



6-1-1999

Batson in Practice: What We Have Learned about Batson and Peremptory Challenges

Kenneth J. Melilli

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

Kenneth J. Melilli, *Batson in Practice: What We Have Learned about Batson and Peremptory Challenges*, 71 Notre Dame L. Rev. 447 (1996).

Available at: <http://scholarship.law.nd.edu/ndlr/vol71/iss3/3>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

Batson in Practice: What We Have Learned About Batson and Peremptory Challenges

Kenneth J. Melilli*

INTRODUCTION

During the jury selection process, litigants are entitled to exercise an unlimited number of challenges for cause, removing venirepersons who are unlikely to be fair and impartial jurors in the particular case.¹

The procedure for these challenges requires that the lawyer specify the reasons for the challenge, and that the trial judge ultimately rule upon the legitimacy of the challenge.² The litigants are also entitled to exercise peremptory challenges. In contrast to challenges for cause, the number of peremptory challenges available to a party is limited by statute or rule, and the lawyers need not state the grounds for peremptory challenges.³

Because peremptory challenges are exercised after the challenges for cause, any prospective juror who is peremptorily struck is presumably an individual who is not subject to a valid challenge for cause. For this reason, and also for the reason that lawyers typically have limited information concerning prospective jurors, peremptory challenges are frequently exercised on the basis of group affiliations rather than individual characteristics.⁴ Indeed, evaluating people on the basis of stereotypes is an inherent aspect of the peremptory challenge system.⁵ The peremptory challenge system allows lawyers and litigants to impose these stereotypes upon the jury selection process without articulating these potentially offensive and divisive prejudices.⁶

There is no federal constitutional right to exercise peremptory challenges.⁷ Nevertheless, peremptory challenges have long been considered to be an essential component of the jury trial system.⁸ In fact, the federal and every state jury selection scheme includes some provision for peremp-

* Professor of Law, Albany Law School of Union University. B.A., Yale University (1976); J.D., New York University School of Law (1979). The author gratefully acknowledges the contributions of Maureen Sladek, Jill Bolton, Thomas Reh, Mary Ellen Ladouceur and Kamayo Smith to this article.

1 JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 11.10 (1985).

2 *Id.*

3 *Id.*

4 Stephen A. Saltzburg & Mary Ellen Powers, *Peremptory Challenges and the Clash between Impartiality and Group Representation*, 41 MD. L. REV. 337, 342 (1982); Roger S. Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235, 287 n.211 (1968).

5 Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369, 370 (1992); Saltzburg & Powers, *supra* note 4, at 373.

6 Saltzburg & Powers, *supra* note 4, at 356; Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545, 553-54 (1975).

7 *Batson v. Kentucky*, 476 U.S. 79, 91 (1986); *Swain v. Alabama*, 380 U.S. 202, 219 (1965); *Silson v. United States*, 250 U.S. 583, 586 (1919).

8 *E.g.*, *Pointer v. United States*, 151 U.S. 396, 408 (1894); *Lewis v. United States*, 146 U.S. 370, 376 (1892).

tory challenges.⁹ The exalted status of the peremptory challenge has never been better illustrated than in *Swain v. Alabama*,¹⁰ in which the Court upheld a conviction against the black petitioner's claim that he had been denied equal protection¹¹ by the prosecutor's use of peremptory challenges to remove all six remaining black venirepersons. The *Swain* Court acknowledged that peremptory challenges are "frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty," and concluded that it could not "hold that the striking of Negroes in a particular case is a denial of equal protection of the laws."¹²

Twenty-one years later, in *Batson v. Kentucky*,¹³ the Court revisited the issue presented in *Swain*. While the Court sought to preserve the peremptory challenge system, it did hold that the exercise of peremptory challenges in a particular case based upon the race of the venireperson is a denial of equal protection.¹⁴ The *Batson* Court specifically held that, in cases in which a criminal defendant establishes a prima facie case of purposeful racial discrimination in the prosecutor's exercise of peremptory challenges, the state must offer satisfactory neutral explanations for challenging black venirepersons.¹⁵

In the years since the *Batson* decision was handed down, a number of developments have occurred. First, the Court has expanded the application of *Batson* beyond its original sphere and correspondingly made further inroads upon the previously impregnable realm of the peremptory challenge. Second, lower courts have had the opportunity, or perhaps task, of implementing *Batson*, refining *Batson*'s general dictates about "prima facie case[s]" of discrimination and "neutral explanations."¹⁶ Third, and perhaps most interestingly, in cases in which *Batson*'s requirement of "neutral explanations" has applied, we have been given a window into a previously secret arena; the thought processes of lawyers in the use of peremptory challenges.

This article examines each of these developments. In examining *Batson* as applied, the article considers virtually every relevant reported decision of every federal and state court applying *Batson* between April 30, 1986 (the date of the *Batson* decision) and December 31, 1993. Part I of this article reviews the decisions of the United States Supreme Court in *Batson* and its progeny and explores the implications of these decisions for the continuing vitality of the peremptory challenge. Part II of this article examines the cases in which *Batson* has been applied from 1986 through 1993 and investigates whether the Court's ambition of simultaneously preserving

9 Brian E. Leach, Comment, *Extending Batson v. Kentucky to Gender and Beyond: The Death Knell for the Peremptory Challenge?*, 19 S. ILL. U. L.J. 381, 384 (1995).

10 380 U.S. 202 (1965).

11 "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

12 *Swain*, 380 U.S. at 220-21.

13 476 U.S. 79 (1986).

14 *Id.* at 96-98.

15 *Id.*

16 *Id.*

the peremptory challenge and outlawing racial discrimination in jury selection has proved successful. Part III looks at the individual explanations for peremptory challenges which have been articulated under the *Batson* formula and, in light of these and other considerations, inquires whether the peremptory challenge is a device worth preserving.

I. *BATSON* IN THE SUPREME COURT

"Discrimination" is a curious word, and *Batson* is a curious decision about discrimination. The word "discrimination" is defined as "the making or perceiving of a distinction or difference."¹⁷ The word is qualitatively neutral.¹⁸ Thus, the entire process of jury selection is one of discrimination. The real issue is whether the criteria upon which the discriminations are based are reasonable and acceptable.¹⁹

In *Batson*, the Court, of course, told us that race is not a reasonable or acceptable criterion for discrimination in the exercise of peremptory challenges. But the *Batson* Court did not purport to announce this rule; this is a rule that was supposedly already in place at the time of *Swain*.²⁰ *Batson*, according to the *Batson* Court, parted company with *Swain* only insofar as it allowed a criminal defendant to establish a prima facie case of purposeful racial discrimination based upon the exercise of peremptory challenges in a single case, rather than by showing a pattern over many cases.²¹ But in this regard, the *Batson* Court was far too modest.

The petitioner in *Swain* actually raised three challenges to the Alabama jury selection procedure used in obtaining his conviction. First, the petitioner challenged the process by which venirepersons were selected.²² Second, the petitioner challenged the fact that the prosecutor used peremptory challenges to remove all six remaining black venirepersons in the petitioner's trial.²³ And third, the petitioner claimed that prosecutors in Talladega County systematically used peremptory challenges to remove black venirepersons, as evidenced by the fact that no black venireperson had ever served on a petit jury in Talladega County, despite the fact that blacks had constituted significant portions of venires.²⁴

The *Swain* Court's rejection of the petitioner's second claim was not premised upon the inadequacy of the petitioner's evidence that the prosecutor's peremptory challenges were racially motivated. Instead, *Swain* made clear that, as long as the racially motivated peremptory challenges were designed to secure a favorable jury in the case at hand, such challenges were perfectly acceptable. For if the *Swain* majority meant to make

17 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 648 (1986).

18 While this is certainly true as a technical matter, the word "discrimination" undoubtedly takes on quite different qualitative connotations in different contexts. Thus, most people would be flattered to be described as discriminating buyers, but equally offended to be reputed to be discriminating employers.

19 See Kuhn, *supra* note 4, at 240.

20 *Batson v. Kentucky*, 476 U.S. 79, 84 (1986).

21 *Id.* at 90-93.

22 *Swain v. Alabama*, 380 U.S. 202, 205-09 (1965).

23 *Id.* at 209-10.

24 *Id.* at 222-23.

clear, as the *Batson* majority later would, that racially motivated peremptory challenges were not an acceptable form of discrimination, why did they specifically endorse the exercise of peremptory challenges on the basis of "race, religion, nationality, occupation or [group] affiliations"?²⁵ Indeed, in rejecting the petitioner's second claim, the *Swain* Court specifically held that it could not "hold that the striking of Negroes in a particular case is a denial of equal protection of the laws. In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause."²⁶

Thus, contrary to the historically revisionist view in *Batson*, *Swain* was not a case which found any constitutional flaw with the exercise of racially motivated peremptory challenges for case-specific reasons, such as the striking of venirepersons who shared the same race as the defendant. Any doubt as to this conclusion vanishes upon an examination of the *Swain* Court's disposition of the petitioner's third claim: the allegation that prosecutors systematically used peremptory challenges to remove black venirepersons in all cases.²⁷ Because this claim, unlike the petitioner's second claim, suggested that prosecutors used racially-motivated peremptory challenges even in cases in which the exclusion of blacks provided no tactical advantage to the state, it "raise[d] a different issue."²⁸ In the words of the *Swain* majority,

We have decided that it is permissible to insulate from inquiry the removal of Negroes *from a particular jury on the assumption that the prosecutor is acting on acceptable considerations related to the case he is trying, the particular defendant involved and the particular crime charged*. But when the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries, the Fourteenth Amendment claim takes on added significance. . . . Such proof might support a reasonable inference that Negroes are excluded from juries *for reasons wholly unrelated to the outcome of the particular case on trial* and that the peremptory system is being used to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population.²⁹

25 *Id.* at 220.

26 *Id.* at 221. In this respect, the *Swain* majority opinion bears a striking resemblance to the dissenting opinion of Justice Rehnquist in *Batson*:

In my view, there is simply nothing "unequal" about the State's using its peremptory challenges to strike blacks from the jury in cases involving black defendants, so long as such challenges are also used to exclude whites in cases involving white defendants, Hispanics in cases involving Hispanic defendants, Asians in cases involving Asian defendants, and so on. This case-specific use of peremptory challenges by the state does not single out blacks, or members of any other race for that matter, for discriminatory treatment.

Batson v. Kentucky, 476 U.S. 79, 137-38 (1976) (Rehnquist, J., dissenting).

27 *Swain*, 380 U.S. at 222-23.

28 *Id.* at 223.

29 *Id.* at 223-24 (citations omitted) (emphasis added).

In fact, it is only this third claim of the petitioner in *Swain* which failed because of a failure of proof to support the petitioner's allegations.³⁰

Thus, while the *Batson* Court characterized its decision as merely overruling *Swain* as to the "evidentiary formulation" necessary to establish racially motivated discrimination,³¹ the truth is that *Batson* radically recharacterized a form of discrimination, previously endorsed in *Swain*, as a violation of equal protection.³²

Batson accomplished this objective by creating a two-step procedure. First, the criminal defendant must establish a prima facie case of purposeful racial discrimination in the exercise of the prosecutor's peremptory challenges.³³ To meet this burden, the defendant must first establish "that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race."³⁴ Beyond that, the defendant must point to facts, such as a pattern of peremptory strikes by the prosecutor or the prosecutor's questions and statements during voir dire, which "raise an inference that the prosecutor used [the state's peremptory challenges] to exclude the veniremen from the petit jury on account of their race."³⁵

If the trial judge is satisfied that the defendant has established a prima facie case, "the burden shifts to the State to come forward with a neutral explanation for challenging black jurors."³⁶ This explanation need not rise to the level of establishing a valid challenge for cause,³⁷ but the prosecutor must do more than merely deny a racial motive.³⁸ In particular, "the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption—or his intuitive judgment—that they would be partial to the

30 *Id.* at 224-26.

31 *Batson v. Kentucky*, 476 U.S. 79, 93 (1986).

32 By characterizing the *Batson* decision as a mere evidentiary adjustment rather than a major substantive change in the definition of impermissible discrimination, the *Batson* Court managed to blithely ignore the havoc that *Batson* played with prosecutorial peremptory challenges. *Batson* essentially told prosecutors that they knew all along that, as a matter of constitutional law, race should not be a basis for their peremptory challenges, but that now they might well be called upon to explain their peremptory challenges to insure constitutional compliance. In many such cases, in which prosecutors struggled to find race-neutral reasons for their peremptory challenges, the truth was that venirepersons had been struck precisely because, in whole or in part, they shared the same race as the defendant. Saltzburg & Powers, *supra* note 4, at 364-65. Cf. Kuhn, *supra* note 4, at 284-85. And prosecutors had done so, not because the relatively relaxed evidentiary standard of *Swain* made it easy to avoid detection, but rather because *Swain* had endorsed this type of case-specific discrimination as an entirely appropriate use of the peremptory challenge. This problem was only exacerbated when *Batson* was held to be applicable to all cases pending on direct review or not yet final at the time of the Court's decision in *Batson*, *Griffith v. Kentucky*, 479 U.S. 314 (1987), hinging the preservation of convictions upon the "recollection" of race-neutral reasons that prosecutors, at the time the peremptory challenges were exercised, did not then know were required.

33 *Batson*, 476 U.S. at 96.

34 *Id.* (citation omitted).

35 *Id.* at 96-97.

36 *Id.* at 97. More recently, in *Purkett v. Elem*, 115 S. Ct. 1769, 1771 (1995), the Court determined that such an explanation need not be "persuasive, or even plausible." If the explanation offered is facially valid, *i.e.*, discriminatory intent is not inherent in the explanation, the burden shifts back to the party raising the *Batson* challenge to prove purposeful discrimination. *Id.*

37 *Batson*, 476 U.S. at 97.

38 *Id.*

defendant because of their shared race."³⁹ This is because *Batson* radically departs from *Swain* in holding that "the Equal Protection Clause . . . forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black."⁴⁰

By virtue of the *Batson* Court's failure to recognize, or at least acknowledge, its substantial departure from *Swain*, the Court simply avoided explaining why it is that "same-race-as-the-defendant" peremptory challenges violate equal protection. Certainly, reliance upon stereotypes is a virtually inherent aspect of a system of peremptory challenges.⁴¹ Was the *Batson* Court suggesting that the stereotypical assumption of same-race sympathy for the defendant is factually invalid? Although the evidence supporting such an assumption is controversial and questionable,⁴² there is certainly some support for the proposition that jurors are more sympathetic to defendants of their same race.⁴³ Moreover, if the "same-race-as-the-defendant" theory is false, then how is the black defendant harmed when the prosecutor uses peremptory challenges to remove black venirepersons?⁴⁴ To the extent that *Batson* is motivated by a desire to insure that black defendants do not suffer the consequences of verdicts by juries with inadequate black representation, that concern makes no sense if the racial identity of the defendant and the jurors is immaterial to such verdicts.⁴⁵ If *Batson* is motivated by a concern for the criminal defendant, the irony is that such concern is premised upon the very same racial stereotype which *Batson* pronounces to be unconstitutional in the context of the peremptory challenge.

If there is a consistent logic to *Batson*, it can only be discovered by identifying the true intended beneficiaries of that decision. Prior to *Batson*,

39 *Id.* (citation omitted).

40 *Id.*

41 Saltzburg & Powers, *supra* note 4, at 382.

42 Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is it, Anyway?*, 92 COLUM. L. REV. 725, 731-32 (1992).

43 See, e.g., JON M. VAN DYKE, JURY SELECTION PROCEDURES, 10 (1977); Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 5 n.12 (1990). See Saltzburg & Powers, *supra* note 4, at 370. Indeed, given the extent to which peremptory challenges are exercised on the basis of stereotypes, *Batson* arguably disallows the stereotype that litigants believe to be the most valid. See also Saltzburg & Powers, *supra* note 4, at 366-67, 373-74. For example, prior to the selection of the jury in the O. J. Simpson murder trial, "the Field Poll, a leading California opinion research agency, reported that while 62 percent of whites believed that Mr. Simpson was 'very likely or somewhat likely' guilty, only 38 percent of blacks agreed with them." Seth Mydans, *In Simpson Case, an Issue for Everyone*, N.Y. TIMES, July 22, 1994, at A4. Even after much of the evidence had been presented by the state in the Simpson case, an Associated Press poll revealed that "[b]lack[s] are about four times as likely as whites to doubt the charges." Howard Goldberg, *Poll: Few Doubt Simpson's Guilt, But A Third Would Oppose Retrial*, ORANGE COUNTY REGISTER, May 29, 1995, at A10.

44 The theory might be that the problem for the black defendant is the racial bias of an all-white jury, not the loss of supposedly sympathetic black jurors. But we need not resolve the issue of who is biased and who is fair in absolute terms to reach some very simple conclusions. First, if a prosecutor seeking a conviction of a black defendant benefits from the removal of blacks from the jury, then that same defendant benefits from the inclusion of those same black jurors. Second, if a black defendant seeking acquittal benefits from the inclusion of black jurors, then a prosecutor seeking a conviction benefits from the exclusion of those same black jurors.

45 See Underwood, *supra* note 42, at 733; Michael A. Cressler, *Powers v. Ohio: The Death Knell for the Peremptory Challenge?*, 28 IDAHO L. REV. 349, 380 (1991-92).

there could be no serious dispute that the primary purpose of jury selection procedures in general, and of peremptory challenges in particular, was to protect the litigants, not the potential jurors.⁴⁶ In the exercise of peremptory challenges, the lawyers, of course, seek not an impartial jury, but rather jurors most favorable to their client's interests.⁴⁷ As long as the validity of peremptory challenges was measured by the primary directive of protecting litigants' interests, nondiscriminatory jury selection could never be a realistic consideration.⁴⁸

The fact is that *Batson* only makes analytical sense if one recognizes that it has shifted the primary focus from the rights of the litigants to the rights of prospective jurors.⁴⁹ *Batson* is only able to depart so dramatically from *Swain* because it stands for the proposition that, at least in the context of racial discrimination, the rights of citizens to participate in their government, and in particular the right to participate by service on juries, outweighs the rights of litigants to remove jurors without cause. Any group of citizens which suffers exclusion from the jury system is marked as inferior and publicly humiliated, and is thereby alienated from its own government's process.⁵⁰ At least in cases in which such an exclusion is based upon race, the right of such citizens to equal protection is violated.⁵¹

Subsequent decisions of the Court expanding the application of *Batson* have illustrated even more clearly that the *Batson* rule is one that is necessarily designed primarily to guarantee equal treatment for potential jurors. In *Powers v. Ohio*,⁵² the Court dispensed with one of *Batson*'s requirements, holding that a white criminal defendant could raise a *Batson* challenge to the exclusion of black venirepersons. Acknowledging that the *Batson* opinion had addressed the harm to the defendant caused by the prosecutor's exclusion of jurors of the defendant's race,⁵³ the *Powers* Court focused instead upon the right of potential jurors to avoid exclusion on the basis of race.⁵⁴

46 See Kuhn, *supra* note 4, at 273.

47 Karen M. Bray, *Reaching the Final Chapter in the Story of Peremptory Challenges*, 40 UCLA L. REV. 517, 559 (1992); Kuhn, *supra* note 4, at 286.

48 Kuhn *supra* note 4, at 287.

49 See Leach, *supra* note 9, at 399-400; Underwood, *supra* note 42, at 726-27, 730-31, 774.

50 Broderick, *supra* note 5, at 370-71, 405, 418.

51 *Batson v. Kentucky*, 476 U.S. 79, 87 (1986). Although the Court in *Batson* thus acknowledged that the right of potential jurors was a component of the Court's analysis, the bulk of the Court's opinion focuses upon the Court's conclusion that "[t]he Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race" *Id.* at 86 (citation omitted). As discussed in the text, this emphasis upon the defendants' right is misplaced. Indeed, if the primary concern is truly that a black defendant will suffer the consequences of insufficient black representation on the jury, then the focus ought to be on the actual composition of such juries and not upon the selection process. See Underwood, *supra* note 42, at 730-31. The failure of the Court in *Batson* to make clear that the primary emphasis must logically be on the right of potential jurors has, as will be demonstrated, contributed to a great deal of confusion in the implementation of *Batson*. In particular, the *Batson* Court's emphasis upon the defendants' right has led some courts, in evaluating whether a defendant has made a *prima facie* showing of a *Batson* violation, to focus upon the racial composition of the selected jury and not upon the racial identity of the venirepersons excluded by the prosecutors' peremptory challenges. See *infra* notes 87-92 and accompanying text.

52 499 U.S. 400 (1991).

53 *Id.* at 406.

54 *Id.* at 406-10. Obviously, the white defendant in *Powers* did not suffer the same potential harm suffered by one who has venirepersons of the same race excluded. Nevertheless, the Court

In *Georgia v. McCollum*,⁵⁵ the Court extended *Batson* to the exercise of peremptory challenges by a criminal defendant.⁵⁶ In this context, there could be no constitutional concern for the party raising the *Batson* challenge, for the government has no constitutional right to equal protection. As a matter of constitutional law, then, *McCollum* represents a shift from *Batson*'s primary focus on the right of a defendant to a fair trial to an exclusive focus on the venirepersons' right to racially-neutral jury selection procedures.⁵⁷ By its decision in *McCollum*, the Court has elevated this "jurors' right" to a position superior even to the criminal defendant's unfettered use of peremptory challenges to select an impartial jury:

We do not believe that this decision will undermine the contribution of the peremptory challenge to the administration of justice. Nonetheless, "if race stereotypes are the price for acceptance of a jury panel as fair," we reaffirm today that such a "price is too high to meet the standard of the Constitution." It is an affront to justice to argue that a fair trial includes the right to discriminate against a group of citizens based upon their race.⁵⁸

By the time of *McCollum*, the *Batson* rule had evolved such that the formerly unassailable fortress surrounding the peremptory challenge had been seriously eroded in at least three respects. First, at least with regard to racial stereotypes, the racial identity of the juror with that of a party or other significant person in the litigation had become no longer a permissible basis for the exercise of a peremptory challenge. Second, the rationale for the *Batson* rule had become focused upon the right of potential jurors not to be blocked from jury service because of race. And third, this right had ascended to a position superior even to the rights of private litigants, including criminal defendants, to the unexamined use of peremptory challenges.

One further expansion of *Batson*, with a corresponding limitation upon the historical autonomy of the peremptory challenge, occurred even after *McCollum*. In *J. E. B. v. Alabama ex rel. T.B.*,⁵⁹ the Court extended

found that such a defendant suffers a sufficient injury to merit standing to raise the equal protection claims on behalf of the excluded jurors. *Id.* at 410-16.

⁵⁵ 505 U.S. 42 (1992).

⁵⁶ *Id.* at 58-59. A necessary component of this decision was the conclusion that the defendant's exercise of peremptory challenges constituted state action for the purpose of the application of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 51-55. This conclusion was substantially predetermined by the Court's decision in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), holding that *Batson* applies to peremptory challenges exercised by private litigants in civil cases.

⁵⁷ See Deborah Zalesne & Kinney Zalesne, *Saving the Peremptory Challenge: The Case for a Narrow Interpretation of McCollum*, 70 DENV. U. L. REV. 313, 326, 328 (1993). As a practical matter, the decision in *McCollum* may well have been influenced by the consequences of prohibiting only one side in a criminal case from using race-based peremptory challenges. For example, in *McCollum*, three white defendants were charged with assaulting two black victims. If the proscriptions of *Batson* applied only to the government, then defense counsel of a mind to secure an all-white jury could almost certainly accomplish that goal. In such circumstances, assuming that there is some merit to the perception that the racial identity of the jurors with the litigants is of some significance, the government would be unfairly prejudiced.

⁵⁸ *McCollum*, 505 U.S. at 57 (citations omitted).

⁵⁹ 114 S. Ct. 1419 (1994).

Batson to the use of peremptory challenges based upon gender.⁶⁰ The Court reasoned that, because distinctions based upon gender, like race, require a level of heightened scrutiny under the Equal Protection Clause,⁶¹ and because individuals enjoy constitutional protection from such unacceptably discriminatory jury selection criteria,⁶² gender cannot be an acceptable basis for the exercise of peremptory challenges. Even if there exists some support for the stereotypes underlying gender-based peremptory challenges, such action remains constitutionally unacceptable.⁶³

The extension of *Batson* to gender is consistent with the premise that it is the right of potential jurors which has assumed prominence in the *Batson* analysis. Because the number of peremptory challenges available to a lawyer is limited, a lawyer seeking to remove all members of a particular group from participation on a jury is not likely to be successful unless members of that group constitute a small portion of the venire. In most cases, members of a particular group will constitute a small portion of the venire only where the members of that group correspondingly constitute a small portion of the general population of the jurisdiction from which the venire is chosen. Thus, the use of peremptory challenges has a particular impact upon minority racial groups, because it was, prior to *Batson* at least, often possible to eliminate members of such groups from the jury selection process by the use of peremptory challenges.⁶⁴ By contrast, it is far less likely that either men or women as a group will constitute a sufficiently small percentage of a particular venire such that a lawyer's use of peremptory challenges could effectively eliminate the presence of members of a particular gender on an individual jury. Nevertheless, the harm caused to individual prospective jurors who are denied participation in the criminal adjudicatory process based on their gender has been of sufficient concern to the Court to warrant this further limitation upon the peremptory challenge.

Throughout the evolution of the *Batson* doctrine, the Court has insisted that the limitations placed upon the peremptory challenge system have not been intended to eliminate, and will not have the effect of eliminating, the peremptory challenge.⁶⁵ The Court has also expressed its confidence in the abilities of the lower courts to implement the *Batson* procedures in order to accommodate the *Batson* objectives while preserving

60 *Id.* at 1421.

61 *Id.* at 1424-25. This heightened scrutiny is premised upon the history of race-based and gender-based discrimination in this country. *Id.* Thus, *Batson* and its progeny erect no barrier to the exercise of peremptory challenges on the basis of stereotypes or classifications which do not reinforce historical denials of fundamental opportunities. *Id.* at 1428 n.14. In *J. E. B.*, the Court specifically endorsed the use of peremptory challenges on the basis of group discriminations which have received only the lower, "rational basis" level of scrutiny under the Court's equal protection analysis. *Id.* at 1429. Thus, in addition to race and gender, national origin and religion are apparently prohibited stereotypes under *Batson*; but age, disability, occupation, education and wealth are probably permissible criteria. Underwood, *supra* note 42, at 764-66 & nn. 172-79.

62 *J.E.B.*, 114 S. Ct. at 1427-28, 1430.

63 *Id.* at 1427 n.11.

64 Kuhn, *supra* note 4, at 287.

65 *J. E. B.*, 114 S. Ct. at 1429; *Georgia v. McCollum*, 505 U.S. 42, 57-58 (1992); *Batson v. Kentucky*, 476 U.S. 79, 98-99 (1986).

the proper use of the peremptory challenge.⁶⁶ Whether the Court's hopes and expectations have proven to be true is the subject of the empirical analysis in the next section.

II. *BATSON* IN PRACTICE

As noted earlier, this section examines *Batson* in practice by examining the published decisions of federal and state courts between April 30, 1986, (the date of the *Batson* decision) and the end of calendar year 1993 (hereinafter "survey period").⁶⁷

66 *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 631 (1991); *Powers v. Ohio*, 499 U.S. 400, 416 (1991); *Batson*, 476 U.S. at 99.

67 Some explanation should be given about criteria and methodology. Substantial effort has been made to include every published decision within the specified time period. Because it is very unlikely that no cases have fallen through the cracks, this goal undoubtedly has not been accomplished. Nevertheless, the real objective has been to collect a substantial data base, both in terms of sheer numbers of cases and in terms of a substantial percentage of all relevant cases, and that goal surely has been accomplished. If a lower court decision was reviewed on appeal, then that particular litigation has been considered only one "case" for purposes of the data. If a lower court decision was reversed on appeal, the lower court decision has been disregarded to the extent of the reversal.

In analyzing the cases, each decision has been examined for its conclusion as to whether a prima facie case had been established and whether the proffered explanations, if any, were found to be neutral and acceptable. This sometimes created interpretive problems and required case-specific judgments. In many cases, the courts explicitly or implicitly assumed the existence of a prima facie case arguendo. See, e.g., Alan Raphael, *Discriminatory Jury Selection: Lower Court Implementation of Batson v. Kentucky*, 25 WILLAMETTE L. REV. 293, 310 (1989). In such instances, the decisions have not been included in any compilations concerning the establishment of a prima facie case. In some cases, the court's conclusion as to the establishment of a prima facie case was not clear because the court proceeded immediately to examine the adequacy of the proffered explanations. These have been generally excluded from any compilations regarding the prima facie case prong of *Batson*, with two exceptions: cases in which the opinion fairly allows for the conclusion that the court had implicitly found that prima facie cases had been established; and, those cases in which the court ultimately found a *Batson* violation, thus indicating an implicit finding of a prima facie case.

Some interpretive problems were also presented by state court decisions following procedures slightly at variance with those specified in *Batson*. In fact, several state courts had enacted rules similar or identical to *Batson* even prior to the *Batson* decision. See, e.g., *State v. Neil*, 457 So. 2d 481 (Fla. 1984); *People v. Thompson*, 435 N.Y.S.2d 739 (N.Y. App. Div. 1981); *State v. Crespin*, 612 P.2d 716 (N.M. Ct. App. 1980); *Commonwealth v. Soares*, 387 N.E.2d 499 (Mass. 1979), cert. denied, 444 U.S. 881 (1979); *People v. Wheeler*, 583 P.2d 748 (Cal. 1978). In one state, for example, the trial courts have been required to consider the proffered neutral explanations as a factor in determining the existence of a prima facie case. *State v. Antwine*, 743 S.W.2d 51 (Mo. 1987), cert. denied, 486 U.S. 1017 (1988). Decisions following such a procedure have been included only to the extent that the results can be measured in accordance with the usual *Batson* procedural steps, which occasionally required some interpretation and judgment.

In addition, no attempt has been made to distinguish between rules of decision and dicta. For example, if a decision indicates that no prima facie case had been established and that, nevertheless, the proffered explanations were satisfactory, each of these conclusions would be treated as having been established by the case, even though the second conclusion was not necessary for the ultimate decision of the court.

Finally, it must be recognized that the data is somewhat self-selective because it consists solely of published decisions on the *Batson* issue. How many unreported *Batson* decisions there are, what the results of those decisions are, and how the inclusion of that information might have altered the information gathered here are all matters of speculation.

A. Which Parties Make Batson Claims?

Although the opportunity to make a *Batson* claim is now available to all parties in both criminal and civil cases, the fact is that *Batson* is a tool used almost exclusively by criminal defendants. Table A-1 indicates the parties who have raised *Batson* challenges during the survey period.

TABLE A-1
BATSON COMPLAINANTS

	Number	Percentage
Criminal Defendants ⁶⁸	1101	95.24%
Prosecutors ⁶⁹	18	1.56%
Civil Plaintiffs	28	2.42%
Civil Defendants	9	0.78%
Total	1156	100.00%

It is true, of course, that the Supreme Court did not extend *Batson* to civil cases until June 3, 1991.⁷⁰ It is also true that the Supreme Court did not extend the obligations to comply with *Batson* to the criminal defense until June 18, 1992.⁷¹ Nevertheless, the data indicates that these expansions of *Batson* have not had a significant impact on the virtual monopoly of *Batson* claims by criminal defendants. Table A-2 indicates the identities of the *Batson* complainants prior to the extension of *Batson* to civil litigants.

TABLE A-2
BATSON COMPLAINANTS (April 30, 1986, through June 3, 1991)

	Number	Percentage
Criminal Defendants	685	97.58%
Prosecutors	5	0.71%
Civil Plaintiffs	9	1.29%
Civil Defendants	3	0.43%
Total	702	100.00%

By comparison, Table A-3 indicates the party status of the *Batson* complainants after *Batson* was extended to civil litigants by the Supreme Court.

⁶⁸ This category includes plaintiffs in habeas corpus proceedings seeking to overturn convictions.

⁶⁹ This category includes defendants in habeas corpus proceedings seeking to overturn convictions.

⁷⁰ *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).

⁷¹ *Georgia v. McCollum*, 505 U.S. 42 (1992).

TABLE A-3
BATSON COMPLAINANTS
 (June 4, 1991, through December 31, 1993)

	Number	Percentage
Criminal Defendants	416	91.63%
Prosecutors	13	2.86%
Civil Plaintiffs	19	4.19%
Civil Defendants	6	1.32%
Total	454	100.00%

Prior to *Edmonson*, civil litigants thus constituted only 1.72% of *Batson* complainants. After *Edmonson*, but still during the survey period, civil litigants constituted 5.5% of *Batson* complainants, an increase but still a quite small portion of the *Batson* complainants.

The effect of extending *Batson* to the peremptory challenges exercised by criminal defendants has been equally unimpressive. Table A-4 details the breakdown of *Batson* complainants prior to the Court's decision in *McCollum* extending *Batson* to criminal defendants.

TABLE A-4
BATSON COMPLAINANTS (April 30, 1986, through June 18, 1992)

	Number	Percentage
Criminal Defendants	914	96.82%
Prosecutors	9	0.95%
Civil Plaintiffs	18	1.91%
Civil Defendants	3	0.32%
Total	944	100.00%

By comparison, Table A-5 details the same data for the survey period after the *McCollum* decision.

TABLE A-5
BATSON COMPLAINANTS
 (June 19, 1992, through December 31, 1993)

	Number	Percentage
Criminal Defendants	187	88.20%
Prosecutors	9	4.25%
Civil Plaintiffs	10	4.72%
Civil Defendants	6	2.83%
Total	212	100.00%

The percentage of *Batson* complainants who were prosecutors increased from 0.95% prior to *McCullum* to 4.23% after *McCullum*, but the portion of *Batson* complainants who have been prosecutors has remained very small.

The data thus indicates that, in practice, *Batson* remains a tool used almost exclusively by criminal defendants. Whether this is because prosecutors are especially prone to violate *Batson's* directive or should be explained otherwise remains to be seen.

B. Which Parties Make Successful *Batson* Claims?

Table B-1 examines all cases within the survey period which came to some conclusive resolution and details the success rate by category of litigant.

TABLE B-1
PREVAILING COMPLAINANTS BY PARTIES

	Successful	Unsuccessful	Success Rate
Criminal Defendants	165	875	15.87%
Prosecutors	11	2	84.62%
Civil Plaintiffs	11	15	42.31%
Civil Defendants	4	3	57.14%
Total	191	895	17.59%

Although criminal defendants monopolize the making of *Batson* claims, the success rate of such claims by criminal defendants is manifestly unimpressive, especially as contrasted with the success rates of other categories of litigants. Of course, the number of claims made by the other parties is very small, and perhaps is not statistically significant. This is perhaps because it will take some time for these other groups to "catch on" to the availability of *Batson* as an affirmative device. It may also be that these parties, prosecutors in particular, are institutionally more selective about making the type of allegations inherent in a *Batson* challenge.

Not to be lost in a focus upon the success rates is the significance of the raw numbers. During the survey period, 191 lawyers were found to have violated the rule of law announced in *Batson*. Of these, 165, or over 86%, have been prosecutors, supposedly a subdivision of the bar having special ethical obligations to uphold the law and seek justice.⁷² The number of prosecutors who have been determined to have acted in violation of the law as set down in *Batson* is a dismal report card on this particular aspect of this obligation.

72 See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 cmt. (1991).

C. Which Parties are Successful in Establishing a Prima Facie Case?

Table C-1 indicates the number of *Batson* complainants, broken down by parties, who have been successful in establishing a prima facie case, the first step in a *Batson* complaint.

TABLE C-1
ESTABLISHING A PRIMA FACIE CASE BY PARTIES

	Successful	Unsuccessful	Success Rate
Criminal Defendants	480	312	60.61%
Prosecutors	14	0	100.00%
Civil Plaintiffs	20	2	90.91%
Civil Defendants	5	1	83.33%
Total	519	315	62.23%

Once again, criminal defendants predominate, but the success rate of criminal defendants is significantly lower than the success rates for the other categories of litigants.

Also of interest is a comparison of the success rates in establishing a prima facie case with the success rates in establishing a *Batson* violation. This data is summarized in Table C-2.

TABLE C-2
SUCCESS RATES BY PARTIES

	Prima Facie Cases	<i>Batson</i> Violations
Criminal Defendants	60.61%	15.87%
Prosecutors	100.00%	84.62%
Civil Plaintiffs	90.91%	42.31%
Civil Defendants	83.33%	57.14%
Total	62.23%	17.59%

This information suggests that it is relatively easy for a *Batson* complainant to establish a prima facie case, but that it is much more difficult ultimately to prevail on a *Batson* challenge. There are several possible explanations for this. First, courts may be very liberal in finding that a prima facie case has been established.⁷³ The reason for this may be because the consequence of the establishment of a prima facie case is merely to require the responding party to offer neutral explanations for the targeted peremptory challenges. A second possibility is that it is too easy for the responding party to offer neutral explanations,⁷⁴ and hence it is too difficult

⁷³ See Brian J. Serr & Mark Maney, *Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 J. CRIM. L. & CRIMINOLOGY 1, 60, 62-63 (1988).

⁷⁴ See, e.g., James R. Acker, *Exercising Peremptory Challenges After Batson*, 24 CRIM. L. BULL. 187, 197 (1988); Serr & Maney, *supra* note 73, at 43, 47, 62-63.

for *Batson* complainants ultimately to prevail. Of course, a third possibility is that the prima facie case threshold was intended to be a relatively low hurdle, and therefore the discrepancies evident in Table C-2 are unremarkable. Some clues as to the appropriate interpretation of these results may be provided by a further examination of the collected data.

D. Which Parties Are Successful in Offering Neutral Explanations?

Table D-1 sets forth the numbers and success rates of the four categories of *Batson* complainants in those cases in which courts have passed upon the adequacy of the neutral explanations proffered by the *Batson* respondents.

TABLE D-1
PROVIDING NEUTRAL EXPLANATIONS BY PARTIES

	Successful	Unsuccessful	Success Rate
Prosecutors	647	165	79.93%
Criminal Defendants	2	11	15.38%
Civil Defendants	15	11	57.69%
Civil Plaintiffs	2	4	33.33%
Total	676	191	77.97%

Notably, criminal defense lawyers have been disproportionately unsuccessful at offering neutral explanations to rebut prima facie *Batson* claims. This result, combined with the relatively small number of *Batson* claims made by prosecutors, tends to confirm the hypothesis that prosecutors are particularly selective about raising *Batson* challenges. By contrast, prosecutors have enjoyed the highest success rate at rebutting prima facie *Batson* complaints with neutral explanations. But when this result is combined with the manifestly disproportionate number of *Batson* complaints made against prosecutors, it tends to confirm the hypothesis that criminal defense lawyers are relatively unselective about raising *Batson* challenges.

An additional conclusion suggested by the data is that it may not be as easy as some critics have theorized⁷⁵ to proffer acceptable neutral explanations in order to avoid a *Batson* violation. In 191 cases, 22% of all cases in which a prima facie case was established, the *Batson* respondent failed to provide satisfactory neutral explanations for the targeted peremptory challenges.

75 See Serr & Maney *supra* note 73 and accompanying text.

E. Which Groups Are Allegedly Disqualified by Illegal Peremptory Challenges?

Table E-1 details the numbers of cases for each group which was the alleged target of peremptory challenges exercised in violation of *Batson*.

TABLE E-1
TARGETED GROUPS

	Number	Percentage
Blacks	1052	87.38%
Hispanics	81	6.73%
Native Americans	16	1.33%
Whites	15	1.25%
Women ⁷⁶	13	1.08%
Men	10	0.83%
Asians	5	0.42%
Italian-Americans	3	0.25%
Young	3	0.25%
Minorities ⁷⁷	2	0.17%
Hawaiians	1	0.08%
Hearing-Impaired	1	0.08%
Jewish	1	0.08%
Religion	1	0.08%
Total	1204 ⁷⁸	100.00%

The data thus indicates that, during the survey period, almost all *Batson* challenges were based upon claimed racial discrimination, with the substantial majority of these allegations claiming discrimination against black venirepersons.

Table E-2 breaks down, for each targeted group, the number of cases in which a final resolution of the *Batson* claim was reached and examines the success rate of *Batson* claims on behalf of each such group.

Interestingly, *Batson* challenges based upon claimed discrimination against the two numerically significant groups—blacks and Hispanics—produced similar low rate of success. By comparison, *Batson* challenges based upon claimed discrimination against some other targeted groups, although numerically small, produced greater success rates.

These numbers can be further explored by examining the success rates, detailed for each targeted group, in establishing a *prima facie* case. Table E-3 does exactly that.

⁷⁶ *J. E. B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994), in which the Court authoritatively extended *Batson* to gender-based peremptory challenges, was not decided until after the survey period closed, which fact undoubtedly contributes to the relatively few *Batson* claims based upon gender.

⁷⁷ These cases were those in which the *Batson* complainant alleged that the *Batson* respondent was exercising peremptory challenges so as to exclude some combination of unspecified minority-group venirepersons.

⁷⁸ The total in Table E-1 is greater than the total in Table A-1 because some *Batson* complainants claimed discrimination against more than one targeted group.

TABLE E-2
PREVAILING COMPLAINTS BY TARGETED GROUPS

	Successful	Unsuccessful	Success Rate
Blacks	169	828	16.95%
Hispanics	10	65	13.33%
Native Americans	0	14	0.00%
Whites	8	7	53.33%
Women	3	7	30.00%
Men	3	6	33.33%
Asians	0	5	0.00%
Italian-Americans	0	3	0.00%
Young	1	2	33.33%
Minorities	0	2	0.00%
Hawaiians	0	1	0.00%
Hearing-Impaired	1	0	100.00%
Jewish	0	1	0.00%
Religion	0	1	0.00%
Total	195	942	17.15%

TABLE E-3
ESTABLISHING A PRIMA FACIE CASE BY TARGETED GROUPS

	Successful	Unsuccessful	Success Rate
Blacks	465	285	62.00%
Hispanics	43	22	66.15%
Native Americans	6	8	42.86%
Whites	11	2	84.62%
Women	6	5	54.55%
Men	5	4	55.56%
Asians	1	2	33.33%
Italian-Americans	2	1	66.67%
Young	1	1	50.00%
Minorities	0	0	—
Hawaiians	0	0	—
Hearing-Impaired	1	0	100.00%
Jewish	1	0	100.00%
Religion	0	1	0.00%
Total	542	331	62.08%

Table E-4 compares the success rates in establishing a prima facie case with the success rates in establishing a *Batson* violation, broken down by targeted groups.

TABLE E-4
SUCCESS RATES BY TARGETED GROUPS

	Prima Facie Case	<i>Batson</i> Violation
Blacks	62.00%	16.95%
Hispanics	66.15%	13.33%
Native Americans	42.86%	0.00%
Whites	84.62%	53.33%
Women	54.55%	30.00%
Men	55.56%	33.33%
Asians	33.33%	0.00%
Italian-Americans	66.67%	0.00%
Young	50.00%	33.33%
Minorities	—	0.00%
Hawaiians	—	0.00%
Hearing-Impaired	100.00%	100.00%
Jewish	100.00%	0.00%
Religion	0.00%	0.00%
Total	62.08%	17.15%

TABLE E-5
PROVIDING NEUTRAL EXPLANATIONS BY TARGETED GROUPS

	Successful	Unsuccessful	Success Rate of <i>Batson</i> Respondents
Blacks	633	168	79.03%
Hispanics	44	10	81.48%
Native Americans	6	0	100.00%
Whites	5	8	38.46%
Women	2	3	40.00%
Men	3	3	50.00%
Asians	3	0	100.00%
Italian-Americans	3	0	100.00%
Young	1	1	50.00%
Minorities	2	0	100.00%
Hawaiians	1	0	100.00%
Hearing-Impaired	0	1	0.00%
Jewish	1	0	100.00%
Religion	0	0	—
Total	704	194	78.40%

To the extent that the overall success of *Batson* complainants is significantly lower than their success in establishing a prima facie case, the obvious conclusion is that *Batson* respondents are generally successful in providing satisfactory neutral explanations when pressed to do so. Table E-5 examines the success of *Batson* respondents in proffering acceptable explanations for peremptorily challenging jurors in the specified targeted groups.

The overall results show that, when called upon to do so, *Batson* respondents offer acceptable neutral explanations in almost four out of five situations. This, of course, tends to confirm the hypothesis that the odds are not with the *Batson* complainant ultimately prevailing. On the other hand, the success rates for *Batson* respondents offering explanations is not so high as to suggest that the courts merely rubber stamp virtually all such explanations as satisfactory.

The numbers involved for most of the individual targeted groups are manifestly too small to justify any firm conclusions. However, it is noticeable that *Batson* respondents are less successful in generating acceptable explanations for peremptory challenges exercised on the basis of gender or against whites, as compared with peremptory challenges exercised against blacks or Hispanics. To a certain extent, this result is counterintuitive, because, unlike blacks and Hispanics, none of these groups—whites, women or men—is likely to constitute a minority of the venire. Therefore peremptory strikes used against members of these groups would presumably be less remarkable and less suspicious. It may very well be that the relatively large number of *Batson* claims involving peremptory challenges against blacks and Hispanics, coupled with the comparatively high success rate of *Batson* respondents in explaining peremptory challenges against members of these groups, is to be explained *in part* by the absence of selectivity in raising *Batson* claims on behalf of these groups.⁷⁹

F. *How Has Batson Been Applied in Different Jurisdictions?*

Table F-1 compares the success of *Batson* complainants in establishing prima facie cases in federal courts as contrasted with state courts, with similar results.

⁷⁹ If true, this hypothesis could only account for a deflation in the success rate of these claims by the inclusion of some number of patently unmeritorious claims in the figures collected. It is clear, however, that the most obvious explanation for the large number of *Batson* claims brought on behalf of black and Hispanic jurors is that it is these venirepersons who are primarily victimized by *Batson* violations. As Table E-2 demonstrates, 179 successful *Batson* claims have involved peremptory strikes used against blacks or Hispanics. This total represents over 92% of the 195 successful *Batson* claims detailed in Table E-2.

TABLE F-1
ESTABLISHING A PRIMA FACIE CASE BY COURTS

	Successful	Unsuccessful	Success Rate
Federal	73	47	60.83%
State	446	268	62.46%

Table F-2 compares the success of *Batson* complainants ultimately in establishing a *Batson* violation in federal courts as contrasted with state courts, with less similar results. Although the comparison is flawed because it necessarily involves two entirely distinct sets of cases, *Batson* complainants in state courts have a better track record than do their federal counterparts.

TABLE F-2
PREVAILING COMPLAINANTS BY COURTS

	Successful	Unsuccessful	Success Rate
Federal	15	134	10.07%
State	176	761	18.78%

Table F-3 examines the success rates of *Batson* complainants in establishing prima facie cases for each state and federal circuit.⁸⁰

A number of conclusions is available from the information contained in Table F-3. First, the number of reported decisions in which the prima facie case issue has been resolved varies widely from one jurisdiction to another. To some extent, this results from a pattern by some jurisdictions to either ignore the prima facie case threshold or to merge it with the *Batson* respondent's explanations into a single criterion. However, as will be made clearer by the next table, there simply is a great disparity among jurisdictions as to the prevalence of *Batson* claims, even taking into account differences in populations and corresponding caseloads. In some jurisdictions, *Batson* appears to have had little impact upon the jury selection process, while in others it has generated a significant amount of motion practice.

Second, it is clear that the prima facie case threshold carries different meanings in different places.⁸¹ In some states, such as Alabama, California, Florida, New York and Texas, the prima facie case showing is a minor obstacle to shifting to the *Batson* respondent the burden to come forward with neutral explanations. In some other states, such as Louisiana, the prima facie case requirement is often an insurmountable hurdle to the *Batson* complainant.⁸²

Table F-4 examines the ultimate success or failure of *Batson* claims, again on a jurisdiction by jurisdiction basis.

⁸⁰ Federal district courts have been included within their respective circuits.

⁸¹ Rodger L. Hochman, *Abolishing the Peremptory Challenge: The Verdict of Emerging Caselaw*, 17 NOVA L. REV. 1367, 1381-83 (1993).

⁸² As will be explored later, different courts use different tests for determining whether a prima facie case has been established. See *infra* Table G-1.

TABLE F-3
ESTABLISHING A PRIMA FACIE CASE BY JURISDICTIONS

	Successful	Unsuccessful	Success Rate
Alabama	60	32	65.22%
Alaska	0	0	—
Arizona	8	1	88.89%
Arkansas	5	8	38.46%
California	17	7	70.83%
Colorado	1	2	33.33%
Connecticut	2	4	33.33%
Delaware	0	0	—
District of Columbia	1	3	25.00%
Florida	21	2	91.30%
Georgia	29	22	56.86%
Hawaii	1	0	100.00%
Idaho	1	0	100.00%
Illinois	49	34	59.04%
Indiana	5	8	38.46%
Iowa	0	1	0.00%
Kansas	4	1	80.00%
Kentucky	1	2	33.33%
Louisiana	16	33	32.65%
Maine	0	0	—
Maryland	10	2	83.33%
Massachusetts	4	1	80.00%
Michigan	0	1	0.00%
Minnesota	2	1	66.67%
Mississippi	8	1	88.89%
Missouri	23	35	39.66%
Montana	0	0	—
Nebraska	6	1	85.71%
Nevada	2	1	66.67%
New Hampshire	0	0	—
New Jersey	3	1	75.00%
New Mexico	4	2	66.67%
New York	35	12	74.47%
North Carolina	6	12	33.33%
North Dakota	0	0	—
Ohio	0	1	0.00%
Oklahoma	4	1	80.00%
Oregon	1	0	100.00%
Pennsylvania	9	7	56.25%
Rhode Island	1	1	50.00%
South Carolina	10	2	83.33%
South Dakota	1	1	50.00%
Tennessee	0	6	0.00%
Texas	81	15	84.38%
Utah	2	1	66.67%
Vermont	0	0	—
Virginia	7	1	87.50%
Washington	1	1	50.00%
West Virginia	3	0	100.00%
Wisconsin	0	0	—
Wyoming	1	3	25.00%
First Circuit	0	2	0.00%
Second Circuit	10	1	90.91%
Third Circuit	3	1	75.00%
Fourth Circuit	8	4	66.67%
Fifth Circuit	12	5	70.59%
Sixth Circuit	2	5	28.57%
Seventh Circuit	8	2	80.00%
Eighth Circuit	15	15	50.00%
Ninth Circuit	6	2	75.00%
Tenth Circuit	2	4	33.33%
Eleventh Circuit	7	6	53.85%
D.C. Circuit	0	0	—
U.S. Supreme Court	0	0	—
Total	519	315	62.23%

TABLE F-4
PREVAILING COMPLAINANTS BY JURISDICTIONS

	Successful	Unsuccessful	Success Rate
Alabama	32	114	21.92%
Alaska	0	0	—
Arizona	2	10	16.67%
Arkansas	3	12	20.00%
California	6	21	22.22%
Colorado	1	2	33.33%
Connecticut	1	6	14.29%
Delaware	0	2	0.00%
District of Columbia	1	3	25.00%
Florida	15	7	68.18%
Georgia	8	55	12.70%
Hawaii	1	0	100.00%
Idaho	0	1	0.00%
Illinois	14	70	16.67%
Indiana	1	17	5.56%
Iowa	0	1	0.00%
Kansas	0	9	0.00%
Kentucky	0	3	0.00%
Louisiana	2	66	2.94%
Maine	0	0	—
Maryland	4	6	40.00%
Massachusetts	3	2	60.00%
Michigan	0	2	0.00%
Minnesota	1	6	14.29%
Mississippi	3	14	17.65%
Missouri	8	94	8.51%
Montana	0	0	—
Nebraska	0	9	0.00%
Nevada	0	4	0.00%
New Hampshire	0	0	—
New Jersey	2	2	50.00%
New Mexico	1	4	20.00%
New York	16	25	39.02%
North Carolina	0	24	0.00%
North Dakota	0	0	—
Ohio	0	4	0.00%
Oklahoma	1	7	12.50%
Oregon	0	1	0.00%
Pennsylvania	2	14	12.50%
Rhode Island	0	4	0.00%
South Carolina	8	13	38.10%
South Dakota	0	2	0.00%
Tennessee	0	8	0.00%
Texas	34	104	24.64%
Utah	1	1	50.00%
Vermont	0	0	—
Virginia	2	10	16.67%
Washington	1	2	33.33%
West Virginia	1	1	50.00%
Wisconsin	1	2	33.33%
Wyoming	0	1	0.00%
First Circuit	0	2	.00%
Second Circuit	1	8	11.11%
Third Circuit	2	5	28.57%
Fourth Circuit	1	13	7.14%
Fifth Circuit	1	24	4.00%
Sixth Circuit	0	9	0.00%
Seventh Circuit	2	13	13.33%
Eighth Circuit	1	35	2.78%
Ninth Circuit	4	7	36.36%
Tenth Circuit	1	5	16.67%
Eleventh Circuit	2	12	14.29%
D.C. Circuit	0	0	—
U.S. Supreme Court	0	1	0.00%
Total	191	895	17.59%

TABLE F-5
SUCCESS RATES BY JURISDICTIONS

	Prima Facie Cases	Batson Violations
Alabama	65.22%	21.92%
Alaska	—	—
Arizona	88.89%	16.67%
Arkansas	38.46%	20.00%
California	70.83%	22.22%
Colorado	33.33%	33.33%
Connecticut	33.33%	14.29%
Delaware	—	0.00%
District of Columbia	25.00%	25.00%
Florida	91.30%	68.18%
Georgia	56.86%	12.70%
Hawaii	100.00%	100.00%
Idaho	100.00%	0.00%
Illinois	59.04%	16.67%
Indiana	38.46%	5.56%
Iowa	0.00%	0.00%
Kansas	80.00%	0.00%
Kentucky	33.33%	0.00%
Louisiana	32.65%	2.94%
Maine	—	—
Maryland	83.33%	40.00%
Massachusetts	80.00%	60.00%
Michigan	0.00%	0.00%
Minnesota	66.67%	14.29%
Mississippi	88.89%	17.65%
Missouri	39.66%	8.51%
Montana	—	—
Nebraska	85.71%	0.00%
Nevada	66.67%	0.00%
New Hampshire	—	—
New Jersey	75.00%	50.00%
New Mexico	66.67%	20.00%
New York	74.47%	39.02%
North Carolina	33.33%	0.00%
North Dakota	—	—
Ohio	0.00%	0.00%
Oklahoma	80.00%	12.50%
Oregon	100.00%	0.00%
Pennsylvania	56.25%	12.50%
Rhode Island	50.00%	0.00%
South Carolina	83.33%	38.10%
South Dakota	50.00%	0.00%
Tennessee	0.00%	0.00%
Texas	84.38%	24.64%
Utah	66.67%	50.00%
Vermont	—	—
Virginia	87.50%	16.67%
Washington	50.00%	33.33%
West Virginia	100.00%	50.00%
Wisconsin	—	33.33%
Wyoming	25.00%	0.00%
First Circuit	0.00%	0.00%
Second Circuit	90.91%	11.11%
Third Circuit	75.00%	28.57%
Fourth Circuit	66.67%	7.14%
Fifth Circuit	70.59%	4.00%
Sixth Circuit	28.57%	0.00%
Seventh Circuit	80.00%	13.33%
Eighth Circuit	50.00%	2.78%
Ninth Circuit	75.00%	36.36%
Tenth Circuit	33.33%	16.67%
Eleventh Circuit	53.85%	14.29%
D.C. Circuit	—	—
U.S. Supreme Court	—	0.00%
Total	62.23%	17.59%

Once again, several conclusions are apparent from this information. First, Table F-4 confirms that *Batson* is often invoked in some jurisdictions and largely ignored in others. Second, a very high percentage of successful *Batson* claims is concentrated in a few jurisdictions. Of the 191 successful claims, 111 (or 58.7%) of these claims come from just five states: Alabama, Florida, Illinois, New York and Texas. Third, in very few states does a significant percentage of *Batson* complainants ultimately succeed, and only a very few of these are states in which a significant number of *Batson* claims have been entertained. Fourth, the ultimate success rates described in Table F-4 indicate a significant dropoff from the success rates in establishing a *prima facie* case in Table F-3. A specific, jurisdiction by jurisdiction comparison of these percentages is detailed in Table F-5.

One of the criticisms of the *Batson* process is that it is too easy for the *Batson* complainant to meet the *prima facie* case threshold and too easy for the *Batson* respondent to avoid detection by offering pretextual explanations which are routinely accepted by the courts.⁸³ This hypothesis cannot be confirmed by looking at the overall success rates for both the establishment of *prima facie* cases and the proffering of neutral explanations. However, when the data is isolated for individual jurisdictions, a much stronger case can be made for this hypothesis as to certain jurisdictions. Table F-5 reveals several jurisdictions in which the decline from the success rate in establishing a *prima facie* case to the success rate in ultimately prevailing on a *Batson* claim has indeed been very steep. And in some of these jurisdictions, the number of cases examined has been large enough to at least raise some questions about the systemic handling of *Batson* claims in certain jurisdictions. Of course, the cases considered in each jurisdiction present unique issues to the respective court systems.

Nevertheless, one has to wonder why, for example, in cases in which the Texas courts resolved the *prima facie* case issue, eighty-one of the ninety-six *Batson* complainants succeeded, while, in cases in which the Louisiana courts resolved the same issue, only sixteen of the forty-nine complainants succeeded. And one has to wonder why, for example, over 68% of the *Batson* complainants ultimately prevailed in Florida while only two of sixty-eight *Batson* complainants ultimately prevailed in Louisiana and only one of thirty-six ultimately prevailed in the Eighth Circuit. At the very least, the data suggests that the criteria used by the courts in measuring both the existence of a *prima facie* case and the adequacy of proffered explanations is by no means uniform.

G. *How Do Courts Determine the Existence of a Prima Facie Case?*

Batson itself gave no specific direction as to the measure of a *prima facie* case.

In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. For example, a "pattern" of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecu-

83 See *supra* notes 73-74 and accompanying text.

tor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative. We have confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a *prima facie* case of discrimination against black jurors.⁸⁴

Although some commentators have cautioned against relying solely upon a mathematical formula for determining the *prima facie* case issue,⁸⁵ it is hardly surprising that *Batson* respondents only infrequently demonstrate discriminatory intent by their questions and statements during jury selection. Consequently, in most cases, the task for the court is to determine what constitutes a "pattern" of strikes against the targeted group, which quite naturally leads to the creation of mathematical formulae.

An examination of the decisions within the survey period reveals eight such methods of quantifying the results of the peremptory challenges used by the *Batson* respondent. Table G-1 simply explains these various formulae.

TABLE G-1
METHODS FOR MEASURING THE EXISTENCE OF A
PRIMA FACIE CASE

- METHOD A This method simply examines the jury as finally selected. If the jury as impaneled includes a sufficient number of jurors from the targeted group, the court finds that no *prima facie* case has been established, without regard to the peremptory challenges used by the *Batson* respondent.
- METHOD B This method compares the percentage of the members of the targeted group on the jury as impaneled with the percentage of the members of the targeted group in the venire from which the particular jury was selected. Thus, for example, if blacks constitute only about 8% of the venire and one black is seated on a jury of twelve persons (8.33%), then no *prima facie* case has been established, without regard to the peremptory challenges used by the *Batson* respondent.
- METHOD C This method compares the percentage of the members of the targeted group on the jury as impaneled with the percentage of the members of the targeted group in the county or district from which the venire has been selected. Method C is identical to Method B except that it uses the general population as a basis of comparison instead of the venire. It is used infrequently and generally only in cases in which information about the makeup of the venire has become unavailable. Like Method B, if the percentage of targeted-group members on the jury is not significantly lower than the comparison group, then no *prima facie* case has been established,

⁸⁴ *Batson*, 476 U.S. at 96-97.

⁸⁵ See, e.g., Alan B. Rich, *Peremptory Jury Strikes in Texas after Batson and Edmondson*, 23 ST. MARY'S L.J. 1055, 1065 n.55 (1992); Serr & Maney, *supra* note 73, at 28, 30 n.170, 35-36.

without regard to the peremptory challenges used by the *Batson* respondent.

METHOD D This method simply tallies the number of peremptory challenges used by the *Batson* respondent against members of the targeted group. Under this method, there is apparently some number of such strikes which will prompt the court to conclude that a prima facie case has been made.

METHOD E This method simply computes the percentage of the peremptory challenges used by the *Batson* respondent which were exercised against members of the targeted group. Like Method D, under this method there is apparently a percentage of such strikes that will cause the court to conclude that a prima facie case has been established.

METHOD F This method looks to see if the *Batson* respondent has removed all of the members of the targeted group who were in the venire or who were in the venire in a position such that they could have been selected for the jury. In most situations in which this phenomenon occurs, the court will find that a prima facie case has been established. Occasionally, in cases in which the *Batson* complainant has only this fact to present in support of the prima facie case and the number of persons from the targeted group who have been peremptorily removed is very small, the courts will conclude that no prima facie case has been established.

METHOD G This method calculates the percentage of members of the targeted group on the venire who have been removed by the peremptory challenges of the *Batson* respondent. Like Method E, under this method there is apparently a percentage of such strikes which is sufficiently high to constitute a prima facie case.

METHOD H This method compares the percentage of the *Batson* respondent's peremptory challenges used against targeted-group members with the percentage of targeted-group members in the venire. Thus, for example, if members of a targeted group constitute 20% of the venire, but the *Batson* respondent uses 80% of his or her peremptory challenges against members of that targeted group, then a prima facie case has likely been established. The theory underlying this method is that, if targeted-group membership is irrelevant to the *Batson* respondent's use of peremptory challenges, then the portion of the *Batson* respondent's peremptory strikes used against the targeted-group members ought to roughly parallel the portion of the venire which consists of members of that targeted group.

Characterizing these various formulae as "methods" requires a bit of a disclaimer, for it is actually rare that a court decision first endorses one of the above methods and then applies it to particular facts before it. Invariably, courts resolving *Batson* disputes will simply point to a total or ratio, fairly described as fitting within one of the above methods, as the reason for its conclusion that a prima facie case has or has not been established. Thus, it is by no means obvious that the selection of a method dictates the

result, rather than a method functioning as an explanation for a result reached for indeterminate reasons.

Table G-2 tabulates the number of times each of these methods has been used as the basis for a resolution of the prima facie case issue. Excluded from Table G-2 are cases in which the prima facie case ruling turned in whole or in part on factors other than one of the above methods. Also excluded from Table G-2 are cases in which the courts relied on some combination of these methods. Thus, Table G-2 reports only decisions in which the prima facie case question was resolved exclusively or predominately on the basis of a single method specified in Table G-1.

TABLE G-2
CASES USING METHODS FOR DETERMINING THE EXISTENCE OF A
PRIMA FACIE CASE

	Number of Cases
METHOD A	36
METHOD B	33
METHOD C	2
METHOD D	80
METHOD E	118
METHOD F	177
METHOD G	105
METHOD H	34
Total	585

The number of cases in which the courts have used one of these methods in determining, or at least explaining, the prima facie case determination is quite significant. The total cases figure of 585 in Table G-2 should be compared with the total cases figure of 834 in Table C-1. The latter figure represents the total number of cases surveyed in which a determination was made on the prima facie case issue: 585, or 70.14%, of these decisions are definitively linked to one of the methods detailed in Table G-1.

It is also quite clear that the method a court chooses to determine or explain its prima facie case determination is significantly correlated to the result of that inquiry. Table G-3 presents the success rates of *Batson* complainants on the prima facie case issue based upon the method used by the court rendering the decision.

A number of interesting conclusions is available from the tabulations thus far presented. For example, one might intuitively think that the use of a formula to determine the prima facie case question would benefit *Batson* respondents rather than *Batson* complainants because it might lead courts to pay insufficient attention to nonquantifiable indicia of discriminatory intent.⁸⁶ In that respect, one might expect that the cases in which such mathematical tests are used would disproportionately include cases in which a prima facie case was not found to have been established. But in fact, the data reveals precisely the opposite result.

86 Cf. Serr & Maney, *supra* note 73, at 35-36.

TABLE G-3
SUCCESS RATES BASED UPON PRIMA FACIE CASE METHODS

	Successful	Unsuccessful	Success Rate
METHOD A	5	31	13.89%
METHOD B	3	30	9.09%
METHOD C	0	2	0.00%
METHOD D	61	19	76.25%
METHOD E	98	20	83.05%
METHOD F	162	15	91.53%
METHOD G	71	34	67.62%
METHOD H	26	8	76.47%
Total	426	159	72.82%

For example, Table G-3 indicates that cases in which the specified methods were used produced a prima facie case success rate of 72.82%, markedly higher than the 62.23% prima facie case success rate for all cases detailed in Table C-1. Table C-1 also indicates a total of 519 cases in which a prima facie case was established. Table G-3 reveals that, in 426 cases (82.08% of the total 519 cases), a method was used to establish the prima facie case. By contrast, Table C-1 indicates a total of 315 cases in which a prima facie case was specifically found not to have been established. Table G-3 reveals that, in only 159 cases (50.48% of the total 315 cases) was a method used in concluding that no prima facie case had been established. A correlation thus exists between the use of one of the specified methods and the establishment of a prima facie case. However, any conclusion as to causation would be extremely speculative for the reasons discussed earlier. It is, in fact, entirely possible that the courts tend to explain their conclusions in methodological terms primarily in those cases in which the numbers speak for themselves in establishing a prima facie case.

Firmer ground can be found by focusing on the choice of methods used by the courts in resolving the prima facie case issue. Here, many of the courts attempting to implement *Batson* have simply bungled the task of defining a "pattern" of unlawful strikes. Method A, which focuses exclusively on the makeup of the resulting jury, is flawed in three respects. First, this method necessarily is predicated on the erroneous assumption that the purpose of *Batson* and its progeny is to protect litigants, not jurors. Given this predicate flaw, as long as a litigant who is a member of a targeted group secures a sufficient number of targeted-group members on the jury, there is no reason for concern. But, as explained earlier, the *Batson* line of cases can only be understood as primarily protecting the rights of jurors.⁸⁷

⁸⁷ See *supra* notes 41-64 and accompanying text. This misfocus on the actual makeup of the jury does not always benefit the *Batson* respondent. For example, in *State v. Sholl*, 743 P.2d 406 (Ariz. Ct. App. 1987), a prima facie case was found despite the fact that the *Batson* respondent used no peremptory challenges against any members of the targeted group. However, because the *Batson* respondent had not used all available peremptory challenges, the sole targeted group member in the venire was not reached. The Arizona courts found this to be a prima facie case, and the *Batson* respondent was put to the test of providing neutral explanations for not striking non-targeted-group venirepersons!

From the perspective of the improperly excluded juror, the inclusion of a different member of the same targeted group is hardly sufficient mitigation.

Second, even from the perspective of the litigant, all members of the same targeted group are plainly not fungible. The exclusion, for impermissible reasons, of a juror favored by the *Batson* complainant is surely not cured by the inclusion of another juror sharing perhaps no more than a single cosmetic characteristic with the dismissed juror.

And finally, Method A fails because it does not even begin to address the question presented. How many members of the targeted group must be on the jury to satisfy this test? If, for example, three out of twelve is enough, does it matter that it would have been nine out of twelve but for the *Batson* respondent's peremptory strikes?

It is not surprising that the success rate for *Batson* complainants is so comparatively low when Method A is used, for Method A is not so much a method as an excuse. Courts that use Method A, even in cases in which the court concludes that a prima facie case has been established, are forsaking their obligation to protect each individual prospective juror from illegal discrimination. In addition, courts that use Method A effectively insulate *Batson* respondents from the scrutiny which would result from the application of a more sensible method of resolving the prima facie case issue.

Method B, which compares the percentage of the targeted group on the jury with the percentage of the targeted group in the venire, essentially suffers from all the flaws of Method A. By ignoring the *Batson* respondent's peremptory challenges and the characteristics of the peremptorily challenged venirepersons, this method fails to address the primary purpose of the *Batson* rule—the protection of individual jurors. Moreover, the *Batson* respondent's use of peremptory challenges is only one factor in determining the ultimate composition of the jury. As such, this method enables *Batson* respondents fortuitously to escape scrutiny. For example, in one case,⁸⁸ no prima facie case was found because there were six of twelve (50.00%) targeted-group members on the jury and seventeen of forty-seven (36.17%) targeted-group members in the venire, even though eight of ten (80.00%) of the *Batson* respondent's peremptory challenges were used against targeted-group members. In a second example,⁸⁹ no prima facie case was found because there were nine of twelve (75.00%) targeted-group members on the jury and twenty-two of forty-two (52.38%) targeted-group members in the venire, even though ten of ten (100.00%) of the *Batson* respondent's peremptory challenges were used against targeted-group members. In a third case,⁹⁰ no prima facie case was found because there were five of twelve (41.67%) targeted-group members on the jury and fifteen of forty-four (34.09%) targeted-group members in the venire, even though ten of sixteen (62.50%) of the *Batson* respondent's peremptory

88 *Willis v. State*, 411 S.E.2d 714 (Ga. Ct. App. 1991), *cert. denied*, No. S92C0235, 1991 Ga. LEXIS 1016 (Ga. Dec. 4, 1991), and *cert. denied*, No. S92C0815, 1992 Ga. LEXIS 411 (Ga. May 8, 1992).

89 *Shaw v. State*, 411 S.E.2d 534 (Ga. Ct. App. 1991).

90 *Hood v. State*, 598 So. 2d 1022 (Ala. Crim. App. 1991), *cert. denied*, No. 1911122, 1992 Ala. LEXIS 801 (Ala. May 29, 1992).

challenges were used against targeted-group members. And in a fourth case,⁹¹ no prima facie case was found because there were six of twelve (50.00%) targeted-group members on the jury and thirteen of twenty-eight (46.43%) targeted-group members in the venire, even though seven of eight (87.50%) of the *Batson* respondent's peremptory challenges were used against targeted-group members.

Method C, which compares the percentage of the targeted group on the jury with the percentage of the targeted group in the relevant county or district, has been used minimally. It is essentially a duplicate of Method B with an even less relevant point of reference. It suffers from all the theoretical and practical defects of Method B, while adding another layer of imprecision by assuming that a particular venire mirrors the demographics and immutable characteristics of the local population generally.

Method D, which focuses upon the number of peremptory challenges used by the *Batson* respondent against targeted-group members, suffers from some fatal flaws as well. First, the raw number of peremptory challenges used against targeted-group members is meaningless without some point of reference. Five such peremptory challenges might mean one thing if the *Batson* respondent used five peremptory challenges, but it might mean quite another thing if the *Batson* respondent used twenty peremptory challenges. And five peremptory challenges against targeted-group members might be dispositive if only five such individuals had previously populated the venire, but they might be entirely unremarkable if virtually the entire venire had consisted of people in that group. Indeed, the almost total uselessness of the bare number of peremptory challenges used against targeted-group members must cause one to wonder whether at least some of the courts which offer this fact alone in support of the prima facie case ruling have done a poor job of articulating the reference point which gives the number some meaning.

Method D is also flawed because it does not complete its task; *i.e.*, it does not tell us how many such peremptory challenges constitute a prima facie case. As a result, there is absolutely no consistency among the decisions which point to this factor as being dispositive. For example, of the sixty-one cases which found a prima facie case with this method, thirty-five cases, (57.38% of the sixty-one cases) found a prima facie case based on the striking of three or fewer targeted group members. On the other hand, of the nineteen cases which found no prima facie case with this method, at least six cases, (31.58% of the nineteen cases) found no prima facie case even though four or more targeted-group members were stricken.

Method E, which focuses upon the percentage of the *Batson* respondent's peremptory challenges used against targeted-group members, is superior to Method D because it considers proportionality among the peremptory challenges exercised. It is still flawed, however, because it makes no provision for consideration of the proportion of the targeted group in the venire. Using fifty percent of one's peremptory challenges against members of a group constituting a small portion of the venire has to be evaluated differently than exercising fifty percent of one's peremp-

91 *Scott v. State*, 599 So. 2d 1222 (Ala. Crim. App.), *cert. denied*, 599 So. 2d 1229 (Ala. 1992).

tory challenges against members of a group constituting half or more of the venire.

Like Method D, Method E does not prescribe the acceptable percentage to avoid a finding of a prima facie case. And like Method D, as a result, Method E has produced inconsistent conclusions. Eleven of the cases which found prima facie cases involved percentages of fifty percent or less, while ten of the cases which found that a prima facie case had not been made involved percentages of fifty percent or more.

Method F, which looks to see whether all members of the targeted group (or all members of the targeted group who realistically might have been selected for the jury) have been excluded, is not really a method so much as, for many courts, an irrebuttable presumption. In other words, this test seems to work in one direction only. For many courts, the removal of all members of a targeted group, no matter how small the number stricken, necessarily constitutes a prima facie case. On the other hand, no court has explicitly or implicitly held that the striking of less than all of the targeted group members necessarily precludes a finding that a prima facie case has been established. The few cases that have found the absence of a prima facie case in this category have been cases in which the number of targeted-group members peremptorily challenged has been very small, and these courts have held that the fact that all of the available targeted-group members have been challenged is not, by itself, enough to establish a prima facie case. On the other hand, many of the 162 cases which have found a prima facie case using this method have involved the striking of only one or two targeted-group members.

This method shares the same theoretical flaw as some of the methods discussed earlier; *i.e.*, it misconstrues *Batson's* primary concern as the actual makeup of the jury and the litigants' virtual entitlement to same-group participation on the jury. It also has some very practical consequences as well. Because of the misfocus and the rigidity of this method, it virtually insulates the last targeted-group member in the venire from a peremptory challenge, unless the exerciser of that challenge is willing to endure the consequences of a prima facie case finding.

Method G focuses upon the percentage of targeted-group members removed by the *Batson* respondent's peremptory challenges. It is distinguishable from Method F because the percentage removed in cases in this category is necessarily less than one hundred percent. This method is superior to some of the other methods because it has a proportionality component and it focuses upon the truly intended beneficiaries of *Batson*. However, it is incomplete because it fails to take into account the portion of targeted-group members in the venire. For example, removal of fifty percent of the targeted-group membership in the venire by itself cannot be truly dispositive. In one case, the *Batson* respondent might have used ten of ten peremptory challenges to remove ten of twenty targeted-group members in a venire of sixty individuals. A prima facie case finding on these facts would seem inevitable. In another case, the *Batson* respondent might have used ten peremptory challenges, only one of which was used to chal-

lenge one of two targeted-group members in a venire of sixty people. On these facts, a prima facie case determination would be very much in doubt.

Like some of the methods discussed earlier, Method G suffers from its failure to specify a definitive percentage for establishing a prima facie case. And, like the other methods, it has suffered a varied application as a result. Nine of the cases using this method to establish a prima facie case have involved percentages of fifty percent or less. On the other hand, twenty-four of the cases which have used this method in concluding that no prima facie case has been established have involved percentages of fifty percent or more.

Method H compares the percentage of the *Batson* respondent's peremptory challenges used against targeted-group members with the percentage of members of the targeted group in the venire. If you are still reading at this point, then you know that this is where we have been heading all along. Method H solves all the problems left unsolved, or even created, by the other methods. It focuses upon the right people, the venirepersons. It examines both the targeted-group members and the *Batson* respondent's peremptory challenges in proportional, rather than absolute, terms. It is perfectly sensible in that it recognizes that neutrally exercised peremptory challenges ought, on average, to affect targeted-group members in proportion to their membership on the venire as a whole.

And yet, this method has been articulated as the test for the prima facie case determination in only thirty-four cases, which represents only 5.81% of the cases which have used some formula for resolving the prima facie case issue, and only 4.08% of all the cases in which a decision has been reached on the prima facie case question. It is also quite clear that consistent application of Method H to the prima facie case inquiry would have produced different results in many of the cases, usually more favorably to the *Batson* complainant.⁹²

A better and more consistent application of the *Batson* prima facie case inquiry would result if the courts would do two things. First, the courts must recognize that the primary intended beneficiaries of the *Batson* rule, particularly as it has developed since *Batson* itself, are the individual venirepersons summoned for jury duty. Second, as a starting point in the prima facie case analysis, courts should use the method described as Method H above. Courts would still be free to roam in either direction on the basis of nonquantifiable information presented on the prima facie case question. But as a starting point in all cases, and as a dispositive point in many cases in which the only evidence of a prima facie case is the quantifiable data which enters into the Method H formula, Method H is the clear choice.

H. How Do Courts Determine the Adequacy of Neutral Explanations?

Within the 867 cases in which the courts have ruled on the sufficiency of proffered neutral explanations,⁹³ a total of 2,994 peremptory challenges

⁹² For example, consider the cases discussed *supra* notes 88-91 and the accompanying text.

⁹³ See *supra* Table D-1.

have been the subject of such explanations. Of these, 533, (17.80%) have been found to have been insufficiently justified.⁹⁴ An examination of these 533 improperly challenged jurors reveals various rationales offered by the courts for rejecting the proffered explanations of the *Batson* respondents. Table H-1 lists these rationales and indicates, numerically and proportionally, how often each rationale is cited by a court as grounds for rejecting a proffered neutral explanation.

TABLE H-1
RATIONALES FOR REJECTING PROFFERED NEUTRAL EXPLANATIONS

	Number	Percentage
Disparate Treatment	172	27.22%
Insufficient Voir Dire	102	16.14%
No Explanation Offered	79	12.50%
Unsupported by Record	61	9.65%
Unpersuasive	57	9.02%
Admission	55	8.70%
Other Stereotypes	49	7.75%
Absence of Common Trait	22	3.48%
Surrogate for Targeted Group	16	2.53%
Conclusory	10	1.58%
Good Jurors	9	1.42%
Total	632 ⁹⁵	100.00%

The rather cryptic rationales listed in Table H-1 each require some explanation.

Disparate Treatment. This is by far the most prevalent rationale for rejecting proffered neutral explanations. It examines the venirepersons accepted by the *Batson* respondents for characteristics proffered as reasons for striking targeted-group members. Thus, for example, if the *Batson* respondent has explained that six black venirepersons were peremptorily challenged because they were each under twenty-five years of age, but four

⁹⁴ When examined on a juror by juror basis, *Batson* respondents offering neutral explanations thus have a success rate of 82.20%. This compares with a success rate of 77.97% when examined on a case by case basis. See *supra* Table D-1. It also compares with a success rate of 78.40% when examined on a targeted group per case basis. See *supra* Table E-5. It is perhaps surprising that these figures are so similar, given the much larger total of jurors than cases and the fact that only one peremptory challenge has to be inadequately explained to result in a case in which the explanations are found to be inadequate. Perhaps this can be accounted for by the way many courts go about addressing the adequacy of proffered explanations. Although there are some cases in which the courts, within a single case, segregate the acceptable explanations from the improper explanations, frequently it is an "all or nothing" affair. In other words, in many cases in which the courts specifically find less than all of the proffered explanations to be unacceptable, they either neglect to address the other explanations or determine that the other explanations are also inadequate because they are tainted by the determination that the *Batson* respondent has acted with discriminatory intent as to some of the peremptory challenges in the same case.

⁹⁵ The total of 632 rationales exceeds the total of 533 jurors for whom proffered neutral explanations were found unacceptable because sometimes courts supplied more than one rationale for rejecting the proffered explanations of the *Batson* respondent.

white jurors under twenty-five years of age have been accepted by the *Batson* respondent, this would constitute disparate treatment. In cases in which the proffered explanations are rejected under this rationale, the seemingly necessary implications are that the proffered explanations are pretextual and that the *Batson* respondents have lied to the court in order to conceal illegal peremptory challenges.

This method of scrutinizing proffered explanations makes a good deal of sense,⁹⁶ with two caveats. First, it should not become the exclusive test for the adequacy of proffered explanations; otherwise, many *Batson* violations can escape detection, either by chance or by the design of the *Batson* violators. Second, when the *Batson* respondents proffer that a combination of characteristics provoked the striking of targeted-group members, it is neither fair nor persuasive to reject such explanations because the same characteristics exist singly, and not in the same combination, among accepted jurors. Despite the sensibility of this rationale, there exist many cases in which courts have accepted proffered neutral explanations despite a record demonstrating, or at least suggesting, disparate treatment. This disparate treatment of the "disparate treatment" rationale surely contributes to the inconsistent application of *Batson* in the lower courts.

Insufficient Voir Dire. In these situations, the *Batson* respondents have highlighted characteristics of the challenged targeted-group members which provide rational grounds for peremptory challenges only if some additional facts are assumed to be true. These additional facts could have been confirmed or dispelled had the *Batson* respondents inquired, or inquired sufficiently, during voir dire. The failure of the *Batson* respondents to do so is sometimes fatal to the success of the proffered explanations, although, again, many courts accept proffered explanations in circumstances in which application of this rationale could easily have produced different results. In cases in which the courts have rejected proffered explanations under this rationale, it is certainly a plausible, and sometimes explicit, conclusion that the failure to pursue the matter during voir dire evidences the *Batson* respondent's bad faith and warrants a conclusion that the proffered explanations are pretextual.

No Explanation Offered. In these cases, the *Batson* respondents have been either unable or unwilling to proffer neutral reasons for the suspect peremptory challenges. Included within this rationale are situations in which the *Batson* respondents have simply denied an improper motive, claimed to have had insufficient information on the challenged venirepersons, maintained only that other prospective jurors were better,⁹⁷ or asserted that their clients, for unspecified reasons, wished the venirepersons struck. In many of these cases, the *Batson* respondents have not been required to offer neutral explanations until long after the jury selection procedures and could not remember the reasons for the peremptory challenges. Thus, *Batson* claims sustained under these circumstances do

⁹⁶ See Acker, *supra* note 74, at 201.

⁹⁷ One of the difficulties with this explanation is that it does not address why the targeted-group member, as opposed to some other venireperson, was selected for a peremptory challenge in order to reach the "better" juror.

not necessarily imply bad faith or pretext on the part of the *Batson* respondents. By contrast, consistent with the continuing theme of inconsistency in the workings of *Batson*, some courts accept as valid explanations reasons such as insufficient information or a desire to reach another juror.

Unsupported by the Record. In these situations, the record of the voir dire either fails to substantiate, or sometimes even flatly contradicts, the explanations offered by the *Batson* respondents. Invariably, the courts need not, and do not, resolve whether the *Batson* respondents' mischaracterizations are intentional or inadvertent.

Unpersuasive. In these cases, the courts regard the proffered explanations as so ludicrous or implausible that they conclude that the explanations are pretextual. One might suspect that this is a rationale of last resort because it requires the courts to most directly find that the *Batson* respondents have lied to the court.⁹⁸

Admission. In these cases, the *Batson* respondents have acknowledged that the targeted-group status of the peremptorily stricken venirepersons was at least relevant to the peremptory challenge decisions. This occurs infrequently, but in these circumstances the courts universally conclude that *Batson* has been violated.

Other Stereotypes. In these cases, the *Batson* respondents have offered, as an alternative to the prima facie case inference, that peremptory challenges have been exercised on the basis of the venirepersons' membership in a targeted group, explanations that the venirepersons have been stricken because of their membership in other groups. In these few forty-nine circumstances, the courts have rejected these explanations because the explanations are themselves based upon group stereotypes and not individual considerations. Table H-2 specifies the particular group stereotypes which have been found to be inadequate rebuttals to prima facie *Batson* cases.

The cases relying on this rationale are most peculiar. First of all, as will be seen later, the explanations which have been found to be inherently inadequate in these cases are routinely accepted by many other courts in many other cases. Secondly, this rationale is clearly not what the Supreme Court has envisioned as the proper implementation of *Batson*.⁹⁹ Thirdly, the courts using this rationale have been anything but clear about the scope of the rationale. Are these group stereotypes unlawful generally under *Batson*, or are they only unlawful when offered to rebut a prima facie case predicated upon race or gender? And fourthly, to the extent that the problem is that the *Batson* respondents operated on the basis of group stereotypes rather than individual characteristics, then what is left of the peremptory challenge? If indeed the *Batson* respondents had sufficient reasons to strike the venirepersons without resort to group stereotypes, would not challenges for cause invariably have been sustained?

98 Cf. Broderick, *supra* note 5, at 421-22.

99 Cases within the survey period were all decided prior to the extension of *Batson* to women in *J. E. B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994). See *supra* notes 59-64 and accompanying text.

TABLE H-2
UNACCEPTABLE GROUP STEREOTYPES

	Number
Teachers	8
Young	7
Residence in High Crime Area	6
Residence or Employment Near Party's Residence	6
Women ¹⁰⁰	5
Ministers	2
Postal Workers	2
Unimportant Jobs	2
Absence of Children	1
Children	1
Counselor	1
Employed Making Videotapes	1
Hospital Employee	1
Irish	1
Limited Education	1
Nurse	1
Separated	1
Social Worker	1
Unwed Mother	1
Total	49

Absence of Common Trait. In these cases, the courts have rejected the proffered explanations because the peremptorily challenged venirepersons have been diverse, sharing no common trait other than the impermissible one: shared membership in the targeted group. While this rationale might have some bearing on the prima facie case determination, it is truly nonsensical as applied to an evaluation of the proffered neutral explanations. It is neither logically or legally necessary that *Batson* respondents have a single reason for exercising all of their peremptory challenges, and therefore the diversity of the challenged venirepersons speaks not at all to the genuineness and sufficiency of the proffered explanations.

Surrogate for Targeted Group. In these cases, the *Batson* respondents evidenced a certain naiveté, either in their own world views or in their perception of the gullibility of certain judges. Some explanations are so manifestly surrogates for the targeted groups as to be plainly unacceptable. Some real examples of instances in this category, all in cases in which the targeted group was blacks, include membership in the NAACP, people who looked like Baptists, and people likely to be offended by racist jokes contained in the evidence.

100 In *J. E. B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994), the Court made explicitly clear that the Equal Protection Clause does not prohibit the use of peremptory challenges on the basis of group discriminations that have received only "rational basis" scrutiny, *id.* at 1429, which would surely include virtually all of the group stereotypes listed in Table H-2.

Conclusory. In these cases, the proffered explanations, such as "de-meanor" and "gave me a bad feeling," have been rejected because they were too vague and conclusory. Prior to *Batson*, these type of intuitive strikes were an inherent aspect of peremptory challenges.¹⁰¹ But peremptory challenges based upon these subjective judgments are almost impossible to screen for pretext.¹⁰² Nevertheless, as will be seen, most courts do accept such explanations in the absence of other evidence of pretext, and the latter approach appears to be the one dictated by the Supreme Court.¹⁰³

Good Jurors. In these cases, the courts have focused upon characteristics of the stricken venirepersons other than the characteristics highlighted in the *Batson* respondents' explanations, independently assessed the stricken venirepersons as being favorable jurors for the *Batson* respondents (independent of their targeted-group status), and concluded that the venirepersons must have been challenged because of their targeted-group status. Almost no courts are willing to engage in this analysis (at least not overtly), presumably because it requires the courts to substitute their judgments for those of the parties on the qualities that make a favorable juror for those parties. It would further seem that this rationale would not meet with the approval of the Supreme Court.

In the final analysis, the courts have struggled with evaluating proffered neutral explanations, producing no more consistency—neither as to methods nor as to results—than they have produced in the *prima facie* case arena. And unlike the *prima facie* case inquiry, there does not even appear to be an approach which would consistently satisfy the competing interests at stake. The courts have searched in vain for a suitable middle ground between the traditional unfettered quality of peremptory challenges and the consistent scrutiny *Batson* seems to require to make it principled and meaningful.¹⁰⁴ Particularly with regard to the evaluation of proffered neutral explanations, an inherent difficulty lies in requiring acceptable reasons in circumstances in which, because the persons struck are not subject to challenges for cause, there cannot be truly persuasive reasons for their removal.¹⁰⁵

A system which, like the current one created by *Batson*, seeks to accommodate both the inherent aspects of the peremptory challenge and the scrutiny of anti-discrimination laws is one which seeks a middle ground which either does not exist or is impossible to locate. For this reason, some critics have suggested that the peremptory challenge must either be abolished or returned to its pre-*Batson* status.¹⁰⁶ Indeed, from the very beginning, Justice Marshall argued that the anti-discrimination goals espoused in *Batson* could only be accomplished by eliminating the peremptory challenge.¹⁰⁷ The impact of the data collected from the surveyed cases upon the question of the future of the peremptory challenge occupies the balance of this article.

101 Saltzburg & Powers, *supra* note 4, at 341 n.21.

102 Serr & Maney, *supra* note 73, at 58-59.

103 See Purkett v. Elem, 115 S. Ct. 1769, 1771 (1995), discussed *supra* at note 36.

104 See Bray, *supra* note 47, at 555; Serr & Maney, *supra* note 73, at 63.

105 Batson v. Kentucky, 476 U.S. 79, 127 (1986) (Burger, C. J., dissenting).

106 Bray, *supra* note 47, at 555; see also Serr & Maney, *supra* note 73, at 63.

107 Batson, 476 U.S. at 102-08 (Marshall, J., concurring).

III. THE PEREMPTORY CHALLENGE

The impact of *Batson* has simply resurrected a long-standing debate about the merits and failings of the peremptory challenge. The peremptory challenge still enjoys significant support, with many describing it as essential to a system of impaneling impartial juries.¹⁰⁸ It also has its equally vociferous critics, who link the peremptory challenge to a host of systemic ills and call for its abolition.¹⁰⁹

Some of the costs of the peremptory challenge are not disputed. Peremptory challenges require a commitment of time and judicial resources, both in the exercising of such challenges and in the voir dire that occurs as a means for discovering the targets of such challenges.¹¹⁰ They also sometimes engender costly litigation.¹¹¹ And *Batson* proceedings, which are necessary only as long as the peremptory challenge continues to survive, are extremely expensive, time-consuming and, sometimes, even divisive.¹¹²

Up until *Batson*, the peremptory challenge was not only a sacred cow in some circles, but a secret one as well. Many trial lawyers might have insisted that their use of peremptory challenges was based upon sound assessments of both the challenged venirepersons and the desired compositions of the juries selected, but the validity of these claims could only be tested anecdotally because no reasons needed to be given for peremptory challenges. One byproduct of *Batson* is that, for the first time, we have a body of cases in which there is a record of the reasons for exercising peremptory challenges. Accordingly, we now arguably have a more suitable data base for testing the value of peremptory challenges generally.

There are certainly some questions that might be raised as to the representativeness of this data base. First, because all of the reasons in our data base were given in response to a *Batson* challenge, they might not be representative of peremptory challenges generally. The most obvious reason for this would be if the data base included false explanations so as to avoid the consequences of a *Batson* violation. But the explanations analyzed in this section include only those situations in which the courts accepted the proffered explanations as legitimate. Even if the data base is nevertheless overinclusive because the courts do not adequately screen pretextual explanations, that would simply mean that some of the included explanations were pretextual; it would not follow that the remaining, non-pretextual explanations are not representative of peremptory challenges generally. Moreover, even if the data base includes pretextual explanations, one might expect that the pretextual explanations offered by the *Batson* respondents were selected precisely because they are the usual, legitimate reasons for exercising peremptory challenges.

A second, and better, reason for questioning the data base is that, because the bulk of *Batson* complaints are lodged by the criminal defense, our

108 See, e.g., Zalesne & Zalesne, *supra* note 57; Cressler, *supra* note 45, at 381; Saltzburg & Powers, *supra* note 4, at 382.

109 See, e.g., Broderick, *supra* note 5, at 420-23; Bray, *supra* note 47.

110 Jere W. Morehead, *When a Peremptory Challenge Is No Longer Peremptory: Batson's Unfortunate Failure to Eradicate Invidious Discrimination from Jury Selection*, 43 DEPAUL L. REV. 625, 639 (1994); Broderick, *supra* note 5, at 421.

111 Broderick, *supra* note 5, at 371.

112 Morehead, *supra* note 110, at 639; Bray, *supra* note 47, at 545-46, 554, 568.

sample of proffered neutral explanations is disproportionately occupied by the explanations of prosecutors. As a matter of fact, this is incontrovertibly true. But whether this significantly limits the value of the data is doubtful. It is important in this context to distinguish between the categories of reasons for exercising peremptory challenges (such as age or occupation) and the specific application of those categories by prosecutors (such as people under age twenty-five or social workers). Although attorneys representing clients or interests different than those represented by prosecutors might well target different subgroups within such categories, there is no reason to believe that the same categories or characteristics are not equally relevant to the peremptory challenge decisions made by these lawyers.¹¹³ There is also no reason to believe that the reasonableness of peremptory challenges exercised by lawyers other than prosecutors is appreciably superior or inferior to that of prosecutors.

An examination of all the accepted explanations offered by *Batson* respondents reveals sixteen major categories of reasons lawyers exercise peremptory challenges. Table III-A lists these categories and specifies the numerical and proportional frequency in which each has been advanced.

TABLE III-A
CATEGORIES OF ACCEPTED PEREMPTORY CHALLENGES

	Number	Percentage
Prior Involvement with Criminal Conduct or Litigation	697	17.88%
Behavior During Voir Dire	532	13.65%
Possession of Extrajudicial Information or Bias	496	12.72%
Difficulty Following Instructions	387	9.93%
Age	343	8.80%
Employment or Training	291	7.47%
Economic Characteristics	233	5.98%
Family Situation	231	5.93%
Education and Intelligence	140	3.59%
Location of Home, Workplace or Other Activities	123	3.16%
Incapacity	111	2.85%
Personal Appearance	95	2.44%
Prior Jury Service	90	2.31%
Gender	82	2.10%
Miscellaneous Characteristics	26	0.67%
Neutral Explanation Did Not Involve Any Objection to the Challenged Venireperson	21	0.54%
Total	3,898 ¹¹⁴	100.00%

Each of these categories requires further examination. First, for each category, there exist several subcategories which further explain the nature

¹¹³ In fact, although the number of *Batson* respondents who were criminal defendants or civil litigants was small, there was no noticeable difference in the categories of explanations offered by these respondents.

¹¹⁴ The 3,898 accepted reasons for exercising peremptory challenges should be contrasted with a total of 2,461 peremptory challenges which were found to have been adequately explained by the *Batson* respondents. The former number is significantly larger than the latter one because, quite often, a *Batson* respondent offers more than one accepted explanation for the scrutinized peremptory challenge.

of the peremptory challenges exercised. Second, the objective here is to examine whether the peremptory challenge is truly a necessary, or even worthwhile, device. This inquiry requires a more detailed examination of the peremptory challenges to discover, at the very least, whether a system which allowed only challenges for cause could sufficiently accommodate the legitimate concerns of litigants and their counsel as to the individuals who will populate the juries which will resolve their litigated fates. One might expect that this inquiry would require solely an examination of whether the proffered explanations are in fact legitimate, and certainly that difficult task must be undertaken.

But a preliminary stage of the inquiry requires the examination of whether the peremptory challenges should have been unnecessary because the grounds for the challenge, if factually accurate, should have resulted in the dismissal of the venirepersons on challenges for cause. One might expect that such instances will materialize only infrequently because the context in which these reasons appear—*i.e.*, as explanations for exercised peremptory challenges—necessarily would suggest that challenges for cause had either been previously unsuccessful or had not been made because there was no basis for a challenge for cause. Surprisingly, however, many of the accepted peremptory challenges, assuming that the explanations offered have been bona fide, quite clearly should have resulted in sustained challenges for cause.

Both the critics and the defenders of the peremptory challenge agree that challenges for cause are unrealistically narrow, both as defined and as applied.¹¹⁵ Not only are the grounds for challenges for cause limited, but, even more importantly, a venireperson's representation that he or she can lay even the most manifest prejudice aside will generally insulate the venireperson from a challenge for cause.¹¹⁶ A large part of the explanation for this phenomenon is the peremptory challenge itself. Trial judges can routinely avoid any real scrutiny of venirepersons and deny challenges for cause, secure in the knowledge that the lawyer will remove the venireperson anyway with a peremptory strike.¹¹⁷ Trial judges thus rely upon the peremptory challenge as a substitute for the meaningful examination of challenges for cause, which in turn causes trial lawyers to rely so heavily upon their peremptory challenges.¹¹⁸ Clearly, any system of jury selection which would seek to function without the peremptory challenge would

115 *E.g.*, Saltzburg & Powers, *supra* note 4, at 355; Frederick L. Brown et al., *The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse*, 14 NEW ENG. L. REV. 192, 235 n.244; Kuhn, *supra* note 4, at 243.

116 *See, e.g.*, Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 STAN. L. REV. 545, 549-50; Kuhn, *supra* note 4, at 243.

117 In cases in which a criminal defendant's challenge for cause is wrongfully denied, with the result that the defense is forced to remove that venireperson with a peremptory challenge and is thereby effectively deprived of a peremptory challenge that would otherwise have been available to use against another venireperson, no federal constitutional right of the defendant has been violated, and the erroneous denial of the challenge for cause is effectively unreviewable. *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988).

118 *See* Saltzburg & Powers, *supra* note 4, at 340.

have to require the revitalization, and possibly the expansion, of the challenge for cause.¹¹⁹

Because the objective here is to isolate the peremptory challenges which would not be successful in a system in which challenges could only be made for cause, a more realistic and meaningful scrutiny of the proffered explanations is appropriate. As will be seen, a significant portion of the peremptory challenges which have materialized from the data would likely have resulted in the jurors being stricken for cause in a system without peremptory challenges. What will also be seen is that the remaining, "true" peremptory challenges tend to meet one of two descriptions. Either the peremptory challenge was based upon a subjective assessment of the individual venireperson by the *Batson* respondent, or the strike was based upon a stereotypical assessment of the venireperson because of that individual's inclusion in some identifiable group. That said, we turn now to a more detailed analysis of the sixteen categories of accepted peremptory challenges.

TABLE III-B
PRIOR INVOLVEMENT WITH CRIMINAL CONDUCT OR LITIGATION

	Number	Percentage
Prior Criminal Activity ¹²⁰	271	38.88%
Close Friends or Relatives—Prior Criminal Activity ¹²¹	376	53.95%
Victim of Crime	28	4.02%
Never Been Victim of Crime	15	2.15%
Insufficiently Concerned about Relative Who Was Victim of Crime	3	0.43%
Prior Civil Litigant	4	0.57%
Total	697	100.00%

To the extent that the bases for the peremptory challenges involved facts beyond the subcategories described in Table III-B,¹²² those additional facts have been separately accounted for in other appropriate subcategories. For our purposes, we are dealing here with cases in which the bases for the challenges are nothing more than the venireperson's generic inclusion in the above-described subcategories. The first question, then, is whether the mere fact that someone, or their friend or relative, has been involved in criminal activity, a victim (or not) of a crime or involved in civil litigation is, or should be, grounds for exclusion for cause.

¹¹⁹ Hochman, *supra* note 81, at 1401-02; Broderick, *supra* note 5, at 422; Bray, *supra* note 47, at 557-58.

¹²⁰ This subcategory includes venirepersons who had been convicted of, arrested for, or even just suspected of, engaging in criminal activities.

¹²¹ This subcategory includes venirepersons who had close friends or relatives who had been convicted of, arrested for, or suspected of, engaging in prior criminal activity.

¹²² Examples of cases which involve more than the subcategories described in Table III-B would be situations in which the venireperson's relative was a victim of the same crime which is the subject of the instant prosecution or situations in which the same individual prosecutor successfully convicted the venireperson's relative.

While a rational system of jury selection could, particularly in criminal cases, exclude some of these subgroups for cause, our systems generally have not seen fit to do so. Whether this failure is because it would be unwise or unfair to do so, or because we have systemically relied upon the peremptory challenge to take care of the "problem" is unknown. For our purposes, we have to conclude that none of these reasons, standing alone, would be the basis for a challenge for cause. It is also apparent that peremptory challenges based upon any of the grounds stated in Table III-B involve group stereotypes rather than subjective individual evaluations.

TABLE III-C
BEHAVIOR DURING VOIR DIRE

	Number	Percentage
Inattentive ¹²³	154	28.95%
Wished to Avoid Jury Service ¹²⁴	75	14.10%
Hostile Toward the Lawyer Who Later Exercised the Challenge	59	11.09%
Responsive to Opposing Lawyer or What Opposing Lawyer Said	51	9.59%
Timid ¹²⁵	46	8.65%
Unfavorable Impression	36	6.77%
Inattentive to Lawyer Who Later Exercised Challenge ¹²⁶	30	5.64%
Strange ¹²⁷	20	3.76%
Friendly Toward Opposing Party ¹²⁸	18	3.38%
Answered No Voir Dire Questions	11	2.07%
Assertive ¹²⁹	11	2.07%
Gave Vague or Evasive Responses	10	1.88%
Liberal or Lenient	6	1.13%
Eager to Serve	3	0.56%
Emotional	2	0.38%
Total	532	100.00%

Some of these subcategories could be satisfactorily addressed in a system that allowed challenges only for cause. That is not to say that, in most of these cases, challenges for cause would necessarily be granted. It is to say, however, that because the objectionable conduct takes place in the

123 This subcategory includes venirepersons who were variously described as inattentive, uninterested, nonresponsive, distracting or apathetic, and also includes individuals who fell asleep or who arrived late for court.

124 This subcategory includes individuals who requested that they be excused, as well as venirepersons who exhibited hostility toward the process or the obligation of jury service.

125 This subcategory includes venirepersons variously described as timid, hesitant, shy, indecisive, fearful, nervous, weak or anxious.

126 This subcategory includes venirepersons who were described as insufficiently attentive to the *Batson* respondent or were described as making poor eye contact with the *Batson* respondent.

127 This subcategory includes venirepersons who were described as having engaged in strange, bizarre, silly or frivolous behavior.

128 This subcategory includes venirepersons who were described as smiling at, seeking to make eye contact with, or casting sympathetic glances toward, the opposing party.

129 This subcategory includes venirepersons who were variously described as assertive, aggressive or strong-willed or as leaders.

courtroom and within the perceptions of the trial judge, the court would be in a position to assess the legitimacy of the accusation. If counsel were concerned about the behavior escaping the attention of the court, counsel could call the particular venireperson to the court's attention in a sidebar conference. Specifically, the subcategories labeled "Inattentive," "Wished to Avoid Jury Service," "Hostile Toward the Lawyer Who Later Exercised the Challenge," "Responsive to Opposing Lawyer or What Opposing Lawyer Said," "Inattentive To Lawyer Who Later Exercised Challenge," "Strange," "Friendly Toward Opposing Party" and "Gave Vague or Evasive Responses" could be accommodated without peremptory challenges. The trial judge could determine if the venireperson's behavior was so excessively inattentive, hostile, bizarre, partial or evasive that their inclusion on the jury would not provide all parties with a fair and impartial factfinder.

By contrast, objections to venirepersons on the grounds that they are "timid," create an "unfavorable impression," "answered no voir dire questions," are "assertive," are "liberal or lenient," are "eager to serve" or are "emotional" would probably find no comfort in a system requiring challenges to be for cause. The subcategory "Answered No Voir Dire Questions" appears to be based on a stereotype about such people, at least relative to persons about whom more information was obtained during voir dire. The other six subcategories listed in this paragraph each manifest subjective judgments by the lawyer seeking the removal of the described persons.

TABLE III-D
POSSESSION OF EXTRAJUDICIAL INFORMATION OR BIAS

	Number	Percentage
Prior Familiarity with Parties, Witnesses or Lawyers	356	71.77%
Admitted Bias	60	12.10%
Prior Information about Case	35	7.06%
Expressed Predisposition on the Credibility of Witnesses ¹³⁰	19	3.83%
Personal Experience Very Similar to Subject of Litigation	17	3.43%
Expertise in Relevant Field	7	1.41%
Bias Established from Information Obtained Outside Voir Dire	2	0.40%
Total	496	100.00%

To the extent that descriptions contained in the subcategories listed in Table III-D are accurate, any sensible system would remove such persons for cause. That 496 persons survived challenges for cause, even allowing for the possibility that the *Batson* respondents have exaggerated their disqualifications, is compelling evidence that, under our current system, the peremptory challenge is the safety net that makes challenges for cause a less effective screening mechanism.

¹³⁰ This subcategory refers to situations in which venirepersons commented generically about the credibility of certain relevant categories of witnesses, such as police officers or rape victims.

TABLE III-E
DIFFICULTY FOLLOWING INSTRUCTIONS

	Number	Percentage
Expressed View Contrary to Applicable Law	288	74.42%
Lied or Failed to Disclose Information Called for on the Jury Questionnaire or During Voir Dire	69	17.83%
Failed to Complete Form	25	6.46%
Disregarded Court's Instructions	5	1.29%
Total	387	100.00%

Certainly, each of the subcategories listed in Table III-E could be capably handled by a well-functioning system of challenges for cause. Voir dire could reveal whether there was some innocent explanation for incidents described in each of the last three subcategories, and it could also explore whether views meeting the definition of the first subcategory were genuinely held and accurately expressed. Especially in a system without peremptory challenges, persons otherwise fitting within any of these subcategories should be removed for cause.

TABLE III-F
AGE

	Number	Percentage
Young	225	65.60%
Old ¹³¹	31	9.04%
Same Age as Opposing Party	56	16.33%
Children Same Age as Opposing Party	26	7.58%
Same Age as Parents of Opposing Party	5	1.46%
Total	343	100.00%

An attorney exercising peremptory challenges on all of the grounds listed in Table III-F would be hard-pressed to find any acceptable venirepersons. Correspondingly, a system which recognized these age factors as grounds for removal for cause would have trouble impaneling any juries. Manifestly, these age-related criteria have no place in a system which allows challenges only for cause. Also quite clearly, as grounds for peremptory challenges, each of these subcategories is premised upon stereotypes involving an assumed affinity based upon age.

¹³¹ To the extent that a person, incidental to being old, lacked the capacity to serve as a juror, that characteristic is tabulated elsewhere. For our purposes here, individuals in this subcategory were simply "old."

TABLE III-G
EMPLOYMENT OR TRAINING

	Number	Percentage
Occupation ¹³²	214	73.54%
Occupation of Friend or Relative ¹³³	50	17.18%
Area of Education or Training ¹³⁴	17	5.84%
Spanish-Speaking ¹³⁵	9	3.09%
No Military Service	1	0.34%
Total	291	100.00%

132 Specifically, this subcategory consisted of thirty-one teachers, twenty-four social workers, twenty-two blue collar workers, fourteen members of the clergy, twelve health care workers, ten counselors, nine mental health care workers, nine postal workers, eight government employees, seven corrections officers, seven law office employees, six students, five homemakers, five venirepersons with unspecified jobs carrying little responsibility, five venirepersons with unspecified jobs which would cause them to be sympathetic to the opposing party, four lawyers, four security guards, three civilian employees of the police department, three people with the same job as the opposing party, two librarians, two musicians, two professionals, two volunteers, and one each of accountants, artists, church organists, day care workers, detectives, engineers, hairdressers, janitors, journalists, massage therapists, military police, pharmacists, pipeline operators, Playboy Club employees, "salesgirls," salesmen, theater employees and an employee who worked for a television station that, independent of the venireperson, once broadcast a documentary that was not complimentary to the police.

Only occasionally did the *Batson* respondents (predominantly prosecutors) explain their theories as to the undesirability of the people with these occupations. When they did so, however, they revealed that these peremptory challenges were premised upon such stereotypes as: people in jobs that involve caring for other people are too liberal and too lenient; accountants and engineers are too meticulous; people in the arts use drugs; people in law enforcement other than the police are jealous and critical of the police; librarians, church organists and salesmen are too liberal; government employees make bad jurors; journalists just want to get on a jury to get a story; and postal workers are, apparently depending upon which lawyer you talk to, liberal, tolerant of violence or dishonest. In none of these instances was there any indication that the lawyers' inferences from the venirepersons' occupations were in any way corroborated during the voir dire.

133 This subcategory includes venirepersons who had friends or relatives in certain occupations, including eight lawyers, seven police officers, five members of the clergy, five venirepersons who were divorced from police officers (or who had friends or relatives who were divorced from police officers), four corrections officers, three social workers, three teachers, two persons with unspecified jobs also held by the opposing party, two persons with unspecified jobs which would provoke sympathy for the opposing party, two law office employees, two mental health care workers, two postal workers, and one each of blue collar workers, civilian employees of police departments, counselors, homemakers, and one spouse of a venireperson who worked for a radio station that had, without any participation by the venireperson's spouse, once broadcast a documentary that had not been complimentary to the police. In none of these cases was there any indication that the voir dire specifically exposed any connection between the occupation of the friend or relative and any relevant predisposition on the part of the friend or relative. Further, in none of these cases was there any indication that the voir dire specifically exposed any connection between any relevant predisposition on the part of the friend or relative and any relevant predisposition on the part of the venireperson.

134 This subcategory includes nine venirepersons with some legal training and eight others with some education or training in psychology, social work, sociology or theology.

135 This subcategory includes venirepersons who, by experience or education, were fluent in Spanish. In each of these cases, the *Batson* respondent was concerned that these venirepersons might not accept the official translations of the testimony of Spanish-speaking witnesses. In none of these cases was there any reason advanced for this concern other than that the venirepersons were fluent in Spanish.

Without more than was offered by the *Batson* respondents in these instances, none of these individuals would be subject to a challenge for cause. In the case of each of the venirepersons in this category, the peremptory challenge was premised solely on the basis of group stereotypes.

TABLE III-H
ECONOMIC CHARACTERISTICS

	Number	Percentage
Unemployed	171	73.39%
Short or Sporadic Employment History	37	15.88%
Low Income	8	3.43%
Family Member Unemployed	7	3.00%
Renter	7	3.00%
Welfare Recipient	2	0.86%
Financial Troubles	1	0.43%
Total	233	100.00%

None of the economic characteristics in Table III-H would justify removal for cause. All of these subcategories are premised on group stereotypes.

TABLE III-I
FAMILY SITUATION

	Number	Percentage
Unmarried	121	52.38%
No Children	26	11.26%
Unmarried Parent	25	10.82%
Separated or Divorced	24	10.39%
Insufficient Community Ties	14	6.06%
Living with Parents	7	3.03%
Children	5	2.16%
Homosexual	2	0.87%
Living Unmarried with Significant Other	2	0.87%
Pregnant	2	0.87%
Relative on Jury	1	0.43%
Relative Removed by Peremptory Challenge	1	0.43%
Widow	1	0.43%
Total	231	100.00%

The subcategory "Relative Removed by Peremptory Challenge" would be irrelevant in a system without peremptory challenges. The subcategory "Relative on Jury" should arguably be the basis for a challenge for cause. The balance of the subcategories in Table III-I are not proper grounds for removal for cause. They are each based upon group stereotypes.

TABLE III-J
EDUCATION AND INTELLIGENCE

	Number	Percentage
Insufficient Education	41	29.29%
Could Not Understand Voir Dire Questions	34	24.29%
Seemed Unintelligent	25	17.86%
Errors on Juror Form	16	11.43%
Could Not Understand Basic Legal Terms	13	9.29%
Will Not Understand Evidence, Issues or Law	6	4.29%
Illiterate	4	2.86%
Too Much Education	1	0.71%
Total	140	100.00%

The subcategories labeled "Insufficient Education," "Could Not Understand Voir Dire Questions," "Errors on Juror Form," "Could Not Understand Basic Legal Terms" and "Illiterate" could all be satisfactorily addressed by challenges for cause. The trial judge is in a position to evaluate the extent to which the factual predicate for the challenge indicates some limitation in education or intelligence, the severity of the limitation and the significance of the limitation in the context of the particular case. For example, illiteracy may be disqualifying in a case in which much documentary evidence will be introduced, but it may be irrelevant in another case in which all of the evidence will be presented in the form of oral testimony.

The other three subcategories would not be proper grounds for challenges for cause. The subcategories labeled "Seemed Unintelligent" and "Will Not Understand Evidence, Issues or Law," without more, are merely subjective judgments of the lawyer. The subcategory entitled "Too Much Education" is a group stereotype.

TABLE III-K
LOCATION OF HOME, WORKPLACE OR OTHER ACTIVITIES

	Number	Percentage
Lived or Worked Near Home or Workplace of Party or Witness or Near Location of Relevant Event	75	60.98%
Lived or Worked in High Crime Area	32	26.02%
Recently Relocated to Area	7	5.69%
From New York	2	1.63%
Same Address or Workplace as Juror Removed by Peremptory Challenge	2	1.63%
Situated in Courtroom Near Opposing Party's "People"	2	1.63%
From Texas	1	0.81%
Inner City Person	1	0.81%
Not Certain Lived in Jurisdiction ¹³⁶	1	0.81%
Total	123	100.00%

In none of these situations did the voir dire reveal anything more specifically relevant to the grounds for removal than the descriptions contained in Table III-K. The subcategory labeled "Same Address or Workplace as Juror Removed by Peremptory Challenge" is irrelevant in a system without peremptory challenges. The last subcategory would be grounds for a challenge for cause. With these exceptions, none of these subcategories would be a basis for a challenge for cause. With the noted exceptions, they all are based upon group stereotypes.

TABLE III-L
INCAPACITY

	Number	Percentage
Hardship ¹³⁷	75	67.57%
Difficulty Communicating	16	14.41%
Difficulty Hearing	11	9.91%
Language Difficulty	5	4.50%
Difficulty Seeing	2	1.80%
On Disability	2	1.80%
Total	111	100.00%

All of the concerns represented by the subcategories in Table III-L can be accommodated by challenges for cause. The trial judge is in no worse position than the lawyers to determine the relevance and severity of the incapacity.

¹³⁶ This subcategory consists of one person for whom (for reasons not disclosed) it was not possible to determine whether the person lived in the jurisdiction and thus whether the person was qualified to sit on a jury within that jurisdiction.

¹³⁷ This subcategory includes venirepersons for whom jury service would be a physical or financial hardship, as well as those individuals with responsibilities for the caring of children or invalids.

TABLE III-M
PERSONAL APPEARANCE

	Number	Percentage
Appearance or Demeanor ¹³⁸	79	83.16%
Facial Hair	7	7.37%
Overweight	6	6.32%
Same Build as the Opposing Party	2	2.11%
Intoxicated	1	1.05%
Total	95	100.00%

Venirepersons who are intoxicated can and should be struck for cause. Challenges for cause can also be used to address legitimate concerns about appearance or demeanor. If a venireperson's appearance evidences disrespect for the court or the proceedings, removal for cause would not be inappropriate. The trial judge is certainly in a position to segregate these challenges from those based simply upon lawyers' preferences for well-dressed (or poorly-dressed) jurors. The explanations labeled "Facial Hair," "Overweight" and "Same Build as Opposing Party" are each irrelevant to challenges for cause and are all based upon group stereotypes.

TABLE III-N
PRIOR JURY SERVICE

	Number	Percentage
Prior Jury Service	10	11.11%
No Prior Jury Service	7	7.78%
Unsatisfactory Prior Jury Service ¹³⁹	73	81.11%
Total	90	100.00%

None of the subcategories in Table III-N would be a basis for a challenge for cause. Each is premised upon a group stereotype: that venirepersons are more or less favorable jurors if they have served before, or that jurors' verdicts in unrelated cases are good predictors of their verdicts in subsequent cases.

¹³⁸ Although several challenges included in this subcategory were not further explained, most of the explanations included here had to do with appearance, rather than behavior. Examples include manner of dress, wearing sunglasses in the courtroom, chewing gum in the courtroom, using a toothpick in the courtroom and wearing curlers.

¹³⁹ This subcategory includes venirepersons who served on juries in prior cases which resulted in hung juries or the "wrong" verdicts from the perspective of the *Batson* respondent, such as cases in which the *Batson* respondent was a prosecutor and the prior jury acquitted the defendant.

TABLE III-O
GENDER

	Number	Percentage
Women	67	81.71%
Men	13	15.85%
Same Gender as Opposing Party	2	2.44%
Total	82	100.00%

Because challenges based upon gender are now illegal,¹⁴⁰ none of the subcategories in Table III-O is a proper basis for a challenge of any kind. In that respect, a system without peremptory challenges is capable of resolving all of the objections to venirepersons contained in Table III-O.

TABLE III-P
MISCELLANEOUS CHARACTERISTICS

	Number	Percentage
Religion ¹⁴¹	18	69.23%
Did Not Own a Gun	2	7.69%
Member of Black Organization ¹⁴²	2	7.69%
Background in the Martial Arts	1	3.85%
Known to Be a Hard Drinker	1	3.85%
Read "Rolling Stone" Magazine	1	3.85%
Used Aliases	1	3.85%
Total	26	100.00%

In none of these instances was the explanation tied to the particular issues in the case. In none of these instances did the *Batson* respondent offer more than the bare information contained in Table III-P. The explanations based upon membership in black organizations and religion are almost surely illegal. The explanation involving the "hard drinker" might presumably be a basis for a challenge for cause if the challenger could support the conclusion that the venireperson could not be a reliable juror. The remaining four subcategories are based upon group stereotypes and would not support challenges for cause.

140 *J. E. B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994).

141 This subcategory includes venirepersons who appeared to be very religious, were members of exotic religious sects, or were members of religious groups whose tenets were viewed by the *Batson* respondent as unfavorable in the context of the particular case. In none of these instances is there any indication that the *Batson* respondent inquired particularly of the venireperson to test the inference about the impact of the venireperson's religious beliefs upon that individual's predispositions in the case at hand.

142 In one instance, the organization was the NAACP and in the other instance the organization was the Black Caucus.

TABLE III-Q
NEUTRAL EXPLANATION DID NOT INVOLVE ANY OBJECTION TO
THE CHALLENGED VENIREPERSON

	Number	Percentage
Insufficient Information	10	47.62%
Attempting to Reach Better Juror	7	33.33%
Would Be Better in Upcoming Cases	3	14.29%
Batson Respondent Did Not Realize Venireperson Was in Targeted Group	1	4.76%
Total	21	100.00%

None of these subcategories would be grounds for a challenge for cause. "Insufficient Information" is a stereotype of sorts. "Attempting to Reach a Better Juror" and "Would Be Better in Upcoming Cases" could be characterized as subjective evaluations, albeit of a relative, rather than an absolute, nature. The last subcategory is not really an explanation at all and would have been much more relevant to the *prima facie* case inquiry than to the neutral explanations issue. Accordingly, it will be disregarded in the final tabulations.

Our total of 3,897 explanations¹⁴³ has been thus analyzed to determine which explanations, in cases in which they are legitimate, could be accommodated by challenges for cause. The remaining explanations have been examined and found to consist of either group stereotypes or subjective judgments. The quantitative results of these examinations are contained in Table III-R.

TABLE III-R
CONCLUSIONS CONCERNING EXPLANATIONS

	Number	Percentage
Addressable by Challenges for Cause	1,707	43.80%
Group Stereotypes	2,045	52.48%
Subjective Judgments	145	3.72%
Total	3,897	100.00%

The most obvious conclusion from Table III-R is that a sensible system of challenges for cause would address nearly 44% of the concerns expressed in the explanations for the exercise of peremptory challenges. Of course, this still leaves over 56% of venirepersons who would not be removed but for peremptory challenges. The inquiry thus naturally turns to whether these individuals can justifiably be excluded from jury service.

The vast majority of individuals who are removed by peremptory challenges and who would not be challengeable for cause are struck because of group stereotyping. Table III-S collects and tabulates all of the subcategories of explanations which have been characterized as group stereotypes.

¹⁴³ We started with 3,898 explanations, *see supra* Table III-A, and deleted one, *see supra* Table III-Q and accompanying text.

TABLE III-S
GROUP STEREOTYPES

	Number	Percentage
Close Friends or Relatives—Prior Criminal Activity	376	18.41%
Prior Criminal Activity	271	13.27%
Young	225	11.02%
Occupation	214	10.48%
Unemployed	171	8.37%
Unmarried	121	5.93%
Unsatisfactory Prior Jury Service	73	3.57%
Lived or Worked Near Home or Workplace of Party or Witness or Near Location of Relevant Event	72	3.53%
Same Age as Opposing Party	56	2.74%
Occupation of Friend or Relative	50	2.45%
Short or Sporadic Employment History	37	1.81%
Lived or Worked in High Crime Area	32	1.57%
Old	31	1.52%
Victim of Crime	28	1.37%
Children Same Age as Opposing Party	26	1.27%
No Children	26	1.27%
Unmarried Parent	25	1.22%
Separated or Divorced	24	1.18%
Area of Education or Training	17	0.83%
Never Been Victim of Crime	15	0.73%
Insufficient Community Ties	14	0.69%
Answered No Voir Dire Questions	11	0.54%
Insufficient Information	10	0.49%
Prior Jury Service	10	0.49%
Spanish-Speaking	9	0.44%
Low Income	8	0.39%
Facial Hair	7	0.34%
Family Member Unemployed	7	0.34%
Living with Parents	7	0.34%
No Prior Jury Service	7	0.34%
Recently Relocated to Area	7	0.34%
Renter	7	0.34%
Overweight	6	0.29%
Children	5	0.24%
Same Age as Parents of Opposing Party	5	0.24%
Prior Civil Litigant	4	0.20%
Insufficiently Concerned about Relative Who Was Victim of Crime	3	0.15%
Did Not Own a Gun	2	0.10%
From New York	2	0.10%
Homosexual	2	0.10%
Living Unmarried with Significant Other	2	0.10%
Pregnant	2	0.10%
Same Build as Opposing Party	2	0.10%
Situated in Courtroom Near Opposing Party's "People"	2	0.10%
Welfare Recipient	2	0.10%
Background in the Martial Arts	1	0.05%
Financial Troubles	1	0.05%
From Texas	1	0.05%
Inner City Person	1	0.05%
No Military Service	1	0.05%
Read "Rolling Stone" Magazine	1	0.05%
Too Much Education	1	0.05%
Used Aliases	1	0.05%
Widow	1	0.05%
Total	2042	100.00%

The reader can, of course, examine Table III-S and form his or her own conclusion about whether lawyers are truly serving their clients' interests by removing these groups of venirepersons, or whether the whole business of striking people from participation on the jury on these grounds is at the least silly, if not offensive. In fact, there have been some studies done that suggest that trial lawyers are not very successful at identifying favorable and unfavorable jurors during jury selection.¹⁴⁴ Accordingly, one might legitimately question whether the stereotypes evidenced in Table III-S indicate more about the biases of the venirepersons in those groups or the biases of the attorneys who exercised those peremptory challenges.¹⁴⁵

Ultimately, however, the issue is not the accuracy of these group stereotypes; the issue is the denial of participation on juries to these individuals.¹⁴⁶ It has previously been suggested that the *Batson* line of cases can only be accurately understood as focusing primarily upon the rights of jurors to nondiscriminatory selection procedures.¹⁴⁷ But it is unimaginable that the Court would have sacrificed the rights of litigants to impartial juries merely to diversify those juries. It is also very unlikely that *Batson* is predicated on the very questionable proposition that race or gender is irrelevant to the performance and verdicts of jurors.¹⁴⁸ Instead, the only persuasive predicate for the *Batson* rule requires a distinction between the goals of the litigants and the goals of the system. Litigants seek to secure favorable jurors; the system seeks to provide fair and impartial juries. When *Batson* ended the previously unfettered regime of the peremptory challenge, the rights of jurors did not ascend to a position superior to the litigants' right to a fair and impartial jury. The rights of jurors were merely elevated above the previously unencumbered practice of attempting to secure the most favorable juries possible for litigants.

One of the lessons of the *Batson* line of cases is that the peremptory challenge, no matter which litigant exercises it, is an action created and endorsed by the state.¹⁴⁹ Because the state's only legitimate interests are to provide the litigants with fair and impartial juries and to provide potential jurors with selection procedures that are not unfairly discriminatory, the interest of litigants in securing the most favorable jurors should be an irrelevant consideration. Thus, when one examines the list contained in Table III-S, that list should be measured, not by whether a rational lawyer might, in some circumstances, wish to exclude such individuals from particular juries, but rather by whether a system which allows such individuals to serve on juries has somehow failed in its duty to provide litigants with fair and

144 See, e.g., Hochman, *supra* note 81, at 1396-97; Broderick, *supra* note 5, at 413; Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491, 517 (1978).

145 See Brown et al., *supra* note 115, at 232-33.

146 Broderick, *supra* note 5, at 411.

147 See *supra* notes 49-64 and accompanying text.

148 Consider again, for example, the public opinion polls demonstrating substantial discrepancies, based upon race, in the perception of the guilt or innocence of O. J. Simpson. See *supra* note 43. By contrast, other than gender (which is now an illegal basis for peremptory challenges) there do not appear to be any similar poll results for any case based on any of the group distinctions listed in Table III-S.

149 See *supra* note 56.

impartial triers of fact. If a system allowing challenges for cause is administered sensibly and without the carelessness engendered by the peremptory challenge safety net, *unfair* biases should be eliminated to the extent possible without resort to peremptory challenges.¹⁵⁰ That is not to say that no biases will be present. The fact is that nobody is truly unbiased.¹⁵¹ But shared group beliefs are not the same things as unfair biases.¹⁵² The value of the jury largely depends upon the representation of various group beliefs, which itself diminishes the impact of any unfair biases.¹⁵³ It is actually the peremptory challenge that distorts this balance by allowing the removal of some of these group beliefs.¹⁵⁴

Although this conclusion has not specifically been articulated by the Supreme Court in the *Batson* line of cases, it would appear to be a necessary premise of the *Batson* rule. That rule is surely not predicated upon the disclaimer that there exist no group beliefs associated with race or gender. Nor is it based upon the superiority of the rights of jurors over the fair trial rights of litigants. It would seem to follow, then, that at least in cases in which race or gender are the grounds for peremptory exclusion, the Court has implicitly concluded that the group beliefs associated with race and gender do not unfairly prejudice the litigants' rights to impartial juries.¹⁵⁵ It would also seem to follow that, if the group beliefs associated with race and gender do not unfairly prejudice the litigants' rights to impartial juries, then the exclusion of individuals from jury service on the basis of race or gender violates the state's other prime directive: the provision of potential jurors with jury selection procedures that are not unfairly discriminatory.

Of course, the Supreme Court has not sought to vindicate the legitimate state interests in jury selection; that is not the Court's function. The Court has necessarily been restricted to addressing the constitutional sufficiency of the peremptory challenge, specifically the limited extent to which the peremptory challenge fails to pass muster under the Equal Protection Clause. It is for this reason that the Court has thus far only limited the peremptory challenge in its application to race and gender, and has explicitly endorsed, as a matter of constitutional scrutiny, the use of peremptory challenges on the basis of group stereotypes not mandating heightened scrutiny under the Equal Protection Clause.¹⁵⁶ But for any legislative or rule-making authority considering the future vitality of the peremptory challenge, the arena is not so limited. Beyond the perimeters of the limited scrutiny permitted under the Equal Protection Clause, there is no rea-

150 Note, *Peremptory Challenges and the Meaning of Jury Representation*, 89 YALE L.J. 1177, 1182 (1980).

151 See, e.g., VAN DYKE, *supra* note 43, at 160, 162; Zeisel & Diamond, *supra* note 144, at 531.

152 Hochman, *supra* note 81, at 1396; Broderick, *supra* note 5, at 411.

153 VAN DYKE, *supra* note 43, at 160, 162; Kuhn, *supra* note 4, at 245-46.

154 VAN DYKE, *supra* note 43, at 162; Morehead, *supra* note 110, at 639; Broderick, *supra* note 5, at 371.

155 Indeed, the Court has explicitly acknowledged that the rights of jurors to nondiscriminatory selection procedures must be balanced against the importance of the peremptory challenge in providing litigants with fair trials, not favorable jurors. *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1426 (1994).

156 *Id.* at 1429. The heightened scrutiny afforded to race and gender is justified because of the long history of discrimination in this country against blacks and women. *Id.* at 1425.

son to distinguish between race and gender as opposed to the host of group stereotypes listed in Table III-S.¹⁵⁷ That is not to say that all, or even any, of the groups in Table III-S have suffered discrimination of a kind commensurate with race or sex discrimination. It is to say, however, that in advancing the goals of impartial juries and fair selection procedures, history need not be a limiting principle.¹⁵⁸

Whichever groups are removed, even if only in some cases and by some litigants, the exclusion from jury service because of group stereotyping brands the excluded group members as inferior,¹⁵⁹ insults individuals by reducing their worth as jurors to a cosmetic or trivial characteristic,¹⁶⁰ makes underrepresented groups less accepting of the court system and its results,¹⁶¹ and injures society as a whole by frustrating the ideal of equal citizen participation in the jury process.¹⁶² Even beyond race and gender, the effects on the representativeness of juries are apparent. For example, empirical data demonstrates that both the young and the old are underrepresented on juries,¹⁶³ and Table III-S confirms that peremptory challenges have at least contributed to that undesirable circumstance. Moreover, some of the currently accepted bases for peremptory challenges, such as economic and geographic criteria,¹⁶⁴ have a disproportionate impact upon certain racial groups.¹⁶⁵

In short, for all of the reasons that race- and gender-based peremptory challenges do not advance any legitimate interests in impartial juries that outweigh the jurors' right to nondiscriminatory selection procedures, peremptory challenges exercised on the basis of the group stereotypes in Table III-S suffer by the same comparison. The costs in terms of the rights of potential jurors and the loss of representative juries is significant. Any gain in terms of fairer or more impartial juries is certainly not apparent from an examination of the data in Table III-S. And any "gain" in terms of the litigants' private interests in gaining more favorable factfinders simply deserves no consideration.

There remains the second category of peremptory challenges: those based upon the subjective judgments of the attorneys. One of the defenses advanced on behalf of the peremptory challenge has been that it allows lawyers to exercise intuitive strikes, acting on the basis of hunches.¹⁶⁶ The data indicates, however, that such subjective judgments accounted for less than four percent of the explanations tabulated.¹⁶⁷ Nevertheless, Table III-

157 See Underwood, *supra* note 42, at 763; Saltzburg & Powers, *supra* note 4, at 364, 372.

158 Even the heightened scrutiny of the Equal Protection Clause extends to racial discrimination against whites and sex discrimination against men, *e.g.*, *J. E. B.*, 114 S. Ct. at 1430, suggesting that, even for equal protection purposes, there is something objectionable about such group stereotypes even in the absence of a long history of discrimination against the particular targeted groups.

159 Kuhn, *supra* note 4, at 247.

160 Bray, *supra* note 47, at 568.

161 Kuhn, *supra* note 4, at 246.

162 Broderick, *supra* note 5, at 417; Kuhn, *supra* note 4, at 246-47.

163 VAN DYKE, *supra* note 43, at 35.

164 See *supra* Tables III-H and III-K.

165 See Kuhn, *supra* note 4, at 239, 313.

166 See, *e.g.*, Saltzburg & Powers, *supra* note 4, at 341 n.21.

167 See *supra* Table III-R.

T summarizes the particular explanations which can be fairly characterized as subjective judgments.

TABLE III-T
SUBJECTIVE JUDGMENTS

	Number	Percentage
Timid	46	31.72%
Unfavorable Impression	36	24.83%
Seemed Unintelligent	25	17.24%
Assertive	11	7.59%
Attempting to Reach Better Juror	7	4.83%
Liberal or Lenient	6	4.14%
Will Not Understand Evidence, Issues or Law	6	4.14%
Eager to Serve	3	2.07%
Would Be Better in Upcoming Case	3	2.07%
Emotional	2	1.38%
Total	145	100.00%

These explanations are even more vulnerable to criticism than the group stereotypes contained in Table III-S. Initially, the subcategories in Table III-T all suffer from being hopelessly vague and conclusory, which surely are inherent characteristics of subjective judgments. But given the doubtful capacity of lawyers accurately to assess venirepersons generally,¹⁶⁸ one can hardly be confident in those assessments in circumstances where the lawyer can offer nothing (not even a stereotype) in support of that assessment.¹⁶⁹

But even assuming that these subjective judgments have been accurately made, these subcategories still suffer from the same flaws as the group stereotypes in Table III-S. Given the legitimate goals of a judicial system in the selection of jurors, there is simply no good reason to believe that a system fails in its obligation to provide litigants with fair and impartial jurors simply because it fails to permit the exclusion of persons who are, for example, timid or assertive or eager or emotional or liberal.

IV. CONCLUSION

The peremptory challenge has outlived its usefulness. It originated at a time when there existed no effective means of screening venirepersons.¹⁷⁰ With regard to the two legitimate goals of providing litigants with fair and impartial juries and providing potential jurors with fair and non-discriminatory selection procedures, it is entirely counterproductive.

¹⁶⁸ See *supra* note 144 and accompanying text.

¹⁶⁹ Compare, for example, some of the specific facts advanced in support of the proposition that particular venirepersons lacked the intelligence or education to serve listed *supra* Table III-J, with the unsupported allegations that jurors "seemed unintelligent" or "will not understand [the] evidence, issues or law" *supra* Table III-T.

¹⁷⁰ Carl H. Imlay, *Federal Jury Reformation: Saving a Democratic Institution*, 6 LOY. L.A. L. REV. 247, 269 (1973).

What should be the end for the peremptory challenge began, ironically, with the Supreme Court's decision in *Batson*. This death knell was not sounded because *Batson* has effectively circumscribed race- and gender-based peremptory challenges; toward that end, *Batson* is almost surely a failure. Instead, *Batson* has, almost inadvertently, demonstrated a number of truisms that support the extermination of the peremptory challenge.

First, *Batson* has focused our attention, or at least resurrected our attention, upon the rights of citizens to be treated fairly in the jury selection process. Second, *Batson* has forced us to recognize that the right to an impartial jury is something quite different from the nonexistent "right" to a favorable jury. Third, *Batson* as applied in the lower courts has demonstrated the futility of simultaneously attempting to preserve the essential character of the peremptory challenge and to redefine "discrimination" in such a way as to prohibit the exercise of peremptory challenges on the basis of certain group stereotypes. Thus far, efforts to accomplish both of these goals have produced enormous, and with regard to the evaluation of proffered neutral explanations, hopelessly irremediable inconsistency. In that regard, *Batson* may yet compel us to choose between returning to a system of unfettered peremptory strikes and doing completely away with the peremptory challenge. Fourth, because of the burdens associated with the resolution of *Batson* challenges, *Batson* has unwittingly contributed to the campaign for the latter choice; *Batson* proceedings are necessarily incidental only to peremptory challenges and are further costs of maintaining that institution.

Finally, *Batson* has provided us with the first opportunity to examine the reasons lawyers use peremptory challenges, and what has emerged is the legal version of the emperor's new clothes. Stripped of its mystique, the peremptory challenge turns out in large part to have operated as an excuse for the inadequate functioning of the challenge for cause. It has also been revealed to be the refuge for some of the silliest, and sometimes nastiest, stereotypes our society has been able to invent. Many of the judgments used by lawyers in the exercise of peremptory challenges look not unlike those of a child in a candy store with a pocketful of change and a commitment to leave the store without any cash. It is time for the peremptory challenge to go. It will not be missed.

