
Race and Jury Selection

Psychological Perspectives on the Peremptory Challenge Debate

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The legal system is a domain of potential relevance for psychologists, whether in the capacity of expert witness or citizen juror. In this article, the authors apply a psychological framework to legal debate surrounding the impact of race on the process of jury selection. More specifically, the authors consider race and the peremptory challenge, the procedure by which attorneys may remove prospective jurors without explanation. This debate is addressed from a psychological perspective by (a) examining traditional justifications for the practice of the peremptory challenge, (b) reviewing research regarding the influence of race on social judgment, (c) considering empirical investigations that examine directly race and peremptory challenge use, and (d) assessing current jury selection procedures intended to curtail racial discrimination. These analyses converge to suggest that the discretionary nature of the peremptory challenge renders it precisely the type of judgment most likely to be biased by race. The need for additional psychological investigation of race and jury selection is emphasized, and specific avenues for such research are identified.

Keywords: jury selection, peremptory challenge, influence of race, stereotyping, bias reduction

From ubiquitous media coverage of each so-called trial of the century to the growing popularity of research at the intersection of psychology and law, it is clear that the U.S. legal system is an institution with a unique ability to capture the attention of the average American—layperson and psychologist alike. Perhaps this fascination stems from the knowledge that at any time, anyone could be thrust into a real-life legal drama as juror or witness, plaintiff or defendant, even consultant or expert witness. As such, all Americans have a vested interest in the machinations of the courtroom, and this participatory system emphasizes objectives such as perceived legitimacy and representativeness. However, the recent U.S. Supreme Court ruling in *Miller-El v. Dretke* (2005; see also *Snyder v. Louisiana*, 2008) serves as a reminder that one of the largest and most recurring obstacles to these efforts to ensure fairness in the courtroom is the potentially biasing influence of race on judgment, a topic quite familiar to the contemporary psychologist.

Miller-El (2005) marks but a recent episode in the Supreme Court's decades-long struggle to curb the influence of race on the process of jury selection. Although

judges and scholars have also addressed problems regarding the racial representativeness of those reporting to jury duty (see Cohn & Sherwood, 1999; Ellis & Diamond, 2003), much of the controversy surrounding race and jury selection focuses specifically on attorneys' manipulation of jury composition through use of the *peremptory challenge*, the practice by which a fixed number of prospective jurors can be excused without evidence of their partiality. At the heart of this debate is how to reconcile the historically discretionary nature of the peremptory challenge with the efforts to protect the rights of defendants to be tried by a jury of their peers and the rights of citizens of all races to serve as jurors. In *Miller-El* (2005), the Court overturned the conviction of a Black defendant, ruling unconstitutional the prosecutorial peremptories that removed 10 of 11 Black prospective jurors during jury selection and citing as evidence of racial discrimination the disparate questions asked of White and Black members of the jury pool. The Court found that the prosecutor's explanations for challenging some Black jurors were equally applicable to White jurors who were not challenged, indicating disparate treatment on the basis of race.

The impact and historical significance of *Miller-El* (2005) have since been assessed in several law review articles (e.g., El-Mallawany, 2006; Hitchcock, 2006; Jackson, 2006). Psychologists also have unique contributions to offer this discourse, as has been the case with other legal debates over the past half century. Here we refer to the use of basic research to adjudicate difficult issues—from the Clarks' studies in *Brown v. Board of Education* (1954) to more recent American Psychological Association amicus curiae briefs regarding capital punishment (*Atkins v. Virginia*, 2002; *Roper v. Simmons*, 2005)—as well as empirical assessment of procedural issues such as jury size (Davis, Kerr, Atkin, Holt, & Meek, 1975; Kerr & MacCoun, 1985), death qualification (Cowan, Thompson, & Ellsworth, 1984; Haney, 1984), and judicial instructions (Diamond, 1993; Lieberman & Sales, 1997). Indeed, ques-

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tions central to the race and jury selection controversy have barely begun to be addressed empirically: To what extent does race influence jury selection judgments? Through what psychological processes? How easy is it to identify the impact of race on any particular peremptory challenge? Absent data on these and other important issues, it is premature to offer concrete policy recommendations, but clearly psychological theory and findings regarding racial stereotyping and bias can inform this ongoing debate. Moreover, this controversy provides an instructive case study for psychologists with more basic interests in race, person perception, and social judgment.

In the first section of this article, we review the history of the peremptory challenge, examine its interaction with race, and assess from a psychological perspective traditional justifications for the practice. We then examine the psychological literature on race and social judgment, assessing the extent to which race likely influences peremptory use, as well as the difficulty inherent in identifying such influence. Next, we consider the few empirical investigations that have examined directly the relationship between race and peremptory challenge use. Finally, we evaluate the viability of current safeguards against the influence of race during jury selection and consider options for their improvement. Throughout the article, we identify avenues for future research that will allow psychologists to offer more substantive and specific contributions to this debate.

The Story of the Peremptory Challenge

Background and Assumptions

During jury selection, there are two routes through which litigants seek removal of prospective jurors. In a successful

challenge for cause, the judge is persuaded that a juror will not be impartial and, thus, removes this individual from the jury panel. Such challenges are unlimited in number, but judges are typically hesitant to accept them absent clear evidence of a fixed opinion that would preclude impartiality (Babcock, 1975; Baldus, Woodworth, Zuckerman, Weiner, & Broffitt, 2001; Hans & Vidmar, 1982). The second option—often pursued after a failed challenge for cause—is to use one of a limited number of peremptory challenges (sometimes referred to simply as *peremptories*), by which a prospective juror is excused without justification. Peremptories enjoy a long legal history, although they are not guaranteed by the U.S. Constitution (Alschuler, 1989; Broderick, 1992). The most common argument in support of the practice is that it allows attorneys to remove jurors whom they believe but cannot prove to be biased. As such, peremptories are presumed to create fair juries and reassure litigants that they have a say as to who judges them (*Batson v. Kentucky*, 1986; Hans & Vidmar, 1982). Babcock (1975) noted two additional benefits: preventing the unpleasantness of articulating concerns about juror bias and enabling attorneys to remove jurors who have been alienated by probing questions during jury selection, or *voir dire*.

Rarely have these alleged benefits been examined empirically (Broderick, 1992). Do peremptories improve jury impartiality? The number of peremptories allowed varies by state and type of case, yet no published analyses compare jury selection outcomes across courthouses, perhaps because of difficulties in operationalizing impartiality. More testable is the assumption that attorneys can accurately and consistently deduce a juror's verdict predisposition—not to mention an inability to remain impartial—during *voir dire*. But few empirical studies support that proposition: “An attorney's ability to predict appears limited by a very low ceiling of precision” (Hastie, 1991, p. 712; see also Finkelstein & Levin, 1997; Johnson & Haney, 1994; Zeisel & Diamond, 1978). Data suggest that attorneys sometimes focus *voir dire* questions on indoctrination as opposed to bias identification (Hastie, 1991), leaving them ill-prepared to use peremptories. Moreover, jurors frequently conceal information during *voir dire* and are unable to assess their own impartiality (Kerr, Kramer, Carroll, & Alfini, 1991; Seltzer, Venuiti, & Lopes, 1991). In sum, although some attorneys may be better than others at identifying biased jurors—and some biases may be easier to identify than others—data provide little evidence of a reliable link between peremptory use and impartial juries. Some analyses even indicate that *voir dire* produces juries with attitudes no different from the attitudes of a group of 12 randomly selected individuals (e.g., Johnson & Haney, 1994).

Other purported benefits of the peremptory challenge have also received scant empirical attention. Does the peremptory challenge provide a safeguard for attorneys who wish to avoid empanelling jurors irritated by aggressive questioning? This proposition seems plausible, although Rose's (2003) interviews with jurors indicate that many do not take personally either the questions they are

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asked during voir dire or the experience of being excused from a jury. Do peremptories increase the perceived fairness of the system? General surveys could address this question directly, but such studies have not been conducted. Relevant findings are reported by MacCoun and Tyler (1988), who found that laypeople prefer juries to judges and prefer 12-person juries to 6-person juries, in large part because of the greater community representativeness associated with larger juries. Combined with the finding that peremptory challenge use often creates less representative juries (see Baldus et al., 2001), this result provides indirect evidence that peremptories do not bolster the legitimacy of the legal system and can, in some cases, even undermine it. Overall, although the arguments in favor of peremptory challenges carry intuitive appeal, they remain largely unexamined and, on some counts, inconsistent with empirical data.

Peremptories and Race

That the peremptory challenge might not live up to its reputation for improving jury impartiality and system legitimacy is not as problematic as the allegation that the practice also enables racial discrimination during jury selection. Indeed, the peremptory controversy centers on race, although other criticisms include, for example, that the practice contributes to making voir dire a cumbersome and inefficient process. Regarding the ostensible advantages of peremptories, these benefits seem even less likely to be realized when challenges are based on race. First, race-based peremptories do not lead to more impartial juries. To the contrary, both legal rulings and empirical data suggest that diverse jury compositions can reduce bias and encourage more thorough deliberations (*Peters v. Kiff*, 1972; Sommers, 2006). Concerning legitimacy, juries that

are not racially representative of their communities tend to elicit skepticism rather than confidence in the system (Ellis & Diamond, 2003; Hans & Vidmar, 1982). And with regard to other advantages suggested by Babcock (1975), she has acknowledged that they are not applicable when peremptories are based on race (Babcock, 1993).

The Supreme Court has addressed the issue of race and peremptories several times. As far back as in the 19th century, the Court ruled against statutes excluding members of particular racial groups from jury duty (*Neal v. Delaware*, 1880; *Strauder v. West Virginia*, 1879) while separately affirming the importance of peremptories in jury selection (*Lewis v. U.S.*, 1892; *Pointer v. U.S.*, 1894). The first case in which race and peremptory use intersected was *Swain v. Alabama* (1965). The appeal of Robert Swain, a Black man convicted of murder and sentenced to death by an all-White jury, was based on the exclusion of all six Black prospective jurors by prosecutorial peremptories. The Court ruled that these challenges were constitutional, as it should be presumed that attorneys have legitimate reason for peremptories in any given case and, in the wake of unnecessary restrictions, “the challenge, pro tanto, would no longer be peremptory” (*Swain*, 1965, p. 222). The majority conceded that more systematic efforts to exclude members of a racial group from jury service across several trials would constitute a violation of equal protection rights, but demonstrating that such bias had occurred proved to be impossible. In denying Swain’s appeal, for instance, the Court majority was not swayed by the fact that no Black individual had ever survived voir dire to serve as juror on a criminal or civil jury in Talladega County, a region with a Black population of 26%.

Twenty years later, the Court’s ruling in *Batson v. Kentucky* (1986) eased this unattainable standard, marking a significant change in thinking since *Swain* (1965). With this ruling, the Court majority served notice that the prevention of racial discrimination now trumped the historical sanctity of the peremptory challenge. Per *Batson*, a defense attorney simply has to make a reasonable argument that race influenced prosecutorial peremptory use in the case at hand—not systematically across cases—before the burden shifts to the prosecution to prove otherwise. *Batson* was a landmark ruling in that for the first time, attorneys could be asked to justify peremptories. This first meaningful restriction on the peremptory challenge has since been extended to defense attorneys (*Georgia v. McCollum*, 1992), civil trials (*Edmonson v. Leesville Concrete Co.*, 1991), and trials in which the defendant and juror are not of the same race (*Powers v. Ohio*, 1991). The *Batson* ruling was also noteworthy in that it singled out race as a characteristic on which peremptories could not be based. Subsequent defendants have appealed on the grounds that peremptories were used to target jurors of other demographics, but the Court generally has upheld only those appeals based on gender (*J. E. B. v. Alabama*, 1994).

As monumental as it was, *Batson* (1986) left many questions unanswered, most notably how exactly judges are supposed to evaluate the legitimacy of peremptories. Some subsequent decisions have rendered it more difficult

to show that a peremptory challenge is based on race, such as the ruling that to comply with *Batson*, an attorney must simply provide any race-neutral justification and not necessarily one that is “persuasive or even plausible” (*Purkett v. Elem*, 1995, p. 768). Other rulings, such as *Miller-El* (2005), suggest criteria for evaluating peremptory challenge justifications, but there remains no clear standard by which judges are to make this determination. Consistent with such ambiguity, archival analysis indicates that *Batson* and its progeny have had little effect on actual peremptory challenge use or jury racial composition (Baldus et al., 2001). Consider, for example, pre-Hurricane Katrina Jefferson Parish, Louisiana, where, despite a Black population of 23% according to the 2000 census, only 4% of jurors in post-*Batson* capital murder trials have been Black (Liptak, 2007). Of course, race-based peremptory use is not the only explanation for data such as these: Large numbers of racial minority group members are eliminated from jury service before even reaching the courthouse because of racial and socioeconomic disparities in jury summons refusals, undeliverable jury summonses, and financial hardships that preclude jury service (see Ellis & Diamond, 2003). Still, the continuing problem of nonrepresentative juries in the wake of *Batson* have led some to resurrect the call to eliminate peremptories found in Justice Thurgood Marshall’s concurring opinion: “Eliminating the shameful practice of racial discrimination in the selection of juries . . . can be accomplished only by eliminating peremptory challenges entirely” (*Batson*, 1986, pp. 102–103).

Clearly, many issues surrounding race and jury selection remain unresolved, and we believe that psychologists are uniquely equipped to inform this ongoing debate. For example, rulings from *Swain* (1965) through *Miller-El* (2005) imply that race affects peremptory challenge use in some cases, but what does the psychological literature on race and social judgment suggest regarding the pervasiveness and nature of this influence? If race impacts peremptory challenge use, what is the likelihood that self-reported justifications for such challenges will reveal this influence? That is, to what extent are attorneys unaware of the influence of race on their judgment, and, even when they are aware of it, how easy is it for them to come up with race-neutral justifications? These are issues to which we now turn our attention.

Race and Social Judgment

Influence of Social Category Information

It is well documented that social category information such as race can have profound effects on judgment (for a review, see Fiske, 1998). The impact of race has been demonstrated in countless settings: medical diagnoses (e.g., LaVeist, Arthur, Morgan, Plantholt, & Rubinstein, 2003), *Diagnostic and Statistical Manual of Mental Disorders* evaluations (e.g., Neighbors, Trierweiler, Ford, & Muroff, 2003), ratings of professors (e.g., Vescio & Biernat, 1999), assessments of students (e.g., Staiger, 2004), perceptions of political candidates (e.g., Sigelman, Sigelman, Walkosz, & Nitz, 1995), and evaluations of job applicants (e.g., Ber-

trand & Mullainathan, 2004), to name a few. Researchers have also examined the effects of race on legal judgment, with much of this work focusing on the influence of a defendant’s race on jurors (see Sommers, 2007). Findings from these varied domains suggest not only that the influence of race on perception and judgment is pervasive but also that it is often automatic (Devine, 1989; Fiske & Neuberg, 1990) and very quick (see Eberhardt, 2005; Ito & Urland, 2003).

Through what processes does race affect social judgment? Two common answers in the psychological literature involve cognition (i.e., stereotypes) and motivation or affect (i.e., prejudice), explanations that are not mutually exclusive. In examining these possibilities in the domain of jury selection, it is important to consider how they interact with attorneys’ primary goal of empanelling a favorable jury that increases their likelihood of winning the case. After all, although explicit purposes of voir dire include empanelling an impartial and representative jury, the U.S. legal system is adversarial by nature. In practice, attorneys’ chief objective in this process is to select jurors whom they believe will be sympathetic to their side of the case (Hans & Vidmar, 1982).

Although we know of no direct empirical assessment of the relationship, ample theoretical and anecdotal evidence suggests that attorneys’ stereotypes regarding jurors of different races contribute to the impact of race on jury selection. As Fiske (1998) described, people tend to rapidly categorize others on salient dimensions such as race. This categorization is often accompanied by stereotypic associations that affect perception and judgment, and such stereotype activation is not always conscious. Colloquial use of the word *stereotypes* connotes exaggerated and negatively valenced beliefs about an outgroup, but stereotypes need not be negative—or inaccurate—to influence judgment. Simply believing that members of a group are likely to possess certain characteristics or attitudes is typically sufficient to affect judgment and bring about confirmatory information search processes (Darley & Gross, 1983; Snyder & Swann, 1978).

There is little reason to suspect that legal judgments are immune from this influence of category-based beliefs. Stereotypes are particularly likely to affect judgments that are based on limited information, made under cognitive load, and hurried by time pressure (e.g., Kruglanski & Freund, 1983; Kunda, Davies, Adams, & Spencer, 2002; van Knippenberg, Dijksterhuis, & Vermeulen, 1999), all apt descriptions of typical voir dire. Indeed, jury selection guides, training manuals, and other sources of jury folklore include countless strategies based on explicit stereotypes: Defense attorneys should seek female jurors unless the defendant is an attractive woman; poor jurors are good for the defense in a civil case because they are uncomfortable with large sums of money; civil plaintiffs should avoid jurors with professions based on precision, such as bank tellers or accountants (Fulero & Penrod, 1990; Olczak, Kaplan, & Penrod, 1991). In the pursuit of a favorable jury, there appears to exist among attorneys a “time-honored stratagem of selecting jurors by way of superstition, ste-

reotypes, body language, implicit theories of attitude and personality” (Kovera, Dickinson, & Cutler, 2002, p. 165) as well as other “seat-of-the-pants” intuitions (Broderick, 1992, p. 410).

It is clear that comparable juror stereotypes exist for race (Page, 2005). Many jury selection manuals include explicit instructions to consider race. Justice Breyer’s opinion in *Miller-El* (2005) summarized some of these racial stereotypes, ranging from the general belief that Black jurors are sympathetic toward civil plaintiffs to point-based strategies by which value is allocated to prospective jurors on the basis of race. Baldus et al. (2001) provided another example, describing a training video for prosecutors that cited race in describing “good” and “bad” jurors. Such juror stereotypes may also exert influence through nonconscious processes. To the extent that attorneys have been exposed to or have developed their own racial stereotypes relevant to juror performance—Blacks are skeptical of police; Whites are forgiving of corporate malfeasance—no conscious effort may be necessary for these stereotypes to influence voir dire evaluations.

A provocative issue in considering juror stereotypes is that some of these assumptions about race may be accurate. Research suggests, for instance, that Black jurors are often more lenient toward Black defendants than are White jurors (see T. W. Brewer, 2004; Mitchell, Haw, Pfeifer, & Meissner, 2005; Sommers, 2007). One might therefore argue that it is rational for attorneys to consider race given their desire to select a sympathetic jury. However, whereas juror stereotypes tend to be global—Black jurors will not convict Black defendants—research suggests that actual effects by juror race are more context dependent. For example, when trial evidence is strong, non-White jurors are often more punitive toward ingroup versus outgroup defendants (Kerr, Hymes, Anderson, & Weathers, 1995; Taylor & Hosch, 2004). Moreover, to the extent that between-race differences in juror tendencies derive from variability in experience and ideology (e.g., Cowan et al., 1984), attorneys may be better served assessing these directly instead of relying on race as a proxy. Of course, from a practical standpoint, these issues are moot, as the Supreme Court has deemed race-based peremptories unconstitutional regardless of the accuracy underlying them.

What about affective or motivational processes? Does racial prejudice among attorneys predict race-based peremptory challenge use? To answer this question, we first propose that the race-related stereotypes that influence jury selection are likely not the same stereotypes that psychologists typically associate with racial prejudice, such as those regarding lack of intelligence, morality, or humanity. Rather, research on juror folklore implies that the influence of race on jury selection often derives from attorneys’ domain-specific beliefs about the tendencies of jurors of different races: Blacks are acquittal prone; racial minority jurors are lenient toward same-race defendants. To our knowledge, however, no studies have examined the link between attorney endorsement of race-related juror stereotypes and peremptory challenge use during jury selection,

and the precise nature of this relationship remains speculative.

More generally, psychological research has demonstrated that prejudice often leads decision makers to judge less favorably and allocate fewer resources to particular outgroups (for a review, see M. B. Brewer & Brown, 1998). In contemporary America, such preferences may not be as overt as they were in previous eras (e.g., Dovidio & Gaertner, 1998; Kinder & Sears, 1981), but they are not uncommon. At the same time, affect and attitudes toward outgroup members—like stereotypic beliefs—are not always negative. Laypeople feel greater warmth toward certain racial groups than others (Fiske, Cuddy, Glick, & Xu, 2002), and the perceived acceptability of prejudice also varies by target group (Crandall, Eshelman, & O’Brien, 2002). Indeed, an emerging body of research suggests that outgroup membership can sometimes have positive effects on perceivers’ judgments (e.g., Barden, Maddux, Petty, & Brewer, 2004; Wittenbrink, Judd, & Park, 2001). For example, some Whites process persuasive arguments more systematically when conveyed by a Black source (Petty, Fleming, & White, 1999; White & Harkins, 1994) or about a Black target (Sargent & Bradfield, 2004), findings attributed to motivations to avoid prejudice. In the context of jury selection, however, no research has examined whether such prejudice-related affect or motivation—in either conscious or nonconscious form—impacts judgments, despite the testability of these relationships.

One could argue that such race-related motivations are unlikely to gain traction in attorneys’ jury selection judgments unless they also facilitate the effort to empanel a favorable jury. As with any walk of life, certainly there are attorneys who harbor animosity toward particular racial groups, but does such sentiment affect peremptory challenge use? Consider, for example, archival data indicating that prosecuting and defense attorneys are often mirror opposites in their use of peremptory challenges (e.g., Turner, Lovell, Young, & Denny, 1986): In cases with Black defendants, prosecutors tend to challenge Black prospective jurors and defense attorneys tend to challenge White prospective jurors. The most parsimonious and intuitive explanation for this finding would not be that prosecutors harbor anti-Black prejudice—and thereby seek to deprive Black citizens of their rights to serve as jurors—whereas defense attorneys hold comparable antipathy toward Whites. More plausible is an account that focuses on stereotypes concerning which jurors are likely to be favorable to each side of the case. To the extent that prejudice does impact peremptory challenge use, it seems likely that these effects are less overt, such as leading attorneys to perceive less rapport with certain jurors during voir dire or predicting a tendency to view outgroup jurors as homogeneous. Of course, these are empirical questions.

In sum, our review of the psychological research has illustrated that race has pervasive effects on judgments across domains. Such influence seems particularly likely to occur in a jury selection process that provides decision makers with a limited amount of individuating information about jurors and actually champions the use of category-

based assumptions. However, researchers have not examined directly the link between attorneys' race-related juror stereotypes and their jury selection tendencies, nor has research explored the relationship between attorney prejudice and preemptory challenge use. The specific psychological mechanisms by which race impacts jury selection therefore remain uncertain, as does the extent to which such influence is based on conscious versus nonconscious processes.

Identifying the Influence of Race

Basic research not only indicates that the influence of race on social judgment is widespread and occurs through multiple processes but also that this influence is difficult to identify in any one instance (see Norton, Sommers, Vandello, & Darley, 2006). Particularly problematic are attempts to assess such influence using self-report data, as courts do in the wake of *Batson* (1986). One limitation of self-report data is the potential for the effects of race to occur outside conscious awareness, as detailed above. If a decision maker is not aware of the impact of race on a decision, he or she obviously cannot cite race as being an influential factor. Complicating matters further is people's well-documented tendency to offer compelling explanations for behavior even when they are unaware of the factors that were influential (Nisbett & Wilson, 1977; Shafir, Simonson, & Tversky, 1993). To the extent that race affects judgment in an implicit, nonconscious manner, efforts to identify this influence via self-report are at best uninformative and at worst misleading (Page, 2005).

However, even if some attorneys consciously consider race, it is unlikely that their self-reports will capture this influence (Crosby, Bromley, & Saxe, 1980). Laypeople often exhibit motivations to avoid prejudice (e.g., Dovidio & Gaertner, 1998; Dunton & Fazio, 1997; Plant & Devine, 1998; Sommers & Norton, 2006), and many Whites resist admitting that they have even noticed race during social interaction (Norton, Sommers, Apfelbaum, Pura, & Ariely, 2006), much less that race has affected their judgment. Even if most attorneys are not particularly susceptible to such normative concerns in the courtroom, the explicit prohibition in *Batson* (1986) constitutes an even stronger constraint against admitting to the influence of race. It is therefore highly unlikely that many attorneys will cite race in justifying preemptories, even if they are aware of its influence.

How do decision makers explain judgments without admitting to the influence of race? Research suggests that people are remarkably facile at generating neutral explanations to justify biased judgments (Norton, Vandello, & Darley, 2004). In one series of studies in which race was manipulated, Norton et al. (2004) presented White participants with information about two college applicants, one of whom was Black and one of whom was White. When asked whom they would admit, participants overwhelmingly selected the Black applicant, evidencing a desire to appear unbiased. In explaining their decisions, though, participants rarely cited race. Rather, when the Black applicant had a higher grade point average, participants rated

grades as the most important factor for admission. When the Black applicant had lower grades but more Advanced Placement classes than the White applicant, the number of advanced classes was deemed more important. Norton et al. (2004; Norton, Sommers, Vandello, & Darley, 2006) suggested that the ease of generating such neutral explanations impedes identification of the influence of race on judgments, a conclusion with legal implications for not only jury selection but also sentencing, employment discrimination cases, and other decisions involving subjective criteria and even a modicum of discretion.

Given these limitations of self-report, psychologists tend to rely on other means of assessing the influence of race. One option is to examine judgment across scenarios. In jury selection, one could examine the racial composition of an attorney's previous juries. Admittedly, though, courts often focus on the narrower question of, Is there evidence of racial bias in this particular case? (see *McCleskey v. Kemp*, 1987; *Swain*, 1965). Another strategy is to present multiple individuals with the same scenario in which the race of the principals is varied (e.g., Norton et al., 2004; Sommers & Ellsworth, 2000). Such manipulation cannot be used during actual voir dire, but as *Miller-El* (2005) suggests, disparate treatment by race can be deduced from inconsistencies in preemptory challenge use. Psychologists have also begun to turn in greater numbers to subtle, nonreactive measures of decision makers' racial attitudes (e.g., Fazio, Jackson, Dunton, & Williams, 1995), as well as assessment of implicit attitudes (e.g., Greenwald, Nosek, & Banaji, 2003). However, these are measures with which courts remain largely unfamiliar and uncomfortable (Krieger, 2004) and about which psychologists continue to debate (e.g., Banaji, Nosek, & Greenwald, 2004; Karpinski & Hilton, 2001). In sum, whereas psychologists use a multitude of methods to examine the effects of race—some of which could be used in the courtroom, some of which are less feasible for such use—the legal system relies exclusively on self-report, a problematic strategy given the unreliability and inaccuracy of such reports.

Investigations of Race and Preemptory Use

Archival Data

To this point, our review suggests two conclusions: (a) A prospective juror's race likely influences preemptory challenge use in many instances and (b) this influence is unlikely to be captured via self-report measures. Archival analyses support both propositions. First, Rose (1999) observed jury selection for 13 trials in North Carolina, all but one of which involved a Black defendant. Overall, Black prospective jurors were no more likely than White prospective jurors to be challenged, but, as alluded to above, race had different effects on prosecution and defense attorneys: Although 71% of Black juror challenges were made by prosecutors, 81% of White juror challenges were made by the defense. This asymmetry implies an expectation that White jurors are more pro-prosecution or at least are relatively less sympathetic to Black defendants than are Black

jurors. Similar findings have been reported for post-*Batson* jury selections in other jurisdictions (Baldus et al., 2001; McGonigle, Becka, LaFleur, & Wyatt, 2005).

Second, archival data also indicate that regardless of its actual influence on jury selection judgments, attorneys are unlikely to cite race when asked to justify peremptory use. Even before *Batson* (1986), in interviews at a federal district court in Illinois regarding more than 100 peremptories, attorneys provided a race-related explanation for only 8 peremptory challenges (Diamond, Ellis, & Schmidt, 1997). Of course, it is possible that race actually did not influence the vast majority of these judgments. But more recently, Melilli (1996) examined close to 3,000 instances in which attorneys alleged that their counterpart's peremptory challenge use violated *Batson*; most involved a prosecutor removing a Black prospective juror. On only 55 occasions—just 1.8% of the time—did an attorney forced to justify a peremptory challenge admit that race had been influential.

Just as noteworthy is that the vast majority of attorneys' race-neutral justifications are accepted by judges as legitimate. Melilli (1996) reported that attorneys required to justify a peremptory challenge successfully convinced the trial judge that the challenge was legitimate more than 80% of the time, whereas Raphael and Ungvarsky (1993) offered the similar conclusion that "only a small percentage of the neutral explanations for peremptory strikes were rejected" (p. 235). Thus, attorneys appear capable of generating a wide array of neutral justifications for race-based peremptory challenges—including age, marital status, occupation, socioeconomic status, previous involvement with the criminal justice system, jury experience, and demeanor—leaving judges with little choice but to accept their explanations (Raphael & Ungvarsky, 1993). Taken together, these analyses of real cases support the conclusion that race-related juror stereotypes are likely influential during jury selection, even while attorney self-reports suggest otherwise.

Experimental Studies

Although archival analyses converge on findings consistent with psychological theory, they do not offer definitive conclusions regarding race and peremptory use. As courts have been quick to point out, correlational studies cannot provide conclusive evidence of causality (e.g., *McCleskey v. Kemp*, 1987). Furthermore, archival analyses cannot rule out the possibility—as improbable as it may be—that in each one of the instances when attorneys failed to cite race as being influential, they did so because the judgments were truly race neutral. A skeptic could assert that juror race simply happened to be confounded with the nonracial factors that were actually influential in these instances. Only through an experimental design can researchers address claims such as this one by testing simultaneously the influence of race on jury selection judgments and the relative unlikelihood that attorney self-reports will provide evidence of this influence.

We conducted such an experimental investigation using three participant samples: college students, law stu-

dents, and trial attorneys (Sommers & Norton, 2007). Participants were presented with a criminal trial summary with a Black defendant and instructed to assume the role of prosecutor. They were told that they had one peremptory challenge remaining and were asked which of two prospective jurors they would challenge. The two jurors exhibited different characteristics that pretesting indicated would concern the prosecution: Juror A was a journalist who had written about police misconduct; Juror B had little background in science or math and stated that he believed people often manipulate statistics such as those used to evaluate the results of forensic lab analysis. We varied the race of the prospective jurors such that in one condition, photographs revealed Juror A to be Black and Juror B to be White, whereas in the other condition, Juror A was White and Juror B was Black.

As expected, prospective jurors were significantly more likely to be challenged when Black than when White. This difference was evident across all three samples and was strongest among our sample of attorneys. We also asked participants to justify their decision to the judge, and we coded these open-ended responses. As predicted, very few participants cited race as a factor. That is, self-report measures did not reflect the significant influence of race on peremptory challenge use. Instead, consistent with the predictions of Norton et al. (2004; Norton, Sommers, Vandello, & Darley, 2006), participants focused their justifications on race-neutral characteristics that bolstered their decision. When Juror A was Black, participants were likely to cite as their chief influence his familiarity with police misconduct. When Juror B was Black, participants were likely to identify his skepticism about statistics as their primary concern. These differences emerged even though the content of the juror profiles was constant across conditions. Thus, even though participants were more likely to challenge Black prospective jurors, their explanations for this tendency were both plausible and race neutral.

In an extension of these findings, gender—another social category that is both salient and prohibited from influencing jury selection (*J. E. B. v. Alabama*, 1994)—had similar effects. In response to a trial summary with a female defendant, participants were more likely to challenge a female juror than a male juror, although these decisions were typically justified in gender-neutral terms (Norton, Sommers, & Brauner, 2007). More troublingly, instructions emphasizing the prohibition against considering gender did not ameliorate the effect, suggesting that reminding attorneys of restrictions on peremptory challenge use would not curtail the impact of proscribed category information. In addition, judgments in this study were not predicted by participants' gender-related ideologies or scores on measures of sexism, providing support for the conclusion that jury selection judgments are driven more by beliefs about juror tendencies than by attorney prejudice.

Taken together, recent experimental data demonstrate the influence of race on jury selection judgments as well as the limitations of self-report measures for capturing this influence. However, these findings are few in number,

leaving unexamined a range of empirical questions. As mentioned above, to the extent that race-based peremptories are driven by juror stereotypes, what is the exact nature of these beliefs? In a trial with a White defendant, would prosecutors continue to avoid Black jurors or would they actually show a preference for non-White jurors? Are expectations related to race and gender unique to these social categories or indicative of a more general stereotype that jurors are lenient toward fellow ingroup members? Furthermore, how often do race-based challenges occur during jury selection relative to peremptories based on more general concerns about impartiality? These are all issues worthy of future examination.

Policy Questions

Evaluating Current Procedures

The *Batson* (1986) ruling led to current practices designed to prevent the influence of race on peremptory use: When a reasonable argument is made that an opposing attorney has based a challenge on race, that attorney must convince the judge otherwise. Our review suggests that it is naive to believe that this procedure is sufficient to identify and prevent race-based peremptories. It is far too easy to generate plausible, race-neutral justifications that leave judges no choice but to accept them (Raphael & Ungvarsky, 1993). Consider some of the successful justifications catalogued by Melilli (1996). On 28 occasions, attorneys persuaded a judge that a peremptory challenge was based on a juror's experience as a crime victim; in 15 cases, attorneys cited that a juror had never been a crime victim. Prospective jurors were dismissed for being too eager to serve as well as too eager to avoid jury service, for being childless as well as for having children, for timidity as well as for assertiveness. On its own, any one of these justifications would be reasonable; viewed in the aggregate, they demonstrate that the range of available justifications is so broad as to render compliance with *Batson* almost a formality.

One of the only meaningful uses for these self-reported justifications may be thorough scrutiny of the explanation for each peremptory. The *Miller-El* (2005) opinion provides an example of such careful analysis for the questioning of Billy Jean Fields, a Black prospective juror challenged by the prosecution. Fields expressed support for capital punishment, explaining that he believes the government acts on God's behalf when carrying out the death penalty. When asked to justify his challenge of Fields, the prosecutor voiced concern about the prospective juror's religious attitudes and death penalty beliefs, and, in particular, "the comment that any person could be rehabilitated if they find God" (*Miller-El*, 2005, p. 240). Not only did this explanation mischaracterize Fields's statement, but it was also inconsistent with the fact that several Whites who were not challenged revealed precisely this type of ambivalent attitude toward capital punishment and rehabilitation.

But even if time and resources permitted such parsing of voir dire in every trial, the overall utility of this strategy is unclear. Not all explanations permit the type of analysis carried out in *Miller-El* (2005). What if the prosecutor had

claimed that he excluded Fields because of poor eye contact? Moreover, Justice Clarence Thomas's dissenting opinion raises the possibility that the challenge of Mr. Fields was more ambiguous than appears at first. Using other excerpts from the same voir dire, Thomas argued that Fields was, in many respects, an undesirable juror. Thomas also referred to other factors—such as the point during the voir dire at which each juror was questioned—as race-neutral considerations that could have been influential. If the *Miller-El* opinions offer a firm conclusion, it may be that peremptories are based on such subjective criteria that it is almost impossible to pin down the factors that influence any one challenge.

In sum, theoretical and empirical analyses suggest that the peremptory challenge is a practice ripe with the potential for the influence of race. Stereotypes based on a wide range of juror characteristics guide peremptory challenge use, and there is no reason to believe that race is an exception. Indeed, the peremptory challenge, by its inherently discretionary nature, is precisely the type of judgment most likely to be biased by race. This conclusion is problematic from a constitutional perspective, but it has other repercussions as well. For one, racially imbalanced juries undermine confidence in system legitimacy (Ellis & Diamond, 2003; Hans & Vidmar, 1982): It is difficult to imagine Black defendants in Talladega County in 1965 or in Jefferson Parish today having faith that they will be tried by a jury of their peers. Furthermore, research on group processes suggests that heterogeneity predicts performance benefits on tasks such as those required of juries (Hoffman & Maier, 1961; Phillips, Mannix, Neale, & Gruenfeld, 2004; Sommers, 2006). That racially homogeneous juries sometimes demonstrate less optimal decision-making processes than do heterogeneous juries is yet another potential downside to race-based peremptories.

Considering the Future

What, then, is to be done about racial discrimination during jury selection? What will be the fate of the peremptory challenge? Some have joined Thurgood Marshall's call for its elimination, arguing that the practice is irreconcilable with the effort to prevent disparate treatment by race (e.g., Broderick, 1992; Marder, 1995; Melilli, 1996; *Miller-El*, 2005, Breyer's concurring opinion, p. 264). Would the elimination—or at least a reduction in number—of peremptories curb the influence of race on jury selection? At first blush, the extensive literature on race and social judgment suggests an affirmative answer. The discretionary nature of peremptories renders them susceptible to the nonconscious influence of race; peremptories also remain the easiest route by which attorneys can intentionally manipulate jury racial composition. Eliminating or reducing in number peremptory challenges would therefore seem likely to decrease the influence of race on jury selection and increase jury representativeness, a conclusion supported by Baldus et al.'s (2001) mathematical modeling of over 300 murder trials in Philadelphia.

However, the issue is complicated. We have focused our analysis of the peremptory challenge on the influence

of race because the most frequent, contentious, and psychologically relevant debate on this issue also focuses on race. But although the Supreme Court has placed an emphasis on preventing racial bias and achieving racially representative juries, another overarching objective of jury selection—from the perspective of the system—is the creation of impartial juries. The question of how best to achieve this goal of impartiality is also amenable to psychological investigation, as voir dire is an exercise in applied person perception. But it is clear that the balance between protecting against attorney racial bias and against more general forms of juror bias is delicate, and tipping it too far in the direction of racial concerns risks undermining the pursuit of impartial juries.

Eliminating peremptories would, for example, handcuff litigants who suspect that a prospective juror is not impartial yet are unable to convince the judge of this. That said, we also note that there is scant empirical evidence that attorneys are consistently able to identify biased jurors during voir dire. Moreover, analyses and anecdotes indicate that attorneys typically use their peremptories to target jurors perceived to be unsympathetic to their side of the case, which is not in keeping with the ideal of assembling a truly impartial jury. In many instances, the end result of this process is nevertheless a balanced jury, as both sides will have identified and challenged their least sympathetic jurors. But in other cases, such as when the two attorneys are not equally matched in their ability to weed out unsympathetic jurors, the adversarial nature of the system will not promote impartiality. Allowing but a handful of peremptories per case—according to the Bureau of Justice Statistics (2004), the current state average is just over 12 for each side in a capital trial and over 7 for criminal trials in which the defendant does not face life in prison—could constitute a compromise serving the objectives of both impartial juries and prevention of racial bias.

Another complication is that eliminating peremptories might not end the influence of race on jury selection. First, challenges for cause in some cases—capital murder trials, for example—have the side effect of disproportionately excusing jurors of particular racial groups (e.g., Cowan et al., 1984). Second, attorneys might still be able to use challenges for cause to influence jury racial composition. Many have suggested that a reduction in number of peremptories must be accompanied by expanded voir dire of individual jurors and loosening of standards for granting challenges for cause (see Council for Court Excellence, District of Columbia Jury Project, 1998; Diamond et al., 1997; Marder, 1995). Without peremptories in their toolbox, attorneys might dig deeper during voir dire questioning of jurors of certain racial groups in the hope of uncovering a basis for a successful challenge for cause. Although for-cause challenges do not present as direct and unregulated a route for race-based exclusion as do peremptories, they still may contribute to the influence of race on jury selection, particularly if judges become less conservative in evaluating them. Experimental, field, and archival methods could be used to assess these possibilities.

In light of the legal system's reliance on precedent and tradition, we believe it is unlikely that the peremptory challenge will meet its end anytime in the near future, despite its potential to facilitate the very racial bias the Supreme Court wishes to avoid. Are there modifications to existing procedure that would curb the influence of race? Psychologists can play an important role in answering this question, and we call on our fellow researchers to consider the ways in which we can contribute to this discussion. In an effort to begin this process, we devote the remainder of this article to applying the general psychological literature on amelioration of racial bias to the specific domain of the courtroom. That is, we identify situational variables and procedures that have been found to moderate the general effects of race on social judgment, and we consider whether their implementation in a jury selection context is feasible. Given the paucity of existing data regarding judgment processes during jury selection, our analysis does not include formal policy recommendations but rather is intended to generate new ideas and identify areas of future investigation.

Consciousness raising. One strategy psychologists have identified to combat the influence of race on judgment is raising consciousness regarding implicit stereotypes (see Blair, 2001; Greenwald & Banaji, 1995). In future studies, psychologists could investigate whether drawing attention to the subtle, automatic effects of race decreases attorneys' use of race-based peremptories. We wonder, though, whether mere awareness of these issues would be influential in this domain. We have found that an explicit reminder of the prohibition against considering gender does not curtail the effects of gender on mock attorney judgments (Norton et al., 2007). Moreover, we presume that many attorneys intentionally consider race in selecting a jury. Consciousness raising seems unlikely to be effective in an adversarial system with clear incentives for winning and when it comes to stereotypes perceived to be accurate. This conclusion should be tested empirically, but absent more severe sanctions for violating *Batson* (1986), it is difficult to imagine motivating attorneys to self-correct for the influence of race during jury selection.

Category masking. Another bias reduction strategy entails rendering decision makers blind to a target's category membership (see Kang & Banaji, 2006). Research on orchestras, for example, demonstrates that female musicians are more likely to be hired when they audition behind a screen, effectively concealing their gender (Goldin & Rouse, 2000). Regarding jury selection, much of the information obtained during voir dire—legal experiences, demographics, educational and occupational history, attitudes about the case—could be assessed via written questionnaire. Until recently, this procedure has been used almost exclusively in high-profile cases (Diamond et al., 1997), but more extensive use of questionnaires—perhaps even in conjunction with a subsequent, limited, face-to-face voir dire—could allow for category masking during jury selection. Future research could assess the accuracy of such questionnaire data compared with

verbal voir dire responses, keeping in mind, of course, that the latter are hardly without limitations of their own.

Increasing available information. Questionnaires could also generate more diagnostic information on which to base peremptories, as would giving attorneys greater latitude in voir dire questioning. The dubious utility of voir dire for identifying biased jurors derives, in large part, from the brief and superficial nature of the process (Council for Court Excellence, District of Columbia Jury Project, 1998; Kovera et al., 2002). Practical constraints restrict the number of questions posed to each juror, leaving attorneys with little basis for evaluation besides superficial characteristics. Stereotypes are particularly influential in precisely this type of situation, when a decision maker is under time pressure and deprived of individuating information (Kruglanski & Freund, 1983; Sherman, Stroessner, Conrey, & Azam, 2005). Thus, it may be that “the way to reduce the use of these hunches and stereotypes is to provide the attorneys with better information” (Diamond et al., 1997, p. 93) and, perhaps, more time to review it. Notably, such options stand in stark contrast to recent efforts to streamline jury selection by limiting or even eliminating attorney-directed voir dire (see Babcock, 1975; Diamond et al., 1997).

Prejudgment ratings. Another possibility identified by psychological research would be to require attorneys to articulate before voir dire the juror characteristics they prefer for their case. Although bias reduction through assessment of prejudgment preferences has met with mixed empirical support (Norton et al., 2004; Uhlmann & Cohen, 2005), in jury selection, it would at least permit more meaningful scrutiny of peremptory challenge use. For example, a prosecutor with a stated goal of finding jurors sympathetic to police would have difficulty justifying the challenge of a Black juror married to a police officer or the failure to challenge a White juror with negative police attitudes. Alternatively, attorneys could rate or rank prospective jurors after reading their questionnaire responses but before a subsequent voir dire. The effects of such procedures could be assessed by researchers, and although they may depart from traditional conceptualizations of the peremptory challenge by requiring attorneys to reveal strategy and articulate stereotypes, *Batson* (1986) already introduced drastic changes to this landscape 20 years ago. Because attorneys are now asked to justify some peremptories, it does not seem terribly problematic to require them to do so earlier rather than later in the voir dire process.

Affirmative jury selection. Yet an entirely different option would be to shift focus away from efforts to prevent biased peremptory use and to focus instead on promoting the selection of diverse juries. For starters, oversampling of racial minorities for jury duty summonses—as well as other related strategies—could address some of the racial disparities that emerge in jury pool composition before voir dire even begins (e.g., Cohn & Sherwood, 1999). With regard to jury selection itself, precedent exists for affirmative policies designed to ensure racial minority representation on empanelled juries. Into the 19th century,

in the United States as well as England, defendants from racial or ethnic groups at high risk for juror prejudice were sometimes tried by special “split juries,” on which at least half of the jurors were guaranteed to be from the same minority group as the defendant; as recently as the 1990s, grand juries in Hennepin County, Minnesota, were created so as to be proportionally representative of their surrounding community (see Ellis & Diamond, 2003; Fukurai & Davies, 1997; Ramirez, 1994). Clearly, practices such as these face potential practical as well as legal obstacles, but it is worth bearing in mind that although psychologists have touted category masking as one potential remedy for biased judgments, they have also cited affirmative strategies as an alternative worthy of consideration (e.g., Greenwald & Banaji, 1995; Kang & Banaji, 2006).

Random selection. Of course, a surefire way to prevent race from influencing jury selection would be to adopt a procedure endemic to much psychological research: random selection. Indeed, random juries would be more representative of their communities (Baldus et al., 2001) and, in many instances, would not vary significantly from those produced by voir dire (Johnson & Haney, 1994). Doing away with voir dire is hardly realistic, however. Such a change would prevent any chance of identifying prospective jurors who cannot remain impartial and would strip litigants of any control over who sits on their jury. As such, it is safe to say that random selection remains the province of the research psychologist and is not a feasible strategy in the legal domain.

Conclusions

The theory and empirical findings reviewed herein converge on the conclusion that the peremptory challenge, by its very nature, is fertile ground for the influence of race on jury selection. Current safeguards against such influence are untenable: Even when attorneys are aware of the impact of race, they are unlikely to admit it, and even when judges scrutinize peremptory justifications for evidence of discrimination, they are unlikely to find it. The procedures adopted in the wake of *Batson* (1986) essentially inform attorneys, “Use any stereotypes you like in jury selection, but be sure to ignore race and gender.” Unfortunately, this sounds like the instruction for an experiment on failed thought suppression rather than a directive likely to prevent the impact of race on jury selection. Assuming that the goal of curbing the effect of race on jury selection is not to be abandoned, our review suggests that modifications to current procedures are required.

However, we also propose that the contributions of psychology to this debate should transcend this conclusion. There remain many aspects of jury selection about which too little is known: If some attorneys make better use of voir dire than do others, what are the situational and personality factors that predict such success? To what extent does confirmation bias affect voir dire? More relevant to our focus on race, what is the precise nature of stereotypes regarding juror race? Do attorneys’ assumptions reflect specific beliefs about jurors of different races or more general expectations regarding ingroup leniency? To what

extent is race influential through nonconscious processes as opposed to intentional trial strategy? Empirical answers to these and other questions would illuminate the processes underlying jury selection, impact the development of policy recommendations, and deepen the understanding of how race impacts person perception and social judgment in the real world.

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