

## The Peremptories Project

Draft Prospectus (2/19/16)

The *American Society of Trial Consultants Foundation* announces a research project focused on gathering data to help defend and extend the peremptory challenge in American courtrooms. This preliminary description lays out the need, the solution, and the possible steps forward.

### The Current Threat

Peremptory challenges are the subject of an unprecedented level of public scrutiny and criticism:

- Because they generally require no rationale, peremptory challenges are broadly viewed as gateways for attorneys' own biases, including racial bias.
- This past November, the U.S. Supreme Court heard oral arguments in the *Timothy Foster* case. Civil rights attorney Steven Bright argued to the Court, "The [Georgia] prosecutors focused on the race of the black prospective jurors in their notes, struck all four black prospective jurors, gave reasons for the strikes that were false, incredible, and contradictory, and argued to the all-white jury that it should impose a death sentence to deter people [living] in the projects."
- Veteran *NPR* court-watcher Nina Totenberg recently commented that "Most experts say," the only way to address systemic racial bias in jury selection, "would be to eliminate or drastically limit peremptory strikes."
- At the *Civil Jury Project* conference in the fall of 2015, Yale University's well-known law professor Akhil Amar called the existence of peremptory strikes "a disgrace," and without constitutional basis.
- As recently as February, 2016, lawyers and judges from across California met to discuss a proposal to reduce the number of peremptories allowed in state courts (*Courthouse News Service, 2/9/2016*).

### The Role for Research

For those who live and work outside the jury trial system, it can be hard to understand why parties would need peremptories. And that is where trial lawyers and those who work with them have not fulfilled their advocacy burden. We have not yet done an effective job of explaining the benefits of a peremptory strike.

- A research review in the American Psychological Association's "Judicial Notebook" (Robbennolt, 2005) suggested that "additional research might explore whether (and how) peremptory challenges serve their stated purpose. Does the availability and use of peremptory challenges... enhance attorneys' ability to explore possible biases with potential jurors?"

- Well-designed research can and should answer the question of whether the proper and non-discriminatory use of the peremptory challenge increases the fairness of jury selection.
- While there is probably more than enough research on the practical failure of *Batson* and progeny – and the problems with pre-textual strikes – what may be lacking is research on the other side; there is a practical need for having peremptories in the vast majority of civil and criminal cases and benefits that do not involve race-stacking.
- For example, one potential experimental design could include video-recorded voir dire, with attorneys as research participants, using four scenarios: 1. No peremptories (i.e., the first eight go in the box), 2. Peremptories with no attorney oral voir dire, 3. Peremptories with poor oral voir dire (e.g., pre-conditioning and “Can You Be Fair?” questions), and 4. Peremptories with oral voir dire that an experienced consultant would consider good oral voir dire. The aim of the study would be to see if the use of peremptories is effective for reducing bias (measured retrospectively) relative to the non-use of peremptories, and the extent to which the effective use of peremptories depends on good oral voir dire.
- The role for the Foundation will be to facilitate and fund research that explores the effective use of peremptories, as well as other projects that broadly address the concerns and criticisms of peremptory challenges. Our goal is for that data to become part of the public discussion on the future of peremptories and improved voir dire conditions.

## Next Steps

- The Foundation will seek out and appoint a Research Director for the ASTC Foundation’s Peremptories Project. It will be the role of the Research Director to facilitate the research project(s) falling under this umbrella, including specific design, execution and reporting, and to report to the ASTC Foundation Board of Directors. Part of the facilitation may also involve recruiting and coordinating the work and funding of academic researchers with an interest in contributing to the project.
- Upon appointment, the Research Director will work with the Foundation Board in developing a focus, process, and timeline for the project and submitting it for approval.
- With successful fund-raising, the Foundation will support a stipend for the Research Director as well as grants for individual researchers.