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Point/Counterpoint

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By Brian A. Wilson

Four decades after the Supreme Judicial Court ("SJC") first proscribed certain group-based peremptory challenges, eradicating unlawful discrimination in jury selection has gained renewed interest. Yet so long as Massachusetts retains the inherently flawed three-step "Batson-Soares" test, lawyers seeking to exclude jurors for impermissible reasons will proceed virtually undeterred.

The solution is not to abolish peremptory challenges, as Arizona did in 2022. When exercised lawfully, they enable litigants to remove jurors they legitimately perceive as biased where a challenge for cause, due to its narrow scope, legally cannot. Eliminating peremptories would provide the parties little opportunity to influence who decides the case, yielding that power to the one person with no stake in the verdict and who before trial is unaware of the precise evidence, arguments, and jurors' reactions thereto that will follow.

Nor is the answer in a criminal case to strip prosecutors of peremptories, a notion even Justice Thurgood Marshall—the Supreme Court's most outspoken critic of peremptories—rejected. There is no more justice in permitting a defense attorney to discriminate against individuals because of their race, ethnicity, gender, or sexual orientation than in allowing a prosecutor to do the same. Furthermore, as the Supreme Court noted in *Georgia v. McCollum*, 505 U.S. 42 (1992), just as a conviction tainted by discriminatory jury selection erodes society's faith in the system, its confidence is "undermined where a defendant, assisted by [group-based] discriminatory peremptory strikes, obtains an acquittal." Attorneys on both sides of the aisle have an equal responsibility to eradicate, not perpetuate, unlawful discrimination.

Instead, the key to curbing discriminatory peremptory challenges is to root out those motivated by implicit, not merely explicit, bias by compelling attorneys to justify them with immediate explanations, and to overhaul the means by which trial and appellate judges evaluate their legitimacy.

Batson-Soares' Greatest Flaw

Batson-Soares' most fundamental flaw is its ignorance of the role implicit bias plays in the peremptory challenge process, a phenomenon courts nationwide have only recently acknowledged. Unconscious biases may cause the most scrupulous attorney to view jurors of a certain race, ethnicity, gender, or sexual orientation differently than others, leading the lawyer to exercise a challenge without realizing that its basis is rooted in such prejudice. Yet by requiring the opposing party to prove at step one an "inference" that the peremptory has "discriminatory purpose," and at step three that it was in fact intentional, *Batson-Soares* grants virtual immunity to challenges motivated by unconscious bias. It does so even though the harm to the excluded juror, to the community, and, if lodged by the prosecutor, to the defendant is the same as if the discriminatory motivation had been conscious.

Ending Step One

Merely modifying step one, however, to require an inference of "explicit or implicit

discrimination" rather than "discriminatory purpose" before mandating an explanation would miss the mark. Despite the SJC intending the threshold burden to be modest, step one in any form hinders the discovery at step two of what is often the most incriminating evidence of prejudice: the purported rationale for the challenge. Though critics note that any lawyer "can easily assert facially neutral reasons for striking a juror," *Batson v. Kentucky*, 476 U.S. 79, 106 (1986) (Marshall, J., concurring), it is the proffered reason itself which often reveals it to be based on the person's protected identity—such as where a prosecutor claims the juror would favor the defendant by virtue of their shared identity, or defense counsel argues the same regarding the victim. Or, a rationale may be so implausible that it betrays the discrimination it intends to conceal, such as the oft-cited example from *Purkett v. Elem*, 514 U.S. 765 (1995), where the prosecutor claimed he struck two Black venire-members because their facial hair appeared "suspicious" and one had "long, unkempt" hair. Under *Batson-Soares*, such spurious reasons might never be exposed if an inference of discriminatory intent were not first proven; eliminating step one would lift this shroud of secrecy.

Doing so would not only expose but deter discriminatory challenges. Requiring attorneys to justify their peremptories will compel them to examine their inner biases and consider whether their challenges might be based on unlawful considerations they overlooked initially.

This measure also would put an end to convictions being vacated where a judge erroneously finds that the defendant failed to establish the required inference, which in Massachusetts mandates a new trial.

Efforts to eliminate step one in the Commonwealth are already underway. Justice Lowy first recommended doing so in *Commonwealth v. Sanchez*, 485 Mass. 491 (2020), reiterating his proposal in *Commonwealth v. Carter*, 488 Mass. 191 (2021). Massachusetts Senate Bill 918, currently under consideration, proposes the same. Similar to rules recently enacted in Washington, California, New Jersey, and Connecticut, it would require one lodging a peremptory challenge to offer a reason upon either the opposing party or the judge objecting. In fact, removing step one would not change the process radically, given that Massachusetts law not only permits but encourages judges to forego step one and proceed to step two sua sponte.

Ending the Real First Step

Eliminating step one, however, will only go so far in curbing unlawful discrimination in jury selection. Senate Bill 918 and measures taken by other states operate on the same flaw: the failure to recognize that "step one" is not actually the first step in the process. The *Batson-Soares* inquiry does not even begin unless a "timely objection" is lodged. Thus, whether a discriminatory challenge is exposed or proceeds unimpeded depends on whether opposing counsel, or the judge sua sponte, objects to it.

While one might expect any attorney or judge to object unhesitatingly to a discriminatory challenge, there are many reasons why one might not. Just as implicit bias may motivate exercising a peremptory, the unconscious biases of opposing counsel and the judge might prevent them from recognizing its discriminatory nature. Unfamiliarity with the developing intricacies of the law in this context might also play a role. Even the most astute lawyer or judge who perceives a potentially unlawful challenge may resist raising an objection. One might be reluctant to lodge what is essentially a public accusation that the lawyer harbors prejudice against

a certain group, or at least engages in conduct that discriminates against its members, particularly if uncertain whether implicit rather than explicit bias motivated the peremptory. Since step three involves a determination of whether the rationale is genuine, an opposing lawyer or judge might also hesitate to imply that the lodging attorney will lie to the court about a challenge's basis. Reluctance to object may likewise be grounded in a concern that an accusation could subject the lodging attorney to an ethics inquiry or other reputational harm, that the attorney otherwise commands respect in the legal community, or that it would sour the relationship between the lawyers and the judge, particularly if they frequently have cases together. A lawyer prone to engaging in similar conduct, whether in the instant trial or others, might fear being exposed by a counter-accusation. Even a lawyer with no such culpability may fear unfounded retaliation. One might also believe an objection would be futile because, under the circumstances of the case, the *Batson-Soares*' intent requirement renders meeting the step three standard, or even step one's, virtually impossible.

Eliminating the objection requirement and requiring the party to offer its rationale whenever a peremptory challenge is lodged, would avoid the possibility that a discriminatory strike evades review. While doing so would, to be sure, change the nature of the peremptory significantly, it would help accomplish what Batson and Soares set out to do.

Requiring every peremptory to be explained and ruled upon would require patience, particularly in murder trials in which each party is granted as many as sixteen (or even more for the Commonwealth in a trial of multiple defendants) as opposed to the far fewer allotted in other criminal and civil cases. Yet, if Massachusetts is serious about implementing meaningful reform, concerns regarding the expenditure of time and resources should take a back seat to evidence that unlawful discrimination infects the trial process.

Mending Step Three

Step three of *Batson-Soares* is even more problematic, starting with confusion as to the precise standards. While recent SJC cases describe it as a judicial determination of "whether the explanation is both adequate and genuine," the Court's most recent decision, *Commonwealth v. Grier*, 422 Mass. 455 (2022), adds that the judge must decide whether the opponent "has proved a discriminatory purpose." Meaningfully restructuring the test will require removing the "purpose" requirement altogether, and replacing it with an unambiguous mandate that the judge deny a challenge motivated by either explicit or implicit bias. It also serves no legitimate purpose for step three to impose the burden of proof on the opposing party, which flows from the longstanding but archaic principle that peremptory challenges are presumed to be valid. See *Commonwealth v. Carter*, 488 Mass. at 196. *Batson-Soares*'s step three also lacks guidance as to what standard of proof the judge must apply, noting only that the judge "must evaluate whether the proffered reasons were adequate and genuine." *See id.* As it does not specify the extent to which the opposing party's proof must convince the judge, such as by a preponderance of the evidence or by clear and convincing evidence, *Batson-Soares* risks producing inconsistency in the way judges apply it.

Senate Bill 918 would make drastic changes to the way peremptory challenges are assessed at step three. As with the four states noted above, the proposed legislation fittingly states that a judge "need not find purposeful discrimination" to reject the challenge, thereby rendering those peremptories motivated by implicit bias equally unlawful. The bill, however, proposes an

unworkable step three standard: the trial judge would be required to deny the challenge if "an objective observer could view race or ethnicity as a factor in [its] use." Creating a hypothetical "objective observer" is unnecessary since the judge, as in any other context, must view the evidence objectively. It would only present an additional point over which legislators might disagree, which risks hindering its passage and delaying progress. Moreover, the standard sets too low a bar by essentially mandating the rejection of the challenge if there exists any possibility that an objective person might believe it was motivated by discrimination. Put another way, a judge could allow a peremptory challenge only if convinced there exists no possibility whatsoever that it was based on improper considerations, a standard even more exacting than proof beyond a reasonable doubt. A more effective standard would require the judge to deny a peremptory challenge upon finding by a preponderance of the evidence that explicit or implicit bias regarding the juror's race, ethnicity, gender or sexual orientation was a factor in exercising it.

Most glaringly, like three of the four states' rules mentioned above, Senate Bill 918 applies to race- and ethnicity-based peremptories only, leaving those based on gender and sexual orientation to be assessed via the flawed *Batson-Soares* test. Acknowledging the pervasiveness of and taking a true stand against gender- and sexual orientation-based discrimination requires that the law be applied to all four protected identities.

Conclusion

Unequivocally deeming explicit and implicit discrimination unlawful and providing the proper tools to identify invidious bias that lawyers, courts and society too often overlook, is the key to meaningful peremptory challenge reform. Any sacrifice in judicial economy comes not at a price, but as an investment in the integrity of our system of justice. Nearly five decades ago, *Soares* was instrumental in paving a path for *Batson* to outlaw race-based peremptories. Massachusetts once again has a unique opportunity to do what other jurisdictions have not.

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