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Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the *Batson* Challenge Procedure

Samuel R. Sommers · Michael I. Norton

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Abstract Practically speaking, the peremptory challenge remained an inviolate jury selection tool in the United States until the Supreme Court's decision in *Batson v. Kentucky.* 476 U.S. 79 (1986). *Batson*'s prohibition against race-based peremptories was based on two assumptions: (1) a prospective juror's race can bias jury selection judgments; (2) requiring attorneys to justify suspicious peremptories enables judges to determine whether a challenge is, indeed, race-neutral. The present investigation examines these assumptions through an experimental design using three participant populations: college students, advanced law students, and practicing attorneys. Results demonstrate that race does influence peremptory use, but these judgments are typically justified in race-neutral terms that effectively mask the biasing effects of race. The psychological processes underlying these tendencies are discussed, as are practical implications for the legal system.

Keywords Jury selection · Peremptory challenge · Racial bias · Social judgment

> "This case illustrates, once again, the difficulties confronting defense counsel and prosecutors, Massachusetts trial judges and appellate courts . . . despite vigilant efforts to eliminate race-based and other impermissible peremptory challenges, it is all too often impossible to establish whether a peremptory challenge has been exercised for an improper reason."
>
> Chief Justice Margaret Marshall,
> Massachusetts Supreme Judicial Court
> (*Commonwealth v. Maldonado*, 2003)

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S. R. Sommers (✉)
Department of Psychology, Tufts University,
490 Boston Avenue, Medford, MA 02155
e-mail: sam.sommers@tufts.edu

M. I. Norton
Harvard Business School

In selecting a jury, attorneys have two means at their disposal for removing members of the venire. First, they may issue a *challenge for cause*, an attempt to convince the judge that a prospective juror cannot be impartial. The second option is to use one of a limited number of *peremptory challenges*, which allow for exclusion of individuals without explanation or evidence of potential bias. Peremptory use in the United States was, in effect, unrestricted for two centuries before the Supreme Court ruled in 1986 that prospective jurors could not be challenged solely on the basis of membership in a "cognizable racial group" (*Batson v. Kentucky*).[1] Subsequent rulings have extended *Batson* to apply to cases when the defendant and prospective juror are not of the same race (*Powers v. Ohio*, 1991) and to peremptories based on gender (*J. E. B. v. Alabama*, 1994).

The Court's willingness to break with precedent and change the very nature of the peremptory challenge is consistent with the conclusions that removal of venire members based on race violates a defendant's equal protection rights as well as the rights of the prospective jurors themselves. Such concerns are bolstered by evidence demonstrating the effects of racial composition on jury performance. Several archival analyses of real cases, mock juror experiments, and meta-analyses converge on the conclusion that jury racial composition–and, thus, the use of race-based peremptories–has the potential to affect decision-making processes and outcomes (e.g., Baldus, Woodworth, Zuckerman, Weiner, & Broffitt, 2001; Bowers, Steiner, & Sandys, 2001; Mitchell, Haw, Pfeifer, & Meissner, 2005; Sommers, 2006; Sommers & Ellsworth, 2003; Sweeney & Haney, 1992). In sum, both Constitutional and performance considerations suggest that *Batson* marked a significant step forward in the effort to curtail racial bias in the jury system.

Unfortunately, as illustrated by the excerpt with which we opened, it is less evident that the implementation of *Batson* has met its lofty objectives (Kovera, Dickinson, & Cutler, 2002). As we mark the 20th anniversary of the decision, many critical assumptions and questions regarding race and peremptory use have yet to be resolved. Intuition and theory suggest that race likely has an observable, pervasive influence on jury selection judgments, but such a causal relationship has not been confirmed through experimentation. Furthermore, though anecdotal and correlational evidence suggests that requiring attorneys to justify suspicious peremptory use–as is the practice post-*Batson*–fails to provide judges with information useful for identifying the influence of race, experimental manipulation remains essential for determining whether the race-neutrality typically conveyed in these justifications indicates true colorblindness or rather the masking of bias. The present research provides such an experimental assessment of the influence of race on peremptory judgments and justifications.

Batson challenges

As *Batson* placed the first practically meaningful restrictions on peremptory use, its enforcement necessitated a new two-step procedure. Specifically, when a defense attorney believes that her counterpart has based a peremptory challenge on race, she may now initiate a *Batson* challenge by establishing a prima facie case of racial discrimination.[2] If the trial judge is satisfied by these

[1] The Court considered the issue of race and peremptory challenges 20 years earlier in *Swain v. Alabama* (1965). In denying Swain's appeal of his conviction and death sentence by an all-White jury, the Court agreed that systematic and intentional effort to exclude members of a racial group from jury service across several trials was not permissible, but ruled that such purposeful discrimination was not proven in Swain's case. Though this ruling outlined circumstances under which race-based peremptories would be unconstitutional, the decision had little practical effect as it set the bar for proving discrimination unattainably high.

[2] Though *Batson* applies to peremptories used by the prosecution in a criminal trial, subsequent rulings extended the prohibition to defense attorneys (*Powers v. Ohio*, 1991) and civil trials (*Edmonson v. Leesville Concrete Co.*,

arguments, the burden shifts to the prosecution to articulate a race-neutral justification. It is ultimately left to the judge to determine whether the defense has proven its assertion that the prospective juror was excused because of race.

Thus, the *Batson* challenge procedure is based on two assumptions regarding race and jury selection judgments: (1) under some circumstances, a prospective juror's race influences attorneys' peremptory use, and (2) racial bias during jury selection can be reduced by requiring attorneys to justify suspicious peremptories. The first proposition, though unexamined by experimental design, is rather uncontroversial. It is well-established that the process of jury selection is often guided by attorneys' intuitions and stereotypes (Broderick, 1992; Kovera et al., 2002), and even the dissenting opinion in *Batson* conceded that at least in some instances, race likely affects peremptory use. Consistent with these conclusions, studies that have analyzed jury selection in actual criminal trials indicate that prosecutors are more likely than defense attorneys to exclude Black venire members, while the opposite is true for White venire members (Baldus et al., 2001; McGonigle, Becka, LaFleur, & Wyatt, 2005; Rose, 1999; Turner, Lovell, Young, & Denny, 1986).

No published experiments have examined the second assumption above, that questioning attorneys is likely to elicit clear evidence of the influence of race, thereby facilitating the effort to curtail racial bias. Such a proposition would be supported either by evidence that attorneys readily admit to the influence of race, or that judges are able to distinguish genuinely race-neutral justifications from ostensibly neutral justifications that belie the influence of race. A review of the psychological literature on social judgment suggests that neither tendency is likely. Many researchers have demonstrated that people can offer compelling explanations for their behavior even when unaware of the factors–such as race–that are actually influential (e.g., Nisbett & Wilson, 1977; Norton, Vandello, & Darley, 2004; Shafir, Simonson, & Tversky, 1993). But even if attorneys consciously and strategically consider race during jury selection, they would be unlikely to admit it. Such an admission would have immediate consequences, as it would comprise a *Batson* violation. More generally, psychologists have noted that behavior is often influenced by the desire to appear nonprejudiced and to avoid the social sanctions that can follow from the appearance of racial bias (e.g., Gaertner & Dovidio, 1986; Norton, Sommers, Apfelbaum, Pura, & Ariely, in press; Plant & Devine, 1998; Sommers & Norton, 2006).

Analysis of actual *voir dire* proceedings supports the conclusions that attorneys are unlikely to cite race as influential and judges are unlikely to deem challenges to be in violation of *Batson*. Melilli (1996) examined every published decision of federal and state courts for the first 7 years after *Batson*, identifying 2,994 *Batson* challenges. In only 533 (17.8%) of these instances was the attorney unable to persuade the judge that the peremptory challenge in question was race-neutral, and in only 55 instances (1.8% of the sample) did the attorney admit that race influenced peremptory use (see also McGonigle et al., 2005; Raphael & Ungvarsky, 1993). Indeed, even before *Batson*, very few attorneys cited race in explaining their jury selection judgments. Diamond, Ellis, and Schmidt (1997) reported on a pre-*Batson* sample of 102 peremptory challenges in the U.S. District Court for the Northern District of Illinois (see also Diamond & Zeisel, 1974). Even absent explicit prohibitions against considering race, on only 8 occasions (7.8%) did attorneys cite a race-related reason for issuing a peremptory when interviewed by the researchers.[3]

1991). Nonetheless, the vast majority of *Batson* challenges are still levied against prosecutors in criminal trials (Melilli, 1996). As such, this investigation focuses on this most common form of *Batson* challenge.

[3] An even more direct test of the effects of *Batson* would examine the racial composition of juries before and after the decision, but as Diamond et al. (1997) observe, such an investigation has not been published. In a related analysis, Baldus et al. (2001) examined peremptory use in Philadelphia and found no reliable differences in the number of Black venire members challenged in the years preceding and following *Batson*.

One explanation for these findings is that race did not affect the challenges. However, this conclusion would be inconsistent with theoretical predictions and archival evidence regarding the influence of race on jury selection judgments. As one–albeit egregious–example, consider that at the time of the Supreme Court's ruling in *Swain v. Alabama* (1965), no Black "within the memory of persons [then] living [had] ever served on any petit jury in any civil or criminal case tried in Talladega County, Alabama" (pp. 231–232). Moreover, such a conclusion that race is not influential would also stand in stark contrast to anecdotal evidence, such as prosecutorial jury selection manuals and training videos that emphasize the importance of considering race during *voir dire* (see Baldus et al., 2001; *Miller-El v. Dretke*, 2005). It would seem likely that race did bias many peremptories examined in the studies reviewed above, but attorney self-reports did not provide judges with sufficient evidence to find a *Batson* violation. To test these competing possibilities, the two assumptions underlying *Batson* must be considered simultaneously and experimentally. That is, a true assessment of the influence of race on jury selection must assess both the extent to which race affects peremptory use, as well as the usefulness of self-report for discerning this influence.

The present research

Psychological theory not only suggests that decision-makers infrequently admit to the influence of social category information such as race, but also demonstrates the ease with which ostensibly neutral explanations can be recruited to justify these judgments. For example, Norton et al. (2004) presented participants with a job hiring task that required choosing between male and female candidates for a stereotypically male job. In one condition the male had less work experience but more education than the female; in the other the male had more experience but less education. The majority of participants "hired" the male applicant regardless of qualifications, yet very few cited gender as influential. Instead, when the male was better educated, they listed education as the primary basis for their decision; when he had more experience, they used experience to justify their choice. Norton and colleagues interpret these findings as resulting from casuistry, the tendency to engage in specious reasoning to justify questionable behavior.

In combination with the broader psychological literature on social judgment, these findings suggest that reliance on judicial assessment of attorney self-reports is problematic on several counts. For one, self-report measures rarely capture the true influence of variables such as race. Furthermore, social judgments of the type made during jury selection are based on criteria so ambiguous and subjective that it is easy to generate race-neutral justifications in most cases (Norton, Sommers, Vandello, & Darley, 2006), a conclusion consistent with archival analyses of peremptory use (McGonigle et al., 2005; Melilli, 1996; Raphael & Ungvarsky, 1993). The present research examines these issues experimentally by exploring casuistry in the context of peremptory challenge judgments. Specifically, we address three questions: (1) To what extent does race affect jury selection judgments? (2) How accurately and completely do self-report measures capture this influence? (3) If decision-makers fail to report the influence of race on jury selection judgments, how do they justify their decisions?[4]

[4] We do not examine the other key empirical question surrounding race and jury selection, namely judges' accuracy in identifying *Batson* violations. Clearly, such a study would be of great interest, but it requires access to a specialized sample outside the scope of the present investigation. Because archival analyses indicate that only a small percentage of peremptories are ultimately rejected by judges, we focused instead on explaining why it is so difficult for judges to conclude that a challenge was based on race by identifying the psychological tendencies underlying peremptory use and justification.

We used one experimental procedure and three participant populations. College students, advanced law students, and practicing attorneys were presented with information about a trial with a Black defendant, shown profiles of two prospective jurors, and asked to play the role of a prosecutor with one peremptory remaining. Our manipulation involved race: one prospective juror was identified as White and the other as Black, but this racial group membership varied across condition. In other words, for half of the participants, the first prospective juror was White and the second Black; for the other half, the first prospective juror was Black and the second White. Prospective jurors' background and *voir dire* responses remained identical across conditions. Of course, in actual jury selection, attorneys evaluate more than two members of the venire and their peremptory use is not limited to one either/or decision. The advantage of the present experimental design is the simplicity that enables conclusions regarding the extent to which race–and race alone–affects judgments. The aggregate data obtained allow for identification of systematic bias and comparison of the actual influence of race with self-reports of its influence. However, the important issue of generalizability to real trials is considered in more detail in the Discussion.

Experiment

Method

Trial scenario

We created a summary of a robbery and aggravated assault trial in which the defendant allegedly beat a male homeowner with a blunt object after being confronted in the midst of a burglary. Because the victim could not identify his attacker, the prosecution's case relied on DNA, hair, and footprint analysis.

Pretesting

Forty-six college students were presented with the trial scenario and descriptions of seven prospective jurors. For each prospective juror, participants were asked to respond to the following statement on a scale of 1 (*strongly disagree*) to 9 (*strongly agree*): "As a prosecutor, I would not want this individual on the jury." Each juror description included one characteristic that could be unattractive to a prosecutor. For example, one prospective juror reported that he believed O.J. Simpson was framed by police. The race of the defendant and jurors was not specified. Pretesting identified two prospective juror profiles that were rated as relatively comparable in terms of unattractiveness to a prosecutor: a journalist who wrote about police misconduct ($M = 7.85$) and an executive skeptical of statistics and forensic analysis ($M = 7.28$). We chose these two profiles for use in the experiment.

Prospective Juror profiles

We expanded the pre-testing information for these two profiles, adding details regarding marital status, age, jury experience, educational background, and career history. In the final prospective juror profiles, Juror #1 was a 43-year-old married male with no previous jury experience. He was a journalist who, several years earlier, had written articles about police misconduct. Juror #2 was a 40-year-old divorced male who had served on two previous juries. He was an advertising executive with little scientific background who stated during *voir dire* that he was skeptical of statistics because they are easily manipulated. Both prospective jurors were described as having

responded to *voir dire* questioning with clear statements that their personal experiences and beliefs would not prevent them from being impartial in the case.

Participants

College students. We first recruited a convenience sample of 90 undergraduates. The issues raised by the use of college participants in investigations of legal decision-making have been detailed by numerous researchers (see Bornstein, 1999; MacCoun, 1989; Sommers & Ellsworth, 2001). In the domain of jury selection, however, research suggests that college students, law students, and even experienced trial attorneys demonstrate similar judgment styles and strategies in evaluating prospective jurors (Olczak, Kaplan, & Penrod, 1991). Of the 90 students who participated in partial completion of a course requirement, 63 (70%) were female; 65 (72%) identified themselves as White, 17 (19%) as Asian, 3 (3%) as Black, 1 (1%) as Latino, and 4 (4%) used other racial identifiers.[5]

Law students. We recruited a sample of 81 second- and third-year students at a Top-10 law school.[6] These students participated as part of a class exercise. Of the 81, 36 (45%) were female; 65 (80%) identified as White, 3 (4%) as Asian, 3 (4%) as Black, 2 (3%) as Latino, and 7 (9%) used other racial identifiers. Participant age ranged from 23–35 with an average of 26 years.

Attorneys. We recruited 28 practicing attorneys with jury trial experience ($M = 3.1$ jury trials; range = 1–15). Attorneys were recruited through personal contact and participated on a voluntary basis. Of the 28, 13 (46%) were female; 22 (79%) identified as White, 3 (11%) as Asian, 2 (7%) used other racial identifiers, and 1 did not identify race. Participant age ranged from 26–63 with an average of 38 years.

Procedure

Participants were given a questionnaire with instructions to assume the role of a prosecuting attorney. They were then presented with the trial scenario described above, along with a photo of the defendant, a 24-year-old Black male (the race of the victim remained unspecified). College participants were provided with background information about the jury selection process, information that was not given to the two legal samples. They were told that as a prosecutor they would be able to eliminate a certain number of prospective jurors "because (a) you don't think they would be able to be fair jurors or (b) you do not think they would be sympathetic to your case." Instructions for the law students and attorneys simply stated, "as a prosecutor, you will be able to eliminate a certain number of individuals using peremptory challenges."

The second page of the questionnaire included the two prospective juror profiles, each with a photograph. In one condition Juror #1 was depicted as Black and Juror #2 as White. In the other condition, information about Jurors #1 and #2 remained the same, but #1 was depicted as White and #2 as Black. The third page informed participants that they had one challenge remaining and required them to identify which prospective juror they would excuse. An open-ended question then instructed them to explain to the trial judge why they challenged the individual they did. Finally, for college participants only, we were able to assess direct perceptions of the two

[5] As our focus is not limited to the judgments of individuals of a particular race, results are based on data from all participants. Across the three samples, analyses indicated no significant between-race differences in responses.

[6] Per 2006 ratings from U.S. News and World Report, available at http://www.usnews.com/usnews/edu/grad/rankings/law/brief/lawrank_brief.php.

Table 1 Peremptory challenge use by prospective juror race across three participant samples

	Juror #1		Juror #2	
	When Black (%)	When White (%)	When Black (%)	When White (%)
College students ($n = 90$)	80	59	41	20
Law students ($n = 81$)	73	51	49	27
Attorneys ($n = 28$)	79	43	57	21

Note. Values represent the percentage of participants who chose to excuse the prospective juror. One prospective juror was always depicted as Black and the other as White, thus the first and last column represent the two prospective jurors presented to participants in one experimental condition (and sum to 100%) and the second and third column represent the two prospective jurors presented to participants in the other condition.

prospective jurors by obtaining a rating of how likely it would have been for each individual to vote guilty after the trial, on a scale of 1 (*very unlikely*) to 7 (*very likely*).

Results

Peremptory challenge use

Across condition and sample, 66% of participants challenged Juror #1, the journalist who wrote about police misconduct, and 34% challenged Juror #2, the executive who was skeptical about statistics. More important to the present investigation, binary logistic regression indicated that these judgments varied by prospective juror race, Wald (1) = 11.56, $p = .001$, odds ratio = 2.87. Overall, the Black prospective juror was challenged by 63% of participants. When Juror #1 was Black, participants challenged him 77% of the time; this same individual was challenged just 53% of the time when he was White. These same data can also be reported with regard to Juror #2, who was challenged 47% of the time when he was Black, compared to 23% when he was White.

The regression did not reveal a significant effect for sample, Wald (1) = 1.09, $p = .30$, or an interaction between prospective juror race and sample, Wald (1) <1. As detailed in Table 1, college students, law students, and attorneys exhibited a comparable tendency to challenge Jurors #1 and #2 more often when they were Black than when they were White. Chi-square analyses indicated that this effect was significant for both the college ($\chi^2(1, N = 90) = 4.66$, $p = .03$, odds ratio = 1.36) and the law student sample (χ^2 (1, $N = 81) = 3.89$, $p < .05$, odds ratio = 1.42), and marginally significant for the smaller attorney sample (χ^2 (1, $N = 28) = 3.61$, $p = .06$, odds ratio = 1.83).

Judgment justifications

Participants' open-ended justifications for their judgments were coded by a research assistant blind to experimental condition. First, responses were coded for mention of race. Despite the fact that race clearly played a role in peremptory judgments, only 7% of college students, 6% of law students, and 8% of attorneys cited race as influential. These frequencies did not vary by prospective juror race, participant sample, or the interaction of these predictors, Wald (1) < 1.

If not race, then what criteria did participants use to justify their decisions? A research assistant naïve to the purpose of the study coded each open-ended response; a second coder confirmed the reliability of the first coder's assessments, $\kappa = .88$. Across all samples, all but 7

participants (96%) cited as their most important justification either Juror #1's familiarity with police misconduct or Juror #2's skepticism about statistics. Not surprisingly, which of these two characteristics participants' emphasized mirrored the effects reported above for peremptory use. Across all participants, when Juror #1–who had written about police misconduct–was Black, familiarity with police misconduct was cited as the most important justification 73% of the time. When this prospective juror was White, however, just 49% of participants claimed that familiarity with police misconduct was the most important factor, a significant decrease, Wald (1) = 12.70, $p < .001$, odds ratio = 3.05. With regard to Juror #2, participants cited skepticism about statistics as the most important consideration 48% of the time when this prospective juror was Black, compared to 23% when he was White. Logistic regression on these peremptory justifications did not reveal effects for sample or an interaction between juror race and sample, Wald (1) < 1. Chi-square indicated that the effect of prospective juror race was significant for the college (χ^2 (1, $N = 86$) = 5.94, $p = .02$, odds ratio = 1.43) and law student samples (χ^2 (1, $N = 79$) = 4.22, $p = .04$, odds ratio = 1.44), and marginally significant for the attorney sample (χ^2 (1, $N = 27$) = 2.93, $p = .09$, odds ratio = 1.70).[7]

To test the possibility that the amount of information contained in the justifications might vary by the race of the prospective juror challenged, we conducted a simple word count. Analysis of variance (ANOVA) indicated no difference in the word count for justifications of Black juror challenges ($M = 42.1$) versus White juror challenges ($M = 40.6$), F (1, 193)<1. A sample effect did emerge, F (2, 193) = 3.08, $p < .05$, $\eta_p^2 = .03$ with a Tukey test ($p < .05$) indicating that attorneys ($M = 48.0$) used significantly more words to justify their decision than did law students ($M = 35.9$); the average for college students was 40.1 words. The interaction between race of prospective juror challenged and sample was not significant, F (2, 193) = 1.49, $p = .23$. A nonsignificant tendency emerged for attorneys–unlike college or law students–to use more words to justify excluding a Black ($M = 52.6$) versus White prospective juror ($M = 43.3$), $d = .27$.

Juror ratings

College participants' predictions of how likely each prospective juror would be to vote guilty also varied by juror race. A repeated-measures ANOVA indicated that, across conditions, participants rated the Black prospective juror as less likely to vote guilty ($M = 3.57$) than the White prospective juror ($M = 4.21$), F (1, 88) = 6.27, $p = .01$, $\eta_p^2 = .07$. We followed the procedure of Baron and Kenny (1986) to test whether these ratings mediated the relationship between prospective juror race and peremptory use. A logistic regression indicated that prospective juror race (i.e., whether or not Juror #1 was Black)[8] predicted peremptory judgment (i.e., whether or not Juror #1 was challenged), Wald (1) = 4.57, $p = .03$. Because it was not the ratings of either individual juror that we expected to mediate this relationship, but rather the difference between ratings of the two prospective jurors, we computed a new variable equal to the rating of Juror #1 minus the rating of Juror #2. Per linear regression, the race of Juror #1 was a significant predictor of this potential mediator, $\beta = .24$, $p = .02$; per logistic regression, the potential mediator was a significant predictor of whether or not Juror #1 was challenged, Wald (1) = 19.83, $p<.001$. Finally, when the potential mediator was entered into our original logistic regression, Juror #1's race was no longer a significant predictor of whether or not he was challenged, Wald (1) <

[7] Open-ended responses were also coded for which factor was cited first by participants. This analysis produced comparable results.

[8] Because of the either/or nature of the design, conducting this analysis with Juror #2 produces the identical result.

1, $p = .40$. In sum, the influence of prospective juror race on peremptory use was mediated by participants' beliefs regarding how the individuals would vote in the case.

Discussion

Across three samples, this investigation provides clear empirical evidence that a prospective juror's race can influence peremptory challenge use and that self-report justifications are unlikely to be useful for identifying this influence–findings that are strikingly similar in direction as well as magnitude to the conclusions of archival analyses of real peremptory use (e.g., Baldus et al., 2001; McGonigle et al., 2005). College students, law students, and attorneys playing the role of a prosecutor trying a case with a Black defendant were more likely to challenge a prospective juror when he was Black as opposed to White; mediational analyses using college participants indicated that beliefs about the prospective jurors' predispositions towards the case drove this effect. When justifying these judgments, participants rarely cited race as influential, focusing instead on the race-neutral characteristics associated with the Black prospective juror. That is, when Juror #1 was Black, participants tended to justify their judgments by citing his familiarity with police misconduct as their reason for excluding him. When Juror #2 was Black, on the other hand, participants reported his skepticism about statistics to be more important than the police misconduct issue. These data serve as important experimental validation of the correlational and anecdotal conclusions of previous researchers regarding race and jury selection processes.

The practical implications of these findings are clear: even when attorneys consider race during jury selection, there is little reason to believe that judicial questioning will produce information useful for identifying this bias. Because judgments such as those made during jury selection are based on multiple, subjective criteria, myriad justifications are typically available (Norton et al., 2006). In fact, recent Supreme Court decisions have held that a peremptory justification need not be plausible nor even relevant to the case in question for it to comply with *Batson*, as long as it is literally race-neutral (Page, 2005). Justifications for peremptories therefore leave judges with little basis for rejecting them, as demonstrated by archival analyses (Melilli, 1996; Raphael & Ungvarsky, 1993). Even in extreme instances of bias–such as the exclusion of every Black member of the venire–the present findings imply that it would be relatively easy to generate multiple, race-neutral justifications. We observed bias against Black venire members only when examining decisions made by several participants; indeed, for any given participant, we are unable to determine whether the peremptory was influenced by race or whether the justification provided was valid. Only in the aggregate does evidence of racial bias emerge, and in the real world, such data are often unavailable.

One of the few instances when it seems possible for biased peremptory use to be identified is when an attorney challenges a Black member of the venire on the basis of characteristics also possessed by an empaneled White juror (Melilli, 1996; Raphael & Ungvarsky, 1993). Such occurrences provide the judge with aggregate data across juror race–the same type of data examined in the current investigation. But even when such comparisons are available, the determination of racial bias remains no easy task. Consider, for example, the *Maldonado* (2003) case from our opening quotation. When the district attorney was questioned about using peremptories for the only two African Americans in the venire, she explained that she challenged one individual because he was 55-years-old and childless. The judge pressed further, reminding her that Whites without children were not similarly challenged. But even when confronted with this argument, the attorney responded as follows: "It's just a feeling. That's why I used my peremptory. I mean it's not because of his color. It's certainly not that" (Burge, 2003).

Another example is provided by the recent Supreme Court decision in *Miller-El v. Dretke* (2005), which includes close analysis of the questioning of Billy Jean Fields, a Black member of

the venire challenged by the prosecution. During *voir dire*, Fields professed support for the death penalty and stated that its administration is consistent with God's will. In justifying the challenge of Fields, the prosecutor cited concern about his religious and death penalty beliefs, even though Fields seemed to be a stronger proponent of capital punishment than many of the empaneled Whites. Whereas the Court majority cited this example as evidence that the peremptory was based on race, the dissenting opinion suggested that the challenge was more ambiguous. Quoting different excerpts from the same *voir dire*, the dissenting Justices concluded that Fields was, in many respects, unattractive to the prosecution. Furthermore, they argued that other race-neutral factors, including the order in which prospective jurors were questioned, provide legitimate justification for the challenge. These contradictory opinions based on the same *voir dire* provide further support for our conclusion that the subjectivity underlying peremptory challenges renders it extremely difficult for judges to reach conclusive determinations of racial bias.

Limitations

Of course, the present paradigm differed in important ways from the judgments required of attorneys during jury selection. For one, only our smallest sample included experienced attorneys. Most college students were likely unfamiliar with *Batson*, and both the college and law student samples could have simply provided responses consistent with a general *stereotype* of how trial attorneys behave. These are valid concerns to which we offer several responses. First, the data from our two student samples were consistent with those obtained from attorneys–if anything, effect size analyses suggest that attorneys were even more influenced by race than the other participants. These findings are consistent with previous conclusions that college and law students exhibit jury selection tendencies similar to those of trial attorneys (Olczak et al., 1991). Second, mediational analyses of the college sample indicated that participants' *personal* beliefs about the prospective jurors' predispositions were responsible for the influence of race, a finding also obtained by archival analysis of trial attorneys (Baldus et al., 2001). Third, and most importantly, the present findings converge with data from actual jury selections that have demonstrated a relationship between prospective juror race and prosecutorial peremptory use (Baldus et al., 2001; McGonigle et al., 2005; Rose, 1999; Turner et al., 1986).

Had our findings been inconsistent with archival analyses–or with theory on race and social judgment–sampling issues would complicate interpretation of these data. However, this was not the case. Our data are remarkably consistent with previous findings and theory, a convergence that strengthens the validity of our study as well as that of previous investigations. The present findings also make novel a contribution by demonstrating the causal effects of race on jury selection and the facility with which decision-makers can provide race-neutral justifications for peremptory use. In fact, our decision to include college participants also led to another interesting conclusion: even absent awareness of the restrictions implemented by *Batson*, individuals are loath to admit to the influence of race. This finding is consistent with a pre-*Batson* review of an Illinois District Court (Diamond et al., 1997), and with psychological theory regarding the extent to which motivations to avoid the appearance of prejudice affect social judgment (Gaertner & Dovidio, 1986; Norton et al., in press; Plant & Devine, 1998).

It is also true that the present design reduced the complex process of jury selection to a simple, single forced choice. This design increased internal validity, particularly when compared to previous analyses; were it not for the fact that juror information was held constant while race was manipulated, we would not be to offer conclusions regarding the influence of race. Nonetheless, such a design has limitations. The obvious comparison of a White and Black juror could have led to demand characteristics, though this likely would have rendered the study *less* likely to find an effect for race. The internal validity of the design also came at the expense of external validity.

Once again, though, our findings are consistent with those of more generalizable correlational studies. Moreover, as our discussion of *Maldonado* (2003) and *Miller-El* (2005) demonstrates, an increased number of prospective jurors and juror characteristics in a case do not necessarily make it easier to detect racial bias. We might also suggest, albeit speculatively, that the pressure to deny or disguise the influence of race on jury selection judgments would be far greater during actual interrogation from a trial judge than it was in the present paradigm, indicating that our findings may underestimate the effects of race (and the difficulty inherent in identifying these effects) in real *voir dire* settings.

Future questions

The present studies also raise interesting questions for future consideration. We focused this investigation on prosecutorial peremptory use since the vast majority of *Batson* challenges continue to be levied against prosecutors who exclude Black prospective jurors (Melilli, 1996). Nonetheless, it would be useful to determine whether similar processes are exhibited by a prosecutor trying a case with a White defendant, or by defense attorneys (see Baldus et al., 2001 for archival analysis of these variables). Such investigations would generalize the present conclusions, and could also confirm that the present data do not simply reflect a general belief that Black jurors are always inferior jurors.

Another important question–for both theoretical and practical reasons–is whether the tendency to provide race-neutral justifications is an intentional and strategic effort to disguise racial bias or an indication of participants' lack of awareness regarding the influence of race. In other words, in the present study, did participants challenge the Black venire member more often because of his race and then seek to hide this influence by focusing their justification on the most plausible race-neutral factor available? Or were the present effects also attributable to less conscious processes? For example, might a prospective juror's previous jury experience, family status, employment history, or other race-neutral characteristics be interpreted differently depending on his race? The present data cannot differentiate between these possibilities, as we asked participants to justify their decisions, not to rate the influence of each characteristic associated with each prospective juror. The significant effects of race on the justifications participants offered may simply result from the tendency to challenge the Black venire member more often than the White one, but these results could also reflect the biasing influence of race on perceptions and weighting of the prospective jurors' race-neutral characteristics (e.g., Hodson, Dovidio, & Gaertner, 2002; Norton et al., 2004).

Determining the relative impact of conscious and unconscious processes has important implications for attempts to eliminate bias. In the domain of jury selection, tightening judicial scrutiny of race-neutral justifications or reminding attorneys of the *Batson* restrictions during *voir dire* become more reasonable strategies if attorneys are intentionally trying to hide the influence of race. On the other hand, to the extent that attorneys are unaware of the effects of race (Page, 2005)–and genuinely believe their race-neutral justifications–proposals short of eliminating peremptory challenges appear less promising (c.f. Bray, 1992; Broderick, 1992; Diamond et al., 1997). Future investigations should include dependent measures that differentiate between public responses to a *Batson* challenge and private beliefs about the factors that influenced judgment. Of course, norms regarding race would still render it difficult to distinguish between true unawareness of bias and mere unwillingness to admit to it. Still, investigations such as these could not only shed light on the psychological processes underlying jury selection, but also guide discourse regarding the most effective strategies for curtailing racial bias in the legal system.

Conclusion

Intuition, anecdote, and psychological theory suggest that race affects jury selection judgments, though identifying this influence is difficult. The present investigation tests these assumptions empirically, providing the first experimental evidence of a causal relationship between race, peremptory challenge use, and peremptory justification. This research also sheds light on the potential psychological processes through which race exerts its influence. Specifically, the present data suggest that decision-makers are remarkably facile at recruiting race-neutral characteristics to justify jury selection judgments, and this tendency poses a threat to current restrictions on peremptory use. Finally, it is worth emphasizing that our findings do not identify limitations specific only to the *Batson* challenge procedure, but rather suggest more generally that the very idea of using self-report measures to assess and curtail the influence of race on legal judgment is untenable.

References

America's best law schools (2005). *U.S. News and World Report*. Retrieved April 14. from: www.usnews.com/usnews/edu/grad/rankings/law/brief/lawrank_brief.php.

Baldus, D. C., Woodworth, G. G., Zuckerman, D., Weiner, N. A., & Broffitt, B. (2001). The use of peremptory challenges in capital murder trials: A legal and empirical analysis. *University of Pennsylvania Journal of Constitutional Law*, *3,* 3–169.

Baron, R. M., & Kenny, D. A. (1986). The moderator-mediator variable distinction in social psychological research: Conceptual, strategic, and statistical considerations. *Journal of Personality and Social Psychology*, *51,* 1173–1182.

Batson v. Kentucky (1986). 476 U.S. 79.

Bornstein, B. H. (1999). The ecological validity of jury simulations: Is the jury still out? *Law and Human Behavior*, *23,* 75–91.

Bowers, W. J., Steiner, B. D., & Sandys, M. (2001). Death sentencing in Black and White: An empirical analysis of jurors' race and jury racial composition. *University of Pennsylvania Journal of Constitutional Law*, *3,* 171–275.

Bray, K. (1992). Reaching the final chapter in the story of peremptory challenges. *UCLA Law Review*, *40,* 517–569.

Broderick, R. J. (1992). Why the peremptory challenge should be abolished. *Temple Law Review*, *65,* 369–423.

Burge, K. (May 24, 2003). SJC urges limits on juror rejections. *Boston Globe*, p. A1.

Commonwealth v. Maldonado (2003). No. SJC-08878 (Mass. SJC May 23).

Crandall, C. S., Eshelman, A., & O'Brien, L. (2002). Social norms and the expression and suppression of prejudice: The struggle for internalization. *Journal of Personality and Social Psychology*, *82,* 359–378.

Devine, P. G. (1989). Stereotypes and prejudice: Their automatic and controlled components. *Journal of Personality and Social Psychology*, *56,* 5–18.

Diamond, S. S., Ellis, L., & Schmidt, E. (1997). Realistic responses to the limitations of *Batson v. Kentucky*. *Cornell Journal of Law and Public Policy*, *7,* 77–95.

Diamond, S. S., & Zeisel, H. (1974). A courtroom experiment on juror selection and decision-making. *Personality and Social Psychology Bulletin*, *1,* 276–277.

Edmonson v. Leesville Concrete Co. (1991). 500 U.S. 614.

Gaertner, S. L., & Dovidio, J. F. (1986). The aversive form of racism. In J. Dovidio, & S. Gaertner (Eds.), *Prejudice, discrimination, and racism* (pp. 61–89). Orlando, FL: Academic Press.

Hodson, G., Dovidio, J. F., & Gaertner, S. L. (2002). Processes in racial discrimination: Differential weighting of conflicting information. *Personality and Social Psychology Bulletin*, *28,* 260–471.

J. E. B. v. Alabama (1994). 511 U.S. 127.

Kovera, M. B., Dickinson, J. J., & Cutler, B. L. (2002). Voir dire and jury selection. In A. M. Goldstein (Ed.), *Comprehensive handbook of psychology*, *Volume 11: Forensic Psychology* (pp. 161–175). New York: John Wiley and Sons.

MacCoun, R. J. (1989). Experimental research on jury decision-making. *Science*, *244,* 1046–1050.

McGonigle, S., Becka, H., LaFleur, R., & Wyatt, T. (2005). Striking differences. *Dallas Morning News*. Retrieved March 15, 2006 from: http://www.dallasnews.com/s/dws/spe/2005/jury/index_jury.html.

Melilli, K. J. (1996). *Batson* in practice: What we have learned about *Batson* and peremptory challenges. *Notre Dame Law Review*, *71,* 447–503.
Miller-El v. Dretke (2005). 545 U.S. _____.
Mitchell, T. L., Haw, R. M., Pfeifer, J. E., & Meissner, C. A. (2005). Racial bias in mock juror decision-making: A meta-analytic review of defendant treatment. *Law and Human Behavior*, *29,* 621–637.
Nisbett, R. E. & Wilson, T. D. (1977). Telling more than we can know. *Psychological Review*, *84,* 231–259.
Norton, M. I., Sommers, S. R., Apfelbaum, E. P., Pura, N., & Ariely, D. (in press). Colorblindness and interracial interaction: Playing the "political correctness game." *Psychological Science*.
Norton, M. I., Sommers, S. R., Vandello, J. A., & Darley, J. M. (2006). Mixed motives and racial bias: The impact of legitimate and illegitimate criteria on decision-making. *Psychology, Public Policy, and Law*, *12,* 36–55.
Norton, M. I., Vandello, J. A., & Darley, J. M. (2004). Casuistry and social category bias. *Journal of Personality and Social Psychology*, *87,* 817–831.
Olczak, P. V., Kaplan, M. F., & Penrod, S. (1991). Attorneys' lay psychology and its effectiveness in selecting jurors: Three empirical studies. *Journal of Social Behavior and Personality*, *6,* 431–452.
Page, A. (2005). Batson's blind-spot: Unconscious stereotyping and the peremptory challenge. *Boston University Law Review*, *85,* 155–262.
Plant, E. A., & Devine, P. G. (1998). Internal and external motivation to respond without prejudice. *Journal of Personality and Social Psychology*, *69,* 811–832.
Powers v. Ohio (1991). 499 U.S. 400.
Raphael, M. J., & Ungvarsky, E. J. (1993). Excuses, excuses: Neutral explanations under *Batson v. Kentucky*. *University of Michigan Journal of Law Reform*, *27,* 229–275.
Rose, M. R. (1999). The peremptory challenge accused of race or gender discrimination? Some data from one county. *Law and Human Behavior*, *23,* 695–702.
Shafir, E., Simonson, I., & Tversky, A. (1993). Reason-based choice. *Cognition*, *49,* 11–36.
Sommers, S. R. (2006). On racial diversity and group decision-making: Identifying multiple effects of racial composition on jury deliberations. *Journal of Personality and Social Psychology*, *90,* 597–612.
Sommers, S. R., & Ellsworth, P. C. (2000). Race in the courtroom: Perceptions of guilt and dispositional attributions. *Personality and Social Psychology Bulletin*, *26,* 1367–1379.
Sommers, S. R., & Ellsworth, P. C. (2001). White juror bias: An investigation of racial prejudice against Black defendants in the American courtroom. *Psychology, Public Policy, and Law*, *7,* 201–229.
Sommers, S. R., & Ellsworth, P. C. (2003). How much do we really know about race and juries? A review of social science theory and research. *Chicago-Kent Law Review*, *78,* 997–1031.
Sommers, S. R., & Norton, M. I. (2006). Lay theories about White racists: What constitutes racism (and what doesn't). *Group Processes and Intergroup Relations*, *9,* 117–138.
Sweeney, L. T., & Haney, C. (1992). The influence of race on sentencing: A meta-analytic review of experimental studies. *Behavioral Sciences and the Law*, *10,* 179–195.
Swain v. Alabama (1965). 380 U.S. 202.
Turner, B. M., Lovell, R. D., Young, J. D., & Denny, W. F. (1986). Race and peremptory challenges during voir dire: Do prosecution and defense agree? *Journal of Criminal Justice*, *14,* 61–69.