Race and Jury Selection: The Pernicious Effects of Backstrikes

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INTRODUCTION

Allen Snyder was tried for first-degree murder in Louisiana.[1] After the prosecutor used peremptory strikes to eliminate the only five black prospective jurors from the panel, the all-white jury convicted Snyder and sentenced him to death.[2] To remove all of the black jurors, the prosecutor had the assistance of a procedure not permitted in most jurisdictions: the backstrike. A "backstrike" is a peremptory challenge used to strike a prospective juror after the juror has been accepted onto the jury panel but before the panel has been sworn.[3] Thus, backstrikes permit an attorney to tentatively accept a juror by declining to exercise a peremptory challenge, but then revisit that decision after additional potential jurors are questioned. Only four states permit backstrikes.[4] Louisiana[5] and Tennessee[6] have explicit statutory provisions providing for challenging previously accepted jurors. Florida's less explicit language[7] has been interpreted to permit backstrikes as a right. In Illinois, discretion resides with the court;[8] many judges, however, prohibit the use of backstrikes, a position that the Illinois Supreme Court has endorsed.[9] According to several experienced defense attorneys in Cook County, backstrikes are now rarely permitted.[10]

Jury consultants Ted Donner and Richard Gabriel claim that the backstrike "plays an important role" in jury selection because the jury can be selected "with an eye towards group dynamics, as opposed to a jury of isolated individuals."[11] Even if the goal of managing group dynamics is seen as a legitimate use of peremptory challenges, there is

1. Snyder v. Louisiana, 552 U.S. 472, 472 (2008).
2. *Id.* at 476.
3. *Id.* at 475.
4. Ross P. LaDart, Mechanics of Jury Selection: Some Tools of the Trade (Dec., 2014) at 26 (Master's Thesis in Judicial Studies, U. of Nevada, Reno).
5. La. Code Crim. P. art. 799.1 (2006) ("[T]he state or the defendant may exercise any remaining peremptory challenge to one or more of the jurors previously accepted.").
6. Tenn. R. Crim. P. 12(d)(3) ("Peremptory challenges may be directed to any member of the jury; counsel are not limited to using such challenges against replacement jurors.").
7. Fla. R. Crim. P. 3.310 ("The state or defendant may challenge an individual prospective juror before the juror is sworn to try the cause.").
8. Ill. Sup. Ct. R. 434(a) ("In criminal cases the parties shall pass upon and accept the jury in panels of four, commencing with the State, unless the court, in its discretion, directs otherwise, and alternate jurors shall be passed upon separately."); People v. Moss, 108 Ill. 2d 270 (1985) (interpreting Ill. Sup. Ct. R. 434(a) to permit courts to dispense with backstriking).
9. *Moss*, 108 Ill. 2d. at 275.
10. Thomas F. Geraghty, Director, Bluhm Legal Clinic, Northwestern Law; Jeffrey Urdangen, Director, Center for Criminal Defense, Bluhm Legal Clinic, Northwestern Law; William Murphy, Private Practice.
11. Jury Selection Strategy and Science § 24:3 (3d ed.) (2013).

good reason to be skeptical of this claim. Questioning during jury selection typically does not supply sufficient information to effectively enable attorneys, even those assisted by trial consultants, to predict the likely interaction patterns of prospective jurors.[12] Attorneys generally have limited information on which to exercise challenges (e.g., prospective jurors do not take standardized personality or cognitive tests at any point). Therefore, predictions about group dynamics during deliberations are more likely to be pure speculation than grounded judgment.

Against this weak claim of a benefit for backstrikes is the serious objection that the backstrike procedure can facilitate the use of race-based peremptory challenges.[13] A glimpse of this potential role was visible in *Snyder v. Louisiana*, when the prosecutor removed five black prospective jurors, resulting in the all-white jury that convicted Allen Snyder.[14] Mr. Brooks, the first black juror questioned during selection, was initially accepted by both sides, but then, after striking two other black jurors, the prosecutor returned to the initially accepted Mr. Brooks and backstruck him.[15] The potential significance of the strike's timing was not lost on Justice Johnson when the case was appealed to the Supreme Court of Louisiana: "The prosecutor's action in accepting the first African-American juror seems to have been a tactic to keep defense counsel from raising *Batson* challenges to the subsequent exclusions."[16] Ultimately, the U.S. Supreme Court found the prosecutor's explanation for the exclusion of Mr. Brooks unconvincing and concluded it had been a *Batson* error to remove him, although the Court did not discuss the potential role played by the backstrike procedure in facilitating race-based exclusions during jury selection.[17]

The data we analyze for this article provide the first systematic evidence on the role played by backstrikes. Our results show that use of backstrikes is common in Caddo Parrish, Louisiana, occurring in 40 percent of the 332 cases we studied. Moreover, controlling for other characteristics, prosecutors had overall between three and five times the odds of using a backstrike on a black prospective juror as on a

12. LaDart, *supra* note 4 at 37–38.
13. Bruce Hamilton, *Bias, Batson, and "Backstrikes":* Snyder v. Louisiana *Through a Glass, Starkly*, 70 La. L. Rev. 3 (2010), http://digitalcommons.law.lsu.edu/lalrev/vol70/iss3/10.
14. *Snyder*, 552 U.S. at 476.
15. *Id.* at 477.
16. State v. Snyder, 750 So. 2d 832, 866 (1999) (Johnson, J., dissenting).
17. *Snyder*, 552 U.S. at 478.

non-black prospective juror.[18] Depending on the type of case and the race of the defendant, the odds of prosecutorial backstrikes against black prospective jurors could be as high as almost nine times that of non-black ones.[19] Prosecutors were also more likely than defense attorneys to exercise backstrikes.[20] This analysis reveals the nefarious implications of backstrikes for race-neutral jury selection.

We begin in Part I with a brief history of the evolution of jury selection and the role of the peremptory challenge. Part II focuses on the history and use of backstrikes as part of peremptory challenge procedures in Louisiana. In Part III we describe data collected on peremptory challenges and the use of backstrikes in Caddo Parrish, Louisiana between January 2003 and December 2012, showing that backstrikes were used in the course of jury selection to increase the already disproportionate exclusion of black prospective jurors from service. In Part IV, we discuss how the unique combination of Louisiana's majority decision rule (permitting verdicts based on 10 out of 12), the unusually large number of peremptory challenges permitted (12 per side for each defendant) and the availability of backstrikes all combine to undermine race-neutral jury selection.

I. JURY SELECTION AND THE PEREMPTORY CHALLENGE

The Sixth Amendment guarantees the right to an impartial jury and the U.S. Supreme Court has found that "a general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants."[21] As a result, the Sixth Amendment provision is binding on the States through the due process clause of the Fourteenth Amendment.[22] Over time, the meaning of impartiality has come to include the cross-sectional ideal.[23] In *Taylor v. Louisiana*, the Supreme Court was explicit that "the American concept of the jury trial contemplates a jury drawn from a fair cross-section of the com-

18. *See infra* at Table IV and p. 26.
19. *See infra* at p. 26.
20. *See infra* Tables 1 & 2.
21. Duncan v. Louisiana, 391 U.S. 145, 158–59 (1968).
22. *Id.*
23. *See* JEFFREY ABRAMSON, WE, THE JURY (1994).

munity."[24] The Court has always focused on the composition of the jury pool, rather than on the make-up of a particular jury.

In order to guarantee trial by an impartial jury, courts have recognized that it is necessary for the jury selection process to include challenges for cause that remove jurors who reveal they are unable to be impartial. To achieve the goal of impartiality, challenges for cause are not limited in number. They may be initiated by the court on its own initiative or proposed by one of the parties and confirmed by the court.

The peremptory challenge, which allows the parties to reject a certain number of potential jurors *without* stating a reason and *without* court endorsement, in contrast, is a limited mechanism for achieving an impartial jury. Only a limited number of peremptory challenges are granted to the parties. Moreover, the right to exercise peremptory challenges is not protected under the federal constitution.[25] Nonetheless, peremptory challenges have been a part of the justice system in the United States since 1790[26] and all state and federal jurisdictions permit them. Various grounds have been offered for this longstanding right to peremptory challenge. Parties can use a peremptory challenge as a "safety valve" to remove a juror they suspect of bias when they don't have evidence sufficient to sustain a challenge for cause.[27] Peremptory challenges can also act as a safeguard against judicial error in deciding on challenges for cause.[28] Finally, peremptory challenges give defendants an opportunity to influence the composition of the panel that will judge them.[29]

The number of peremptory challenges in felony jury trials for offenses other than murder varies substantially, from three per side in New Hampshire[30] and Hawaii,[31] to fifteen in New York.[32] In federal

24. 491 U.S. 522, 527 (1975); *see also* Leslie Ellis & Shari S. Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.-KENT L. REV. 1033, 1036 (2003) (characterizing impartiality as a *jury* rather than a *juror* quality).

25. *See*, *e.g.*, Rivera v. Illinois, 129 S. Ct. 1446, 1450 (2009) ("This Court has 'long recognized' that peremptory challenges are not of federal constitutional dimension.") (citing United States v. Martinez-Salazar, 528 U.S. 304, 311 (2000)).

26. Swain v. Alabama, 380 U.S. 202, 214 (citing 1 Stat. 119 (1965)).

27. Rose, M.R. & S.S. Diamond, *Judging Bias: Juror Confidence and Judicial Rulings on Challenges for Cause*, 42 LAW & SOCIETY REVIEW 513 (2008) at 543.

28. A.B.A., PRINCIPLES FOR JURIES AND JURY TRIALS, PRINCIPLE 11, SUBDIVISION D COMMENTARY, 77 (2005).

29. *Id.*

30. N.H. R. CRIM. P. 22. Selection of Jury (d) Peremptory Challenges. For offenses punishable by death, the defendant shall be accorded, in addition to challenges for cause, no fewer than twenty peremptory challenges; the State shall be afforded, in addition to challenges for cause, no fewer than ten peremptory challenges. In first degree murder cases, both the State and the de-

court, defendants in non-capital felony cases have ten peremptory challenges and the U.S. attorney has six.[33] Only four states, including Louisiana,[34] give the state as many as twelve challenges per defendant for non-capital offenses carrying less than a life sentence.[35]

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fendant shall be afforded, in addition to challenges for cause, no fewer than fifteen peremptory challenges. In all other criminal cases the defendant and the State shall, in addition to challenges for cause, be entitled to no fewer than three peremptory challenges. In trials involving multiple charges, the number of peremptory challenges shall be the number of challenges allowed for the most serious offense charged.

31. HAW. R. PENAL P. 24(b) Peremptory Challenges. (In felony cases other than murder, each side is entitled to 3 peremptory challenges). If there are 2 or more defendants jointly put on trial for such an offense, each of the defendants shall be allowed 2 peremptory challenges. In all cases, the prosecution shall be allowed as many peremptory challenges as are allowed to all defendants.

32. N.Y. CODE CRIM. P. § 270.25, *infra* note 35.

33. FED. R. CRIM. P. 24(b). ("Peremptory Challenges. Each side is entitled to the number of peremptory challenges to prospective jurors specified below. The court may allow additional peremptory challenges to multiple defendants, and may allow the defendants to exercise those challenges separately or jointly.

(1) *Capital Case.* Each side has 20 peremptory challenges when the government seeks the death penalty.

(2) *Other Felony Case.* The government has 6 peremptory challenges and the defendant or defendants jointly have 10 peremptory challenges when the defendant is charged with a crime punishable by imprisonment of more than one year.").

34. LA. CODE CRIM. P. art. 799 (2006). ("Number of peremptory challenges. In trials of offenses punishable by death or necessarily by imprisonment at hard labor, each defendant shall have twelve peremptory challenges, and the state twelve for each defendant. In all other cases, each defendant shall have six peremptory challenges, and the state six for each defendant."). In cases with six peremptory challenges per side, the jury is composed of six rather than twelve jurors. LA. CODE CRIM. P. art. 782 (2006).

35. The other three are Kansas, New Jersey, and New York.

KAN. CODE CRIM. P. § 22-3412 ("Jury selection; peremptory challenges; swearing of jury; alternate or additional jurors. (a) . . .

> (2) For crimes committed on or after July 1, 1993, peremptory challenges shall be allowed as follows:
> (A) Each defendant charged with an off-grid felony or a nondrug or drug felony ranked at severity level 1 shall be allowed 12 peremptory challenges.
> (B) Each defendant charged with a nondrug felony ranked at severity level 2, 3, 4, 5 or 6, or a drug felony ranked at severity level 2 or 3, shall be allowed 8 peremptory challenges.
> (C) Each defendant charged with an unclassified felony, a nondrug severity level 7, 8, 9 or 10, or a drug severity level 4 felony shall be allowed six peremptory challenges.
> (D) Each defendant charged with a misdemeanor shall be allowed three peremptory challenges.
> (E) The prosecution shall be allowed the same number of peremptory challenges as all defendants.
> (F) The most serious penalty offense charged against each defendant furnishes the criterion for determining the allowed number of peremptory challenges for that defendant.");

N.J.: 1:8-3 ("Examination of Jurors; Challenges (d) Peremptory Challenges in Criminal Actions. Upon indictment for kidnapping, murder, aggravated manslaughter, manslaughter, aggravated assault, aggravated sexual assault, sexual assault, aggravated criminal sexual contact, aggravated arson, arson, burglary, robbery, forgery if it constitutes a crime of the third degree as defined by N.J.S.A. 2C:21-1b, or perjury, the defendant shall be entitled to 20 peremptory challenges if tried alone and to 10 such challenges when tried jointly; and the State shall have 12 peremptory challenges if the defendant is tried alone and 6 peremptory challenges for each 10 afforded defend-

Before 1986, the right to eliminate jurors without stating any reason, although not constitutionally guaranteed, was provided for in federal and all state statutory jury procedures.[36] In *Batson v. Kentucky*, the Supreme Court placed a limit on the exercise of all peremptory challenges in criminal cases, forbidding prosecutors from using juror race as a basis for striking jurors who are the same race as the defendant.[37] *Powers v. Ohio* extended *Batson*, making it unlawful to strike a juror because of his or her race, whether or not the juror is of the same race as the defendant.[38] Shortly after that, the Court ruled in *Edmonson v. Leesville Concrete Co.* that *Batson* applied to civil cases,[39] and in *Georgia v. McCollum* expanded this prohibition to cover defense attorneys in criminal cases.[40] A few years later, in *J. E. B. v. Alabama ex rel. T. B.,* the Court found that gender, like race, could not be used as the basis for a peremptory challenge.[41]

Both court observers and empirical studies have suggested that *Batson* has had little effect in curtailing race-based peremptory challenges.[42] In practice, judges are reluctant to accuse an attorney of dissembling if the attorney offers any non-race explanation for a challenge, however suspicious or flimsy. As we have previously sug-

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ants when tried jointly. In other criminal actions each defendant shall be entitled to 10 peremptory challenges and the State shall have 10 peremptory challenges for each 10 challenges afforded defendants.");

N.Y. CODE CRIM. P. § 270.25 ("Trial jury; peremptory challenge of an individual juror.

1. A peremptory challenge is an objection to a prospective juror for which no reason need be assigned. Upon any peremptory challenge, the court must exclude the person challenged from service.

2. Each party must be allowed the following number of peremptory challenges:

(a) Twenty for the regular jurors if the highest crime charged is a class A felony, and two for each alternate juror to be selected.

(b) Fifteen for the regular jurors if the highest crime charged is a class B or class C felony, and two for each alternate juror to be selected.

(c) Ten for the regular jurors in all other cases, and two for each alternate juror to be selected.

3. When two or more defendants are tried jointly, the number of peremptory challenges prescribed in subdivision two is not multiplied by the number of defendants, but such defendants are to be treated as a single party. In any such case, a peremptory challenge by one or more defendants must be allowed if a majority of the defendants join in such challenge. Otherwise, it must be disallowed.").

36. Kenneth Melilli, *Batson in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447 (1996); Jeffrey Bellin & Junichi P. Semitsu, *Widening* Batson's *Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1116–20 (2011).

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

38. Powers v. Ohio, 499 U.S. 400 (1991).

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

40. Georgia v. McCollum, 505 U.S. 42 (1992).

41. J. E. B. v. Alabama *ex rel* T. B., 511 U.S. 127, 129 (1994) ("We hold that gender, like race, is an unconstitutional proxy for juror competence and impartiality.").

42. Melilli, *supra* note 36, at 447.

gested, "[i]t is only when the pattern of excuses is extreme (e.g., the prosecutor eliminates the only five blacks on the panel) that the ambiguity is reduced."[43] Even then, creative non-race explanations (e.g., facial hair) for removing a juror can insulate challenges from *Batson*[44] unless they also apply to other jurors who were not struck.[45] By giving attorneys even greater latitude in molding the composition of the jury, as revealed in *Snyder v. Louisiana*,[46] backstrikes have the capacity to exacerbate the problem. And the evidence we present in this article reveals that they do.

II. THE HISTORY AND USE OF BACKSTRIKES IN LOUISIANA

The opportunity to exercise backstrikes as part of the jury selection process has long been accepted in Louisiana. Originally, the right to peremptorily challenge a juror generally ended when the juror was initially accepted, but the trial judge had discretion to permit the challenge of a previously accepted juror.[47] Over time, judges came to routinely permit backstrikes.[48] The current Louisiana statute governing jury selection in criminal cases states, "Peremptory challenges shall be exercised prior to the swearing of the jury panel."[49] This provision has been interpreted to expressly sanction backstriking. That is, it has been interpreted to mean that a juror in a criminal prosecution, though "provisionally accepted" and sworn, may nevertheless be challenged peremptorily by a party at any time prior to the swearing of the jury panel.[50] Thus, a juror who has not been removed for cause and who has been deemed acceptable by the attorney, may yet be removed by a peremptory challenge exercised at any time before the jury panel is sworn by a backstrike.

Prior to the research described here, no systematic analysis had assessed how often backstriking was used and when it occurred. What might on the surface be expected to constitute a rarely used "adjustment" measure, in fact turns out to be a commonly used procedure

43. Shari Seidman Diamond, Leslie Ellis & Elisabeth Schmidt, *Realistic Responses to the Limitation of* Batson v. Kentucky, 7 CORNELL J.L. & PUB. POL. 77, 82 (1997).
44. *See*, *e.g.*, Purkett v. Elem, 514 U.S. 765 (1995).
45. Miller-El v. Dretke, 545 U.S. 231 (2005).
46. 552 U.S. 472, 472 (2008).
47. State v. Thornhill, 188 La. 762, 777 (1937).
48. *See, e.g.*, State v. Layton, 217 La. 57 (1950).
49. LA. CODE CRIM. PROC. ANN. art. 795(B)(1) (2015).
50. Riddle v. Bickford, 785 So. 2d 795, 798 (La. 2001) (citing State v. Watts, 579 So.2d 931 (La. 1991)).

that attorneys deploy to mold the composition of juries, and their use of the procedure is not race-neutral. Although *Snyder v. Louisiana* gave a hint of this possibility,[51] the systematic use of backstrikes across cases revealed here provides evidence that *Snyder* was not an isolated incident.

III. BACKSTRIKING IN CADDO PARRISH

A. Background on jury selection procedures in Caddo Parrish

Jury selection in Caddo Parrish courtrooms begin with the questioning of a randomly selected panel of six or twelve prospective jurors drawn from the larger venire seated in the courtroom.[52] The number in the panel is determined by the number of jurors to be selected.[53] The first step is for the judge to determine whether, due to hardship or partiality or some other inability to act as a juror, a juror should be excused for cause.[54] Prospective jurors removed for cause are then excused.[55] The remaining prospective jurors may be questioned further. The prosecutor and defense attorney then simultaneously submit "strike sheets" to the court, listing the names of jurors they wish to peremptorily challenge.[56] Unless one of the attorneys raises a *Batson* challenge alleging that race or gender was the reason for the peremptory challenge, attorneys do not have to give any reason for their peremptory challenges.[57] If a *Batson c*hallenge is raised, and the judge finds a prima facie case for discrimination, the party disputing the *Batson* claim must then supply a race or gender-neutral explanation for the challenge, and the court will then reject or sustain the *Batson* claim.[58] Challenged jurors, unless they have been the sub-

51. Hamilton, *supra* note 13, at 3.

52. A review of court documents in the cases (Criminal Case Minutes and Jury Selection sheets) showed this procedure.

53. La. Code Crim. Proc. Ann. art. 782(A) (2015) (requiring twelve member juries if the punishment upon conviction necessarily consists of confinement at hard labor or death. Otherwise, the jury is composed of six jurors.).

54. *See generally* La. Code Crim. Proc. Ann. art. 783, 797, 798 (2015).

55. La. Code Crim. Proc. Ann. art. 783 (2015).

56. 1st Judicial District Court Parish of Caddo ("Pursuant to Code of Criminal Procedure Article 788, the court adopts this rule to provide for a system of simultaneous exercise of peremptory challenges. At the conclusion of the examination of prospective jurors as provided in Article 786, those prospective jurors who have not been excused pursuant to a challenge for cause shall be tendered to the state and the defendant(s) for simultaneous exercise of peremptory challenge in writing in a manner to be determined by the court."); www.lasc.org/rules/dist.ct/COURTRULESAPPENDIX19.0.pdf.

57. *Batson*, 476 U.S. at 96-98.

58. *Id.*

ject of a sustained *Batson* claim, are then excused.[59] This process is repeated until twelve (or six if only six are required) jurors are accepted by both sides and sworn in. During this process, attorneys can *at any time* return to a previously questioned and accepted juror to exercise a peremptory challenge, i.e., to backstrike that juror. Prospective alternate jurors are then questioned and subjected to challenge using the same procedure.

Under Louisiana law, jury size and number of defendants determine the number of peremptory challenges.[60] Each side has twelve peremptory challenges for each defendant in a case with a twelve member jury.[61] Each side has six peremptory challenges for each defendant in a case with a six member jury.[62] Because the number of challenges is determined *per defendant*, a given case may have up to twenty-four challenges per side with two defendants, up to thirty-six per side with three defendants, or even more, giving the attorneys substantial opportunity to de-select jurors they would prefer not to seat, either for race or any other reason.

B. The Data

The MacArthur Justice Center in New Orleans, Louisiana, collaborating with the Louisiana Capital Assistance Center and Reprieve Australia, collected detailed data tracing jury selection in 332 cases in Caddo Parish, Louisiana.[63] The data include the demographic characteristics of the defendants, judge and attorneys, the nature of the charged offenses, the demographic characteristics of the prospective jurors in these cases, the use of *Batson* challenges, the exercise of backstrikes, and the selection outcome for each juror.

The Clerk's Office in Caddo Parrish provided a list of all criminal jury trials held between January 2003 and December 2012. The list consisted of 476 trials. Cases could not be included in this analysis if the record was sealed or could not be located or accessed by the Clerk's Office, the defendant pled guilty or the judge declared a mistrial during jury selection, or the information identifying either the

59. *Id.*
60. La. Code Crim. Proc. Ann. art. 799 (2015).
61. *Id.*
62. *Id.*
63. Ursula Noye, *Blackstrikes: A Study of the Racially Disparate Use of Peremptory Challenges by the Caddo Parish District Attorney's office* (2015), https://blackstrikes.com/resources/Blackstrikes_Caddo_Parish_August_2015.pdf.

prospective juror or selection outcome was unclear or incomplete.[64] Complete selection and outcome information were obtained for the 332 trials analyzed here involving 10,968 prospective jurors. Of the juries, 224 were twelve person juries and 108 were six person juries. Six of the cases had two defendants; the remainder had one. In nine cases, the state sought the death penalty.

Information on each case and each juror was obtained from the court records for these cases, supplemented with information from voter registration lists. A variety of court documents supplied this information: official minute entries from jury selection, voir dire transcripts, official jury selection charts prepared by minute clerks, other juror lists included in the trial record, the trial court's official jury charts, and peremptory challenge forms submitted by each attorney. The information included: the race, gender and selection outcome for each prospective juror; the race and gender of the defendant; the trial outcome; and the names of the judge, prosecutors(s) and defense attorney(s). The selection outcome for a juror reflected all possible results in the selection process: Accepted as a juror (n=3336); Accepted as an alternate (n=463); Removed for cause (1847); Struck by the state (n=1982); Struck by the defense (n=2351); Struck by both (n=186); or Unused (n=803).[65]

We also collected information on the criminal charges in each case and categorized the charges according to the FBI's NIBRS typology: crimes against persons (n=124); crimes against property (n=101); and crimes against society (n=107).[66] We attempted to obtain information on victim race and gender, but were only able to obtain that information for 144 of the 239 cases that involved victims. As a result, we conducted all analyses both on the entire sample without the victim data and on the sub-sample of cases that included victim data.

64. Of the 145 excluded cases, 59 of them were sealed, 6 others could not be located by the clerk's office, and 11 had incomplete *voir dire* information either because the defendant pleaded guilty or a mistrial was declared during selection, or because some of the challenge information or juror identification was missing. The remaining 69 had incomplete race and gender information for some of the jurors.

65. Unused jurors consisted of those who had been questioned, but were not needed because the attorneys had completed their strikes and the full number of required jurors and alternates had been accepted by both sides.

66. When a case included multiple charges in different categories, we coded the case according to the most serious of the charges, with crimes against persons taking precedence over crimes against property, and crimes against property taking precedence over crimes against society.

Excluding the 1,847 jurors removed for cause and the 803 jurors who remained unused after jury selection was completed, 8,318 prospective jurors were tendered to the parties for potential peremptory challenge, either initially or later before the jury was sworn. These jurors are the focus in this study because they are the only jurors on whom backstrikes could be used. At this point in the jury selection process, 35 percent of the jurors eligible to serve were black (see Appendix A for the list of variables used in this analysis and the distribution of each in the data set).

C. The Use of Peremptory Challenges and Backstrikes

1. Overall Pattern of Peremptory Challenges and Backstrikes

During the peremptory challenge stage of jury selection, attorneys exercised at least one challenge in 330 of the 332 trials. Prosecutors in twelve-member jury trials exercised an average of 8.0 peremptory challenges per trial (exercising at least eleven challenges in 23 percent of trials with one defendant),[67] while defense attorneys averaged 9.2 per trial (exercising at least eleven challenges in 46 percent of trials with one defendant).[68] In six-member jury trials, the averages were 3.6 and 4.3, respectively. The prosecutors in the six-member jury trials used at least six challenges in 23 percent of those trials, which all involved one defendant, and the defense attorneys used at least six challenges in 30 percent of those trials. Thus, attorneys in Caddo Parrish made extensive use of the substantial number of peremptory challenges they were permitted to exercise.

The attorneys exercised at least one backstrike in 133 of the 332 trials (40 percent): 23 percent of the six member jury trials and nearly half (48 percent) of the twelve member jury trials. They exercised a total of 315 backstrikes, averaging about one prospective juror per case (range = 0–16). The defense exercised a higher number of peremptory challenges overall (2351 versus 1982 exercised by the prosecution, plus 186 jointly exercised), but prosecutors were more likely than defendants were to use backstrikes to remove jurors (175 versus 145).[69] Thus, prosecutors used backstrikes to supplement their initial challenges by 9 percent (175/1993), while defense attorneys used back-

67. In the six trials with two defendants, prosecutors exercised at least 11 challenges in two cases: 11 in one and 24 in the other.

68. In the six trials with two defendants, defense attorneys exercised at least 11 challenges in three cases: 14, 15, and 24.

69. Five jurors were backstruck by both the prosecution and the defense.

strikes to supplement their initial challenges by 6 percent (145/2392). The difference is statistically significant ($\chi^2 = 10.72$, $p<.002$).

2. Method of Analysis

Our analysis of the potential role of juror race in jury selection and the exercise of backstrikes proceeds in two steps. We first describe the overall patterns of peremptory challenge and the use of backstrikes. We then present multivariate analyses that control for potential juror and case characteristics other than juror race in the exercise of backstrikes.

3. Overall Patterns of Prosecutorial Challenge by Juror Race

Table I shows the overall pattern of prosecutor use of peremptory challenges and backstrikes by juror race.

Table I. Prosecutorial Peremptory Challenges and Backstrikes Across Cases

Selection Outcome	Black prospective jurors	All other prospective jurors	All prospective jurors
Struck	46.0% (1338)	15.3% (830)	26.1% (2168)
Initially struck	42.2% (1226)	14.3% (767)	24.0% (1993)
Backstruck	3.9% (112)	1.2% (63)	2.1% (175)
Retained	54.0% (1570)	84.7% (4580)	73.9% (6150)
Total	100.0% (2908)	100.0% (5410)	100.0% (8318)

Without controlling for other factors, prosecutors were three times as likely to challenge a black juror as a non-black juror (46.0/15.3 = 3.01). In exercising initial peremptory strikes, they were almost three times as likely to challenge a black juror as a non-black juror (42.2/14.3 = 2.95). The disproportionate use of strikes against black jurors was even more extreme for backstrikes: prosecutors used backstrikes 3.25 times as often against black jurors as against non-black jurors (3.9/1.2 = 3.25). The difference in use of strikes by juror race is statistically significant in all three of these comparisons ($p<.001$).

4. Overall Patterns of Defense Challenge by Juror Race

The pattern of challenges by the defense provided a partial correction to the disproportionate use of challenges on black jurors by the prosecution. Before the peremptory challenge process began, the venire of eligible jurors was 35.0 percent black. If only prosecutors were permitted to exercise peremptory challenges, the eligible jury pool would have ended up 25.5 percent black. With the defense challenges included, the ultimate composition of the pool that formed the 332 juries, including the alternates, was 31 percent black. Table II shows the pattern of strikes by the defense.

Table II. Defense Peremptory Challenges and Backstrikes Across Cases

Selection Outcome	Black prospective jurors	All other prospective jurors	All prospective jurors
Struck	14.9% (434)	38.9% (2103)	30.5% (2537)
Initially struck	13.8% (400)	36.8% (1992)	28.8% (2392)
Backstruck	1.2% (34)	2.05% (111)	1.7% (145)
Retained	85.1% (2474)	61.1% (3307)	69.5% (5781)
Total	100.0% (2908)	100.0% (5410)	100.0% (8318)

The aggregate analyses presented in Tables I and II present a rough picture of the patterns of peremptory challenge and the use of backstrikes. They do not, however, control for a variety of case and juror characteristics that could affect the comparisons. First, because challenge decisions within the same case may not be independent of one another, it is important to control for that potential influence. In addition, juror, defendant, judge, and attorney characteristics, as well as the nature of the offense and jury size, might modify the overall patterns. To control for these factors, we conducted multivariate analyses that predicted challenge patterns controlling for all of these factors. We discuss the results for all uses of peremptory challenge

elsewhere, showing that the patterns in Tables I and II are robust;[70] here we focus on the use of backstrikes.

5. Multivariate Analysis of Backstrikes and Juror Race

In the analysis reported below, we tested the predictors of the decision to backstrike a juror. We used logistic regression to test the odds that each party would exercise a backstrike against jurors in particular situations (e.g., against a black prospective juror or in cases involving crimes against persons) compared to the odds that the party would exercise in other situations (e.g., against non-black prospective jurors or in cases with other kinds of charges).

In each model, we controlled for the number of defendants in a case, the type of charge according to the FBI's NIBRS typology, the jury size, and the race and gender of the prospective juror, the prosecutor, and the defendants. Additionally, we included two variables (Percent Non-black members in venire and Percent Male in venire) that measure the race and gender of the other prospective jurors who could have served on the jury. These two variables account for a party's considerations about the likelihood of obtaining a juror of a different race or gender when deciding whether to exercise a backstrike. A prosecutor attempting to avoid black jurors, for instance, would be more likely to accomplish that goal if the jurors next in line in the remaining venire were not black. We also tested each model with and without the nine capital cases included in the analysis, since capital cases in Louisiana are the only twelve-member jury cases that require a unanimous jury verdict and can otherwise contain unique jury selection procedures; our results are substantially the same including or excluding capital cases.[71] Finally, each model includes adjustments in the standard errors by clustering them according to case; this procedure statistically accounts for factors common to a particular case that affect patterns of backstriking within that case.

i. Backstrikes by the Prosecution

The decision to exercise a backstrike can occur at any point between the first exercise of a peremptory challenge and the time that

70. Joshua Kaiser & Shari Seidman Diamond, *Understanding Jury Selection: The Role of Race*. Note that we find that the patterns of disproportionate use of peremptory challenges revealed in Tables I and II are even more extreme in the multivariate analysis.

71. Tables presented include the nine capital cases in the sample. Tables without these cases are available upon request.

the jury is sworn. As a result, we analyzed the odds of a backstrike in two contexts: first (context 1), against the background of all of the 8318 jurors who were questioned and not excused for cause or unused when selection ended, and second (context 2), against the background of those 8318 jurors minus those jurors the attorney had removed with an initial peremptory challenge. The reduced group of jurors in Context 2 reflects the fact that attorneys did not need to use a backstrike to remove a juror the attorney had already struck. Each table in this subsection presents the results for both contexts. As the tables that follow show, juror race was a significant, persistent predictor of the odds of a backstrike in all of these analyses.

Table III shows the racial pattern of prosecutorial backstrikes when other control variables are included in the analysis.

Table III. Odds of Prosecutorial Backstrikes, Clustered by Case

	All Jurors Questioned and Not Excused for Cause (Context 1)		Questioned Jurors not Challenged for Cause or Initially Struck by Prosecution (Context 2)	
Variable Description	Odds Ratio	Standard Error	Odds Ratio	Standard Error
Juror race†	3.37***	0.55	5.18***	0.88
Juror gender†	1.06	0.18	1.01	0.18
Number of defendants	4.13***	1.63	4.23***	1.74
Charge				
Crime against property	(reference category)		(reference category)	
Crime against society	0.92	0.22	0.93	0.22
Crime against persons	1.43	0.33	1.41	0.33
Jury size (1 = 12, 0 = 6)	1.07	0.31	1.10	0.31
Percent white in venire	1.00	0.01	1.01	0.01
Percent male in venire	0.98	0.01	0.98	0.01
Judge race†	1.57*	0.33	1.59*	0.34
Judge gender†	0.76	0.23	0.77	0.23
Prosecutor race†	0.88	0.17	0.90	0.17
Prosecutor gender†	1.24	0.29	1.19	0.27
Defendant race†	0.80	0.22	0.86	0.24
Defendant gender†	1.02	0.56	1.05	0.58
Intercept	0.00	0.00	0.00	0.00
n	8318		6325	

* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$
†for race variables (1 = black; 0 = non-black); for gender variables (1 = female, 0 = male)

Among the controls we used in this analysis, the only factors that are statistically significant in predicting prosecutorial backstrikes are the number of defendants, the race of the judge, and the race of the prospective juror. Multiple defendants in a case increase the number of available peremptory challenges, so it is not surprising that an additional defendant in a case increases the odds of a prosecutorial backstrike against any given prospective juror by a factor of 4.13 ($p<0.001$). If the judge is black, the odds of a prosecutor exercising a backstrike is just over 1.5 times ($p<0.05$) the odds with a non-black judge.[72] Most importantly, black prospective jurors faced prosecutorial backstrikes at 3.37 times the odds that non-black prospective jurors did ($p<0.001$). The results are substantially similar for the analysis in context 2, that is, if we exclude prospective jurors who were initially struck by the prosecution, except that in this context, the odds that the prosecution will exercise a backstrike against a black prospective juror increases to more than five times the odds of a backstrike for a non-black prospective juror ($p<0.001$).

Table IV shows the analysis including variables for victim race and victim gender—and therefore excluding all cases that do not include a victim or for which victim information was unavailable.[73]

72. We are not certain how to explain this result, but in light of the small number of black judges ($n = 4$), we are hesitant to attribute it to race.

73. Note that the FBI's NIBRS classification does not necessarily correspond to inclusion of a victim or not. A crime against property can include a victim who testifies or is involved if no physical violence is done to that victim (e.g., simple burglary of a dwelling that does not involve firearms or other violence). Crimes against society can involve victims in similar ways.

Table IV. Odds of Prosecutorial Backstrikes, Clustered by Case (for cases with victim race and gender)

	All Jurors Questioned and Not Excused for Cause (Context 1)		Questioned Jurors not Challenged for Cause or Initially Struck by Prosecution (Context 2)	
Variable Description	Odds Ratio	Standard Error	Odds Ratio	Standard Error
Juror race†	3.37***	0.79	5.21***	1.28
Juror gender†	0.97	0.21	0.89	0.21
Number of defendants	6.03***	2.31	6.68***	2.51
Charge				
Crime against property	(reference category)		(reference category)	
Crime against society	2.07	1.29	1.84	1.22
Crime against persons	1.83	0.60	1.86	0.60
Jury size (1 = 12, 0 = 6)	1.04	0.30	1.11	0.32
Percent white in venire	0.97*	0.04	0.97	0.01
Percent male in venire	0.96**	0.03	0.96	0.01
Judge race†	1.87*	0.54	2.00*	0.58
Judge gender†	0.39**	0.14	0.37**	0.14
Prosecutor race†	1.28	0.31	1.29	0.31
Prosecutor gender†	1.66*	0.41	1.58	0.38
Defendant race†	0.47	0.23	0.48	0.23
Defendant gender†	1.58	1.25	1.60	1.35
Victim race†	1.84	0.83	1.92	0.86
Victim gender†	0.85	0.27	0.93	0.30
Intercept	0.06	0.08	0.04	0.05
n	3653		2787	

* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$
†for race variables (1 = black; 0 = non-black); for gender variables (1 = female, 0 = male)

Neither the victim's race nor the victim's gender produced a significant impact on the prosecutor's decision to backstrike in either context 1 or context 2. However, in this limited set of cases that includes victims, each defendant increases the odds of a prosecutorial backstrike by 6.03 (context 1) or 6.68 (context 2) times, respectively ($p<0.001$), while a black judge increases the odds by a factor of 1.87 (context 1) or 2.00 (context 2), respectively ($p<0.05$). In cases involving victims, it appears that the gender of the judge also matters. Prospective jurors in cases with a female judge face only 0.39 or 0.37 times the odds, respectively, of being backstruck by the prosecution as they

would in cases with a male judge ($p<0.01$). The pattern and significance of the odds ratio for backstrikes of black jurors compared to non-black jurors, however, is nearly identical in this subset of cases and in the larger sample: the odds ratios are 3.37 (context 1) and 5.21 (context 2).

We also tested interactions between juror race and the variables in these analyses. In Table V, we present the statistically significant interactions between juror race and defendant race, and between juror race and type of charge.[74]

74. We tested interactions between juror race and other variables that are not listed in the tables, including interactions with defendant gender, prosecutor race, prosecutor gender, judge race, judge gender, effective venire race, and effective venire gender. None produced statistically significant results. Tables are available upon request.

Table V. Odds of Prosecutorial Backstrikes, with Interactions, Clustered by Case

	All Jurors Questioned and Not Excused for Cause (Context 1)				Questioned Jurors not Challenged for Cause or Initially Struck by Prosecution (Context 2)			
	Model 1 (with juror race X defendant race interaction)		Model 2 (with juror race X charge interaction)		Model 3 (with juror race X defendant race interaction)		Model 4 (with juror race X charge interaction)	
Variable Description	Odds Ratio	Standard Error	Odds Ratio	Standard Error	Odds Ratio	Standard Error	Odds Ratio	Standard Error
Juror race†	1.71	0.57	5.50***	1.61	2.15*	0.70	8.75***	2.56
Defendant race†	0.50	0.18	0.80	0.22	0.47*	0.17	0.86	0.24
Defendant race X Juror race	2.30*	0.86			2.93**	1.09		
Juror gender†	1.06	0.18	1.06	0.18	1.00	0.17	1.01	0.17
Defendant gender†	1.03	0.18	1.02	0.55	1.06	0.57	1.03	0.56
Number of defendants Charge	4.07***	1.61	4.08***	1.61	4.16***	1.72	4.20***	1.75
Crime against property	(reference category)		(reference category)		(reference category)		(reference category)	
Crime against society	0.92	0.22	1.31	0.50	0.94	0.23	1.31	0.50
Crime against society X juror race			0.61	0.25			0.61	0.25
Crime against persons	1.43	0.33	2.32*	0.81	1.41	0.33	2.40*	0.84
Crime against persons X juror race			0.48	0.19			0.44*	0.17
Jury size (1 = 12, 0 = 6)	1.07	0.31	1.07	0.31	1.10	0.31	1.10	0.17
Percent white in venire	1.00	0.01	1.00	0.01	1.00	0.01	1.01	0.01
Percent male in venire	0.98	0.01	0.98	0.01	0.98	0.01	0.98	0.01
Judge race†	1.57*	0.33	1.57*	0.33	1.60*	0.34	1.59*	0.34
Judge gender†	0.77	0.23	0.77	0.23	0.77	0.23	0.77	0.23
Prosecutor race†	0.88	0.17	0.88	0.17	0.89	0.17	0.90	0.17
Prosecutor gender†	1.23	0.28	1.23	0.29	1.18	0.27	1.18	0.27
Defendant race†	0.50	0.18	0.80	0.22	0.47*	0.17	0.86	0.24
Defendant race X Juror race	2.30*	0.86			2.93**	1.09		
Defendant gender†	1.03	0.18	1.02	0.55	1.06	0.57	1.03	0.56
Intercept	0.01	0.01	0.00	0.00	0.01	0.01	0.00	0.00
n	8318	8318	6325	6325				

* p < 0.05, ** p < 0.01, *** p < 0.001
†for race variables (1 = black; 0 = non-black); for gender variables (1 = female, 0 = male)

Models 1 and 3 of Table V show the results when the interaction between juror race and defendant race is included in the analysis. There is a statistically significant effect of the race of the prospective juror for both black and non-black defendants, but the effect is far more pronounced for black defendants. In the context 1 analysis, including jurors who were initially struck by the prosecution (model 1), black prospective jurors in cases with *non-black defendants* are at risk of being backstruck by the prosecution only 1.71 times more than non-black jurors are ($p>0.05$). In cases with *black defendants*, however, black prospective jurors are 3.92 times more at risk than are non-black jurors ($p<0.05$). In context 2 (model 3), the same relationship exists but is even more pronounced. In cases with non-black defendants, black prospective jurors have 2.15 times the odds of being backstruck by the prosecution as do non-black prospective jurors ($p<0.05$), while in cases with black defendants, black prospective jurors have 6.29 times the odds of being subject to a prosecutorial backstrike as do non-black jurors ($p<0.01$). No other variables in these models demonstrate notably different effects from those in the initial analysis from Table III.

The pattern of results in this interaction with defendant race highlights the use of juror race in the exercise of backstrikes. If non-racial qualities of a juror (such as facial hair or demeanor) were motivating the prosecutor's backstriking patterns, we would anticipate that the race of the defendant would not affect the odds of backstriking black jurors relative to the odds of striking non-black jurors. Yet, as this analysis shows, it does. Prosecutors are more likely to backstrike black jurors than non-black jurors, and they are particularly likely to do it if the defendant is black. We see a similar, but reverse and smaller effect for defense attorneys.[75]

Lastly, we add to the analysis the interaction between juror race and the nature of the charge. Both the context 1 and context 2 analyses (models 2 and 4 of Table V) show that the odds of prosecutorial backstrikes vary significantly according to the nature of the charge brought against a defendant; and that the odds are even higher than shown in other models when we account for this interaction. Backstrikes are about as likely in cases involving crimes against society as they are in cases involving crimes against property, but prospective jurors do have higher odds of being backstruck when the charge is a

75. *See infra* Table VIII.

crime against persons (2.32 times in the context 1 analysis and 2.40 times in the context 2 analysis; $p<0.05$).

Because the odds of prosecutorial backstrikes are higher for *all* prospective jurors in cases that involve crimes against persons, however, the disparity between non-black and black jurors is less pronounced in those cases. In other words, the disparity in prosecutorial backstriking behavior between black and non-black prospective jurors is greatest in cases that do *not* involve crimes against persons. In the context 1 analysis (model 2), the significant difference in the odds of a prosecutorial backstrike for black compared to non-black jurors is not exacerbated by the type of charge; in property crimes cases, black jurors have 5.50 times the odds of being backstruck as do non-black jurors ($p<0.001$), but there is no significant increase in those odds for other types of charges. However, in the context 2 analysis (model 4), there is a significant effect. Compared to non-black prospective jurors in cases that involve property crimes, black prospective jurors face 8.75 times the odds of being backstruck by the prosecution as do non-black prospective jurors in cases involving crimes against property, about the same increased odds in cases involving crimes against society, but only 3.86 times the odds in cases involving crimes against persons ($p<0.05$). Importantly, although the disparity between the odds of backstrikes for black and non-black jurors is compressed in person-crimes cases, black prospective jurors in those cases face increased chances of a prosecutorial backstrike both from their race and from the nature of the charges. As such, black prospective jurors in person-crimes cases have the highest odds of any group in this analysis of being backstruck by the prosecution.

ii. Summary of Results for Prosecution Backstrikes

All of the results in these analyses reveal persistent increased odds of being backstruck for black jurors relative to non-black jurors, with overall odds ratios between 3.37 and 5.18. For some sub-groups of cases (e.g., those with black defendants), the odds ratio is even higher (i.e., in context 2, for cases involving blacks defendants the odds ratio reaches 6.29 and for cases involving property- or society-crimes it reaches 8.75). This robust disproportionate use of backstrikes against black jurors, undiminished by controls for other case characteristics, provides systematic evidence that the procedure contributes to undermining race-neutral jury selection.

iii. Backstrikes by the Defense

Our analysis of defense backstrikes includes the same controls and proceeds in the same fashion as our analysis of prosecutorial backstrikes did. Just as with prosecutorial backstrikes, backstrikes by the defense are considered in context 1 and then in context 2. Thus, our analysis of defense backstriking also includes two sets of models: context 1 includes the 8318 prospective jurors who were not excused for cause or unused, and context 2 includes only the 5926 prospective jurors who were not excused for cause, unused, or initially struck by the defense. Subsequent tables show both sets of results.

Table VI shows the racial pattern of defense backstrikes when other control variables are included in the analysis.

Table VI. Odds of Defense Backstrikes, Clustered by Case

	All Jurors Questioned and Not Excused for Cause (Context 1)		Questioned Jurors not Challenged for Cause or Initially Struck by Defense (Context 2)	
Variable Description	Odds Ratio	Standard Error	Odds Ratio	Standard Error
Juror race†	0.50***	0.11	0.36***	0.09
Juror gender†	0.89	0.17	0.78	0.15
Number of defendants	2.47	1.51	2.60	1.59
Charge				
Crime against property	(reference category)		(reference category)	
Crime against society	0.65	0.21	0.66	0.21
Crime against persons	1.73*	0.44	1.71*	0.43
Jury size (1 = 12, 0 = 6)	1.23	0.36	1.29	0.36
Percent Non-black percent in venire	0.96***	0.01	0.96***	0.01
Percent Male in venire	0.99	0.01	0.99	0.01
Judge race†	1.60*	0.26	1.64*	0.36
Judge gender†	0.72	0.18	0.74	0.18
Prosecutor race†	0.90	0.18	0.89	0.18
Prosecutor gender†	0.94	0.22	0.82	0.21
Defendant race†	0.68	0.24	0.84	0.25
Defendant gender†	1.43	0.91	1.36	0.84
Intercept	0.15	0.15	0.27	0.28
n	8318		5926	

* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$
†for race variables (1 = black; 0 = non-black); for gender variables (1 = female, 0 = male)

The pattern of defense backstrikes is quite different from that of prosecutorial backstrikes. For defense backstrikes, the likelihood of a backstrike does not change significantly with the number of defendants. Unlike the prosecution's patterns, defense backstriking is influenced by the type of charge in the case. Prospective jurors in cases that involve a crime against persons have 1.73 times the odds of being backstruck by the defense as do those in cases involving property crimes ($p<0.05$); prospective jurors in cases involving crimes against society, however, face about the same odds as do those in property-crimes cases. As with prosecutors, defendants apparently exercise backstrikes more frequently in front of black judges, with a similar odds ratio of 1.60 times the odds ratio for non-black judges ($p<0.05$).

Juror race is significant for defense attorneys, but the direction of the effect reverses the pattern for prosecutors: the defense is less, rather than more, likely to backstrike a black juror. The odds of a black prospective juror being backstruck by the defense is 0.50 times the odds of a non-black juror being backstruck ($p<0.001$). This is equivalent to saying that the odds of a *non-black* juror being backstruck by the defense is two times the odds of a *black juror* being backstruck ($1/.50 = 2$). Moreover, defense backstriking is also influenced by the racial composition of the remaining jurors in the effective venire; for every one percentage point increase in non-black prospective jurors who were seated for questioning in the case, the odds of a defense backstrike decreases by about four percent ($p<0.001$).

The patterns for defense backstrikes presented in Table VI are substantially similar for context 2, except for the odds ratio for juror race. For *non-black* prospective jurors, the odds of a defense backstrike increases to 2.78 times the odds of a defense backstrike of a *black* juror ($p<0.001$).

The analyses in Table VII include variables for victim race and victim gender, and thus also exclude cases without victims or for which victim information was unavailable.

Table VII. Odds of Defense Backstrikes, Clustered by Case (for cases with victim race and gender)

	All Jurors Questioned and Not Excused for Cause (Context 1)		Questioned Jurors not Challenged for Cause or Initially Struck by Defense (Context 2)	
Variable Description	Odds Ratio	Standard Error	Odds Ratio	Standard Error
Juror race†	0.59*	0.18	0.43**	0.14
Juror gender†	0.92	0.27	0.78	0.23
Number of defendants	5.82***	2.90	5.91***	2.90
Charge				
Crime against property	(reference category)		(reference category)	
Crime against society	1.42	1.47	1.31	1.35
Crime against persons	2.32*	0.95	2.27*	0.90
Jury size (1 = 12, 0 = 6)	0.72	0.21	0.75	0.22
Percent white in venire	0.94***	0.01	0.94***	0.01
Percent male in venire	0.96**	0.01	0.96***	0.01
Judge race†	1.64	0.55	1.70	0.56
Judge gender†	0.80	0.27	0.83	0.28
Prosecutor race†	1.07	0.28	1.06	0.27
Prosecutor gender†	1.41	0.34	1.32	0.31
Defendant race†	0.68	0.36	0.79	0.42
Defendant gender†	4.73	3.96	4.24	3.22
Victim race†	1.07	0.38	1.00	0.35
Victim gender†	0.66	0.18	0.64	0.18
Intercept	0.91	1.16	1.70	2.21
n	3653		2601	

* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$
†for race variables (1 = black; 0 = non-black); for gender variables (1 = female, 0 = male)

As with prosecutorial backstrikes, neither the victim's race nor the victim's gender has a significant impact on the defense's decision to backstrike. Nonetheless, in this more limited sample that includes only cases involving victims, the number of defendants does appear to matter; when victims are present, each defendant increases the odds of a defense backstrike by 5.82 (context 1) or 5.91 (context 2) times ($p<0.001$). The effect size for the race of the judge does not change, but it becomes non-significant with the smaller sample size. The odds ratio for person-crime cases compared to property-crime cases increases to a factor of about 2.3 ($p<0.05$). The odds ratio for black com-

pared to non-black jurors, however, stays approximately the same. If anything, the rate at which the defense backstrikes disproportionately according to race decreases in cases involving victims (to a factor of 0.59 for context 1 or 0.43 for context 2). Still, defendants appear to backstrike less frequently as the effective venire includes more white jurors (an odds ratio of 0.94 per percentage increase; $p<0.001$) as well as less frequently as the effective venire includes more men (an odds ratio of 0.96 per percentage increase; $p<0.001$).

As we did for prosecutorial backstrikes, we also tested the effects of significant interactions with juror race in the defense decision to backstrike.[76] Table VIII adds the interactions with juror race and juror gender.

76. Again, none of the other interactions with juror race was significant. Tables reflecting those analyses are available upon request.

Table VIII. Odds of Defense Backstrikes, with Interactions, Clustered by Case

	All Jurors Questioned and Not Excused for Cause				Questioned Jurors not Challenged for Cause or Initially Struck by Prosecution			
	Model 1 (with juror race X defendant race interaction)		Model 2 (with juror race X charge interaction)		Model 3 (with juror race X defendant race interaction)		Model 4 (with juror race X charge interaction)	
Variable Description	Odds Ratio	Standard Error	Odds Ratio	Standard Error	Odds Ratio	Standard Error	Odds Ratio	Standard Error
Juror race†	1.01	0.39	0.26**	0.11	0.91	0.37	0.18***	0.08
Defendant race†	0.89	0.30	0.68	0.24	1.03	0.35	0.73	0.25
Defendant race X Juror race	0.40*	0.18			0.30*	0.14		
Juror gender†	0.89	0.17	0.89	0.17	0.78	0.15	0.78	0.15
Defendant gender†	1.44	0.92	1.45	0.93	1.38	0.85	1.39	0.86
Number of defendants	2.52	1.56	2.54	1.57	2.70	1.65	2.74	1.70
Charge								
Crime against property	(reference category)		(reference category)		(reference category)		(reference category)	
Crime against society	0.65	0.21	0.65	0.21	0.65	0.21	0.66	0.22
Crime against society X juror race			0.99	0.77			0.96	0.76
Crime against persons	1.73*	0.44	1.36	0.35	1.72*	0.43	1.33	0.34
Crime against persons X juror race			2.93*	1.51			3.14*	1.64
Jury size (1 = 12, 0 = 6)	1.23	0.35	1.24	0.17	1.28	0.36	1.30	0.36
Percent white in venire	0.96***	0.01	0.96***	0.01	0.96***	0.01	0.96***	0.01
Percent male in venire	0.99	0.01	0.99	0.01	0.99	0.01	0.99	0.01
Judge race†	1.60*	0.36	1.61*	0.36	1.65*	0.36	1.66*	0.37
Judge gender†	0.72	0.18	0.71	0.18	0.73	0.18	0.72	0.18
Prosecutor race†	0.89	0.18	0.89	0.18	0.88	0.17	0.89	0.18
Prosecutor gender†	0.95	0.22	0.94	0.22	0.95	0.22	0.93	0.21
Intercept	0.11	0.13	0.17	0.18	0.20	0.20	0.31	0.33
n	8318		8318		5926		5926	

* p < 0.05, ** p < 0.01, *** p < 0.001† for race variables (1 = black; 0 = non-black); for gender variables (1 = female, 0 = male)

Models 1 and 3 of Table VIII show the results when the interaction between juror race and defendant race is included in the analysis. As with the prosecutorial backstrike pattern, the defense backstrike pattern depends on the race of the defendants in a case. In the context 1 analysis (model 1), non-black prospective jurors are about as likely to be backstruck by the defense as are black prospective jurors in cases involving all *non-black defendants*, but they have about 2.50 times the odds of a defense backstrike as do black prospective jurors in cases with *black defendants* ($p<0.05$). The same relationship is even more pronounced in the context 2 analysis (model 3); non-black prospective jurors have about the same odds of facing a defense backstrike as do black prospective jurors in cases with non-black defendants, but about 3.70 times the odds that black prospective jurors do in cases with black defendants ($p<0.05$). No other effects are of note compared to those in Table VI.

Our final models 2 and 4 show the patterns in defense backstriking when the interaction between juror race and type of charge is added to the analysis. Defense backstrikes by juror race also depend on the type of charge brought in the case—in a similar pattern to the one we saw with prosecutorial backstriking. Although prosecutors backstrike both black and non-black jurors more frequently in cases that involve crimes against persons (though still backstriking black jurors at a higher rate than non-black ones), defendants backstrike both black and non-black jurors at about the same rate in person-crime cases. However, in cases involving property or society crimes, the odds that a defense backstrike is exercised for a *non-black* juror is almost four (3.84) times the odds for a *black* juror ($p<0.01$). These figures increase slightly when jurors initially struck by the defense are removed from the analysis (context 2): non-black jurors in property- or society-crime cases have 5.56 times the odds of facing a defense backstrike as do black jurors ($p<0.001$), while odds of defense backstrikes for black and non-black jurors in person-crimes cases do not differ.

iv. Summary of Results for Defense Backstrikes

Defense backstrikes are exercised significantly less frequently than prosecution backstrikes, so they influence jury composition less.[77] Nonetheless, they do act as something of a counterweight to the

77. *Cf.* text following *supra* note 50.

prosecution's robust pattern of persistently increased odds of backstriking black jurors relative to non-black jurors. The overall odds ratios for defense backstrikes of non-black jurors compared to black jurors range from 2.0 to 2.78, and rise further for some sub-groups of cases (e.g., 3.70 with black defendants in context 2). Note that the significantly greater use of backstrikes by prosecutors than by defense attorneys further undermines the argument that backstrikes are merely a rational tool for managing group dynamics.[78] It that were true, we would expect both sides to be equally active in using them.

IV. THE PROBLEM OF BACKSTRIKES IN CADDO PARRISH

Using this unique data set that maps the use of peremptory strike and backstrikes during jury selection, we find that backstrikes occur frequently, removing jurors who have initially been accepted in 40 percent of these 332 cases. Moreover, controlling for other available case and juror characteristics, prosecutors were between three and more than five times as likely to use a backstrike on a black prospective juror as on a non-black prospective juror, thus expressing a strong preference for backstriking black jurors. The reverse pattern for defense attorneys is weaker and thus only partially counterbalances the actions of the prosecutors.

Prosecutors were even more likely to disproportionately backstrike black prospective jurors in two situations: when the cases involved black defendants, and when the case involved a property crime or a crime against society as opposed to a crime against a person. They were also more likely than defense attorneys to exercise backstrikes. This pattern of backstrikes exacerbates the already disproportionate removal of eligible black jurors by peremptory challenge during jury selection. The higher backstrike rate for the prosecutor in the cases with black defendants, which constitute 83 percent of the cases, provides evidence of the racial influence on these decisions to exercise a backstrike. It is hard to explain why black jurors are less desirable to the prosecution when the defendant is black unless race infects the decisions.

But what about *Batson* challenges as a way to prevent race-based exclusions? Attorneys in only ten of the 332 cases in Caddo Parrish raised a *Batson* challenge: eight prosecutors and six defense attorneys.

78. *See* note 12 *supra*.

A minority of these efforts, three of the prosecution and two of the defense challenge efforts had some effect, restoring to juries a total of 14 jurors. Only four of the restored jurors whose strikes were subjected to a successful Batson challenge were black jurors who had been initially struck by the prosecutor; the remaining ten were non-black jurors who had been initially struck by the defense. Thus, as a way to protect race-neutral strikes by the prosecution, *Batson* had an almost imperceptible effect. The rare effort to mobilize *Batson* is not surprising in view of the trail of both U.S. Supreme Court[79] and lower court acceptance of all but the most egregious and blatant instances of race-based use of the peremptory challenge.[80]

A number of judges and scholars have called for the elimination of peremptory challenges to avoid race-based use of peremptory challenges. Almost thirty years ago, Justice Thurgood Marshall, in his concurring opinion in *Batson*, pointedly argued that the Court should eliminate the use of peremptory challenges in all criminal proceedings so that they could not be based on race.[81] He predicted that because courts would find it difficult to identify a race-based motivation for a peremptory challenge unless it was blatant, the rule in *Batson* would fail to eliminate racially motivated strikes from jury selection.[82] Twenty years later, Justice Stephen Breyer concluded that Justice Marshall was correct.[83] Others too have found the elimination of the peremptory challenge as an attractive way to produce race-neutral jury selection.[84]

Does the peremptory challenge have a place in the modern jury trial? One potential justification for the peremptory challenge is that it can remove a juror suspected of bias when the party who suspects bias lacks sufficient proof to sustain a challenge for cause.[85] This justi-

79. *See, e.g.*, Purkett v. Elem, 514 U.S. 765, 768 (1995) (per curiam).

80. *See, e.g.*, Stokes v. State, 194 S.W.3d 762, 765 (Ark. 2004); Taylor v. State, 620 S.E.2d 363, 366 (Ga. 2005); Smith v. State, 448 S.E.2d 179, 181–82 (Ga. 1994).

81. *Batson*, 476 U.S. at 107 (J. Marshall, concurring) ("Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill-equipped to second-guess those reasons.").

82. *Id* at 106.

83. *Miller-El*, 545 U.S. at 273 (J. Breyer, concurring) ("I believe it necessary to reconsider *Batson*'s test and the peremptory challenge system as a whole.").

84. *See, e.g.*, Albert Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 199–211 (1989); Akhil Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS. L. REV. 1169, 1182–83 (1995); Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809 (1997); Melilli, *supra* note 36, at 502–03.

85. A.B.A. PRINC. OF JURIES AND JURY TRIALS (2005) princ. 11, subdiv. D.

fication has some merit outside the racial context. If the spouse of a police officer whose son is also an officer declares during jury selection that he will not give greater weight to the testimony of the police officers who will testify than to other witnesses, the court will not remove the juror for cause. The juror may be accurate in his claim, but it would be understandable if the defendant was skeptical and wished to exercise a peremptory challenge to remove this juror. Thus, the ability to remove this juror can promote the defendant's (and presumably any observer's) confidence in the fairness of the tribunal. But even if some use of the peremptory challenge is justified, how extensive should the right to peremptory challenges be? Three features of jury selection and decision making in Louisiana combine to make jury selection particularly vulnerable to race effects.

First, recall that in twelve-member juries, Louisiana permits each side to exercise twelve strikes with one defendant, adding another twelve strikes for each additional defendant, and additional challenges for each alternate.[86] This large number of peremptory challenges enables attorneys to influence the composition of the jury far more than in jurisdictions where the number of challenges is more limited. In contrast to Louisiana, the majority of states with twelve-member juries in felony cases[87] allocate six or fewer peremptory challenges to the state. Only three others give the state as many as twelve.[88]

Second, Louisiana is one of only two states that permit juries in felony cases to reach a verdict based on the agreement of ten out of twelve jurors.[89] Thus, an attorney need not remove all potential jurors who may be unsympathetic; two can be retained without jeopardizing the preferred verdict of the remaining ten. The number of potential challenges and the ten-out-of-twelve decision rule thus inflate the opportunity of a prosecutor who is consciously or unconsciously motivated by race to disproportionately remove black jurors during jury selection. The prosecutor can retain two minority jurors without jeopardizing a verdict the prosecutor expects will be affected by, or at least correlate with, the racial composition of the jury.

86. La. Code Crim. Proc. Ann. art. 789 (2015) (noting that the court determines whether alternate jurors are desirable, how many, and how many additional peremptory challenges shall be allowed).

87. All states except Connecticut, Florida, and Utah.

88. *See supra* note 35 and accompanying text.

89. Oregon permits ten out of twelve jurors in most felony cases, but requires unanimity in cases of aggravated murder.

What about the backstrike? This is the third feature of the Louisiana jury selection system that affects the racial make-up of the jury. Recall that the juror who is subjected to a backstrike has previously been deemed acceptable by the attorney exercising the backstrike. The attorney exercising the backstrike has simply decided belatedly that he or she would prefer another juror to the juror being backstruck. Why might that happen? Assume that the prosecutor is implicitly or explicitly motivated to remove black jurors because they are viewed as unfriendly to law enforcement, unduly sympathetic to defendants, or for any other reason. If race influences the prosecutor's choice, it is an unconstitutional violation of the Equal Protection Clause. How can the opportunity to backstrike facilitate such behavior? As in *Snyder v. Louisiana*,[90] the prosecutor may tentatively retain a minority juror to avoid the appearance of a race-based challenge pattern, and then return to use a backstrike later in the process. We cannot directly measure the motivation of the backstriking in Caddo Parish, but we do have evidence that race is a persistent predictor not only of initial peremptory challenge decisions, but also *among jurors already found acceptable by the prosecutor* of the odds that a juror will be removed with a backstrike. The series of analyses presented in this article show that juror race consistently predicts backstriking even when a variety of case controls are introduced. Thus, the opportunity to backstrike supplies an additional way to engage in race-based exclusion.

If we wanted to facilitate the use of race-based exclusions and the seating of juries on which minority jurors can be ignored, the Louisiana system provides a good template: First, use a decision rule that will permit the majority of ten out of twelve to ignore or outvote the minority. Second, provide the prosecutor with a large supply of peremptory challenges. Recall that the prosecutor in Louisiana gets twelve for each defendant. Third, permit backstrikes that can enable additional maneuvering to manage the use of the peremptory challenges. The remedy for all of these threats to race-neutral jury selection is clear: use a unanimous decision rule on twelve-person juries that empower all jurors, as 44 other states and the federal courts do;[91] reduce the number of peremptory challenges permitted so that the number reflects the lower norms for number of peremptory challenges

90. *See Snyder*, 552 U.S. at 474.

91. The other exceptions are Arizona and Utah (unanimous 8 person juries); Florida and Connecticut (unanimous six person juries) and Oregon (10 agreeing on a 12-person jury).

in most other parts of the country; and eliminate backstrikes, a procedure used in only three other states. Peremptory challenges are under attack and vulnerable to criticism, but they can be defended and justified if their use is cabined reasonably. The problem is that *Batson* has unfortunately been an effective tool in only the most egregious instances of race-based exclusions and there is convincing evidence presented in this article and elsewhere that race-based exclusions are far more common than those resulting in successful *Batson* challenges.

Backstrikes only exacerbate the problem of race-based exclusions through peremptory challenge by providing attorneys with greater latitude in striking jurors and making it harder to monitor the basis for an individual challenge decision. *Snyder v. Louisiana* showed how that can happen.[92] The prosecutor did not exercise a backstrike on Mr. Brooks until the day after Mr. Brooks had initially been accepted and after excusing two other black jurors.[93] The defense lodged a *Batson* challenge at that point, but by that time the prosecutor was prepared to offer supposedly race-neutral reasons for the strike: Mr. Brooks' conflicting obligations as a student-teacher and his nervous demeanor.[94] The trial court accepted the prosecutor's explanations for the strike and it was only twelve years later when the case made its way to the U.S. Supreme Court that the removal of Mr. Brooks was judged to be pretextual and discriminatory.[95] As the Court noted, several white jurors who the prosecution had chosen not to strike had said they had conflicting work and family obligations at least as serious as those of Mr. Brooks.[96]

Our results from Caddo Parish point to a systemic problem with backstrikes that mirrors the problem in *Snyder*: They cannot be characterized as race-neutral. Permitting backstrikes increases the likelihood of race-based exclusions, and they are used by prosecutors to disproportionately to remove black jurors. In doing so, they undermine the legitimacy of a jury selection process that is already viewed with suspicion. The most effective way to eliminate the harm that backstrikes inflict is to eliminate backstrikes as an option.

92. *See Snyder*, 552 U.S. at 474.
93. *Id.* at 477–79.
94. *Id.* at 478.
95. *Id.* at 485.
96. *Id.* at 480–83. In addition, in response to the trial court's inquiry, the Dean supervising Mr. Brooks had said that he didn't see a problem and promised to work with Mr. Brooks to help him meet his requirements.

APPENDIX A:
VARIABLES IN THE BACKSTRIKE ANALYSIS

Variable Name	Sample Characteristics	n
Number of defendants	326 (98.2%) = 1; 6 (1.8%) = 2	332 cases
Charge		332 cases
Crime against property	101 (30.4%)	
Crime against society	107 (32.2%)	
Crime against persons	124 (37.4%)	
Jury size	108 (32.5%) six-person juries = 0; 224 (67.5%) twelve-person juries = 1	
Victim race	all non-black victims = 0; all black victims = 1; mean of 61.4% black victims per case	296 victims
Victim gender	all male victims = 0; all female victims = 1; mean of 48.8% female victims per case	296 victims
Juror race	5410 (65.0%) non-black jurors = 0; 2908 (35.0%) black jurors = 1	8318 jurors
Juror gender	3555 (42.7%) male jurors = 0; 4763 (57.3%) female jurors = 1	8618 jurors
White percentage of venire	all non-white prospective jurors = 0; all white prospective jurors = 1; mean of 70.2% white prospective jurors per case	332 cases (8318 jurors)
Male percentage of venire	all female prospective jurors = 0; all male prospective jurors = 1; mean of 44.2% male prospective jurors per case	332 cases (8318 jurors)
Judge race	203 (74.9%) cases with non-black judge = 0; 129 (38.9%) cases with black judge = 1	332 cases (12 judges)
Judge gender	261 (78.6%) cases with male judge = 0; 71 (21.4%) cases with female judge = 1	332 cases (12 judges)
Prosecutor race	all non-black prosecutors = 0; all black prosecutors = 1; mean of 25.1% black prosecutors per case	332 cases (45 prosecutors)
Prosecutor gender	all male prosecutors = 0; all female prosecutors = 1; mean of 16.1% female prosecutors per case	332 cases (45 prosecutors)
Defendant race	all non-black defendants = 0; all black defendants = 1; mean of 83.4% black defendants per case	332 cases (338 defendants)
Defendant gender	all male defendants = 0; all female defendants = 1; mean of 4.1% female defendants per case	332 cases (338 defendants)