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Ed Johnson, a black man from Chattanooga Tennessee, was arrested for sexually assaulting a white female in 1906. He was tried under an all-white jury, convicted, and sentenced to death. The rape was pinned on Johnson because a witness claimed they saw him with a leather strap with which the victim was allegedly knocked unconscious. Johnson denied owning a leather strap, provided numerous alibi witnesses at trial, and the victim never definitively identified her attacker. The US Supreme Court granted a stay of execution on the grounds that his right to a fair trial was violated. Just as Johnson's death sentence was decided unjustly, so was it enforced. That night Johnson was dragged out of his cell, beaten, lynched, and shot by a white mob. (Yellin 2000) Those who were meant to bring justice to Ed Johnson through an impartial jury were of the same people who brutally murdered him. Justice Oliver Wendell Holmes speaks to this atrocity as he says, "In all likelihood this was a case of an innocent man improperly branded a guilty brute and condemned to die from the start." (Yellin 2000)

The right to an impartial jury protected through the Sixth Amendment is a vital right to United States justice system. The use of a jury system has had an historical record of being diluted with discrimination, of which Ed Johnson was a victim. Yet, just as society has progressed, so has our justice system. With the Sixth Amendment as the foundation of an impartial jury, race and sex discrimination in jury service has been addressed, readdressed, and continues to be pursued through court decisions and societal challenges to precedence.

The Sixth Amendment of the Constitution grants that, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed...” The right to an impartial jury, one without discrimination based on race or sex, is clearly protected. Repeatedly, though, cases challenging the presence of this protection have been given protection, not depending on the Sixth Amendment, but due to the Equal Protection Clause of the Fourteenth Amendment. The Sixth Amendment gives the basis for maintaining justice within the criminal justice system through an impartial jury and the Equal Protection Clause provides the standards of application and layers of protection of this right. An impartial jury should be protected on its own, but the Equal Protection Clause closes any perceived loopholes with clearly defined standards addressing the inevitable issue of equal treatment that comes with the issue of an unfair trial. The Court has used both to achieve the protection of an impartial jury.

Within the interpretations of the Sixth Amendment in accordance with the protections of the Equal Protection Clause, there exist “inherent” rights used as foundational institutions of assuring an impartial jury. The first of which is the peremptory challenge. This challenge is considered by the Court as an essential, longstanding institution to shield the defendant from discrimination of partial jurors. However, it has been widely debated as a tool used to allow discrimination. Peremptory strike is a tool for attorneys to strike certain members from the petit jury without being burdened to give reason. This differs from a “for cause” strike which requires bias to be named and is meant to filter out potential jurors who are incompetent or disqualified through specific bias and which are approved by the judge. It is clear a “for cause” strike is protected by the Constitution as it acts to eliminate bias that would cause a partial jury.

Peremptory challenge is not Constitutionally protected, but Court holds that it is of longstanding importance to the American judicial system's notion of impartiality and fairness. (Adams 1998) The verdict of *Batson v Kentucky* exemplifies the tensions of loyalty to peremptory challenge and the discriminatory issues it brings up. This case decision held that the state is not permitted to use its peremptory challenges to automatically exclude potential members of the jury because of their race. It also established a burden of proof required to show discriminatory use of peremptory strikes. To one extent, the Court limited the use of peremptory strike and to another extent, the Court protected its existence. The opinions of the Court further expand on the differences of interpretation in regards to the peremptory challenge. Justice Marshall in his concurrence pushes the Court to go further to eliminate the peremptory challenge altogether. "Only by banning peremptories entirely can such discrimination be ended." (*Batson v Kentucky* 1986) Burger's dissent pulls the opposite direction. "An institution like the peremptory challenge that is part of the fabric of our jury system should not be casually cast aside..." (*Batson v Kentucky* 1986) An interpretation of peremptory challenge as a tool for injustice compared to the view that it is an inherent institution of the jury system create two competing applications of the Sixth Amendment.

The second right diffused from the Sixth Amendment with the Equal Protection Clause is cross-section representation. Cross-section representation is the application of the right to an impartial jury through its holding that juries must be drawn from pool representative of their communities. (Adams 1998) It was declared in *Taylor v Louisiana* as an "essential component" of the right to an impartial jury as guaranteed by the Sixth Amendment. (Mancini 1985) This institution is similar to that of the peremptory challenge in that there is tension within the extent

of its application. *Taylor v Louisiana* further provides that though the panel chosen from must be representative of the community, the selected jury is not held to that standard. The application cross-section representation is inconsistent and difficult to enforce and yet required by the Court's view of it being an "essential component". "The concept of cross-section representation should not be taken literally. At an illogical extreme, it would require the seating of jurors irrationally prejudiced against the accused to the extent such prejudice existed within the community." (Gobert 1988, 291) Also as with peremptory challenge, this institution can be interpreted as a discrimination tactic or, contrarily, as a means of maintaining justice. The Court holds to the latter as evidenced by its consistent application of cross-section representation demonstrated in *Duren v Missouri* which set up a test to determine a cross-section requirement violation. (Gobert 1998)

Further interpretations of the Sixth Amendment and its application of an impartial jury include whether the focus of protection should be on the right of the jurors to be involved in the system or rather on the right of the defendant to have an impartial trial. It can also be included that the interpretation of whether the limitations of discrimination tools such as peremptory challenge should be limited to just the prosecutor or also the defendant. These interpretations, together with the interpretations mentioned above, have driven the progression and application of the impartial jury system.

The progression of the impartial jury in regards to racial and gender discrimination begins over a hundred years ago. In 1880, in *Strauder v West Virginia* the Court holds an individual is protected by the equal protection clause from being on trial before an all-white jury that purposefully excluded members of his race. (Mancini 1985) This step towards an

anti-discriminatory justice system through an impartial jury was not well executed. Ed Johnson, murdered in 1906, is a testimony to that. In the 1965 case *Swain v Alabama*, Swain was convicted of rape and sentenced to death by an all-white jury. The entitlement to a proportionate number of one's race on the jury or jury panel was denied and the petitioner failed to meet the burden of proof needed to show he was racially discriminated against. (Mancini 1985) His conviction and sentencing from the all-white jury stood. This verdict has been overturned in several parts, but the Court still holds that the Constitution does not ensure the right to a proportional jury, only an impartial one.

Though the protection of an impartial jury began with tension over white and black, the extension of rights beyond black and white discrimination has evolved since *Strauder v West Virginia*. In *Hernandez v Texas*, the Court looked at the case of Hernandez, a Mexican-American, who was tried by an all-white jury that barred persons of Mexican-American descent from being jurors. The Court determined that protection extended past white and black and to the Mexican-American race also. This purposeful exclusion was deemed in violation of the Equal Protection Clause. (*Hernandez v Texas* 1945) The extension continued to women in *Taylor v Louisiana* when the Court ruled a state statute that exempted women who did not file written requests from jury duty unconstitutional based on the Sixth, and Fourteenth Amendment. (Gobert 1988) The Equal Protection Clause has been a significant basis for courts decisions on the extension of rights to all "distinguished groups" and continues to be used in anti-discriminatory cases today.

Further protection of an impartial jury occurred in a series of cases addressing the inclusion of questioning jurors on their racial attitudes. In *Ristaino v Ross* (1976), the Court held

that a black man convicted of a violent racial crime is not entitled to have veniremen specially questioned about their racial attitudes. (Bennet 1987) After several more cases attempting to address this issue, *Turner v Murray* (1986) determines the right of a defendant to have the jury asked about racial bias is limited to violent interracial crimes in which capital punishment is in question. This decision raises much controversy. “By doing so, the Court implies to a defendant that he must commit a capital offense in order to get a fair and impartial trial.” (Bennet 1987, 220) Though it is a very restrictive standard to meet in order for the question of racial bias to be asked, when considering the effectiveness of asking, it seems the question alone is not worth controversy. A juror may often be ignorant of him or herself enough to not recognize their racist bias, they may intentionally lie (an act hard to prove and discern), or the juror may truly be able to lay aside prejudice, a useful and desirable skill for a juror, which would be overlooked if they admitted to having a racial bias. For a true push towards non-discriminatory juries, a method of determining bias based on other factors besides an extension of questions during voir dire, should be pursued.

Batson v Kentucky set a precedent of putting the peremptory challenge under scrutiny that has extended past race and has made this case and its subsequent rulings in following Court verdicts one of the most essential cases in the progress of protecting an impartial jury. In *J.E.B. v Alabama* (1994) the Court ruled that the Equal Protection Clause prohibits the striking of potential jurors not only based on race or ethnicity, but also based on gender. *Batson* has also been extended to restriction on civil litigants and criminal defendants. The Expansion of *Batson* focuses more on the interest of a particular juror to participate in the judicial system rather than the interest of litigants to secure “the most favorable juror.” (Adams 1998) Justice Blackmun’s

majority opinion in *J.E.B. v Alabama* speaks to this view: "Discrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process."

The Court has largely extended *Batson*, and has consequently further protected impartial juries through equal protection. However, the implications of *Batson* and scrutiny of peremptory challenge is not without its shortcomings. Due to the narrow focus of the protection of only the final step of the jury selection, much of the system goes on discriminatorily. The discouragement of using discriminatory peremptory challenge is not sufficient and the procedure to challenge the use of it is not accessible. The penalties for attorneys who discriminate with peremptory challenge must extend beyond the inclusion of the venireperson challenged or granting of new trial. This places the penalty on the public and the system as a whole, not on the attorney. And the procedure is complex and inefficient and leaves chances for neutral criteria to be made up to maintain the strike. Only 17.59% of those challenging the bias in peremptory challenges have been successful. (Adams 1998) Despite the progress through the extension of *Batson* towards a less discriminatory judicial system, discrimination within the jury system still widely exists today.

Race and gender remain a consistent discrimination in the court system along with other long-standing discriminations, and furthermore, there are several other threats to an impartial jury that have presented themselves in recent years. If the *Batson* verdict continues as it has, it may lead to the extinction of the peremptory challenge altogether. Though some would praise this, it raises the issue of restricting minorities from using the tool of peremptory challenge to rid a jury of bias not distinguishable for use of by "for cause" strikes. The Court will, presumably,

have several more cases raising the issue of the peremptory challenge's presence, or exclusion, challenging the right to an impartial jury. This is an important issue to consider all angles of in order to truly pursue the fairest jury and justice system possible.

A more recent issue in regards to maintaining impartial juries is finding jurors who have not had prior expulsion to the case. Technology connects jurors and leads to the increase in challenged verdicts and more re-trials of the case. (Lane 1998) In the *Chambers of State of Georgia* case (1995), nine of the twelve jurors googled defendants' names and definitions of medical terms which led to the finding of evidence judges had excluded. The judge declared a mistrial accordingly. (Lane 1998) Technology and technology use has since expanded greatly, and so has the difficulty of maintaining the traditional concept of an impartial trial. With the media and communication so accessible, ignorance is not as widely found. It could be argued that an educated population on current events is exactly what is needed for a valuable and fair trials- ones with jurors that explore all evidence and perspectives. This is an issue that will have a continued and growing need to be sorted out within the judicial system. With this issue rests several court cases and Supreme Court verdicts waiting to happen. This may be the beginning of a new definition of impartial trials in regards to pre-knowledge of an issue disqualifying a juror

Racial tensions have long been a part of American history, and it remains part of society today. This is made known within the judicial system, as in several areas of society. With a disproportionate amount of black convictions over white, there is reason to question the impartiality of our system still today. "Specifically, in cases with no blacks in the jury pool, black defendants are convicted at an 81% rate and white defendants at a 66% rate. When the jury pool includes at least one black potential juror, conviction rates are almost identical: 71% for black

defendants and 73% for white defendants.” (Anwar 2012) Conviction rates of blacks and whites vary greatly when the jury is all or mostly white whereas with the presence of even just one black juror, convictions vary much less. This cannot be blamed on a black jurors partiality toward a black defendant, because then the same assumption must be applied to all juries of all defendants regarding race. The inclusion of minorities being represented causes perspective, discussion, and depth to the verdict, which leads to more consistent convictions. These stats are evidence of the need for diversity and racial representation within the justice system. This is change that cannot be approached passively as if the Court has had sufficient precedence on the issue. This is an important issue, and one worth solving before we write injustice in the history books.

The United States criminal justice system has had an unfortunate history of injustice in its system. Ed Johnson was pardoned of his conviction 100 years too late. The same injustice is true of the Scottsboro Boys, Lena Baker, the Trenton 6, and many more. (Grimsley 2013) Because the criminal system was too late to ensure justice within the system, hundreds of wrongful convictions have diluted justice. Since these cases, the U.S. impartial jury system has taken great strides to ensure justice. Through the application of the Sixth Amendment, in accordance with the Equal Protection Clause of the Fourteenth Amendment, the right to an impartial jury has been more clearly defined as the Supreme Court aims to ensure protection of a fair trial. We have come a long way since the time of our Founders in societal progress, and in protection through our Constitution, both of which have led to more protection of an impartial jury today than ever before. Despite this evolution, more progress is certainly on the horizon as the Court is faced with new issues surrounding the impartiality and discrimination within the jury system.

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