. It is difficult for attorneys to be able to learn about all aspects of a juror’s life in such a short span of time so it is possible that a juror (or jurors) may share beliefs with the accused. Jurors may even sympathize with a defendant as a result of similar ethnic ties or roles. Contrastingly, jurors may be biased against those defendants of a certain nationality. These biases tarnish the way jurors are able to interpret evidence and could, in the end, affect deliberations and verdict decisions. Much research since September 11th, 2001 has revealed that jurors often feel obliged to return a sentence identical to community sentiments. Can peremptory challenges relieve juries of these effects? Are there even enough peremptory

---

challenges allotted in a particular case to wean out those believed to be biased? Without further, detailed research it is difficult to imagine that the United States judicial system would be able to revamp its processes to ensure that terrorism cases abide by different rules when exercising peremptory challenges.

To delve into the special characteristics involved in terrorism cases, this section will review cases that include the trials of terrorists within the United States juridical system.

A good example to begin with is the infamous case of two Italian-American anarchists, Ferdinando Nicola Sacco and Bartolomeo Vanzetti. The two laborers were tried, convicted and executed via electrocution on August 23, 1927 in Massachusetts for the 1920 armed robbery and murder of two payroll clerks. Their trial attracted great international attention, with critics accusing the prosecution and presiding judge of improper conduct, since anti-Italian, anti-immigrant, and anti-anarchist sentiment was believed to have prejudiced the jury. One instance even involved the alleged bombing of one juror’s house. To take proactive measures in assuring the safety of its jurors, the state of Massachusetts responded by having police guard the courthouse during trial, strangers in the courtroom were searched for weapons and the judge even went as far as re-examining the weapons that were evidence to make sure they were truly unloaded.

Another prominent case in American history was United States v. Salameh, which was the case concerning the first bombing of the World Trade Center in 1993. The main issue surrounding jurors in this case was the claim made by one defendant that the jurors were not questioned properly in voir dire. Tremendous bias existed amongst the jurors regarding Muslims,
Arabs and those persons of Islamic Fundamentalism that it was difficult identifying jurors who held no ill-harbored feelings.\textsuperscript{181}

In order to assure the court that no bias was held against these men or their ethnic origins, the presiding judge in this case, Judge Duffy decided to take matters into his own hands. He went about selecting jurors in an innovative system of three steps. The first stage consisted of fifty possible jurors. The judge read the accused names, explained their charges and then outright asked if anyone would prefer to be excused.\textsuperscript{182} It was at this point jurors could be dismissed for challenges for cause since they would outwardly admit to the courts that there was no way they could render an impartial verdict. Out of the one hundred-fifty jurors in the pool, ninety men and women dismissed themselves.

The second stage called for the jurors to be broken up into groups of fifty, answering questions that may reveal biases against those of Arab or Muslim decent or religion. Examples of these questions included \textit{``If you had to describe your religious views, how would you do it?''} and \textit{``Have you ever had an incident in your life that would make it difficult to judge another person because of their race or creed or color or national origins or anything like that?'''}\textsuperscript{183} Any juror that expressed hesitancy or an unfavorable answer was excused. It was at the final stage where the judge, with the consent and presence of counsel, individually questioned the remaining jurors. Following this individually-directed voir dire, attorneys were allowed to exercise their allotted peremptory challenges.

After research on the individual voir dire conducted in this case, the author of this thesis believes that this form of jury impaneling was the only way Judge Duffy was going to be able to


\textsuperscript{182} Id.

\textsuperscript{183} Id.
have an impartial trial. The attack on the World Trade Center had received so much coverage that even a change of venue would not have eliminated the same confrontations. It was beneficial that the first round of jury selection allowed for jurors to dismiss themselves because it then allowed attorneys to successfully use their peremptory challenges in the end. The jury would have been compiled of many biased persons since attorneys would have only been allowed to dismiss a handful of these citizens. This particular case is one of the only terrorism cases in history in which the tools of peremptory challenges were successful.

The trial for Omar Mohammed Ali Rezaq raised similar concern. Omar Rezaq, a member of the Abu Nidal terrorist front, was the only surviving hijacker out of three, who hijacked the Egypt Air Flight 648 in 1985. The remaining two hijackers were killed, either in in-flight shooting with a sky-marshal or after Egyptian commandos stormed the hijacked plane.

Omar Rezaq had given his name as Omar Marzouki and used a Tunisian passport when boarding that plane at Athens airport, but later he admitted that he was of Palestinian origin and born in Lebanon in 1963. On November 2, 1988 Rezaq was arraigned in court in Malta and he pleaded guilty to seven of nine charges against him. These were the illegal arrest of crew and passengers, the deaths of Nitzan Mendelson and Scarlett Marie Rogenkamp, the attempted killings of Methad Mustafa Kamal, Patrick Scott Baker, Jacqueline Nink Pflug and Tamar Artzi, along with the illegal possession of arms and explosives. Rezaq, nonetheless, served only seven years in Malta and was released. As a free man under an assumed name, he moved to Ghana and remained there until July 1993. He was later arrested in Nigeria, where authorities turned him over to the United States FBI. Following a month-long trial, Rezaq was sentenced to life in prison in 1996 on a single count of air piracy. U.S. District Court Judge Royce C. Lamberth, who
sentenced him, recommended that any request for parole made after the 10-year period should be rejected.

Civilian jurors should have never been present in this trial. The night after closing arguments, TWA’s Flight 800 crashed in nearby New York. The media swarmed the story, while jurors were not kept from televisions and other news coverage. At the time, reporters had suggested the flight crash was terrorist related and that the flight had left from Athens, “now known as a base for terrorists.” Athens was the same city Omar Rezaq had boarded the Air Egypt Flight 648. Two days later the jury deliberated and issued a guilty verdict. Many, still to this day, believe the jury was primed and that the jury should have been sequestered. Research may never prove whether or not they just were wrongly influenced in their decision-making. However, it is probable to conclude that, in this situation, the deliberation was not handled properly. The true question that remains is whether or not a military tribunal, as opposed to civilian jurors, would have provided an equal or more justifiable sentence.

The most horrific occurrence of a terrorist attack occurred eight years later on September 11th, 2001. It was again an attack on New York City’s World Trade Center. Only this time, the al-Qaeda terrorists succeeded in knocking down the Twin Towers. There were 2,974 fatalities, not including the 19 hijackers: 246 on the four planes (no one on board any of the hijacked aircraft survived), 2,603 in New York City in the towers and on the ground, and 125 at the Pentagon in Washington, DC. Within hours of the attacks, the FBI was able to determine the names and, in many cases, details such as dates of birth, known and/or possible residences, visa status, and specific identity of the suspected pilots and hijackers. The hijackers did little to

---

disguise their names on flight and credit card records. Mohamed Atta, one of the hijackers on board of Flight 11 had papers in his luggage that revealed the identity of all 19 hijackers and other important clues about their plans, motives, and backgrounds. On the day of the attacks, the National Security Agency intercepted communications that pointed to Osama bin Laden, as did German intelligence agencies. Today there are still questions lurking about whom else or what other terrorist groups may have been involved in the September 11th tragedies. For a case of this magnitude, what make-up of a jury could possibly be impartial? What thoughts and emotions rushed civilian jurors the day they were ordered to jury duty and found out that the name of their trial was *Osama Bin Laden v. the United States of America*? There existed no U.S. citizen who was not either directly or indirectly affected by the tragedy of September 11th, 2001.

Due to the new concerns the American nation had never had to deal with before the trial system for terrorism cases was completely changed. Two months after the attacks in New York, President George W. Bush declared that “juryless military tribunals would try non-citizens suspected of complicity in international terrorist attacks against the United States.” Five years later, the Administration was still pursuing alternate options of handling terrorist cases. On October 17, 2006, President George W. Bush signed the Military Commission Act of 2006, in response to the federal court’s decision in the *Hamdan v. Rumsfeld* case. The Commission Act was an act of Congress, signed in order to “facilitate bringing to justice terrorists and other unlawful enemy combatants through full and fair trials by military commissions, and for other

---

purposes.\textsuperscript{189} This Act intended to remove all civilian jurors from cases of this magnitude and complexity. However, terrorist cases are still filed in the United States’ criminal court system today. Although it is possible that some civilians may not mind serving jury duty for a case of this sort, it is a well-accepted observation that most Americans do not want to sit on these types of juries. If this is to occur, how should these trials be conducted? One must remember that everyone under the American court of law is entitled to an impartial jury. Regardless of litigants, the United States Constitution must still be upheld and assure that the best possible trials are held. If this fact were to be neglected it would erode the strength and integrity of the American democratic society as a whole. When this idea was presented to the defense attorney in the 2003 Enaam Arnaout trial, he further questioned that because of the impact of September 11\textsuperscript{th}, 2001 whether, “a fair and impartial jury could be found anywhere in America today that could sit in judgment of an Arab-American in a case involving allegations of terrorism.”\textsuperscript{190} It is hard to imagine that even after the creation of a judicial system with appellate review and additional statutes to protect the rights of litigants that the Founding Fathers could have imagined challenges of this enormity.

After 9/11, the attention on jury bias has become greater and the likelihood of biases being valid is largely considerable. The case of Walker Lindh, also known as the American Taliban, is a prime example of the thoughts suspected to influence jurors. The courtroom where Lindh was to be tried was located near the Pentagon and nearby Washington, DC, which had just survived an anthrax attack. Coincidentally, Johnny “Mike” Spann, a local CIA agent, had just been killed after interviewing Lindh in Afghanistan. All of these happenings had occurred while

\textsuperscript{190} United States v. Arnaout, 431 F.3d 994 (7th Cir.2005).
the country was still suffering from the aftermath of September 11th. Virginia jurors deliberated on Lindh’s verdict and were reported to be “appearing less sympathetic to Lindh” before his trial than jurors elsewhere.\textsuperscript{191} A study was conducted, measuring the sentiments of jurors and concluded that 70\% of people in Virginia had an unfavorable or very unfavorable view of Lindh, compared to 55\% of people surveyed in Illinois.\textsuperscript{192} Again, even exercising all of an attorney’s peremptory challenges would not allow the jury to be rid of biased jurors.

Besides protecting the safety of civilian jurors, it is also critical to maintain the innocence of a defendant until proven guilty. In order to assure that a defendant is given the most honorable trial, all evidence, whether for or against the defendant, must be able to be presented during the trial. Unfortunately, since not all civilian jurors have security clearances as high as “TS” or top secret, the presence of jurors in a courtroom during a terrorism case may limit the amount of classified material the government is able to display. In cases where National Security is at stake, the state may be hesitant and unwilling to show evidence or intelligence, as well as reveal sources in fear that it would be damaging to US safety. Classified information may also be limited in these cases, especially if there is fear that intelligence may somehow get back to terrorist groups. The British government took this threat seriously in 1978 when it set its new guidelines for jury vetting. Great Britain set up a Public Interest Immunity (PII) certificate, which allows a minister to give his approval over the use of information and eliminates cross-examinations. The main goal of this effort is to prevent the public or civilian jurors, from learning about classified information or sources that could later be used against the country.\textsuperscript{193}

\textsuperscript{191} United States v. Arnaout, 431 F.3d 994 (7th Cir.2005).
\textsuperscript{192} Id.
This is a special circumstance where the use of military tribunals would limit these complications by enduring all evidence that could be used at trial.

Should the United States move its methods to those closer of Great Britain’s? Is it democratic to not disclose information in a trial that may be used to indict the defendant or even to prove his innocence? Or should America allow the suspension of juries? This was a puzzling question for the American government to find an answer to. In the wake of 9/11 the government felt there needed to be some action taken in order to simultaneously prosecute terrorists, but also protect jurors.

As a result of September 11th, 2001, President Bush and his administration declared that any non-citizen of the United States who has been confirmed by the executive branch of the U.S. government of being linked to al-Qaeda or as a part of the Taliban operatives will be sent to Guantanamo Bay Naval Base. Under the Geneva Convention, the detainees are not considered Prisoners of War (POW’s), and as a result, are tried by a military tribunal. A military tribunal is defined as a “military court designed to try members of enemy forces during wartime, operating outside the scope of conventional criminal and civil matters.” In military tribunals the judges, themselves, are military officers and also act as jurors. However, it is important to note that this enactment only applies to those captured within the United States and not outside of the country. Regulations are very different for those suspected of perpetrating terrorist attacks against the U.S. who are found in foreign lands. The federal government has not yet determined how to handle each of these cases.

In an article analyzing the effects of trying a terrorist by an actual jury, Laura Donahue points out that the United States government had “logic” instituting the law to try terrorist detainees under military tribunals. She wrote how the U.S. government believed military tribunals provided the “appropriate forum for trying the enemy” as opposed to civilian jurors. Government officials are believed to advocate strongly for military tribunals primarily for safety concerns, but also due to the fact that civilian jurors may not be fitting for cases of this magnitude.

Although there is still research to be conducted about how military tribunals operate entirely, it is proven that military commissions have alleviated many of the common concerns for jurors, as well as those concerns for attorneys. For attorneys, it is fearful stepping into a courtroom of a high profile case already expecting that prospective jurors may have noticeable biases. In military tribunals there are no jurors to select since the panel is already compiled. Not having to interpret biases or read the minds of jurors are definitely a plus when weighing the advantages of tribunals.

Another great attribute of a military tribunal is the fact that the likelihood of juror intimidation is negated since military personnel are trained in self-defense and active combat. These skills are said to defeat the factor of intimidation. The US government also believes that it is easier to protect a unit of the military than it is to protect civilians, who may live anywhere. Classified information is protected easily in military tribunals since it would only be handled by military judges who have security clearances. Alongside the protection of civilian jurors, the elimination of civilian jurors also gave the Bush Administration greater control over the trial.

---


296 Id.
processes, in thoughts of reducing the amount of dangerous individuals being set free. The use of military tribunals is a new and innovative idea since September 11th, 2001. It is fair to note that they are not perfect at work and do require modifications to ensure that due process is served through them. In order to make certain the tribunals’ flaws are corrected it is important to examine their weaknesses.

It is imperative to disclose the opposing facts to fully explore the issue of military tribunals. Military tribunals do possess a significant amount of negative implications. Having “due process” being served under the regulations of the U.S. militia (the commissions) for example, could enact new laws that are not a part of a traditional court process. In her article, Donahue argues that it is possible to create new laws regarding evidence in military tribunals. If this were to happen the court would be granted access to information that in traditional court rooms they would not.197 The most important fact concerning military tribunals is the fact that they are not bound by the United States Constitution. More clearly stated, “Trials by military commission of offenses against laws of war are not subject to the constitutional requirement of trial by jury.”198 However, the research in this thesis conveys the contrary. Military tribunals, themselves, may not have to adhere to the rules outlined in the United States Constitution, but their very existence implies that their use is a precautionary method which is the main goal of the Constitution. The U.S. Constitution was created to protect citizens. Exercising the use of military tribunals would not only more fully serve the rights of the accused in regards to allowing all evidence to be heard in a case by military personnel, but it would also protect the rights of civilians. If military tribunals were established as the systematic method of trying terrorists, each

198 Id. P. 1342.
of their processes would need to be reviewed by the judicial system to prove that their routines were constitutionally sound. This thesis argues that military tribunals could be used as positive forces for the accused, as well as for jurors. In order to keep military tribunals in a positive light all the federal government would need to do is to assure that their hearings were conducted as closely within the constitutional limits as possible.

The final negative aspect of this use of military tribunals is the fact that foreign nations already look down on the idea of these processes. One specific instance is within the case of two al-Qaeda suspects, Sheik Muhammad Ali Hassan al-Mouyad and Muhammad Moshen Yahya Zayed. Germany delayed extradition of these two suspects until the U.S. guaranteed that the men would not be tried by a military tribunal. The image of free society suddenly begins to dwindle when the very nation that is trying to convince others of the superiority of democracy lacks democracy. The United States, for years, has depended on other nations for information in order to keep the state abreast of diplomatic affairs. It is necessary that if military tribunals were to become a consistent method of trying terrorism cases that there be some agreement made with neighboring countries. There would be no way the United States would be able to uphold a judicial system that no other country abroad agreed with.

Military tribunals are a great remedy for trying cases in which the safety of civilian jurors is at risk. The concept of tribunals is also ideal when it comes to bringing in classified evidence in order to fairly defend a litigant. Although the use of military tribunals has become more common since the wake of September 11th, 2001, much of the publicity surrounding them has been negative in connotation. There has not been much public disseminated information demonstrating that military tribunals are, in fact, a beneficial approach for jurors and defendants.

alike. Although it is not explicitly stated, military tribunals do, indeed, uphold the ideals of the United States Constitution. The Constitution insists that all litigants be provided with a fair and speedy trial. Allowing defendants to be tried by military officials, those considered professional, rather than civilian jurors who may have harbored biases is definitely an advantageous approach to upholding the duties of the courts.

Further Measures to Protect Jurors

As this last section conveyed, there are sometimes cases, such as those trying terrorists, where the use of peremptory challenges and the subjection of juries are no longer an option. However, as a result of supplementary statutes the United States judicial system has created, there are other alternatives the nation may exercise when selecting a jury. The following are a collection of choices gathered by a number of researchers who have other interests for ways of protecting both civilian jurors and a democratic society.

As this thesis mentioned earlier, the selection of jurors occurs when jurors’ names are randomly chosen from voter’s or driver’s lists. The eligibility to become a juror in a particular case must be met by the civilian. Some examples include that the juror, themselves, cannot be involved in the specific case they are being summoned for, nor can they know anyone targeted in the case. The civilian must be free of any bias and effectively remain as a potential juror once voir dire is conducted.200 Researchers have suggested further information be gathered and added tests be performed to advance a juror’s capability of sitting trial. Lauren Donahue suggests that jurors who show a particular susceptibility to terrorist intimidation or prove untrustworthy to

sensitive information should be dismissed. In order to test these factors, information, aside from the juror questionnaires, would have to be made accessible to counsel before juror screening.

The United States could also set a higher standard of qualifications for jurors. As it stands, anyone who is a US citizen, at least eighteen years of age, English-speaking, not a convicted felon and does not suffer from mental or physical handicap that would hold them unable to participate in a jury are eligible to serve as a juror in a federal court. The only groups barred from taking part in jury duty are members of the armed forces on active duty, members of professional fire and police departments and public officers of local and federal governments. In Northern Ireland, for example, the restrictions for serving on a jury are placed by age, mental capacity, job description and criminal background. That is, anyone who works in the administration of justice (anyone holding office, justices of the peace, clerks, etc) is ineligible to serve. Even correctional officers or any person serving in the British military forces is excused from jury duty. Even though these characterizations of job descriptions already place people under “high-risk occupations”, the British government still does not want to add another level of possible problems.

Conversely, the British government also bars some less-risk occupations from serving on juries. The British law also excludes “public officials, such as school inspectors, mines inspectors, and the Controller and Auditor General for Northern Ireland.” If his were the case in the United State, officials such as crossing guards and toll collectors would be excluded from serving on a jury. Researchers have questioned why public officials of this type would be excluded from jury duty, considering they seem like the very people a state would want on their

---

203 Id.
jury. These occupations are of citizens who represent “normalization” and seem to be the least likely targets of intimidation or coercion from a terrorist.204 When confronted with the question of why Northern Ireland excluded these low-risk occupations, Lord Charlie identified that “widening the jury pool may dilute the risk of intimidation and perverse verdicts…” However, the government explains their reasoning, it is clear to Northern Ireland that the qualifications for jurors have a meaning. The state insists that their procedure works and prevents biased jurors from entering their courts. If statistics display that stricter standards for juries prevail, then this is a direction the United States could think of moving towards.

The use of alternate jurors is already an option put into practice by the United States. In a U.S. federal court up to six jurors are allowed to sit as alternates in case actual jurors are disqualified or unable to uphold the juror process.205 However, there is an idea of innovating the use of alternate jurors. In regards to terrorism trials, alternate jurors “could be used to dilute the risk posed by terrorist organizations”, by having alternate jurors sit on trial with actual jurors and then, right before deliberation, twelve jurors could be picked by a draw to deliberate.206 That is, all jurors, alternates included, could listen to the trial and then, in the end, only twelve out of eighteen or twenty-four jurors would be chosen to render a verdict. As a result, defendants would be uncertain which jurors would be chosen to decide their fate. This chance of probability would dramatically reduce the influence of juror intimidation.

The idea of working with alternate jurors was introduced to the courts, but has since resulted in a split decision among circuits. The Seventh Circuit declared that “the presence of an

alternate juror during deliberations did not violate right to trial by jury”, but further declared that the alternate would be unable to participate in deliberations and would be unable to vote.\footnote{207} In \textit{Shreeves v. United States}, a search and seizure case from Washington, DC in 1978, alternate jurors were substituted in and it was declared that the defendant’s Sixth Amendment rights were still protected.\footnote{208} Circuit courts are still deciding whether the substitution of jurors adequately provides due process with some holding that this is unconstitutional. It is important that the courts re-examine the use of alternate jurors for the purpose of reducing juror intimidation. In the wake of September 11\textsuperscript{th}, 2001 and the acts of various terrorist attacks, this new form may be helpful in rendering constitutional verdicts. Jurors may be more willing to reach verdicts that they might have been previously afraid of pursuing.

If military tribunals are not an alternative resource for trying terrorists in court, then the final recommendation for protecting civilian jurors is the possibility of concealing jurors’ identities. In the United Kingdom, for example, the question lurking was how far the government could go in containing a juror’s identity. However, the UK did not mean ‘concealing’ in a literal term. The country was thinking along the lines of restricting the amount of juror information that was given to each party. Researchers suggested assigning jurors numbers and have them referred to only by their numbers. In this instance, the police could perform the background checks and collect necessary information from the jurors without ever having to disclose their identities to counsel for either party. It would be a criminal offense for personal juror information to be disclosed to any party, witness or expert without “specific leave of the court.”\footnote{209} While this idea may seem excellent in theory, it is extremely difficult to secure a jurors name and personal

\footnote{207 \textit{Johnson v. Duckworth}, 650 F.2d 122, 125 (7th Cir. 1981).}  
\footnote{208 \textit{Shreeves v. United States}, 395 A.2d 774 (D.C. 1978).}  
information. This intense precaution of security measures may even backfire on the entire practice of due process. If the backgrounds of jurors cannot be questioned, analyzed and reviewed by counsel, then the courts may have a worse scenario than protecting its jurors. The court would have to be weary of defendants possibly being acquitted or given a lesser sentence due to jury corruption or the improper use of peremptory challenges.

Instead of concealing jurors’ names and personal information from counsel and terrorist defendants, why not physically conceal the identity of jurors? There is no research reviewed in the placement of this idea, but this does not appear to be in violation of any constitutional amendments or rights. A recommendation that could be made to the courts is to have jurors sit behind a wall or within a concealed jury box in which only the jurors can see out of. Jurors would still have access to the view of the defendant, in order to observe his or her facial expressions and mannerisms, but the defendant would never have the opportunity to recognize a juror. This use of one-way glass would be another addition to its purpose, besides its use in local police stations for the identifying of suspects. Again, counsel could perform its necessary duties for checking backgrounds of jurors since no personal information would be concealed from them but, still, the physical identities of the jurors would remain unrevealed to the defendants. Northern Ireland did not enact this very idea of juror protection, but it did suggest locating the juror box “out of sight form the public gallery…or in a separate wing.”

Because of the large security threat many jurors are faced with and feel when sitting on a high-profile case, often in times it is important that their identities and personal information be kept confidential. Securing the identity of jurors, although drastic, is a safeguard that could more commonly be used in the United States. After all, it would only take for the physical identity of

---

one juror to corrupt the whole procedure. This one juror could be targeted by terrorists and coerced into revealing the identities of the remaining jurors. This catastrophe could then, lead to greater difficulties within the verdict rendering, as well as the security of civilians. The courts must go to all extents to make sure the jurors’ personal information is kept out of the wrong hands.

Jurors are an important part of a democratic system. However, it may not be possible, in regards to safety, to have civilians presiding over terrorists’ cases. If the government were to improve the process of military tribunals and guarantee due process, these commissions would be the greatest and most successful procedures for trying terrorists. Although military tribunals currently are not designed to adhere to the exact regulations outlined in the U.S. Constitution, their very existence, by nature, upholds the idea of the Constitution. Military tribunals, by enactment, are meant to protect not only civilian citizens from harm, but also allow defendants the fairest possible trial. Terrorism is a frightful occurrence, but so is the thought of losing due process. Military tribunals do require modifications to their procedures, but may be the United States greatest defense against high-profile cases. Besides securing the safety of the United States, it is the personal safety and protection of civilian jurors that is most important to a democratic nation.

Conclusion

While the debate surrounding the efficacy of juries and the use of peremptory challenges may still continue, it is inevitable that the event of trials will continue to take place. This idea is certain because trials will always take place when two parties have disputed over facts in a situation. To solve these disputes, democratic societies, like the United States, depend on juries
in order to give an honest and unbiased verdict, resolving the disputation of facts. However, due to the possibility of uncovered biases and prejudices of jurors, the question of whether or not juries are truly capable of rendering impartial verdicts has been posed. One of the main reasons for this uncertainty was due to the outcome in the 1986 *Batson v. Kentucky* case. In *Batson*, prosecuting attorneys purposefully used their peremptory challenges to remove all African Americans from the jury, to compose an all-white jury [unrepresentative of his peers]. The defendant was convicted and appealed his case, claiming that his rights were violated due to improper selection of his jury. A “Batson claim” refers to a claim by a party in a case that opposing counsel has improperly used its peremptory challenges to compile a jury with a preferred racial balance. Once this unfortunate misuse of process was exercised in the late 1980s the question of whether or not juries can truly be impartial became a looming fear. It demanded further research on the compilation of juries and the processes of the United States judicial system. The question of the constitutionality of peremptory challenges and their effects on juries today is what ignited the flame for this research to be conducted.

Proponents for juries insist that their existence is what keeps the United States government from taking complete control over the courts and resulting in one judge rendering a verdict. If juries were to cease the outcome would result in one person, a judge, deciding the fate of an accused, rather than a group of citizens deliberating over the facts and rendering a verdict. Juries act as “an essential counterpoise” to attorneys and judges, aiming to provide an objective view. Jurors are instructed to view the evidence and hear the facts and work as “triers of fact”

---

or those who determine the truth. Opponents of juries express concerns for juries and their capabilities for rendering decisions in high profile cases and terrorist cases. They assert that civilian jurors are too expensive, often ineffective and ill-prepared to decide verdicts for more serious cases. Contrastingly, proponents for juries advocate their effectiveness in achieving justice by serving a defendant by a group of his or her peers, a right guaranteed under the Sixth Amendment of the United States Constitution. Proponents also assert that the use of juries is a tradition held from the time of the Romans, granted to a democratic society. The debate has prevailed and will continue for years to come, as proponents of each side of the argument attempt to weigh and outweigh the benefits of juries. However, it is the opinion of this author that juries should remain a primary component of the judicial system.

If it is agreed that juries are necessary in a trial and needed to provide a fair verdict then it must also be assured that those compiling the jury be free of bias. However, what is to be done in instances where a juror is clearly not unbiased? There are tools used to dismiss jurors for obvious reasons of bias, but there are also times where a prejudice may not be as visible. It is during these times that attorneys must be able to read jurors as closely and intuitively as possible. An attorney needs to recognize when a juror may not be revealing the entire truth during voir dire or individual questioning. If counsel does sense that a juror has displayed biased behavioral patterns, he or she may dismiss the juror through a peremptory challenge without writing down a specific reason. This challenge will remove a specific juror from a case. Peremptory challenges, may not, however, be used to discriminate against the race, ethnicity, sex or religion of a juror.

U.S. Const. art. III, §2, cl. 3.
Peremptory challenges, when used correctly by attorneys, are a beneficial and effective tool. In fact, for over two hundred years their use has allowed attorneys to remove jurors from trials in which they may not be impartial. As discussed throughout this thesis, it is a guarantee by the United States Constitution that the court will do its best to uphold the Constitution and ensure that a defendant receives the fairest possible trial. The allowing of attorneys to remove jurors who will fail to render an impartial verdict greatly increases the guarantees of the United States judicial process.

There are many facts advocating for the continuance of peremptory challenges. The strongest and most basic reasoning for proponents of the challenges is that peremptory challenges protect the accused and allow for the fairest possible trial. It is irrational to think that all persons summoned for jury duty will be as honest as instructed and not hold previous opinions about a group of people, whether the opinion is based on a previous experience or learned stereotype. As a result, peremptory challenges serve as a protective measure for litigants who may have such biased persons on their jury. Unfortunately, voir dire and challenges for cause do not eliminate all inappropriate jurors from a case. However, it is through the use of peremptory challenges that an attorney may be able to protect his or her client and remove the most unfavorable jurors from the jury. In simplest forms, peremptory challenges make sure a jury is as honest as possible in order to best serve a defendant and provide justice. There are opinions that reveal how peremptory challenges are unfair because they allow attorneys to pass judgment on certain types of people in excluding them from a jury. However, for an attorney to use stereotypes would only hurt his or her case. In fact, an attorney must do all he or she can in
order to analyze beyond stereotypes so as to look for serious cases of biases or prejudices. These opinions discount the true incentives of attorneys and their use of peremptory challenges.\textsuperscript{215}

Peremptory challenges, by nature alone, promote reason. If these challenges were eliminated from the judicial system then what would prevent unfavorable candidates from serving as jurors? Voir dire and challenges for cause often leave many jurors behind who turn out to be less than desirable. For example, corrupt persons may lie during voir dire and give appeasing answers to counsel’s questions in order to ‘pass’ this procedure. These persons may very well have their own personal agenda as to why they want to sit on a jury so badly. With the tool of peremptory challenges attorneys have the possibility to dismiss these unscrupulous individuals and make certain that trials remain reliable in fact and in appearance.\textsuperscript{216}

A second, but still important, argument for keeping peremptory challenges alive resides in the pure fact that peremptory challenges are a part of American tradition. The United States of America was built on a concrete foundation provided by the Constitution. Although they are not explicit powers written in the Constitution, the use of peremptory challenges are implied and have been for centuries. To remove them from the judicial system would be removing a pillar from the American foundation. A main argument of proponents is that peremptories have been effective in the past at securing impartial juries and that as long as they are used properly, peremptory challenges will continue to be successful.\textsuperscript{217}

Peremptory challenges are also tools to keep jury deliberations are simple as possible. Jurors have enough to decide on when entering a deliberation room then to make matters worse


\textsuperscript{216} Id.

and include jurors who have extreme views on a matter. When exercising their peremptories attorneys are also looking to eliminate those potential jurors who may have extreme, overbearing viewpoints. These people usually tend to make deliberations extenuated and more controversial than necessary. Many of these cases result in a hung jury, where a true verdict is unable to be reached. Through the use of their challenges, attorneys are able to rid the jury of these persons so deliberations can go as smoothly as possible. Without the added pressures of an extremist, it is assumed that jurors are able to come to a consensus more easily.

One of the main fears looming for the courts if peremptory challenges were to be removed is the thought of disrupting voir dire. Removing peremptory challenges could cause the pretrial questioning of jurors to go either way: voir dire could either be extended or shortened. If juror questioning were to be extended this could lead to longer trials and the possible backlog of cases. Anyone involved in the juridical system today already recognizes that the amount of cases waiting to be heard on trial today is already a problem. If more cases were to add to this delay some trials may not be heard for years, causing litigants to remain in the system for a longer period of time. If the opposite were to occur and voir dire was shortened, then it is possible that attorneys may not be able to ask the questions they deem important. As a result, again, jurors who do not deserve to remain on a case may make it through this questioning since all answers would be unable to be heard. Without the benefit of asking in depth questions attorneys may be unable to reveal the existence of bias if it exists.

This thesis does not deny that there have been occurrences of racial or other bias, but it does suggest that not all peremptory challenges are used maliciously. As mentioned earlier, the

---

219 Id.
cases of *Batson v. Kentucky* in 1985 and the 2008 case of *Snyder v. Louisiana* are clear
depictions of what can go wrong when the power of the judicial system is misused. Although it is
an attorney’s number one priority to defend his or her client, he or she must be careful not to
cross the line of racial discrimination. Attorneys are officers of the court, sworn to uphold the
United States Constitution, and must be mindful of their legal commitments. These cases were
unfortunate examples of what occurs when attorneys make poor decisions. Furthermore, it must
be noted that in these cases it was not the *tool* of peremptory challenges that failed the system,
but the *attorneys* who made the dissolute decision. It is possible that future abuse of the judicial
system will occur, but it is up to the judges and fellow moral attorneys to be the bulwark to
protecting due process. It will be those dutiful persons who will protect the law and the litigants
it serves. The efficacy of peremptory challenges can only increase if a close watch is kept on
attorneys in the future to ensure that they properly use this judicial tool.

Further evidence to support the use of peremptory challenges relies in the findings of
human psychology. Correlations can be drawn from human behavioral patterns to determine that
peremptory challenges may act as a mechanism attorneys use to defend their subconscious
decisions about the impartiality of a juror and to preserve due process. The compilation of
anecdotes in Malcolm Gladwell’s *Blink* supports researchers’ beliefs that the unconscious mind
is something to be appreciated. The use of peremptory challenges should, too, be appreciated
since their very use may be what actually keeps the practice of law fresh, truthful and
vindicating. This paper also recommends that research be conducted in order to suggest that
attorneys demonstrate the blink effect when choosing jurors. To add subsequent research to the
effectiveness of peremptory challenges, this research has examined the concepts associated with
the “blink effect” and how this process correlates to an attorney’s selection of jurors. In order to
bring the concepts of rapid cognition, think-slicing and the use of peremptory challenges together, this thesis examined specific examples of each process at work. Each of these concepts, within reason, explains how individuals arrive at decisions. While this paper was unable to explore in depth each principle of the rapid cognition theory, it did examine the most important aspects of the concept in context to jury selection. This paper concluded that it is safe to apply rapid cognition theories to real life situations, particularly the selection of jurors, since attorneys must make snap judgments when selecting jurors for a trial. In agreement with the research Malcolm Gladwell summarized in Blink, this paper supports the correlation that attorneys actively use psychological behavioral patterns, particularly thin-slicing, when impaneling a jury.

Research on human behavioral patterns has concluded that it is natural for humans to express instinctive reactions on a daily basis. Since this activity is well-accepted in society, it is only logical to correlate these daily human reactions with the instinctive reactions used by attorneys when impaneling a jury. Attorneys exercise the same cognitive reflexes and thin-slicing behavior when processing voir dire as other humans do when he or she makes natural, instinctive decisions. It is not a stretch of science to draw a direct correlation between the instinctive reactions individuals experience daily and the gut reactions attorneys exercise when removing jurors from a case.

There have been cases where defendants have argued that their trial was designed unfairly, resulting in a jury comprised of biased jurors. There is no doubt that this has not been the case in some instances, such as the trial of Batson v. Kentucky. However, more research needs to be conducted in order to determine if all cases appealed on Batson challenges were truly racially biased. If research on the application of the “blink effect” for the selection of jurors were conducted, researchers may well conclude that attorneys did not violate a defendant’s Sixth
Amendment right under the United States Constitution. If further research were conducted it could demonstrate that, when using peremptory challenges, attorneys are relying on their instincts to provide a fair trial and making impulsive decisions to do so. The “blink effect” could even provide an explainable defense for attorneys and their voir dire decisions.

The argument may be readily made that there are attorneys, much alike average citizens, who easily thin-slice people and situations and are able to effectively select the best jury for his or her client. However, what happens in the cases where time is of the essence or those cases in which a novice attorney is making his first attempt at a serious trial? Thin-slicing and following intuitive impulses are a natural event, but like all human efforts, it is one that only gets better with time and experience. For these instances where an attorney needs an extra hand in impaneling the right jury for his or her client there are those persons who practice thin-slicing as a career. These individuals are known as jury consultants. The rise of jury consulting has remarkably reshaped the science of compiling a jury. Jury consultants have provided attorneys the extra help in successfully compiling a jury that will be the most fair and unbiased according to the study of human behavioral patterns.

The phenomenon of jury consulting is fairly new to the judicial system. Only time will tell how effective this science is in helping to achieve greater justice. It is the opinion of this thesis that jury consultants remain a part of the court process. There is nothing illegal or unconstitutional about having an extra, professional hand in selecting a jury. After all, attorneys have a limited amount of time to be able to select the best possible jury for clients. As a result, the additional expertise is a beneficial factor that serves an important purpose. Although the jury consulting process has proved to be effective thus far, this thesis does provide recommendations for continuing to improve the consulting development, as well tips to improve its performance.
and ensure its continuation. The following are recommendations by the author based on the research conducted for this thesis. As always, future research is suggested since jury consulting is so new. It is only with more experiences that consultants and their efforts will be able to be analyzed more thoroughly. Only then will the public be able to verify whether the consultant’s work is truly an effective asset to the judicial system.

In the past ten years more information on the significance of jury consultants has emerged. Proponents for jury consultants have even offered recommendations in order to assure their effectiveness. In an article written for Villanova University, Audrey Cleary proposed a few recommendations for how jury consultants can remain legitimate, especially in the eyes of the public. The author of this thesis greatly identifies and agrees with some of the recommendations Cleary stated. The first of these recommendations was to mandate that all information gathered from surveys conducted by the consultants for one party be readily available to all counsel.220 By allowing all of the attorneys in a particular case to have access to all of the questions asked of jurors then there is no side that has a greater advantage over the other. At the end of a trial neither of the litigants would be able to state that they were unaware of information the other counsel had. Also, by having both sides be familiar with the survey information, all litigants would benefit from a fairer and best possible trial. The main reason for this recommendation is to make certain that neither side has an unfair advantage over the other.

Another recommendation of scholars is that all jury consultants be required to qualify for a universal state license in order to practice.221 This would allow for a standard requirement of knowledge for each jury consultant. All jury consultants who received this license would then have the adequate amount of knowledge, understanding and ethics to work within the judicial

221 Id.
system. Attorneys, as well as litigants, would have the confidence of knowing that their jury consultants were properly trained in their field and have the necessary qualifications to be effective. Scholars suggest that a universal licensing would also help to weed out consultants who are not suited for this profession and those who are dishonest.

The author of this thesis has two additional recommendations for the future of jury consulting. If jury consultants are going to become the innovative practice for securing the fairest jury, then it is a privilege that all litigants, not just wealthy litigants, should be granted. As a result, it is recommended that there also exist “public jury consultants” similar to public defenders. There should be an assigned number of public jury consultants for each court in order to work with clients unable to afford their own jury consultant. These particular jury consultants could be consultants who have just received their licensing and are waiting be hired by a private firm or consultants who simply enjoy serving the public. The public jury consultants must also be competent and meet professional criteria for practice. In no way should these consultants be of any lesser caliber than consultants hired to work for a private firm.

The institution of public jury consultants available for all litigants will decrease the prejudice against their use and their negative connotation of being used by the rich. The idea of instituting trial consultants for poor defendants was attempted in the case of Reginald Denny in 1993. Reginald Denny was a white truck driver who fell victim to the attack of four Los Angeles police officers after the verdict of the Rodney King trial had been announced.\textsuperscript{222} Denny was severely beaten, having his skull bashed in by a cinderblock by one of the police officers, causing him to suffer permanent brain and speech damage. It is believed that the “L.A. Four” sought their revenge on the first truck driver who passed through the streets of South Central

L.A. in 1992. The efforts and information gathered by the jury consultants is unknown, but Damian Williams, one of Denny’s attackers, was denied bail and sentenced to ten years in prison. It is believed that jury consultants worked diligently in selecting the best jury for this case, but had a hard time overcoming the racism and public outcries that stemmed from this case. Unfortunately, jury consultants in the future may still face difficult challenges, such as extensive media attention and public involvement, but it must be imperative that there inabilities to overcome these challenges are not a result of their lack of experience or intellect.

In order to make sure jury consultants remain effective and recognized as valuable contributors to the jury selection process, it is recommended that consulting firms report the information gathered by consultants to the public. The author of this thesis further recommends that jury consultants’ findings be reported in a scholarly jury consulting journal that is accessible by the public. Once a trial is completed it would be useful for jury consultants to publish the results of their surveys, the types of questions they asked and even the stereotypes they were looking to avoid in a particular case. All of the information published would be helpful for future consultants to learn from, as well as beneficial to attorneys who employ jury consultants. The published information would promote the fairness and honesty jury consultants attempt to achieve when selecting juries. It would answer any questions the public may have about services rendered by consultants or how their processes work.

Although the United States judicial system continues to develop practices in order to uphold the Constitution and ensure that defendants are given a fair trial, there are instances where juries no longer qualify to serve this purpose. As a result, further processes have been created. The option of using a military tribunal to try an accused of a terrorist act is a process

---

224 Id.
built to protect civilian jurors. History has demonstrated that those accused of terrorist acts have been known to intimidate jurors and threaten the safety of their lives. In these special circumstances, military personnel may be the best option for not only protecting themselves during the trial, but also for securing the fairest verdict under these types of pressures. It would be almost impossible to expect a civilian jury to easily deliberate a case where there is so much at risk.

Further reasons supporting the implementation of military tribunals for all terrorism cases include the fact that few civilian jurors hold security clearances. If there is top secret evidence that must be displayed in court in order to prove a case against/in defense of a litigant, civilian jurors may not be able to view this evidence. As a result, that particular defendant’s rights may not be fully protected through the best possible trial. However, if military personnel were to sit as a jury then the top secret evidence would be permitted in court, helping to better present the defendant’s case. Finally, in regards to budget restrictions, military tribunals are also less costly to hold than typical criminal trials.

Although military tribunals are typically frowned upon by foreign nations and by many scholars within the United States, it is important that the use of tribunals be understood as an effective and beneficial resource. Although military tribunals are heavily criticized as being unconstitutional, in regards to protecting the safety of civilian jurors military tribunals have been a valuable means for ensuring an impartial jury when juries and peremptory challenges are no longer an option. This remedy demonstrates the commitment by the United States to all litigants the right to a fair and unbiased jury. The implementation of military tribunals for terrorism cases provides citizens of the U.S. the option of using other tools to ensure that an unprejudiced jury is gathered. Supplemental tools, such as military tribunals, should not be ignored.
In spite of the recent attention surrounding the efficacy of juries and the constitutionality of peremptory challenges, research conducted for this thesis, including the review of relevant literature and fundamental trials, as well as numerous interviews with attorneys, concludes that juries are capable of rendering fair verdicts and that they must remain a vital component of the American judicial system. Research has also concluded that peremptory challenges, when used correctly, are critically important in instituting a fair and impartial jury. Without their use in court, attorneys would have no way to remove biased jurors from a case and in turn, fully guarantee a defendant his or her Sixth Amendment right, assuring that he or she has received the most impartial jury. This thesis recommends that peremptory challenges remain in the courts in order to ensure that all defendants are guaranteed their constitutional right of an unbiased jury. If the use of juries and peremptory challenges ceased within the courts, it would be depriving an American citizen of a guaranteed right. There is no prediction for the future of Americans’ constitutional freedoms if rights begin to be eliminated today.
Bibliography


   *Journal of Personality and Social Psychology,* 64, No. 3, 431-441.


   http://www.abanet.org/publiced/lawday/talking/jurytalk.html


   http://www.ajs.org/jc/juries/jc_privacy_sequester.asp


   Vol. 11, P. 3-15.

   http://www.bc.edu/bc_org/avp/cas/comm/free_speech/chandler.html


   http://www.wisegeek.com/what-is-a-jury-consultant.htm


   www.workers-compensation-lawyers.org/art4.htm


15. DOAR, Litigation Consulting Firm.


www.law.cornell.edu/rules/frcrmp


http://jurist.law.pitt.edu/currentawareness/militarycommissions.php


32. Landler, Mark. *World Briefing Europe: Germany: Delay in Extradition Ruling.*


http://www.law.umkc.edu/faculty/projects/ftrials/Simpson/simpson.htm
36. Magna Carta. (1297) (c. 9). *UK Statute Law Database.* 

www.statutelaw.gov.uk/content.aspx?activeTextDocId=1517519


http://www.law.georgetown.edu/faculty/nkk/documents/MilitaryCommissions.pdf

#search='Military%20Commissions%20Act


43. NARA. National Archives Article on the Constitutional Convention. 1986.


44. Nichols, R. *Thomas Reid’s Theory of Perception.* 


*Journal of Personality and Social Psychology.*


47. Phillips, Don. *747 Explodes with 229 Aboard Shortly After Takeoff from N.Y.;* 


http://links.jstor.org/sici?sici=00819557%281987%291987%3C97%3A

VKCTD%3E2.0.CO%3B2-X


58. State v. Snyder, 942 So.2d 484 (1st Cir. 2005).


64. Trial Graphix, Jury Consulting Firm.


65. Trialology, LLC.


67. U.S. Const. § 1861, 1862, 1863 and 1870.

68. U.S. Const. art. III, §2, cl. 3.

69. U.S. Const. art. VII, amend. VI.

70. U.S. Constitution Annotated. *Impartial Jury*.


71. *United States v. Arnaout*, 431 F.3d 994 (7th Cir.2005)


Curriculum Vita

Contact Information
Alexis M. Gioia
853 20th St. NE Apt 8
Washington, D.C. 20002-4121
609.892.7661 cell
alexis.gioia@gmail.com

Personal Information
Born October 29, 1982
Philadelphia, Pennsylvania

Education
Johns Hopkins University, Washington, D.C.
Zanvyl Krieger School of Arts and Sciences, 1717 Massachusetts Avenue
Master of Arts in Government, with a Concentration in Law & Justice
May, 2008
Trying Peremptory Challenges: Are These Tools Effective in Selecting an Impartial Jury?

Seton Hall University, South Orange, New Jersey
College of Arts and Sciences, 400 South Orange Avenue
Bachelor of Arts in Political Science, with a Minor in English
May, 2005