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THE FUTURE OF THE POST-BATSON PEREMPTORY CHALLENGE: VOIR DIRE BY QUESTIONNAIRE AND THE "BLIND" PEREMPTORY

Jean Montoya*

This Article examines the peremptory challenge as modified by Batson and its progeny. The discussion is based in part on a survey of trial lawyers, asking them about their impressions of the peremptory challenge, Batson, and jury selection generally. The Article concludes that neither the peremptory challenge nor Batson achieve their full potential. Primarily because of time and other constraints on voir dire, the peremptory challenge falls short as a tool in shaping fair and impartial juries. While Batson may prevent some unlawful discrimination in jury selection, Batson falls short as a tool in identifying unlawful discrimination once it occurs.

The Article proposes the reform of jury selection procedures to improve both the effectiveness of the peremptory challenge and Batson. The proposal is simple: Allow the usual number of alternating peremptory challenges and allow the complete questioning of the jury panelists, but allow voir dire by questionnaire only and the exercise of "blind" peremptories. In a system of blind peremptories, jury panelists would be identified by number only, and no questions regarding cognizable group status (e.g., race, ethnicity, or sex) would be permitted. The suggested reform improves the effectiveness of the peremptory challenge in eliminating biased jurors. The blind peremptory, coupled with thorough attorney examination of the panelists by questionnaire, frees the litigant to exercise more principled peremptory challenges. The suggested reform also improves the effectiveness of Batson in eliminating unlawful discrimination in jury selection. The blind peremptory prevents unlawful discrimination in jury selection by limiting the ability of the litigants to discern the race, ethnicity, and sex of the jury panelists.

INTRODUCTION

This Article discusses the constitutional restraints on the exercise of peremptory challenges in jury selection. A peremptory challenge allows a litigant to exclude an otherwise qualified
jury panelist from the jury panel during jury selection.⁠¹ Formerly, a litigant could use the peremptory challenge to exclude a limited number of panelists from the jury panel for any reason.⁠² This method of jury selection worked for a time, at least as long as jury panels were comprised of affluent white men.⁠³ As jury panels became more diverse and began to include African-Americans, women, and other groups previously excluded from jury service,⁠⁴ however, the peremptory challenge assumed a new and historically unprecedented role as an instrument of race and gender discrimination. This situation was tolerated far too long.⁠⁵ The United States Supreme Court ultimately concluded, however, that this sort of discrimination in jury selection was unconstitutional.

In a series of decisions beginning with Batson v. Kentucky,⁶ the Court began to tackle the problem of race and gender discrimination in jury selection. In 1986, the Court announced in Batson that the Equal Protection Clause forbids a prosecutor to exercise race-based peremptory challenges, at least when the excluded jurors and the defendant share the same race.⁷ Five

1. For a more detailed explanation of the peremptory challenge and how it works, see infra Part I.
2. See 4 William Blackstone, Commentaries *346 (stating that the peremptory challenge is "an arbitrary and capricious species of challenge"); see also Swain v. Alabama, 380 U.S. 202, 219 (1965) (approving Blackstone's description); Lewis v. United States, 146 U.S. 370, 378 (1892) (same).
4. See Marder, supra note 3, at 1096–98 (showing that the makeup of the American jury has changed only recently); Toni M. Massaro, Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images, and Procedures, 64 N.C. L. Rev. 501, 509 (1986) (describing how the composition of the American jury has changed over time).
5. As late as 1965, the United States Supreme Court condoned a litigant's purposeful exclusion of African-Americans from the jury. Swain, 380 U.S. at 212 (finding merit in a system that allows for the purposeful exclusion of "any group of otherwise qualified jurors in any given case, whether they be Negroes, Catholics, accountants or those with blue eyes"). Not until 1986, more than 20 years later, did the Court officially rectify the situation. See infra notes 6–14 and accompanying text.
7. See id. at 89.
years later, in *Powers v. Ohio*,8 the Court clarified its stance, holding that a prosecutor's race-based peremptory challenges violate the Equal Protection Clause regardless of whether the defendant and the excluded jurors are members of the same race.9 That same year, the Court held that the race-based peremptory challenges of private civil litigants also violate the Equal Protection Clause.10 A year later, in *Georgia v. McCollum,11* the Court held that the Equal Protection Clause precludes even criminal defendants from exercising race-based peremptory challenges.12 Most recently, in *J.E.B. v. Alabama ex rel. T.B.,13* the Court held that the Equal Protection Clause forbids gender-based peremptory challenges.14

The future of peremptory challenges in jury selection is uncertain. Appellate litigation regarding *Batson*’s scope is likely to continue. We can anticipate, for instance, that the Court eventually will consider whether religion-based peremptory challenges offend the Equal Protection Clause.15 Another area

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9. See id. at 402.
12. See id. at 59.
14. See id. at 129. For an interesting critique of *J.E.B.*, see Roberta K. Flowers, *Does It Cost Too Much? A “Difference” Look at J.E.B. v. Alabama*, 64 FORDHAM L. REV. 491 (1995) (arguing that courts should read the *J.E.B.* opinion narrowly because it did not recognize that the differences between men and women have an impact on the deliberation process).
15. *J.E.B.* holds that *Batson* requires nondiscrimination in jury selection when dealing with classifications subject to strict and heightened scrutiny. See *J.E.B.*, 511 U.S. at 143 (noting that parties may use their peremptory challenges to exclude any group normally subject to “rational basis” review). In Larson v. Valente, 456 U.S. 228 (1982), the Court held religion-based discrimination subject to strict scrutiny under the First Amendment. See id. at 244–46. Arguably, it follows that religion-based peremptory challenges offend *Batson.* See Angela J. Mason, Note, *Discrimination Based on Religious Affiliation: Another Nail in the Peremptory Challenge’s Coffin?* 29 GA. L. REV. 493, 522 (1995). Indeed, Justice Scalia has assumed that *J.E.B.* effectively extended *Batson* to religion-based peremptory challenges. *J.E.B.*, 511 U.S. at 161 (Scalia, J., dissenting) (observing that the “*Batson* principle. . . presumably would include religious belief”). In *Davis v. Minnesota*, 114 S. Ct. 2120 (1994), denying cert. to 504 N.W.2d 767 (Minn. 1993), however, the United States Supreme Court denied certiorari in a case raising religion-based peremptory challenges. See id. In that case, an African-American petitioner argued that the prosecutor's race-neutral reason for striking a black juror—that the juror was a Jehovah's Witness—violated the Equal Protection Clause. See id. at 2121. Justice Thomas, joined by Justice Scalia, dissented to the denial of certiorari. See id. at 2120–21.

ripe for the Court's consideration is the exercise of peremptory challenges to exclude jurors because of the panelist's race and gender, in other words, challenges based on the jury panelist's intersectionality.\textsuperscript{16}

This Article explores the future of the peremptory challenge. Part I examines the peremptory challenge as modified by \textit{Batson} and its progeny. Part II appraises \textit{Batson} by confronting the assertions of the \textit{Batson} critics and by assessing \textit{Batson}'s effectiveness in eradicating unlawful discrimination in jury selection. The discussion is based in part on the results from a survey of trial lawyers, which asked them their impressions of the peremptory challenge, \textit{Batson}, and jury selection generally. The Article concludes that neither the peremptory challenge nor \textit{Batson} achieves its full potential. Specifically, the peremptory challenge falls short as a tool in shaping fair and impartial juries, and \textit{Batson} falls short in identifying unlawful discrimination in jury selection. Accordingly, Part III proposes the reform of jury selection procedures in order to improve both the effectiveness of the peremptory challenge and \textit{Batson}: voir dire by questionnaire and the "blind" peremptory.

\textsuperscript{16} Challenges based on intersectionality purposely exclude jurors who are both of a particular race and a particular gender, for example, African-American women or Latino men. See Jean Montoya, "What's So Magical About Black Women?" Peremptory Challenges at the Intersection of Race and Gender, 3 MICH. J. GENDER & L. 369 (1996) (arguing that \textit{Batson} should be extended to intersectional discrimination in jury selection).
I. THE PEREMPTORY CHALLENGE: AN OVERVIEW

The exercise of peremptory challenges provides a litigant with an opportunity to shape the jury that will decide the litigant's case at trial. Procedures vary from jurisdiction to jurisdiction, but generally the exercise of peremptory challenges proceeds as follows: A panel of potential jurors (the venire) is summoned into the courtroom for questioning by the court and litigants (voir dire). The court typically inquires into the general background of the jury panelists—residential area, occupation, marital status, prior jury service and the like—and then the litigants question the panelists, probing for biases that may bear on the case. Following the examination of the jury panelists, the litigants exercise challenges for cause by asking the court to exclude certain jury panelists for specific, legally recognized reasons. After the exercise of unlimited challenges for cause, the litigants alternately exercise their peremptory challenges. Unlike challenges for cause, peremptory challenges are limited in number. Also unlike challenges for cause, the litigant ordinarily need not specify the reason for excluding a particular jury panelist.

The peremptory challenge serves at least four widely recognized purposes. First, the peremptory challenge allows the litigants to "eliminate extremes of partiality" on the venire. Accordingly, at least in theory, it operates to secure for the litigants a fair and impartial jury. Second, it gives the parties

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17. The grounds for challenges for cause are often statutorily enumerated. Grounds include, but are not limited to, actual bias (a jury panelist admits during questioning the inability to be fair and impartial in the particular case), see, e.g., CAL. CIV. PROC. CODE § 225(b)(1)(C) (West Supp. 1996); implied bias (familial or business ties exist between a jury panelist and one of the litigants or witnesses), see, e.g., id. §§ 225(b)(1)(B), 229; and disqualifications based on citizenship, age, residence, and English language ability, see, e.g., id. §§ 203, 225(b)(1)(A).

18. See, e.g., id. § 231(a) (allowing the prosecution and the defense 20 peremptory challenges each in cases involving the possibility of a life or death sentence and 10 peremptory challenges each for other cases). See also BLACKSTONE, supra note 2, at *347 (observing that peremptory challenges must have "[s]ome reasonable boundary" and noting that the common law allowed a prisoner 35 such challenges).


20. Id. at 219.

21. See Batson v. Kentucky, 476 U.S. 79, 91 (1986) (observing that peremptory challenges "traditionally have been viewed as one means of assuring the selection of a
some control over the jury selection process and thereby enhances the litigants' confidence in the proceedings and respect for the jury's ultimate verdict.\textsuperscript{22} Third, it permits litigants to probe for biases during voir dire without fear of alienating a potential juror.\textsuperscript{23} Even if no grounds for a challenge for cause appear, the litigant can exercise a peremptory challenge to exclude a panelist who may have been antagonized by the litigant's questioning. Fourth, it serves as a safety net of sorts for those instances when the challenge for cause is wrongly denied or cannot be demonstrated, but the litigant still believes that the jury panelist harbors bias.\textsuperscript{24}

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\textsuperscript{22.} See Edmonson v. Leesville Concrete Co., 500 U.S. 614, 630 (1991) (observing that “the role of litigants in determining the jury's composition provides one reason for wide acceptance of the jury system and of its verdicts”); Swain, 380 U.S. at 219 (arguing that the “function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise”); see also BLACKSTONE, supra note 2, at *347 (emphasizing “that a prisoner . . . should have a good opinion of his jury”); Babcock, supra note 21, at 552 (“[T]he peremptory challenge teaches the litigant, and through him the community, that . . . [the jury's] decision should be followed because in a real sense the jury belongs to the litigant: he chooses it.”); Saltzburg & Powers, supra note 21, at 356 (asserting that allowing the litigant to remove unwanted jury panelists is a means of ensuring that a litigant has “a good opinion of the jury”); Underwood, supra note 15, at 771 (observing that the peremptory challenge provides the litigants “an opportunity to participate in the construction of the decision-making body, thereby enlisting their confidence in its decision”). & \\
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\textsuperscript{23.} See Swain, 380 U.S. at 219–20 (noting the possibility of incurring a jury panelist's hostility during voir dire); Lewis v. United States, 146 U.S. 370, 376 (1892) (quoting Blackstone regarding the need to exclude jury panelists offended by voir dire). See also BLACKSTONE, supra note 2, at *347 (observing that “the bare questioning [of a jury panelist's] indifference may sometimes provoke a resentment”); Babcock, supra note 21, at 554–55 (recognizing the need to exclude jury panelists alienated by voir dire); Saltzburg & Powers, supra note 21, at 356 (observing that extensive voir dire regarding possible biases can alienate a jury panelist); The Supreme Court—Leading Cases, 106 HARV. L. REV. 163, 247 (1992) (observing that inquiries into potential bias can insult and alienate jury panelists). & \\
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\textsuperscript{24.} See Babcock, supra note 21, at 549–50 (noting the reluctance of judges to find bias and grant the challenge for cause); Kenneth J. Melilli, Batson in Practice: What We Have Learned about Batson and Peremptory Challenges, 71 NOTRE DAME L. REV. 447, 486 (1996) (observing that lawyers “rely so heavily upon their peremptory challenges because trial judges “rely upon the peremptory challenge as a substitute for the meaningful examination of challenges for cause”); Saltzburg & Powers, supra note 21, at 355–56 (describing jury panelists as reluctant to admit bias and judges as reluctant to find bias); Underwood, supra note 15, at 771 (characterizing the peremptory challenge as “an essential fallback for use when a challenge for cause is rejected”). & \\
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A. The Evolution of Batson

Prior to Batson, in Swain v. Alabama, the United States Supreme Court actually condoned the exercise of group-based peremptory challenges, including peremptory challenges based on race. In Swain, the African-American male defendant demonstrated that there were eight African-Americans on his venire but that none actually served, two being exempt and six having been challenged by the prosecutor during jury selection. The defendant claimed that the prosecutor purposely excluded the black jury panelists in violation of the Equal Protection Clause. The Court, however, declined to hold that purposely excluding black jury panelists in a particular case violates the Equal Protection Clause. Instead, it reasoned, "[i]n the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause." Indeed, the Court identified the pluralistic nature of American society as necessitating the opportunity to make race-based peremptory challenges.

Of course, since Swain, the Court has recast its position on the subject of race-based peremptory challenges in a particular case. In Batson, the Court held that purposely excluding black jury panelists in a particular case violated the Equal Protection Clause. In that case, the defendant, a black man, objected when the prosecutor used his peremptory challenges to exclude all four black persons on the venire, producing an all white jury. While Batson was framed in terms of a criminal defendant's Equal Protection right not to have members of the defendant's race excluded because of their race, subsequent cases have framed the issue in terms of the right of jury panelists not

26. See id. at 220–21.
27. See id. at 205.
28. See id. at 210.
29. See id. at 221, 223. The Court observed, however, that the prosecutor's exclusion of black jury panelists in case after case, such that no black panelist ever served on a jury, would violate the Equal Protection Clause. See id. at 223.
30. Id. at 221.
31. See id. at 218, 222.
33. See id. at 82–83.
34. See id. at 85–86.
to be excluded because of their race—a right that litigants can assert on behalf of the excluded jury panelist(s). It thus has become increasingly clear that race cannot serve as a proxy for determining juror bias or competence. In contrast to Swain, the Court in both Batson and J.E.B. has recognized that the pluralistic nature of our society requires the prohibition of race- and gender-based peremptory challenges, respectively.

The Court clarified the reach of Batson's prohibition in J.E.B., holding that gender also could not serve as a proxy for determining juror bias or competence. The Court based its decision prohibiting gender-based peremptory challenges on the history of women's exclusion from American political life and compared the nature and extent of that exclusion to the exclusion of African-Americans from American political life. The Court cited laws depriving women of various rights associated with citizenship, such as jury service, voting, holding political office, and serving in the military.


36. See McCollum, 505 U.S. at 55–56 (holding that the state has standing to challenge a criminal defendant's discriminatory use of peremptory challenges); Edmonson, 500 U.S. at 628–30 (holding that a civil litigant has standing to challenge an opposing litigant's discriminatory use of peremptory challenges); Powers, 499 U.S. at 410–15 (holding that a white criminal defendant has standing to challenge the state's use of peremptory challenges to exclude black jury panelists).

37. See Powers, 499 U.S. at 410.

38. See Batson v. Kentucky, 476 U.S. 79, 99 (1986) (noting that "[i]n view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race"); J.E.B. v. Alabama ex rel T.B., 511 U.S. 127, 146 (1994) ("When persons are excluded from participation in our democratic processes solely because of race or gender, the promise of equality dims, and the integrity of our judicial system is jeopardized."); see also Edmonson, 500 U.S. at 630–31 (admonishing that "[i]f our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress"); Marder, supra note 3, at 1083 (observing that peremptory challenges based on group identity are inconsistent with democratic ideals).

39. The reasoning in Batson is somewhat obscure, perhaps because the defendant-petitioner, apparently discouraged by the Court's Equal Protection Clause analysis in Swain, based his claim on the Sixth Amendment, and, as a result, the briefs and argument failed to develop an Equal Protection Clause analysis. See Batson, 476 U.S. at 112–18 (Burger, C.J., dissenting).

office, bringing suit, and holding property as examples of exclusion.\textsuperscript{41} It compared these laws to laws specifically excluding African-Americans.\textsuperscript{42} The Court reasoned that, under Equal Protection Clause analysis, this history of exclusion required the heightened scrutiny of gender-based discrimination,\textsuperscript{43} and that gender-based peremptory challenges could not survive such scrutiny.\textsuperscript{44} The Court made clear that, although men have been favored historically for inclusion on juries and in other aspects of American political life, they, like women, are a cognizable group and the state's intentional exclusion of them from the jury panel also would violate the Equal Protection Clause.\textsuperscript{45} The Court also made clear, however, that peremptory challenges may be exercised to "remove from the venire any group or class of individuals normally subject to 'rational basis' review"\textsuperscript{46} and offered occupation-based challenges as an example of permissible group-based discrimination in the exercise of peremptory challenges.\textsuperscript{47}

\textbf{B. The Post-Batson Peremptory Challenge in Operation}

If working properly, then, the post-Batson peremptory challenge functions as follows: Assume a charge of battery on a law enforcement officer. The offered defense is self-defense in response to the use of unreasonable force by the law enforcement officer. The defense would exercise its peremptory challenges to exclude law enforcement officers, the friends and relatives of law enforcement officers, and anyone who might be perceived as a law-and-order type. The prosecution would exercise its

\begin{footnotesize}
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    \item 41. \textit{See id.} at 131–36.
    \item 42. \textit{See id.} at 135–36.
    \item 43. \textit{See id.}
    \item 44. \textit{See id.} at 136–42 (assessing whether gender discrimination in jury selection substantially furthers the State's legitimate interest in a fair and impartial jury and concluding that it does not).
    \item 45. \textit{See id.} at 141–42. Although the result (forbidding the purposeful exclusion of male jury panelists when it is women who have been historically excluded from American political life) may seem absurd, it stems from the Court's focus on discrimination as opposed to subordination. The Court believed that affording women protection from gender-based peremptory challenges but not extending the same protection to men denied men equal protection under the law. \textit{See also} Powers v. Ohio, 499 U.S. 400, 423–24 (1991) (Scalia, J., dissenting).
    \item 46. \textit{J.E.B.}, 511 U.S. at 143.
    \item 47. \textit{See id.} at 142 n.14.
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peremptory challenges to exclude anyone who has had a bad experience with law enforcement officers, the friends and relatives of those who have had negative experiences with law enforcement officers, and anyone who might be perceived as an anti-establishment type. When the exercise of each side's peremptory challenges was completed, theoretically the impartial jury panelists (those who have had no personal experience or familiarity with police brutality or law enforcement) would

48. Proponents of the peremptory challenge system value the ignorance or "impartiality" of jurors; that is, they favor jurors who will be free from "bias" so that they can base their decision on the evidence presented by the parties at trial. Mark Cammack, In Search of the Post-Positivist Jury, 70 IND. L.J. 405, 428-34 (1995). This model, however, is arguably flawed. It assumes that truth is objective and that the human observer and the external world are separable. Modern cognitive theory posits different conceptions of truth and the human observer:

[T]he mind has come to be seen not as a mirror reflecting exact images of reality, but as a lens through which external reality is refracted. . . . All experience is mediated by preexisting knowledge structures, constellations of assumptions, interests, and purposes that filter and organize perception as it occurs. And because the minds that take the world in are a product of their time and place, their representations of reality are likewise socially conditioned and partial to some degree. . . .

. . . Because all perception is dependent on the interpretive apparatus of the observer, truth is invariably relative to a community that shares the same conventions of interpretation. No perspective can claim priority on the basis of privileged access to the truth.

Cammack, supra, at 416-17, 420 (footnotes omitted); see also Martha Minow, Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors, 33 WM. & MARY L. REV. 1201, 1208 (1992) (advocating a collaborative decision-making process based on the inclusion of multiple perspectives); M.A. Widder, Comment, Neutralizing the Poison of Juror Racism: The Need for a Sixth Amendment Approach to Jury Selection, 67 TUL. L. REV. 2311, 2324-25 (1993) (advocating a jury that is "well rounded").

These modern conceptions of truth and the human observer do not support excluding the biased, for everyone is biased. Instead, they support including as many perspectives as possible, provided that the jurors are "willing to suspend judgment, to attempt to see things from another perspective, and to learn." Cammack, supra, at 485. As Professor Martha Minow explains:

None of us can know anything except by building upon, challenging, responding to what we already have known, what we see from where we stand. But we can insist on seeing what we are used to seeing, or else we can try to see something new and fresh. The latter is the open mind we hope for from those who judge, but not the mind as a sieve without prior reference points and commitments.

Minow, supra, at 1217.
remain. After *Batson*, the litigants cannot exclude a particular race of jury panelists on the assumption that they have a bias in favor of the defendant or a prejudice against law enforcement. Assuming no showing of pretext to discriminate against black jury panelists, however, litigants lawfully may exclude panelists who have had negative experiences with law enforcement officers, even if that means excluding all black jury panelists.

II. *BATSON*: AN APPRAISAL

A. The Erroneous Assertions of the Batson Critics

*Batson* jurisprudence has had its critics. The dissenting and concurring Justices in *Batson* and its progeny argue that the decisions neglect important considerations. They spotlight the pedigree of the peremptory challenge and extol its role in securing a fair and impartial jury. They regret that *Batson* and its progeny disregard the history and function of the peremptory challenge, and instead restrict the exercise of

49. In reality, "in a diverse society the peremptory challenge is actually a stacking tool that favors majority interests while handicapping the party who would benefit from minority representation on the jury." Tracey L. Altman, Note, *Affirmative Selection: A New Response to Peremptory Challenge Abuse*, 38 STAN. L. REV. 781, 800 (1986). That is, if the venire is likely to have more law-and-order types than anti-establishment types, the likelihood is that the prosecution will eliminate all the anti-establishment types, but the defense will not eliminate all the law-and-order types. This sort of "stacking" may occur because peremptory challenges are limited in number. See *supra* note 21 and accompanying text.

50. To exclude these jurors, however, is arguably to exclude a black perspective on police conduct. Inclusion advocates would argue that this exclusion undermines truth-seeking insofar as it excludes this black perspective. Cf. *supra* note 48. Only the elimination of peremptory challenges could prevent this sort of exclusion.

51. See *J.E.B.*, 511 U.S. at 147 (O'Connor, J., concurring) (observing that the "peremptory's importance is confirmed by its persistence: it was well established at the time of Blackstone and continues to endure in all the States"); id. at 163 (Scalia, J., dissenting) (describing *Batson* jurisprudence as a "vandalizing of our people's traditions"); *Batson*, 476 U.S. at 112, 118–21 (Burger, C.J., dissenting) (lamenting that "the Court sets aside the peremptory challenge, a procedure which has been part of the common law for many centuries and part of our jury system for nearly 200 years"); id. at 137 (Rehnquist, J., dissenting) (declining to "subscribe to the Court's unprecedented use of the Equal Protection Clause to restrict the historic scope of the peremptory challenge"). For a history of the peremptory challenge, see *Swain v. Alabama*, 380 U.S. 202, 212–19 (1965).
peremptory challenges in order to prevent the intentional exclusion of certain groups from juries.52

These Justices also predict doom for the implementation of Batson. Their more notable assertions are that Batson interjects racial matters into the jury selection process,53 diminishes the ability of litigants to act on sometimes accurate group-based assumptions (or stereotypes),54 forces ""the peremptory challenge [to] collapse into the challenge for cause,""55 effectively abolishes the peremptory challenge,56 and lengthens trials that are already too long.57 This Article will now address each of these concerns.

52. See Batson, 476 U.S. at 125 (Burger, C.J., dissenting) (observing that ""[p]eremptory challenges have long been viewed as a means to achieve an impartial jury that will be sympathetic toward neither an accused nor witnesses for the State on the basis of some shared factor of race, religion, occupation, or other characteristic"). In his dissent, Justice Rehnquist noted:

The use of group affiliations, such as age, race, or occupation, as a ""proxy"" for potential juror partiality, based on the assumption or belief that members of one group are more likely to favor defendants who belong to the same group, has long been accepted as a legitimate basis for the State's exercise of peremptory challenges.

Id. at 138.

53. See id. at 129 (Burger, C.J., dissenting).

54. See J.E.B., 511 U.S. at 149 (O'Connor, J., concurring) (observing that gender or race may affect a juror's verdict, but that J.E.B. renders ""any correlation between a juror's gender and attitudes . . . irrelevant as a matter of constitutional law"); Batson, 476 U.S. at 138-39 (Rehnquist, J., dissenting) (describing group affiliations, including race, as a legitimate proxy for potential juror partiality in the exercise of peremptory challenges).

55. Batson, 476 U.S. at 127 (Burger, C.J., dissenting) (alteration in original) (quoting United States v. Clark, 737 F.2d 679, 682 (7th Cir. 1984)).

56. See Powers v. Ohio, 499 U.S. 400, 425 (1991) (Scalia, J., dissenting); see also J.E.B., 511 U.S. at 149 (O'Connor, J., concurring) (observing that the prohibition on gender-based discrimination in jury selection comes ""a step closer to eliminating the peremptory challenge"). Some legal commentators have joined the justices in their more extreme assertions about Batson's effect on the peremptory challenge. See, e.g., J. Christopher Peters, Note, Georgia v. McCollum: It's Strike Three for Peremptory Challenges, But is it the Bottom of the Ninth?, 53 LA. L. REV. 1723, 1755-57 (1993) (asserting that ""peremptory challenges have outlived their usefulness"" and have become ""watered-down"" challenges for cause); Susan A. Winchurch, Note, J.E.B. v. Alabama ex rel. T.B.: The Supreme Court Moves Closer to Elimination of the Peremptory Challenge, 54 MD. L. REV. 261, 262-63 (1995) (asserting that ""the Court's extension of Batson principles to gender-based peremptory challenges has compromised the peremptory challenge to such a degree that it is no longer an effective litigation tool"). But see Underwood, supra note 15, at 768-73 (arguing that Batson limits but does not destroy the value of the peremptory challenge).

57. See J.E.B., 511 U.S. at 147 (O'Connor, J., concurring) (describing Batson ""mini-hearings"" as ""routine"); id. at 162 (Scalia, J., dissenting) (observing that Batson and its progeny spawn ""extensive collateral litigation"); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 645 (1991) (Scalia, J., dissenting) (noting that ""the amount of judges' and lawyers' time devoted to implementing [Batson and its progeny] will be enormous"" and
1. **Batson Does Not Disregard History and Interject Race into the Jury Selection Process**—The *Batson* critics' appeal to history in defense of the peremptory challenge seems wrongheaded. Blacks and women historically were excluded from jury service, so the use of peremptory challenges to exclude them as jurors from a particular trial in earlier times was simply not an issue. Perhaps the peremptory challenge could go unquestioned in an earlier society with different values—in a society in which only affluent white males sat on juries. Contemporary American society, however, apparently values more heterogeneous juries. The use of peremptory challenges to exclude certain groups from juries ignores changes in the historical context and contravenes modern values by rendering the prospect of heterogeneous juries elusive, perpetuating stereotypes and prejudices, and subordinating socially significant minority groups.

Similarly, to say that *Batson* interjects race into the jury selection process misses the point. The use of peremptory challenges to exclude jurors on the basis of race already has injected race into the jury selection process.

2. **Batson Does Not Unduly Limit the Ability of Parties to Act on Group-Based Assumptions**—*Batson* and its progeny do diminish the ability of parties to act on sometimes accurate group-based assumptions, but not to a worrisome degree. Concurring in *J.E.B.*, Justice O'Connor observed that

like race, gender matters. . . . [O]ne need not be a sexist to share the intuition that in certain cases a person's gender

that "[t]hat time will be diverted from other matters"; *Batson*, 476 U.S. at 125 n.7 (Burger, C.J., dissenting) (predicting that voir dire will become "Title VII proceeding[s] in miniature").

58. See *J.E.B.*, 511 U.S. at 141 n.15 (recognizing that various traditions, like "de jure segregation and the total exclusion of women from juries, are now unconstitutional even though they once co-existed with the Equal Protection Clause"); see also Marder, supra note 3, at 1093–94 (arguing that adherence to tradition makes no sense given that the jury and the peremptory challenge have changed over time); Massaro, supra note 4, at 510 (arguing that the problem of discrimination in jury selection "cannot be solved by reference to history").

59. See supra note 3 and accompanying text.

60. See supra note 38 and accompanying text.

61. See *J.E.B.*, 511 U.S. at 138–40, 146.

62. The argument that *Batson* has interjected race into the jury selection process is reminiscent of the argument that affirmative action has stigmatized and demeaned its intended beneficiaries. Yet, "affirmative action did not cause stigma to attach to selected racial groups; society already had taken care of that." John E. Morrison, *Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric Against Affirmative Action*, 79 Iowa L. Rev. 313, 343 (1994). Any criticism of *Batson* on this point would have similar flaws.
and resulting life experience will be relevant to his or her view of the case. "Jurors are not expected to come into the jury box and leave behind all that their human experience has taught them."^63

*J.E.B.* does not so much contest the observation that race and gender matter as much as it prohibits the lawyer from acting on that assumption without more.\(^64\) Instead, any race- or gender-based assumption must be demonstrably accurate in the case of each individual jury panelist for whom the opponent demonstrates a prima facie case of purposeful discrimination.\(^65\) In other words, information or observations gained from voir dire (other than the excluded jury panelist's race or gender) must evidence the jury panelist's bias or otherwise support a permissible reason for excluding the jury panelist.\(^66\)

The reason: race and gender may matter, but the reason that they may matter—centuries of discrimination and subordination based on these characteristics—makes exclusion from jury service based on race or gender particularly intolerable.\(^67\) Moreover, although race and gender may matter, how they matter is often unknowable. Race and gender characteristics may interact with each other and with a host of other characteristics, such as age, income, occupation, education, political affiliation, and religion, to make any one characteristic an unreliable indicator of bias.\(^68\)

For instance, a male defendant in a sexual harassment case could assume that women, as a group, are more likely than men to have suffered sexual harassment, and that women who have suffered sexual harassment would have a bias in favor of the female plaintiff. Defense counsel therefore might seek to exclude

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64. See id. at 139 n.11 (acknowledging that "a shred of truth may be contained in some stereotypes, but [requiring] that state actors look beyond the surface before making judgments about people that are likely to stigmatize as well as to perpetuate historical patterns of discrimination").

65. See id. at 138–40.

66. See Edmonson v. Leesville Concrete Co., 500 U.S. 614, 631 (1991) (observing that biases "can be explored in a rational way... without the use of classifications based on ancestry or skin color").

67. See supra note 38 and accompanying text.

68. Marder, supra note 3, at 1077–83 (rejecting the idea that "people can[] be reduced to one characteristic"). Cf. Holland v. Illinois, 493 U.S. 474, 512 & n.10 (1990) (Stevens, J., dissenting) (observing that focusing on achieving a racially balanced jury "would likely distort the jury's reflection of other groups in society, characterized by age, sex, ethnicity, religion, education level, or economic class").
women jury panelists. In the case of any individual woman panelist, however, the opposite could just as well be true. For instance, polls conducted during the Clarence Thomas confirmation hearings demonstrated that women who have been harassed may be skeptical of another woman’s claims. Professor Martha Minow considers the possibilities:

Perhaps the complainant did not respond the way the adjudicator did or would have; perhaps the complainant appears disloyal or otherwise blameworthy in the eyes of the adjudicator. These alternatives simply point to the multiple directions that bias may take, but not to its absence. Would restricting decisionmaking to a man or group of men be any better? . . .

[Men] might identify with the accused and might worry about being accused themselves. They might worry about false accusations and the difficulty of rebutting them. They might worry about true accusations, yet not believe them serious enough to warrant public sanction. They also might worry about true accusations and seek to show their ability to overcome any appearance of bias by coming down hard on the accused.

For the same reason, it would be overly simplistic to assume that black jurors are biased in favor of other blacks and therefore exclude black jury panelists in a case involving a black defendant. While some members of minority groups may be sympathetic to members of their own group, others may “respond to discrimination and prejudice by attempting to disassociate themselves from the group, even to the point of adopting the majority’s negative attitudes towards the minority.” In addition, blacks sometimes witness and are victimized

70. Minow, supra note 48, at 1208–09.
71. Castaneda v. Partida, 430 U.S. 482, 503 nn.2–3 (1977) (Marshall, J., concurring) (citing social science evidence); see also Babcock, supra note 21, at 553 (citing the 1969 criminal trial of 21 Black Panthers on multiple charges of violent crimes in New York for the proposition that “black males as a class can be biased against young alienated blacks who have not tried to join the middle class”). In that litigation, the defendants challenged about as many black jury panelists as the prosecution. See id. at 553 n.30.
by black-on-black crime and as a result may actually be prejudiced against the black defendant. For example, a black woman juror, commenting on jury service in the District of Columbia, made the following observation:

Some defense lawyers may feel that the predominantly middle-aged, predominantly black jury most often chosen in the District is more sympathetic to the black defendant. But they are espousing . . . another bit of folklore. In fact, quite the opposite is true. Enough crime is enough, such juries feel. We are the victims. You see it on the unsigned exit questionnaires handed out at month's end in the early-sunset wintertime. "Give us more protection walking from the Courthouse to the bus." Or "This is a high crime neighborhood; don't hold us in the court past dark."  

Batson diminishes the ability of parties to act on group-based assumptions. The cost to the parties, however, is somewhat elusive. The cost perceived by the Batson critics assumes that the group-based assumption is accurate, that the individual jury panelist fits the group-based assumption, and that voir dire will not expose the panelist's bias.  

Of course, any one of these assumptions might not hold true. If the stereotype is not empirically supported, if an individual jury panelist does not fit the stereotype, or if the jury panelist's bias is exposed during voir dire, then the litigant who would otherwise rely on the stereotype loses nothing.

3. Batson Has Neither Effectively Eliminated the Peremptory Challenge, nor Caused it to Collapse into the Challenge for Cause—Batson and its progeny undeniably alter the exercise of the peremptory challenge. Whether Batson has caused the peremptory challenge to collapse into the challenge for cause or has effectively abolished the peremptory challenge is another matter.

73. Dissenting in J.E.B., Justice Scalia opined that even expanded voir dire would not help litigants select a fair and impartial jury in a post-Batson trial: "The biases that go along with group characteristics tend to be biases that the juror himself does not perceive, so that it is no use asking about them. It is fruitless to inquire of a male juror whether he harbors any subliminal prejudice in favor of unwed fathers." 511 U.S. 127, 162 (1994). Assuming that subliminal prejudice cannot be demonstrated or exposed, however, should we allow parties to assume bias and exclude on the basis of race and gender? The premise of Batson and its progeny is that we should not tolerate such assumptions.
Although the challenge for cause has always required the lawyer to articulate a basis for excluding a jury panelist, the hallmark of the pre-Batson peremptory challenge was the ability to exclude a jury panelist without articulating a reason. After Batson and its progeny, a lawyer may not exercise race- or gender-based peremptory challenges, and a litigant may be required to articulate the basis for his or her challenges. If the lawyer opposing the peremptory challenge establishes a prima facie case of purposeful discrimination in jury selection, the lawyer making the challenge must articulate a race- or gender-neutral reason for excluding the jury panelist. Assuming that the lawyer’s explanation is facially valid, the trial court must determine whether the opponent of the peremptory challenge has carried his or her burden of proving purposeful discrimination. The trial court may find that a facially valid explanation for a peremptory challenge really serves as a pretext for purposeful discrimination.

Batson nevertheless makes clear that although a litigant cannot rebut a prima facie case of discrimination “merely by denying that he had a discriminatory motive or ‘affirm[ing] [his] good faith in making individual selections,’” the litigant’s “explanation need not rise to the level justifying exercise of a

74. See supra note 19 and accompanying text.


76. See Purkett, 115 S. Ct. at 1771 (rejecting the notion that a proffered neutral explanation must be persuasive or plausible, because that requirement would shift the burden of persuasion regarding racial motivation from the opponent to the maker of a peremptory challenge).

77. See id. at 1770–71. Demonstrating disproportionate impact in the absence of purposeful discrimination does not suffice to show a Batson violation. See Hernandez v. New York, 500 U.S. 352, 362 (1991) (upholding the exclusion of bilingual jurors even though the exclusion would have a disproportionate impact on Latino jury panelists). However, disproportionate impact may evidence purposeful discrimination. See id. at 363.


challenge for cause. Moreover, the Batson critics are far removed from the trial court procedures that they have declared doomed. In order to assess the effect of Batson on the actual practice of exercising peremptory challenges, I explored the more extreme assertions of these critics and other questions in a survey of state and federal trial lawyers.

a. A Survey of Trial Lawyers—In the summer of 1994, I drafted and distributed a written survey® to 664 San Diego trial attorneys: 92 Assistant U.S. Attorneys, 259 Deputy District Attorneys, 65 Deputy City Attorneys, 23 Federal Public Defenders, 195 Deputy Public Defenders, and 30 Alternate Public Defenders.® Of the 664 surveys sent, 197 anonymous surveys were returned in pre-addressed, pre-stamped return envelopes.® Of the 197 returned surveys, 98 were completed by prosecutors, 96 by defense attorneys, and 3 by attorneys who did not identify themselves as either prosecutors or defense attorneys.® Of the 197 returned surveys, 9 were completed by exclusively federal court practitioners, 150 were completed by exclusively state court practitioners, and 36 were completed by lawyers who had practiced in both federal and state courts.® The lawyers who responded to the survey had extensive trial experience—20 had conducted 0–10 trials, 30 had conducted 11–25 trials, 66 had conducted 26–50 trials, 50 had conducted 51–100 trials, and 29 had conducted more than 100 trials.® Significantly, 23 of the

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80. Id. at 97.
81. See infra app. A for a copy of the survey. Of course, surveys rely on self-reporting to gather information, and the value of survey research depends highly on the reliability of the survey subjects. Successful survey research depends on the survey subject being knowledgeable, self-aware, honest, and cooperative. Readers should consider the results of survey research with this limitation in mind.
82. The survey was distributed to criminal law practitioners in public service because these practitioners typically have substantial trial experience and are easy to identify on various attorney rosters. Distribution was based on attorney rosters for the following agencies: the Office of the United States Attorney, Southern District of California—Criminal Division; the County of San Diego Office of the District Attorney; the City Attorney's Office—Criminal Division; Federal Defenders of San Diego, Inc.; the County of San Diego Department of the Public Defender; and the Alternate Public Defender Office.
83. Alternate Public Defenders handle cases that the Public Defender does not accept for a variety of reasons, primarily conflicts of interest.
84. See survey responses (on file with author).
85. See infra app. A, question 16, asking responding attorneys to describe their professional experience. See infra app. B, tbl. 1, for a profile of the attorneys who returned the survey. For unknown reasons, not all questions were answered on a few of the returned surveys.
86. See infra app. B, tbl. 1.
87. See id.
lawyers with federal court experience spent some time practicing pre-Batson, and 73 of the lawyers with state court experience spent some time practicing pre-Wheeler (California’s Batson counterpart). These lawyers therefore would be able to compare pre- and post-Batson and pre- and post-Wheeler practice, respectively.

The surveyed attorneys were asked about peremptory challenges, Batson/Wheeler motions, and jury selection generally. Specifically, the attorneys were asked the following questions:

- How valuable are peremptory challenges to litigants, and were peremptory challenges of any more value pre-Batson (or pre-Wheeler)?
- How often were Batson (or Wheeler) motions made in cases you personally tried?
- Do Batson/Wheeler motions take up too much court time?
- How difficult or easy is it to establish a prima facie case of purposeful discrimination and to rebut a prima facie case of purposeful discrimination?
- Is the venire adequately questioned before the exercise of peremptory challenges?
- How is the venire questioned?
- Do Batson/Wheeler motions prevent unlawful discrimination in jury selection?

Should peremptory challenges be eliminated from the jury?

88. Predating Batson, the California Supreme Court prohibited peremptory challenges based on “group bias” but permitted challenges based on “specific bias.” People v. Wheeler, 583 P.2d 748, 761–62 (Cal. 1978). The court defined “specific bias” as a bias relating to the particular case on trial and “group bias” as the presumption that certain jurors are biased merely because of their membership in an identifiable group distinguished on racial, religious, ethnic, or similar grounds. See id. at 761. Wheeler held that the use of peremptory challenges to exclude prospective jurors on the basis of group bias violated the state constitutional right to trial by a jury drawn from a representative cross-section of the community. See id. at 761–62. Like Batson, however, Wheeler held that a showing of specific bias could support a peremptory challenge. See id. at 762.

Some legal scholars and commentators have advocated the applicability of the Sixth Amendment’s fair cross-section requirement to the government’s discriminatory use of peremptory challenges in jury selection. See, e.g., Marder, supra note 3, at 1128–34, 1138; Massaro, supra note 4, at 536–39; Widder, supra note 48, at 2331–32. However, the Supreme Court has limited the Sixth Amendment fair cross-section requirement to the empaneling of jury venires. See Holland v. Illinois, 493 U.S. 474, 478 (1990).

89. See infra app. A, questions 1 and 2.
90. See id. questions 3 and 4.
91. See id. question 5.
92. See id. question 6.
93. See id. question 7.
94. See id. question 8.
95. See id. questions 9 and 10.
96. See id. question 11.
97. See id. questions 12 and 13.
selection process?98 The surveyed attorneys were also asked to explain why they answered certain questions as they did.99

b. Trial Lawyers Assert that the Peremptory Challenge Remains Valuable—Despite the constitutional restrictions on the exercise of peremptory challenges, and despite the impressions of the Batson critics, practitioners overwhelmingly described peremptory challenges as valuable. Of the lawyers who answered the question regarding the value of peremptory challenges,100 81% described peremptory challenges as having great value.101 An additional 18% described peremptory challenges as having some value. Fewer than 1% described peremptory challenges as having no value. Prosecutors and defense attorneys, as well as federal court and state court practitioners, generally agreed that peremptory challenges were valuable.102

The reasons most often cited by lawyers for why peremptory challenges are valuable were the following: Peremptory challenges allow litigants to exclude jurors with whom the attorney has "bad chemistry" or to exclude jurors on the basis of "gut feeling." Peremptory challenges allow litigants to exclude jurors when challenges for cause should have been granted but were not, or to exclude jurors with attitudes and experiences that would not support a challenge for cause but would support an inference of bias against the client or the client's case theory.

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98. See id. questions 14 and 15.
99. The answers to relevant survey questions were assigned a numerical value and two formulas were used to determine statistical significance: the t test when a question asked respondents to choose from four or more possible answers, and the chi-square test when a question asked respondents to choose from three or fewer possible answers. See Dean J. Champion, Basic Statistics for Social Research 171–76, 234–39, 243–46 (2d ed. 1981). A finding of significance indicates that there is a low probability that the difference between the obtained sample means is due to random error. That is, a finding of significance indicates real differences.
100. See infra app. B, tbl. 2, for a detailed breakdown of the responses to this question.
101. Throughout this discussion percentages are rounded and based on the total number of attorneys answering the particular question. See infra app. B, tbls. 2–8, for more detail.
102. See infra app. B, tbl. 2. Regarding the value of peremptory challenges, 83% of the prosecutors thought that peremptory challenges were of great value and 80% of the defense attorneys thought they were of great value. Similarly, 82% of the state court practitioners thought they were of great value, and 83% of the lawyers who had practiced in both federal and state courts thought they were of great value. In contrast, only 56% of the federal court practitioners thought that they were of great value. The sample of exclusively federal court practitioners was small, however, and the balance of the federal court practitioners, 44%, thought that peremptory challenges were of some value.
Survey respondents additionally observed that peremptory challenges allow litigants some control over the composition of the jury because they allow litigants to exclude jurors on the basis of unprotected group membership (e.g., occupation), to skew the panel in the client's favor by excluding panelists in the opponent's favor, and to exclude the "screwballs" (the quirky, unpredictable jurors). Finally, prosecutors, who must obtain a unanimous verdict, find peremptory challenges valuable to shape a working group of jurors. Lawyers indicating that peremptory challenges were only of some value often commented that time (and other) limits on the examination of the panelists limited the lawyer's ability to discover biases.\footnote{103}

While the lawyers responding to the survey acknowledged that peremptory challenges were valuable, they also felt that peremptory challenges had depreciated in value following \textit{Batson} and \textit{Wheeler}. Of the lawyers who answered the question whether peremptory challenges were of any more value before \textit{Batson} or \textit{Wheeler}, 57% said that they were equally valuable, 23% said that they had been slightly more valuable, and 16% said that they had been significantly more valuable. Only 5% said that they had been less valuable prior to \textit{Batson} and \textit{Wheeler}.\footnote{104}

The lawyers who had practiced pre-\textit{Batson} or pre-\textit{Wheeler} answered differently, however, attributing more value to the pre-\textit{Batson} and pre-\textit{Wheeler} peremptory challenge. Of the lawyers practicing before \textit{Batson} in federal courts, only 42% thought that peremptory challenges were equally valuable today, 37% thought that pre-\textit{Batson} peremptory challenges had been slightly more valuable, and 11% thought that they had been significantly more valuable.\footnote{105} Of the lawyers practicing pre-\textit{Wheeler} in state courts, 48% thought that peremptory challenges were equally valuable today, 26% thought that they had been slightly more valuable before \textit{Wheeler}, and 22% thought that they had been significantly more valuable prior to \textit{Wheeler}.\footnote{106}

Thus, 47% of the pre-\textit{Batson} attorneys and 48% of the pre-\textit{Wheeler} attorneys believed that the peremptory challenge depreciated in value following \textit{Batson} and \textit{Wheeler}, respectively, but only 39% of the general population of surveyed attorneys perceived a depreciation of the peremptory challenge.\footnote{107}

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\footnote{103. See survey responses (on file with author).}
\footnote{104. See infra app. B, tbls. 2, 3, for a detailed breakdown of the responses to this set of questions.}
\footnote{105. See id. tbl. 3.}
\footnote{106. See id.}
\footnote{107. See id. The difference between pre-\textit{Wheeler} and post-\textit{Wheeler} attorneys reached statistical significance. Attorneys who practiced before \textit{Wheeler} were more likely to say....}
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The reasons cited by the lawyers for assigning a particular value to pre-Batson and pre-Wheeler peremptory challenges were telling. The survey respondents stated that, as a consequence of Batson, a lawyer’s discretion has been curtailed. That is, before Batson the lawyer could challenge jurors on the basis of race and sex (for example, “there is obviously a tendency for people to sympathize with those from the same race”). After Batson, however, even non-discriminatory challenges are chilled if lawyers cannot explain them (as, for example, when the lawyer bases the challenges on “gut feeling”). As another consequence of Batson, lawyers are saddled with additional burdens. For example, before Batson lawyers did not have to explain any peremptory challenges, but after Batson lawyers must justify their challenges and therefore must question the jurors more extensively, take more notes during that questioning, and spend more time comparing the responses of jurors.\footnote{108}

The primary reason cited by lawyers for why peremptory challenges remain equally valuable today was that peremptory challenge practice remains unchanged by Batson. The lawyers observed that peremptory challenge practice remains unchanged for two reasons: either because the lawyer has never exercised a peremptory challenge on the basis of race or sex and is therefore unaffected by Batson’s prohibition,\footnote{109} or because Batson motions are rarely granted and Batson therefore poses no obstacle for lawyers who make race- and gender-based peremptory challenges.\footnote{110}

Although the lawyers who practiced pre-Batson and pre-Wheeler were more likely to believe that the value of the peremptory challenge depreciated following Batson and Wheeler, these lawyers described the current value of the peremptory challenge in terms comparable to the general population of surveyed lawyers.\footnote{111} Thus, the general population of lawyers value

\footnote{108. See survey responses (on file with author).
109. In particular, defense attorneys noted that they typically have no interest in challenging panelists who belong to one of the cognizable groups. See \textit{id}.
110. See survey responses (on file with author).
111. See infra app. B, tbls. 2, 3. Of the lawyers practicing pre-Batson, 83% thought that peremptory challenges were of great value, 13% thought that they were of some value, and only 4% thought that they were of no value. Of the lawyers practicing pre-Wheeler, 80% thought that peremptory challenges were of great value and 20% thought that they were of some value. None thought that they were of no value. By comparison,}
the current peremptory challenge highly, as do lawyers who currently practice and also practiced pre-Batson and pre-Wheeler. Lawyers who practiced pre-Batson and pre-Wheeler continue to value the peremptory challenge despite the constitutional limits placed on the challenge. This fact is particularly significant given that at least the state court practitioners have been living with Wheeler since 1978, and these lawyers would therefore have substantial experience with the limits that Wheeler and its progeny impose on jury selection. Moreover, that the post-Batson peremptory challenge remains valuable to trial lawyers disproves the Batson critics' more extreme claims: Batson has not forced the peremptory challenge to collapse into the challenge for cause and has not effectively abolished the peremptory challenge.112

The surveyed trial lawyers nevertheless identified some problems with the usefulness of peremptory challenges. In particular, they noted inadequate questioning of the jury panelists before the lawyers are called upon to exercise their peremptory challenges as a problem. Of the lawyers answering the question regarding the adequacy of voir dire, 28% thought that questioning was never adequate and 56% thought that it was only sometimes adequate.113 Prosecutors and defense attorneys agreed that inadequate questioning was a problem.114 These survey results indicate that the post-Batson peremptory challenge retains great value for trial lawyers. For reasons unrelated to Batson, however, such as various limits on voir dire, the peremptory challenge works less well than it could in identifying jury panelist bias.

4. Batson Procedures Do Not Unduly Burden the Courts—Apart from erroneous assertions about what Batson does to the peremptory challenge, some of the Justices have condemned Batson for what it does to the justice system by prolonging trials.115 Accordingly, the survey considered the burden associated with the implementation of Batson and its progeny.

81% of the general population of lawyers thought that peremptory challenges were of great value, and 18% thought they were of some value.

112. See supra notes 55–56 and accompanying text.

113. See infra app. B, tbl. 4, for a detailed breakdown of the responses to this question.

114. See id. Only 20% of the prosecutors thought that voir dire was never adequate, however 37% of the defense attorneys thought that it was never adequate. The difference between prosecutors and defense attorneys reached statistical significance. Defense attorneys were more likely to say that voir dire was inadequate.

115. See supra note 57 and accompanying text.
According to the surveyed trial lawyers, *Batson* and *Wheeler* are not often invoked,\(^\text{116}\) and when they are, the motions do not take up too much court time.\(^\text{117}\) When asked how often *Batson* or *Wheeler* motions were made by the attorney, co-counsel, or the opposition attorney in cases personally tried by the attorney, only 1% of the surveyed lawyers said that such motions were made in all cases and 5% said that such motions were made in most cases. Notably, 68% said that such motions were made in only some cases, and an additional 26% said that they were never made. Moreover, prosecutors and defense attorneys basically shared this view.\(^\text{118}\)

When asked if *Batson/Wheeler* motions take up too much court time, 87% of the surveyed attorneys thought that they did not, and 13% thought that they did. Interestingly, prosecutors and defense attorneys answered this question somewhat differently. Of prosecutors, 75% thought that these motions did not take up too much court time, and 25% thought that they did. In contrast, 98% of defense attorneys thought that these motions did not take up too much court time, and only 2% thought that they did.\(^\text{119}\) The difference between prosecutors and defense attorneys may be attributable to the fact that defense attorneys bring these motions more often than prosecutors.\(^\text{120}\) Defense attorneys

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116. For a detailed breakdown of the responses to this question, see *infra* app. B, tbl. 5.

117. See id. tbl. 6, for a detailed breakdown of the responses to this question.

118. See id. tbl. 5. Prosecutors shared the view of the general population of lawyers: 1% said that *Batson* or *Wheeler* motions were made in all cases, 7% said that they were made in most cases, 57% said that they were made in only some cases, and 34% said that they were made in no cases. Defense attorneys arguably perceived more motion activity: 1% said that such motions were made in all cases, 2% said that they were made in most cases, 80% said that they were made in some cases, and only 17% said that they were made in no cases.

119. The difference between prosecutors and defense attorneys reached statistical significance. Prosecutors were more likely to say that *Batson/Wheeler* motions took up too much court time.

The difference between lawyers practicing pre- and post-*Batson* in federal courts also reached statistical significance. Lawyers with pre-*Batson* experience were more likely to say that the motions took up too much court time. Notably, however, the difference between lawyers practicing pre- and post-*Wheeler* in state courts did not reach statistical significance, although it was close. Of the pre-*Wheeler* attorneys, 20% thought that the motions took up too much court time, but only 9% of the post-*Wheeler* attorneys thought so. See *infra* app. B, tbl. 6. Perhaps examination of a larger pre- and post-*Batson* pool of attorneys similarly would fail to reach statistical significance.

120. See Melilli, *supra* note 24, at 457–59 (demonstrating that *Batson* is invoked almost exclusively by criminal defendants); see also DiPERNA, *supra* note 3, at 154 (observing that pre-*Batson* protests to race-based peremptory challenges were “mostly defense complaints objecting to prosecutorial behavior” and that “peremptory challenge abuse [was] most widespread among, though not confined to, prosecutors”).
who make these motions would be unlikely to think (or admit) that they burden the system. In any event, three out of four prosecutors agreed that the motions do not take up too much court time.

**B. Assessing Batson’s Effectiveness in Eradicating Unlawful Discrimination in Jury Selection**

According to the survey, then, *Batson* does not unduly burden the courts. Although this may be true, *Batson* may not be particularly effective either. If it were wholly or even grossly ineffective in eradicating unlawful discrimination in jury selection, any burden on the courts would be unjustified, and alternatives to *Batson* would have to be considered.

Justice Marshall, concurring in *Batson*, predicted that the Court’s decision would not end race discrimination in jury selection primarily because a trial court would have difficulty assessing a lawyer’s motives in excluding the subject jury panelist(s). Many legal scholars and commentators have echoed Justice Marshall's concerns, and empirical evidence supports his prediction that lawyers would proffer lame excuses

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for prima facie discriminatory challenges and that courts would accept them. For instance, a study examining 824 cases, primarily appellate court opinions, applying the *Batson* procedures in the first five years after *Batson*, concluded that a prosecutor who wanted to rebut a prima facie case of illegal discrimination in jury selection did not face a significant challenge. Other case studies have reached the same conclusion. Indeed, one study concerned with pretextual explanations for prima facie discriminatory peremptory challenges sarcastically asks, "Is everything race neutral?"

The impressions of trial lawyers in the survey generally confirmed the conclusions of these studies. Lawyers in the survey were only moderately impressed with the ability of *Batson* and *Wheeler* to prevent unlawful discrimination, noting that a prima facie case of purposeful discrimination was difficult to establish and easy to rebut. Again, prosecutors and defense

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Somewhat in contrast, Professor Melilli has demonstrated that almost four out of five times a lawyer facing a *Batson* challenge successfully offers a neutral explanation, but he concludes that this success rate is "not so high as to suggest that the courts merely rubber stamp virtually all such explanations as satisfactory." Melilli, *supra* note 24, at 465. Professor Melilli admits, however, that in certain jurisdictions, a much stronger case can be made that courts routinely accept pretextual explanations. *See id.* at 470.

125. Brand, *supra* note 124, at 591. One legal commentator has hypothesized that trial courts accept weak explanations for peremptories because they do not carefully scrutinize the prima facie case, which often is weak. In other words, "weak explanations are all that is needed to rebut weak inferences of discrimination." Diprima, *supra* note 75, at 914. This commentator argues that trial courts must scrutinize more carefully the prima facie case and recommends statistical decision theory to analyze the numeric evidence of discrimination. *See id.* at 914–15.

126. For example, 65% of the lawyers thought that *Batson* and *Wheeler* only sometimes prevented unlawful discrimination. Another 15% thought that they never prevented unlawful discrimination. Only 20% thought that they usually prevented unlawful discrimination. *See infra* app. B, tbl. 7, for a more detailed breakdown of the responses to this question.

127. Not surprisingly, 45% of the lawyers thought that it was somewhat difficult to establish a prima facie case of discrimination, 23% thought that it was very difficult, 23% thought that it was easy to establish a prima facie case, and only 9% thought that it was very easy.

Similarly, 50% of the lawyers thought that it was easy to rebut a prima facie case of discrimination, 14% thought that it was very easy, 23% thought that it was somewhat
attorneys responded to these questions somewhat differently. Defense attorneys apparently were more cynical about the effectiveness of *Batson* and *Wheeler* and about the ability to establish a case of unlawful discrimination. Again this divergence of opinion between prosecutors and defense attorneys may stem from the fact that defense attorneys make *Batson* and *Wheeler* motions more frequently than prosecutors. Because they make these motions more often, defense attorneys would be more conscious of and sensitive to the difficulty in establishing these claims.

When asked why *Batson/Wheeler* motions do or do not prevent unlawful discrimination in jury selection, some of the more skeptical lawyers indicated that in order to win a *Batson/Wheeler* motion the discrimination must be flagrant (i.e., the motions are never granted). *Batson* and *Wheeler* motions are difficult to win because lawyers rebutting a prima facie case of discrimination may not tell the truth, and the rebutting lawyer can too easily come up with a race-neutral reason for the challenge (i.e., counsel can use the most subjective justifications for excusing a juror, such as body language or poor eye contact—basically, the attorney who discriminates by exercising the challenge has to be an idiot to get caught). Similarly, lawyers can get away with discrimination if they accept even one minority (i.e., *Batson* only limits what either side can get away with); and if only one

difficult, and 13% thought that it was very difficult. See infra app. B, tbl. 8, for a more detailed breakdown of the responses to this question.

128. Of the responding defense attorneys, only 13% thought that *Batson* and *Wheeler* usually prevented unlawful discrimination in jury selection, 75% thought that they sometimes prevented unlawful discrimination, and 13% thought that they never prevented it. In contrast, of the responding prosecutors, 28% thought that *Batson* and *Wheeler* usually prevented unlawful discrimination, 55% thought that they sometimes prevented unlawful discrimination, and 17% thought that they never prevented it. See id.

129. Of the responding defense attorneys, 40% thought that it was very difficult to establish a prima facie case of unlawful discrimination in jury selection, 41% thought that it was somewhat difficult, 15% thought that it was easy, and only 5% thought that it was very easy. See id. In contrast, of the responding prosecutors, only 7% thought that it was very difficult, and 50% thought that it was somewhat difficult, while 29% thought that it was easy, and 14% thought that it was very easy. See id.

In terms of rebutting a prima facie case of unlawful discrimination, 48% of the defense attorneys thought that it was easy, 21% thought that it was very easy, 14% thought that it was somewhat difficult, and 17% thought that it was very difficult. See id. Among prosecutors, however, 51% thought that rebutting a prima facie case of unlawful discrimination was easy, but only 8% thought that it was very easy. Another 33% thought that it was somewhat difficult, and 8% thought that it was very difficult. See id.

130. See supra note 120 and accompanying text.
or two members of a cognizable group are panelists, which is often the case, it is almost impossible to show a pattern or practice of excluding the group.\textsuperscript{131} Survey respondents additionally noted that efficiency concerns come into play when the trial court accepts specious grounds for challenge to avoid losing time by summoning a new panel. Some prosecutors also commented that defense counsel sometimes use the motions strategically, to embarrass the prosecutor or to prevent the loss of a juror biased in the defendant's favor.

More optimistic lawyers indicated that attorneys and judges are sensitive to the issue of discrimination in jury selection; lawyers know what they can and cannot do and comply with the law. Some thought that \textit{Batson} and \textit{Wheeler} deter "knee-jerk" challenges based on stereotypes because lawyers know that they must justify their challenges. In addition, offending lawyers face the prospect of various sanctions that serve as deterrents: their misconduct may be reported in the press, they may be labeled racists, and they may face contempt proceedings.

The survey thus gives us some insight into the more disturbing findings of the case studies.\textsuperscript{132} \textit{Batson} and its progeny may have transformed jury selection practice by educating responsible attorneys about race and gender discrimination in jury selection. \textit{Batson} and its progeny may also function as a prophylactic, chilling the discriminatory jury selection practices of trial attorneys who fear the sanctions associated with \textit{Batson} violations.\textsuperscript{133} Although the narrative responses of trial lawyers in the study suggest both effects, the case studies simply do not tell us about the number of unlawful peremptory challenges that \textit{Batson} has prevented—discriminatory challenges that might have been made pre-\textit{Batson}. Nor do they tell us about the

\textsuperscript{131} One method of proving a prima facie case of discrimination is to show that a party has challenged most or all of the members of a cognizable group. See \textit{People v. Motton}, 704 P.2d 176, 182 (Cal. 1985) (en banc); \textit{People v. Wheeler}, 583 P.2d 748, 764 (Cal. 1978); see also \textit{Batson v. Kentucky}, 476 U.S. 79, 97 (1986) (noting that a "pattern" of strikes may give rise to an inference of discrimination). For a discussion and critique of the "numbers game" in raising the inference of discrimination in jury selection, see \textit{Serr & Maney}, supra note 122, at 27–37.

\textsuperscript{132} See supra notes 121–25 and accompanying text.

\textsuperscript{133} See \textit{Alschuler}, supra note 3, at 172 (optimistically arguing that "most prosecutors probably will comply with \textit{[Batson]} in good faith"); \textit{Cammack}, supra note 48, at 455 (positing that "[m]ost attorneys probably take the prohibition against race- or gender-based peremptories seriously"); \textit{Herman}, supra note 122, at 1834 (assuming some prophylactic effect); \textit{Underwood}, supra note 15, at 769 (reporting that informal conversations with trial attorneys suggest that jury selection practices have changed following \textit{Batson}).
number of cases in which Batson motions have been granted by the trial courts. What the case studies do tell us is that Batson’s requirement of articulating a neutral explanation for suspect peremptory challenges creates no substantial hurdle for “those . . . who are of a mind to discriminate,” let alone for those who discriminate unconsciously. The survey results support this conclusion by demonstrating that many practicing lawyers believe that Batson does not effectively prevent unlawful discrimination. So, although Batson appears to play some role in preventing unlawful discrimination in jury selection, specific Batson procedures may be ineffective in identifying that discrimination once it occurs.

C. Proposed Alternatives to Batson

Perceiving that Batson and its progeny have failed to eradicate unlawful discrimination in jury selection, many scholars and commentators have advocated the elimination of peremptory challenges. The overwhelming weight of professional sentiment, however, supports retaining them.

In response to the question regarding whether peremptory challenges should be eliminated from the jury selection process, 98% of the attorneys who answered the question said

134. Batson, 476 U.S. at 96 (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).
135. See Brand, supra note 124, at 611–13. For the seminal article on how equal protection analysis fails to account for unconscious racism, see Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317 (1987).
136. See Alschuler, supra note 3, at 209 (underscoring the gains from elimination: substantial economic savings and effective control of illegal discrimination); Amar, supra note 3, at 1182 (arguing that “[j]uries should represent the people, not the parties”); Cammack, supra note 48, at 486 (observing that elimination of peremptory challenges would increase diversity on juries); Marder, supra note 3, at 1052–53, 1136 (emphasizing the public roles that a jury performs); Morehead, supra note 122, at 632–37 (asserting that Batson accomplishes too little and costs too much); Bray, supra note 122, at 555 (arguing that the costs of Batson outweigh the benefits); Dowling, supra note 122, at 785 (underscoring the costs of implementing Batson and its lack of benefits); Developments in the Law—Race and the Criminal Process, 101 HARV. L. REV. 1472, 1882 (1988) (assuming, however, that the elimination of peremptory challenges would apply only to the prosecution’s exercise of such challenges); see also Massaro, supra note 4, at 504 (advocating, before Batson, the elimination of government peremptory challenges).
137. See infra app. B, tbl. 9.
138. See infra app. B, tbl. 9, for a detailed breakdown of the responses to this question.
that peremptory challenges should not be eliminated.\textsuperscript{139} Only 2% thought that they should be eliminated. Significantly, the lawyers who practiced pre-\textit{Batson} and pre-\textit{Wheeler} also opposed the elimination of the peremptory challenge in numbers comparable to the general population of surveyed lawyers.\textsuperscript{140}

The reasons cited by the lawyers for retaining peremptory challenges mirrored their reasons for why peremptory challenges were valuable to them: peremptory challenges allowed them to assemble a fair jury because they could eliminate predisposed jurors and weed out unreceptive jurors. Peremptory challenges prevented hung juries because the attorney could consider group dynamics in making his or her challenges. In addition, peremptory challenges provided for attorney and party control of jury selection, and thereby validated jury verdicts. Notably, none of the lawyers commented that peremptory challenges should be eliminated to prevent unlawful discrimination in jury selection. One lawyer noted, however, that peremptory challenges should not be eliminated merely because some lawyers use them to discriminate illegally. Another commented that they actually were necessary to prevent discrimination.\textsuperscript{141}

\textsuperscript{139} Prosecutors and defense attorneys alike shared this sentiment, as did state court and federal court practitioners. Ninety-nine percent of the prosecutors, 99% of the defense attorneys, 99% of state court practitioners, 94% of the lawyers who practiced in both federal and state courts, and 100% of the federal court practitioners thought peremptory challenges should not be eliminated. \textit{See id.}

\textsuperscript{140} \textit{See id.} Of the lawyers practicing pre-\textit{Batson}, 91% opposed the elimination of the peremptory challenge. Only 9% thought that peremptory challenges should be eliminated. Of the lawyers practicing pre-\textit{Wheeler}, 97% thought that peremptory challenges should not be eliminated. Only 3% thought that the peremptory challenge should be eliminated.

\textsuperscript{141} \textit{See} survey responses (on file with author). Various legal scholars have emphasized the problem of conscious and unconscious juror racism directed toward the criminal defendant. \textit{See Herman, supra} note 122, at 1814–15 (expressing concern about the Court's increasing emphasis on the rights of excluded jurors and decreasing attention to the rights of defendants and the problem of prejudice); Sheri Lynn Johnson, \textit{The Language and Culture (Not To Say Race) of Peremptory Challenges},\textit{ 35} \textit{WM. & MARY. L. REV.} 21, 22–23 (1993) (arguing that a criminal defendant's right to a racially unbiased jury verdict should be the primary focus of equal protection jurisprudence in the context of jury selection); \textit{The Supreme Court—Leading Cases, supra} note 23, at 240–49 (criticizing the use of \textit{Batson} to protect potential jurors and arguing that the greatest potential for injustice lies with a defendant facing a racially biased jury); Widder, \textit{supra} note 48, at 2312, 2331–32 (discussing the problem of the racist jury and advocating a defendant-oriented approach to jury selection that focuses on the composition of the jury actually empaneled). \textit{But see Underwood, supra} note 15, at 726–50 (arguing that “the fundamental injury inflicted by race discrimination in jury selection is its effect on the excluded jurors” and not its effect on the criminal defendant).
Given the opposition of trial lawyers to the elimination of the peremptory challenge,\(^{142}\) and the fact that “nothing . . . in the \textit{Batson} line suggests that the Court is actually likely to abolish the peremptory challenge soon,”\(^{143}\) legal scholars and commentators have considered various alternatives to simply eliminating the peremptory challenge. For example, some legal scholars and commentators have argued for reducing the number of peremptory challenges allowed, primarily to encourage the more responsible exercise of the peremptory challenge.\(^{144}\) Some have argued for eliminating peremptory challenges but expanding challenges for cause, presumably minimizing the loss of the peremptory challenge by allowing litigants to exclude jury panelists for legitimate, articulated reasons that ordinarily would not satisfy the stringent standards of challenges for cause.\(^{145}\) Others propose more effectively deterring \textit{Batson} violations by aggressively punishing such violations with dismissal of the case, contempt citations, censure, reprimand, removal from the courtroom, temporary suspension from practice in the courtroom, referral to appropriate disciplinary bodies, or identification and admonition in published judicial

\(^{142}\) For a discussion of trial lawyer resistance to peremptory challenge reform, see William T. Pizzi, \textit{Batson v. Kentucky: Curing the Disease but Killing the Patient}, 1987 \textit{SUP. CT. REV.} 97, 150–51.


\(^{144}\) \textit{See, e.g.}, Morehead, \textit{supra} note 122, at 640 (suggesting that each party be allowed only one or two peremptory challenges, but advancing that idea as a fallback position to complete elimination); Ogletree, \textit{supra} note 143, at 1148 (advocating the reduction of prosecution peremptories to one or two if asymmetrical abolition of peremptories proved politically unfeasible); Pizzi, \textit{supra} note 142, at 148–49 (suggesting that a sharp reduction in the number of peremptory challenges be coupled with expanded challenges for cause or limited trial court discretion to grant additional peremptories in cases involving an unusual problem of possible prejudice); Pam Frasher, \textit{Note, Fulfilling Batson and its Progeny: A Proposed Amendment to Rule 24 of the Federal Rules of Criminal Procedure to Attain a More Race- and Gender-Neutral Jury Selection Process}, 80 \textit{IOWA L. REV.} 1327, 1330–31, 1347 (1995) (recommending a reduction in the number of peremptory challenges allowed in combination with expanded voir dire); \textit{see also} Saltzburger & Powers, \textit{supra} note 21, at 376–77 (criticizing \textit{Batson}-type limits on the exercise of peremptory challenges, but suggesting that reducing the number of peremptory challenges available to each side would encourage the responsible use of those challenges).

\(^{145}\) \textit{See, e.g.}, Marder, \textit{supra} note 3, at 1107–14; Morehead, \textit{supra} note 122, at 640–41; Ogletree, \textit{supra} note 143, at 1148 (arguing for the elimination of peremptory challenges for prosecutors and civil litigators only, but expanding their challenges for cause); Bray, \textit{supra} note 122, at 557–58 (suggesting the expansion of challenges for cause in combination with liberalization of voir dire).
opinions. Others advocate expanding voir dire so that litigants have information other than simple stereotypes upon which to base their challenges. Some suggest more critically evaluating neutral explanations to prevent unlawful discrimination. Still others propose utilizing affirmative selection procedures, which allow litigants to have some say in who is on the jury and not simply some say in who is excluded. Finally, several commentators advocate employing race-and gender-consciousness in jury selection to diversify juries.

146. See, e.g., Ogletree, supra note 143, at 1116–23.
147. See, e.g., id. at 1123–31 (favoring expanding voir dire in combination with allowing both attorneys to participate in all phases of the Batson hearing); Bray, supra note 122, at 557–58 (supporting expanded voir dire in combination with expanded challenges for cause); Frasher, supra note 144, at 1347 (arguing for expanded voir dire in combination with a reduction in the number of peremptory challenges allowed).
148. See, e.g., Raphael & Ungvarsky, supra note 123, at 267–68; Serr & Maney, supra note 122, at 47–62; Swift, supra note 122, at 361–62. One idea advanced by Raphael and Ungvarsky was to require the lawyers to submit their criteria for dismissing jurors before the trial and before having any information about the identity of the persons on the jury venire. See Raphael & Ungvarsky, supra note 123, at 267–268, 271. The proposal is designed to prevent the tendering of pretextual explanations for peremptory challenges.
149. See, e.g., Deborah A. Ramirez, The Mixed Jury and the Ancient Custom of Trial by Jury De Medietate Linguae: A History and a Proposal for Change, 74 B.U. L. REV. 777, 806–08 (1994) (proposing a procedure in which the exercise of peremptory challenges would follow the selection of a “relevant qualified venire,” using a combination of random selection by the court and affirmative peremptory choices by the litigants); Altman, supra note 49, at 806–11. Altman’s particularly interesting proposal requires both sides, having exercised their challenges for cause, to list in order of preference, 12 jurors. See id. at 806. The judge would first select any juror whose name appeared on both lists, regardless of how the juror was ranked. See id. Then, alternating between the lists, the judge would take the highest-rated juror from each list until a complete panel had been assembled. See id.
150. See, e.g., Albert W. Alschuler, Racial Quotas and the Jury, 44 DUKE L.J. 704, 716–23 (1995) (advocating affirmative action in the distinct context of jury selection); Brand, supra note 124, at 627 (advocating the inclusion of jury panelists from groups that have been historically oppressed); Forman, supra note 122, at 75–76 (advocating gender-consciousness); Sheri Lynn Johnson, Black Innocence and the White Jury, 83 MICH. L. REV. 1611, 1695–99 (1985) (proposing that every African-American, Native-American, Hispanic, and Asian-American defendant be entitled to the inclusion of three “racially similar” jurors on a jury of 12); Lorrie L. Luelling, Why J.E.B. v. T.B. Will Fail to Advance Equality: A Call for Discrimination in Jury Selection, 10 WIS. WOMEN’S L.J. 403, 455–56 (1995) (arguing that when dealing with “women-specific harms,” courts should allow the woman suffering the harm to exercise peremptory challenges to exclude male jury panelists while requiring the opposing party to show cause to exclude female jury panelists); Kenneth B. Nunn, Rights Held Hostage: Race, Ideology and the Peremptory Challenge, 28 HARV. C.R.-C.L. L. REV. 63, 69–70 (1993) (arguing that the peremptory challenge of black jury panelists “should be prohibited whenever there is a substantial likelihood that racial issues [will] impact the trial”); Widder, supra note 48, at 2331–33 (recommending that peremptory challenges be examined for their effect on the heterogeneity of the jury).
For the most part, the proposed alternatives focus on improving the effectiveness of *Batson*, but not on improving the effectiveness of the peremptory challenge. This focus results because the problem of unlawful discrimination in jury selection drives the various proposals. The survey indicates, however, that the effectiveness of both *Batson* and the peremptory challenge are causes for concern. The effectiveness of the peremptory challenge will only improve to the extent that litigants can better identify and eliminate biased jury panelists. To the extent that both *Batson* and the peremptory challenge are less effective than they can and should be, reform efforts appropriately consider how to improve the effectiveness of both.

Of the various alternatives identified above, only the recommendation to expand voir dire could improve the effectiveness of the peremptory challenge in identifying and eliminating biased jury panelists and improve the effectiveness of *Batson* in eliminating illegal discrimination in jury selection. It theoretically would improve the effectiveness of the peremptory challenge because it would result in better informed and more intelligent challenges.\(^1\) It theoretically would improve the effectiveness of *Batson* because additional information about individual jury panelists would mean that litigants would be less likely to resort to illegal group-based assumptions in exercising their peremptory challenges.\(^2\) Nevertheless, the recommendation to expand voir dire is unlikely to be economically or politically feasible in the context of costly live voir dire.\(^3\)

\(^1\) A study of the effect of peremptory challenges on jury verdicts found that voir dire “did not provide sufficient information for attorneys to identify prejudiced jury panelists.” Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in Federal District Court*, 30 STAN. L. REV. 491, 528 (1978). Although defense attorneys performed slightly better than prosecutors in identifying prejudiced jury panelists, “[t]he collective performance of the attorneys [was] not impressive.” Id. at 517. Accordingly, the researchers identified a need to “increase the amount of information on which lawyers base their decisions.” Id. at 529. See also VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 77 (1986) (observing that research findings indicate that with limited voir dire lawyers are generally ineffective in uncovering bias).

\(^2\) J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 143 (1994) (observing that properly conducted voir dire makes reliance on “stereotypical and pejorative notions about a particular gender or race both unnecessary and unwise”); see also Edmonson v. Leesville Concrete Co., 500 U.S. 614, 630–31 (1991) (observing that “[o]ther means exist for litigants to satisfy themselves of a jury's impartiality without using skin color as a test” and advising litigants to explore bias in a “rational way”).

\(^3\) See Forman *supra* note 122, at 71 (noting a trend to curtail voir dire); Morehead, *supra* note 122, at 636–37 (describing the voir dire required by *Batson*)
For some time now, voir dire has come under attack as too time-consuming and expensive. As a result, courts and legislatures have imposed restrictions on voir dire. Many jurisdictions have replaced attorney-conducted voir dire with judge-conducted voir dire. When attorney-conducted voir dire is allowed, severe time constraints are often imposed.

In addition, regardless of who conducts the voir dire, much modern voir dire involves directing questions to the entire panel rather than to individual jury panelists. Even when jury panelists are examined individually, they are usually examined in the presence of other jurors. These circumstances foster conformity in juror responses:

In such situations the willingness of jurors to give an answer contrary to what has previously been given by other members of the group (either in terms of the content of the responses or the breaking of silence during group questioning) is diminished, particularly if such disclosures would potentially lead to negative evaluations of them.

jurisprudence as too time-consuming and expensive); Pizzi, supra note 142, at 140 (describing Batson and the "pressure" it creates to conduct more extensive questioning of jury panelists as a "step in the wrong direction as far as the efficiency of the system is concerned"); The Supreme Court—Leading Cases, supra note 23, at 248 n.72 (noting the administrative burden of voir dire); see also Massaro, supra note 4, at 527–29 (demonstrating that the Court has provided little protection for voir dire). But see V. Hale Starr & Mark McCormick, Jury Selection § 10.0.4 (2d ed. 1993) (observing a trend toward concern for obtaining a more complete voir dire).

154. See Babcock, supra note 21, at 545 & n.2.

155. See id. at 548. Judge-conducted voir dire predominates in the federal courts. See DiPerna, supra note 3, at 91; Starr & McCormick, supra note 153, § 10.0.1; Diprima, supra note 75, at 893. It is also popular in the state courts. In 1990, California voters passed Proposition 115, which made voir dire conducted by a judge (as opposed to an attorney) mandatory in state criminal trials absent a showing of good cause. See Cal. Civ. Proc. Code § 223 (West Supp. 1996). It also limited examination of the panelists to questions going to challenges for cause and prohibited questions going to peremptory challenges. See id. Other jurisdictions providing for judge-conducted voir dire are the following: Arizona, Delaware, District of Columbia, and Pennsylvania. David B. Rottman, U.S. Dep't of Justice, State Court Organization 1993 tbl. 36, 269–73 (1995). In addition, some states provide for judge-conducted voir dire, but allow the judge to invite attorney participation. These states include Illinois, Maine, Massachusetts, and New Jersey. See id. Finally, New Hampshire allows counsel to propose voir dire questions, especially in murder cases, though the judge still conducts the voir dire. See id.

156. See Babcock, supra note 21, at 546.

157. See id. at 547.


The attorney survey offers some insight into the problem of restricted voir dire. When asked how the jury panelists were usually questioned, 59% of the lawyers said that they were usually questioned only by the court, and 29% said by counsel and the court.\textsuperscript{160} Defense lawyers seemed to perceive more court domination of voir dire as 64% indicated that the court alone questioned the jury panelists, and only 54% of the prosecutors indicated that the court alone questioned the jury panelists.

When asked what, if anything, interfered with the adequate questioning of the jury panelists, the lawyers overwhelmingly concurred that judge- (as opposed to attorney-) conducted voir dire explained the inadequate questioning of the venire. Specifically, the lawyers commented that judges limit questioning to demographics, ask closed-ended questions eliciting little information, fail to ask obvious follow-up questions, and know little or nothing about the issues important to each side. Moreover, judges apparently refuse to ask questions proposed by the attorneys. Several lawyers attributed the inadequacy of judge-conducted voir dire to judicial apathy and laziness. Others believed that judges were more concerned about efficiency than justice. The lawyers also noted that the dishonesty of the jury panelists contributed to the inadequacy of voir dire.\textsuperscript{161} Any proposal to improve both the effectiveness of the peremptory challenge and \textit{Batson} must address these concerns.

III. VOIR DIRE BY QUESTIONNAIRE AND THE "BLIND" PEREMPTORY: A PROPOSAL

This Article proposes a system of "blind" peremptories. The proposal is simple: allow the usual number of alternating peremptory challenges and allow complete questioning of the jury panelists, but allow only voir dire by questionnaire and the exercise of "blind" peremptories. In a system of blind peremptories, jury panelists would be identified by numbers and not their names, and no questions regarding cognizable group status (such as race, ethnicity, or sex) would be

\textsuperscript{160} See \textit{infra} app. B, tbl. 10, for a detailed breakdown of the responses to this question.

\textsuperscript{161} See survey responses (on file with author).
permitted.\textsuperscript{162} Jury panelists would be questioned by questionnaire rather than in open court.\textsuperscript{163} Lawyers would base their peremptory challenges on a panelist's written answers and would exercise them blindly—that is, without the opportunity to confront the jury panelists in person.

**A. The Proposal Would Effectively Address the Problems Inherent in the Current Peremptory Challenge System and Batson**

A system of blind peremptories would improve the effectiveness of the peremptory challenge in eliminating biased jurors. Although none of the surveyed trial lawyers had experience with voir dire by questionnaire only,\textsuperscript{164} questionnaires are becoming more common tools in jury selection,\textsuperscript{165} and at least 11\% of the surveyed trial attorneys had some experience with voir dire by questionnaire.\textsuperscript{166} Voir dire by questionnaire would allow fuller, more meaningful, attorney-conducted voir dire (attorney-conducted because the parties and not the court would draft the questionnaire). Questionnaires also have the advantage of allowing for individualized questioning outside the presence of other jurors (individualized because each jury panelist

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\textsuperscript{162} The proposed procedure should be distinguished from the selection of an anonymous jury. In some cases, primarily organized crime cases, attorneys select a jury from a panel of prospective jurors whose names, addresses, and perhaps other personal information, remain unknown to the parties. \textit{See} Eric Wertheim, \textit{Note, Anonymous Juries}, 54 \textit{Fordham L. Rev.} 981, 982 (1986) (describing an anonymous jury). The procedure is "designed to protect jurors from outside influence and the fear of retaliation." \textit{Id.} Voir dire by questionnaire to prevent unlawful discrimination in jury selection does not implicate the defendant's presumption of innocence. \textit{Cf. id.} at 985–97 (assessing the effect of using an anonymous jury on a defendant's presumption of innocence). Nor does it implicate the media's right of access to information the same way that the use of an anonymous jury does. \textit{See} Marc O. Litt, \"Citizen-Soldiers\" or \textit{Anonymous Justice: Reconciling the Sixth Amendment Right of the Accused, the First Amendment Right of the Media and the Privacy Right of Jurors}, 25 \textit{Colum. J.L. & Soc. Probs.} 371, 373–74 (1992) (discussing media access to the names and addresses of jurors and arguing that "anonymous justice should be tolerated only in the rarest of cases"). Upon completion of jury selection, the jurors' identities ordinarily would be revealed.\textsuperscript{163} Completed questionnaires would be available to the press and public, as well as to the parties.\textsuperscript{164} \textit{See infra} app. B, tbl. 10.\textsuperscript{165} \textit{See} \textit{Starr & McCormick, supra} note 153, §§ 2.8, 10.0.1, 11.5.1.\textsuperscript{166} \textit{See infra} app. B, tbl. 10.
completes a separate questionnaire), reducing the embarrassment of speaking publicly, reducing the embarrassment of admitting bias, eliminating the pressure to conform one's answers to the answers of other panelists, and eliminating the risk that one jury panelist's prejudicial remarks will influence the balance of the panel. The blind peremptory, coupled with complete examination of the panelists by questionnaire, thus frees the litigant to exercise more principled peremptory challenges. Because the jury panelists would complete their questionnaires simultaneously and counsel could review the completed questionnaires while the trial court attended to other matters, it would also save trial courts the time and resources required for live voir dire.

A system of blind peremptories would also improve the effectiveness of Batson in eliminating unlawful discrimination in jury selection. In their study of 824 cases applying Batson, Raphael and Ungvarsky observed that proffered explanations for prima facie discriminatory peremptory challenges fell into twelve categories: age, occupation, unemployment, religion, demeanor, relationship with a trial participant, lack of "intelligence," socioeconomic status, residence, marital status, previous involvement with the criminal justice system, and jury experience. These explanations typically served to rebut the prima facie case of discrimination, except, perhaps, when white jury panelists with characteristics similar to the excluded panelists were not also excluded. Raphael and Ungvarsky believe that proffered explanations are often suspect and that courts need to scrutinize these explanations for pretext more thoroughly. Because litigants would not have the opportunity to examine jury panelists visually or orally, blind peremptories would eliminate the more subjective, pretextual explanations based on demeanor, voice, and appearance, such as no eye

167. Individual questioning of jurors outside the presence of other jurors has been identified as the best method of discovering juror bias. See FREDERICK, supra note 159, § 5-201; HANS & VIDMAR, supra note 151, at 71–72; Developments in the Law—Race and the Criminal Process, supra note 136, at 1584.

168. See STARR & MCCORMICK, supra note 153, §§ 11.5.2, 11.6.3 (detailing the benefits of using questionnaires and approving of their use in conjunction with live voir dire).


170. See id. at 238.

171. See id. at 239, 243, 254, 260–61, 264.

172. See id. at 266–67.

173. See id. at 246 (observing that juror demeanor was an "extremely frequent" proffered explanation in their study and the most subjective of the recurring, arguably pretextual explanations).
contact, staring, body language, accent, hair style, and dress. Blind peremptories would also eliminate pretextual explanations based on categories not closely linked to race or gender, such as age, unemployment, relationship with a trial participant, intelligence, socioeconomic status, marital status, previous involvement with the criminal justice system, and prior jury experience. Even the lawyer intent on discriminating would not know whether the eighty-year-old jury panelist was black or white, male or female. Although it would not eliminate pretextual explanations closely linked to race or gender, like occupation, religion, and residence, a system of blind peremptories would make peremptory challenges based on these sorts of categories less valuable and more of a gamble for “those . . . who are of a mind to discriminate.” The lawyer simply would not know for sure the race or gender of the prospective juror (e.g., the juror could be a male nurse or a woman with military experience). Thus, the blind peremptory prevents unlawful discrimination in jury selection by limiting the ability of the litigants to discern the race and gender of the jury panelists. To the extent that unlawful discrimination in

174. Occupations are often associated with gender. For example, clerical work, homemaking, nursing, and elementary school teaching are occupations often associated with women. Data may support a litigant’s belief that a panelist in one of these occupations is likely to be female.

175. Religion is sometimes associated with race. Buddhism, Hinduism, and the American Nation of Islam, for instance, are religions associated with race. Nevertheless, if religion-based peremptory challenges offend Batson—and they probably do, see supra note 15,—under a system of voir dire by questionnaire and blind peremptories, inquiries into a jury panelist’s religion would be prohibited.

176. Race is often linked to residence since housing segregation continues in modern America. For example, a litigant may rationally conclude that a panelist from East Los Angeles is likely to be Mexican-American. For a discussion of black and Hispanic segregation in the metropolitan United States, see Douglas S. Massey & Nancy A. Denton, Hypersegregation in U.S. Metropolitan Areas: Black and Hispanic Segregation Along Five Dimensions, 26 DEMOGRAPHY 373 (1989).


178. See Saltzburg & Powers, supra note 21, at 365 (discussing the opportunity costs of challenging jurors on the basis of questionable stereotypes).

179. A jury panelist’s sex may be discernible from the panelist’s handwriting. Handwriting experts, known as graphologists, assert that sex cannot be reliably determined from handwriting, see Stephen Kurdsen, Graphology: The New Science 11 (1971); Betty Link, Advanced Graphology 15 (1986); Nadya Olyanova, Handwriting Tells 136 (1969); Dorothy Sara, Handwriting Analysis 15 (1956), but studies indicate that experts and lay persons do better than chance in identifying an author’s sex from the author’s handwriting. These studies demonstrate that experts and lay persons are able to identify the sex of the author accurately about 70% of the time.
jury selection is more effectively curtailed, trial and appellate court savings can also be expected as *Batson* motions decrease.

Although several legal scholars and commentators have acknowledged the value of using questionnaires in jury selection, no one has previously suggested examining the jury panelists by questionnaire only and then exercising blind peremptories. The proposal will likely meet with some opposition. This Article addresses the likely arguments below.

**B. Possible Objections to the Proposal**

Some will argue that at least a criminal defendant has a constitutional right to confront the jury panelists during voir dire. Indeed, in 1892, the Court held in *Lewis v. United

See [David Lester, The Psychological Basis of Handwriting Analysis] (1981); Lewis R. Goldberg, *Some Informal Explorations and Ruminations About Graphology*, in *Scientific Aspects of Graphology: A Handbook* 281, 284–85 (Baruch Nevo, ed., 1986); Maya Bar-Hillel & Gershon Ben Shakkar, *The A Priori Case Against Graphology: Methodological and Conceptual Issues*, in *Scientific Aspects of Graphology: A Handbook* 263, 274 (Baruch Nevo, ed., 1986). Assuming the reliability, validity, and generalizability of these studies, even in a system of blind peremptories gender may be discernible from the jury panelists' handwriting 70% of the time. When gender is discernible, litigants might exercise discriminatory, gender-based peremptory challenges. Cf. [Lani Guinier et al., *Becoming Gentlemen: Women’s Experiences at One Ivy League Law School*, 143 U. Pa. L. Rev. 1, 36 n.96 (1994) (reporting the concern of women law students that “knowledge of . . . gender (based on handwriting) may consciously or unconsciously influence the way that a professor grades your exam”) (omission in original). The proposed system of blind peremptories, however, still represents a marked improvement over the current jury selection system in which gender is discernible from physical confrontation nearly 100% of the time.


182. Rule 43 of the Federal Rules of Criminal Procedure provides that “[t]he defendant shall be present at . . . every stage of the trial including the impaneling of the jury.” *Fed. R. Crim. P.* 43(a). The protection provided by Rule 43, however, is broader than the protection provided by the confrontation and due process rights of the federal Constitution. See United States v. Gordon, 829 F.2d 119, 123 (D.C. Cir. 1987) (observing that Rule 43 codifies "both a defendant's constitutional right and his common law right to presence"). Cf. United States v. Gagnon, 721 F.2d 672, 676–77 (9th Cir. 1983) (observing that "the scope of Rule 43 is broader than that of the Sixth Amendment confrontation and the Fifth Amendment due process rights").* rev’d on other grounds*, 470 U.S. 522 (1985); United States v. Washington, 705 F.2d 489, 496 (D.C. Cir.
States\textsuperscript{183} that the accused was entitled to face the subject jury panelists when exercising peremptory challenges.\textsuperscript{184} The Court noted that the right of peremptory challenge came "from the common law with the trial by jury itself, and has always been held essential to the fairness of trial by jury."\textsuperscript{185} The Court also noted the importance of assessing the "bare looks and gestures" of the panelists when exercising one's challenges.\textsuperscript{186} It additionally appeared that even at English common law the jury panelist was "'presented to the prisoner or his counsel, that they might have a view of his person.'"\textsuperscript{187} No constitutional right to confront jury panelists during voir dire exists, however.\textsuperscript{188} Moreover, to the extent that \textit{Lewis} addressed a criminal defendant's right to be present (as distinct from a right of confrontation)\textsuperscript{189} during jury selection, the Court subsequently has observed that the \textit{Lewis} remarks were "dictum, and no more... with the added observation that it deals with the rule at common law and not with constitutional restraints."\textsuperscript{190}

Certainly, a criminal defendant has a Fifth and Fourteenth Amendment right to be present whenever his presence has a

\begin{itemize}
\item \textsuperscript{183} (observing that Rule 43 is "[r]ooted in... a common law right of presence," as well as the confrontation clause of the Sixth Amendment and the due process clause of the Fourteenth Amendment); United States v. Alessandrello, 637 F.2d 131, 138 (3d Cir. 1980) (observing that "the scope of Rule 43 was intended to be broader than the constitutional right"). \textit{See also} United States v. Gagnon, 470 U.S. 522 (1985) (separately analyzing the defendants' Fifth Amendment Due Process and Rule 43 claims).
\item \textsuperscript{184} \textit{Id.} at 370 (1892).
\item \textsuperscript{185} \textit{Id.} at 376.
\item \textsuperscript{186} \textit{Lewis}, 146 U.S. at 376.
\item \textsuperscript{187} \textit{Id.} at 377.
\item \textsuperscript{188} \textit{See supra} note 182. A criminal defendant does, however, enjoy the constitutional right to confront the witnesses against him or her. \textit{See U.S. CONST. amend. VI}. Indeed, the author has examined and vigorously defended a criminal defendant's confrontation rights in the context of child sexual abuse prosecutions. \textit{See} Jean Montoya, \textit{Lessons from Akiki and Michaels on Shielding Child Witnesses}, 1 PSYCHOL., PUB. POLY & L. 340 (1995); Jean Montoya, \textit{On Truth and Shielding in Child Abuse Trials}, 43 HASTINGS L.J. 1259 (1992).
\item \textsuperscript{189} The Court has acknowledged that the right of confrontation is sometimes confused with the right of presence. \textit{See} Snyder v. Massachusetts, 291 U.S. 97, 107 (1934). \textit{Cf.} United States v. Gagnon, 470 U.S. 522, 526 (1985) (observing that "the constitutional right to presence is... protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him").
\item \textsuperscript{190} \textit{Snyder}, 291 U.S. at 117 n.2.
\end{itemize}
reasonably substantial relationship to his opportunity to defend against the charge. The Court has acknowledged that "defense may be made easier if the accused is permitted to be present at the examination of jurors." The Court has explained, however, that the presence of the accused makes defense easier because it is in the defendant's power, "if present, to give advice or suggestion [to his lawyer]." Voir dire by questionnaire and blind peremptories would not entail the defendant's lawyer (or any other lawyer) meeting with the prospective jurors outside the defendant's presence. Nor would it prevent the defendant from observing and assisting his lawyer's performance. The defendant would be able to assist his lawyer's construction of the questionnaire and his lawyer's assessment of the completed questionnaires. The defendant would also be present during his lawyer's exercise of peremptory challenges—even if the jury panelists would not also be present—and would, therefore, have the opportunity to monitor and inform his lawyer's choices in court.

A related and more compelling argument will be that, apart from a constitutional right to be present and confront the jury panelists, the parties and their attorneys should, as a practical matter, have the opportunity to observe the demeanor and body language of the jury panelists during voir dire. A striking number of attorneys in the survey commented on the importance of observing the jury panelists during voir dire. Professor Saltzburg has argued that "[e]very juror's reactions should be observable." Assuming that physical confrontation, separate and distinct from interrogation, reliably assists jury selection, however, the value of that physical confrontation must be balanced against the constitutional right of litigants and jurors to be free from invidious discrimination in jury selection. If Batson is ineffective in detecting that discrimination, as the case studies and the survey indicate, then the balance tips in favor of the constitutional right.

191. See id. at 105–06.
192. Id. at 106. Snyder actually addressed a criminal defendant's right to be present at a jury view of the crime scene. See id. at 103.
193. Id. at 106.
194. Saltzburg & Powers, supra note 21, at 381.
195. As Justice Marshall, concurring in Batson, observed, "were it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former." Batson, 476 U.S. at 107 (quoting Swain v. Alabama, 380 U.S. 202, 244 (1965) (Goldberg, J., dissenting)).
Whether nonverbal indicators like demeanor and body language reliably inform jury selection is, however, questionable.\(^{196}\) Certainly, the value of these observations will depend upon the nature of the voir dire.\(^{197}\) For instance, Professor Saltzburg has linked these observations to attorney-conducted voir dire: "The advantage of having the lawyers [as opposed to the judges] actually ask [prospective jurors questions] is that each lawyer has an opportunity to see how a juror reacts to him and his side of the case."\(^{198}\) In reality, judge-conducted voir dire is the trend, not attorney-conducted voir dire,\(^{199}\) so lawyers have significantly less opportunity to "see how a juror reacts to [them]." Voir dire restricted in length and content, also the current trend, similarly diminishes the value of nonverbal indicators in jury selection.\(^{200}\) Given the questionable nature of reliance on nonverbal indicators in exercising peremptory challenges, the balance of interests tips even more clearly in favor of the constitutional right of litigants and jurors to be free from invidious discrimination in jury selection.

That balance tips even farther when we consider that physical confrontation with the jury panelists, the necessary precondition for observation of nonverbal indicators like demeanor and body language, has its downside for the litigants. Much juror hostility is linked to probing, attorney-conducted voir dire that offends the jurors.\(^{201}\) Questionnaires would minimize the confrontational aspects of voir dire.\(^{202}\) Jury panelists would also

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\(^{196}\) Indeed, the basis for his observation is well settled: The right to challenge peremptorially is not guaranteed by the Constitution. See cases cited supra note 185.

\(^{197}\) See Frederick, supra note 159, § 4-300 (observing that "little empirical data" exist regarding the effectiveness of various jury selection techniques, including reliance on nonverbal indicators, and emphasizing that "much more remains to be learned"); Hans & Vidmar, supra note 151, at 90 (observing that various jury selection techniques are "probably unreliable" and specifically identifying reliance on body language cues as "open to question").

Some, however, have emphasized the role of a jury panelist's nonverbal communication in informing an attorney's decision to exercise a peremptory challenge. See, e.g., Starr & McCormick, supra note 153, §§ 12.0–15.10 (regarding the role of appearance, voice, and movement in reflecting personality, character, and attitudes of individuals); David Suggs & Bruce Dennis Sales, Using Communication Cues to Evaluate Prospective Jurors During the Voir Dire, 20 Ariz. L. Rev. 629, 633–41 (1978) (regarding the role of communicative behaviors in evaluating jury panelists).

\(^{198}\) See Frederick, supra note 159, § 4-300.

\(^{199}\) Saltzburg & Powers, supra note 21, at 381 (emphasis added).

\(^{200}\) See supra note 155 and accompanying text.

\(^{201}\) Cf. supra note 23 and accompanying text.

\(^{202}\) See Starr & McCormick, supra note 153, §§ 11.5.2, 11.6.3 (observing that confrontation inhibits the openness of prospective jurors).
be less apt to direct any hostility that they did have toward a particular attorney or party when responding to a consolidated case questionnaire that did not identify the author of particular questions.

Others will argue that all blindness-based solutions to discrimination are flawed, primarily because these solutions typically show more concern for process than results. Of course, blindness-based solutions to discrimination do not necessarily make for good law; "[r]ace- [and gender-] neutral policies are only as good or bad as the results they produce." Unlike other blindness-based solutions to discrimination, however, the solution proffered here is concerned with results—the objective being more heterogeneous juries, or more modestly, nondiscrimination in jury selection.

*Batson*, the current blindness-based solution to discrimination in jury selection is blindness at its worst. *Batson* and its progeny tell parties and their lawyers that they cannot discriminate on the basis of race or gender in jury selection—in other words, that they must be blind to race and gender in the exercise of their peremptory challenges. *Batson* is, at best, utopian, however, because race and gender not only may matter, but are typically observable. That is to say, we are not

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204. Culp, supra note 203, at 162.

205. Professor Gotanda describes colorblind decision-making as requiring what he calls "nonrecognition":

Before a private person or a government agent can decide "not to consider race," he must first recognize it. In other words, we could say that one "noticed race but did not consider it." Of course, this two-step process arises only when the initial recognition of race takes place, through visual identification or some other form of racial classification.

Gotanda, supra note 203, at 6. He further describes nonrecognition's fundamental flaw:

In everyday American life, nonrecognition is self-contradictory because it is impossible to not think about a subject without having first thought about it at least a little. Nonrecognition differs from nonperception. Compare color-blind nonrecognition with medical color-blindness... This is not just a semantic distinction. The characteristics of race that are noticed (before being ignored) are
blind, and "those . . . who are of a mind to discriminate" will discriminate. Because judges are apparently ill-equipped to discern lawyer's intentions and reluctant to identify purposeful discrimination, the scrutiny of suspect peremptory challenges in a Batson hearing provides no answer. Batson also fails to recognize that much discrimination in jury selection, like discrimination generally, is the product of unconscious racism and sexism.

Voir dire by questionnaire and blind peremptories are not foolproof antidiscrimination devices, but blindness is fairly well achieved. There is no reason to expect that this method of jury selection will disproportionately exclude particular cognizable groups, despite less than promising results in other areas. Jury selection is simply not comparable to the sort of "merit"-based testing for jobs and school admission that disproportionally impacts historically disadvantaged minorities and other cognizable groups. For instance, the fact that

situated within an already existing understanding of race. That is, race carries with it a complex social meaning. The proponents of color-blind nonrecognition do not acknowledge this aspect of racial consciousness when they describe their "neutral" decisionmaking processes.

This pre-existing race consciousness makes it impossible for an individual to be truly nonconscious of race.

Id. at 18–19 (footnote omitted).

206. Batson v. Kentucky, 476 U.S. 79, 96 (1986) (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)). Professor Culp has remarked that "[t]he most difficult problem of the colorblind principle is raised by 'peeking,' when social actors use race covertly in making decisions." Culp, supra note 203, at 182.

207. See supra notes 121–25 and accompanying text.

208. See supra note 135 and accompanying text.

209. Even Professor Culp, who generally rejects blindness-based solutions to discrimination, has acknowledged that one way to prevent "peeking," that is, covert racial discrimination, would be to exclude all information about race from the deliberations. See Culp, supra note 203, at 191 (discussing the redistricting cases). He laments, however, that "such exclusion is not required and, as a practical matter, will not occur."

Id.

210. For a critique of meritocracy, see Hayman, supra note 203, at 98–102. A system of blind peremptories, including voir dire by questionnaire, assumes that jury panelists are literate and could result in the exclusion of the uneducated and undereducated jury panelists who are unable to complete the questionnaires. However, many jurisdictions already have language and literacy qualifications for jurors. Among those jurisdictions requiring jurors to have the ability to read English are the following: Alabama, Alaska, Arkansas, Colorado, Delaware, District of Columbia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Mississippi, Missouri, Nebraska, New Jersey, New York, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Vermont, West Virginia, and the federal courts. See Rottman, supra note 151, at tbl. 34, at 256–63. Among those jurisdictions requiring jurors to have the ability to write English are the following: Arkansas, Mississippi, New Jersey, Pennsylvania, South Carolina,
minorities and other cognizable groups historically have been excluded from jury service is unlikely to reduce their chances of serving as a juror in a particular case. Indeed, lawyers may favor traditionally excluded groups for selection because lawyers often exclude jury panelists who have served previously on juries. Moreover, to the extent that a category of voir dire inquiry, like residence, disproportionately impacts particular cognizable groups, the legislation providing for peremptory challenges by questionnaire could accommodate these concerns.

Yet others may argue that a system of blind peremptories could make it more difficult to demonstrate unlawful discrimination in jury selection than the current Batson procedures. A litigant who has not seen the jury panelist from South Central Los Angeles could argue that they had no way of knowing that the excluded jury panelist was African-American. If they had no way of knowing the race of the excluded jury panelist, it follows that they could not have discriminated on the basis of race. This sort of argument carried some weight in Hernandez v. New York, a case in which the prosecutor denied knowing which jury panelists were Latinos. Carried to its logical conclusion, however, this argument would favor nonblind peremptory challenges.

It is the odd argument that would make it easier to discriminate illegally in order to make it easier to prove that discrimination. The bottom line has to be which procedure better curtails unlawful discrimination in jury selection. Moreover, given the apparent lack of rigor with which the trial courts assess proffered neutral explanations under Batson, a system of blind peremptories will make it only slightly more difficult for the moving party to demonstrate unlawful discrimination in jury selection. The moving party can still demonstrate that a proffered explanation for a peremptory challenge is pretextual

South Dakota, Texas, and Vermont. See id. The problems raised by jury panelist illiteracy could be remedied by providing assistance to panelists who need help completing the questionnaire.

211. See supra notes 174–76 and accompanying text.
212. For instance, the legislation could prohibit inquiries into a jury panelist's address or limit such inquiries to the panelist's city of residence (as opposed to the panelist's specific neighborhood or area of residence within the city), unless the party seeking the more specific information about residence could demonstrate good cause.
214. See id. at 356, 369–70.
215. See supra notes 121–25 and accompanying text.
because it is the excluding lawyer's perception of race and/or gender and that lawyer's intention to discriminate that matter.\textsuperscript{216} Perceptions of race and/or gender could be created by the jury panelist's answers on a questionnaire, as well as by the jury panelist's appearance in court.\textsuperscript{217}

\section*{CONCLUSION}

Historically, our society has embraced the peremptory challenge, but we also have evolved to value heterogeneous juries. This interest in heterogeneous juries has been translated into a principle of nondiscrimination in jury selection. The peremptory challenge and nondiscrimination in jury selection, however, are not readily compatible. Elimination of the peremptory challenge would result in more heterogeneous juries because it would eliminate illegal and legal discrimination in jury selection. Assuming we want to retain peremptory challenges but prohibit illegal discrimination in jury selection, we will have to resolve the problem of pretextual explanations for illegal discrimination in jury selection.

The proposal of voir dire by questionnaire and the blind peremptory uniquely addresses the dual objectives of improving the effectiveness of the peremptory challenge and achieving the goals of \textit{Batson}. It improves the effectiveness of the peremptory challenge by maximizing the litigants' amount of legally relevant information about the jury panelists. At the same time, it improves the effectiveness of \textit{Batson} by restricting the litigants' access to legally irrelevant information about the jury panelists, like their race, ethnicity, and sex. Juries selected blindly will also be more heterogeneous, at least insofar as illegal discrimination in jury selection is more effectively curtailed.

\textsuperscript{216} The California Supreme Court has observed that the true racial identity of challenged jurors is less important than their apparent racial identity, because "discrimination is more often based on appearances than verified racial descent." People v. Motton, 704 P.2d 176, 180 (Cal. 1985) (en banc).

\textsuperscript{217} For example, in a rape or sexual harassment case, counsel should be able to demonstrate a prima facie case of gender discrimination where evidence exists that opposing counsel is excluding jury panelists who write "like women" or write "like men." See \textit{supra} note 179.
APPENDIX A

SURVEY

1. Given the judicial limits on the exercise of peremptory challenges, are peremptory challenges of any value to the litigants?*

   Peremptory challenges are of great value/some value/no value. (Please circle one.)

2. Why?

   

   

3. Were peremptory challenges of any more value pre-Batson (or pre-Wheeler for attorneys practicing in the state courts)?

   Peremptory challenges were of significantly greater value/slightly more value/the same value/less value. (Please circle one.)

4. Why?

   

5. How often has a Batson or Wheeler motion been made by you, your co-counsel, or the opposition attorney in cases which you have personally tried?

   Such motions were made in all cases/most cases/some cases/no cases. (Please circle one.)

* Although I circulated a draft survey for comments with no negative feedback, this question turned out to be imprecisely worded. It should have read, “Given the constitutional limits...” Some attorneys indicated that they thought the question was vague. Some noted that any limits were statutory and not judicial. In any event, I believe that the answers regarding the value of peremptory challenges remain well taken.
6. Do Batson/Wheeler motions take up too much court time?

Batson/Wheeler motions do/donot take up too much court time. (Please circle one.)

7. How difficult/easy is it to establish a prima facie case of purposeful discrimination in the exercise of peremptory challenges such that the trial court asks the opposition to justify his or her challenges?

It is very difficult/somewhat difficult/easy/very easy to establish a prima facie case of purposeful discrimination in the exercise of peremptory challenges. (Please circle one.)

8. Once the trial court finds a prima facie case of purposeful discrimination, how difficult/easy is it to satisfy the trial court that a peremptory challenge was exercised in a permissible manner?

It is very difficult/somewhat difficult/easy/very easy to satisfy the trial court that a peremptory challenge was exercised in a permissible manner. (Please circle one.)

9. Is the venire adequately questioned before you are asked to exercise your peremptories?

The venire is always/usually/sometimes/never adequately questioned before I am asked to exercise my peremptories. (Please circle one.)

10. What, if anything, interferes with adequate questioning of the venire?

11. How is the venire usually questioned?

The venire is usually questioned by counsel/by the court/by counsel and the court/by questionnaire/by counsel and questionnaire/by court and questionnaire/by counsel, court, and questionnaire. (Please circle one.)
12. Do *Batson/Wheeler* motions prevent unlawful discrimination in jury selection?

*Batson/Wheeler motions always/usually/sometimes/never prevent unlawful discrimination in jury selection. (Please circle one.)*

13. Why?

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

14. Should peremptory challenges be eliminated from the jury selection process?

Peremptory challenges *should/should not* be eliminated from the jury selection process. (Please circle one.).

15. Why?

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

16. How would you describe yourself?

I am a *prosecutor/defense attorney*. (Please circle one.)

I have practiced as a trial attorney *only in federal court/only in state court/in both federal and state courts*. (Please circle one.)

For Attorneys Who Have Practiced in the Federal Courts:

I *was/was not* practicing pre-*Batson*. (Please circle one.)

For Attorneys Who Have Practiced in the State Courts:

I *was/was not* practicing pre-*Wheeler*. (Please circle one.)

I have personally tried approximately jury ____ trials. (Please indicate number.)
APPENDIX B

TABLE 1

RETURNED SURVEYS
A PROFILE OF THE ATTORNEYS:

<table>
<thead>
<tr>
<th>Description</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prosecutors</td>
<td>98</td>
</tr>
<tr>
<td>Defense Attorneys</td>
<td>96</td>
</tr>
<tr>
<td>Federal Practice Only</td>
<td>9</td>
</tr>
<tr>
<td>State Practice Only</td>
<td>150</td>
</tr>
<tr>
<td>Both Federal and State Practice</td>
<td>36</td>
</tr>
<tr>
<td>0–10 trials</td>
<td>20</td>
</tr>
<tr>
<td>11–25 trials</td>
<td>30</td>
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<tr>
<td>26–50 trials</td>
<td>66</td>
</tr>
<tr>
<td>51–100 trials</td>
<td>50</td>
</tr>
<tr>
<td>More than 100 trials</td>
<td>29</td>
</tr>
<tr>
<td>Pre-Batson Federal Practice</td>
<td>23</td>
</tr>
<tr>
<td>Pre-Wheeler State Practice</td>
<td>73</td>
</tr>
</tbody>
</table>
TABLE 2

THE CURRENT VALUE OF THE PEREMPTORY CHALLENGE

<table>
<thead>
<tr>
<th>Peremptory Challenges are of:</th>
<th>Entire Pool</th>
<th>Prosecutors</th>
<th>Defense Attorneys</th>
<th>Federal Practice Only</th>
<th>State Practice Only</th>
<th>Both State and Federal Practice</th>
<th>Pre-Batson Federal Court Practice</th>
<th>Pre-Wheeler State Court Practice</th>
</tr>
</thead>
<tbody>
<tr>
<td>great value</td>
<td>157 81.35%</td>
<td>81 82.65%</td>
<td>74 80.43%</td>
<td>5 55.56%</td>
<td>120 82.19%</td>
<td>30 83.33%</td>
<td>19 82.61%</td>
<td>57 80.28%</td>
</tr>
<tr>
<td>some value</td>
<td>35 18.13%</td>
<td>16 16.33%</td>
<td>18 19.57%</td>
<td>4 44.44%</td>
<td>26 17.81%</td>
<td>5 13.89%</td>
<td>3 13.04%</td>
<td>14 19.72%</td>
</tr>
<tr>
<td>no value</td>
<td>1 0.52%</td>
<td>1 1.02%</td>
<td>0 0.0%</td>
<td>0 0.0%</td>
<td>0 0.0%</td>
<td>1 2.78%</td>
<td>1 4.35%</td>
<td>0 0.0%</td>
</tr>
<tr>
<td>The Pre-Batson/Pre-Wheeler Peremptory Challenge was of.</td>
<td>Pre-Wheeler Peremptory State Court Practice</td>
<td></td>
<td></td>
<td></td>
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<td>-----------------------------------------------------</td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Entire Pool</td>
<td>21, 15.91%, 17, 22.97%, 4, 7.14%, 2, 10.53%</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Prosecutors</td>
<td>30, 22.73%, 18, 24.32%, 11, 19.64%, 7, 36.64%</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Defense Attorneys</td>
<td>75, 56.92%, 38, 51.35%, 36, 64.29%, 8, 42.11%</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>significantly greater value</td>
<td>6, 4.55%, 1, 1.35%, 5, 8.93%, 2, 10.53%</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>slightly more value</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>the same value</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>less value</td>
<td></td>
<td></td>
<td></td>
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<td></td>
</tr>
</tbody>
</table>

### TABLE 3

The Value of the Pre-Batson/Pre-Wheeler Peremptory Challenge
## TABLE 4

**The Adequacy of Voir Dire for Purposes of Exercising Peremptory Challenges**

<table>
<thead>
<tr>
<th>The venire is adequately questioned</th>
<th>Entire Pool</th>
<th>Prosecutors</th>
<th>Defense Attorneys</th>
</tr>
</thead>
<tbody>
<tr>
<td>always</td>
<td>1</td>
<td>0.53%</td>
<td>1</td>
</tr>
<tr>
<td>usually</td>
<td>29</td>
<td>15.26%</td>
<td>17</td>
</tr>
<tr>
<td>sometimes</td>
<td>107</td>
<td>56.32%</td>
<td>57</td>
</tr>
<tr>
<td>never</td>
<td>53</td>
<td>27.89%</td>
<td>19</td>
</tr>
</tbody>
</table>

## TABLE 5

**The Frequency of Batson/Wheeler Motions**

<table>
<thead>
<tr>
<th>Such motions were made in</th>
<th>Entire Pool</th>
<th>Prosecutors</th>
<th>Defense Attorneys</th>
</tr>
</thead>
<tbody>
<tr>
<td>all cases</td>
<td>2</td>
<td>1.03%</td>
<td>1</td>
</tr>
<tr>
<td>most cases</td>
<td>10</td>
<td>5.13%</td>
<td>7</td>
</tr>
<tr>
<td>some cases</td>
<td>133</td>
<td>68.21%</td>
<td>55</td>
</tr>
<tr>
<td>no cases</td>
<td>50</td>
<td>25.64%</td>
<td>33</td>
</tr>
<tr>
<td>Batson/Wheeler motions take up too much court time</td>
<td>Entire Pool</td>
<td>Prosecutors</td>
<td>Defense Attorneys</td>
</tr>
<tr>
<td>--------------------------------------------------</td>
<td>-------------</td>
<td>-------------</td>
<td>-----------------</td>
</tr>
<tr>
<td>agree</td>
<td>24</td>
<td>13.19%</td>
<td>22</td>
</tr>
<tr>
<td>disagree</td>
<td>158</td>
<td>86.81%</td>
<td>65</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
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<tr>
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<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
### TABLE 7

**PREVENTING UNLAWFUL DISCRIMINATION IN JURY SELECTION**

<table>
<thead>
<tr>
<th>Batson/Wheeler motions prevent unlawful discrimination</th>
<th>Entire Pool</th>
<th>Prosecutors</th>
<th>Defense Attorneys</th>
</tr>
</thead>
<tbody>
<tr>
<td>always</td>
<td>0 0.00%</td>
<td>0 0.00%</td>
<td>0 0.00%</td>
</tr>
<tr>
<td>usually</td>
<td>34 19.88%</td>
<td>23 28.05%</td>
<td>11 12.64%</td>
</tr>
<tr>
<td>sometimes</td>
<td>111 64.91%</td>
<td>45 54.88%</td>
<td>65 74.71%</td>
</tr>
<tr>
<td>never</td>
<td>26 15.20%</td>
<td>14 17.07%</td>
<td>11 12.64%</td>
</tr>
</tbody>
</table>

### TABLE 8

**PROVING PURPOSEFUL DISCRIMINATION IN JURY SELECTION**

<table>
<thead>
<tr>
<th>It is... to establish a prima facie case of discrimination</th>
<th>Entire Pool</th>
<th>Prosecutors</th>
<th>Defense Attorneys</th>
</tr>
</thead>
<tbody>
<tr>
<td>very difficult</td>
<td>40 23.12%</td>
<td>6 7.14%</td>
<td>34 39.53%</td>
</tr>
<tr>
<td>somewhat difficult</td>
<td>78 45.09%</td>
<td>42 50%</td>
<td>35 40.70%</td>
</tr>
<tr>
<td>easy</td>
<td>39 22.54%</td>
<td>24 28.57%</td>
<td>13 15.12%</td>
</tr>
<tr>
<td>very easy</td>
<td>16 9.25%</td>
<td>12 14.29%</td>
<td>4 4.65%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>It is... to rebut a prima facie case of discrimination</th>
<th>Entire Pool</th>
<th>Prosecutors</th>
<th>Defense Attorneys</th>
</tr>
</thead>
<tbody>
<tr>
<td>very difficult</td>
<td>21 13.13%</td>
<td>6 7.89%</td>
<td>14 17.28%</td>
</tr>
<tr>
<td>somewhat difficult</td>
<td>36 22.50%</td>
<td>25 32.89%</td>
<td>11 13.58%</td>
</tr>
<tr>
<td>easy</td>
<td>80 50%</td>
<td>39 51.32%</td>
<td>39 48.15%</td>
</tr>
<tr>
<td>very easy</td>
<td>23 14.38%</td>
<td>6 7.89%</td>
<td>17 20.99%</td>
</tr>
</tbody>
</table>
TABLE 9

THE ELIMINATION OF PEREMPTORY CHALLENGES

<table>
<thead>
<tr>
<th>Peremptory Challenges . . . be eliminated</th>
<th>Entire Pool</th>
<th>Prosecutors</th>
<th>Defense Attorneys</th>
<th>Federal Practice Only</th>
<th>State Practice Only</th>
<th>Both State and Federal Practice</th>
<th>Pre-Batson Federal Court Practice</th>
<th>Pre-Wheeler State Court Practice</th>
</tr>
</thead>
<tbody>
<tr>
<td>should</td>
<td>3</td>
<td>1</td>
<td>1</td>
<td>1.03%</td>
<td>0.00%</td>
<td>1</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>1.53%</td>
<td>1.03%</td>
<td>1.04%</td>
<td>0.00%</td>
<td>0.67%</td>
<td>5.56%</td>
<td>8.7%</td>
<td>2.78%</td>
</tr>
<tr>
<td>should not</td>
<td>193</td>
<td>96</td>
<td>95</td>
<td>98.96%</td>
<td>99.96%</td>
<td>99.33%</td>
<td>94.44%</td>
<td>91.30%</td>
</tr>
<tr>
<td></td>
<td>98.47%</td>
<td>98.97%</td>
<td>100%</td>
<td>98.96%</td>
<td>98.96%</td>
<td>99.33%</td>
<td>94.44%</td>
<td>97.22%</td>
</tr>
</tbody>
</table>
## TABLE 10

### HOW JURY PANELISTS ARE QUESTIONED

<table>
<thead>
<tr>
<th>The venire is usually questioned by:</th>
<th>Entire Pool</th>
<th>Prosecutors</th>
<th>Defense Attorneys</th>
</tr>
</thead>
<tbody>
<tr>
<td>counsel only</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>court only</td>
<td>109</td>
<td>48</td>
<td>59</td>
</tr>
<tr>
<td>counsel and court</td>
<td>54</td>
<td>28</td>
<td>25</td>
</tr>
<tr>
<td>questionnaire</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>counsel and questionnaire</td>
<td>1</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>court and questionnaire</td>
<td>14</td>
<td>8</td>
<td>6</td>
</tr>
<tr>
<td>counsel, court, and questionnaire</td>
<td>6</td>
<td>4</td>
<td>2</td>
</tr>
</tbody>
</table>