DUE PROCESS AND CRIMINAL TRIALS
OPERATION PROTECT AND DEFEND – 2024-25 PROGRAM

Many people have seen parts of a criminal trial, either on television or occasionally in person. This year's curriculum focuses on the constitutional underpinnings of a criminal jury trial.

The source of much of the relevant constitutional law in a criminal trial is the Due Process Clause, contained in the Fifth and Fourteenth Amendments to the United States Constitution, and the Sixth Amendment.

The Fifth Amendment states "[n]o person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law."

The Fourteenth Amendment provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Sixth Amendment states, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."

Under the Incorporation Doctrine, those rights enumerated in the Bill of Rights that are "fundamental to the concept of ordered liberty" apply to the states through the Due Process Clause of the Fourteenth Amendment.

When presiding over jury trials, judges are required to "instruct" the jury throughout the case. The judge must tell the jurors what the law is and define certain concepts in order to ensure that the jury properly applies the law to the factual evidence that the jury hears during the trial.

2024-25 Curriculum

This year's program will address due process in criminal trials with an emphasis on the following: the presumption of innocence, burden of proof, the privilege against compelled self-incrimination, and the right to a jury chosen by a process free from discrimination on the basis of race or gender. As part of the discussion of the right to jury trial, the curriculum will focus on concepts that are frequently misunderstood by prospective jurors.

These materials include summaries of the following cases:

-*Cage v. Louisiana,* 498 U.S. 39 (1990)
-*Griffin v. California*, 380 U.S. 609 (1965)
-*Batson v. Kentucky*, 476 U. S. 79 (1986)
-*People v. Nadey*, 16 Cal.5th 102 (2024)

And the following California statutes:

-Code of Civil Procedure section 231.7
-Penal Code section 745 "The Racial Justice Act"

Proof Beyond a Reasonable Doubt

In the American legal system, there are different burdens of proof. A burden of proof is the legal standard by which the party bringing the lawsuit must prove its case. In most civil cases, the burden of proof is preponderance of the evidence. This means more likely than not or a little bit more than 50% probability. This is the easiest, or least strict, standard applied by finders of fact in court cases.

In criminal cases, the courts are required by the Due Process Clause to use the highest standard of proof available in our legal system, proof beyond a reasonable doubt. This has historically been difficult to define. In California, judges are limited to reading to the jury the following definition: "Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt." (CALCRIM No. 220.)

The principle that criminal cases must be proven beyond a reasonable doubt has been long established. The "demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, [though] its crystallization into the formula 'beyond a reasonable doubt' seems to have occurred as late as 1798." (*In re Winship* 397 U.S. 358, 361 (1970), quoting C. McCormick, Evidence § 321, pp. 681-682 (1954)).

The proof beyond a reasonable doubt standard was reviewed in *Cage v. Louisiana*.

In *Cage*, the Supreme Court quoted the seminal case of *In re Winship* stating:

This reasonable-doubt standard "plays a vital role in the American scheme of criminal procedure." Among other things, "it is a prime instrument for reducing the risk of convictions resting on factual error."

Winship had found that "[t]he standard provides concrete substance for the presumption of innocence -- that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.' "

Presumption of Innocence

The requirement that guilt be proven beyond a reasonable doubt goes hand in hand with the presumption of innocence. The presumption of innocence dates back to at least the second or third century from the Roman emperor Justinian. There it was written as "Proof lies on him who asserts, not on him who denies." More commonly it is characterized as innocent until proven guilty.

In California, judges are required to tell juries about the presumption of innocence as follows:

"The fact that a criminal charge has been filed against the defendant is not evidence that the charge is true. You must not be biased against the defendant just because he or she has been arrested, charged with a crime, or brought to trial. A defendant in a criminal case is presumed to be innocent." (CALCRIM No. 220.) This presumption requires that the People prove each element of a crime beyond a reasonable doubt.

Right Against Self-Incrimination

Another fundamental principle of criminal law is the right against compelled self-incrimination. To incriminate means to show evidence of involvement in a crime.

A defendant in a criminal trial has a constitutional right under the Fifth Amendment not to testify at his or her own trial. Since the prosecution has the burden of proof, the defendant is not obligated to say anything or even produce any evidence. In presenting his or her case at trial, the accused may rely on the state of the evidence and the presumption of innocence. The defense in the case can consist entirely of showing the weakness of the prosecution's case through cross-examination of the prosecution witnesses and argument to the jury. When one party has called a witness to testify, cross-examination is when the opposing party is able to ask that witness questions. Some have described cross-examination as "the greatest legal engine ever invented for the discovery of truth." (John H. Wigmore, quoted in *Lilly v. Virginia*, 527 U.S. 116 (1999).)

As the *Griffin v. California* case points out, if the accused chooses not to testify, the prosecution may not comment on that choice, otherwise that right would be significantly weakened. Commenting on or criticizing the defendant's decision not to testify penalizes the defendant for exercising his or her Fifth Amendment rights. This Amendment states "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." *Griffin* pointed out a number of reasons why an accused might choose not to exercise his or her right to testify stating "[e]xcessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offences charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him." A defendant might also choose not to testify because doing so might allow the jury to learn about prior convictions that the defendant has. Prior convictions can sometimes be introduced into evidence to challenge a witness's credibility while they are testifying.

Right to an Impartial Jury

Jury duty is regarded as vital to the administration of justice and, as such, is considered an obligation of citizens. As one court put it:

> Jurors perform a vital role in the American system of justice. The protection of our rights and liberties is largely achieved through the teamwork of judge and jury who, working together in a common effort, put into practice the principles of our great heritage of freedom. The judge determines the law to be applied in the case while the jury decides the facts. Thus, in a very important way, jurors become a part of the court itself.

> Jurors must be men and women possessed of sound judgment, absolute honesty, and a complete sense of fairness. Jury service is a high duty of citizenship. Jurors aid in the maintenance of law and order and uphold justice among their fellow citizens. Their greatest reward is the knowledge that they have discharged this duty faithfully, honorably, and well. In addition to determining and adjusting property rights, jurors may also be asked to decide questions involving a crime for which a person may be fined, placed on probation, or confined in prison. In a very real sense, therefore, the people must rely upon jurors for the protection of life, liberty, and the pursuit of happiness.

(*Handbook for Trial Jurors,* United States District Court, Southern District of New York.)

Every year in the United States, there are thousands of criminal trials. Many of these cases are tried before a jury. The process by which prospective jurors are questioned is called *voir dire*, meaning to tell the truth. During *voir dire*, the judge and sometimes the attorneys ask questions of the jurors to determine whether they should be excused for cause, such as bias against one side. After the judge has excused jurors for cause, the attorneys are allowed to excuse a certain number of jurors without giving a reason. These are called "peremptory challenges." If a party exercises a peremptory challenge, that juror is excused from the trial. Historically, peremptory challenges were regarded as important in securing a fair trial. "[The] right of challenge is almost essential for the purpose of securing perfect fairness and impartiality in a trial." (W. Forsyth, History of Trial by Jury 175 (1852).)

In the *Batson* case, the United States Supreme Court held that peremptory challenges to prospective jurors may not be exercised for racial reasons and that a judge, upon objection to a peremptory challenge, if it appears that a challenge against a particular juror may have been racially motivated, must inquire as to the basis for the challenge. If the inquiry reveals that the challenge was based on race, the court must deny the challenge to the juror or declare a mistrial, if the juror has already been excused, and then jury selection must start again from the beginning .

Subsequent California statutes, including Code of Civil Procedure 231.7, have applied *Batson* protections to additional protected classes such as ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or the perceived membership of the prospective juror in any of those groups.

Due Process and Criminal Trials: Key Terms

- Fifth Amendment
- Sixth Amendment
- Fourteenth Amendment
- Compulsion
- Concurring Opinion
- Dissent/Dissenting Opinion
- Due Process
- Equal Protection
- Fundamental Rights
- Impartiality
- Implicit Bias
- Incorporation Doctrine
- Independent Judiciary
- Judicial Review
- Jurisdiction
- Peremptory Challenge
- Precedent
- Prejudice
- Presumption of innocence
- Reasonable doubt
- *Voir Dire*

Cage v. Louisiana, 498 U.S. 39 (1990)

Background of the Case:

Cage was convicted in Louisiana of first-degree murder and sentenced to death after a trial in which the jury was instructed:

> If you entertain a reasonable doubt as to … the defendant's guilt, (you must) return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit … This doubt, however, must be a reasonable one … founded upon a real tangible substantial basis and not upon mere caprice and conjecture. It must be such doubt as would give rise to a grave uncertainty. … A reasonable doubt is not a mere possible doubt. It is an actual substantial doubt … that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a moral certainty.

The Louisiana State Supreme Court rejected Cage's argument that the instruction violated the Due Process Clause.

Court Ruling

The United States Supreme Court reversed the decision of the Louisiana Supreme Court, holding that the jury instruction violated Cage's right under the Due Process Clause to be acquitted unless his guilt was proven beyond a reasonable doubt.

Discussion

The Due Process Clause protects the accused in a criminal case against conviction except upon proof beyond a reasonable doubt. This protection is important because it is "a prime instrument for reducing the risk of convictions resting on factual error."

The instruction here was deficient. The words "substantial" and "grave" suggest a higher degree of doubt than is required under the reasonable doubt standard.

The instruction did at one point state that, to convict, guilt must be found beyond a reasonable doubt. But it then equated a reasonable doubt with a "grave uncertainty" and an "actual substantial doubt," and stated that what was required was a "moral certainty" that the defendant was guilty. The words "substantial" and "grave," as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard. Those words together with the reference to "moral," rather than evidentiary, certainty, could be understood by reasonable jurors as allowing a finding of guilt based on a degree of proof below that required by the Due Process Clause.

Critical Thinking Questions

1. Why not allow a criminal conviction based on a probability of guilt (for example, more likely than not)?

2. How sure must a juror be before voting for guilt under the reasonable doubt standard?

3. Should a trial judge be allowed to restate the beyond-a-reasonable-doubt standard in common sense terms in order to help jurors understand it better? How would it do that? Do you see problems resulting from letting each judge come up with their own common sense definition?

4. It's been said that it's better nine guilty people be wrongfully acquitted than one innocent person be wrongfully convicted. Do you agree?

Griffin v. California, 380 U.S. 609 (1965)

Background of the Case

During a first degree murder trial in California, the defendant chose not to testify. The prosecutor commented on this fact with a detailed summary of the circumstances surrounding the crime that the defendant should know about. The prosecutor argued: "These things he has not seen fit to take the stand and deny or explain. And in the whole world, if anybody would know, this defendant would know. [The victim] is dead, she can't tell you her side of the story. The defendant won't."

The judge instructed the jury:

> As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable.

The defendant was convicted and thereafter sentenced to death. The case was appealed and the California Supreme Court affirmed the judgment of the trial court. The defendant then appealed to the United States Supreme Court.

An earlier U.S. Supreme Court case, *Wilson v. United States,* 149 U.S. 60 (1893), had held that a specific federal law barred comment on a defendant's decision not to testify in *federal* proceedings. In other words, in a trial in a federal court for violation of an Act of Congress, as opposed to one in a state court for violation of a state law, like murder. Additionally, the year before hearing and deciding this case, the Supreme Court held in *Malloy v. Hogan,* 378 U.S. 1 (1964) that the Self-Incrimination Clause of the Fifth Amendment of the United States Constitution ("No person…shall be compelled in any criminal case to be a witness against himself….") applied to the individual states by incorporation through the Due Process Clause of the Fourteenth Amendment. What remained undecided was whether the California law permitting comments and instruction, such as occurred here, would actually be a violation of the Self-Incrimination Clause.

Court Ruling

The United States Supreme Court reversed the decision of the California Supreme Court and held that the instructions and the prosecutor's comments violated the Fifth Amendment. Justice William O. Douglas wrote the majority opinion, adopting the same reasoning the Court had previously applied in considering the scope of the protection granted in *Wilson*. There, the Fifth Amendment was deemed to bar comment on a defendant's failure to testify because the Amendment protected those who might not "safely venture on the witness stand though entirely innocent of the charge against him." There was a distinct difference, the Court felt, between what jurors might conclude on their own about a defendant's failure to testify, and what they

might conclude after "the court solemnizes the silence of the accused into evidence against him." Comment or instruction to the effect that the silence of the accused could be considered as evidence of guilt on his part were, therefore, an impermissible "penalty" for exercising a guaranteed right.

Justice Harlan concurred but was concerned about the extension of the Court's recent adoption of the incorporation doctrine.

Justice Stewart dissented from the decision. He claimed that the Court's comments actually were "a means of articulating and bringing into the light of rational discussion a fact inescapably impressed on the jury's consciousness." He felt the comments aided the defendant by cautioning that the defendant's failure to testify "does not create a presumption of guilt or by itself warrant an inference of guilt."

Critical Thinking Questions

1) In some countries, Great Britain for example, a defendant is required to testify. What do you think of this?

2) How difficult do you think it is to testify when one has been accused of a crime?

3) If you read in the newspaper about a defendant in a criminal case who did not take the stand and testify in his own defense, how would you react?

4) Could you be fair as a juror to a defendant who did not testify?

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

Background of the Case

At trial in Jefferson County, Kentucky on a charge of second-degree burglary and receiving stolen goods, the prosecutor used his peremptory challenges to strike all four African-American persons on the venire, the panel of persons from which the jury is selected. Prior case law (*Swain v. Alabama,* 380 U.S. 202 (1965)) had upheld the longstanding rule that no reason needed to be given for peremptory challenges. To require otherwise, would infringe on the use of these challenges. In order to prove discrimination in jury selection, a defendant would have to prove either that people of certain races had been excluded from even being in the pool or show that the prosecutor had used discriminatory challenges over a number of different cases. The latter standard was very difficult to meet, and no defendant had ever met it.

Court Ruling

The United States Supreme Court reasoned that "[a] person's race simply 'is unrelated to his fitness as a juror.' " Justice Powell wrote the majority opinion and held that "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection processes that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice."

While a defendant has no right to a jury composed in whole or in part of persons of his or her own race, the defendant does have a right to a jury composed of a fair cross section of the community. The Court held that the prosecutor's discriminatory use of peremptory challenges was a violation of the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.

The Court fashioned a mechanism by which a defendant could allege discriminatory use of the challenges. In doing so, the Court looked to Title VII of the Civil Rights Act of 1964 for guidance. The defendant must first make a prima facie ("first look" or sufficient on its face) showing of purposeful discrimination. The defendant can do so "solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial" (without regard to other cases.) The trial court can consider all relevant circumstances including: a pattern of strikes against black jurors and the prosecutor's questions and statements during voir dire in exercising his or her challenges.

If the defendant can meet this burden, the burden shifts to the prosecution to provide "a neutral explanation related to the particular case to be tried." In light of both parties' submissions, the court must determine whether the defendant has shown purposeful discrimination. If the defense can show this, the court has several remedies, including ordering a new group of jurors.

The Court cited with approval a California case, *People v. Wheeler*, 22 Cal.3d 258 (1978), which had banned the discriminatory use of peremptory challenges holding that "in this state the right to trial by a jury drawn from a representative cross-section of the community is guaranteed

equally and independently by the *Sixth Amendment to the United States Constitution* and by *article I, section 16, of the California Constitution*."

Concurrence: Justice Thurgood Marshall would have had the Court ban peremptory challenges entirely. He felt that misuse of peremptory challenges had become common and flagrant. Justice Marshall felt that "[a]ny prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons."

The dissent by Chief Justice Burger and (future Chief) Justice Rehnquist took issue with the majority for deciding the case on Equal Protection grounds. The dissent felt that the majority's new limitation to peremptory challenges essentially undermined the main purpose behind peremptory challenges, to allow an attorney to challenge a juror without having to give a specific reason. The dissent cited an example of a hypothetical Asian-American defendant who was on trial for murder before and an all white panel of prospective jurors. If the white jurors denied harboring racial prejudice but the defense did not believe their responses, the defense would have no recourse.

Critical Thinking Questions

1) Should peremptory challenges be prohibited for any other types of categories?

2) Do you agree with Justice Marshall that the Court should ban peremptory challenges entirely?

3) How difficult is it to come up with race neutral explanations for peremptory challenges?

California Case:
People v. Nadey, 16 Cal.5th 102 (2024)

In *Nadey*, the prosecutor struck five of the six African-American potential jurors (the defense attorney struck the sixth). The trial court denied the defense's *Batson-Wheeler* motion, finding that the reasons given by the prosecution were facially and racially neutral.

Justice Corrigan wrote the majority opinion, joined by Justices Guerrero, Kruger, Groban and Jenkins. The majority found that "in each instance the prosecutor's reasons were inherently plausible and supported by the juror's questionnaire responses and voir dire." The majority found that some of the prosecutor's reasons were not supported by the record. The court, nonetheless, accepted these reasons. The court found that one juror's work with welfare recipients might make her sympathetic to the defense or disinclined to impose the death penalty. The same juror had concerns about law enforcement over her husband being stopped for driving while intoxicated. The majority found that a "close relative's negative contact with the criminal justice system is a race-neutral basis for excusal." The majority engaged in comparative juror analysis, comparing accepted jurors' views with those of the stricken jurors and upheld all five peremptory challenges.

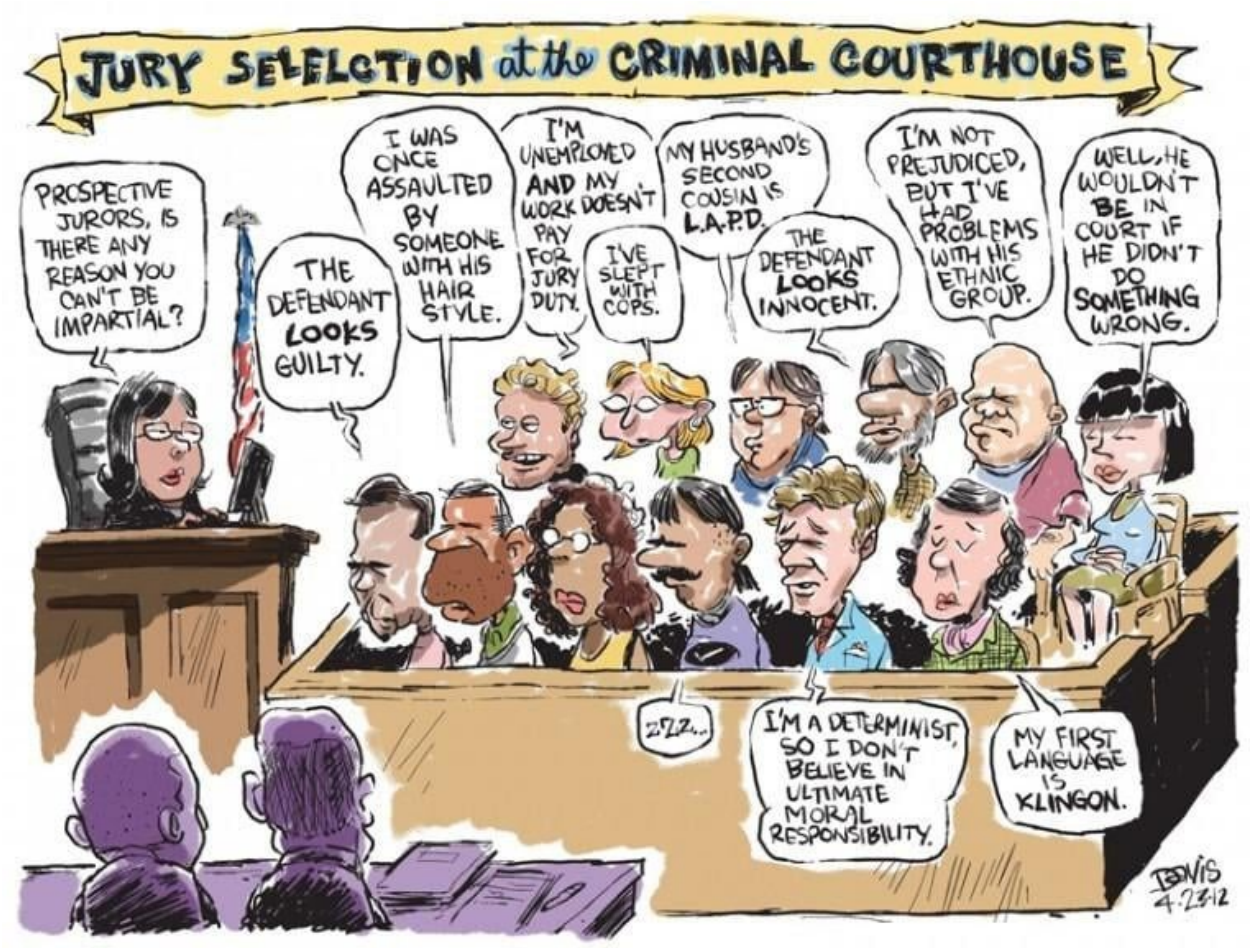
In a strong dissent, Justice Liu, joined by Justice Evans, pointed out that "it has been more than [36] years since this court has found any type of *Batson* error involving the removal of a Black juror." Justice Liu found that the trial court failed to make "a sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror". Justice Liu pointed out that the Legislature had recently passed Code of Civil Procedure section 231.7, which now made many of the prosecutor's reasons for striking the jurors presumptively invalid. Among these reasons were: employment in a field that serves a population disproportionately composed of members of a certain race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation (such as social services); distrust of or having a negative experience with law enforcement or the criminal legal system; and not being a native English speaker. Justice Liu felt that "[t]his court should not lag behind the Legislature when it comes to ensuring the fairness of our justice system."

Question: Does it matter that in *Nadey* the defense used one of their challenges on the sixth African-American juror? Why?

A minor issue in *Nadey* was poems written by a juror and whether that affected the juror's ability to be fair. One of the poems read:

JUROR RESPONSIBILITY
The responsibility of someone's life in your hand—
Only a juror would understand.
Is he guilty? Or is he not?
In your mind this battle's fought.
If there is a reasonable doubt,
"Not guilty," the jury will shout.
If the evidence is so compelling,
"Guilty," is what they'll be yelling.
Justice certainly will prevail
If a guilty man is put in jail.
An innocent man shall be free.
These decisions are up to WE.
WE as a jury need to find
If—or if not—he did the crime.
Clear up any of your confusion
Before you come to your conclusion.
Remember WE all must agree

Question: Do you believe this poem is grounds for dismissing this potential juror? Why or why not?



Critical Thinking Questions

1. Describe the action taking place in the cartoon.

2. What is the message of the cartoon? Is there a biased point of view?

3. What interest groups would agree or disagree with the cartoon's message? Why?

Peremptory Challenge Hypothetical

The following is based on a real Sacramento County case.

Alex, Casey, and Sam, who are all white, are coming back from a long day boating and drinking on the river. As they turn right onto Broadway, another car occupied by Jody and Morgan who are African-American, comes from opposite them and turns left, coming close to them. Alex, Casey, and Sam allege that the car then cuts them off. At the next traffic light, words are exchanged and one of the boaters is alleged to have used a racial slur. Jody and Morgan pull into the gas station to get gas. Alex, Casey, and Sam stop their car at the next building and run back to the gas station and proceed to begin fighting with Jody and Morgan. Alex, Casey, and Sam are arrested and charged with assault with an enhancement for committing a hate crime. They request a jury trial and the trial commences with jury selection.

You are the defense attorney. What kind of jurors would you want? Suppose you are the prosecutor. What kind of jurors would you select?

Prospective juror #1 is an African-American woman. She is a teacher with a sister in law enforcement. She is married with two high-school age children.

Should either side be able to use a peremptory challenge on her? On what basis?

How easy should it be to show discrimination in jury selection?

How do you feel about peremptory challenges?

“The California Racial Justice Act of 2020, Explained”

- April 22, 2024 By Hoang Pham & Amira Dehmani

The following article has been edited for length

The [Racial Justice Act (RJA)] allows for the reversal or modification of a conviction or sentence even without the racial bias being shown to have altered the trial outcome. [A recent ruling has] generated optimism from supporters of reform, who expect the law to help reduce the impact of racism in the state’s justice system. But the RJA has also been criticized harshly by those who believe it will clog the court system, produce unjust outcomes for victims, and treat defendants differently based on their race.

What is the California Racial Justice Act of 2020?

Challenging criminal convictions or sentences as racially discriminatory is very difficult, due in part to the seemingly impossible standard set in 1987 by the U.S. Supreme Court in *McCleskey v. Kemp*. That decision established that a defendant must “prove that the decisionmakers in *his* case acted with discriminatory purpose” and cannot rely solely on statistical studies showing discrimination broadly. The defendant must offer evidence “specific to his own case that would support an inference that racial considerations played a part in his sentence.” Defendants are rarely successful in meeting that standard. However, because Supreme Court decisions establish a “constitutional floor”, states have the power to legislate and provide greater protections—which California did in 2020 with the RJA.

The RJA, or AB 2542, states that the “state shall not seek or obtain a criminal conviction or seek, obtain, or impose a sentence on the basis of race, ethnicity, or national origin.” Specifically, a violation under the RJA can be established [by relying on statistical data and] when:

- a judge, attorney, law enforcement officer, expert witness, or juror in the case “exhibited bias or animus towards the defendant because of the defendant’s race, ethnicity, or national origin”;
- racially discriminatory language about the defendant’s race, ethnicity, or national origin was used in the criminal legal process, “or [a judge, attorney, law enforcement officer, expert witness, or juror] otherwise exhibited bias or animus towards the defendant . . . whether or not purposeful”;
- race was a factor in the usage of peremptory challenges;
- the defendant was charged or convicted of more serious offenses than defendants of other races who commit similar offenses, and the evidence establishes “that the prosecution more frequently sought or obtained convictions for more serious offenses against people who share the defendant’s race”; or

- when a longer or more severe sentence was imposed on the defendant when compared to other individuals convicted of the same offense, and "longer or more severe sentences were more frequently imposed for that offense on people that share the defendant's race."

Under the RJA, if a court finds a violation, they are required to impose a remedy specific to the violation from a set list of remedies:

- If a judgment has not yet been entered, the court may: reseat a juror removed by use of a peremptory challenge; declare a mistrial; empanel a new jury; and in the interest of justice, "dismiss enhancements, special circumstances, or special allegations, or reduce one or more charges."
- If a judgment has been entered and the court finds the conviction was "sought or obtained in violation of" the RJA, the court "shall vacate the conviction and sentence, find that it is legally invalid, and order new proceedings consistent" with the RJA.

Once a violation has been established, a prosecutor can no longer seek the death penalty. . . .

. . .

What do supporters say about the Racial Justice Act?

Assemblymember Ash Kalra (D-San Jose), the RJA's primary author, suggested that the law serves as a "countermeasure" to *McCleskey*, arguing that the decision "established an unreasonably high standard for victims of racism in the criminal legal system that is almost impossible to meet without direct proof that the racially discriminatory behavior was conscious, deliberate and targeted." The RJA would therefore help the state of California "take an important step in prohibiting the use of race and ethnicity as a factor in the state's justice system across the board."

Kalra and other supporters believe the RJA will reduce racial disparities in California's criminal justice system—disparities which are well documented. For example, according to a 2021 report by the California Budget & Policy Center, people of color continue to be overrepresented in state prisons. The report notes that despite reforms to California's criminal laws, such as Proposition 47 which reclassified certain drug and property crimes as misdemeanors, disparities have actually widened for Black men, who were incarcerated at a rate 9.6 times that of White men in 2019 as compared to 9.1 in 2010.

Furthermore, research by Professors Colleen Chien, W. David Ball, and William Sundstrom reported that "Black Californians are nearly three times as likely to have an arrest record as White Californians, four times as likely to have at least one felony conviction, and six times as likely to have received at least one incarceration sentence." The authors said the RJA "gives by state statute what the *McCleskey* decision foreclosed constitutionally—a pathway to relief based solely on evidence of unexplained racial disparity."

What do critics say about the Racial Justice Act?

While the RJA has been considered a win for advocates, there remains much criticism. Heather Mac Donald, a fellow at the Manhattan Institute, has argued that the RJA "will produce unequal justice for victims as well as offenders." She posits that racial disparities in incarceration reflect disparities in who is more likely to commit criminal offenses. Citing police department data, Mac Donald said, "In Los Angeles, Blacks are 21 times as likely as Whites to commit a violent crime, 36 times as likely to commit a robbery, and 57 times as likely to commit a homicide." She further argued that the RJA will have a disproportionate impact on Black victims, stating that the victims and witnesses who contribute to police department data are "themselves disproportionately Black . . . [and] are 17 times as likely to be homicide victims as Whites."

Some have also claimed that the RJA perpetuates reverse discrimination towards White defendants. . . . [For example, c]onsider a Black and White person who together commit the same crime, and are charged exactly the same—both with more serious offenses than others who commit a similar crime. Under the RJA, the Black defendant may be able to use statistical data to argue that the prosecution more frequently sought these types of convictions against other Black defendants, while that argument might be foreclosed for the White defendant if the same disparity doesn't exist for other White defendants. In this scenario, although the Black defendant would be entitled to remedies under the RJA, the White defendant would not—even though they were both charged with the same crime.

As the bill made its way through the California legislature, the California District Attorneys Association (CDAA) and California State Sheriffs' Association stood in opposition to the RJA. Specifically, the CDAA argued that the bill would require "lengthy and costly evidentiary hearings involving the testimony of attorneys, law enforcement officers, jurors, experts, or other members of the criminal justice system," which would "grind the system to a halt." These practical concerns are why they were particularly opposed to the bill not requiring a showing of intentional discrimination.

Criticism didn't just come from prosecutors. At the recent California Racial Justice Act Symposium hosted by Berkeley Law, Lisa Romo, an attorney at the Office of the State Public Defender, noted, "There's not enough money; we have defenders who are overwhelmed and not enough staff to process all the requests coming in. We desperately need more resources. The legislature just appropriated $2 million just for retroactive RJA claims, which is appreciated, but that's just a drop in the bucket because so many people need assistance." Additionally, UC Berkeley Goldman School of Public Policy Professor Mia Bird suggested that because data is so heavily decentralized, "It's not assembled in a way that can be used for research purposes, and may fail to account for differences at earlier stages of the criminal legal process."

For an example of how the RJA has been used in a recent case, listen to this episode of the podcast, The Bay. Warning: A single instance of profanity is used in this podcast.

How the Racial Justice Act Could Shake Up California's Criminal Court System | KQED

Critical Thinking Questions for podcast

1) Do you think the RJA will reduce discrimination in our justice system? Why or why not?

2) How difficult do you think it will be to obtain the data to support an RJA claim?

Now think of the details of the murder case in Antioch:

3) Four men were charged with murder and attempted murder with gang enhancements. How do the gang enhancements relate to the RJA?

4) How did lawyers get the enhancements dropped using RJA?

5) How do the text messages have an impact on the case? What does the judge decide to do?

6) What are some of the things that will slow down use of the RJA?

7) What is the response of the victim's mom? How does race play a role here for her?

California Code of Civil Procedure 231.7

On January 1, 2022, California Code of Civil Procedure 231.7 was enacted (became the law). It was written to address concerns about the use of peremptory challenges, including those involving implicit bias. As a follow up to the Racial Justice Act (passed in 2020), Code of Civil Procedure 231.7 outlined, in detail, how peremptory challenges would be examined to guard against discrimination **"based on ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation or the perceived membership of the prospective juror in any of those groups.**" These are to be considered protected groups for jury selection.

Code of Civil Procedure section 231.7 lowers the burden for challenging a peremptory dismissal from "purposeful discrimination" to whether an "objectively reasonable" person would view the dismissal as a result of bias, conscious or unconscious.

The purpose of this new statute is to make it more difficult for lawyers to find "neutral" reasons to dismiss groups of jurors based on bias against one of the protected classes of people listed above.

The code lists 13 reasons that lawyers might use as an explanation for dismissing a prospective juror OTHER than race, ethnicity, gender, gender identity, and so on. These reasons are not to be considered adequate unless there is clear and convincing evidence that an "objectively reasonable person would view the rationale as unrelated to a protected group" and that the reasons will impact the juror's ability to be fair and impartial in the case.

1. Expressing a distrust of or having a negative experience with law enforcement or the criminal legal system
2. Expressing a belief that law enforcement officers engage in racial profiling or that criminal laws have been enforced in a discriminatory manner
3. Having a close relationship with people who have been stopped, arrested, or convicted of a crime
4. A prospective juror's neighborhood
5. Having a child outside of marriage
6. Receiving state benefits (food stamps, other forms of welfare)
7. Not being a native English speaker
8. The ability to speak another language
9. Dress, attire, or personal appearance
10. Employment in a field that is disproportionately occupied by members [of a protected group] or that serves a population disproportionately comprised of members of a [protected] group or groups . . . .
11. Lack of employment or underemployment of the prospective juror or prospective juror's family member

12. A prospective juror's apparent friendliness with another prospective juror of the same [protected] group . . . .
13. Any justification that is similarly applicable to a questioned prospective juror or jurors, who are not members of the same [protected] group as the challenged prospective juror but were not the subject of a peremptory challenge by that party.

Other reasons given for peremptory challenges have also been historically considered discriminatory:

a. The prospective juror was inattentive, or staring or failing to make eye contact
b. The prospective juror exhibited either a lack of rapport or problematic attitude, body language, or demeanor
c. The prospective juror provided unintelligent or confused answers

The court must find these reasons invalid unless the trial court can confirm the behavior *and* the lawyer can explain why the identified behavior matters to the case to be tried.

See also People v. Sanmiguel (Oct. 8, 2024) 2024 Cal.App. LEXIS 635, which upheld Code of Civil Procedure § 231.7.

Critical Thinking Questions

1) Do you think Code of Civil Procedure section 231.7 will be effective at reducing discriminatory peremptory challenges?

2) To determine whether a peremptory challenge was unlawfully used, court sometimes have to engage in comparative juror analysis whereby a party objecting to a peremptory challenge compares the challenged juror's answers to other jurors' answers to show that the reasons given for dismissing the juror were false. How difficult do you think this would be to do?