REALISTIC RESPONSES TO THE LIMITATIONS OF *BATSON v. KENTUCKY*

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The modern view of the jury, expressed in recent years in *Batson v. Kentucky*[1] and its progeny, is of an institution made up of citizens who view themselves and who should be viewed by others as color-blind and gender-neutral. From this viewpoint, the racial and gender make-up of a particular jury should not affect the fairness or legitimacy of the jury's verdict, for the color-blind view assumes that the race or gender of a juror does not affect that juror's verdict preference. Rather, what matters for fairness and legitimacy is that the jury selection process has not systematically removed legally eligible citizens based on their race[2] or gender.[3]

The procedures outlined in *Batson* were intended to prevent parties from using race in the exercise of their peremptory challenges.[4] Justice Marshall predicted that the procedures would fail to meet that goal.[5] Several scholars who have examined jury selection in the aftermath of *Batson* suggest that Justice Marshall was correct.[6] As a result, they have argued that the elimination of peremptory challenges is the only way to prevent race- and gender-based excuses.[7]

After briefly describing the exercise of challenges in the jury selection process and how *Batson* and its progeny purported to change the exercise of peremptory challenges, we examine the available evidence

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1 476 U.S. 79 (1986), *modified by* Powers v. Ohio, 499 U.S. 400 (1991).

2 *See id.*

3 *See* J.E.B. v. Alabama, 511 U.S. 127 (1994).

4 *See Batson*, 476 U.S. at 85-89.

5 *See id.* at 102-03 (Marshall, J., concurring).

6 *See, e.g.*, Albert Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 209 (1989); Kenneth Melilli, Batson *in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 503 (1996); Karen Bray, *Reaching the Final Chapter in the Story of Peremptory Challenges*, 40 UCLA L. REV. 517, 564-66 (1992).

7 *See supra* note 6; *see also* Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041, 1044 (1995).

for *Batson*'s lack of impact on the exercise of the peremptory challenge. Next, we discuss why the promise of *Batson* has not been met in light of the requirements for a successful *Batson* challenge. Then, using data from peremptory challenges in pre-*Batson* cases, we evaluate the likely consequences of eliminating peremptory challenges. Finally, we revisit notions of impartiality and bias as we consider potential remedies to maximize jury heterogeneity and representativeness without eliminating peremptory challenges.

I. VOIR DIRE AND THE EXERCISE OF CHALLENGES

Individuals summoned for jury duty who meet the general qualifications for jury service (e.g., citizenship, age, and residency) go through a final screening process called voir dire before they are seated on a petit jury in a particular case. During the voir dire, the potential jurors are questioned, at times briefly but occasionally quite extensively, about their background and attitudes by the judge alone and, increasingly less often, by the attorneys.[8]

Either the judge or a party, through his or her attorney, can excuse a prospective juror. Excused jurors are removed by challenges for cause or by peremptory challenges. The judge may excuse a juror for cause if: 1) that juror explicitly admits he or she cannot be impartial due to a personal belief, prejudice, or bias for or against one of the parties, or about the case in general; or 2) the judge determines from the juror's answers during the voir dire that the juror is unable or unwilling to decide the case on the basis of the evidence and the law.[9] The judge may remove a juror for cause either on the judge's own motion or in response to an attorney's motion.[10]

The right to challenge jurors based upon evidence of bias or prejudice—that is, to excuse jurors for cause—existed at English common law and was adopted by the colonies, individually and in the Declaration of Rights of the First Continental Congress in 1774.[11] The right has been interpreted by some as part of the constitutional right to a fair trial by an impartial jury.[12] Challenges for cause are unlimited in number.[13]

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[8] *See* Gordon Bermant & John Shapard, *The Voir Dire Examination, Juror Challenges and Adversary Advocacy, in* THE TRIAL PROCESS 69, 81 (Bruce Dennis Sales ed., 1981).

[9] *See* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 973-74 (2d ed. 1992) (listing several reasons why judges would excuse a juror).

[10] *See, e.g.*, ARIZ. R. CRIM. P. 18.4(b).

[11] *See* LLOYD E. MOORE, THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY 66, 95 (1993).

[12] *See* Andrea B. Horowitz, Note, Ross v. Oklahoma*: A Strike Against Peremptory Challenges*, 1990 WIS. L. REV. 219, 238.

[13] *See* LAFAVE & ISRAEL, *supra* note 9, at 973.

A potential juror may also be excused by one of the parties when his or her attorney uses a peremptory challenge. In *Swain v. Alabama*,[14] the United States Supreme Court defined peremptory challenges as "challenges without cause, without explanation and without judicial scrutiny."[15] Peremptory challenges have been a part of the justice system in the United States since 1790,[16] but the use of the peremptory challenge is not constitutionally guaranteed. The right to eliminate jurors without stating a reason has not been recognized as being included in the constitutional right to due process, a fair and impartial jury, or a cross-section of the community,[17] but is provided for in federal and all state statutory jury procedures.[18]

The number of peremptory challenges each party can exercise is limited and varies widely across jurisdictions. The maximum number within a jurisdiction often depends on the type of case (more challenges are permitted in more serious cases). For example, in New York, each side receives fifteen challenges if the highest crime with which the defendant is charged is either a class B or C felony, while each side receives twenty challenges if the highest crime with which the defendant is charged is a class A felony.[19] In criminal cases the number of challenges allotted to the defendant may equal the number allotted to the prosecution[20] or it may exceed that number.[21] Judges also have some discretion in determining the maximum number of potential peremptory challenges and may, for example, allot the statutorily prescribed number of challenges to each defendant when the case involves multiple defendants.[22]

In 1986, *Batson* placed a limit on the exercise of all peremptory challenges, forbidding prosecutors from using juror race as a basis for striking jurors who are the same race as the defendant.[23] Over the past eleven years, the Supreme Court has expanded this prohibition to cover defense attorneys in criminal cases,[24] and attorneys in civil cases.[25] *Powers v. Ohio*[26] extended *Batson* further, making it unlawful to strike a juror because of his or her race, whether or not the juror is of the same

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14 380 U.S. 202 (1965).

15 *Id.* at 211-12.

16 *See id.* at 214 (citing 1 Stat. 119 (1790)).

17 *See* Melilli, *supra* note 6, at 447.

18 *See id.* at 447-48.

19 *See* N.Y. CRIM. PROC. § 270.25 2(a)-(b) (McKinney 1993 & Supp. 1997).

20 *See, e.g.*, 726 ILL. COMP. STAT. ANN. 5/115-4(e) (West Supp. 1997); ARIZ. R. CRIM. P. 18.4(c); N.Y. CRIM. PROC. LAW § 270.25 (McKinney 1996).

21 *See* FED. R. CRIM. P. 24(b).

22 *See, e.g.*, FLA. STAT. ANN. ch. 3.350(d) (West 1989 & Supp. 1997).

23 *Batson*, 476 U.S. at 89.

24 *See* Georgia v. McCollum, 505 U.S. 42 (1992).

25 *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991).

26 499 U.S. 400 (1991).

race as the defendant. In *J.E.B. v. Alabama*[27], the prohibition was extended to forbid gender as well as race as a basis for the exercise of peremptory challenges.[28] Taken together, these cases mandate that, regardless of the type of case and who is doing the striking, it is unlawful to use peremptory strikes to eliminate jurors systematically from a petit jury because of their race or gender, or because of an "incorrect" assumption that they will not be able to be impartial due to their race.

The Court's decisions in *Batson* and the subsequent cases have focused greater scrutiny on the exercise of peremptory challenges. The evidence accumulated thus far, however, suggests that the increased scrutiny has not resulted in the elimination of race-based challenges. We turn next to the evidence that *Batson* has failed to alter race-based exercises of peremptory challenges. We then discuss likely explanations for that failure.

II. *BATSON* PROCEDURES AND THEIR EFFECTS

The Court in *Batson* delineated a three-step procedure for examining a potential *Batson* violation. First, the complaining attorney must establish a prima facie case to support the claim that the opposing party has exercised its peremptory challenges in a discriminatory fashion.[29] Second, if the judge believes a prima facie case has been made, the burden shifts to the accused party, who must offer a race-neutral explanation for the contested challenges.[30] Finally, the trial court judge must decide whether the offered explanation is sufficient to rebut the claim that the challenge was racially motivated.[31]

Since *Batson* was decided, numerous litigants have raised so-called *Batson* challenges, and parties have appealed trial court decisions based on those challenges. Kenneth Melilli examined virtually all federal and state civil and criminal cases published between April 30, 1986 (when *Batson* was decided) and December 31, 1993.[32] He identified all cases in which there was both a *Batson* claim and decision, and found 1,156 *Batson* complainants during that time period.[33] The majority of those complainants were not ultimately successful because the party charged with the *Batson* violation was able to provide a neutral explanation that was acceptable to the judge.[34] Only eighteen percent of those attorneys

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27 511 U.S. 127 (1994).

28 *Id.* at 131.

29 *See Batson*, 476 U.S. at 96.

30 *See id.* at 97.

31 *See id.* at 96-98.

32 *See* Melilli, *supra* note 6, at 448.

33 *See id.* at 457.

34 *See id.* at 460.

charged with basing challenges on race were found to be in violation of *Batson*.[35]

Of course a low rate of success does not necessarily indicate that valid complaints are being defeated. A review of explanations that have been accepted as neutral when a challenge has been raised, however, suggests a reluctance on the part of trial and appellate courts to reject even the most minimal explanations offered to rebut a *Batson* challenge. For instance, in *United States v. Romero-Reyna*[36] the prosecutor excused a Hispanic juror who worked as a pipeline worker because his job title began with the letter *P*.[37] The District Court rejected this explanation,[38] but at a later hearing the attorney recalled that he had excused the juror because pipeline workers are known for smoking marijuana.[39] The District Court accepted that explanation.[40] In *Purkett v. Elem*,[41] long hair and a beard were enough to justify the prosecutor's decision to excuse two African-American jurors.[42]

This record suggests that the promise of *Batson* has not been fulfilled. Note, however, that it does *not* mean that *Batson* has been totally ineffective. Researchers who have examined the impact of *Batson* have looked only at cases in which *Batson* challenges have been mounted.[43] If *Batson* has produced any educative or deterrent effect that has reduced the number of peremptory challenges that prosecutors or defense attorneys would otherwise use to strike jurors based on race, that effect would not be revealed in the cases involving *Batson* complaints. The most direct test of the effect of *Batson* would compare the racial make-up of juries in the years preceding and following *Batson*.[44] That is a test that has not yet been conducted.

In any case, available evidence suggests that *Batson* has not effectively prevented the intrusion of race into the jury selection process.[45] This failure arises from the ambiguous grounds for most peremptory challenges. If legitimate peremptory challenges after *Batson* remain "challenges without cause, without explanation"[46] as long as they are not based on race or gender, then they can be based merely on the attorney's

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35 *See id.*

36 889 F.2d 559 (5th Cir. 1989).

37 *See id.* at 560.

38 *See id.*

39 *See id.* at 561.

40 *See id.*

41 514 U.S. 765 (1995).

42 *Id.* at 768.

43 *See, e.g.*, sources cited *supra* note 6.

44 It would be desirable to examine the racial make-up of challenged jurors as well, but courts do not typically keep records on the identity of jurors excused during voir dire.

45 *See, e.g.*, sources cited *supra* note 6.

46 Swain v. Alabama, 380 U.S. 202, 212 (1965).

wise or foolish hunch. The trial court is then left in the difficult position of distinguishing these from race- or gender-based decisions. In the modern voir dire, the attorney generally has limited information on which to base peremptory challenge decisions,[47] so that hunches derived from feelings, intuition, and stereotypes may be the basis for all challenges.[48] Thus, it actually *may* be a beard or a wink or a gruff reply that evokes a challenge.

If an attorney excuses a juror based on the juror's race and is challenged under *Batson*, the attorney is likely to give an explanation for the challenge that sounds much like a hunch. The judge then must distinguish between a "real" hunch and a fake hunch being used to conceal an illegitimate peremptory challenge, an exercise in mind-reading that courts are understandably inclined to resist. The appellate court is even more constrained because, in addition to the usual deference to the trial court, it lacks access to cues that are not contained in the written record.[49]

Thus, unless an attorney offers an explanation that would apply equally to a juror of a different race or gender whom the attorney has retained (e.g., the attorney says she excused a juror because he works for the post office and both a challenged minority juror and a retained white juror are postal employees), it is difficult to identify a race- or gender-based challenge. Prospective jurors differ from one another on a host of dimensions, and the resourceful attorney can generally point with ease to a distinguishing non-race and non-gender characteristic to justify a particular challenge.

Even if the judge suspects that the attorney's real reason for the challenge is race or gender, the judge may be reluctant to act. When a judge finds that a *Batson* violation has occurred after the attorney offers a purportedly neutral explanation for excusing the juror, the judge is really saying that the attorney has lied to the court in denying that he or she engaged in intentional discrimination. Thus, while the typical voir dire provides limited information, judges generally cannot determine with any assurance that a race- or gender-based challenge has been exercised in any particular case and are understandably reluctant to reject even apparently flimsy explanations. It is only when the pattern of excuses is extreme (e.g., the prosecutor eliminates the only five blacks on the panel) that the ambiguity is reduced. Therefore, it is only as a deterrent and at

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[47] *See* discussion *infra* Part IV.

[48] In high-stakes or high-profile cases consultants may have collected survey or focus group data that influence decisions on peremptory challenges. The reference here is to the typical case in which the litigants do not obtain such assistance.

[49] *See, e.g.*, United States v. Ploof, 464 F.2d 116, 118 (2d Cir. 1972); State v. Rose, 589 P.2d 5, 13 (Ariz. 1978) (entire voir dire process is best left to the discretion of the trial court judge).

the extremes (i.e., do not excuse all of the minority group members) that *Batson* controls are likely to have much impact. Batson's ineffectiveness has led to a search for alternative remedies for racial discrimination in jury selection.

III. DECISIONS BY JUDGES AND ATTORNEYS DURING VOIR DIRE

The elimination of peremptory challenges accompanied by an expansion of grounds for challenges for cause is the remedy many commentators have proposed for avoiding race-based challenges in the wake of *Batson*.[50] We turn now to a set of trials conducted in the pre-*Batson* era to assess how this reform might affect jury selection. The standard voir dire provides limited information to judges who must make decisions on challenges for cause and to attorneys who must decide when to exercise their peremptory challenges. As we will show, under these circumstances judges excuse jurors for cause only on rare occasions, and attorneys faced with this limited information rely on relatively crude stereotypes and assumptions in exercising their peremptory challenges. Nonetheless, even the minimal information available to attorneys provides enough detail on each juror to justify exercising a peremptory challenge to excuse that juror on grounds other than race or gender.

The data we report here were collected as part of a study of jury selection conducted by Hans Zeisel and Shari Diamond in twelve criminal trials in the U.S. District Court for the Northern District of Illinois.[51] The trials lasted from several hours to three weeks, with criminal charges ranging from draft evasion to conspiracy and extortion. The three judges in the study excused fifty jurors for cause. The attorneys exercised a total of 102 peremptory challenges and in each instance were asked to complete a form on each juror they challenged indicating the basis for their challenge. The attorneys filled out forms on eighty-two of the peremptory challenges.[52]

The reasons given by attorneys for their peremptory challenges ranged from occupation (e.g., prospective juror in a case involving mail fraud worked in shipping and receiving) and family ties (e.g., husband

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[50] *See* sources cited *supra* notes 6-7; *see also* JEFFEREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY, 136-37 (1994).

[51] See Hans Zeisel & Shari S. Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491 (1978); Shari S. Diamond & Hans Zeisel, *A Courtroom Experiment on Jury Selection and Decision-Making*, 1 PERSONALITY & SOC. PSYCHOL. BULL. 276 (1974).

[52] All but one prosecutor and two defense attorneys completed the forms. These three attorneys excused a total of eighteen jurors. In two other cases the attorneys did not give reasons for excusing one of the jurors: one attorney did not remember excusing the juror and another could not remember his reason for the challenge.

employed as a police officer) to demeanor (e.g., "looks like an FBI agent and appeared to be a snob") and attributes now prohibited in the wake of *Batson* (i.e., race and gender). Table I shows the distribution of the 117 reasons they gave.[53] Using the voir dire transcripts, courtroom observations by one of the authors (S.D.), and the reasons given by the attorneys, we can learn something about the pre-*Batson* era and the circumstances under which challenges for cause were granted. We can also learn what

TABLE I

REASONS GIVEN BY ATTORNEYS FOR PEREMPTORY CHALLENGES

	Number of Challenges*	Number of Cases
Occupation/work history	30	11
General: self	13	9
friend or relative	9	4
Case-related: self	6	5
friend or relative	2	1
Demeanor/appearance	29	11
Weak, immature, timid	5	3
Bossy, assertive	5	5
Critical, hostile, stern, grim	6	4
General, unspecified	7	5
Other**	8	6
Comprehension/hearing/speaking difficulty	7	3
Prior jury service	9	5
Politics	4	2
Crime-related experience (e.g., victim, drug-user)	3	2
Age	11	7
Youth	3	3
Old Age	8	5
Area where juror lives	4	2
Batson-barred Reasons	11	4
Race: White	6	2
Black	2	1
Gender: Male	0	0
Female	6	3
Miscellaneous	4	4

* Subcategories may sum to a number greater than the category total if some attorneys gave more than one reason within the category.
**Included 3 too intelligent, 1 not intelligent enough.

[53] There are more reasons than challenges because attorneys sometimes gave more than one reason for excusing a particular juror.

a more generous standard for challenges for cause might produce, and the role played by what are now impermissible grounds for challenge.

Jurors were challenged for cause in seven of the eleven trials for which we have voir dire transcripts.[54] Thirty of the thirty-three jurors removed for cause explicitly said that they could not be fair to one or both sides. Only three jurors were excused for cause without directly expressing an inability to be fair. The first was a potential juror in an extortion case who, apparently hard of hearing, was excused by the judge after she failed to respond when her name was called. The second was a potential juror in a draft evasion case who said she had been very close to a nephew who was killed in Vietnam. The judge told her that attitudes about the war were irrelevant and asked if she could be fair. She said she would try to be fair and the judge told her that was not enough and excused her. The third was a juror in the same case who appeared rather confused. The juror initially said that he did not believe in getting out of the draft. After some explanation from the judge, the juror stated that he could make a decision based only on the evidence and the judge's instructions. The juror started to speak again when the judge asked if anyone felt he or she could not be fair. The judge then excused the juror without further questioning. In sum, all but one of the jurors excused for cause gave strong indications that they would find it difficult or impossible to be fair and impartial.

Among those jurors who said they could not be fair, three said simply that they could not be fair without indicating why, but all of the remaining jurors gave specific reasons. For example, one juror in a drug case said he could not be objective because he was a U.S. Treasury agent. Another said that he could not be fair because he personally had experimented with drugs. In a case of fraud involving a mail-order house, a juror who worked at Sears said that he might have problems being impartial. An accountant in a case involving fraudulent preparation of income tax forms said he could not be fair because he did not see how anyone could misfile a report. Thirteen of the jurors in six different cases mentioned either their occupation or the occupation of a close friend or relative, seven of them involving law enforcement. The largest concentration of reasons occurred in the draft evasion case, in which six jurors said they could not be fair in light of their feelings or experiences with the military. Others mentioned a variety of reasons (e.g., ethnic sympathy [the juror and the defendant were Italian-Americans]; prior knowledge about the case; the age of a juror's daughter [in a drug case]; prior victimization). Only two of the twenty-nine jurors who gave rea-

54 Except where otherwise noted, the data reported here were previously unpublished and the analyses were conducted specifically for this article. The original data are on file with one of the authors, Shari Seidman Diamond.

sons why they could not be fair gave socially undesirable explanations: one juror said he had experimented with drugs, and a second juror said he had been convicted of grand larceny seven years previously. Thus, no juror said he or she was unwilling to follow the judge's instructions or refused to accept the presumption of innocence.

Which of the jurors excused on a peremptory challenge might have been eliminated under a more generous standard for granting challenges for cause? We considered the explanations given by each attorney who excused a juror and we identified challenges that might pass muster if judges exercised their power more actively to remove jurors for cause. Although judges currently have wide discretion in excusing jurors for cause, they are generally reluctant to remove a juror who says he or she can be fair, and appellate courts generally defer to that judgment.[55] As we have seen, nearly all of the jurors removed for cause in these cases said that they could not be fair. Because attorneys can exercise peremptory challenges to remove jurors who give signs that they may not be impartial, judges need not feel compelled to use the authority of the state to dismiss a juror who claims he or she can perform the duties expected of a juror. Of course, judicial reluctance to excuse for cause means that an attorney must use one of the limited number of peremptory challenges that might otherwise by applied to another juror.

If peremptory challenges were eliminated or if fewer peremptories were allotted to each party, judges might be more vigilant in policing potential bias or inadequacy on the part of prospective jurors. What effect would greater vigilance have produced in these cases? We identified twenty of the eighty-two challenged jurors who might have been removed with a more generous use of the challenge for cause.[56] The first category included three jurors employed in case-related jobs, which might have led each of these jurors to have particular sympathy for the alleged victim of the offense. One juror worked for the railroad in a case involving theft from interstate shipment. Two other jurors were employed in shipping in a case involving an alleged attempt to defraud a mail-order house. The second category included two jurors in a drug case who either had friends who experimented with marijuana or used it themselves. The third category covered jurors connected in some way to others in the case: one juror happened to work with a previously accepted juror and a second juror worked in the same place as one of the defendants. In the fourth category were seven challenged jurors who

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[55] *See, e.g.*, United States v. Ploof, 464 F.2d 116, 118 (2d Cir. 1972); State v. Rose, 589 P.2d 5, 13 (Ariz. 1978) (holding that an appellate court will not reverse a judge's ruling on a challenge for cause absent a palpable abuse of discretion).

[56] The attorneys supplied us with the reasons for their challenges. *See* Diamond & Zeisel, *supra* note 51, at 277.

might have had some difficulty in their language skills, appeared inattentive in court, or seemed to have trouble hearing. Finally, the last category included six jurors who were close relatives of police officers.[57]

Even under an expansive interpretation of the challenge for cause, it is unlikely that all of these jurors would be removed. For example, the wholesale exclusion of all close relatives of police officers from all criminal cases is arguably over-inclusive. Yet, even if all of these twenty jurors were removed, that would still leave sixty-two jurors who would not be covered by challenge for cause. For example, while the defense attorney in one case thought it was significant that a prospective juror gave his last name first and was concerned that the juror was quite deferential to the judge, those behaviors do not constitute the kind of clear signals of bias that would enable a judge to dismiss a juror.[58] Moreover, an expanded use of challenges for cause would have eliminated nine of the thirty jurors excused on peremptory challenge based on occupation or work history, but it would have had little effect on the group of challenges based on less tangible attributes of demeanor and appearance, which constituted the largest remaining category of reasons for peremptory challenge. A juror's assertiveness or stern appearance is not grounds for dismissal for cause, even though litigants may feel uneasy about having such jurors decide their fate.

Would *Batson* and its progeny have prevented attorneys from exercising some of these remaining peremptory challenges? Of the twelve cases we examined, five involved black defendants, one involved two Hispanic co-defendants, and the remaining six involved white defendants. All defendants with the exception of one of the two Hispanic co-defendants were males. The attorneys in the study gave fourteen race- or gender-based explanations for challenging eleven jurors, reasons for excusing jurors that would be impermissible now.[59] All of these challenges occurred in four of the six cases involving minority defendants. Under *Batson* and its progeny, if the attorney can supply at least one race- (or gender-) neutral explanation for the challenge, the removal of the juror will be acceptable unless the attorney also mentions that race or gender accounted in part for the challenge.[60] In exercising all but one of the

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57 One of these jurors, a young man who was the son of a twenty-five year veteran police officer, had been the subject of a side-bar between the attorneys and the judge. The defense attorney asked to have the juror removed for cause, and the judge refused.

58 *See, e.g.*, Johnson v. State, 356 So. 2d 769, 772 (Ala. Ct. App. 1978) ("To disqualify a prospective juror he must have more than a bias, or fixed opinion, as to the guilt or innocence of the accused. His opinion must be so fixed that it would bias the verdict the juror would be required to render.").

59 A combination of race and gender was mentioned as the reason for three of the challenges.

60 *See Batson*, 476 U.S. at 97.

challenges in which race or gender was listed as a reason, the attorney mentioned at least one other neutral reason that might have allowed the challenge to survive a *Batson* charge if the attorney avoided mentioning the additional race or gender basis for the challenge (the reason given for the single remaining challenge was that the juror was a black woman). Thus, we might expect that nearly all of the race- and gender-based challenges that were visible in this study would not be visible in the post-*Batson* courtroom.

Based on these results, we anticipate that a litigant in a system without peremptory challenges would be required to accept a jury that includes many members whom the litigant would prefer to excuse. That does not mean that the jurors eliminated by peremptory challenge would actually be biased against the party who wished to excuse them. Indeed, there is some evidence that attorneys in the standard judge-conducted voir dire have only limited success in identifying unfriendly jurors.[61] It does mean that litigants would be deprived of the opportunity to remove apparently unfriendly prospective jurors, potentially undermining their confidence in the impartiality of the jury.[62] To preserve the ability of litigants to participate in selecting the members of their jury, a modest alternative to eliminating peremptory challenges might be to curtail severely the number of challenges allocated to each party. Limiting the number of peremptory challenges to three, for example, would make it impossible for an attorney to remove four black jurors even if *Batson*'s prohibition of race-based peremptory challenges failed to stop him or her. That approach, however, would not prevent attorneys from using ill-informed hunches and stereotypes in exercising even those few challenges. It is not the irrationality of the attorneys that inhibits the rational exercise of the peremptory challenge, but rather the weak information attorneys typically have about the jurors when they exercise those challenges.

IV. THE LIMITS OF VOIR DIRE FOR DISCLOSING JUROR BIAS

Voir dire in the typical trial presents only a limited opportunity to explore the biases of potential jurors so that the attorney can make informed decisions about peremptory strikes. While the intent of voir dire is to encourage jurors to reveal attitudes or experiences that may affect their ability to be fair, research on juror disclosure during voir dire indicates that jurors often provide incomplete, and sometimes explicitly inac-

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61 *See* Zeisel & Diamond, *supra* note 51 at 517.

62 *See, e.g.*, E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 94-110 (1988). The authors describe many studies showing that control and participation increase perceptions of fairness and legitimacy.

curate, information about their attitudes and backgrounds.[63] Seltzer, Venuti, and Lopes observed the jury selection in thirty-one criminal trials, recording all juror responses to the voir dire questions.[64] They then conducted post-trial interviews with the jurors who actually served on the juries, asking each juror some of the questions that the juror had answered during the voir dire (e.g., have you or any of your close family members or friends been a victim of a crime?).[65]

During the interviews, jurors mentioned experiences that they had not reported when they were asked about them during voir dire.[66] Approximately twenty-five percent of jurors who did not disclose during the voir dire that they or a family member had been a victim of a crime reported in the interview that they or a family member *had* been a victim of crime.[67] Similarly, thirty percent of the jurors reported knowing a law enforcement officer even though they did not disclose that information during voir dire.[68]

In addition, jurors revealed attitudinal information during the post-trial interview that they did not disclose during voir dire.[69] During voir dire, jurors were asked several due process questions designed to probe, for instance, whether they incorrectly believed that the defendant had the burden of proof or that the defendant should not be presumed innocent.[70] During voir dire, no jurors disclosed any disagreement with the due process issues, yet during the post-trial interviews many jurors revealed their disagreement on these same issues.[71]

Although judges typically believe that they can obtain full disclosure from jurors, research by Susan Jones suggests that such confidence is unwarranted.[72] Jones compared the impact of judge- versus attorney-conducted voir dire, as well as the impact of the interpersonal style of judges and attorneys, on juror candor.[73] Jury-eligible participants engaged in a mock voir dire that was conducted by either an attorney or a judge who used either a personal, informal interpersonal style or a formal interpersonal style.[74] The jurors gave verbal responses during the voir

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63 *See* Richard Seltzer et al., *Juror Honesty During Voir Dire*, 19 J. CRIM. JUST. 451, 460 (1991).

64 *See id.* at 453.

65 *See id.* at 454.

66 *See id.* at 455-56.

67 *See id.* at 455.

68 *See id.* at 456.

69 *See id.* at 457.

70 *See id.*

71 For instance, approximately 47 percent of the jurors responded during the interview that if a defendant testifies at trial, he has to prove his innocence in at least some cases.

72 Susan E. Jones, *Judge- Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor*, 11 LAW & HUM. BEHAV. 131 (1987).

73 *Id.* at 136.

74 *See id.*

dire, and the attitudes expressed during the voir dire were compared to the attitudes the jurors expressed in a written questionnaire that was completed prior to the voir dire. Participants altered their responses almost twice as much during judge-conducted voir dire as during attorney-conducted voir dire.[75]

Furthermore, though the public verbal responses to the attorney were more consistent with the earlier more private written responses when the attorney used a personal style rather than a formal style, the consistency of responses to the judge did not vary with the style the judge used.[76] Jones concluded that jurors were less forthcoming during a judge-conducted voir dire than during an attorney-conducted voir dire.[77] Even when judges attempted to be friendly and unassuming, judges still exerted considerable pressure on jurors to behave in a way that they perceived to be acceptable to the judge.[78] In sum, Jones's research suggests that jurors are somewhat reluctant to provide honest and complete answers to voir dire questions, especially when questioned by judges.

Juror disclosure might be less than frank and complete for several reasons. First, jurors who are highly motivated to serve may be reluctant to describe experiences or opinions they believe will cause them to appear undesirable as jurors and to be excused from service.[79] Second, jurors may be hesitant to reveal experiences or attitudes that would embarrass them in front of the judge, the attorneys, and the venire.[80] This may be exaggerated because the courtroom is not only open to the public, but is also equipped with a court reporter who records the entire proceeding.

Third, some jurors may be too self-conscious or shy to speak in public, regardless of how personal they perceive the question to be. Jurors are generally questioned in the courtroom before an audience consisting of the judge, the court reporter, the attorneys, the parties, and their fellow prospective jurors as well as any members of the public who happen to be present in the courtroom. Public speaking presents a common anxiety-provoking situation,[81] which includes several elements that tend to increase the speaker's apprehension about communicating with others: (1) the novelty of a situation (the courtroom is unfamiliar to most jurors);

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75 *See id.* at 143.

76 *See id.* at 144.

77 *Id.* at 143-44.

78 *See id.*

79 *See id.* at 145.

80 For instance, potential jurors who are called to serve in a trial involving a drug crime may be asked about their own drug use or the drug use of friends or family members. The jurors may not admit as much if that disclosure would embarrass them or someone close to them.

81 *See* Joe Ayres et al., *Two Empirical Tests of a Videotape Designed to Reduce Public Speaking Anxiety*, 21 J. APPLIED COMM. RES. 132-47 (1993).

(2) the formality of a situation (the courtroom is formal); (3) the speaker's conspicuousness (the juror being questioned individually is the focus of all trial participants); (4) the speaker's lower status (the juror may feel subordinate to the judge and the attorneys); (5) the speaker's unfamiliarity with those to whom he or she is communicating (the courtroom is filled with strangers); 6) the speaker's perceived dissimilarity with those to whom he or she is communicating; and (7) the degree of attention the speaker receives from others.[82] A situation in which the speaker anticipates being evaluated is also a cause of anxiety.[83] All of these factors make the voir dire a situation in which many jurors are likely to feel some communication anxiety. Moreover, this communication anxiety may cause communication avoidance,[84] discouraging the juror from speaking freely.

Fourth, in addition to the difficulty jurors have in revealing embarrassing experiences, jurors may be hesitant to reveal opinions that they believe might engender disapproval from the judge or others.[85] For instance, jurors may want to avoid admitting that they do not accept practices that guarantee a defendant's constitutional right to due process.

Even if a juror at first boldly admits to an opinion that could disqualify her from service, judges frequently attempt to rehabilitate the juror, and the juror may have great difficulty maintaining her unacceptable stance under such pressure. For example, the following exchange occurred between the judge and a juror during voir dire in a federal criminal case in Illinois:[86]

Judge: "You are satisfied that if the Government failed to prove the guilt of the defendants beyond a reasonable doubt, you would find them innocent, right?"

Juror: "I have to think about it."

Judge: "I am going to tell you if the Government failed to prove their guilt beyond a reasonable doubt you will have to find them innocent, if you are a good and proper juror in the case. You understand?"

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82 *See* James C. McCroskey, *The Communication Apprehension Perspective, in* AVOIDING COMMUNICATION: SHYNESS, RETICENCE, AND COMMUNICATION APPREHENSION 13-38 (John A. Daly & James C. McCroskey eds., 1984); *see also* Arnold H. Buss, SELF-CONSCIOUSNESS AND SOCIAL ANXIETY 165-219 (1980).

83 *See* John A. Daly & Arnold H. Buss, *The Transitory Causes of Audience Anxiety, in* AVOIDING COMMUNICATION: SHYNESS, RETICENCE, AND COMMUNICATION APPREHENSION, *supra* note 82, at 67-78.

84 *See* McCroskey, *supra* note 82, at 35 (avoidance is a common behavioral response to high communication anxiety); *see also id.* at 26.

85 *See* DOUGLAS P. CROWNE, THE EXPERIMENTAL STUDY OF PERSONALITY, 156-60 (1979) (individuals may misrepresent themselves to avoid social disapproval).

86 This is an excerpt from one of the cases discussed in Section III that we analyzed for this article.

Juror: "Yes."
Judge: "You can do that?"
Juror: "I will see."
Judge: "All right."

The judge in this exchange may have educated the juror or extracted a commitment that the juror would honor the legal standard, but a strong competing description is that he merely succeeded in getting the juror to say the magic words that would please the judge without producing a change in the juror's views or in the juror's ability or willingness to follow the legal standard. Middendorf and Luginbuhl found evidence of a similar molding of juror responses.[87] Jurors who viewed other jurors being questioned in a simulated voir dire before they were questioned were more likely to endorse due process issues than those who were not exposed to a voir dire prior to their own participation.[88] Middendorf and Luginbuhl described this effect of exposure to others' responses to voir dire questions as positive, arguing that increased endorsement of due process values resulted because those values were explained and explored during voir dire.[89] The alternative explanation, they also acknowledge, is that jurors simply learned to give responses that would not lead the judge or attorneys to excuse them.[90]

Even when jurors are motivated to be completely honest during voir dire, their responses may be inaccurate. People are often unable to recognize the extent to which their experiences or attitudes affect their judgments.[91] For example, a prospective juror who has four close family members who are police officers may not be able to gauge whether her relationships with those individuals will affect her ability to consider impartially the testimony of the police officers testifying for the government in a criminal case. Indeed, in any particular case it may be impossible for *anyone* to determine whether the juror will be improperly influenced by her prior history. Even the juror who reports that she could not be fair, leading the judge to excuse her for cause, may be so

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87 Kathi Middendorf & James Luginbuhl, The Value of a Nondirective Voir Dire Style in Jury Selection, 22 CRIM. JUST. & BEHAV. 129 (1995).

88 *See id.*

89 *Id.* at 145-46.

90 *See id.* at 145.

91 *See, e.g.*, Richard E. Nisbett & Timothy D. Wilson, *The Halo Effect: Evidence for Unconscious Alteration of Judgments*, 35 J. PERSONALITY & SOC. PSYCHOL. 250 (1977) (participants in four studies were unable to articulate the effects that situations had on their behavior, indicating that people have difficulty identifying the causes of their own behavior); Timothy D. Wilson & Richard E. Nisbett, *The Accuracy of Verbal Reports About the Effects of Stimuli on Evaluations and Behavior*, 41 J. PERSONALITY & SOC. PSYCHOL. 118 (1978) (participants were unaware of the effects that a target person's manner of presentation had on their judgments about other attributes of the target person).

concerned about fairness and so motivated to deal equitably with both sides that she overestimates the effects of her initial reactions.

In sum, the typical voir dire entails a number of obstacles that reduce the information attorneys receive about the likely biases of potential jurors. In our view, the only serious way to combat these limitations is to address their sources and to modify voir dire so that jurors are encouraged to reveal socially undesirable characteristics and unpopular attitudes.

V. ALTERNATIVE METHODS FOR BOLSTERING *BATSON*

When voir dire is limited, jurors are less likely to reveal biases that will justify an excuse for cause. Attorneys, therefore, must rely primarily on superficial cues or stereotypes (e.g., giving the last name first indicates a willingness to accept state authority) in exercising their peremptory challenges. Stereotype utilization increases when the decision-maker is under a high cognitive demand and when individuating information is not available.[92] Thus, during the judge-conducted voir dire of a typical trial in which attorneys are faced with multiple competing demands and do not have much information specific to the individual jurors, stereotypes are likely to be the primary foundation for their peremptory challenges. The way to reduce the use of these hunches and stereotypes is to provide the attorneys with better information.

The information available to the court and the parties is influenced by the way the voir dire is conducted. Although the trend is toward both a more limited voir dire[93] and one which is increasingly conducted by the judge,[94] there is evidence that the increased efficiency is purchased at significant cost by reducing the information it produces.[95] Nietzel and Dillehay studied the role played by varying procedures in jury selection in thirteen capital murder trials.[96] Cases involving voir dire in which potential jurors were individually sequestered during the entire time they were questioned by judges and attorneys resulted in more sustained defense challenges for cause than cases in which jurors were questioned only en masse in open court.[97] Nietzel and Dillehay suggest that this

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92 *See generally* David Hamilton & Jeff Sherman, *Stereotypes, in* HANDBOOK OF SOCIAL COGNITION 5 (Robert Wyler & Thomas Srull eds., 1994) (When individuals must attend to a variety of internal and/or external stimuli, they cannot give attention to individuating information, so they are more likely to rely on stereotypes.).

93 *See* ANN FAGAN GINGER, JURY SELECTION IN CIVIL & CRIMINAL TRIALS §8.40 (2d. ed. 1984).

94 *See* BERMANT & SHAPARD, *supra* note 8, at 81.

95 *See* Michael T. Nietzel & Ronald C. Dillehay, *The Effects of Variations in Voir Dire Procedures in Capital Murder Trials*, 6 LAW & HUM. BEHAV. 1 (1991).

96 *See id.* at 5.

97 *See id.* at 8.

difference emerged because sequestered individual questioning promotes more complete disclosure of juror bias through the use of more individually tailored questions.[98] An additional explanation may be that the jurors were not censoring their responses because of what they heard other jurors say; the sequestered, individually questioned jurors had no access to the "correct" responses of others.

The form of questioning can also encourage or discourage disclosure. In the cases from the Zeisel and Diamond study,[99] the judges tended to ask closed-ended questions (e.g., would you be satisfied to have a jury composed of twelve people like you? Does anyone have a problem applying the law as I instruct you?). Both attorneys and judges may unwittingly engage in the kind of leading, directive questioning that inhibits self-disclosure. For instance, Middendorf and Luginbuhl had participants listen to judicial instructions on such due process issues as the presumption of innocence, the state's burden of proof, reasonable doubt, the defendant's right not to testify, and the defendant's right to present no evidence.[100]

Then, in the second phase of the experiment, the participants underwent questioning on these issues.[101] Jurors who underwent a non-directive questioning were significantly more likely to disagree with due process issues and were more self-disclosing (i.e., expressed more doubt about their ability to abide by due process guarantees) than were those who underwent directive questioning,[102] suggesting that jurors are more able to admit biases when they undergo non-directive as opposed to directive questioning.

Finally, although individual questioning and attorney-conducted voir dire may increase the time required for jury selection, one proposal that could facilitate juror disclosure without increasing costs is an expanded use of juror questionnaires. Jurors who are reluctant to disclose information in a crowded courtroom may be willing to write down sensitive or personal information on a questionnaire.[103] Moreover, the responses to the questions on the questionnaire cannot contaminate or be contaminated by the responses of other jurors answering the same questions.

The call for more extensive voir dire is at odds with the recent push toward reducing time spent in jury selection. In trials that have attracted

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98 *See id.* at 10.

99 Zeisel & Diamond, *supra* note 51.

100 Middendorf & Luginbuhl, *supra* note 87, at 133.

101 *See id.* at 133-34.

102 *See id.* at 142-45.

103 *See generally* Dennis Bilecki, *Efficient Method of Jury Selection for Lengthy Trials*, 73 JUDICATURE 43 (1989) (a study of the effect of pre-voir dire questionnaires on the costs associated with jury selection in complex trials).

significant media coverage, however, courts have recognized the need to explore the potential effects of pre-trial publicity and other predispositions that may influence juror behavior.[104] What we suggest here is that one way to ensure impartial juries and to discourage attorneys from exercising stereotype-based challenges is simply to apply the standards usually reserved for high-profile jury trials to jury trials in general.

How does an expanded voir dire comport with the goal of an impartial jury? There is a potential tension between a jury that is representative of the community and one that will provide the litigants with an impartial decision-maker. A representative jury may be representative of a prejudiced community. A full voir dire with a system of peremptory challenges may be the only way to reduce the likelihood that jurors who are unaware of their biases or who are unwilling to admit to them will be seated on a jury. This may be the only way to ensure that the unpopular defendant receives a trial before an impartial jury. In the wave of support for eliminating peremptory challenges as a way of shoring up *Batson*, we should not ignore the role that peremptory challenges can play in ensuring an impartial jury. Moreover, if attorneys are given the opportunity to make judgments based on individuals rather than images, they may be less likely to rely on snap-shot racial stereotypes in their judgments about potential jurors.

104 *See, e.g.*, FRED S. SIEBERT ET AL., FREE PRESS AND FAIR TRIAL: SOME DIMENSIONS OF THE PROBLEM 6-11 (Bush ed., 1970) (found that 92% of judges relied on voir dire as well as judicial admonition in order to address jury bias).