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Editor's Preface to the Fall Edition

Here at Elon University, we are extremely grateful to host *The Pi Sigma Alpha Undergraduate Journal of Politics*. We are proud to present the Fall 2021 issue and congratulate all authors published in this issue for their high achievement.

This publication seeks to highlight the intellectual curiosity that leads to innovative scholarship in all subfields of political science, scholarship that addresses timely questions, is carefully crafted, and utilizes diverse methodologies. We are committed to intellectual integrity, a fair and objective review process, and a high standard of scholarship as we showcase the work of undergraduate scholars, some of whom pursue questions that have been traditionally ignored in scholarship but that drive our discipline forward.

Following the lead of the American Political Science Review (APSR) Editorial Board, we are excited to publish research in the areas of “American politics, comparative politics, international relations, political theory, public law and policy, racial and ethnic politics, the politics of gender and sexuality and qualitative and quantitative research methods.” This publication also values the relationships formed through student-faculty collaboration and aims to build a culture of scholarship that expands beyond the college campus. We hope to encourage and empower students to seek out knowledge and pursue their potential, contributing to scholarship in a variety of disciplines.

This year, we thank our advisors Dr. Baris Kesgin and Dr. Aaron Sparks for their support, without which the issue would not have been possible. We would also like to thank the entirety of the Political Science and Policy Studies Department at Elon University, especially Dr. Laura Roselle; our Faculty Advisory Board; and all the students who shared their exceptional work with us this semester.

We are excited to present the Fall 2021 edition of the *Journal*. Thank you for your continued support and readership of our publication; we hope you enjoy the edition.

Sincerely,

The Editorial Board at Elon University

Submission of Manuscripts

The *Journal* accepts manuscripts from undergraduates of any class and major. Members of Pi Sigma Alpha are especially encouraged to submit their work. We strive to publish papers of the highest quality in all areas of political science.

Generally, selected manuscripts have been well-written works with a fully developed thesis and strong argumentation stemming from original analysis. Authors may be asked to revise their work before being accepted for publication.

Submission deadlines are October 1st for the Fall edition and February 15th for the Spring edition. Manuscripts are accepted on a rolling basis; therefore early submissions are strongly encouraged.

Students may submit their work through Elon University's submission portal, found here: <https://www.elon.edu/u/academics/arts-and-sciences/political-science/psa-journal/>

Alternatively, students may email psajournalelon@gmail.com with an attached Word document of the manuscript. In the body of the email, students are asked to include their name and university, the title of the manuscript, and the closest subfield of political science to which their manuscript pertains (American politics, comparative politics, international relations, political theory, or policy studies). Due to the time committed to the manuscript review process, we ask students to submit only one manuscript at a time.

Submitted manuscripts must include a short abstract (approximately 150 words) and citations/references that follow the *APSA Style Manual for Political Science*. Please do not exceed the maximum page length of 35 double-spaced pages, which includes references, tables, figures, and appendices.

The *Journal* is a student-run enterprise with editors and an Editorial Board that are undergraduate students and Pi Sigma Alpha members at Elon University. The Editorial Board relies heavily on the help of our Faculty Advisory Board, which consists of political science faculty from across the nation, including members of the Pi Sigma Alpha Executive Council.

Please direct any questions about submissions or the Journal's upcoming editions to the editors at Elon University: psajournalelon@gmail.com.

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On the Basis of Race & Gender: How Intersectional Identity Informs Peremptory Strike Decisions in Arkansas Capital Trials

Bailey Lindsey, Hendrix College

Since the 1986 landmark Supreme Court case Batson v. Kentucky declared the striking of jurors on the basis of race to be unconstitutional, group-based peremptory protections have been expanded to include the gender, religion, and ethnicity of the juror. Despite these developments, the Supreme Court has yet to expand Batson protections to intersectional identities, failing to acknowledge the unique ways in which racial and gender stereotypes intersect to affect prosecutorial and defense perceptions of venire members. This article examines the peremptory strike patterns of seven Arkansas capital cases, paying close attention to how both the prosecution and defense invoke peremptory strikes on the basis of race, gender, and intersectional identity. Though I hypothesized that prosecutors would strike Black men and defense attorneys would strike white men at the highest rates from the venire, the data suggest something else entirely: neither prosecutors nor defense attorneys struck venire members disproportionately across intersectional identity, though prosecutors were shown to disproportionately strike Black prospective jurors from the venire. While several scholars have analyzed peremptory strike patterns in terms of intersectional identities, this research marks the first in the field to focus exclusively on intersectional strike patterns, as well as the first to examine jury selection in the context of Arkansas capital trials, where the state's supreme court overturned a murder conviction on the basis of Batson as recently as 2019.

INTRODUCTION

In 1985, an all-white jury convicted Edward James Motton of second-degree murder, sentencing him to fifteen years to life in prison. The jury panel was created in spite of the objections of Motton's defense attorneys, who repeatedly asserted that the prosecutors were deliberately striking Black women—four in total—from the jury panel via peremptory challenge until no Black women were left. In response to the defense's objections, Alameda County Superior Court Judge Jacqueline Taber argued against the notion presented by the defense that Black women were a cognizable group, asserting that Black women were no more of a cognizable group than those who wore toupees:

What's so magic[al] about Black women? ... I'd like to hear from you what it is about the Black woman that has some special quality in it ... You can have a cognizable group of people who wear toupees. Actually, everybody that I have been able to detect that wore toupees with respect to jurors have been excused, too; but is there some significance to that? You have got women on the jury. What function does a Black woman fulfill that the white woman doesn't? (People v. Motton 1985)

There is extensive literature detailing just what makes Black women “so magical,” as well as other ways in which both racial

and gender stereotypes coalesce to form stereotypes that are wholly unique to one's intersectional identity. Wage gaps persist between both racial and gender identities, with Black men making more per dollar than Black women yet less per dollar than white men (Graf et. al 2019). Black women were arrested during traffic stops at the highest rates in 2015, followed by Latino men, Black men, white men, Latina women, and white women (Prison Policy Initiative 2019). The list goes on. The combinations of one's race and gender identities intersect in ways that make them unique—“magical”—from both their racial and gender counterparts, affecting how employers, police officers, doctors, and potentially lawyers view them.

The decision of the Alameda County judge came just months prior to the United States Supreme Court's decision in *Batson v. Kentucky* (1986), which declared that race-based peremptory strikes violate the Constitution's Equal Protection Clause. Yet *Batson* did not determine a venire member's intersectional identity to be a cognizable group worthy of protection, either. As *Batson* protections have been extended to include gender, religion, and ethnicity of a venire member, American courts have stopped short of recognizing the unique way in which one's race and gender identity intersect to affect the way attorneys perceive them. Judges uphold even the most egregious peremptory strike patterns, often denying that a prima facie argument has been made and pointing to jurors

passed by the prosecution or defense that are members of an intersectional identity's separate racial and gender identities.

Likewise, the vast majority of scholars examining the strike patterns of prosecutors and defense attorneys have focused exclusively on how race, and to a lesser degree, gender, play a role in *voir dire*. Perhaps unsurprisingly, they have found that prosecutors disproportionately strike Black and female venire members from the jury while, to a lesser degree, defense attorneys exercise peremptory strikes against white and male venire members in a myriad of trial settings (Baldus et al. 2001; Craft 2018; DeCamp 2021; Eisenberg 2017; Flanagan 2018; Grosso and O'Brien 2012; Wright, Chavis, and Parks 2018). Only a handful have broken down strike patterns into intersectional groups—Black men, Black women, white men, white women, etc.—and none have focused exclusively on the question of whether prosecutors and defense attorneys strike venire members disproportionately according to a venire member's intersectional identity.

In this article, I aim to do just this and examine the peremptory strike patterns of prosecutors and defense attorneys in seven Arkansas capital trials. While I pay special attention to how attorneys exercise peremptory strikes across intersectional identities—namely Black men, Black women, white men, and white women—I also examine the way they exercise peremptory strikes across race and gender. I compare strike patterns across these identities in order to determine whether, like race and gender, the intersectional identity of a venire member should be granted constitutional protection. Such research marks the first of its kind to not only focus exclusively on the issue of intersectionality at the peremptory stage of *voir dire*, but to do so within the state of Arkansas, where the state's supreme court overturned a murder conviction on the basis of *Batson* as recently as 2019 and denied the defense's *Batson* challenge against the prosecution's removal of Black women in 2006, pointing to Black men and white women on the panel as evidence that no wrongdoing had been done. All seven of the defendants whose trial transcripts were analyzed were Black men, and all were sentenced to death.

BACKGROUND

In the Constitution of the United States of America, the right to trial by an impartial jury is enumerated in the Third Article, illustrating its significance to the founding fathers. The issue of impartiality was so important to the framers, in fact, that each stage of the jury selection process aims to remove prospective jurors that may be biased, unqualified, or ultimately unfit to weigh in on a defendant's guilt or innocence. As will be discussed below, however, each of the three stages of the jury selection process admits racial and gender discrimination by attorneys under the guise of impartiality, allowing for all-white or nearly-all white juries to convict Black defendants at significantly higher rates than white defendants (Anwar, Bayer, and Hjalmarsson 2012).

The Selection of the Venire

The first stage of the jury selection process occurs outside of the courtroom with the determination of who will—and consequentially, who will not—be eligible to serve on a jury. In order to create the pool of prospective jurors, two things must happen. First, an updated list of those eligible to serve on a county's jury must be created. In Arkansas, these lists may be created from a combination of both voter and driver registration records or consist only of voter registration records, depending upon the specific procedures within a county. Venire members are then randomly selected from these lists and notified of their jury duty shortly after. Prosecutors and defense attorneys send jury questionnaires to the selected venire members—inquiring about their education, family, and employment—and the prospective jurors are given a date to come to court.

This process is not unique to Arkansas; voter and driver registrations are commonly invoked to create jury pools across the United States. While these lists may be the most comprehensive records available to court officials, however, they may not be the most representative. Women and the elderly are less likely to have a driver's license than other members of society, and voter rolls may omit upwards of a third of a county's adult citizens, with a disproportionate number of those being people of color (Fukurai 2006). Thus, before a jury is even created, white and male venire members may be overrepresented in the pools from which they are selected.

Voir Dire & Strikes for Cause

Once the venire is selected, prospective jurors gather in the courtroom and begin the process of *voir dire*, where prosecutors, defense attorneys, and judges question venire members in order to determine their suitability to serve on a jury panel. Before handing the floor over to the attorneys, the trial judge poses questions to the jury pool as a whole. They ask whether venire members are family or friends with the victim, defendant, attorneys, or witnesses. They ask whether the member would give more or less weight to the testimony of a police officer versus the testimony of another witness. They ask whether they have been exposed to media coverage or small-town gossip that led them to conclude that the defendant was guilty or innocent before the trial began. They ask whether they have any work or health conflicts that would render them unable to serve on the jury panel for days, weeks, or even months at a time. If a venire member answers in such a way to indicate that they have pre-existing biases or are ultimately unfit to serve on the jury panel for other reasons, both litigants hold the ability to request that a venire member be struck for cause. Though there are no limitations to how many venire members can be removed for cause, the reason for such a challenge must be approved by the judge presiding over the trial. In small counties, Black venire members have been shown to be disproportionately struck for cause, with prosecutors citing the venire member's relationship to the defendant's family or their conviction of a family member as means for their removal (Craft 2018).

In capital trials, the Arkansas Supreme Court has also affirmed that venire members can be struck for cause if they either could never vote to impose the death penalty or would always vote to impose the death penalty. In turn, attempts to acquire a “death-qualified” jury have been found to disproportionately exclude Black and female venire members from the venire on the basis of their opposition to capital punishment. In a recent analysis of death-qualified juries in two racially diverse counties in Northern California, for instance, about half of the Black Americans in the jury pool were removed on the basis of their views on the death penalty, compared to approximately a third of white venire members. Likewise, nearly half of the women were potentially excusable due to their view of the death penalty, compared to approximately a third of male venire members (Lynch and Haney 2018). The result is the creation of a venire heading into the final stage of *voir dire* that overrepresents a county’s white and male citizens and underrepresents its female and minority citizens.

The Peremptory Stage of *Voir Dire*

After all the appropriate prospective jurors have been removed for cause, the court moves into the final stage of the jury selection process, in which both prosecutors and defense attorneys are allowed to exercise peremptory strikes against otherwise venire-eligible jurors. In Arkansas capital trials, the defense is granted twelve peremptory strikes while the prosecution can only exercise peremptory strikes against ten venire members.

Unlike strikes for cause, peremptory strikes can be exercised without any sort of explanation at all. Therefore, it is often impossible to know why an attorney decided to strike one prospective juror over another. They may remove those who they believe will be overly sympathetic to the defendants or victims, those who express some discomfort with the death penalty, or those they simply do not like. In theory, there does not even have to be a reason at all, since attorneys are not required to justify their strike before the court. It is often impossible to tell.

Peremptory strikes are both highly controversial and incredibly powerful in the formation of juries. While some hold peremptory strikes to be vital to the creation of fair and impartial juries, others have advocated for their total elimination, pointing to the ability of prosecutors to utilize peremptory strikes against Black venire members until none are left on the panel. In one trial judge’s words, the peremptory strike may be “the last best tool of Jim Crow”—a persistent yet obscure vestige of racial segregation (Hoffman 1997, 827).

In *Batson v. Kentucky* (1986), the Supreme Court attempted to put an end to race-based peremptory strikes with the introduction of the Batson challenge. For the first time in American history, attorneys were now required to give an identity-neutral reason for peremptory strike decisions when the opposition provided a prima facie case that their

opponent exercised a peremptory strike on the basis of one’s race. If an attorney is unable to provide an identity-neutral reason for the strike, then the strike is reversed and the venire member is placed upon the jury panel. Most often, however, these “identity-neutral” reasons—the venire member’s age, demeanor, marital status, employment, etc.—are upheld as valid by the trial court, the Batson challenge is overturned, and the prospective juror is dismissed from the venire. The jury selection process then carries on, with both sides either striking or passing prospective jurors until twelve are seated on the panel and up to six more are selected as alternates.

In his concurring opinion of *Batson v. Kentucky* (1986), Justice Thurgood Marshall expressed his pessimism about the decision’s ability to put an end to race-based peremptory strikes. Despite its incongruity with the 14th Amendment, he argued that “any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill-equipped to second-guess those reasons” (*Batson v. Kentucky* 1986, 106). Thirty years later, it is widely believed that Justice Marshall was correct. All-white and nearly all-white juries continue to convict Black defendants to death across the United States, in spite of the function of the Batson challenge to end peremptory strikes based solely upon race.

A REVIEW OF THE LITERATURE

The role of race in the jury selection process is well documented, even if the motives of prosecutors and defense attorneys are not completely understood. In the peremptory stage of *voir dire*, when attorneys do not have to state their reasoning for striking a juror who is otherwise qualified, this is especially true. Peremptory strikes based upon the gender or intersectional identity of the prospective juror are less documented by scholars of the jury selection process, though may not be of equal importance.

The Role of Race

The vast majority of empirical research within the field has come to the same conclusion: prosecutors often disproportionately strike Black venire members from the jury pool. These conclusions have been upheld in a myriad of trial settings, with empirical support arising from general criminal trials (Craft 2018; DeCamp 2021), felony criminal trials (Flanagan 2018; Rose 1999; Wright, Chavis, and Parks 2018), and capital trials (Baldus et al. 2001; Eisenberg 2017; Grosso and O’Brien 2012). Several studies also assert that the defense disproportionately strikes white venire members (Baldus et al. 2001; Craft 2018; Eisenberg 2017). Race even persisted as the most pertinent factor when Catherine Grosso and Barbara O’Brien controlled for 65 non-racial variables in their analysis of 173 North Carolina capital trials (2012).

Despite scholars’ inability to truly determine why one venire member is peremptorily challenged over another, a consensus has formed on what motivates prosecutors and

defense attorneys to disproportionately strike Black and white venire members: racial stereotypes. Trial attorneys, hoping to create a jury they believe will side with their client, utilize centuries-old stereotypes to inform strike decisions. Specifically, prosecutors in capital trials will strike venire members they believe to hold reservations against the death penalty or embody anti-government biases—typically Black and female citizens—and defense attorneys will strike white venire members who they perceive to be overly trusting of the government. Further, when the defendant is Black, prosecutors have been revealed to strike Black venire members at higher rates than if the defendant was white, as they likely assume that Black jurors will be biased in favor of the member of their same race (Baldus et al. 2001). Thus, 145 years after Congress aimed to eliminate racial discrimination in jury selection, all-white and nearly all-white juries continue to be formed, convicting Black defendants at significantly higher rates than white defendants. The promise of an impartial “jury of your peers” has thus languished for the nation’s people of color (Anwar, Bayer, and Hjalmarsson 2012; Flanagan 2018).

The Role of Gender

Scholars have also examined the ways in which gender may play a role in the jury selection process, though to a lesser extent. The results have been mixed. On one hand, several empirical analyses have suggested that gender does play a role in influencing peremptory strike decisions (Craft 2018; Eisenberg 2017; Hightower 1999; Rose 1999). In a large empirical analysis of 35 South Carolina capital cases, for instance, the prosecution was significantly more likely to strike women than men; 22% of eligible women faced peremptory challenges compared to only 14.5% of men. Meanwhile, defense attorneys disproportionately utilized their peremptory challenges against men, with 48.5% of all eligible men being struck from the jury pool compared to 39.4% of women (Eisenberg 2017). An analysis of 418 criminal trials in Mississippi’s 5th Circuit Court District—the jurisdiction of the infamous District Attorney whose excessive removal of Black jurors was the focus of *Flowers v. Mississippi* (2019)—yielded similar results. The state struck women at a rate of 1.16 times that of men (Craft 2018).

If one is to believe the rationale that peremptory strike decisions are often rooted in stereotypes, these results make sense; women are often perceived to hold anti-government bias and reservations against the death penalty, just like Black citizens (Baldus et al. 2001). However, gender has never appeared to be more influential than race in influencing peremptory strike patterns. The racial analysis of the 418 criminal trials in Mississippi’s 5th Circuit Court District illustrates this point exactly; while 25.27% of venire-eligible women were struck from the jury, a staggering 49.81% of Black venire members were struck by the same prosecutors (Craft 2018). Compared to gender, race appears to be the most powerful factor, time and time again.

The role of race is so powerful, in fact, that some scholars argue any gender discrepancies in peremptory strike patterns to be the result of race-based discrimination, not gender discrimination. In order to make this point, Whitney DeCamp analyzed the same dataset of 418 Mississippi criminal trials as Will Craft, who deduced that prosecutors struck women at 1.16 times the rate of men just two years prior (Craft 2018). Unlike Craft, however, DeCamp could find no significant difference between the strike patterns of men and women once he controlled for race and other factors (DeCamp 2021). DeCamp’s findings suggest that gender-based discrimination is not a systemic factor, contrary to race. Several other studies also reached the same conclusions, though they did not tackle the claims of past literature so directly (Clark et al. 2007; Grosso and O’Brien 2012).

The Role of Intersectional Identity

No matter the conclusion, all of the studies described above have ultimately fallen short in acknowledging the role that the *combination* of one’s racial and gender identity plays in informing peremptory strike patterns. Professor Kimberlé Crenshaw describes the unique relationship between racial and gender stereotypes most eloquently in her book *Demarginalizing the Intersection of Race and Sex*, asserting that “Black men and women live in a society that creates sex-based norms and expectations which racism operates simultaneously to deny; Black men are not viewed as powerful, nor are Black women seen as passive” (Crenshaw 1989, 155). Descriptions of strike patterns in broad terms like Black or white, or men or women, as the literature above utilized, thus fails to address the nuances that likely exist between Black women and Black men, or Black women and white women. A myriad of empirical research has demonstrated that such nuances between intersectional statuses do exist and have enduring social significance in various aspects of American life (Ayres 1991; Montoya 1995). For example, one study reveals that white women, Black men, and Black women cannot purchase the same car for the same price as white men can. Despite using identical bargaining strategies, the prices of cars were 40% higher for white women, twice as high for Black men, and three times as high for Black women (Ayres 1991). Car salesmen appeared to perceive separate intersectional identities in unique, consequential ways, with Black women facing the worst of the discrimination. Therefore, gender stereotypes likely clash with centuries-old stereotypes of race to form perceptions of intersectional identities that are entirely separate from those of their racial counterparts.

As issues of intersectionality have made their way into scholarly circles, more and more research has focused upon the unique ways in which Black men, Black women, white men, and white women—not Black, white, male, and female venire members—are peremptorily challenged in the jury selection process. Perhaps surprisingly, the findings of this research contradict those that focus solely on peremptory

strike patterns across racial or gender identities. The first study to analyze peremptory strikes in terms of separate, intersectional categories was conducted in 2001 and even went so far as to consider age alongside racial and gender identities. Analyzing the peremptory strike decisions of 317 capital trials in Philadelphia County, Pennsylvania between 1981 and 1997, David Baldus and his colleagues ultimately found that the prosecution, respectively, peremptorily challenged young Black men and women 78% and 67% of the time whenever they were present in the *voir dire* process (Baldus et al. 2001). While these results are consistent with the wider field's consensus that Black venire members are disproportionately peremptorily challenged by the prosecution, they contradict many of those that concluded women to be the greatest victims of gender-based discrimination at the hands of the state.

Seventeen years after Baldus and his colleagues published their work, Ronald Wright, Kami Chavis, and Gregory Parks arrived at similar conclusions. In what is perhaps the largest study of the jury selection process to date, Wright and his colleagues analyzed all North Carolina felony trials that proceeded in 2011 and found that Black men were more likely to face a peremptory strike from the state than Black women. Out of all the Black men that were eligible to serve on a felony trial, 23.6% were removed; only 18.5% of Black women faced the same fate. Meanwhile, there was no significant difference in the prosecution's utilization of peremptory challenges against white venire members across gender, and no significant difference between defense strike rates across both race and gender identities (Wright, Chavis, and Parks 2018).

Like Baldus' study, Wright's results also conflict with existing literature about the role of gender in the jury selection process; however, their findings are not totally unsurprising. After all, America's criminal justice system is composed disproportionately of Black men. This fact, coupled with the likelihood of anti-governmental biases as well as the persistence of stereotypes characterizing Black men to be violent, likely coalesce to motivate prosecutors to strike Black men from juries because they believe they will be overly sympathetic to the defendant (Baldus et al. 2001; Gramlich 2020; Quillian and Pager 2001).

To this day, Baldus', Wright's, and their colleagues' works are the strongest indication that both race and gender identity do intersect with one another to play a unique role in the peremptory stage of the jury selection process. Specifically, their findings suggest it to be Black men, not Black women, who experience the highest rates of removal via prosecutorial peremptory challenges. Their results contradict the findings of existing literature that hold Black and female venire members to have the highest peremptory removal rates; however, their conclusions should not be called into question simply because they conflict with the analyses of previous scholars. In fact, I would argue instead that such discrepancies validate the need for further empirical analysis of peremptory challenges in

terms of intersectional identities, as analyzing race and gender as wholly separate, distinct aspects of one's identity appears to yield incredibly different results. My research aims to do just this and expand upon the limited literature that exists to address the role of intersectional identities in influencing peremptory strike decisions in Arkansas capital cases.

THEORY

In this article, I hypothesize that prosecutors and defense attorneys make peremptory strike decisions that are informed by a venire member's intersectional identity, with prosecutors striking Black men and defense attorneys striking white men at the highest rates from the venire. I, therefore, challenge the narrative put forth by previous scholars that asserts race and gender are separate, unrelated facets of one's identity and instead argue that a new narrative, rooted in Crenshaw's (1989) intersectional framework, should be applied to peremptory strike research. However, I theorize that attorneys' strike decisions lie as much in their broader understanding of how members of a particular intersectional identity generally feel towards the government and death penalty as in their reliance upon centuries-old stereotypes.

Prosecutors and defense attorneys are undoubtedly aware of broad trends in the way in which Black men, Black women, white men, and white women feel about issues pertinent to capital trials, as well as how prospective jurors themselves may utilize stereotypes to determine a defendant's guilt. Despite public opinion surveys typically relying upon separate racial and gender analyses to portray their findings, those that do break down their data amongst intersectional identities suggest that support for the death penalty varies between white men, white women, Black women, and Black men. The 2020 American National Electoral Survey, for instance, reports white men to be the most likely to support the death penalty, followed by white women, Black men, and Black women. An analysis of the 2014 General Social Survey yielded similar results, with 71.2% of white males, 65.4% of white females, 48.7% of Black men, and only 41.2% of Black women respondents supporting the death penalty as a form of capital punishment (Pittroff 2020). While it is true that both a venire member's refusal to invoke the death penalty or promise to always invoke the death penalty are justifiable reasons for capital trial attorneys to strike a juror for cause, Batson challenged attorneys continue to cite their lingering concerns about an individual's opinion of the death penalty as the reason behind their peremptory strike—even if the prospective juror states that they would ultimately be able to sentence someone to death (Lynch and Haney 2018).

Yet, I posit that death penalty trends amongst intersectional identity matters the most to defense attorneys, whose clients have the most to lose if jurors sentence their client to death. The very process of death-qualification is shown to favor the prosecution, with evidence suggesting

that death-qualified jurors are more likely to possess racial animosity, distrust defendants, and be overzealous supporters of the death penalty than non-death qualified jurors (Fitzgerald and Ellsworth 1984; Haney 1984). In order to combat this phenomenon, I theorize that trial attorneys utilize statistics regarding the likelihood that a member of an intersectional identity will support the death penalty, ultimately striking white men at the highest rates from the venire, followed by white women, Black men, and Black women.

However, I hold that death penalty support could not alone explain potential differences in prosecutorial strike rates amongst intersectional identities. I instead theorize that centuries-old stereotypes coalesce with intersectional analyses of institutional trust to play the largest roles in shaping prosecutors' perceptions of Black male, Black female, white female, and white male venire members. Specifically, I believe that prosecutors assume that all Black men distrust law enforcement and, in turn, the state. There are several bodies of intersectional research that suggest prosecutors are at least somewhat accurate about the likelihood of a Black man distrusting the government. Most, however, break down their findings between Black men and Black women, or white men and white women, but not all four intersectional identities together. Nevertheless, a general picture can be drawn from tying these findings together. Black intersectional analyses of trust in governance and police suggest that Black men—not Black women—are most likely to distrust law enforcement, while white intersectional analyses suggest that both white women and white men generally display trust in law enforcement agencies, with white men being

the most likely of either (Dobrin et al. 1996; Ludwig 2000; Mangum 2016; Nofziger and Williams 2005). I thus theorize that prosecutors strike Black men at the highest rates from the venire, fearful that assumed anti-governmental biases coupled with stereotyped criminality will incentivize Black men to sympathize with defendants that are also Black men. Meanwhile, I hypothesize that Black women, whom prosecutors assume to harbor slightly lower levels of anti-government biases yet similar predispositions as mothers of Black men themselves, will be struck at the second highest rate from the venire. Finally, I predict white women and men, who are more likely to trust law enforcement officers and perceived as neither aggressive nor criminal, will be struck at the lowest rates from the venire, with their peremptory strike rates paralleling the likelihood that they would harbor anti-government sentiment.

Baldus (2001), Wright (2018), and their colleagues are the only scholars in their field that broke down strike rates into intersectional identities, such as Black men, Black women, white men, and white women. However, neither discussed the role of intersectionality in their separate analyses. Though, by the very nature of peremptory strike research, this intersectional analysis ultimately proves unable to determine what *exactly* influenced attorneys' peremptory strike decisions in seven Arkansas capital trials, it nevertheless acts as an extension of the work previously done by Baldus (2001) and Wright (2018) by applying Crenshaw's (1989) intersectional framework to the jury selection process and analyzing a data source that has never before been studied: Arkansas capital cases.

Figure 1. Model of the Role of Race & Gender in Peremptory Strike Decisions

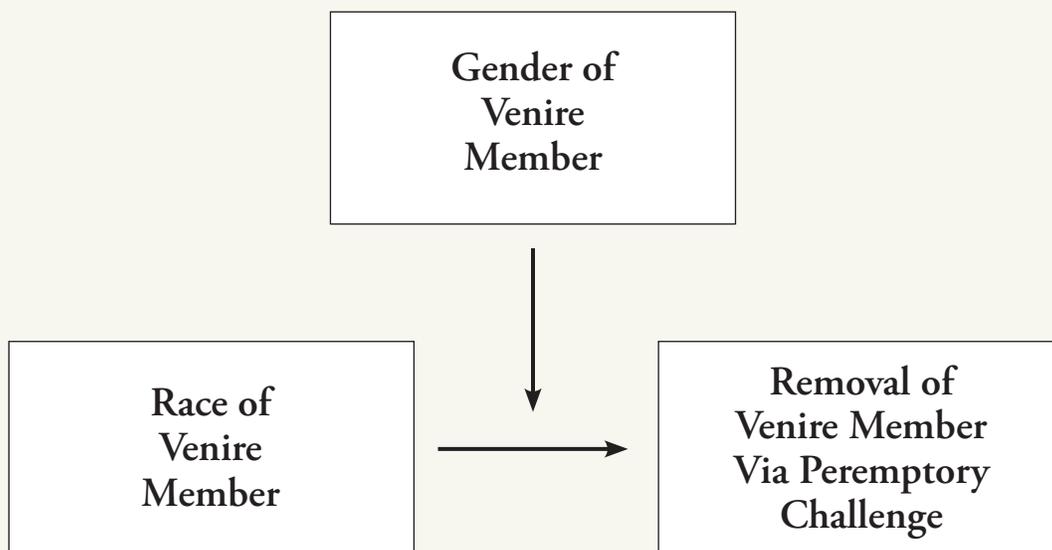


Table 1. Expected Likelihood of Peremptory Strike

Model	Independent Variables	Corresponding Dependent Variable Values
Race & Gender Identity of Venire Member → Likelihood of Prosecutorial Peremptory Strike	Black Men	Expect highest likelihood of peremptory challenge
	Black Women	Expect high likelihood of peremptory challenge
	White Men	Expect lowest likelihood of peremptory challenge
	White Women	Expect low likelihood of peremptory challenge
Race & Gender Identity of Venire Member → Likelihood of Defense Peremptory Strike	Black Men	Expect low likelihood of peremptory challenge
	Black Women	Expect lowest likelihood of peremptory challenge
	White Men	Expect highest likelihood of peremptory challenge
	White Women	Expect high likelihood of peremptory challenge

RESEARCH DESIGN

In order to examine the intersectionality of peremptory challenges in the jury selection process, I analyze the *voir dire* processes of seven Arkansas Death Row capital cases with Black defendants. I thus utilize a small-n case study research design, with 211 venire members to be included in the final statistical analysis of the data. My independent variables are prosecutorial/defense peremptory strikes in Arkansas capital cases, and my dependent variable is the rate at which each intersectional identity—Black men, Black women, white men, and white women—is struck peremptorily from the jury. Only one venire member did not fit within this Black/white dichotomy: a Hispanic woman who was ultimately struck by the state. In order to draw more succinct conclusions about perceptions of white men, white women, Black men, and Black women in the jury selection process, this individual was ultimately removed from the analysis.

My research faces some limitations due to the small sample size of capital cases analyzed, the inability to determine the race of every venire member, and the nature of the small-n case study research design. It is important to note that this is primarily exploratory research; however, I am attempting to determine *if* a relationship can be established between prosecutorial/defense strike patterns and intersectional identities, first and foremost. While a small-n case study may have its limitations, such a research design allows me to draw conclusions—albeit narrow ones—of whether the intersection of race and gender uniquely affects venire members’ likelihood of being peremptorily challenged.

Nevertheless, the internal validity of my research is boosted by the ability to control for several trial characteristics

including the race of the defendant, the severity of the crime, and the state where these trials occurred. Specifically, all data are derived from the jury selection processes of Black defendants facing capital charges in the state of Arkansas from 1995 - 2015. Four of these trials were decided in rural counties and three were decided in urban counties, mirroring Arkansas’s rural/urban county divide during this period; in 2011, just over half of the state’s counties were composed of less than 20,000 people (University of Arkansas Division of Agriculture 2011). Meanwhile, the external validity of this analysis is enhanced by Arkansas being a “typical case,” where gender and race-based jury selection is likely to be found and upheld by the court (Howard 2017, 127). After all, the Arkansas Supreme Court has acknowledged the pervasiveness of race-based peremptory challenges on at least ten separate occasions (Stevenson 2010).

DATA SOURCES & OPERATIONALIZATION

The trial transcripts that I utilize for my research were provided to me by the Arkansas Habeas Corpus Capital Unit, an organization of federal public defenders that represent nearly a third of those currently on Arkansas’s Death Row. Despite the significant role that these lawyers played in these trials’ jury selection processes, however, there is no threat of bias being portrayed within the transcripts themselves. Transcripts are written by court stenographers, independent of both the prosecution and defense, and are thus impartial and complete records of a trial’s *voir dire* process. Within these transcripts, I was able to determine the names and gender of the potential jurors, the way they might have been struck (for cause or

peremptorily), and the questions asked to the venire members by the prosecution and defense. The race of the jurors was not always explicitly stated in these trial transcripts, so jury questionnaires, public records searches, and appeals made by the defense were utilized to supplement my research whenever they were available.

It is possible, however, that the examination of trials represented by federal public defenders may be indicative of just one type of capital trial: those with defendants that cannot afford to hire private counsel. Thus, I analyze the trial transcripts of capital cases with poor, Black defendants. Though some may argue that this could limit my data, I would assert that such characteristic acts as a further control to my analysis of how prosecutors and defense attorneys exercise peremptory strikes against venire members. Both the prosecution and defense are making strike decisions based upon the identity of the defendant as a poor, Black male, not a wealthy Black man who might be both well-connected and able to escape the violent stereotypes associated with poor Black men.

In the following analysis, the trial transcripts are measured and analyzed in terms of the intersectional identities of the venire members. As the jury selection process played out within these documents, potential jurors were placed into one of four categories: Black men, Black women, white men, and white women. The race of twenty venire members could not be determined altogether. From there, they were categorized once more, dependent upon whether they were peremptorily struck by the prosecution, the defense, or at all. A coding protocol for the analysis of the trial transcripts can be found in Appendix A.

METHODOLOGY

To examine the relationship between my independent variables—Black men, Black women, white men, and white women—and two dependent variables, prosecutorial and defense peremptory strike patterns, I conduct two separate statistical analyses. Both statistical analyses were administered in Excel and compare the number of venire members struck to all those present at the beginning of the peremptory process. To coincide with this statistic, the number of those passed by the defense or prosecution was compared to the total number analyzed. A two-way ANOVA test analyzed whether the differences in prosecutorial and defense peremptory strike rates

between intersectional identities were statistically significant.

To illustrate the importance of intersectional analyses of peremptory strike patterns, I also include four tables that exclusively analyze race-based and gender-based prosecutorial/defense strike patterns. I followed the same protocol as before, with the total number struck and passed compared to the total present in the analysis, though I examine race and gender as two separate entities; Black and white members were examined independently of male or female analyses. A chi-squared test was utilized to determine statistical significance in strike patterns between racial and gender identity, and these statistics were compared to the analysis of intersectional identities in order to illuminate any discrepancies that arise in the data.

ANALYSIS & DISCUSSION

Despite the broad range of research examining the separate roles of race and gender in the jury selection process, very few scholars have focused exclusively on how both the prosecution and defense take intersectional identity into account when exercising peremptory challenges. To do just this, I analyzed the peremptory strike decisions made by the prosecution and defense in seven Arkansas capital cases. In each trial, the jury panel decided the defendants to be guilty and sentenced them to death. A total of 210 otherwise venire-eligible prospective jurors were analyzed, with 119 of these venire members ultimately being peremptorily struck from the jury. Among those eligible to be peremptorily challenged, thirteen (6.19%) were Black men, fifteen (7.14%) were Black women, 74 (35.24%) were white men, and 88 (41.9%) were white women. The race of twenty (9.52%) venire members could not be determined.

Even before accounting for the combination of racial and gender identity, some prosecutorial peremptory strike patterns begin to emerge from the *voir dire* processes of these seven Arkansas capital cases. In the analysis of 211 venire members, prosecutors exercised peremptory challenges at significantly higher rates against Black venire members than against white venire members; as indicated in Table 2, only 12.96% (22/162) of venire-eligible white men and women were removed from the jury, compared to 53.57% (15/28) of Black venire members. A p-value of less than .01 indicates that these results are statistically significant and supposes with 99% confidence that the null hypothesis is void. This is consistent with the findings of previous literature that examined

Table 2. Prosecutorial Peremptory Strike Patterns Across Racial Identities

	Black	White	Unknown	Total
Struck	15 (53.57%)	21 (12.96%)	2 (10%)	38 (18.1%)
Passed	13 (46.43%)	141 (87.04%)	18 (90%)	172 (81.9%)
Total	28 (100%)	162 (100%)	20 (100%)	210 (100%)

Table 3. Prosecutorial Peremptory Strike Patterns Across Gender Identities

	Men	Women	Total
Struck	14 (14.74%)	24 (20.87%)	38 (18.1%)
Passed	81 (85.26%)	91 (79.13%)	172 (81.9%)
Total	95 (100%)	115 (100%)	210 (100%)

Table 4. Prosecutorial Peremptory Strike Patterns Across Intersectional Identities

	Black Men	Black Women	White Men	White Women	Unknown	Total
Struck	5 (38.46%)	10 (66.66%)	8 (10.81%)	13 (14.77%)	2 (10%)	38 (18.1%)
Passed	8 (61.54%)	5 (33.33%)	66 (89.18%)	75 (85.23%)	18 (90%)	172 (81.9%)
Total	13 (100%)	15 (100%)	74 (100%)	88 (100%)	20 (100%)	210 (100%)

peremptory strikes solely with regards to a venire member’s race, and these results are not particularly surprising when examined at their face.

An analysis of prosecutorial peremptory strike patterns across male and female venire members also yielded relatively unsurprising results. As indicated in Table 3, the prosecution peremptorily challenged 20.87% (24/115) of the 115 women eligible to serve on the venire. Men, who composed a smaller percentage of the jury pool, were struck 14.74% (14/95) of the time. Ultimately, however, the disparity in prosecutorial strike rates between male and female venire members is not as great as it is between Black and white venire members; the differences in strike rates between men and women were not statistically significant. Therefore, it appears that prosecutors struck male and female venire members more proportionally than they did Black and white venire members in Arkansas capital cases, just as they did in South Carolina and Mississippi (DeCamp 2021; Eisenberg 2017).

The analysis of the peremptory strikes exercised by the defense yielded completely different results. As seen in Table 5, defense attorneys removed white venire members

at slightly higher rates than Black venire members, with the defense striking 37.65% (61/162) of the eligible white venire members and 25% (7/28) of the eligible Black venire members. However, the difference between these respective strike rates was much smaller than prosecutorial strike rates across racial identities; the defense struck white venire members at a rate that was just 12.65% higher than Black venire members, while the prosecution struck Black venire members at a rate that was 40.61% higher than the rate at which they struck white venire members. Further, unlike prosecutorial strike decisions across race, defense peremptory strike patterns across race were found to be insignificant, holding a p-value greater than 0.5, and the null hypothesis was thus not voided. While it is likely that such values may not totally reflect the totality of the defense’s strike patterns due to the existence of twenty “unknown” venire members, these findings nevertheless align with previous research within the field that found there to be no significant difference between defense strike rates across racial identities (Wright, Chavis, and Parks 2018).

Similarly, defense attorneys invoked peremptory challenges against male and female venire members at nearly identical rates.

Table 5. Defense Peremptory Strike Patterns Across Racial Identities

	Black	White	Unknown	Total
Struck	7 (25%)	61 (37.65%)	12 (60%)	80 (38.1%)
Passed	21 (75%)	101 (62.35%)	8 (40%)	130 (61.9%)
Total	28 (100%)	162 (100%)	20 (100%)	210 (100%)

	Men	Women	Total
Struck	37 (38.95%)	43 (37.39%)	80 (38.1%)
Passed	58 (61.05%)	72 (62.61%)	130 (61.9%)
Total	95 (100%)	115 (100%)	210 (100%)

As indicated in Table 6, the defense struck 38.95% (37/95) of the venire’s eligible men and 37.39% (43/115) of its eligible women, meaning that men were struck at a rate that was just 1.56% higher than women. In fact, a chi-squared test rendered these differences in male and female strike rates insignificant. These findings contradict previous research, which suggests that the defense strikes men at greater rates than women (Craft 2018; Eisenberg 2017). However, these numbers may not be truly reflective of the strike patterns of Arkansas defense attorneys; a single capital case, in which the defendant was accused of murdering two women, was responsible for twelve of the 32 strikes that the defense exercised against women as a whole. Without this case, women would have been struck at a rate of 29.81% (31/104), which is considerably less than that of men and aligns more clearly with the results of existing literature on peremptory strike patterns of defense attorneys (Craft 2018; Eisenberg 2017). Nevertheless, these findings align with previous research within the field that found there to be no significant difference between defense strike rates across gender identities (Wright, Chavis, and Parks 2018).

Once again, however, a more complete understanding of how Arkansas defense attorneys exercise race-based peremptory strikes can potentially be acquired when one examines peremptory strikes across intersectional identity. As seen in Table 7, the defense struck white men (37.84%) and white women (37.5%) at almost identical rates, followed by Black men (30.77%), and Black women (20%). Therefore, unlike the prosecution, which disproportionately invoked peremptory strikes across intersectional identities, defense attorneys challenged white men and white women the most and at rates that were nearly identical to one another; only 0.34% separated the strikes rates of white men and women. As stated in the

analysis of defense peremptory strikes across gender, however, this may be in part due to the strike decisions of a single capital case, in which the defense exercised eleven of their thirteen peremptory challenges against white women. Without this trial, white women would have been struck at a rate of 31.37% from the venire, which is just slightly higher than the strike rate of Black men.

Meanwhile, the defense struck Black men at a rate that was 10.77% higher than the rate at which they removed Black women, suggesting that the intersectional identity of the venire member mattered most to the defense attorney when the prospective juror was Black. The magnitude between the strike rates of Black men and Black women, however, is likely due in part to the small number of Black venire members that were present at the peremptory stage of *voir dire*. If just one more Black woman was struck by the defense, the rate at which they were struck (26.67%) would be within 4.1% of Black men. Further, when compared to the difference between prosecutorial strike rates across Black men and women, 10.77% is relatively small; as a reminder, prosecutors invoked peremptory strikes against Black women at a rate that was 28.2% higher than the rate at which they struck Black men. That said, the difference in strike rates across intersectional identities was not statistically significant and the null hypothesis was upheld. A complete breakdown of the results of the two-way ANOVA test can be found in the Appendix.

Therefore, across both prosecutorial and defense peremptory strike patterns, the intersectional identity of a venire member did *not* appear to have a significant effect on peremptory strike decisions. In fact, in the six analyses of seven Arkansas capital trials with Black defendants, only one acquired statistical significance: prosecutorial peremptory strike

	Black Men	Black Women	White Men	White Women	Unknown	Total
Struck	4 (30.77%)	3 (20%)	28 (37.84%)	33 (37.5%)	12 (60%)	80 (38.1%)
Passed	9 (69.23%)	12 (80%)	46 (62.16%)	55 (62.5%)	8 (40%)	130 (61.9%)
Total	13 (100%)	15 (100%)	74 (100%)	88 (100%)	20 (100%)	210 (100%)

patterns across racial identities. Meanwhile, neither gender nor intersectional identity appeared to play a significant role in prosecutorial peremptory strike decisions, and neither gender, intersectional identity, *nor* race appeared to play a significant role in the peremptory strike decisions of Arkansas defense attorneys.

Even so, it is impossible to know precisely why prosecutors struck Black venire members, not white venire members, at the highest rates from the jury, or even why they struck Black venire members at higher rates at all. The peremptory challenge, unfortunately for its researchers, functions precisely to conceal—to hide the intentions and aims of the legal counsel from all those in the court. Previous research points to overly simplistic beliefs harbored by the prosecution that Black jurors are biased towards Black defendants, harboring anti-governmental bias that may lead them to doubt testimonies from police officers or hold reservations against the death penalty (Baldus et al. 2001; Grosso and O'Brien 2012). Earlier in this paper, I endorsed a similar theory.

Besides speculation, however, the only means of understanding prosecutors' peremptory challenges of Black venire members is to examine the race-neutral reasonings they gave the court when the defense invoked a Batson challenge. Surprisingly, most prosecutors cited a venire member's reservations against the death penalty. Of the nine Black venire members whose removals were Batson challenged, in fact, six were supposedly due to these death penalty reservations, the others purportedly being struck because the prosecutor tried their family members (4), they were sleeping in court (1), they would not be able to understand DNA evidence (1), or they were not making eye contact (1) (the defense contested this, arguing that the venire member had a physical disability causing their eyes to be "crooked"). While it is impossible to tell whether the prosecutors truly believed the race-neutral reasonings they were giving, such findings do align with previous research that suggests that the prosecutors in capital cases primarily strike Black venire members on the basis of holding reservations against the death penalty (Grosso and O'Brien 2012).

CONCLUSION

Since the Supreme Court declared the striking of jurors on the basis of their race to be unconstitutional in the 1986 ruling of *Batson v. Kentucky*, the courts have extended Batson protections to include the gender, religion, and ethnicity of venire members. They have stopped short, however, of determining one's intersectional identity to be worthy of the same protection, allowing judges to point to members of one's separate racial and gender identities sitting on the jury panel as the means to allow for venire members' continued exclusion. The preceding analysis of seven Arkansas capital trials rejects the initial hypothesis that the race and gender of a venire member intersect to affect their likelihood of

being peremptorily challenged, though paints a more familiar picture about how litigators, particularly prosecutors, exercised peremptory challenges according to a venire member's separate racial and gender identities.

The patterns revealed from the peremptory strike decisions of Arkansas defense attorneys, however, are relatively unsurprising, despite contradicting my initial hypothesis. The above analyses of peremptory strike decisions across racial, gender, and intersectional identities, found there to be no significant pattern at all; Arkansas defense attorneys peremptorily struck Black and white, men and women, Black men, Black women, white men, and white women at relatively proportional rates.

The same cannot be said for Arkansas prosecutors. While they exercised peremptory strikes relatively proportionately across gender and intersectional identity, Arkansas prosecutors disproportionately struck Black venire members from the venire. In the seven capital trial transcripts that were analyzed, prosecutors removed Black venire members at more than four times the rate of white venire members; of the 38 peremptory strikes that they exercised, 53.57% (15/38) were against Black prospective jurors, despite Black venire members composing only 13.27% of the venire. Though gender and intersectional analyses of their peremptory strike decisions indicated that Arkansas prosecutors struck women and Black women at the highest rates from the jury, these variances were ultimately determined not to be statistically significant. Therefore race, not intersectional identity, appears to have been the aspect of a venire member's identity that was most influential in prosecutorial peremptory strike decisions in Arkansas capital cases, just as previous empirical analyses have suggested (Craft 2018; DeCamp 2021; Flanagan 2018; Rose 1999; Wright, Chavis, and Parks 2018).

While these results do not suggest that intersectional identity influenced peremptory strike decisions in Arkansas capital cases, the peremptory strike patterns of one trial, in particular, indicate that *whether* intersectional identity matters may depend upon the intersectional identity of the crime's victim. In the trial of a Black defendant accused of murdering two white women, Arkansas defense attorneys exercised 84.61% (11/13) of their peremptory strikes against white women. Though this pattern was only obvious in one of the seven analyzed capital trials, further research is necessary to determine whether this is unusual or part of a larger trend in peremptory strike decisions.

However, future research about the role of intersectional identity in the jury selection process should not end there. All subsequent research should aim to incorporate intersectional discussions and analyses into their work, even if there may not always be evidence that they played a significant role in the jury selection process. Describing strike patterns in terms of Black, white, male, and female venire members fails to acknowledge the different ways in which systems of oppression manifest themselves in the identities of venire members to potentially

affect attorneys' perceptions of them. While this body of research did not conclude that the strike decisions of Arkansas attorneys were influenced by the intersectional identity of a prospective juror, it faced limitations due to the small sample of venire members analyzed. Meanwhile, previous analyses of peremptory challenge patterns that found evidence of strikes based upon intersectional identity were noteworthy for just how *large* of a data set they utilized; Wright analyzed nearly 30,000 prospective jurors, while I analyzed just 210 (2018).

Despite its limitations, however, the preceding analysis of seven Arkansas capital trials is noteworthy on several fronts. First, it is the first research of this kind to take place in Arkansas, where the Arkansas Supreme Court has overturned a conviction on the basis of *Batson* (1986) as recently as June of 2019 (LaRowe 2019). The trials of nearly half of the Black men sitting on Arkansas' Death Row are represented in such analysis, illustrating the potential implications prosecutorial manipulation of the juries may have had—and may continue to have—in Arkansas capital trials. Second, this article represents the only in the field to focus exclusively on peremptory strike patterns across intersectional identity and to do so in conversation with broader analyses of peremptory strike patterns across racial and gender identity. While this article does not find that Arkansas prosecutors or defense attorneys exercised peremptory strikes disproportionately across intersectional *or* gender identity, it does suggest that the state's prosecutors disproportionately strike Black prospective jurors from the venire. As the American courts continue to grapple with the implications of *Batson v. Kentucky* (1986), this article indicates that race-based peremptory strikes are alive and well in Arkansas capital trials, 34 years after the Supreme Court declared them to be unconstitutional. ■

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APPENDIX

Trial Transcript Coding Protocol A1

MR. LONG: Your Honor, I would ask that the Court to show for the record, that the Defendant has exercised two peremptory challenges in this go around. One of them is

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against a white male, Mr. Oxner and the other against a white female, Ms. Wilson. I don't ask for anything else. I just want that noted for the record.

Trial Transcript Coding Protocol A2

Defendant	Name of Juror	Race	Gender	Peremptory	By Whom
Johnson	Mr. Oxner	White	Male	1	Defense
Johnson	Ms. Wilson	White	Female	1	Defense

APPENDIX (CONT'D)

ANOVA Table of Defense Intersectional Peremptory Strikes A3					
Source of Variation	Sums of Squares	Degrees of Freedom	Mean Squares	F	p-value
Between rows	SSR=0.4602	$r-1=6$	$MSR=0.46026=0.0767$	$0.07670.0724=1.0591$	0.4219
Between columns	SSC=0.2024	$c-1=3$	$MSC=0.20243=0.0675$	$0.06750.0724=0.9317$	0.4962
Error (residual)	SSE=1.3035	$(r-1)(c-1)=18$	$MSE=1.303518=0.0724$		
Total	SST=1.9661	$rc-1=27$			

ANOVA Table of Defense Intersectional Peremptory Strikes A4					
Source of Variation	Sums of Squares	Degrees of Freedom	Mean Squares	F	p-value
Between rows	SSR=0.1413	$r-1=6$	$MSR=0.14136=0.0235$	$0.02350.0798=0.2952$	0.9313
Between columns	SSC=0.5173	$c-1=3$	$MSC=0.51733=0.1724$	$0.17240.0798=2.1618$	0.0958
Error (residual)	SSE=1.4357	$(r-1)(c-1)=18$	$MSE=1.435718=0.0798$		
Total	SST=2.0942	$rc-1=27$			