The Peremptory Challenge: Should It Still Exist? An Examination of Federal and Florida Law

Vivien Toomey Montz

Craig Lee Montz

Follow this and additional works at: http://repository.law.miami.edu/umlr

Recommended Citation


Available at: http://repository.law.miami.edu/umlr/vol54/iss3/2
The Peremptory Challenge: Should It Still Exist? An Examination of Federal and Florida Law

VIVIEN TOOMEY MONTZ*
CRAIG LEE MONTZ**

I. INTRODUCTION ...................................................... 451

II. HISTORY OF THE PEREMPTORY CHALLENGE ..................... 454

III. THE U.S. SUPREME COURT AND FEDERAL DECISIONS .......... 459

A. Protected Groups After Batson .................................... 460
B. Nondiscriminatory Justifications for the Peremptory Challenge .. 466

IV. THE PEREMPTORY'S FUNCTIONAL ELIMINATION IN FLORIDA .... 471

A. History of the Challenge in Florida ............................... 471
   1. PROTECTED GROUPS IN FLORIDA ............................ 473
   2. NONDISCRIMINATORY JUSTIFICATIONS ......................... 474
B. Practical Difficulties in Exercising the Challenge in Florida ... 478

V. WHAT REMAINS OF THE PEREMPTORY CHALLENGE? ................ 480

A. The Challenge's Inaccuracy in Successfully Predicting Jurors' Verdicts 481
B. Suggestions for Reform ............................................ 486
   1. REVISI]* THE CHALLENGE FOR CAUSE ........................ 486
   2. RETURNING THE PEREMPTORY TO ITS PRE-BATSON STATE .... 491
   3. ABOLITION OF THE PEREMPTORY CHALLENGE ................. 491

VI. CONCLUSION ........................................................ 494

I. INTRODUCTION

"Personally I think that the entire body of law in this area is outrageous, but it is clear that peremptory challenges no longer exist."¹

The peremptory challenge has been the subject of numerous state and federal court decisions since 1986, when the United States Supreme Court subjected it to equal protection analysis in Batson v. Kentucky.²

* Instructor, University of Miami School of Law. Summer research grants from the University of Miami School of Law supported the writing of this article.
** Instructor, University of Miami School of Law. The authors would like to thank Irwin Stotzky for his support and inspiration in the writing of this article.
Before *Batson*, litigants used peremptory challenges to strike a predetermined number of potential jurors based upon arbitrary, "seat of the pants" instincts. Challenges could be made for any reason at all, and litigants were not required to offer explanations. *Batson* dramatically affected the jury selection process, as it prevented litigants from exercising peremptory challenges on the basis of race, and it required them to formulate race-neutral justifications for the strike. The Supreme Court subsequently expanded *Batson*'s protections to classifications such as ethnicity and gender. Challenges directed against those groups also require neutral, non-pretextual explanations to withstand equal protection scrutiny. If a court determines that an attorney's proffered explanations for a peremptory strike are not credible, the strike will be disallowed.

The peremptory challenge has resulted in confusion among state and federal courts in determining which groups are protected from its nondiscriminatory application. Litigants' explanations for their use of peremptories frequently require trial courts to assess their credibility through extensive questioning. In 1995, The Supreme Court announced in *Purkett v. Elem* that litigants may proffer any "facially valid" reason for the strike, which the trial court must assess as credible. This holding has resulted in conflicts between federal courts as to what constitute acceptable, non-pretextual justifications for the peremptory.

Prior to *Batson*, courts were reluctant to inquire into the basis of the peremptory challenge because of its inherently selective nature, reason-

---

4. See *Swain*, 380 U.S. at 220.
5. See *Batson*, 476 U.S. at 97.
7. See *J.E.B. v. Alabama*, 511 U.S. 127, 143 (1994) (stating that *Batson*'s scope may not extend to groups normally subject to rational basis review). *J.E.B. left open the question regarding *Batson*'s extension to classifications satisfying heightened scrutiny. See *id.* at 135-42. For example, in addition to race, gender, and national origin, religion may be a protected classification under *Batson*. See *United States v. Somerstein*, 959 F. Supp. 592 (E.D.N.Y. 1997) and discussion infra Part III.A.
9. See Kenneth Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 470 (1996) ("[T]he 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.") See also infra notes 85-104 and accompanying text.
11. Id. at 768.
12. See Melilli, *supra* note 9, at 466-70; see also infra notes 136-54 and accompanying text.
ing that to protect particular groups at the expense of others would itself be discriminatory.\textsuperscript{13} The \textit{Batson} Court sought to remedy a history of discriminatory practices that had systematically excluded racial groups from jury service, and, in so doing, to protect the integrity of the judicial process.\textsuperscript{14}

The current peremptory challenge attempts to preserve the constitutional guarantees of equal protection and of an impartial trial.\textsuperscript{15} However, it also results in mini-hearings and potential appeals on each strike, and its efficacy in successfully predicting jurors’ tendencies is highly questionable.\textsuperscript{16} Because the strike is designed to eliminate jurors whose hidden biases would affect their assessment of the evidence, the strike’s failure to adequately predict jurors’ responses supports its abolition. The benefits of the current peremptory challenge system are strongly outweighed by its damage to the jury selection process and corruption of the judicial system.

Part II of this article examines the history of the peremptory challenge and the rationales justifying its use prior to the \textit{Batson} decision. Part IIIA examines the confusion that \textit{Batson} and its progeny have created in state and federal courts in establishing which classes of jurors are subject to constitutional protection from the discriminatory use of the challenge. Part IIIB examines the conflict in federal courts in determining whether litigants’ justifications for using the challenge are nondiscriminatory or pretextual. It concludes that the Supreme Court’s decision in \textit{Purkett v. Elem} has resulted in a morass of inconsistencies in determining whether litigants’ use of the strike is discriminatory. Part IVA addresses how Florida courts, in attempting to provide greater constitutional protection to parties and jurors than federal courts, have functionally eliminated the strike as a method of nondiscriminatory jury selection. Part IVB illustrates the difficulties in constitutionally exercising the strike in Florida, thereby supporting the challenge’s abolition.

Finally, Part V explores alternatives to the peremptory challenge in its current form, including the viability of returning the challenge to its original, pre-\textit{Batson} form, of creating a new type of “quasi-cause” challenge, or of eliminating the peremptory challenge altogether. This article joins the many critical works that support the challenge’s abolition\textsuperscript{17} due


\textsuperscript{14} See \textit{Batson}, 476 U.S. at 99.

\textsuperscript{15} See id. at 97.

\textsuperscript{16} See \textit{Kramer} et al., \textit{On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity: An Empirical Study}, 40 AM. U. L. REV. 665, 668 (1991) (“[T]here is little evidence that attorneys’ peremptory challenges are reliably related to jurors’ verdict preferences”); \textit{see also infra} notes 242-64 and accompanying text.

\textsuperscript{17} See, e.g., Lisa Lee Mancini Hayden, \textit{Recent Case, The End of the Peremptory Challenge?}
to its history of discriminatory use, its unworkability if converted to a revised or "quasi-cause" form, and its inaccuracy in selecting a favorable jury.

II. HISTORY OF THE PEREMPTORY CHALLENGE

While the Constitution does not confer a right to peremptory challenges, they originally arose as a means to select a qualified and unbiased jury. The peremptory challenge is "a practice of ancient origin" and is "part of our common law heritage." It has been in practice for nearly as long as juries have existed.

In the years following the Norman Conquest, the jury existed as an inquisitorial device from which the English Crown had the right to select the most informed witnesses. By the end of the thirteenth century, jurors were generally knights selected by the king who acted both as grand jurors and as petit jurors. The Crown subsequently began exercising unlimited peremptory challenges in capital cases, while the defendant was entitled to only thirty-five. The early English peremptory challenge may have been a variant of the challenge for cause, as it was generally practiced in small English villages and towns, where people knew each other well enough to recognize certain jurors' obvious

---


18. See Raymond J. Broderick, Why the Peremptory Challenge Should be Abolished, 65 TEMPEL. L. REV. 369, 374 (1992). The Supreme Court has held that the peremptory challenge is not constitutionally required; thus, its abolition would not per se violate the constitutional right to an impartial jury. See Ross v. Oklahoma, 487 U.S. 81, 88 (1988).


20. The Romans used peremptories in civil cases, as reflected in the Lex Servilia. See J. Pettingal, An Enquiry Into the Use and Practice of Juries Among the Greeks and Romans 115, 135 (1769). The Roman jurors originated as "Judices" who were called from the Senate to serve as prospective jurors in Senatorial trials that year. See Hoffman, supra note 17, at 814. Eighty-one senators would be selected by lot for any particular trial, and then each litigant could challenge fifteen prospective jurors. Id. Apart from the Roman Judices and Athenian juries or "dikasteria," ancient juries served primarily as investigative bodies and witnesses for suspected criminal activities. Id. at 815.


22. See Hoffman, supra note 17, at 818. The Magna Carta also did not guarantee a right to a jury, but Pope Innocent III's ban on trials by ordeal left trial by jury as the only alternative after 1219 for deciding serious criminal cases. Id. at 818, 819. The English jury system began to thrive after this ban. Id. at 819.

23. See id. at 819-20.
biases.  

Parliament abrogated the Crown's right to unlimited peremptory challenges in 1305 by the "Ordinance of Inquests," which obligated the Crown to show cause for every challenge.  

Since that time in England, the prosecution has not had the right to use peremptory challenges.  

The peremptory challenge subsequently became established in England solely as a right of the defendant in felony trials.  It was defined as "an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all." The number of peremptories allowed in English criminal trials decreased over the centuries, and in 1989 Parliament abolished them as a method of jury selection.  

The British peremptory challenge carried over to the early American colonies, and it was subsequently incorporated in all the states.  

Following the English method, most states were slow to recognize the challenge as a right of the prosecution and regarded it as a shield for the defendant against conviction-prone jurors. New York and Virginia, two of the most populous states at the time, did not allow the prosecutor to use peremptories until 1881 and 1919, respectively. Although the Constitution does not confer a right to use the peremptory challenge, for over one hundred years, the United States Supreme Court has recog-

---

24. See id. at 820.  
25. See LoH, supra note 21, at 386.  
26. See id.  
27. See id.  
28. 4 WILLIAM BLACKSTONE, COMMENTARIES *353.  
29. See Hoffman, supra note 17, at 822 (citing The Criminal Justice Act, 1988, ch. 33, § 118(1)(Eng.)).  
30. See Broderick, supra note 18, at 374.  
31. See LoH, supra note 21, at 386. The colonial courts also disagreed on the number of peremptory challenges allowed to the prosecution. "Some colonies permitted an unlimited number of prosecution peremptories, others allowed none." Hoffman, supra note 17, at 823.  
33. Article III, § 2 of the Constitution provides:  

The Trial of all Crimes, except in Cases of Impeachment, shall be by jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.  

U.S. CONST. art III, § 2, cl. 3. The Sixth Amendment provides:  

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.  

U.S. CONST. amend VI. The Constitution is silent about peremptory challenges, although at least one draft of the Sixth Amendment provided that a defendant had a right to challenges for cause. See Hoffman, supra note 17, at 824 (citing VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 37 (1986)).
nized the peremptory challenge as a significant means to an impartial jury. Federal guidelines governing the exercise of peremptory and for-cause challenges reflect the historical restriction of the peremptory to a specific number of strikes — a restriction that is not placed upon the challenge for cause.

The discriminatory reality of the historical use of the peremptory strike is reflected by its efficacy after the Civil War in eliminating African-American prospective jurors. Restrictive laws on voting rights and, therefore, juror qualifications were implemented in many states, resulting in the discriminatory use of the peremptory to prevent African-Americans from serving on the petit jury when selective qualification requirements failed to eliminate them from the venire. The peremptory allowed attorneys to bar African-Americans regularly from sitting on juries in the South.

Restrictive statutes on juror qualifications similarly prevented

34. See Edmonson v. Leesville Concrete Co., 500 U.S. 614, 633 (1991) (O'Connor, J., dissenting) ("The peremptory challenge fosters both the perception and reality of an impartial trial.");

The tradition of peremptory challenges for both the prosecution and the accused was already venerable at the time of Blackstone, . . . was reflected in a federal statute by the same Congress that enacted the Bill of Rights . . . was recognized in an opinion by Justice Story to be part of the common law of the United States . . . and has endured through two centuries in all the States . . . The constitutional phrase "impartial jury" must surely take its content from this unbroken tradition.


35. For example, see 28 U.S.C. § 1870 (1998), which states:

In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.

All exercises for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court.

See also Fed. R. Crim. P. 24(b), which states:

If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. . . .


37. See id. For example, "[B]lack citizens in antebellum New York could vote, and therefore serve on a jury, only if they owned at least $250 worth of property. No such requirement applied to whites." Id. at 871 (citing Richard Kluger, Simple Justice: The History Of Brown v. Board Of Education And Black America's Struggle For Equality 32 (1977)).

38. See id.

39. See Hoffman, supra note 17, at 828-30; see also Swain v. State, 156 So. 2d 368, 375 (Ala. 1963), aff'd, Swain v. Alabama, 380 U.S. 212 (1965) ("Negroes are commonly on venires but are always struck by attorneys in selecting the trial jury.").
The prohibition of women from serving on grand and petit juries was derived from the English common law, which allowed exclusion due to “propter defectum sexus,” the “defect of sex.” Women were often thought to be too fragile for the “polluted courtroom atmosphere,” and many states excluded them from jury service despite the ratification of the Nineteenth Amendment in 1920. By 1975, five states provided an automatic exemption from jury service for any woman requesting it, and women were regularly underrepresented on venires. As a result, the peremptory challenge operated as a second device for the deliberate exclusion of female veniremembers when the statutory exemptions failed.

Despite evidence of its discriminatory use in particular cases, courts were reluctant to inquire into the basis of the peremptory strike because of its reliance on inarticulate hunches. As the Supreme Court stated in *Swain v. Alabama*, “To subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of

40. See People v. Irizarry, 536 N.Y.S.2d 630, 633 (1988), rev'd, 560 N.Y.S.2d 279 (1990) (observing that New York’s Charter of Liberties and Privileges of 1683 directed a “jury of twelve men” and that “the history of the jury system in New York from 1683 through 1937 finds women precluded from being jurors”); see also Taylor v. Louisiana, 419 U.S. 522, 523-24 (1975) (finding that under the Louisiana system, a woman could not serve on a jury unless she filed a written declaration of her willingness to do so, and that although 53% of the persons eligible for jury service were women, less than 1% of the 1,800 persons whose names were drawn from the jury wheel during a single year were women).


42. Id.

43. See id. at 131.

44. See Duren v, Missouri, 439 U.S. 355, 359-60 (1979) (summarizing the statutory provisions enacted by the states in the previous twenty years to exclude women from jury service by allowing for voluntary exemptions or exemptions for “good cause shown,” resulting in their underrepresentation on venires).

45. See J.E.B., 511 U.S. at 135-40 (recognizing that women had historically been peremptorily stricken based on state-sponsored group stereotypes, and “while the prejudicial attitudes toward women in this country have not been identical to those held toward racial minorities, the similarities . . . in some contexts ‘overpower those differences’”) (citations omitted); see also Melilli, supra note 9, at 456. Professor Melilli examined the published decisions of federal and state courts between 1986 and 1993, after *Batson* but before *J.E.B.* was decided, and found that 54% of peremptorily stricken women were successful in establishing a prima facie case of discrimination, although only 30% were successful in establishing a *Batson* violation. Id. at 463. He accounts for the discrepancy by noting that women were unlikely at that time to constitute a minority of the venire, so strikes against them would appear less suspicious. Id. at 465.

46. See, e.g., State v. Thompson, 206 P.2d 1037, 1039 (Ariz. 1949) (the “challenge is an arbitrary and capricious species . . . it is not essential. . . that any bias or prejudice . . . be shown.”); Lewis v. United States, 146 U.S. 370, 378 (1892).

47. 380 U.S. 202 (1965).
The challenge. The Swain Court also reasoned that all prospective jurors, regardless of their race or ethnicity, were subject equally to the peremptory challenge. Thus, to protect certain groups from exclusion by the strike while exposing other groups would be discriminatory in itself. In order to establish a discriminatory use of the strike that violated the Equal Protection Clause, the Swain Court required a defendant to demonstrate that the prosecutor had systematically, in case after case, used peremptories to exclude African-American jurors.

A number of courts following Swain held that a violation of the Equal Protection Clause could be established by proof of repeated striking of African-Americans over a number of cases. The burden of proof to establish this systematic exclusion was crippling. The defendant would have to investigate the race of the persons tried in the particular jurisdiction over a number of cases, the racial composition of the venire and the final jury, and both parties’ manner of exercising the challenge.

The Batson Court subsequently found that the “hunches” behind the strike could be, and often were, a pretext for the exclusion of persons due to constitutionally impermissible prejudice. The arbitrary aspect of the challenge also could increase the potential for abuse. Because it found prejudicially employed strikes to be repugnant to the ideals of a nondiscriminatory adversarial system, the Batson Court required a

48. Id. at 221. The Court added, with much foresight,

The challenge, pro tanto, would no longer be peremptory, each and every challenge being open to examination, either at the time of the challenge or at a hearing afterwards. The prosecutor’s judgment underlying each challenge would be subject to scrutiny for reasonableness and sincerity. And a great many uses of the challenge would be banned.

Id.

49. Id. at 220. This view has currently been resurrected. See Coburn R. Beck, Note, The Current State of the Peremptory Challenge, 39 WM. & MARY L. REV. 961, 999 (1998) (“Whereas wholesale discrimination against any group offends the Equal Protection Clause... [p]rotecting certain groups of people from being excluded by a peremptory when every other group is exposed to exclusion is discriminatory in itself.”).

50. Swain, 380 U.S. at 227. The Court held that the defendant had not met his burden in establishing systematic discrimination, even though no African-American had served on a jury in Swain’s Talladega County since about 1950. Id. at 226.

51. See, e.g., United States v. Jenkins, 701 F.2d 850, 859-60 (10th Cir. 1983); United States v. Pearson, 448 F.2d 1207 (5th Cir. 1971).


53. Id. at 93 n.17 (observing that “in jurisdictions where court records do not reflect the jurors’ race and where voir dire proceedings are not transcribed, the burden would be insurmountable”).

54. Id. at 98 (“[T]he reality of practice... amply shows that the challenge... unfortunately at times has been used to discriminate against black jurors.”).

55. See id. at 106 (Marshall, J., concurring).
showing that the strike was employed in an unbiased manner. It thus inquired into the basis of the strike. As the following decisions demonstrate, Batson and its progeny have resulted in the functional elimination of the peremptory challenge.

III. THE U.S. SUPREME COURT AND FEDERAL DECISIONS

The United States Supreme Court in Batson overruled Swain and held that racial discrimination in jury selection violated both the defendant's and excluded juror's rights under the Equal Protection Clause. The Batson prosecutor used his peremptory challenges to strike all four African-American persons on the venire. The Court held that the race-based challenges violated the defendant's equal protection rights by distorting the impartiality of the jury process. They also violated the equal protection rights of the excluded jurors by denying them participation in jury service. The Court also recognized that discriminatory challenges adversely affected the "entire community" because they undermined confidence in the fairness of the judicial system.

The Court formulated a three-step inquiry to establish the nondiscriminatory use of the challenged strike. First, the defendant has the burden of proof to show that he is a member of a "cognizable racial group" and that the prosecutor exercised his challenges on account of race. The burden then shifts to the prosecution to state a racially neutral explanation for striking the juror in question. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.

Justice Marshall, in his concurrence, urged that the peremptory challenge should be abolished from the criminal justice system because of its inherent potential for invidious discrimination. He observed that the peremptory had been flagrantly misused and that particular case-by-

---

56. Id. at 96-98.
57. Id. at 97-98.
58. See id. at 83.
59. Id. at 97-98.
60. Id. at 87.
61. See id. at 96. For example, a pattern of strikes against African-American jurors in a particular venire, or the prosecutor's questions during voir dire may refute or support an inference of discriminatory purpose. Id.
62. See id. at 97-98. The mere denial of a discriminatory motive would not be enough. Id. The prosecutor must give a "clear and reasonably specific" explanation of his "legitimate reasons" for exercising the challenge. See id. at 78 n.20 (quoting Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981)). The Supreme Court relaxed the second part of the Batson inquiry in Purkett v. Elem, 514 U.S. 765 (1995), discussed infra Part III.B.
63. See Batson, 476 U.S. at 98.
64. Id. at 107.
case inquiries into its basis would be insufficient to unmask racism.\textsuperscript{65} Foreseeing the difficult burden judges would assume in assessing prosecutors' justifications for the strike, he stated, "A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is ‘sullen’ or ‘distant’... A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported."\textsuperscript{66} Justice Marshall concluded that the peremptory challenge could be eliminated without impairing the constitutional guarantees of an impartial jury and fair trial, because its discriminatory potential was so severe as to distort those guarantees.\textsuperscript{67}

The Supreme Court continued to extend Batson's ambit by concentrating on the rights of jurors to participate in the jury process. In Powers v. Ohio,\textsuperscript{68} the Court held that the opponent of a strike need not be of the same race as the excluded juror. It reasoned that "[a]ctive discrimination by a prosecutor during [the jury selection] process condones violations of the United States Constitution within the very institution entrusted with its enforcement..."\textsuperscript{69} Although the white criminal defendant in Powers had not himself been denied equal protection, the Court held that he had third-party standing to challenge the denial of equal protection to seven stricken African-American jurors.\textsuperscript{70}

While Batson and Powers addressed the use of peremptory challenges in the criminal context, the Supreme Court extended Batson scrutiny to civil cases in Edmonson v. Leesville Concrete Co.\textsuperscript{71} It found that civil litigants constitute state actors, and that discriminatory exercises of peremptory challenges have the same effect on prospective jurors in the civil context as they do in the criminal context.\textsuperscript{72}

A. Protected Groups After Batson

The Supreme Court later expanded Batson's protections to include ethnicity\textsuperscript{73} and gender.\textsuperscript{74} This expansion resulted in speculation as to whether Batson applied to other classes receiving heightened scrutiny.\textsuperscript{75} Hernandez v. New York involved the peremptory challenges of two prospective bilingual Hispanic jurors because of their lack of proficiency in

\textsuperscript{65} Id. at 103-06.
\textsuperscript{66} Id. at 106.
\textsuperscript{67} Id. at 107.
\textsuperscript{68} 499 U.S. 400 (1991).
\textsuperscript{69} Id. at 412.
\textsuperscript{70} Id. at 415.
\textsuperscript{72} Id. at 631.
\textsuperscript{75} See infra notes 97-105 and accompanying text.
English. The Court determined that "for certain ethnic groups and for some communities, proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis."  

The Court was persuaded by the prosecutor’s explanation that the challenges rested neither on stereotypical assumptions about Hispanics nor on an intention to exclude Hispanic or bilingual jurors. It found the prosecutor’s explanation for the strike to be race-neutral because it rested on the jurors’ ability to accept the translator’s rendition of Spanish-language testimony as the final arbiter of the witnesses’ responses. Although the Court affirmed the defendant’s conviction, it warned, “[A] policy of striking all who speak a given language, without regard to the particular circumstances of the trial or the individual responses of the jurors, may be found by the trial judge to be a pretext for discrimination.”

The Court similarly prohibited gender-based peremptory strikes in J.E.B. v. Alabama. In J.E.B. the State used nine of its ten peremptory strikes to remove male jurors, resulting in an all-female jury in a paternity suit. The State reasoned that men “might be more sympathetic and receptive” to the arguments of a male defendant. The Court rejected this distinction as resting on invidious, “state-sponsored group stereotypes” that violated the equal protection rights of potential jurors. Although it recognized that women, unlike African-Americans, are not a numerical minority, the Court sought to avoid creating the impression that the judicial system “suppres[ed] full participation by one gender.” The Court thus continued its shift of focus from the defendant’s equal protection rights to the rights of the excluded jurors and the judicial system’s integrity. Foreseeing the scope of its decision, the Court stated that its holding did not imply the elimination of all peremptory

76. Hernandez, 500 U.S. at 371.
77. See id. at 361.
78. Id. Justice Stevens, in his dissent, stated that if the prosecutor’s concern was “valid and substantiated by the record, it would have supported a challenge for cause.” Id. at 379. He contended that the prosecutor’s failure to make a for-cause challenge should have disqualified him from advancing that concern as a justification for the peremptory. See id. The majority disagreed, stating, “While the reason offered by the prosecutor for a peremptory strike need not rise to the level of a challenge for cause. . . the fact that it corresponds to a valid for-cause challenge will demonstrate its race-neutral character.” Id. at 362-63.
79. Id. at 371-72.
81. Id. at 138.
82. Id. at 146.
83. Id. at 136.
84. Id. at 140.
85. Id.
challenges: “[p]arties still may remove jurors who they feel might be less acceptable than others on the panel; gender simply may not serve as a proxy for bias.”

Federal and state courts subsequently have expanded the definition of a “cognizable racial group” to include both race and ethnic affiliation, such as Italian-Americans, Native-Americans, and Asian-Americans. However, federal courts have rejected certain groups as being cognizable and distinct, such as city residents, young adults and college students, non-registered voters, blue-collar workers, young adults, and “less-educated persons.” The J.E.B. Court was careful to note that parties may exercise their peremptory challenges to remove from the venire “any group or class of individuals normally subject to ‘rational basis’ review.” Therefore, the scope of the Court’s decisions generally has been limited to racial, ethnic, and gender-based strikes, although their extension to classifications or characteristics that would satisfy heightened scrutiny remains an open question.

_Batson_ and _J.E.B._ may be seen as attempts to wipe out the remnants of widespread, historical, discriminatory practices. Because there is no

86. _Id._ at 143.
87. _See_ United States v. Biaggi, 853 F.2d 89, 95 (2d Cir. 1988) (Italian-Americans “share a common experience and culture, often share the same religious and culinary practices, often have commonly identifiable surnames, and have been subject to stereotyping.”). _But see_ United States v. Bucci, 839 F.2d 825, 833 (1st Cir. 1988) (holding that the ethnic group in question must be subject to discriminatory treatment before it can qualify as a “cognizable group”).
88. _See_ United States v. Chalan, 812 F.2d 1302 (10th Cir. 1987).
89. _See_ United States v. Sneed, 34 F.3d 1570 (10th Cir. 1994).
90. _See_ United States v. Canfield, 879 F.2d 446 (8th Cir. 1989). The Court in _J.E.B._ v. Alabama, 511 U.S. 127, 134 (1994), noted that the Sixth Amendment principles applied in _Taylor_ v. Louisiana, 419 U.S. 522 (1975), in determining which groups are distinct for fair cross-section purposes, are “consistent with the heightened equal protection scrutiny afforded gender-based classifications.”
91. _See_ Ford v. Seabold, 841 F.2d 677 (6th Cir. 1988).
92. _See_ United States v. Afflerbach, 754 F.2d 866 (10th Cir. 1985).
93. _See_ Anaya v. Hansen, 781 F.2d 1 (1st Cir. 1986).
94. _See id._ at 3.
95. _See id._
96. _J.E.B._, 511 U.S. at 143.
97. _See, e.g.,_ Matthew Crehan, _The Disability-Based Peremptory Challenge: Does it Validate Discrimination Against Blind Potential Jurors?_, 25 KY. L. REV. 531, 544 (1998). Judge Crehan states that “[t]he death knell has not been sounded for peremptory challenges at least in relation to the disabled,” but concludes that it is highly unlikely that the disabled compose a suspect class entitled them to the same heightened-scrutiny analysis applicable to minorities and women. _Id._ at 542. He observed that although fifteen states specifically prohibit the exclusion or disqualification of prospective jurors on the basis of disability, some of them have statutes or rules allowing for a challenge if the disability would “impair the rendering of satisfactory jury service.” _Id._ at 536; _see also_ Andrew D. Leipold, _Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation_, 86 GEO. L.J. 945 (1998) (noting that “it is difficult to explain why gender based strikes . . . are barred by the Equal Protection Clause, but viewpoint discrimination . . . is not”).
comparable history of discrimination against many of the groups that often are subject to peremptory strikes (e.g. "liberals," friends of attorneys or police officers, or people recently divorced), the use of such challenges on them generally would not, absent other protected factors, trigger the *Batson* inquiry.\(^9\) However, peremptory strikes against white men also could be prohibited on racial or gender lines,\(^9\) even though there is no comparable history of discrimination. Although current decisions generally have limited the initial *Batson* inquiry to racial, ethnic, or gender classifications,\(^10\) equal protection jurisprudence logically would allow a larger application. As Justices Burger and Rehnquist stated in their dissenting opinion in *Batson*:

[I]f conventional equal protection principles apply, then presumably defendants could object to exclusions on the basis of not only race, but also sex...age...religious or political affiliation...mental capacity...number of children...living arrangements...employment in a particular industry...or profession. In short, it is quite probable that every peremptory challenge could be objected to on the basis that, because it excluded a venireman who had some characteristics not shared by the remaining members of the venire, it constituted a "classification" subject to equal protection scrutiny.\(^10\)

Some courts have included the potential juror's religion in the type of classification properly subject to *Batson* scrutiny.\(^10\) The Supreme Court denied certiorari of a decision from the Michigan Supreme Court in *Davis v. Minnesota* which allowed the peremptory challenge of a Jehovah's Witness on religious grounds.\(^10\) In denying certiorari, Justice Ginsburg noted that religious affiliations are not as self-evident as race or gender and that questions concerning a juror's religious affiliation are

---

98. See Leipold, *supra* note 97, at 976.
99. See *J.E.B.*, 511 U.S. at 127; Georgia v. McCollum, 505 U.S. 42, 62 n.2 (1992) (Thomas, J., concurring) ("Today, we decide only that white defendants may not strike black veniremen on the basis of race. Eventually, we will have to decide whether black defendants may strike white veniremen...Although...the issue technically remains open, it is difficult to see how the result could be different if the defendants here were black.")
100. See *Crehan*, *supra* note 97, at 546 ("[I]t appears that the unrestricted peremptory challenge is alive and well in all but racial and gender strikes and will stay that way for the foreseeable future.").
102. See United States v. Somerstein, 959 F. Supp. 592 (E.D.N.Y. 1997); Joseph v. State, 636 So. 2d 777 (Fla. 3d DCA 1994); State v. Gilmore, 511 A.2d 1150, 1159 n.3 (N.J. 1986) (applying equal protection analysis to peremptory challenges on the basis of religion, national origin, race, or gender). The *Somerstein* court concluded that Jewish panel members could also be classified as a "race" based on their ancestry or ethnic characteristics, and that "whether persons of the Jewish faith are considered a religion or a race or both...the *Batson* rule does apply." *Somerstein*, 959 F. Supp. at 595.
ordinarily improper and prejudicial.104 However, in his dissent from the denial of certiorari, Justice Thomas stated, "[G]iven the Court's rationale in *J.E.B.*, no principled reason immediately appears for declining to apply *Batson* to any strike based on a classification that is accorded heightened scrutiny under the Equal Protection Clause."105

In *United States v. Somerstein*,106 one federal court recently applied *Davis* to conclude that the *Batson* rule would apply to religious classifications, such as persons of the Jewish faith.107 It specified, however, that in order to uphold such a strike against a *Batson* challenge, the juror's religion must be relevant to the issues of the case, and the inquiry should involve only the juror, and not the juror's family or friends.108

The *Somerstein* case illustrates the difficulty in challenging jurors based upon their religious affiliation. In that case, the criminal defendants, kosher caterers, objected to the prosecutor's challenge of one juror, James Lefkowitz, because of his "quintessential Jewish name" and his father's position as president of "American Palestine."109 The court stated that the defendants satisfied their burden to establish a prima facie case of religious discrimination in his case.110

The court also found that three of the defendants' objections to the prosecutor's challenges failed to state a prima facie case of discrimination.111 One juror described herself as "Irish/German" and her husband as "Hebrew, Polish, and Russian;" the court found this description was insufficient to establish that the juror was of the Jewish faith.112 Another juror, named Meyer, had "attended kosher catered events."113 The court noted that many people in the Eastern District of New York had attended a kosher catered event but were not of the Jewish faith. The defendants again failed to state a prima facie case of discrimination.114 The court also denied the defendant's objection to a juror who described herself as "American (German, Lithuanian, Polish)" and whose nephew was Bar Mitzvahed.115 The court stated that either the juror was of Jewish ancestry, "a highly unlikely supposition, or . . . her brother married a Jewish

---

104. *Id.*
105. *Id.* at 1117.
107. *Id.* at 595.
108. *Id.* at 595-96.
109. *Id.* at 596.
110. *Id.* However, the prosecutor's justification, that the proposed juror read a book throughout the entire voir dire, thus demonstrating a lack of interest in the criminal proceeding, was sufficient to demonstrate a facially valid reason for the challenge. *Id.* at 597.
111. *Id.* at 596-97.
112. See *id.* at 596.
113. *Id.* at 597.
114. See *id.*
115. *Id.*
woman. Assuming the latter to be the case, the Court again express[es] its grave doubt that a Batson challenge based on religion could ever be applied to a panel member's relationship with a third party''.

As Somerstein illustrates, a prima facie case of religious discrimination based on surname or descent could be greatly misleading as to the prospective juror's religion. Because Davis implies that direct questions would be inappropriate to establish a potential juror's religious affiliation, the court is limited by such factors. Although the Somerstein court was careful to limit its rule to avoid opening a "pandora's box" of factual disputes and hearings on the issue, it ultimately had to speculate as to whether several of the challenged jurors were within the class it sought to protect. Such speculation further reduces the use of the challenge to a guessing game, which undermines the integrity of the judicial process that Batson sought to protect.

A further logical extension of the Batson doctrine would include applying its protections to jurors' other First Amendment rights. Once the door is open to protecting jurors' religious freedoms, then their speech and association freedoms should similarly be protected. The fact that litigants have generally been free to peremptorily strike jurors based upon their speech and affiliation implicitly assumes that the defendant's Sixth Amendment right to an impartial jury, combined with the government's right to preserve public confidence in the judicial system, outweigh the jurors' First Amendment rights.

Professor Andrew Leipold challenges this assumption, contending that peremptorily striking jurors because of their protected activities should not withstand strict scrutiny. He reasons that the government's and the defendant's interests "would fail to tip the balance in favor of peremptories," because peremptories are poor predictors of jurors' decisions and, therefore, are not narrowly tailored to serving the governmental interests. State and federal courts' willingness to allow peremptories based upon potential jurors' associations and beliefs also undermines public confidence in the integrity of the judicial process, because jurors understandably wonder why such associations justify

116. Id.
117. See id. at 594, 595.
118. See Cheryl G. Bader, Batson Meets the First Amendment: Prohibiting Peremptory Challenges That Violate a Prospective Juror's Speech and Association Rights, 24 Hofstra L. Rev. 567, 616 (1996) ("A prohibition on the exercise of peremptory challenges arising from the prospective juror's speech and association practices reduces the potential for stigmatizing jurors and chilling the exercise of such rights, and thereby minimizes the risk of undermining the value we attach to the First Amendment freedoms.").
119. Leipold, supra note 97, at 981-86.
120. Id. at 982.
121. Id. at 984.
removal. Excused veniremen leave the courtroom thinking that the trial process is trivial, because it rests on stereotypical assumptions that their "liberal" views or membership in associations keep them from properly assessing the evidence.\footnote{122} As a practical matter, the peremptory challenge would be very difficult to exercise if a prospective juror’s beliefs and association rights were subject to Batson’s protections.\footnote{123} Litigants could still question jurors about their beliefs and affiliations to lay the groundwork for a challenge for cause, but most of the categories that currently support the use of the strike would be foreclosed.

B. Nondiscriminatory Justifications for the Peremptory Challenge

The Supreme Court in Purkett v. Elem\footnote{124} relaxed the second stage of Batson’s burden-shifting analysis, resulting in conflicts among lower courts as to whether particular justifications in using the challenge could withstand equal protection scrutiny. The prosecutor in Elem rejected two prospective African-American jurors because they had mustaches and goatees, and counsel for the African-American defendant objected.\footnote{125} Because the veniremembers satisfied the first step of the Batson test,\footnote{126} the Court focused on the second part of the analysis — the facial valid-

\footnote{122}{ Judge Hoffman, supra note 17, at 861-62, observes,} I cannot count the number of times I have seen prospective jurors flash me a look of betrayal when, after they have passed through the gauntlet of challenges for cause, they have been excused peremptorily because of their educational level or their occupation or the kind of car they drive.

\footnote{123}{ See Melilli, supra note 9, 487-98 (listing sixteen reasons that lawyers typically use as a basis for the peremptory. These reasons include close friends or relatives having prior criminal activity, employment, marital status, liberal status, religion, membership in an African-American organization, and reading Rolling Stone magazine). Striking a juror based on his viewpoints about gun ownership could interfere with his free speech rights, because the government is depriving him of his right to jury service based on the content of his speech. See generally R.A.V. v. City of St. Paul, 505 U.S. 377 (1992). A peremptory strike based upon the juror’s marital status could similarly implicate his privacy and family rights. See Littlejohn v. Rose, 768 F.2d 765, 769 (6th Cir. 1985) (holding that a public school teacher could not be denied the renewal of employment because of an impending divorce, as decisions regarding marital status are protected by the right to privacy). See also Leipold, supra note 97, at 979-80 (listing these rights and additional rights implicated by peremptory strikes, such as the right to petition the government, when the juror is stricken based upon his filing a prior lawsuit, and the right of free association, when the juror belongs to a particular political group). “In each case, the benefit of jury service is denied because the potential juror has expressed a view; taken an action, or associated with others in a way that a state actor disfavors.” Id. (footnotes omitted).}

\footnote{124}{ 514 U.S. 765 (1995) (per curiam).}

\footnote{125}{ See id. at 766.}

\footnote{126}{ See id. at 767. The state trial judge had initially rejected the defendant’s Batson objection on the ground that the defendant had failed at the first step of the Batson inquiry, but, as Justice Stevens noted, “Everyone now agrees that finding was incorrect.” Id. at 771, 775 (Stevens, J., dissenting). Justices Stevens and Breyer found that the majority opinion “implicitly ratifies the Court of Appeals’ decision to evaluate on its own whether the prosecutor had satisfied step two.” Id. at 776.}
ity of the prosecutor's explanation. While the *Batson* Court held that the prosecutor must give clear, specific, and "legitimate reasons for exercising the challenge," the *Purkett* Court held that the litigant's explanation for the challenge did not have to be "persuasive, or even plausible," for it to be legitimate. A legitimate reason is not one "that makes sense, but a reason that does not deny equal protection." Unless discriminatory intent is inherent in the prosecutor's explanation, the justification will be deemed race-neutral.

The persuasiveness of the proffered reason is only relevant in the third part of the analysis. "At that stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination . . . the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." The Court added that, in the third stage, the "whole focus [is not] upon the reasonableness of the asserted nonracial motive . . . [but] rather . . . the genuineness of the motive . . . a finding which turns primarily on an assessment of credibility."

The *Purkett* prosecutor stated that he struck the jurors because of their "mustache and goatee type beard[s]. Those are the only two people on the jury . . . with the facial hair . . . I don't like the way they looked . . ." The Court stated that this explanation was "race-neutral and satisfie[d] the prosecution's step two burden of articulating a nondiscriminatory reason for the strike . . . Thus, the inquiry properly proceeded to step three, where the state court found that the prosecutor was not motivated by discriminatory intent." The Court reversed and remanded the case because the Court of Appeals had erroneously focused on the reasonableness, rather than on the genuineness, of the asserted non-racial motive.

The *Purkett* decision has been criticized as furthering hidden discrimination in jury selection, because any reason, plausible or implausible, would satisfy its second step. Some scholars initially predicted

129. *id*. at 769.
130. *See id.* at 768.
131. *id*.
133. *id*. at 766.
134. *id*. at 769.
135. *id*. at 769-70.
136. *See, e.g., Beck*, supra note 49, at 996, stating, "[T]he Court may settle for the . . . more discrete method of turning a blind eye towards certain illicit challenges." He also notes that it was not difficult even under *Batson's* more stringent test to satisfy the explanation requirement: "one study of hundreds of lower court cases in the five years following *Batson* revealed that judges ruled only a small fraction of prosecutors' neutral explanations to be insufficient and invalid." *Id.*
that the decision signaled a retreat from earlier post-*Batson* jurisprudence and a return to a more unfettered use of the challenge.\(^{137}\) The practical result has been a conflict among lower courts in determining whether particular justifications are in fact pretexts for discrimination or presumptively non-pretextual.\(^{138}\)

For example, striking an African-American venireperson for lack of "eyeball contact" has been held not to be pretextual,\(^{139}\) but striking an African American venireperson based on "feelings . . . that she would not be a good juror" was pretextual.\(^{140}\) Striking African-American venirepersons for lack of business experience and education was not pretextual,\(^{141}\) but striking African-American venirepersons for living in a low-income neighborhood was pretextual.\(^{142}\) As a result, the New York appellate courts have drawn up guidelines to help trial courts apply *Batson* 's second step. These guidelines include reasons that will be presumed pretextual and reasons that will be presumed non-pretextual.\(^ {143}\)

*Minetos v. City University of New York*\(^ {144}\) is illustrative of the "bedevilling problems associated with peremptory challenges which, by their very nature, invite corruption of the judicial process."\(^ {145}\) In that case, the plaintiff claimed that the defendants had committed a *Batson* error by using three peremptories to exclude two African-Americans and

---

\(^{137}\) See id. at 996; see also Joan E. Imbriani, *Fourteenth Amendment, Section One-Equal Protection Clause-Prosecution's Explanation for Exercising Peremptory Challenges Need Only Be Race-Neutral, Not Persuasive or Plausible, Where Intentional Racial Discrimination Is Alleged*, 6 SETON HALL CONST. L.J. 911, 915 (1996).


\(^{139}\) See Splunge v. Clark, 960 F.2d 705, 708-09 (7th Cir. 1992).

\(^{140}\) See United States v. Tucker, 836 F.2d 334, 338-40 (7th Cir. 1988).

\(^{141}\) See United States v. Bishop, 959 F.2d 820, 821, 827 (9th Cir. 1992).

\(^{142}\) See *Minetos v. City University of New York*, 925 F. Supp. 177, 183 (S.D.N.Y. 1996). Under the New York Guidelines, reasons that will be presumed pretextual include:

-the attorney's concern for a balanced jury . . . the juror's being too old or too young
 . . . the juror's living in the same or an adjacent community . . . the attorney's feeling that the juror 'did not appeal to him or her' . . . the attorney's lack of time to question the juror . . . [and] the juror's clothing, where other jurors' clothing was not an issue.

*Id.* Reasons that will be presumed non-pretextual include "the juror's having a job that is police related . . . the juror gives inconsistent statements regarding his or her leanings . . . prior criminal jury service by the juror . . . the juror's tardiness . . . the juror's familiarity with the crime scene . . . the juror's criminal record . . . [and] the juror's related expertise." *Id.*


\(^{144}\) *Id.* at 183.
one Hispanic from the prospective jury, and the defendants objected that the plaintiff had used all of her peremptories to strike only white males.\footnote{146} The defendants offered the following explanations for their peremptory challenges:

The individual . . . indicated that he didn’t feel that people . . . needed to speak English on the job. And the question of . . . foreign language is right at the heart of this case . . . With respect to the black woman . . . she was a teacher in the . . . public school system which is exactly what the plaintiff is . . . [The third juror] is a blue collar worker with no office experience whatsoever, which is a factor for us.\footnote{147}

The court found that these explanations were pretextual because the defendants exclusively struck Hispanic and African American venirepersons, which created an unmistakable pattern of discrimination.\footnote{148} It also found that the plaintiff’s proffered reason for striking the white males, “to exclude individuals who [were] viewed as pro-management,” was not credible. Because the New York City business community is “disproportionately white . . . the ‘promanagement’ excuse offers easy cover for those with discriminatory motives in jury selection.”\footnote{149} Although the plaintiff’s and defendants’ justifications for their peremptories appeared plausible, the court was unwilling to accept them. It held that, given the plaintiff’s own Batson error, equity did not favor granting her a new trial based on the defendant’s Batson violations.\footnote{150}

Judge Motley observed that the New York Guidelines effectively provided attorneys a “how-to guide for defeating Batson challenges.”\footnote{151} Such guidelines allow litigants to mask their discriminatory motives by using non-genuine justifications that would survive judicial review. Although the Purkett Court attempted to prevent this practice by requiring the trial court to assess the challenger’s genuineness and plausibility,\footnote{152} a court would be extremely reluctant to second-guess a

\footnotesize{146. Id. at 180.  
147. Id. at 181, 182. The defendant considered these characteristics to be “factors” because the plaintiff, an office assistant, had brought suit against a university alleging, inter alia, discrimination on the basis of origin and Hispanic accent in violation of Title VII.  
148. Id. at 182.  
149. Id. The court found the plaintiff’s “promanagement” justification for striking white professional veniremembers to be presumptively pretextual based in part on the New York Guidelines, which state that striking a juror because of his employment will be presumed pretextual. Id. at 184. The Guidelines also state that striking a juror because he “is employed in a creative field” will be presumed nonpretextual. See id. Because employment in a creative field is a subset of employment in general, it is difficult to see the logic in this distinction.  
150. Id. at 185.  
151. Id; see also Greg B. Enos, Discriminatory Peremptory Strikes in Civil Trials, 58 Tex. B. J. 228, 232 (1995) (“[A]n intelligent attorney can defeat a Batson challenge by dreaming up any excuse that is not based on racial, religious, or other prohibited modes of discrimination.”).  
justification that is presumptively non-pretextual. Judge Motley used this reasoning to conclude that the Batson and Purkett protections are “illusory” because they fail to “truly unmask racial discrimination.” Judge Motley also added that “peremptory challenges per se violate equal protection,” joining Justice Marshall in advocating a ban on their use.

A judge’s failure to conduct a two-step Batson inquiry also can lead to reversible error so that defense counsel can take advantage of this failure to obtain a new trial. In U.S. v. Huey, counsel for a white criminal defendant, Huey, peremptorily struck five African-American venirepersons. When the co-defendant, Garcia, made Batson objections to the strikes, the court required no response or explanation from Huey’s counsel and allowed the strikes. After the case proceeded to trial, both defendants were convicted. They appealed their conviction on the grounds that the jury selection process violated the equal protection rights of the five excluded jurors.

In reversing the convictions, the appellate court found that the trial court, by failing to request a race-neutral explanation, had failed to protect the rights of the excluded jurors. The court noted, “We are not unaware that there is some irony in reversing Huey’s conviction given that it was his counsel who made the discriminatory strikes. We are convinced, however, that this result is consistent with the teachings of Batson and its progeny.” The Huey case encourages defense attorneys, when zealously representing their clients, to exercise discriminatory peremptories in the hope that the judge will not conduct an inquiry that would result in reversible error. Huey thus rewards discriminatory behavior on the part of defense attorneys, while attempting to protect the rights of excluded jurors.

The Seventh Circuit expressly disagreed with Huey in U.S. v. Boyd when it rejected a defendant’s contention that he was entitled to a new trial based upon an unconstitutional challenge exercised by his counsel. The court stated that “giving a defendant a new trial because of

---

154. Id.
155. See U.S. v. Huey, 76 F.3d 638 (5th Cir. 1996).
156. 76 F.3d 638 (5th Cir. 1996).
157. Id. at 638.
158. See id. at 640.
159. See id.
160. See id.
161. Id. at 641.
162. Id.
163. See generally Audrey M. Fried, Fulfilling the Promise of Batson: Protecting Jurors From the Use of Race-Based Peremptory Challenges by Defense Counsel, 64 U. CHI. L. REV. 1311 (1997).
164. 86 F.3d 719, 721 (7th Cir. 1996).
his own violation of the Constitution would make a laughingstock of the judicial process.”

IV. THE PEREMPTORY’S FUNCTIONAL ELIMINATION IN FLORIDA

Florida courts have been active in attempting to prevent the discriminatory use of peremptory challenges prior to the Supreme Court’s decision in Batson v. Kentucky. As the discussion below demonstrates, the courts’ vigor in recognizing the existence of a prima facie case and in disallowing strikes, based upon findings of pretext, has accelerated the process of destroying the peremptory as an effective tool of jury selection.

A. History of the Challenge in Florida

Florida courts generally have provided litigants greater protection than federal courts in attempting to prevent discriminatory jury selection practices. The Florida Supreme Court has employed a burden-shifting analysis since 1984, which has resulted in a complex and conflicting body of case law. Prior to Batson, the court in State v. Neil decided that the Florida Constitution recognized a protection against improper bias in jury selection that exceeded the current federal guarantees. It established that a party challenging the opponent’s use of a peremptory challenge must “make a timely objection and demonstrate on the record that the challenged persons are members of a distinct racial group and that there is a strong likelihood that they have been challenged solely because of their race.” If the court finds that such a likelihood exists, the burden shifts to the challenger to show that the strikes were not race-based. If the party has been challenging jurors on the basis of race, then the court should dismiss the jury pool and start voir dire again with a new pool.

165. Id. at 725.
167. 457 So. 2d 481 (Fla. 1984), clarified sub nom., State v. Castillo, 486 So. 2d 565 (Fla. 1986).
168. Neil, 457 So. 2d at 486.
169. Id.
170. See id. at 486-87. The social ramifications of race-based strikes are particularly evident in areas with a history of racial tension. See Albert W. Alschuler, The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts, 56 U. Ch. L. Rev. 153, 195-96 (1989) (describing riots and public outrage engendered by two trials in Miami, Florida, in which African-American jurors were peremptorily stricken by white defendants accused of racial assault).
171. See Neil, 457 So.2d at 487. The court clarified Neil’s application in State v. Castillo, 486 So. 2d 565 (Fla. 1986), where it held that the Neil rule applied to all cases pending on direct appeal when Neil became final. Castillo, 486 So.2d at 565. It also stated that a timely objection
The Florida Supreme Court clarified the Neil burden-shifting analysis in State v. Slappy. It required first that a party must object to his opponent’s use of the peremptory challenge. Once the court determines that the complaining party’s objection is proper and not frivolous, the burden of proof shifts, and the opponent must rebut the inference that its use of the peremptory challenge is discriminatory. This rebuttal must consist of a “clear and reasonably specific” racially neutral explanation of “legitimate reasons” for the use of the peremptory challenges.

The Slappy prosecutor used four of the state’s six peremptory challenges to exclude African-Americans from the panel, although all four had indicated an ability to serve as fair and impartial jurors. The state explained its striking of two of the African-American jurors by claiming that they were teachers, which indicated a “degree of liberalism” and sympathy for “people who go astray.” Although the state’s explanation that teachers were often liberals was superficially reasonable, the prosecutor did not question the challenged jurors to demonstrate that they were in fact liberal. The court stated, “If they indeed possessed this trait, the state could have established it by a few questions taking very little of the court’s time.” The court stressed the necessity for record-support to establish the absence of pretext, based on answers provided during voir dire or other facts on the record.

The Slappy court was sensitive to Justice Marshall’s concern in Batson that prevarication and unconscious racism in the strike’s use would make its protections illusory. Its requirement for record-support has led to lengthy questioning during voir dire in an attempt to establish whether particular justifications are pretextual. The decision must be raised prior to the swearing of the jury: “the issue being presented for the first time on a motion for mistrial, after the jury is sworn, is not timely.”

172. 522 So. 2d 18 (Fla. 1988).
173. See id. at 22.
174. See id. The court listed five factors which would weigh against the legitimacy of a race-neutral explanation: (1) the alleged group bias was not shared by the juror in question, (2) the state failed to examine or perfunctorily examined the juror, assuming neither the court nor opposing counsel had questioned the juror, (3) the juror was singled out through questions designed to provoke a particular response, (4) the proffered reason was unrelated to the facts of the case, and (5) the proffered reasons were equally applicable to jurors who were not challenged. Id.
175. Id. at 19-20.
176. Id. at 23.
177. Id. It also noted that “liberalism” also reasonably could be construed as favorable to the defense’s position, rather than the prosecutor’s, because liberals arguably “are more likely to convict someone for violating gun-control laws.” Id. The court was careful to emphasize that the trial court’s function is not to substitute its judgment for that of the prosecutor in determining reasonableness, but merely to decide whether “some reasonable persons would agree” with the state’s assertions. Id.
178. Id. at 22-23.
led to administrative difficulties,\textsuperscript{179} which were exacerbated by the Florida courts’ wide latitude in defining the cognizable group requirement.

1. PROTECTED GROUPS IN FLORIDA

Florida courts have been expansive since \textit{Batson} and \textit{Neil} in determining which classes of venirepersons constitute protected groups. The Florida Supreme Court found Hispanics to be a cognizable ethnic group in \textit{State v. Alen}.\textsuperscript{180} It relied heavily upon the United States Supreme Court’s decision in \textit{Hernandez v. Texas},\textsuperscript{181} which held that persons of Mexican descent were a separate ethnic class for purposes of the peremptory challenge. The \textit{Alen} court established a “two-prong” test to determine whether an ethnic group fits into a cognizable class: first, whether the group’s population is large enough that the general community recognizes it as an identifiable group, and second, whether the group is internally cohesive, based on attitudes or experiences that may not be adequately represented by other segments of society.\textsuperscript{182} The court found that Hispanics satisfied both prongs.\textsuperscript{183} It noted, however, that national origin, native language, and surname are not dispositive in establishing a person’s ethnicity.\textsuperscript{184} The trial court has discretion to make this determination when an objection is made to a peremptory challenge.\textsuperscript{185}

A juror’s religious affiliation also may satisfy the cognizable ethnic class requirement in Florida.\textsuperscript{186} In \textit{Joseph v. State},\textsuperscript{187} the prosecutor sought to excuse a venireperson, Ms. Friedman, and the defendant’s attorney objected, based upon the \textit{Neil/Slappy} decisions. The appellate court applied the two-prong test set forth in \textit{Alen} and recognized Jewish persons as a cognizable class.\textsuperscript{188} It looked at the Jewish population in

\begin{itemize}
\item \textsuperscript{179} See, e.g., Joseph A. Tringali, \textit{The Challenge of Peremptory Challenges, A Brief Study in the Evolution of the Law}, FLA. B. J., June 1997, at 100, 102 (“The now designated \textit{Neil/Slappy} rule was troublesome from the start simply because most lawyers are not very reasonable when picking a jury.”).
\item \textsuperscript{180} 616 So. 2d 452, 453 (Fla. 1993).
\item \textsuperscript{181} 347 U.S. 475, 480 (1954).
\item \textsuperscript{182} \textit{Alen}, 616 So. 2d at 454.
\item \textsuperscript{183} Id. at 455.
\item \textsuperscript{184} Id.
\item \textsuperscript{185} See id. at 456. Gender based peremptories were similarly held to be constitutionally impermissible in \textit{Abshire v. State}, 642 So. 2d 542, 544 (Fla. 1994). A male defendant objected to the prosecution’s exclusion of women jurors after he said, “Judge, if we can get something besides women and former police officers, we’ll get us a panel.” \textit{Id.} at 543 n.4. The court held that these comments violated the prospective juror’s and the defendant’s rights to equal protection. \textit{Id.} at 544.
\item \textsuperscript{186} See \textit{Joseph v. State}, 636 So. 2d 777, 780 (Fla. 3d DCA 1994).
\item \textsuperscript{187} 636 So. 2d 777 (Fla. 3d DCA 1994).
\item \textsuperscript{188} \textit{Id.} at 780.
\end{itemize}
Dade County, from which the venire was drawn, and found that they comprised approximately ten percent of the population, thus satisfying the first prong of the *Alen* test. It also noted that shared religious beliefs may establish the characteristics of an ethnic group. The court consequently found the prosecutor’s peremptory challenge to be a proxy for discrimination, and it remanded the case for a new trial.

The court recognized a number of problems in its *Joseph* decision, stating that extending *Batson* to religious affiliations “may be characterized by some as another nail in the coffin of the peremptory challenge system.” It noted the difficulties in determining whether a venireperson belongs to a particular religious group, and it allowed reliance on criteria besides surname to determine whether a juror is Jewish, “such as the wearing of a yarmulke, a six-pointed star, or the distinctive attire of the Hasidic Jews.”

The *Joseph* and *Alen* decisions require litigants to be aware of the ethnic composition of their particular community, and thus turn judges and attorneys into amateur anthropologists in assessing the existence of identifiable ethnic groups. These cases raise problems in identifying whether Irish-Americans would be an identifiable group in Boston, but not in Honolulu, and whether groups that are “internally cohesive” nonetheless do not comprise a significant population in the general community. These problems increase substantially when attorneys must rely on surname or attire to establish these factors.

2. NONDISCRIMINATORY JUSTIFICATIONS

The *Slappy* decision’s administrative burdens during voir dire were increased by the United States Supreme Court’s decision in *Purkett*. In *Melbourne v. State* the Florida Supreme Court refined its *Neil/Slappy* requirements to establish new guidelines in exercising peremptory challenges. First, the party objecting to the strike must make a timely

---

189. Id.
190. Id.
191. Id.
192. Id. at 781.
193. Id. at 780. Reliance on surname and descent, absent other criteria, can be misleading and speculative, when direct questioning on the issue is inappropriate. See United States v. Somerstein, 959 F. Supp. 592, 595 (E.D.N.Y. 1997); United States v. Greer, 968 F.2d 433, 438 (5th Cir. 1992) (“where, as here, the court has inquired adequately into the jurors’ possible biases, that is, in a manner reasonably calculated to identify any bias, the failure to inquire that the prospective jurors of a particular religion identify themselves does not constitute an abuse of discretion nor render the trial constitutionally suspect”); see also supra notes 106-17 and accompanying text.
194. 679 So. 2d 759 (Fla. 1996).
195. Id. at 764.
objection, state that the strike is racially motivated, and request the court
to ask the strike’s proponent to justify it.196 At the second stage, the
burden of production shifts to the strike’s proponent to provide a race-
neutral explanation.197 Third, if the explanation is facially race-neutral,
and the court believes that the explanation is not a pretext given the
circumstances surrounding the strike, it will be sustained.198 The court
must focus on the genuineness of the explanation, rather than on its rea-
sonableness.199 The burden of persuasion as to the strike’s discrimina-
tory use rests with the opponent of the strike, and peremptories are
presumed to be exercised in a nondiscriminatory manner.200 Even when
the inquiry is unfavorable, the litigant must renew his objection before
the jury is sworn to preserve the issue for appeal.201 The Melbourne
decision shifted the court’s focus from the reasonableness of the pro-
ffered explanation, as required by Slappy, to its credibility, as required by
Purkett.202

Florida courts generally have been vigorous in finding Batson viola-
tions under the Neil/Slappy inquiry.203 In a survey period between
1986 and 1993, 91% of complainants were able to establish a prima facie
case of racial or ethnic discrimination in jury selection.204 Of those, 68.18%
were able to successfully establish a Batson violation based upon the inadequacy of the proffered explanation.205 The Supreme Court’s relaxation of the second stage inquiry in Purkett, com-
bined with the latitude reviewing courts give to the trial court’s determi-

---

196. See id.
197. See id.
198. See id.
199. See id.
200. See id. The need for public confidence in the judicial system, preserved by this
 presumption, is especially high in cases involving race-related crimes. See Georgia v. McCollum,
201. See Melbourne, 679 So. 2d at 765.
202. The Third District Court of Appeal addressed the remarkably low threshold established by
Purkett when it stated,
[A]s an extreme example to make what appears to be an illusive point, if in response
to a Melbourne inquiry the proponent of a peremptory strike were to explain that he
or she believed the juror in question was an extra-terrestrial and consequently not
sufficiently familiar with life on the planet Earth to serve as a juror, the reason
would be facially race-neutral and valid because it is not race-based. The absurdity
or implausibility of the reason is irrelevant to the step two analysis.
Johnson v. State, 706 So. 2d 401, 403 n.1 (Fla. 3d DCA 1998).
203. See Melilli, supra note 9, at 470 (“Of the 191 successful claims [between 1986 and 1993]
111 (or 58.7%) of these claims came from just five states: Alabama, Florida, Illinois, New York,
and Texas.”).
204. See id. at 466 (concluding that the prima facie case showing was a minor obstacle in
Florida courts).
205. See id. at 469.
nation of pretext, show the increasing difficulty litigants encounter in successfully using the strike in Florida.

The Florida Supreme Court recently addressed both the cognizable class and race-neutral explanation requirements in State v. Franqui. It relaxed the burden in establishing record support that the challenged juror is a member of a distinct racial group. The Franqui defendant’s counsel, Mr. Diaz, used his peremptory strike against a prospective juror named Diaz. The prosecutor objected, stating, “Are they striking Aurelio Diaz? State would challenge that strike.” The defense counsel justified the strike by saying, “I don’t like him.” The trial court disallowed the strike because the defense did not provide a race-neutral reason for his exercise of the challenge.

The Florida Supreme Court held that the trial court properly disallowed the defendant’s peremptory challenge because it “clearly understood that the objection to the challenge of a venireperson in Dade County, who was born and raised in Havana, Cuba, and whose name was Aurelio Diaz, was being made on racial grounds.” The court found this to be “especially true” because there was never any contention that Diaz was not a member of a cognizable minority.

It also found that the justification, “I don’t like him,” may have appeared to be race-neutral, but the transcript yielded no obvious reason for disqualification. Diaz had been questioned extensively by the court, the prosecutor, and defense counsel, and the lack of record-support for disqualification showed that the defense counsel’s reasons for the strike were not credible.

Justice Anstead dissented in part, stating that even if the State had noted juror Diaz’s ethnicity or race for the record, “there was . . . no reason for the trial court to require Franqui, a Cuban, male defendant, to provide a race-neutral justification for striking prospective juror Diaz.

206. See Johnson, 706 So. 2d at 404 (stating that a trial judge does not have to articulate his thought process in assessing the genuineness of a proffered justification, if, reading his comments in context, he appears to disbelieve it); see also King v. Byrd, 716 So. 2d 831, 834 (Fla. DCA 1998) (“Melbourne left decisions with respect to peremptory challenges to the trial court. Because those decisions turn on credibility determinations which encompass the assessment of all the circumstances and dynamics of the trial setting, appellate review is very narrow indeed.”).

207. 699 So. 2d 1332 (Fla. 1997).

208. See id. at 1335.

209. Id. at 1334.

210. Id.

211. See id.

212. Id. at 1335.

213. Id.

214. Id.

215. See id.
presumably a Cuban male resident of Dade County."\textsuperscript{216} He added that "[i]f there is ever a case where the presumption that peremptory strikes are exercised in a nondiscriminatory manner holds true, it is this one."\textsuperscript{217} He observed that the use of a peremptory strike becomes suspect when it appears to be used prejudicially, which logically requires that the prospective juror has characteristics which would "seem to be adverse to the position of the challenger."\textsuperscript{218}

The \textit{Franqui} opinion puts the peremptory challenge deeper into its grave. By allowing a general objection to the strike’s use, the court effectively presumes that a challenge is based on bias, so long as the juror falls within a protected class.\textsuperscript{219} This conflicts with prior decisions, which require both a \textit{showing} of discriminatory purpose and a \textit{presumption} that the peremptory challenge is exercised in a nondiscriminatory manner.\textsuperscript{220} The likelihood of improper bias is very low to non-existent when the challenging attorney seeks to strike jurors with the same ethnic or racial characteristics as his client. It is even lower when the attorney also apparently belongs to the same ethnic group as the stricken juror. As a result, viable objections to the use of the challenge have been greatly broadened. This further limits the litigant’s ability to use peremptory challenges according to their original purpose. As Justice Harding noted in his dissent:

By affirming the trial court’s handling of this matter, the majority confirms the trial court’s erroneous assertion that peremptory challenges no longer exist . . . If nothing more than a general objection can thwart the use of the peremptory challenge, then we do eliminate peremptory challenges as they have been used historically and substitute in their place two classes of challenges for cause.\textsuperscript{221}

\textsuperscript{216} \textit{Id.} at 1337.
\textsuperscript{217} \textit{Id.}
\textsuperscript{218} \textit{Id.} (finding this to be the case in "the overwhelming majority of cases—if not every case—in which a peremptory challenge has been disallowed under \textit{Batson} and \textit{Neil}.”). \textit{Compare} Holland v. Illinois, 493 U.S. 474, 492 (1990) (Marshall, J., dissenting) (suggesting that the defendant’s race may be irrelevant to his standing to raise the \textit{Batson} equal protection claim, as \textit{Batson} also protects the rights of the venire and of the general public to be free from discrimination). Although there is a possibility that the attorney may be striking the Hispanic juror based on his own prejudice, it is unlikely given the ethnicity of his client.
\textsuperscript{219} The use of a general objection depends upon the trial court’s “clear understanding” that the objection is made on racial or gender-grounds. \textit{Franqui}, 699 So. 2d at 1335. The \textit{Franqui} opinion thus allows unsupported reliance on the trial judge’s assessment of ethnicity, and it essentially allows the objecting party to accuse the proponent of the strike of racism without a supporting foundation.
\textsuperscript{220} See \textit{Davis} v. State, 691 So. 2d 1180, 1182 (Fla. 1997); \textit{Melbourne} v. State, 679 So. 2d 759, 764 (Fla. 1996).
\textsuperscript{221} \textit{Franqui}, 699 So. 2d at 1339, 1341.
B. Practical Difficulties in Exercising The Peremptory Challenge in Florida

The successful use of the peremptory strike in its current form in Florida depends upon a recognition of the ethnic distribution within the litigant’s community, an assessment of the distribution of potential jurors within the jury pool, and record-support for the strike through sufficient questioning. For example, a pattern of strikes against a protected group or the single strike of the sole member of a protected group in the venire could give rise to an inference of discrimination.

Illustrative is Harrison v. Emanuel, which upheld the trial court’s denial of the defendant’s strike of an African-American juror in a case involving a rear-end automobile collision, even though the juror, like the plaintiff, had been rear-ended in a past car accident. The court found this reason to be pretextual because the juror and the plaintiff had a common race, and the juror was the only African-American veniremember challenged by defense counsel. Although the justification for the strike was reasonable, the court did not find it to be credible. Consequently, even if the practitioner makes a clear record establishing the reasons for his strike, the venire’s composition could allow a finding of discrimination.

The challenge of one juror in a protected group, after accepting other jurors who share the same alleged bias, also can establish discrimi-

222. See State v. Alen, 616 So. 2d 452, 454 (Fla. 1993).
223. See Harrison v. Emanuel, 694 So. 2d 759 (Fla. 4th DCA 1997).
225. 694 So. 2d 759 (Fla. 4th DCA 1997).
226. Id. at 761.
227. Id. at 762.
228. Compare Holland v. Illinois, 493 U.S. 474 (1990), where the Court stated that the prosecutor’s use of peremptory challenges to strike the only two African-American veniremen did not violate the defendant’s Sixth Amendment right to a fair cross-section of the community. The Court stated that “to say that the Sixth Amendment deprives the State of the ability to ‘stack the deck’ in its favor is not to say that each side may not, once a fair hand is dealt, use peremptory challenges to eliminate prospective jurors belonging to groups it believes would unduly favor the other side.” Id. at 481. The Court noted, however, that only the Sixth Amendment claim was at issue in that case, and not the equal protection claim. Id. at 487. Under Batson, a pattern of strikes against a particular racial group of veniremen would support an inference of discriminatory purpose under the Equal Protection Clause. See Batson v. Kentucky, 476 U.S. 79, 96 (1986); but see J.E.B. v. Alabama, 500 U.S. 127, 143 (1994) (“Challenging all persons who have military experience would disproportionately affect men at this time, while challenging all persons employed as nurses would disproportionately affect women. Without a showing of pretext, however, these challenges may well not be unconstitutional, since they are not gender- or race-based.”) (citing Hernandez v. New York, 500 U.S. 352 (1991)). The likelihood of a finding of discrimination may be lower with a gender-based strike, because women as a group do not generally constitute so small a percentage of the venire that striking them would eliminate their presence on the jury. See Melili, supra note 9, at 455.
229. See State v. Slappy, 522 So. 2d 18, 22 (Fla. 1988).
230. 718 So. 2d 230, 231-232 (Fla. 3d DCA 1998).
231. See id.
232. See Slappy, 522 So. 2d at 22; see also Stroud v. State, 656 So. 2d 195, 196 (Fla. 1st DCA 1995) (finding a peremptory challenge to a prospective African-American juror was pretextual, when she was stricken because the prosecutor did not like her brief answer to what she thought of the criminal justice system, and then failed to conduct a further inquiry).
233. 672 So. 2d 555 (Fla. 2d DCA 1996).
234. Id. at 556.
235. Id. Compare King v. Byrd, 716 So. 2d 831, 834 (Fla. 4th DCA 1998), which held that the trial court properly found a doctor’s reason for peremptorily striking an African-American venirememer was pretextual, in a medical malpractice action involving a brain-damaged child, where the veniremember was a single mother of two young children. Although the striking of the juror in King appeared to be related to the facts of the case, the doctor’s counsel also stated that he “could strike anyone even if he didn’t like the cut of their hair.” Id. But see Smith v. State, 662 So. 2d 1336, 1338 (Fla. 2d DCA 1995) (finding that the trial court abused its discretion in prohibiting the peremptory strike of a single mother with two children because the state’s primary witness was also a single mother, and the strike was related to the facts of the case). In Haile, King, and Smith, there was no additional questioning to establish record-support for the venirepersons’ alleged sympathies, and all three cases have discordant results. The Smith court observed the increasing difficulties Florida courts have in interpreting the complex requirements of peremptory challenge jurisprudence.

We pause at this juncture to acknowledge the trial court’s well-founded observation in the record that it is often difficult to keep abreast of the ever-changing principles which govern what has become a most complex body of trial-related jurisprudence . . . We also recognize the myriad of difficult scenarios confronting trial courts in attempting to correctly apply these principles, especially when an error made even before the jury is sworn becomes irreversible no matter how error-free the trial may eventually be and no matter that the jury’s verdict is supported by substantial, competent evidence.  

Id. at 1339 (emphasis added).
As Harrison demonstrates, however, record-support would be insufficient to sustain a strike if the composition of the jury pool would support an inference of discrimination. Litigants are placed in the unwelcome position where it may be useless to peremptorily strike the last or only representative of a protected group because no justification may be sufficiently credible to overcome the inference of discrimination.\textsuperscript{236}

The main, and perhaps only, benefit of the detailed questions currently necessary during voir dire, to support the nondiscriminatory use of the peremptory challenge, is that they may also arm the litigant with a strike for cause. Striking for cause is not only appropriate and more desirable in removing partial jurors, it is also far less complex than using the current peremptory challenge.\textsuperscript{237}

V. WHAT REMAINS OF THE PEREMPTORY CHALLENGE?

The expansion of the cognizable class requirement and the discrepancy in state and federal courts' acceptances of proffered explanations as credible have undermined the effectiveness of the peremptory challenge. African-Americans, Italian-Americans, Native-Americans, Asian-Americans, Hispanics, Jews, and gender are currently all cognizable classes in either state or federal courts.\textsuperscript{238} A peremptory strike upon almost any venireperson could thus generate both an objection and a race or gender-neutral explanation by the other party. As Justice O'Connor pointed out in 1994, "Batson mini-hearings are now routine in state and federal trial courts, and Batson appeals have proliferated as well."\textsuperscript{239} The expansiveness of the cognizable class requirement could continue in state and federal courts as the demographics change within communities. The reach of the challenge to include particular groups could turn attorneys and judges into amateur anthropologists, attempting to discern from jurors' names, language, and clothing whether they represent an identifiable group.\textsuperscript{240} A further and logical extension of Batson's protections to a juror's protected speech and associations also would effectively extinguish peremptory challenges.\textsuperscript{241} The administrative difficulties in effectively implementing the post-Batson challenge support its abolition,

\textsuperscript{236} See also Michael A. Cressler, Powers v. Ohio: The Death Knell for the Peremptory Challenge?, 28 Idaho L. Rev. 349, 350-51 (1991) ("With the focus upon the newly created equal protection rights of the challenged venireman, the potential for equal protection claims against the exercise of peremptory challenges becomes incalculable, while the future of the practice itself becomes doubtful.").

\textsuperscript{237} See infra text accompanying notes 282-89.

\textsuperscript{238} See supra text accompanying notes 87-97.


\textsuperscript{240} See State v. Alen, 616 So. 2d 452, 453 (Fla. 1993).

\textsuperscript{241} See supra text accompanying notes 118-23.
particularly because its effectiveness as a tool in jury selection, as demonstrated below, is questionable at best.

A. The Challenge's Inaccuracy in Successfully Predicting Jurors' Verdicts

Attorneys exercising the peremptory challenge are generally unsuccessful in reliably predicting jurors’ tendencies, according to the numerous empirical studies conducted in this area. Those studies have overwhelmingly concluded that the nature and strength of the evidence are the most determinative factors in the outcome of the trial, rather than the jurors’ characteristics. The studies also have established that there is little support for attorneys' beliefs that jurors' backgrounds (e.g. race, social class, education, gender), social and political attitudes, and personality characteristics are predictive of their verdict preferences in particular cases.

---

242. See Kramer et al., supra note 16, at 668 ("[T]here is little evidence that attorneys' peremptory challenges are reliably related to jurors' verdict preferences."); Michael Saks, The Limits of Scientific Jury Selection: Ethical and Empirical, 17 JURIMETRICS J. 3, 13 (1976) ("No evidence exists to support the apparently widely held belief that scientific jury selection is a powerful tool."); Hans Zeisel & Shari S. Diamond, The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in Federal District Court, 30 STAN. L. REV. 491, 517 (1978) (observing after comparing attorneys' predictions of bias with the verdicts of stricken jurors who were allowed to witness the trials. "The collective performance of the attorneys is not impressive."); see also Solomon M. Fulero & Steven Penrod, The Myths and Realities of Attorney Jury Selection Folklore and Scientific Jury Selection: What Works?, 17 OHIO N.U.L. REV. 229 (1990) (examining empirical studies addressing the efficacy of attorneys' jury selection strategies, including the studies' methodological difficulties). Fulero and Penrod conclude that: though a number of researchers have made preliminary excursions into the empirical evaluation of attorney voir dire behavior and accuracy, it is still quite rudimentary. Broder's and Zeisel and Diamond's results certainly suggest that attorneys are not very accurate in their selections. The studies by Blauner, Padawer-Singer, Sinder, and Singer, and Van Dyke suggest that attorneys do exercise their challenges systematically, but the results of Hawrish and Tate, Hayden and Penrod suggest that the systematicness may extend only to a few demographic characteristics of limited predictive value.

Id. at 243-44 (footnotes omitted). Accord Hastie et al., Inside the Jury 237 (1983) ("The literature on juror personality available to practicing attorneys is rich in predictions of individual bias in verdict preference which were not borne out in the present results.").

243. See Saks, supra note 242, at 20 ("There is simply no empirical foundation for such statements as the following, offered by its authors as 'a very obvious fact: the people who constitute the jury have as much or more to do with the outcome of a trial as the evidence and arguments.' Indeed, the data consistently and directly contradict that conclusion."); Fulero & Penrod, supra note 242, at 253 ("the nature and strength of the evidence in a given case is the critical variable in predicting verdict"); Loh, supra note 21, at 403 ("In the trial setting, features of the proceeding itself are the decisive influences on the jury verdict. Simulation studies 'are unanimous in showing that evidence is a substantially more potent determinant of jurors' verdicts than the individual characteristics of jurors.'").

244. See Loh, supra note 21, at 402 ("Since 1970, there have been a large number of jury simulations on the effects of various personality and demographic characteristics of mock jurors..."
Researchers generally have adopted two strategies in assessing the reliability of attorneys' predictions — one of surveying sitting jurors at the end of their jury service and comparing their verdicts to attorneys' predictions, and the other of presenting attorneys with information about mock jurors before a simulated trial, in order to establish whether their assessments of jurors' verdict preferences were accurate.\footnote{See Fulero & Penrod, supra note 242, at 244. See generally Zeisel & Diamond, supra note 242, at 517; Kramer et al., supra note 16, at 680-85.}

For example, one study created "shadow juries" out of those who had been peremptorily stricken in twelve criminal trials. The study allowed them to remain in the courtroom during the trials.\footnote{See Zeisel & Diamond, supra note 242, at 492, 498.} The researchers then reconstructed the votes of the juries that would have decided the case had there been no peremptory challenges.\footnote{See id. at 492.} The study concluded that the votes of challenged jurors were unlikely to differ significantly from the jurors who were not removed.\footnote{The study observed that prosecutors and, to a lesser degree defense attorneys, were generally unable to use the challenge to their benefit. \textit{See id.} at 517.} Zeisel and Diamond concluded that "the average fluctuations around the mean scores are plus or minus 38 for the prosecutor and plus or minus 25 for the defense, suggesting that in this limited sample of twelve cases, attorney performance was highly erratic." \textit{Id.} This study is significant by its use of a control group to compare the actual verdicts with those that would have been delivered, had the challenges not been employed. It also had the benefit of observing actually stricken jurors' verdict results in actual criminal trials, which simulated studies could not provide.\footnote{See Kramer et al., supra note 16, at 672.}

Researchers in another study exposed mock jurors to prejudicial pre-trial publicity and videotaped them as they responded to questions during a simulated voir dire.\footnote{Id. at 517.} The researchers then sent the tapes to

\begin{itemize}
\item on their decision making . . . In general, 'although the literature indicates that authoritarians do indeed recommend more severe punishment . . . only a single study has shown they are more likely to vote for conviction . . . Another review also concluded that 'the claim that high authoritarian jurors have a proclivity for guilty verdicts is also unwarranted . . . With respect to individual differences other than authoritarianism, there is also no unequivocal proof of a direct, one to one relationship with conduct . . .') (citations omitted); \textit{accord} Fulero & Penrod, supra note 242, at 253; \textit{see also} HASTIE ET AL., supra note 242, at 149 ("In summary, the relationship is weak between the background characteristics of jurors, such as demography, personality, and general attitudes, and their verdict preferences in typical felony cases."). In those cases where attorneys have effectively used the strike in an empirically demonstrable manner, they were generally aided by social scientists. \textit{See} John T. Frederick, \textit{Social Science Involvement in Voir Dire: Preliminary Data on the Effectiveness of "Scientific Jury Selection,"} 2 BEHAV. SCI. & L. 375 (1984) \textit{(researchers conducted an attitudinal survey of 976 registered voters, and then conducted a mock jury project for the defendant, concluding that the estimates could accurately predict verdicts in an analogous trial situation); \textit{see also} John B. McConohay et al., The Use of Social Science in Trials with Political and Social Overtones: The Trial of Joan Little, 41 LAW & CONTEMP. PROBS. 205 (1977) \textit{cited in} JOHN MONAHAN & LAURENS WALKER, \textit{Social Science in Law} 573-78 (4th ed. 1998) (using social scientists to estimate the potential of prospective jurors to be pro-defense, based upon their demographic rating, authoritarianism, or body language, the defense attorneys selected a jury that acquitted the defendant of all charges).}
\end{itemize}
trial judges, prosecutors, and defense attorneys, who estimated whether they would peremptorily challenge a juror and which way the juror would lean in the trial.250 The jurors went on to deliberate and reach a verdict in a mock criminal trial.251 The researchers found that, although the prosecutors had some success in identifying unfavorable jurors, the judges and defense attorneys could not consistently and accurately predict unfavorable jurors.252 Their predictions were about as accurate as flipping a coin.253 The study concluded that “attorneys overestimate their ability to predict juror behavior.”254

Attorneys exercising their peremptories frequently rely on unsubstantiated group stereotypes that jurors’ education, appearance, background, and viewpoints significantly affect their verdict preferences.255 The limited information available during voir dire about jurors’ names,

250. See id. at 672, 677. The judges rated how likely they were to grant a challenge for cause to each particular juror. Id. at 677.

251. See id. at 672. The participants rated the simulated voir dire as “fairly realistic.” Id. at 679. All the standard elements of a courtroom criminal trial were included in the simulation. Id. at 674.

252. See id. at 680-685. They stated, “More experienced judges were somewhat more effective than their less experienced brethren in identifying, through causal challenges, those jurors who were most inclined to convict the defendant, but the overall performance of the judges was quite near the level of chance.” Id. at 683.

253. See id. The authors of the study concluded:

As with the judges, defense attorneys’ peremptory challenges were not associated with juror verdicts. Thus, in identifying jurors hostile to their cases, defense attorneys would have done no worse in exercising their peremptory challenges had they simply flipped coins rather than analyzing the responses jurors made to questions about their exposure to pretrial publicity . . . The same basic analyses were carried out for those taking on the prosecutor role. First, the correlational analysis, with prosecutor as the unit of analysis, indicated that these ratings were weakly, but only marginally, correlated with juror behavior. There was no significant mean correlation between prosecutor experience and this correlational index of effective peremptory use.

Id. at 685.

254. See id. at 700.

255. See id. at 667-68, where the authors found:

[A]ttorneys appear to rely on a variety of cues in determining whether a peremptory challenge is necessary, including factors such as age, sex, race, national origin, education, occupation, juror demeanor, and attorneys’ intuitive perceptions of jurors’ receptiveness to their client’s or their adversary’s positions . . . [A]lthough particular juror characteristics have shown predictive value in certain types of cases, e.g., a juror’s gender in cases involving rape, none of the typically used juror characteristics correlate consistently or powerfully to juror verdicts across a wide spectrum of cases.

See also Steven Penrod et al., The Implications of Social Psychological Research for Trial Practice Attorneys, in Psychology & Law 439 (D.J. Miller et al eds, 1984), cited in Nancy S. Marder, Beyond Gender: Peremptory Challenges and the Roles of the Jury, 73 Tex. L. Rev. 1041, 1138 (1995). Penrod, in an unpublished Ph.D. dissertation at Harvard University, collected demographic material on 367 members of a Boston jury pool and concluded that the jurors’ age, race, and gender “were almost useless in predicting how that person would decide a case.” Id.
addresses, family, occupation, and prior service on a civil or criminal jury promotes fast and superficial judgments. Practice manuals often are filled with stereotypical observations about the verdict tendencies of groups of jurors, such as statements that women "are generally more emotional and sympathetic" and that writers and artists will generally rule for plaintiffs while accountants are pro-defense. These group stereotypes would never be sufficient to support a challenge for cause, and they have not been correlated with verdict preferences by numerous studies. If anything, according to Professor Melilli, "One might legitimately question whether the stereotypes . . . indicate more about the biases of the venirepersons in those groups or the biases of the attorneys who exercised the peremptory challenges."

Nonetheless, the opinions of the Supreme Court and of numerous attorneys demonstrate an unquestioning acceptance of the peremptory's implicit assumption that group stereotypes are predictive of hidden partiality. Attorneys generally like using peremptories and are confident that

257. See MELVIN BELLI, MODERN TRIALS (2d ed. 1982), cited in MONAHAN & WALKER, supra note 244, at 570-71. Belli states,

[A]s a rule of thumb, if plaintiff is an Irishman or a Swede, prospective juror Olsen or O'Brien . . . will not be excused by plaintiff's lawyer . . . The author believes that a plaintiff does better on the amount of verdict by peremptorily challenging the accountant, statistician, and bank and insurance clerks . . . The rule of thumb here: artists, writers, musicians, actors and public figures generally make good plaintiff jurors . . . As plaintiff's counsel and a criminal defendant's lawyer, I love this type of juror. They are philosophically tuned in to my side of the case and will vote for me substantively, and will usually give me a substantial reward.

Id.

258. Melilli, supra note 9, at 496-97.
259. See id. at 498 (tabulating typical group stereotypes that are frequently used in peremptories, such as "low income, facial hair, family member unemployed, living with parents, no prior jury service, recently relocated to area, renter, overweight, children . . .," and concluding that, other than gender and race (both of which are improper as bases for the peremptory), there were no poll results substantiating predictive jury verdicts for any of those categories); see also LOH, supra note 21, at 402 ("The assumption, in other words, is that human conduct is caused—or at least conditioned—by socialization experiences or personal makeup. . . . However, there are empirical and theoretical grounds for questioning the validity of this heroic assumption. . . . The notion that who a person is determines how that person acts, irrespective of the social context, is also at odds with recent thinking on the nature of personality."); accord Fulero & Penrod, supra note 242, at 238.

260. Melilli, supra note 9, at 499.
261. See J.E.B. v. Alabama, 511 U.S. 127, 148 (1994) (O'Connor, J., concurring) ("That a trial lawyer's instinctive assessment of a juror's predisposition cannot meet the high standards of a challenge for cause does not mean that the lawyer's instinct is erroneous."); Swain v. Alabama, 380 U.S. at 220-21 ("[The peremptory challenge] is often exercised . . . on grounds normally thought to be irrelevant to legal proceedings or official action, namely the race, religion, nationality, occupation or affiliations of people summoned for jury duty. For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be.").
their predictions are correct, although their assessments are, by their nature, difficult to substantiate and rely on anecdotal evidence.\textsuperscript{262} Attorneys sometimes discover how individual jurors voted, but they cannot learn how a stricken juror would have voted. They are also more likely to seek confirming information, which would allow the attorney to maintain his jury selection theories in spite of their incorrectness.\textsuperscript{263} As Professor Alan Dershowitz states, “Ten years of accumulated experiences may be ten years of being wrong.”\textsuperscript{264}

Peremptory strikes have been justified as a device to remove jurors with hidden partialities for both the defense and prosecution and to create a more “neutral” jury.\textsuperscript{265} Conversely, these strikes also are intended to help litigants to “stack” the jury with people whom they believe will be more favorable to their position.\textsuperscript{266} However, the group dynamics in the jury deliberation process can be unpredictable, as they allow jurors to voice a variety of viewpoints that elude the predictive patterns of individual peremptory strikes.\textsuperscript{267} Jurors also generally take their roles very seriously, as both judges and those observing the deliberative process have observed.\textsuperscript{268} Researchers often have found that the individual differences among jurors account for little in the variation of their group performance.\textsuperscript{269} Moreover, although some juror polls have shown that a juror’s race, gender, or ethnicity may have some influence on his decision-making,\textsuperscript{270} \textit{Batson} prevents any challenges made on this

\textsuperscript{262} For example, in the Kramer et al., study, \textit{supra} note 16, at 689, the attorneys thought that their predictions about how prospective jurors would vote were correct 71.9\% of the time, but in fact they were correct only 45.4\% of the time.

\textsuperscript{263} Fulero & Penrod, \textit{supra} note 242, embellish on this point, stating,

Negative instances are thus rarely encountered, and when they are, it is probably simply a matter of modifying the selection slightly to incorporate the exception. If any learning does take place under these conditions, it is likely to resemble the superstitious behavior of animals reinforced with food at fixed or random intervals.

\textit{Id.} at 238 (footnotes omitted).

\textsuperscript{264} \textit{Valerie P. Hams \& Neil Vidmar, Judging the Jury} 76 (1986) (quoting Professor Alan Dershowitz).

\textsuperscript{265} \textit{Id.} at 983.

\textsuperscript{266} \textit{See} Judith H. Germano, \textit{Preserving Peremptories: A Practitioner’s Prerogative}, 10 St. John’s J. Legal Comment. 431 (1995) (stating that litigators generally try to select venirepersons who fit the ideal juror profile for the case, focusing on a favorable outcome rather than impartiality); William J. Schwarzer, \textit{The Federal Rules, The Adversary Process, and Discovery Reform}, 50 U. Pitt. L. Rev. 703, 708 (1989) (“Jury selection itself operates to select not a truly ‘fair and impartial’ jury but one that has as many presumptively favorable and as few unfavorable jurors as each lawyer can seat.”).

\textsuperscript{267} \textit{See} Ballew v. Georgia, 435 U.S. 223, 233 (1978) (stating that groups generally performed better than individuals because “prejudices of individuals were frequently counterbalanced, and objectivity resulted.”) (citations omitted).

\textsuperscript{268} \textit{See} Hoffman, \textit{supra} note 17, at 871.

\textsuperscript{269} \textit{See} Loh, \textit{supra} note 21, at 403.

\textsuperscript{270} For example, polls conducted before the O.J. Simpson trial found that African-American
assumption.

The supposition that jurors decide cases based on their biases, rather than on the evidence, also can create a "balkanized" effect among jurors who perceive attorneys as striking other veniremen based upon unsubstantiated perceptions of partiality.\textsuperscript{271} This balkanization denigrates the integrity of the judicial system that \textit{Batson} and its progeny sought to preserve. The judicial system, by condoning the use of unsubstantiated stereotypes in the exercise of the peremptory, exercises a tangible injury to the rights of excluded veniremen. As Judge Hoffman observes, "The proposition that lawyers, in the exercise of their peremptory challenges, are permitted to act, and indeed are often acting, on their most bigoted, stereotyped, and irrational hunches screams out to everyone present during voir dire. We are not fooling anyone."\textsuperscript{272}

\section*{B. Suggestions for Reform}

\subsection*{1. Revising the Peremptory Challenge into a Modified Challenge for Cause}

Some critics have suggested removing the peremptory challenge and revising the challenge for cause.\textsuperscript{273} Under such a system, the grounds in establishing a "for cause" challenge could list broader factors indicating a juror's inability to be impartial.\textsuperscript{274} The attorney must satisfy


271. See Hoffman, \textit{supra} note 17, at 862.

272. \textit{Id.} at 863.


274. See \textit{id.} (recommending, after reviewing New York's Jury Project, which reduced the number of peremptory challenges in civil and criminal cases, that "the Jury Project's recommendations are only temporary solutions in the fight to eliminate all discrimination from jury selection. The most effective and equitable solution would be a system based solely on challenges for cause."); see also Marder, \textit{supra} note 255, at 1109 (discussing the requirements of a revised challenge for cause). Marder states, "Under a system of revised for-cause challenges, all
those factors when stating the grounds for the challenge. The decision to
strike the juror would not be based on the litigant’s “gut” reaction, and
the court would be required to make an objective decision concerning
the legitimacy of such a challenge. Under this system, the litigant still
would have the incentive to probe into the veniremembers’ backgrounds
in order to establish the basis for a challenge for cause, and therefore
would be well informed about the jury’s composition. If peremptories
are abolished and the for-cause challenge is expanded, judges may be
more inclined to remove jurors for cause who are borderline in demonstrat-
ing an alleged bias, and could allow lengthier questioning to estab-
lish partiality. The judge’s decisions would also be reviewable, just as
the current for-cause and peremptory challenges are currently
reviewable.

One advantage of revising the challenge for cause while abolishing
the peremptory would be for attorneys to retain some control over the
composition of the final jury. It would also allegedly end the difficulties
in applying the current form of the peremptory, and it would prevent the
use of status or other immutable characteristics from factoring into the
reasons for the strike. For example, a juror who is Irish-American
could not be eliminated for cause although the defendant is British-
American, and the trial involves the sale of illegal weapons to the IRA,
unless the juror states that she could not be impartial. However, “a juror
who is a member of the Ku Klux Klan may be eliminated for cause in a
case involving racial bias because this juror has taken an individual
action that suggests bias.”

prospective jurors are presumed eligible to serve unless they meet a limited number of enumerated
exceptions.” Id. at 1112.

275. See Domini & Sheridan, supra note 273, at 188; see also Laeser, supra note 270, at 656.
Laeser proposes a “quasi-cause” challenge where attorneys would inquire into jurors’
backgrounds during voir dire to “determine whether their racial status would prevent them from
making fair and honest decisions in that case . . .

If a juror has articulated opinions which do not give rise to the level of cause
challenges, but still indicate some bias, the peremptory should remain a viable
option . . . Alternatively, courts may prefer to set up a mini-trial when a juror is
stricken for perceived racial reasons . . . Perhaps if the juror felt racial
discrimination was at play, the juror could expound to the court the reasons why he
or she would not be affected by race. If one leaves this option in the hands of the
juror, and not as an automatic judicial inquiry, the ends of justice would be better
served.

Id. at 656-57. This proposal, however, undermines the presumption that the peremptory challenge
is exercised in a nondiscriminatory manner, see Melbourne, 679 So. 2d at 764, and places a
burden on the juror to object to the use of the challenge, a burden the juror may not fully under-
stand or wish to yield.

276. See Leipold, supra note 97, at 1004.
277. See Marder, supra note 255, at 1109.
278. Id. Professor Marder applies a status-conduct distinction, contending that the Ku Klux
As the above examples demonstrate, the new guidelines could involve considerable drafting difficulties in adding new categories that establish bias. If organizational membership allows the use of a broader strike for cause because it involves conduct rather than status, the guidelines would have to separate organizations presumptively demonstrating bias from those that do not. Although the Ku Klux Klan is an obvious example of a bias-based organization, Mothers Against Drunk Driving could similarly be implicated in any case involving alcohol. Basing a for-cause challenge upon a potential juror's organizational involvement or other categories would run into the same empirical difficulties already existing in justifying the peremptory challenge as a method of eliminating bias. It also could infringe upon the juror's protected First Amendment rights, by the same reasoning that extends Batson to prohibit discrimination based upon a juror's protected speech and associations.

Additional categories to justify striking jurors for cause would also be unnecessary, since the current for-cause challenge already is designed to discover potential jurors' partiality during voir dire. Challenges for cause generally have enumerated grounds such as consanguinity or affinity within the fourth degree to the parties, a relationship such as family, attorney-client, or landlord-tenant with the parties, indictment within twelve months for a similar offense, or service as a juror within the preceding year. The operation of the current challenge for cause in Florida illustrates the latitude that it already possesses in identifying bias. The juror must be excused for cause if any reasonable doubt exists as to

279. See supra text accompanying notes 255-60. One possible method of resolving this problem would be to include a potential juror's membership in a hate-based organization as grounds for challenging him or her for cause. This would require careful drafting, such as including membership in an organization that evidences prejudice against others on the basis or race, religion, national origin, or gender, rather than one that, for example, demonstrates a viewpoint against drinking. Even here this involves an understanding of the underlying beliefs of particular organizations, e.g. White Supremacists, which could be problematic in determining whether particular group memberships qualify.

280. See supra text accompanying notes 118-23; see also Bader, supra note 118, at 600 (contending that Batson should prohibit a defense attorney from peremptorily challenging Mothers Against Drunk Driving, even if they had a greater than average tendency to convict). Bader states, "The affiliation-based exclusion wrongfully prevents a qualified, unbiased juror from participating in jury service and perpetuates a stereotype against M.A.D.D. members." Id.


282. See Fla. Stat. ch. 913.03 (1998), which provides:
whether the juror possesses the state of mind necessary to render an impartial verdict. The juror's statements that he would be able to follow the law, after making earlier statements that reveal his partiality, may be insufficient to remove doubt as to the juror's fairness or mental integrity. The Florida trial court has broad discretion in determining the existence of a juror's bias and the questioning during voir dire may be extensive to determine a prospective juror's partiality.

A challenge for cause to an individual juror may be made only on the following grounds:

1. The juror does not have the qualifications required by law;
2. The juror is of unsound mind or has a bodily defect that renders him or her incapable of performing the duties of a juror, except that, in a civil action, deafness or hearing impairment shall not be the sole basis of a challenge for cause of an individual juror;
3. The juror has conscientious beliefs that would preclude him or her from finding the defendant guilty;
4. The juror served on a grand jury that found the indictment or a coroner's jury that inquired into the death of a person whose death is the subject of the indictment or information;
5. The juror served on a jury formerly sworn to try the defendant for the same offense;
6. The juror served on a jury that tried another person for the offense charged in the indictment, information, or affidavit;
7. The juror served as a juror in a civil action brought against the defendant for the act charged as an offense;
8. The juror is an adverse party to the defendant in a civil action, or has complained against or been accused by the defendant in a criminal proceeding;
9. The juror is related by blood or marriage within the third degree to the defendant, the attorneys of either party, the person alleged to be injured by the offense charged, or the person on whose complaint the prosecution was instituted;
10. The juror has a state of mind regarding the defendant, the case, the person alleged to have been injured by the offense charged, or the person on whose complaint the prosecution was instituted that will prevent the juror from acting with impartiality, but the formation of an opinion or impression regarding the guilt or innocence of the defendant shall not be a sufficient ground for challenge to a juror if she declares and the court determines that he or she can render an impartial verdict according to the evidence;
11. The juror was a witness for the state or the defendant at the preliminary hearing or before the grand jury or is to be witness for either party at the trial;
12. The juror is a surety on the defendant's bail bond in the case.

283. See Akins v. State, 694 So. 2d 847, 849 (Fla. 4th DCA 1997).
284. See Huber v. State, 669 So. 2d 1079, 1082 (Fla. 4th DCA 1996) (holding that a juror should have been dismissed for cause when he stated that he believed the police do not arrest innocent people, even though he eventually said that he would be able to follow the law). Failure to dismiss a juror for cause when the record reflects that he or she may be biased cannot be harmless error. See Noe v. State, 586 So. 2d 371 (Fla. 1st DCA 1991).
286. A federal district judge also has broad discretion in how to conduct the voir dire; he may reject supplemental questions proposed by counsel if the voir dire is otherwise sufficient to test the potential jurors for partiality. See United States v. Powell, 932 F.2d 1337, 1340 (9th Cir. 1991).
Statements that reveal equivocation\textsuperscript{287} or racial or ethnic bias\textsuperscript{288} would justify the challenge of a potential juror for cause. For example, a prospective juror who stated, "Well, I've lived in Dade County for thirty-three years, before there was cocaine and drugs and before a lot of Latin people . . . came and took over the area" should have been excused for cause, even though he stated that he had no personal animosity toward a Hispanic defendant charged with cocaine trafficking.\textsuperscript{289}

In the example regarding the Ku Klux Klan member, any statements that would show equivocation would be sufficient grounds to strike him for cause. The wearing of racially discriminatory insignia or a statement of Klan membership would be a stronger statement of bias than the equivocal statement above regarding Latin people.\textsuperscript{290} The questioning during voir dire that reveals his Klan membership would likely also produce at least one statement revealing a fixed opinion or equivocation about impartiality.\textsuperscript{291} The prospective juror’s assurance that he could remove any prejudice from his mind would not be determinative of his competence. The trial judge remains free to disregard those statements in light of the juror’s other responses during voir dire.\textsuperscript{292} Any reasonable doubt concerning the juror’s partiality would be grounds for dismissal for cause.\textsuperscript{293}

The problems inherent in establishing non-pretextual justifications for the use of the peremptory strike have greater force against allowing

\textsuperscript{287} See Huber, 669 So. 2d at 1082 (finding the trial judge erred in refusing to dismiss a juror for cause when he stated that he “probably” would be prejudiced, but that he “probably” could follow the judge’s instructions).

\textsuperscript{288} See Farias v. State, 540 So. 2d 201, 202 (Fla. 3d DCA 1989).

\textsuperscript{289} Id.

\textsuperscript{290} See, e.g., Mauldin v. State, 874 S.W.2d 692, 698 (Tex. Crim. App. 1993) (“questions such as those concerning whether members of the venire . . . had ever held membership in the Ku Klux Klan or White Citizen’s Council, . . . would have given insight into their personal prejudices . . . and should have been allowed”); People v. McCray, 443 N.E.2d 915, 918 (N.Y. 1982), cert. den. sub nom., McCray v. New York, 461 U.S. 961 (1983) (“fundamental fairness dictates that a member of the Ku Klux Klan be disqualified from sitting on a jury in a case in which a black man is accused of assaulting a white. These individuals can adequately be eliminated through the challenge for cause.”).

\textsuperscript{291} But see Powell v. State, 297 So. 2d 163, 168 (Ala. Crim. App. 1974), finding that the trial court did not abuse its discretion in qualifying a jury, and that it was not required to ask the prospective jurors the defendant’s proffered questions as to whether any member believed in the white supremacy of another witness, although the trial court had asked prospective jurors whether they were members of the Ku Klux Klan and received no responses from the panel. An elimination of the peremptory should also require judges to allow sufficient questioning during voir dire to establish grounds for bias, to avoid seating jurors after only perfunctory and superficial inquiries. The voir dire should be adequate to assure an impartial jury, by enabling the parties intelligently to exercise their challenges. See Darbin v. Nourse, 664 F.2d 1109, 1113 (9th Cir. 1981).

\textsuperscript{292} See Akins v. State, 694 So. 2d 847, 849 (Fla. 4th DCA 1997).

\textsuperscript{293} See id. at 848.
an expansion of the challenge for cause. A broadened strike for cause could still result in discrimination because courts would be unwilling to second-guess justifications listed as presumptively nondiscriminatory under new guidelines (e.g. organizational membership). Such guidelines could be virtual "how-to guides" for prejudicially striking jurors who do not meet objective criteria for bias. Any use of judicial discretion in determining the genuineness of such broadened strikes for cause essentially would reproduce the current, post-Batson use of the peremptory challenge.

2. RETURN TO THE PRE-BATSON CHALLENGE

Another proposal by critics of the current peremptory challenge is to revert to the pre-Batson challenge. Proponents argue that the historical challenge will be a safeguard for the removal of jurors when a challenge for cause is unsuccessful because it gives parties some control over the jury's composition, and it would apply equally to all prospective jurors. The third rationale was used in Swain v. Alabama, however, and is unlikely to be successful in light of the Supreme Court's recognition that past discriminatory practices prevented an even-handed application of the historical peremptory challenge. The fact that courts currently continue to find that peremptories are being used in a discriminatory fashion also works against a return to the original pre-Batson system.

3. ABOLITION OF THE PEREMPTORY CHALLENGE

The complex inquiry, administrative difficulties, and confusion in the post-Batson case law effectively have abolished the peremptory challenge in its original form. An elimination of the peremptory would prevent conscious and unconscious discrimination in the jury selection process, and would promote a greater perception of integrity in the judicial process.

The protections afforded by the "fair cross section" requirement under the Sixth Amendment also support an abolition of the chal-

295. Id. at 998.
298. See supra text accompanying note 272.
299. See Taylor v. Louisiana, 419 U.S. 522, 527 (1975) (ruling that criminal defendants have a right, under the Sixth and Fourteenth Amendments, to a jury drawn from a "fair cross section of the community"); Duren v. Missouri, 439 U.S. 357 (1979). The fair cross section requirement was established as a method to secure the defendant's right to an impartial jury under the Sixth Amendment, by preventing the systematic disqualification or exemption of particular groups, such as women, from jury service. See Taylor, 419 U.S. at 526-31.
challenge. Under this requirement, a criminal defendant has a right to a panel selected from a group of citizens who represent a fair cross-section of the community. Current venire selection mechanisms are designed to summon prospective jurors who are representative of the broad community, and the elimination of the peremptory as a potentially discriminatory mechanism for group exclusion would widen the probability of a diverse sample in the petit jury.

The Supreme Court in *Holland v. Illinois* addressed the relationship between the “fair cross section” requirement and the Equal Protection Clause when a litigant’s use of the peremptory results in eliminating distinctive groups from the petit jury. In *Holland*, a white defendant alleged that the prosecutor used his peremptory challenges to strike the only two African-American venire members from the petit jury, thereby violating his Sixth Amendment right to a fair cross-section of the community. The Court held that the defendant’s right to a fair cross-section did not extend from the venire to the petit jury because there is no requirement under the Sixth Amendment that petit juries must mirror the distinctive groups in the population. The Court stated, “[D]efendants are not entitled to a jury of any particular composition because the Sixth Amendment fair cross-section requirement is “a means of assuring, not a representative jury (which the Constitution does not demand), but an impartial one (which it does).” The Court added that the attainment of an impartial jury “impliedly compels peremptory challenges, but in no way could it be interpreted directly or indirectly to prohibit them.”

---

300. See *Duren*, 439 U.S. at 364 (“[I]n order to establish a prima facie violation of the fair cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a “distinctive” group in the community; (2) that the representation of this group in venires from which jurors are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.”).


302. Peremptories currently still often result in the elimination of minority venirepersons from the petit jury, because many minorities who receive the jury summons report to the courthouse at a lower rate, and can be eliminated through race-neutral explanations for the strike. See *Adams & Lane*, supra note 265, at 705. Therefore, “[a]lthough intended to remedy the striking of minority venirepersons for racial reasons, the Supreme Court’s holding in *Batson v. Kentucky* has failed to deter the practice effectively.” *Id.* at 706 (footnotes omitted).

304. *Id.* at 476.
305. *Id.* at 474.
306. *Id.*
307. *Id.* at 480.
308. *Id.* at 482.
The Court based its decision upon the assumption that the peremptory challenge furthers the goal of impartiality by eliminating "extremes of partiality on both sides" so that a neutral or impartial jury will result. The Sixth Amendment goal of attaining an impartial jury would only "compel" the peremptory if it were in fact successful in identifying biased jurors. However, as discussed earlier, studies of jurors' deliberations have shown that they tend to decide cases based upon the evidence, and attorneys are unsuccessful in predicting jurors' partiality.

The challenge for cause is the only mechanism that demonstrably establishes a potential juror's bias, and it is currently the only sufficient method to ensure the elimination of unfavorable jurors. The reality of practice, based upon the historical use of the challenge, has in fact established its efficacy as a tool for discrimination sanctioned by the judicial process. The current, post-Batson protections have been insufficient to eliminate this discrimination because attorneys can effectively cloak their bias with neutral but disingenuous justifications.

Ironically, the "fair cross section" requirement preserves the defendant's Sixth Amendment right to an impartial jury by assuming that diverse groups bring different perspectives and, therefore, "balance" the jury's perspective as a whole. The Batson inquiry, in contrast, presumes that jurors will not decide the evidence in a racially biased manner. This conflict can be resolved by assuming that jurors' cultural perspectives allow them to view evidence in different ways, without presuming an ethnic or racial bias in their decisions. The striking of any group of jurors through the peremptory therefore increases the probability that diverse viewpoints reflecting the broad community will be eliminated.

309. Id. at 484 (quoting Swain v. Alabama, 380 U.S. 202, 219 (1965)).
310. See supra Part V.A.
311. See Lockhart v. McCree, 476 U.S. 162, 175 (1986), where the court noted,

   The wholesale exclusion of . . . large groups from jury service . . . for reasons
   completely unrelated to the ability of members of the group to serve as jurors in a
   particular case . . . raised at least the possibility that the composition of juries would
   be arbitrarily skewed in such a way as to deny criminal defendants the benefit of the
   common-sense judgment of the community.
312. See Batson, 476 U.S. at 97, where the court stated,

   [J]ust as the Equal Protection Clause forbids the States to exclude black persons
   from the venire on the assumption that blacks as a group are unqualified to serve as
   jurors . . . so it 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. The
   core guarantee of equal protection . . . would be meaningless were we to approve the
   exclusion of jurors on the basis of such assumptions.
313. See supra note 270 and accompanying text.
314. Compare Lockhart, 476 U.S. at 178-79, where the Court stated,

   [I]f it were true that the Constitution required a certain mix of individual viewpoints
   on the jury, then trial judges would be required to undertake the Sisyphean task of
Trial judges often can avoid an in-depth scrutiny of venirepersons for bias because they can rely on the attorneys’ use of peremptories to act as a back-up method for striking jurors.\textsuperscript{315} An elimination of the peremptory would require judges and attorneys to probe more thoroughly into whether veniremembers’ statements could support a challenge for cause. This inquiry would not be unduly burdensome, in light of the inquiry already necessary to establish support for a non-pretextual explanation for a peremptory. The basis of the challenge for cause also is objectively demonstrable, unlike the basis for the peremptory.

An improper use of the peremptory results not only in unconstitutionally discriminating against the party and the juror, but also in undermining the integrity of the judicial process. The litigant runs the risk of reversal and a new trial if he improperly establishes the basis for the strike. This risk can be high in light of the discrepancies between courts in accepting particular justifications as legitimate. The benefit to parties of allowing the peremptory is therefore low in comparison to the risk to potential jurors’ constitutional rights to participate and retain confidence in the jury system. An elimination of the peremptory challenge would broaden the jury base without significant adverse consequences, because the challenge for cause already allows the removal of demonstrably biased potential jurors.

VI. CONCLUSION

The historical peremptory challenge has vanished and its current version, the nondiscriminatory challenge, has become increasingly complex, resulting in an increasing amount of criticism. Although attorneys generally like using peremptory challenges because they appear to provide greater control over the jury selection process, this control is illusory. The benefit of the current challenge—the selection of an unbiased

\footnotesize{\textsuperscript{315} See Melilli, supra note 9, at 486.}
jury—has not been substantiated and the risks of its unconstitutional application, including subsequent reversal and a new trial, are high.

The current peremptory challenge, as a method of preventing the discriminatory exclusion of particular groups from the petit jury, is seriously flawed. Knowledgeable practitioners can mask discriminatory motives through plausible justifications, which courts may be reluctant to second-guess. Litigants also run the risk of having legitimate justifications disallowed because the composition of the jury pool could raise a false inference of discrimination. Courts currently struggle with separating plausible, legitimate justifications from plausible, but pretextual explanations for the strike, resulting in contradictory and illogical decisions. These decisions obscure the nondiscriminatory use of the challenge and turn voir dire into a lengthy process, where counsel attempt to determine which jurors' habits could substantiate their guesses as to bias. The challenge thus undermines jurors' confidence in the integrity of the judicial process, as they see veniremen stricken for stereotypical reasons without a demonstration of actual bias.

The challenge, as currently used, is practically unworkable and should be eliminated. Any other alternative, such as establishing a "quasi-cause" challenge, would continue the confusion and the mini-trials that exist from the use of the post-Batson challenge. Eliminating the peremptory challenge would reduce the expense of jury research and profiling, and would continue the trend which Batson and its progeny set into motion.