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Proposed Revisions to RsMo Section 494.480

PROPOSED BY

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MISSOURI BATSON REFORM– Peremptory Challenges
Proposed Revisions to Section 494.480 RSMo1997

Executive Summary

Purpose

The purpose of this proposal is to safeguard the Sixth Amendment right of a "fair and impartial jury" of all Missouri citizens by ensuring their right to an impartial jury as provided in the United States and Missouri Constitutions. It seeks to further ensure "that the selection of a petit jury from a representative cross section of the community" (*Taylor v. Louisiana, 419 U.S. 522, 528, 1975*).

The Problem

The use of peremptory challenges based on race are impermissible, the practice occurs often and disproportionately remove people of color, and women from petit juries and subjects the trial integrity to a practice that relies on the manipulation of sympathetic jurors and "stacking the deck" prior to opening arguments. The peremptory challenge system does not protect the constitutional rights of prospective from discrimination based on religion and is a costly practice that expends resources that could be redistributed to areas of more critical need.

- This is a national issue – The State of Arizona eliminated peremptory challenges effective January 2022.
- This issue is currently being reviewed by CREF in Missouri as it is a well-known topic on securing one's right to the sixth and Equal Protection Clause of the fourteenth amendments. Missouri's disparity was cited in Batson v. Kentucky (1986) using a 1974 study which spoke to the state's disparities.
- The cost seat jurors throughout the State of Missouri for one-hour is $1851.00. Between two and eighteen additional jurors are brought to the venire per case with the understanding that at least that many will be eliminated. This costs the taxpayers of Missouri dollars that can be used other places.
- Batson and its progeny disallow the use of peremptory challenges based on religion and ability.

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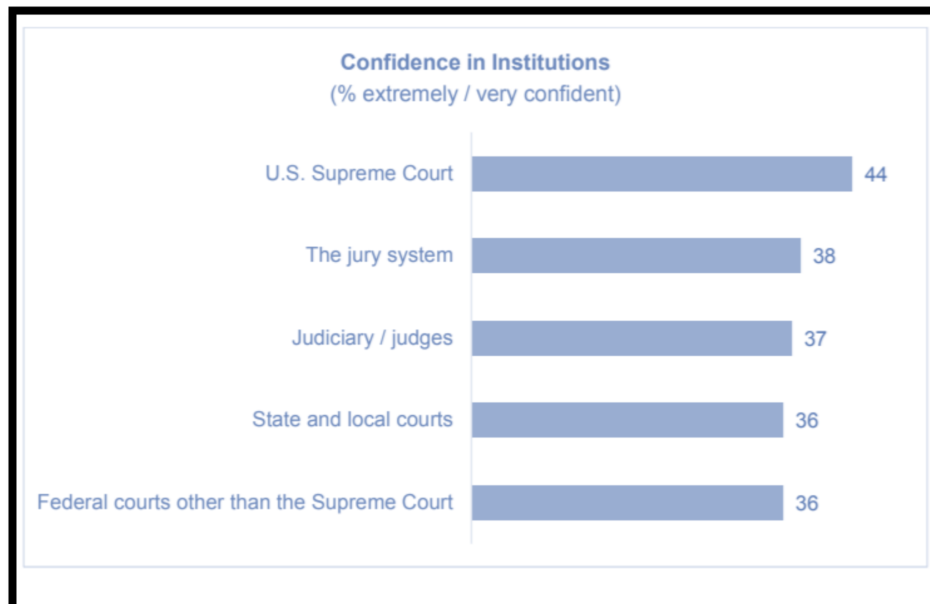
The Solution

- Remove peremptory strikes for all criminal trials
- Limit peremptory strikes in civil matters to one per party.
- Place a restriction on peremptory strikes that are perceived to be an attribute of a class or group.

Highlights

Confidence in State and local courts, the jury system, and the court system is low. The Respondents to the 2019 Willow Research study reported that they thought the courts were too political and that court decision should reflect the attitudes of the public. Practices such as peremptory challenges to potential jurors undermines the public confidence in the jury system. Widely known and accepted neutral responses to Batson challenges often include employment and marital status, perceived adequacy of one's community connections, and home ownership.



[Willow Research, 2019]

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<u>MISSOURI BATSON REFORM</u>– Peremptory Challenges

Proposed Revisions to Section 494.480 RSMo 1997

<u>Purpose</u>

The purpose of this proposal is to safeguard the Sixth Amendment right of a "fair and impartial jury" of all Missouri citizens by ensuring their right to an impartial jury as provided in the United States and Missouri Constitutions. It seeks to further ensure "that the selection of a petit jury from a representative cross section of the community" (*Taylor v. Louisiana, 419 U.S. 522, 528, 1975*). This proposal looks to eradicate that mechanism by which ideologically and morality based jury selection replacing all peremptory challenges in criminal cases with challenges for cause and reducing the allowable number of challenges in civil cases, thereby ending all peremptory challenges in criminal cases.

<u>Proposed Revisions to RSMo Section 494.480</u>

494.480. Peremptory challenges — civil cases, multiple parties, allocation — [~~criminal cases — qualification of juror as basis for new trial — costs for impaneling jury to be paid, when.~~] 1. In trials of civil causes each party shall be entitled to peremptorily challenge ~~three jurors~~ **one juror**. When there are multiple plaintiffs or defendants, all plaintiffs and all defendants shall join in their challenges as if there were one plaintiff and one defendant. ~~The court in its discretion may allocate the allowable peremptory challenges among the parties plaintiff or defendant upon good cause shown and as the ends of justice require. In all cases, the plaintiff shall announce its challenges first.~~

2. [~~In all criminal cases, the state and the defendant shall be entitled to a peremptory challenge of jurors as follows:~~]

(1) [~~If the offense charged is punishable by death, the state shall have the right to challenge nine and the defendant nine;~~]

(2) [~~In all other cases punishable by imprisonment in the penitentiary, the state shall have the right to challenge six and the defendant six;~~]

(3) [~~In all cases not punishable by death or imprisonment in the penitentiary, the state and the defendant shall each have the right to challenge two.~~]

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3. [~~In all criminal cases where several defendants are tried together, the following provisions shall apply:~~]

(1) [~~Each defendant then on trial shall be allowed separate peremptory challenges as provided in subsection 2 of this section;~~]

(2) [~~The number of peremptory challenges allowed the state by subsection 2 of this section shall be multiplied by the number of defendants then on trial in each case.~~]

4. Within such time as may be ordered by the court, the state shall announce its peremptory challenges first and the defendants thereafter. The qualifications of a juror on the panel from which peremptory challenges by the defense are made shall not constitute a ground for the granting of a motion for new trial or the reversal of a [~~conviction or sentence~~] **verdict** unless such juror served upon the jury at the defendant's trial and participated in the verdict rendered against the defendant.

5. [~~If the defendant pleads guilty to a lesser or included offense other than the offense charged in the information or indictment in return for a specific lesser sentence than such defendant would likely have received if such defendant were found guilty of the crime charged, or makes any other plea bargaining arrangement, at any time after the jury is impaneled such defendant shall be liable to the county for the costs associated with impaneling the jury~~]~~.~~

Background

In *Strauder v. West Virginia* (1879), the United States Supreme Court (Supreme Court) established that excluding people from juries based on their race violated the fourteenth amendment. While Strauder disallowed race-based jury selection practices, it did not provide a mechanism to ensure the absence of discriminatory practices. Counsel was afforded the latitude to dismiss jurors using peremptory challenges without explanation.

When the Supreme Court issued its opinion in *Batson v. Kentucky* in 1986, scholars and the legal community lauded the decision as a landmark (Harrington, 2014) for ensuring all people within cognizable classes (*Castaneda v. Partida, 430 U.S. 482, 1977*) were equally protected under the Sixth and Fourteen Amendment. Moreover, the Batson decision attempted to do what the Strauder decision did not: establish an accountability mechanism for peremptory strikes now referred to as the "Batson Rule."

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Under the Batson Rule:

> "A defendant in a criminal case can make an Equal Protection claim based on the discriminatory use of peremptory challenges ("*Batson challenge*") at a defendant's trial. Once the defendant makes a showing that race was the reason potential jurors were excluded, the burden shifts to the state to come forward with a race-neutral explanation for the exclusion." (*Batson v. Kentucky, 476 U.S.79, 1986*)

To evaluate a Batson challenge, The Supreme Court delineated a three-part analysis or "*test*" in what has come to be known as the "Batson test" For the first time, the Batson test provided structure for peremptory challenges. The Batson test required,

1. The defendant must present a prima facia case showing that they are a member of a cognizable group and the prosecutor exercised peremtory challenges based on race. *(p. 96-97*)
2. If the court determines an initial showing was made, then the burden shifts to the prosecutor to provde a race-netural reason for challenging each potential juror. (*p. 97-95)*
3. The court determines whether a race-neutral reason was provided, it is then the responsibility of the defense to prove wheather the proffered reason is pretextual. The court makes the final determination if intentional discrimination occurred or not. (*p. 98*)

While the language is specific in "defendant", the Supreme Court's discussion in Batson is clear; it is Justice Steven's reminder that [the] ".potential for racial prejudice, further, inheres in the defendant's challenge as well" (*P. 108*). One refers to a "reverse Batson challenge" when the prosecutor raises the Equal Protection issue on behalf of the country, city, state, county, or municipality. The rule and test are consistent regardless of which counsel raises the challenge.

If the court improperly denies a Batson challenge, there may be grounds for a reversal of the verdict in the case, but if the court grants the Batson challenge, the court must seat the juror who was previously excused before the challenge.

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Problem Statement

Although the use of peremptory challenges based on race are impermissible, the practice occurs often and disproportionately remove people of color, and women from petit juries and subjects the trial integrity to a practice that relies on the manipulation of sympathetic jurors and "stacking the deck" prior to opening arguments. While the Supreme Court used Batson to cure a disease, it mildly treated the symptoms while risking the overll health of the patients. By employing the Equal Protection framework, the Supreme Court missed an opportunity to protect potential jurors from stereotyping and discreet forms of discrimination in jury selection. By overlooking the opportunity to view this through the ocular of the sixth amendment, fell short of ensuring one's sixth amendment right to a jury that is fair, impartial, and representative of the community.

Under the Batson challenge system, one cannot raise a Batson challenge against a peremptory juror strike unless the alleged violation is egregious enough to rise to the level the challenger has enough evidence to prove a prima facia case. The responding party proffers a neutral, and likely pre-prepared reason for striking a juror; some of the most common and widely acceptable are:

- Criminal History of Family Member - (*U.S. v. Hendrix, 509 F.3d 362, 370, 7th Cir. 2007*)
- Innsuficient Community Ties – (*United States v. Atkins, 25 F.3d 1401, 1406, 8th Cir.*)
- Occupation – (*Alverio v. Sam's Warehouse Club, Inc., 253 F.3d 933, 941, 7th Cir. 2001*)
- Unemployment – (*U.S. v. McAllister, 693 F.3d 572, 579, 6th Cir. 2012*))
- Education Level – (*U.S. v. Lane, 866 F.2d 103, 106, 4th Cir. 1989*)
- Demanor or Behavior During Voir Dire[1] – (*Thaler v. Haynes, 559 U.S. 43, 48, 2010*)
- Past Jury Service – (*U.S. v. Mitchell, 502 F.3d 931, 958, 9th Cir. 2007*)
- Grooming and Appearance – (*Purkett v. Elem, 514 U.S. 765, 769, 1995*)
- Language Barriers – (*Galarza v. Keane, 252 F.3d 630, 639, 2d Cir. 2001*)
- Renting versus owning home – (*U.S. v. Adams, 604 F.3d 596, 601,8th Cir. 2010*)
- Views expressed in voir dire – (*U.S. v. Allen, 644 F.3d 748, 753, 8th Cir. 2011*)
- Age[2] – (*Sanchez v. Roden, 808 F.3d 85, 90, 1st Cir. 2015*)
- Marital Status – (*U.S. v. Omoruyi, 7 F.3d 880, 881, 9th Cir. 1993*)

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A 2016 version of a Santa Clara County, California, prosecutors' training manual makes avaialable a 30-page list of seventy-seven justifications that reviewing courts have regarded acceptable. (Reuters, 2020)

While allowed, many of these neutral reasons have been used to exclude people from petit jurors by allowing alternative subjective reasons for the jurors' dismissal. Additionally, continuing peremptory challenges, people are routinely denied the opportunity to serve on a jury based on counsel's worldview or preconceived notions of various groups.

- A 2004 Texas District and County Attorney Association trial skills course encouraged prosecutors to offer reasons like "watching gospel TV programs" and "views in favor of the O.J. Simpson verdict" to justify strikes against Black jurors. (Reuters, 2020)

In determining the outcome of a peremptory challenge, the judicial officer concludes whether a challenging party proffered enough information to meet their burden in proving discrimnation occurred. It is this crucial step where currently no guidance exists from the Supreme Court. Even so, judicial officers view peremptory challenges as mechanisms to remove jurors who showed prefernce for opposing cousel. Moreover, judges are supportive of this practice, there is little data regarding the accuracy of peremptory challenges bar the published results of Batson challenges and outcomes of homogeneous juries and heterogeneous litigants and defendants (Ochoa, 1996).

The subjective standards used to defend and often defeat challenges to Batson and its progeny have become so routine that more subtle formes of discrimination are more difficult to detect. During the thirty years post Batson, none of the 114 Batson-challenge cases decided by appeallate courts in North Carolina found a substantive Batson violation. (Decamp, 2019)

In 2017, three panelists at the American Bar Association event "Batson at 30: A Legacy of Partial Impartiality" ("Panelists call Batson a failure, offer solutions," 2017) referred to Batson as a "total failure" ("Panelists call Batson a failure, offer solutions," 2017) due to the burden of proof.

> "In the Foster v. Chatman death penalty case, Bright produced evidence of a list used by the prosecutor in the case where the blacks in the jury pool had been color-coded or a letter notation used to denote their race that made it easy to strike during the selection process. He, like others on the panel, said they know of situations where lawyers are coached on

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> how to strike potential jurors and in some instances are given cheat sheets with reasons to strike without excluding people because of race." ("Panelists call Batson a failure, offer solutions," 2017)

While employment, marital status, and whether one lives in a house or apartment may be neutral reasons for a peremptory challenge, one cannot overlook the fact that they also serve as subjective ruses. They give rise to "seat-of-the-pants" (*Batson v. Kentucky, 476 U.S.79, 1986*) assumptions about potential jurors and disenfranchise potential jurors by allowing their dismissal based on traits that counsel may associate with groups of people, whether real or perceived. Continuing to allow the current peremptory challenge structures further gives way for discrimination based on socioeconomic background, political affiliation, or other ideologies.

Though this becomes evident in Batson and its progeny in that Batson has progeny at all, the groups most affected by juror displacement by covert discriminatory practices are those identified as "Black" (African Americans) and women. Even when discrimination occurs, jurors seldom have a remedy for challenging it. Increasing "access to the jury is moot if the practices of eliminating people based on gender, (*Duren v. Missouri, 439 U.S. 357,1979*). Race, ability, and other cognizable factors are allowed to remain intact.

The current peremptory challenge structure does not protect the first amendment rights of potential jurors. While case law prohibits the use of race, ethnicity, and gender as factors in jury selection, Batson and its progeny disallow challenges based on religious affiliation and ability status.

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Key Data Points

- The Baldus study is the most study on race and jury selection. Baldus and his researchers studied the jury selection process of 317 Philadelphia County murder trials over a seventeen year period. Baldus found that the prosecution struck an average of 51% of the Black jurors that were avialable for dismissal comparable with 26% of non-Black jurors. The disparate effect remained even when controlled for other variables such as answers to voir dire questionaire questions, age, employment status (Baldus, 2000)
- The Missouri Supreme Court found no racial discrimination where a Black prospective juror who asked questions about the different degrees of murder was struck for showing too much "initiative," even though a white juror who asked similar questions was not removed (*State v. Bateman, 318 S.W.3d 681, 691-92, 693, Mo., 2010*) (en banc).
- A recent study in Mississippi spanning a 25-year period ending in 2017 found that Black prospective jurors were four times more likely to be struck than white prospective jurors (DeCamp and DeCamp (2019)
- More than 5,000 Louisiana cases from 2011 to 2017 found that prosecutors struck Black jurors at 175% the expected rate based on their proportion of the jury pool (*Foster v. Chatman, 136 S. Ct. 1737, 1760,* 2016)
- The Georgia Supreme Court has consistently failed to find that Black prospective jurors were discriminated against, even where the prosecution used 80% of its strikes to remove Black jurors. *Myrick v. State*, 834 S.E.2d 542, 545, 547 (Ga. 2019).
- Eisenberg studied capital cases in North Carolina and found,"…of the 307 jurors who were struck she found "[T]he prosecution's strikes were responsible for eliminating 12% of whites who went through the voir dire process without being removed, and 35% of blacks who did so. It shows that the defense's strikes eliminated 35% of whites who were not removed during voir dire, and 3% of blacks. The differences are statistically significant at the .001 level." (Eisenberg, 2017)

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Recent National Case

State of Georgia v. Travis McMichaels, State of Georgia v. Travis McMichaaels, and State of Georgia v. William "Roddy" Bryan

McMichaels, McMichaels, and Bryan were charged with and convicted with their roles in the 2020 murder of Ahmaud Arbery in Glynn County, Georgia. Although each was convicted, peremptory challenges were at the forefront of the discussion in this case.

William "Roddy" Bryan's attorney Kevin Gough raised concerns that the final jury pool was devoid of white men over 40, without four-year-college degrees, a "blue-collar" demographic that would relate to his client. Gough expressed objections about the missing demographic; however, since the composition of the jury and alternates consisted of 11 white women, 3 White men, and 1 Black man, Gough determined that attempting a challenge to peremptory strikes would not be fruitful as the law recognizes cognizable groups.

In this same case, the prosecution filed a reverse-Batson challenge alleging that Black people were systematically removed from the jury. In addition, the Assistant District Attorney alleged that the defense used 11 of their allotted peremptory strikes on Black potential jurors. After hearing arguments by the prosecution and the defense, Judge Walmsley stated the prosecution did establish a prima facie case of intentional discrimination in the panel during the strike process.

Judge Walmsley went on to deny the Batson challenge based on the "very limiting" Batson statute, which called for the acceptance of the racially neutral reasons presented by the defense.

Relevant Missouri Cases

Strickland

Kevin Strickland was convicted by an all-white jury of murder in 1979. According to the State's motion, "The jury in the first trial was unable to reach a verdict, an outcome the prosecution blamed on the inclusion of at least one Black juror. After that mistrial, the prosecutor described the seating of that juror as 'careless' and a 'mistake' that he would not repeat." In April 1979, Strickland was again tried before an all-white jury. During jury selection, the prosecutor noted the race of everyone in the venire room and "used its first

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four peremptory strikes to remove the only four Black jurors remaining after the for-cause challenges."

Although the defense objected, the prosecution did not supply a race-neutral reason for targeting those jurors. Instead, the State objected to the inquiry about the basis of its strikes and that it has "has a right to exercise [those strikes] in any way it chooses without explanation therefor." Since this case preceded Batson, there was no obligation to provide race neutral justifications for the strikes. A case about four Black victims and four Black perpetrators proceeded without a representative cross section of the community. (*Missouri v. Strickland, 16CR7900036, MO, 2021*)

<u>Edwards</u>

In April 2015, more than sixty lawmakers and religious leaders drafted a letter to then-Governor Jay Nixon regarding Andre Cole and Kimber Edwards, who had pending executions on April 12th and May 12the, respectively. The letter raised concerns over the use of the "Postman Gambit" (being employed by the U.S. Postal Service) by St. Louis County prosecutors (Harris, 2015) as a reason to excuse Black people from the jury, a well-known practice among the Black communities. The letter showed that while 24% of St. Louis County was Black, the jury was all White despite Black jurors being willing to serve (Harris, 2015). Furthermore, the letter called to Nixon's attention five additional cases of Black defendants who received trials on unrelated charges to Cole and Edwards by all-White juries within short spates of time.

<u>Hall</u>

In June of 2020, for the second time, an all-white jury was seated to resolve the case of white St. Louis Metropolitan Police Officers accused of assaulting off-duty police detective Luther Hall. Hall had been working undercover as a protester following the acquittal of fellow officer Jason Stockley, who had been charged with murder. Defense attorney Scott Rosenblum successfully argued that the dismissal of the one black man making it to the final panel should be because he had an incarcerated family member and the potential juror continued contact with the family member's mother. First Assistant U.S. Attorney Carrie Constantin invoked a Batson challenge, and as noted above, the criminal history of a potential juror's family qualifies as a race-neutral reason (Byers, 2021).

<u>Justifications for Recommendations</u>

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- Ensure a Fair and Impartial Jury: As previously discussed, the attempt to address discrimination in jury selection through the sole basis of the Equal Protection Clause did little to change that discrimination during jury selection occurs but rather, how it appears. Thus, the availability of Batson training to counsel in and of itself is not of critical concern. Instead, the continued harm of one not receiving a fair, impartial jury representative of a cross-section of the whole community, lies with the readily accessible and widely accepted lists of pre-defined neutral (race-neutral) reasons one may select to defend a Batson challenge.

  A system that allows for one to prepare for such a challenge in this manner is tantamount to sanctioning counsel to subject a juror to "rejection for a *real or imagined* partiality that is less easily designated or demonstrable" *(Batson v. Kentucky, 476 U.S.79, 1986).*

- Not Guaranteed by U.S. Constitution: In the United States, legal scholars and judges have protected and defended the use of the peremptory challenge as a right guaranteed by the U.S. Constitution. In *Swain v. Alabama*, the Supreme Court acknowledged the historic significance of the peremptory challenge as "one of the most important rights of the secured to the accused" (*Swaim v. Alabama, 380 U.S. 202, 1965*) although the peremptory challenge itself is not constitutionally granted to neither the prosecution nor the defense. (Leak, 2020)

- Reduction in Jury Costs: Excluding mileage, the total cost for one seated juror in each county for one hour is $1851.00 (this figure does not include mileage). Using the formula n= r x h x d, the total approximate cost of a seated juror each year is projected $4,945,872.00. The empaneled number of potential jurors for voir dire currently takes into consideration the number of peremptory challenges allowed by each side. Restructuring 494.480 RSMo1997 as proposed would reduce the venire by between two and eighteen people each case.

- Rebuilding Public Trust in Missouri Jury Systems: A study conducted by Willow Research in 2019 reflected that 67% of American's did not have faith in their court system and 66% of the same respondents believed that the courts had become too political. While achieving racial or gender homogeneity on a jury may have the court believe the appearance of fairness is achieved. In fact, the data reflects that 38% of those surveyed have faith in the current jury system. By

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eliminating the current peremptory challenge structure and appearing less subjective in the eye to the community.

- Protect the Rights of Potential Jurors – As mentioned earlier, challenges on the grounds of religion and ability status are impermissible. While this has not been found to be a violation of Batson and its progeny it offends those whom it affects. Elimination people from the venire due to religious or ability reasons is a de facto violation of the juror's first amendment right and their right under the American with Disabilities Act.

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