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A VOIR DIRE OF VOIR DIRE: LISTENING TO JURORS' VIEWS REGARDING THE PEREMPTORY CHALLENGE

MARY R. ROSE*

INTRODUCTION

Jury selection in the United States involves a unique set of practices. Although varying to some extent across states and jurisdictions, jury selection procedures have the following in common: (1) a questioning process (called the "voir dire"), which allows the judge and attorneys to collect information from jurors about potential biases; (2) challenges for cause, in which a judge can excuse anyone who possesses characteristics or attitudes that demonstrate that the juror cannot be fair; and, (3) a set of peremptory challenges, which

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1. WORLD JURY SYSTEMS 33 (Neil Vidmar ed., 2000) ("The law in the United States stands almost alone in taking practical cognizance of all forms of bias through pretrial questioning of jurors by judge or judge and opposing counsel.").

2. Jurisdictions can vary in whether they use a "sequential method" of exercising challenges, in which case one side exercises peremptories before the other does, versus a "strike method," in which both sides exercise challenges at the same time. See Gordon Bermant & John Shapard, THE Voir Dire Examination, Jury Challenges, and Adversarial Advocacy, in THE TRIAL PROCESS 69, 81, 92-93 (Bruce D. Sales ed., 1981). Federal and state courts typically differ in whether attorneys (state courts) or the judge (federal courts) conduct the majority of questioning. See, e.g., GORDON BERMANT, CONDUCT OF THE VOIR DIRE EXAMINATION (1977). Jurisdictions also differ in how many peremptories they allow. See JURY TRIAL INNOVATIONS 231 (G. Thomas Munsterman et al. eds., 1997).

3. Zeisel and Diamond note that "voir dire is sometimes translated from the French as 'see [them] talk,' but in fact means 'true talk,' the word voir being a corruption of the Latin verus, or 'true'." Hans Zeisel & Shari Seidman Diamond, THE EFFECT OF PEREMPTORY CHALLENGES ON JURY AND VERDICT: AN EXPERIMENT IN A FEDERAL DISTRICT COURT, 30 STAN. L. REV. 491, 491 n.1 (1978).

4. For example, a juror may have a serious conflict of interest in a given case, such as being related to one of the parties through blood. People may also show actual bias by possessing an inability or unwillingness to remain fair and impartial. In all instances, challenges for cause are granted because of a "narrowly specified, provable and legally cognizable basis for partiality." Swain v. Alabama, 380 U.S. 202, 220 (1965).
allow parties to dismiss a limited number of prospective jurors without providing any explanations. Although all these practices are subject to some level of analysis and criticism, the peremptory challenge is by far the most controversial aspect of U.S. jury selection practices.

The peremptory challenge does indeed offer several sources of concern. Empirical research on jury selection in criminal cases demonstrates the continued use of race in the exercise of peremptory challenges. Many have lamented the seeming inability of Batson and its progeny to remedy discriminatory practices, and one critic

5. Id. ("...[T]he peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable.").


11. See, e.g., Nancy S. Marder, Beyond Gender: Peremptory Challenges and the Roles of the Jury, 73 TEX. L. REV. 1041, 1123 (1995) ("[T]he way in which Batson has been put into practice has allowed race-based, and will now allow gender-based, peremptories to continue... "); Melilli, supra note 6, at 503 ("This death knell [of the peremptory] was not sounded because
refers to the peremptory simply as the "last best tool of Jim Crow." Apart from utilizing stereotypes based upon race or gender—which the Supreme Court has addressed—some see the peremptory as encouraging decision making based upon unfounded assumptions about many other types of groups. During jury selection prospective jurors may be asked about the organizations to which they belong, the media they consume, and a host of other factors that potentially bear little relationship to how they will ultimately view a criminal case. Critics express a strong distaste for using these or other stereotypes to make decisions, rather than treating and evaluating people as individuals who likely hold a complex range of views. Finally, the peremptory is believed to squander human capital by dismissing from juries people who may be able to serve as well or better than the people who replaced them. The little empirical research available does indeed show that attorneys are poor at assessing bias and predicting its effects. In addition, attorneys are accused of overusing peremptory challenges simply to preserve for


appeal any disagreements they may have with the judge regarding challenges for cause.\textsuperscript{21}

According to its critics, the net result of all these problems with the peremptory is the creation of an embittered and cynical group of former jurors.\textsuperscript{22} In this view, whether selected or not, people who observe modern jury selection practices are expected to shake their heads in disgust as they watch a spectacle of adversarial, self-interested parties pass judgment on the fairness and impartiality of ordinary citizens. Some believe the excused to be especially resentful:

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. Is it any wonder that these people leave our courtrooms thinking that the whole trial process is just as trivial and flawed as jury selection?\textsuperscript{23}

The peremptory challenge also has its share of supporters. Former Chief Justice Burger maintained that the peremptory is essential to a fair jury selection process.\textsuperscript{24} Professor Barbara Babcock outlined four functions the peremptory serves, including giving the appearance of fairness because a litigant has control over choosing a jury;\textsuperscript{25} leaving unstated any concerns parties might have about jurors’ biases;\textsuperscript{26} overriding jurors’ natural reluctance to admit partiality;\textsuperscript{27} and serving as a “shield for the exercise of the challenge for cause.”\textsuperscript{28} The “shield” means that attorneys need not fear alienating a prospective juror whom they aggressively questioned because if a challenge for cause ultimately fails they can always remove that prospective juror with a peremptory challenge. Nonetheless, even Professor Babcock

21. Hoffman, \textit{supra} note 7, at 857 (“Lawyers have significant procedural incentive to exercise all of their peremptory challenges: if they do not, in most jurisdictions they lose any appellate argument regarding erroneous rulings on challenges for cause.”).

22. Broderick, \textit{supra} note 18, at 418 (“Failure to adhere to the mandate of equality erodes community trust in the fairness and neutrality of our judicial system.”); Marder, \textit{supra} note 11, at 1084 (“Those who witness the improper exclusion of prospective jurors based on peremptories are also taught harmful lessons.... They may also conclude that there is hierarchy, rather than equality, among citizens. ...”).


26. \textit{Id.} at 553.

27. \textit{Id.} at 554.

28. \textit{Id.}
has seen fit to revisit her prior opinions,\textsuperscript{29} and for critics, the peremptory's burdensome problems far outweigh any of its alleged advantages.\textsuperscript{30} With regularity, law review articles\textsuperscript{31} and legal opinions\textsuperscript{32} either predict or call for the demise of the peremptory challenge.

This Essay will not dispute the troubling fact that lawyers sometimes use the peremptory challenge to racially gerrymander a jury. Empirical research has documented this practice,\textsuperscript{33} and indeed in my own research I have seen it happen.\textsuperscript{34} However, as the above literature review suggests, concerns about the peremptory are broader than issues of gender or racial representation on juries. Fundamentally, critics of the peremptory take issue with the injection of adversaries' interests into jury selection by way of the challenge.\textsuperscript{35} The negative effect of the adversarial process is not merely the composition of the resulting jury, but also the reactions and feelings of the excused jurors. Nevertheless, there is scant empirical evidence regarding the effect of the peremptory on its targets—the excused jurors themselves. For although some worry that excused jurors see triviality in selection decisions,\textsuperscript{36} feel unfairly treated,\textsuperscript{37} and look down on the courts,\textsuperscript{38} no research shows that they do. In both legal writings and the social science literature, the documented voice and perspective of

\begin{itemize}
\item \textsuperscript{29} Barbara Allen Babcock, \textit{A Place in the Palladium: Women's Rights and Jury Service}, 61 U. CIN. L. REV. 1139, 1147 (1993) ("What I failed to recognize... was that, even though no words were spoken, tides of racial passion swept through the courtroom when the peremptory challenges were exercised.").
\item \textsuperscript{30} Hoffman, supra note 7, at 871 ("These costs—in juror distrust, cynicism, and prejudice—simply obliterate any benefits achieved by permitting trial lawyers to test their home-grown theories of human behavior on the most precious commodities we have—impartial citizens.").
\item \textsuperscript{31} Id. n.1.
\item \textsuperscript{33} See sources cited supra note 8.
\item \textsuperscript{34} See, e.g., Rose, supra note 8, at 699 (discussing representativeness of all thirteen trials); infra note 94 and accompanying text (providing an example of an unrepresentative jury).
\item \textsuperscript{35} Hoffman, supra note 7, at 865–70 (arguing that "the peremptory challenge injects an inappropriate level of adversariness into the jury selection process").
\item \textsuperscript{36} Id. at 862 (observing that people leave the court thinking that the whole trial process is "just as trivial and flawed as jury selection").
\item \textsuperscript{37} Id. n.218 ("Most prospective jurors take their roles very seriously, at least by the time we have reached the peremptory challenge phase, and I sense they are regularly offended when they are excused for unexplained reasons, about which they naturally assume the worst... ").
\item \textsuperscript{38} Broderick, supra note 18, at 418 (noting the erosion of trust in courts); Marder, supra note 11, at 1084 ("[T]here is the stigma that exclusion casts. ... ").
\item \textsuperscript{39} Id., supra note 11, at 1077 (noting that when peremptories are exercised on group-based characteristics, "it is unlikely that the community will perceive the process as fair and accept the verdict").
\end{itemize}
the juror is absent. This is surprising since *Batson* and its progeny implicate a juror's Equal Protection rights when peremptory challenges are exercised on impermissible grounds.\(^{39}\)

As an initial step in remedying this situation, the project described here conducted, in essence, an additional "voir dire" on jurors who have already gone through one jury selection experience. In interviews of over 200 former jurors,\(^{40}\) I asked people about jury selection, inviting them to consider the event in terms of the social science of procedural justice.\(^{41}\) The procedural justice literature looks at distribution systems and asks questions not only about the perceived fairness of *what* someone gets (distributive justice), but also the fairness of *how* benefits and burdens are distributed (procedural justice).\(^{42}\) This distinction between perceptions of outcomes versus procedures is especially important in the context of jury selection, which distributes a burden of citizenship. People may not necessarily want to be selected for a jury—and in one sense, may be happy to be excused—but, according to critics, such people may nevertheless feel that the procedure, in particular the peremptory challenge, is flawed. Several questions posed to jurors during the interviews allow for a detailed examination of excused jurors' reactions to being excused, as well as their views of the jury selection process.

The result is a more nuanced portrait of reactions to jury selection practices than what typically appears in debates about the peremptory. In particular, evidence emerged for each of the following:

(1) Although jurors reported that stereotyping was involved in decisions to excuse them, these stereotypes varied in what might be called "acceptability" and in their relationship to jurors' own assess-

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39. See cases cited supra notes 9–10. Interestingly, it is the defendant who usually "speaks" for the excluded juror in these cases through third-party standing.

40. Throughout this Paper, I use the term "juror" to refer to anyone who underwent voir dire, irrespective of whether they were actually selected for the jury or not. This avoids the cumbersome necessity of using phrases such as former "prospective jurors" or "venire members" to refer to those excused.


ments of their fitness to serve. In contrast to those who believed they were dismissed because of their behavior during voir dire or because of legally relevant experiences, those who believed they were dismissed on the basis of assumptions about their personal characteristics were the least accepting of their outcome.

(2) Despite differences in the acceptability of rationales, the perceived reasons for being excused were not associated with ratings of being treated fairly, overall satisfaction with the jury experience, or willingness to serve on a jury in the future.

(3) When asked to define fair treatment, both selected and excused jurors raised jury selection decision making as an issue of fair treatment. But whereas the peremptory challenge was rarely mentioned as a symbol of unfairness, jurors were critical of aspects of the challenge for cause—specifically, how the court handles hardship cases. Jurors who described fair treatment also focused on whether court personnel were evenhanded, respectful, and asked appropriate questions.

In Part I, I describe the data source. Part II discusses how I categorized jurors' claims about why they were excused and presents the distribution of these categories. This part also considers the ways in which these categories are associated with jurors' beliefs about their abilities to be fair and support for the decision to excuse them. Part III examines whether people's suspicions about why they were excused predict other ratings of jury selection, especially how fairly jurors were treated. I also discuss the ways in which jurors defined "fair treatment" during voir dire. Part IV discusses the results and their implications. I conclude that rather than supporting the worst fears about a public alienated by jury selection, the data are more consistent with what has been described as a "generally accepting attitude" toward voir dire and its practices.43 If the reactions of jurors themselves are to justify drastic changes to jury selection, critics will not find support among the jurors with whom I spoke.

I. The Data

A. Jury Selection Practices and Trial Observation

The present study is based on interviews with 207 people who completed jury service in thirteen criminal trials in a single North Carolina county. Cases were selected nonrandomly from the court calendar by choosing the most serious felony case to be tried in a given week. However, due to the courthouse’s small size, usually no more than one serious criminal case would be tried in a given week; thus, the cases in the sample represent a sizeable proportion of those felonies tried during the study period. For all trials, I observed the entire jury selection procedure and kept notes on jurors’ responses to questions.

Jury selection in this county used a “sequential method.” Twelve jurors were called randomly from the venire and seated in the jury box. The judge introduced the case and typically asked a few general questions about jurors’ names, employment, familiarity with the case, and whether they knew of any reason they could not be fair in the case. However, attorneys conducted most of the voir dire questioning, and the prosecution always commenced. After the district attorney exercised challenges, those eliminated were replaced, and the prosecutor asked questions of these replacement jurors. The defense did not begin questioning until the prosecutor had passed a panel of twelve. After the defense exercised his or her challenges, jurors were replaced again, and the process was repeated until both parties were satisfied with the jurors. Each side was allowed six peremptory challenges, in addition to one challenge for the alternate. In trials with multiple defendants, there were six peremptory challenges available per defendant, per side.

The racial profile of jurors selected for trials in this largely biracial county was complex, and has been described in detail elsewhere.

44. Of the thirteen cases, there were four cases of homicide (three second-degree murder and one involuntary manslaughter), one case of felonious assault (which included first-degree sex offenses), two cases of robbery with a dangerous weapon (one of which was a car-jacking), two felony drug offenses, two accusations of breaking and entering/possession of stolen goods, and two cases of obtaining property by false pretenses.
45. Bermant & Shapard, supra note 2.
46. One trial had four defendants, one had three, and the rest had a single defendant.
47. See Rose, supra note 8.
In brief, there was no overall association between race and being excused: 41% of African-Americans were excused through the peremptory compared with 49% of Whites. However, this masked the adversary nature of excusing African-Americans and Whites. Of the African-Americans dismissed, 71% were eliminated by the state; of Whites dismissed, 81% were eliminated by the defense. Gender showed little association with selection status. Of note, all but one defendant in these trials were African-American, and only two were female. The defense exercised 66% of all peremptories.

B. Recruiting People for the Interview

With the permission of the court, a clerk provided me with the names and addresses of all people who had been questioned, whether they had been selected for the case or not. Across trials, 345 people were questioned for potential jury service. Ninety percent of these people (n = 309) were deemed eligible to participate in the follow-up survey.\(^\text{48}\) To recruit for the interview, people with listed telephone numbers were called directly at their homes. I sent all persons with unlisted telephone numbers a letter asking if they would be willing to be contacted.\(^\text{49}\) For those who did not return the letter, I attempted at least one “house call” in order to contact the juror personally at the address listed with the court. An additional seventeen people were included in the sample through this effort, which was 33% of all attempts.\(^\text{50}\) Unlisted persons are underrepresented in the final sample.\(^\text{51}\) The total response rate was 67% (range across trials: 39%…

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\(^{48}\) People were eligible for the follow-up interview if they (a) underwent questioning by at least one lawyer (and were not simply questioned by the judge) and (b) were part of the initial pool of jurors called for the trial. The first requirement ensured that I excluded people who never underwent questioning to determine biases but instead were immediately excused for obvious conflicts (e.g., being an active duty police officer) or, in some cases, for hardship circumstances. The second requirement was imposed because, in a few trials, challenges exhausted the initial group of prospective jurors prior to seating a final panel for the trial; therefore, the judge summoned a second group of jurors from the jury pool room. As the second pool of jurors did not have the opportunity to observe the voir dire questioning of those already seated or excused, they were deemed ineligible for the survey. Thus, only those who had an opportunity to observe the same jury selection process (prior to being excused, if applicable), and to receive the same orientation from the trial judge, were included in follow-up.

\(^{49}\) Twenty-two percent responded to the letter and all but two of these people were successfully contacted and completed the interview.

\(^{50}\) Most people were not home at the time of the visit; only two people refused during in-person visits.

\(^{51}\) Forty percent of all persons with unlisted telephone numbers were recruited, compared to 80% of listed persons.
All interviews took place within six weeks of the juror's service to the court.  

Of the 207 responses, 105 (51%) were from excused jurors, which includes mostly those dismissed by the peremptory challenge \((n = 92)\), and a small number dismissed for cause \((n = 13)\). Fifty-five percent of all respondents were women, and 72% were married. The sample somewhat underrepresents African-Americans, who were 24% of respondents but 42% of nonrespondents. The sample is well-educated (54% have a college degree or higher) and middle to upper-middle income. For 54% of participants, the target trial was their first experience with voir dire.

The interview covered a range of topics, with a special focus on jurors' views of privacy protection. In this Paper, I focus on what excused jurors had to say about why they were dismissed, their evaluations of that decision, and how these factors relate to other perceptions of jury selection.

II. PERCEIVED RATIONALES FOR BEING EXCUSED: ACCEPTABLE JUDGMENTS OR UNWARRANTED STEREOTYPES?

To begin this examination of jurors' reactions to the peremptory challenge, a basic question concerns jurors' own intuitions about why
they had been excused and the extent to which the reason appears to be an invidious assumption versus a more understandable concern about how the juror might behave if selected. In this study, I asked everyone who had been excused to speculate on the reason for their dismissal. All answers were placed into one of four categories by two independent coders.

A. Developing Coding Categories and the Meaning of “Acceptability”

The categories developed for coding were designed to represent the range of reasons jurors offered to explain their dismissal. In developing these categories, I made some (testable) assumptions about which rationales were more likely than others to be acceptable to the jurors themselves. In doing so, I was aided by considering some possible extremes of acceptability.

At one extreme, there are people who have strong incentives not to serve on a given jury due to their life circumstances. For example, work may be particularly hectic; they may suffer a marked loss in income by serving, especially if they are self-employed; or they may have difficulty arranging substitute care for children, sick spouses, or elders. Frequently these people are unable or unwilling to demonstrate to the judge that they cannot, per se, be fair and, hence, are not dismissed through a challenge for cause.

58. For a categorization and analysis of reasons for peremptory dismissals as offered by attorneys, see Diamond et al., supra note 8.
59. Jurors in this county were paid twelve dollars per day.
60. For example, at least one judge in this study took the position that he would not dismiss jurors due to concerns about work because that would put him in the position of having to make distinctions about which jurors’ jobs were more important than others. In any case, most judges were fairly strict about hardship dismissals and often demanded that jurors demonstrate “actual bias” to grant a challenge for cause. In other words, jurors had to state that they could not or would not perform the duties of a juror. Voir dire in these cases might go something like this:

Juror: It’s just a very bad time for me at work. I have several very important deadlines coming up, and although I want to serve, Your Honor, and to do my duty, it’s a very, very bad time.
Judge: Are you saying that, because of these circumstances at work, you are unable to listen to the evidence, follow my instructions, and render a verdict based on the evidence?
Juror: Well, no, I would certainly try to do my job as a juror.
Judge: So, even given your circumstances at work, you can be fair and impartial?
Juror: Er, yes. I can be fair, but. . .
Judge: Challenge for cause denied.
has some indication that the attorney did so because of the hardship, then the juror in this situation is quite likely to feel good about the challenge and about being "helped" by the attorney.

Contrast this scenario with a juror who believes that she was dismissed because of some simplistic, group-based stereotype, such as her race, religion, or other important feature of identity. This person is likely to view this use of the peremptory as unacceptable, or, at the very least, to view it as less acceptable than the person who believes that the lawyer used a peremptory to relieve a hardship circumstance. Beyond simple self-interest, the two extremes are distinguishable by the fact that in the hardship case, the person's dismissal stemmed from what he or she said during voir dire (e.g., "It would be very difficult for me to serve on this case because of my work situation."); conversely, in the stereotyping case, the juror is dismissed on the basis of some personal, often immutable, characteristic that is unrelated to what he or she said during voir dire.

This distinction—between voir dire-related behaviors (or admissions), on the one hand, and stereotypes on the other—seems simple enough until one considers the complexity of "stereotypes" and the extent to which assumptions about people might be more or less well-founded. This is an issue that raises strong feelings. For instance, in her original work on voir dire, Babcock suggested that the peremptory "avoids trafficking in the core of the truth in most common stereotypes." In recent years, she referred to this as the "most cited passage" in that paper. The citations come, in part, because of resentment over the notion that there is a "core of the truth" when assumptions are made about people. Nevertheless, there is an

61. Although challenges were "peremptory," the public nature of voir dire and this court's use of the sequential method meant that attorneys could on occasion comment on their dismissals. So an attorney might ask the juror with a difficult time at work a few questions but then say, "Your Honor, it sounds like Mrs. Jones' mind is going to be elsewhere during the trial, so I would thank but excuse her at this time." The connection to the hardship rationale would not be as evident if attorneys did not choose to make such comments or did not have an opportunity to do so, as might be the case in a "strike" system in which all challenges are exercised at the same time by both parties, often by indicating decisions only to the judge.

62. In short, the juror must believe that the attorney was acting out of concern for the hardship and was not using this as a pretext to dismiss the person for some other, less noble reason (e.g., race or gender).

63. Babcock, supra note 25, at 553.

64. Babcock, supra note 29, at 1146.

65. Hoffman, supra note 7, at 863 ("We are not fooling anyone, except apparently a few law professors, by refusing to shine the light of rational inquiry on these insupportable hunches.").
emerging consensus among social psychologists that stereotypes can vary in accuracy, and the pertinent academic inquiry seems to be: under what circumstances are stereotypes relatively more or less accurate?

With respect to jury selection, the accuracy of stereotypes is likely to vary in how relevant they seem to the tasks that jurors undertake—namely, the evaluation of a criminal case. For example, Melilli analyzed attorneys' allegedly race-neutral explanations offered for defending Batson challenges. The author attempted to separate group-based stereotypes from individual characteristics or circumstances that might be addressed through a challenge for cause. The result was a range of stereotypes varying in the extent to which there might be a plausible relationship between the stereotype and the job of jurors. Along with patently suspect rationales, such as the fact that a juror was “from Texas,” “from New York,” or was “the same build as the opposing party,” “stereotypes” also included having been a crime victim in the past, knowing the location of the crime, or having a relative who has engaged in criminal activity. Although all these examples are indeed based on assumptions about membership in a given category, such assumptions clearly differ in how closely related they are to issues that might arise when evaluating a criminal case. A defense attorney may be engaging in stereotyping if she assumes that a rape victim might be a little harder on a defendant than someone who has never been raped—but this stereotype is not a wholly unreasonable one.

Likewise, I would expect that relevance to legal matters relates to how accepting jurors will be of the suspected rationales for their dismissal. A juror who believes her status as a crime victim contributed to an attorney’s decision to dismiss her is probably more likely to accept this form of stereotyping than a person who believes she was dismissed because she is White. Similarly, a juror who believes he was excused by the prosecutor because he has a sibling who is currently incarcerated is more likely to understand that decision than the juror who believes he was dismissed because of his age. Of course

66. STEREOTYPE ACCURACY (Yueh-Ting Lee et al. eds., 1995).
67. Id. at 83.
68. Melilli, supra note 6.
69. Id. at 486.
70. Id. at 498.
71. Id.
jurors could still be annoyed if they feel their past victimizations or family situation disqualified them from a jury.72 But the empirical question is: what assumptions are more or less likely to make a juror accepting of an attorney’s decision to exclude that juror. Jurors who believe that they were categorized on the basis of an experience or association that gives them unique knowledge of the legal system (or even of the case itself) seem distinguishable from jurors who believe they were stereotyped on the basis of other characteristics. My categorization of suspected rationales therefore separated people who believed they were excused on the basis of their legally relevant experiences from those who believed they were excused on the basis of some personal characteristic. Although it is a rough distinction, if one is asking about acceptability, then it is expected to be a distinction with a difference.73

Two coders74 placed all responses into one of the following four categories:

(1) **Behavior in Court.** People were placed into this category if they said they were dismissed because of concerns about time conflicts due to work or childcare. In addition, this category also captures people who cited other types of behavior during voir dire that might have given a lawyer pause. Jurors in this sample gave reasons

72. As one juror in this study commented: “Your family isn’t going to be on the jury, you are. . . . If it’s my [criminal] record [that leads to my being excused], OK, but [a family member] could die in the gas chamber, and it’s not you.” Interview, supra note 53, No. 905. This quotation and the issue of stereotyping with respect to privacy protection is discussed in Rose, supra note 6, at 15.

73. Neil Vidmar’s article in this symposium provides additional data on a specific type of “legal experiences.” Neil Vidmar, When All of Us Are Victims: Juror Prejudice and “Terrorist” Trials, 78 CHI.-KENT L. REV. 1143 (2003). He considers instances in which crimes (terrorist attacks) affect so wide a swath of the public that it is difficult to find anyone who has not had a “legal experience.” Id.

74. Although the categorizations are broad, having two coders allowed me to determine how reliable the coding is—that is, how likely it is that a different set of raters would come to the same conclusions. This was especially important given that the coding would be used in subsequent analyses. The present categorization proved highly reliable as measured by a kappa coefficient in which fractions closer to 1.0 suggest better reliability. See, e.g., Jacob Cohen, Weighted Kappa: Nominal Scale Agreement with Provision for Scaled Disagreement or Partial Credit, 70 PSYCHOL. BULL. 213 (1968). Reliability in this study was affected by the fact that a small subset of jurors in this sample gave more than one reason for their dismissal and coders were allowed to double-code in these instances; one of the coders, however, was more diligent than the other in this regard. If we were to count all the double-codes as agreements (i.e., the two coders agreed on at least one of the codes), the kappa statistic is .84 (weighted value = .86), indicating excellent reliability. Even counting all the instances of double-coding as disagreements, reliability is still high, .72 (weighted value = .74). All disagreements between coders were solved through discussion and consensus about which code best described each person’s response.
such as, "I was hesitant about whether I could be fair," or, "I think I was being kind of flip in my responses." To be coded into this category, the jurors had to make a specific reference to a statement or behavior that was part of voir dire. If they just said, "I'm smarter than they wanted," that would be coded into "Personal Characteristics."

(2) Legal Experiences. Excused jurors were placed into this category if they had unique legal or case knowledge, indicated by citing any of the following as reasons for their having been excused: (i) having been a victim of a crime, (ii) knowing a victim of a crime, (iii) having been charged with a crime, (iv) knowing someone who has been charged with a crime, (v) having familiarity with the case or knowing one of the parties or witnesses in the case, or (vi) having served on a jury before. If legal knowledge stemmed from the juror's occupation (e.g., being an attorney), it was considered a personal characteristic.

(3) Personal Characteristics. This refers to reasons for dismissal based on features that make up a person's identity. Personal characteristics tend to be immutable (e.g., race, gender, being a grandmother), although occupation, associations in voluntary organizations, or even the characteristics of one's spouse are included here though people can, in theory, change these facts about themselves.

(4) Cannot Say. A small subset of jurors had no idea why they were excused and would not even speculate.

B. Results: Distribution Across Categories

Table 1 reports the distribution of reasons cited by jurors to explain why they had been excused through a peremptory challenge. Only six people fell into the Cannot Say category; the remaining

75. The decision to place attorneys into the Personal Characteristics category despite their legal knowledge stemmed from a desire to isolate people who had had salient or unique experiences with the legal system in the past. For practicing attorneys, their legal experiences are of a more routine nature and therefore seemed distinguishable from the legal experiences captured in this category.

76. The high number of people offering a guess as to why they were excused may stem from the court's use of a sequential selection method. In this system, one side exercises challenges at the end of a round of questioning, which means that jurors know whether the state or the defense excused them. In addition, sometimes inquiries are tailored to one juror's unique circumstances. If jurors are excused shortly after they have been extensively questioned by one
eighty-six people dismissed through the peremptory felt they knew the reason or were willing to speculate. 77

Before discussing the results further, it is important to emphasize, once again, that these are the reasons the jurors cite for their dismissal, rather than the actual reason (which no one but the attorney knows). On the one hand, some, jurors may be minimizing or softening discrimination. For example, one elderly African-American woman said she thought the fact that she has "sons and grandsons" made the district attorney worry that she might be sympathetic to the defendant. It is equally plausible that she was dismissed because she was the same race as the defendant. 78 On the other hand, some jurors may be minimizing the effect of past experiences. One woman said that she was dismissed because she is a member of an "advocacy group," and she was therefore coded into the Personal Characteristics category. This advocacy group, however, was Parents of Murdered Children and the woman was sitting for a homicide case. She claimed both during voir dire and during my interview that her experience with her son's death would not affect her ability to be fair and impartial in the present case. 79 In short, the coding was done on the basis of the reasons the jurors reported. 80
Table 1: Reasons Jurors Cited for Being Dismissed Through the Peremptory
\((N = 92)\)

<table>
<thead>
<tr>
<th>Category</th>
<th>N</th>
<th>Examples</th>
</tr>
</thead>
<tbody>
<tr>
<td>Behavior in Court</td>
<td>16</td>
<td>Conflicts with work, care-giving, or juror takes medication (8)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Hesitated/uncertain on questions, looked nervous, or was flip (5)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Reluctant to send someone to jail (1)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Communicated strong views regarding O.J. Simpson case (1)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Watched defendant intently (1)</td>
</tr>
<tr>
<td>Legal Experiences</td>
<td>27</td>
<td>Knew party, witness, attorney, or victim’s family member (8)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Crime victim in family (6)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Crime victim them self (4)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Read about or had other knowledge of case (4)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Been a juror or grand juror (3)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Been a witness in court before (2)</td>
</tr>
</tbody>
</table>
Table 1 continued:

<table>
<thead>
<tr>
<th>Category</th>
<th>N</th>
<th>Examples</th>
</tr>
</thead>
<tbody>
<tr>
<td>Personal Characteristics</td>
<td>43</td>
<td>Occupation (12)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Relatives/friends are attorneys or juror</td>
</tr>
<tr>
<td></td>
<td></td>
<td>knew associates of the attorneys in case (9)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Race/gender/age (9)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Voluntary associations or religion (6)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Relatives/friends in law enforcement (4)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Conservative views (1)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Never been in trouble before (1)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Has sons and grandsons (1)</td>
</tr>
<tr>
<td>Cannot say why</td>
<td>6</td>
<td>—</td>
</tr>
</tbody>
</table>

Numbers in parentheses indicate the number of people giving that reason within each category.

(1) Behavior in Court. Sixteen people made reference to their behavior in court as the reason for having been excused; half of this group mentioned their hardship circumstance. This hardship group includes those who had conflicts with employment and those who provided care-giving for sick relatives, as well as one juror who said the effects of medication and her medical needs might interfere with her ability to serve. The remaining people in this category all referred to comments they had made or behaviors they had engaged in during voir dire, such as expressing hesitation about an issue (e.g., being fair to the police) or looking nervous. For instance, despite a fairly long soliloquy from the district attorney that jurors do not sentence, one person reported reluctance to send someone to jail

81. This person had recently been to a doctor for pain in her lower leg. She was beginning to take pain medication, until a diagnosis was definitive. The juror could not say with any certainty whether the drugs would have problematic side effects or whether she might be summoned back to the doctor if the problem was identified or needed further attention.
(although he promised to try to overcome this); during the follow-up interview, this person said that this reluctance probably contributed to his dismissal. Another juror in a different case spent a few moments of voir dire expressing his outrage over the O.J. Simpson verdict and how it made him question the justice system (again promising to set aside this view); he thought the defense attorney factored this into his decision. Finally, another speculated that he was dismissed because he was being very "attentive" during voir dire, in particular, that he watched the defendant quite carefully.

(2) *Legal Experiences.* Twenty-seven people were coded as having had some personal experience that related to the case or revealed involvement in the legal system. The largest group of people \((n = 8)\) knew a witness, one of the attorneys,\(^2\) or a relative of the victim. None claimed that these associations would affect their abilities to be fair, although a couple of these cases presented great challenges in this regard. One juror knew the deceased victim's wife and invested money for her as part of the juror's job at a bank. The victim's wife was, in fact, engaged in a civil suit regarding the same circumstances that were being tried as a criminal matter. During my interview with the juror, she expressed great relief over having been dismissed because maintaining impartiality—though theoretically achievable—would have been very difficult, and the juror felt that the case might have implications for the business relationship. For example, she said that it might have been awkward to interact with her client after the trial.\(^3\) Another knew the defendant through the juror's work in a county prison; that is, she knew the defendant as a former inmate. She, too, was glad that she was dismissed, although did not say during voir dire that she lacked impartiality.

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\(^2\) The people who reported that they knew the attorney had to have knowledge of one of the attorneys trying the case. If they merely knew a friend of the attorney or the attorney's colleague (e.g., they knew the elected district attorney but not the prosecuting attorney), they were coded into the Personal Characteristics category because this was considered less of a direct connection to the case. One person was placed in the Legal Experiences category even though he knew not the ADA but the ADA's wife; this person, however, had been to the prosecutor's house and was in a book group with the ADA's wife, which was considered more than a remote connection to the attorney.

\(^3\) The attorney in this case did not attempt to challenge this juror for cause because, even after several questions, the juror would never say that the situation threatened her impartiality. Indeed, at one point, the juror agreed that the situation—especially the fact that a guilty verdict might help the wife's civil suit—posed a conflict of interest: "I do think it's a conflict of interest. But if you are asking, 'Can I be fair?' I think I can." Interview, *supra* note 53, No. 901.
Six jurors suggested that their having had a family member who was a victim of a crime determined their dismissal; another four suggested it was their own experience with crime. The crimes at issue were sometimes fairly commonplace, as with one juror who said that his grown child's house had been burglarized. Still others reported crimes that were stark and sometimes closely related to the case. For instance, two jurors in separate cases, each involving armed robberies, had themselves been robbed at gunpoint. One woman had been raped as a child and was sitting for service on a case involving a sexual assault. In one case involving questions of spousal abuse and homicide, a prospective juror admitted that his brother had murdered his own wife and then turned the gun on himself. All these jurors maintained during voir dire that these experiences would not affect their abilities to be fair to the state or to the defendant.

Four of the remaining jurors in the Legal Experiences category had knowledge of the case either by having read about it or through other experiences (e.g., by living near the crime scene or having handled the deceased's medical records as part of the juror's job). Three jurors speculated that their service on juries in the past (including two of whom had been grand jurors) affected the attorneys' decisions; another two suggested the reason they had been excused was that they had been witnesses in court before (one as an expert witness and one as a witness for the state in a homicide case).

(3) **Personal Characteristics.** Nearly half of those excused (47%) cited personal characteristics as the basis for their dismissal. These personal characteristics involved a range of issues about which the jurors suspected stereotypes as the basis. Twelve people mentioned their current or former occupations as the basis for the decision. These occupations involved prior military service or law enforcement, being a pharmacist, teacher, attorney, "managerial type," or other occupations that might raise issues similar to those involved in the case, for example, one case involved theft from a store and the juror had previously been a store manager. Nine jurors suspected that their associations with attorneys—either as spouses or friends, or because they have mutual acquaintances with the attorneys trying the case—might have explained their dismissal; another four thought their associations with people in law enforcement might be the basis for their dismissal.

84. This juror was sitting for a drug case.
Although any stereotyping raises troubling questions about overgeneralizations and inaccurate inferences, the remaining personal characteristics seem paradigmatic of what most concerns people about the peremptory challenge. Nine people cited their race, age, or gender as the reason for their dismissal, although they usually mentioned these characteristics in combination or with other profiles (e.g., “probably because I was a young white male who possessed a firearm”;\textsuperscript{85} “I was a senior citizen, white, and had a policeman for a father”\textsuperscript{86}). All of the people remarking on race specifically \textit{(n = 7)} were White, and all were dismissed by the defense. In addition to these demographics, a few jurors reported being profiled on the basis of holding conservative views (dismissed by the defense), being a mother and grandmother, or having not “been in trouble” before. The person voicing this last explanation elaborated:

\begin{quote}
Juror: [H]ere’s a lady that’s lived in [this city] all her life, worked, raised three children—all went to school—and she’s never given anyone no trouble. And sometimes they think that if she’s not been in trouble, she won’t think anyone else should. But it ain’t like that.

Interviewer: How do you feel if that’s the reason?

Juror: It’s all right if they feel like that. I am proud of myself.\textsuperscript{87}
\end{quote}

Another six people cited\textsuperscript{88} their voluntary associations, including their religions, as personal characteristics that explain why they were dismissed.\textsuperscript{89} The voluntary associations cited were the Parents of Murdered Children group, the Junior League, and a remote connection to the Ronald McDonald House (in a case involving a McDonald’s restaurant).

\textsuperscript{85} \textit{Interview, supra} note 53, No. 1029.

\textsuperscript{86} \textit{Id.} No. 1403.

\textsuperscript{87} \textit{Id.} No. 1406.

\textsuperscript{88} Half of the six people who mentioned voluntary associations mentioned religion. Two indicated it was because they were Christian, and another said it was because he was a minister. Although one could say that for the minister, his occupation was the characteristic upon which the attorneys focused, it seems clear that it is his occupation as a \textit{religious person} that is the issue.

\textsuperscript{89} \textit{See supra} note 79 and accompanying text.
C. Ambivalent Jurors as Collaborators in Stereotyping: Some Examples

The last two cases regarding assumptions about voluntary organizations merit further explanation because they both demonstrate the ambivalence some jurors may have about the use of stereotypes during jury selection. Both explanations come from the same trial, which was expected to last about two weeks, rendering most people reluctant to serve. During voir dire, the woman who cited the Junior League as the reason for her dismissal discussed her lack of childcare during the trial but was not excused for cause, and the state's attorney also did not dismiss her after his questioning. When I asked this juror during the interview why she had been excused, she responded as follows:

juror: Because I told him [the defense attorney] I belonged to the Junior League. I think people have this misconception. I think they think it's a group of women—as they say, "pearls and white gloves"—who are opinionated. There may be women like that, but I don't think I am or that the people here [in this county] are.

Interviewer: How do you feel if that is the reason?

juror: I guess I was glad that it got me off the jury at a time I needed to get off. They weren't respecting the fact of child care. I guess I can't prove them—I don't have the opportunity to defend or explain myself, so I'll have to leave it at that.90

The second woman said she was excused because her church had given money to the Ronald McDonald House. She admitted during the interview that she looked for ways to be dismissed:

juror: The questioning at the beginning was thorough, but by the time I got to the jury box they only broadly covered the questions; there was not as much in-depth. I said [to myself], "If they ask me that, I'll answer it this way." But I didn't get to answer because they didn't ask me that question. . . . I'll say why I was excused. I'd gone through what I could think of for valid reasons [to be off the jury]. When the lawyer was asking questions about your church and whether you belong to any organizations, I told him I belonged to a church, and he asked which one. I gave him more information than he asked for about what organizations in the community my church supports. I listed the organizations, including Ronald McDonald House. And then he asked if it would be difficult to be fair and impartial considering this case involved a McDonald's. I said, "I don't think so." And he said he hadn't thought about until

90. Interview, supra note 53, No. 1010.
just then, and I said I hadn't either. Then after talking with his cli-
ent, they dismissed me. The two had not—I had not—thought
about it prior.

Interviewer: How do you feel if that’s the reason?

Juror: That was like saying that because of this, you can't be fair
and impartial, but they didn't know that. I could have been.\textsuperscript{91}

These examples are remarkable in several respects. First, both
jurors suggest a collaborative effort with the attorneys to have
themselves removed. When asked why she was dismissed, the Junior
League member did not simply cite her association with the group but
instead said, "Because I told him I belonged to the Junior League,"\textsuperscript{92}
hinting that she knew the disclosure would leave a certain impression.
The other woman more explicitly admitted to planning answers ahead
of time and to "giving more information than he asked for"\textsuperscript{93} when
discussing her church's donations. Quite clearly both women did not
want to sit on this jury. On the other hand, both sounded ultimately
disappointed that the lawyer, in essence, “took the bait” and dis-
missed them when the jurors felt these factors had nothing whatso-
ever to do with their abilities to be impartial. Complicating the entire
matter is the fact that these examples come from a case that involved
multiple defense attorneys (for multiple young African-American
male defendants), each of whom worked to fashion a highly unrepre-
sentative final panel.\textsuperscript{94} In the end, it is possible these women—who
were both White and upper middle-class—were complicit in helping
the attorneys make use of a stereotype, just not the ones the women
had in mind. They may have simply given the attorney a useful
pretext for a race-based peremptory.\textsuperscript{95}

\textbf{D. Results: Acceptability}

I have suggested that the reasons jurors cite for why they have
been dismissed probably differ in acceptability, but thus far I have
shown only that the reasons proffered did span the range of catego-
ries (from Behavior in Court to Legal Experiences to Personal

\begin{itemize}
  \item \textsuperscript{91} Id. No. 1021.
  \item \textsuperscript{92} Id. No. 1010, No. 1021.
  \item \textsuperscript{93} Id. No. 1021, No. 1010.
  \item \textsuperscript{94} African-Americans constituted 71\% of the final panel which is more than twice their
prevalence in the county.
  \item \textsuperscript{95} Pretext was not an issue in the cases in this study; none of which involved a \textit{Batson}
challenge.
\end{itemize}
I have also offered some instances in which jurors reported finding the use of personal characteristics to be unwarranted—even if they appreciated getting out of jury duty. The remaining question is whether the categories do, in fact, reflect differences in how acceptable the decision seems to the juror.

This study offered two ways of assessing this question, both of which involved two different items. During the interview, all jurors assessed their abilities as jurors by rating the extent to which they thought they could have been fair and impartial jurors and their confidence in their abilities to be fair and impartial. In addition, jurors indicated their support for the decision by rating their satisfaction with the decision to excuse them along with the fairness of that decision. Those who view the rationale for their dismissal as more acceptable should likewise express greater doubts about their abilities to have been fair and to express more support for the decision to dismiss them (in terms of satisfaction and fairness).

Table 2 presents these ratings across the categories of reasons for dismissal. Those dismissed through the challenge for cause are also included for comparison because they were dismissed for actual bias, and therefore are expected to view that decision as the most acceptable. In addition, due to the small size of the Cannot Say category, I

96. These items were: (1) “Thinking back to how you felt during the jury selection process, did you personally believe you could be a fair and impartial juror in this case? Would you say, ‘Yes,’ ‘No,’ or you are ‘Not sure?’” Answers were then coded 1 = yes, 2 = not sure, and 3 = no; thus lower numbers indicate a greater belief in one’s own fairness; and (2) “How confident would you say you felt that you could be fair and impartial? On a scale from 1 to 7 where ‘1’ is ‘not at all confident’ and ‘7’ is ‘very confident,’ how would you rate yourself?” These two items are strongly related to one another, \( r = -0.54 \) (\( p < 0.0001 \)).

97. The two items indicating support for the outcome were: (1) “On a scale from 1 to 7, how satisfied were you with the decision to have been excused from this particular jury? Suppose ‘1’ is ‘very unsatisfied’ and ‘7’ is ‘completely satisfied?’” and (2) “On a scale from 1 to 7, how fair was the decision to excuse you from this particular jury? Suppose ‘1’ is ‘very unfair’ and ‘7’ is ‘very fair?’”

These two items are strongly related to one another \( (r = 0.55, p < 0.0001) \). These two items were modestly related to the two items measuring agreement with the decision. Decision satisfaction correlated with belief in one’s own fairness \( (r = -0.23, p < 0.05) \) and confidence in one’s own fairness \( (r = 0.24, p < 0.05) \). Decision fairness was less highly related to the other two \( (r = -0.15, p < 0.22 \) and \( r = 0.21, p < 0.07, \) respectively). As will be discussed below, see infra note 100, decision fairness proved to be a difficult item for people to assess. I opted not to combine items into aggregate measures. In the case of abilities to be fair, the two items were measured on different scales; in the case of support for outcome, I wanted to distinguish satisfaction from fairness, especially given the complexities associated with decision fairness.
combined these responses with those of the Personal Characteristics group.98

Consistent with expectations, jurors in the Personal Characteristics category expressed the least support for the decision to excuse them. Compared to the other categories of excused jurors, this group was significantly99 more likely to believe they could have been fair jurors and to be confident in their abilities to be fair. By significant margins, this group was the least satisfied with the decision to be excused and regarded this decision as the least fair.100

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98. Placing the Cannot Say group into the Personal Characteristics category—as opposed to the other two groups—was done for multiple reasons. First, there is an a priori concern that this group, like the Personal Characteristics group, will be especially troubled by the peremptory challenge decision because these respondents are essentially bewildered as to why they were dismissed. Second, empirical analysis showed that the ratings of the Cannot Say group most resembled those of the Personal Characteristics category.

99. “Significantly” in this sense refers to a significant statistical difference between the groups. A statistical difference allows one to determine whether the mean ratings from different groups, which appear to be different from one another, actually are. For example, the Legal Experiences category may have a mean of 6.22 on decisions satisfaction, whereas the personal characteristics group has a mean of 5.10. One certainly seems larger than the other, but an actual difference depends upon how much variability there was among jurors’ ratings within those categories. Further, there is a chance that differences in results could have been a fluke, and that if the same study were done many times the difference would not appear. By use of a hypothetical, statistical significance assigns a probability value to the following: “How likely is it that I would observe a difference between two groups that is this large or larger, if I were to assume that, in reality, the two groups did not differ at all?” If the probability is high, one assumes that the groups do not differ from one another, even if they appear to have “different” mean ratings. If the probability is low—typically defined as 1 in 20 or less (p < .05)—then the difference between the groups can be treated as “real”—although one always seeks other evidence, such as replication of the result, in order to actually regard it as a true difference.

The probability values for the ratings in Table 2 were derived from an overall test (called an ANOVA) of whether there were any differences across the groups, and then specific comparisons of differences between any two groups (called t-tests). I conducted these tests after examining whether models should be adjusted for any jury-level effects, meaning that perhaps some of the variation in ratings is due to differences across the trials and not just across jurors. All tests indicated that adjustments for trial-level effects were unnecessary.

100. Decision fairness did not involve the same pattern of significant differences. On this variable, the Personal Characteristics ratings did not differ significantly from the Behavior in Court group. It should be noted that the decision fairness item proved difficult for people to assess, best indicated by the large number of missing cases (n = 19). Missing values were present for twelve people in the Personal Characteristics category, five in Legal Experiences category, and two in the Behavior in Court category. The item may have been challenging because the true reason for their dismissal was unavailable (e.g., a juror might say, “If the decision is based on racial discrimination, then it is unfair; if it is because I made the attorney nervous because I don’t like attorneys, then it was fair.”). In addition, some jurors would ask me, “Well, fair to whom?,” suggesting they might make distinctions between their interests and those of the attorneys. In future work, I would like to ask the question in multiple ways; for the present, however, the decision fairness item should be treated with some conservatism because other jurors may have had difficulty rating the item but were less inclined to refuse to do so outright.
Table 2:
Excused Jurors' Views of Their Abilities To Be Fair in Target Trial, Decision Satisfaction, and Decision Fairness, By Category of Suspected Reasons for Dismissal.

<table>
<thead>
<tr>
<th></th>
<th>Behavior in Court (n = 16)</th>
<th>Legal Experiences (n = 27)</th>
<th>Personal Characteristics (n = 49)</th>
<th>Cause-challenged (n = 13)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Believe could be fair*</td>
<td>1.69ᵃ (0.87)</td>
<td>1.44ᵃ (0.80)</td>
<td>1.22ᵇ (0.44)</td>
<td>1.85ᵃ (0.55)</td>
</tr>
<tr>
<td>Confident could be fair</td>
<td>5.50ᵇ (1.46)</td>
<td>5.67ᵇ (1.84)</td>
<td>6.53ᵇ (1.00)</td>
<td>3.62ᶜ (2.10)</td>
</tr>
<tr>
<td>Decision satisfaction</td>
<td>6.13ᵃ (1.54)</td>
<td>6.22ᵃ (1.34)</td>
<td>5.10ᵇ (2.05)</td>
<td>6.92ᵃ (0.28)</td>
</tr>
<tr>
<td>Decision fairness</td>
<td>5.71ᵃᵇ (1.94)</td>
<td>6.14ᵃ (1.32)</td>
<td>5.08ᵇ (1.07)</td>
<td>6.92ᵃ (0.28)</td>
</tr>
</tbody>
</table>

Standard deviations appear in parentheses.
Within a row, means that have no superscripts in common differ significantly (p < .05) from one another.

*Lower values on this item means a stronger belief in one's ability to be fair; for all other items, higher scores reflect more confidence, satisfaction, and fairness.

The other two categories (Behavior in Court and Legal Experiences) did not differ significantly from one another on any of the items. In fact, members of both groups seemed particularly supportive of the decision to excuse them: on decision satisfaction and decision fairness, their ratings were comparable to those dismissed through the challenge for cause.

E. Summary

This study is the first to ask jurors for their assessments of why they had been eliminated from a jury panel. Critics of the peremp-
tory challenge sometimes claim that those dismissed in this manner are "perfectly acceptable, perfectly fair, and perfectly impartial" and must feel betrayed and disillusioned by the decision. Although not conclusively demonstrating the appropriateness of these dismissals, jurors' reports about their jury selection experiences revealed several notable results.

First, jurors frequently suspect that attorneys made use of "stereotypes" and assumptions about jurors when deciding whom to dismiss. However, beliefs about the these supposed stereotypes vary in acceptability. Over half the people excused either had no idea why they had been deemed incapable or cited group-based stereotypes that often had tenuous connections to the case before them. On average, this group was more confident in their abilities to keep an open mind, and had the lowest decision fairness and decision satisfaction ratings. Although the results are based on a small number of self-rated assessments, they are consistent with the concern that the peremptory challenge can sometimes "waste" people who may well have been up to the job. However, nearly half the sample showed support for the attorneys' decisions. Those who linked likely rationales to their own words or behavior during voir dire, as well as those who cited their unique legal knowledge and experience, tended to express more doubts about their abilities to be fair and to rate the decision to excuse them more favorably. This in no way proves that these jurors could not have been fair and impartial had they been seated, but it does suggest that a substantial number of jurors seem neither confused nor offended by why they were dismissed.

Second, these interviews documented jurors' frequent reluctance or unwillingness to admit even a little partiality. For example, according to jurors, lawyers sometimes used peremptories to eliminate people who reported work or child-care conflicts. These people

101. Hoffman, supra note 7, at 858.
102. See supra note 19.
103. It could be argued that the differences among the groups on perceptions of their own fairness and view of the decision simply reflects different levels of desire to be on the jury. That is, perhaps those who cited their behavior in court or their legal experiences had less interest in serving than those who cited personal characteristics as the reason for their dismissal and then made their decision ratings accordingly. All jurors in this study rated how much they wanted to be on the particular jury for which they had been questioned. There were no significant differences on this item across the categories of people dismissed through the peremptory, suggesting that interest in serving did not account for differences across groups on the outcome measures.
were not dismissed through the challenge for cause largely because even this group—though highly motivated to get out of jury duty—would not say that they were unable to be fair and impartial. Certainly this could reflect the powerful sense of duty that is emphasized during voir dire, as jurors are keenly aware that if they are not chosen, others present will have to take their place. But it may also speak to the difficulty of cogently evaluating the most basic question posed during voir dire: "Can you set aside these issues and be fair and impartial?"

Finally, further evidence of the difficulty of assessing one’s own bias came from those who had harrowing past experiences with crime or who had tangled relationships with parties in the case. Many of these people maintained during voir dire that they could keep an open mind. However, in several cases, their tone was different by the time of the interview. Perhaps because the attorneys had already rendered a decision about them, or perhaps because of the more relaxed atmosphere of a telephone conversation, many of these people confessed that the service would have been hard for them and that the outcome was probably for the best. Although social science has already demonstrated that people are not particularly good at either identifying their biases or gauging their influences, the current study is a reminder of the strong forces acting on jurors during voir dire and that according to jurors’ own assessments, the peremptory seems to eliminate a set of people who are probably best able to serve elsewhere.

III. RATINGS OF THE JURY SELECTION EXPERIENCE AND DEFINITIONS OF FAIR TREATMENT

The previous section shows that variations in the perceived acceptability of a decision to excuse a juror were associated with support for that decision. Of course, viewing a decision as unacceptable is not the same thing as having a negative opinion of jury selection in its entirety. The literature on procedural justice suggests that, in some circumstances, people can disagree with or dislike an outcome but nevertheless make an independent, positive assessment of

the procedures used to arrive at a decision. A crucial question remains as to whether this is true of jury selection or whether, as critics fear, the experience of being both stereotyped and eliminated from a jury harms jurors' perceptions of the court.

Several questions from this study address impressions of jury selection. During the interview, former jurors were asked, "Overall, how satisfied were you with the jury selection experience?" In addition, they assessed how willing they would be to serve on a jury in the future. I also asked all respondents to rate the following items, "How fairly were you treated during jury selection?" and "How fairly were other people treated during jury selection?" Fair treatment is a particularly important issue. If jurors dismissed from service report being treated in an unfair or shabby manner, this would be a severe indictment of the entire voir dire process, including the peremptory challenge.

A. Results: Quantitative Ratings

Table 3 presents the results of these items across the categories described in the previous section. Except for a small difference between the Personal Characteristics group and those excused through the challenge for cause on the willingness variable, this table requires no other notations to mark significant differences because, quite simply, there is little variation in any of these ratings

105. LIND & TYLER, supra note 42, at 112 ("The elation or disappointment prompted by the verdict would not erase the effects of such factors as opportunity for expression of your side of the case.").

106. All ratings were made on a 1 to 7 scale in which higher values correspond to higher satisfaction with jury selection, more willingness to return in the future, and more fair treatment.

107. Initially, I had wanted to be able to distinguish between how people perceived their own treatment from how they viewed the treatment of others because the two need not be identical. This distinction proved unnecessary, as the ratings of the two items were highly correlated (r = .76), meaning that if one was high, so was the other.

108. The fact that those excused through the challenge for cause had somewhat lower ratings of their willingness to serve again is intriguing, especially given the fact that, unlike the peremptory challenge, commentators are not typically concerned about how the challenge for cause affects jurors' views of the court. However, it is possible that these jurors suspect that they are unlikely to be selected for any trial, and in that sense, returning to the court in the future seems to be a waste of time. Beliefs about one's abilities to be a good juror have been linked to lack of response to jury summonses. See, e.g., Robert G. Boatright, Why Citizens Don't Respond to Jury Summons and What Courts Can Do About It, 82 JUDICATURE 156, 159 (1999). Nonetheless, it should be noted that while there is high variability (high standard deviations) for the willingness variable, the effect observed here is small, and the Cause-challenged group is significantly different only from the Personal Characteristics group (who had the highest rating of willingness to return).
associated with the coding categories. Regardless of whether jurors believed they had been dismissed because of their behavior in court, their legal experiences, their personal characteristics, or some other reason, overall satisfaction with jury selection, willingness to return in the future, and a sense of fair treatment were viewed in similar ways.\(^\text{109}\)

**Table 3:**

<table>
<thead>
<tr>
<th></th>
<th>Behavior in Court (n = 16)</th>
<th>Legal Experiences (n = 27)</th>
<th>Personal Characteristic (n = 49)</th>
<th>Cause-challenged (n = 13)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overall satisfaction</td>
<td>4.88 (1.54)</td>
<td>4.81 (1.92)</td>
<td>4.79 (1.76)</td>
<td>4.38 (1.26)</td>
</tr>
<tr>
<td>Willingness to serve in the future</td>
<td>5.19 (2.22)&lt;sup&gt;ab&lt;/sup&gt;</td>
<td>5.07 (2.11)&lt;sup&gt;ab&lt;/sup&gt;</td>
<td>5.57 (1.90)&lt;sup&gt;a&lt;/sup&gt;</td>
<td>4.23 (2.20)&lt;sup&gt;b&lt;/sup&gt;</td>
</tr>
<tr>
<td>Fair treatment</td>
<td>6.28 (1.26)</td>
<td>6.17 (1.11)</td>
<td>6.28 (1.22)</td>
<td>6.42 (1.22)</td>
</tr>
</tbody>
</table>

All ratings made on a 1 to 7 scale, with higher values corresponding to more satisfaction, willingness, and sense of fair treatment. Standard deviations appear in parentheses.

Within a row, means that have no superscripts in common differ significantly \(p < .05\) from one another.

The numerical value of the means in Table 3 is also informative. Jurors’ overall satisfaction with jury selection was modest (just above the midpoint of a 7-point scale), and willingness to return in the future was only somewhat higher. Ratings of fair treatment, however, were quite high—consistently above a 6. Quite clearly, though they

109. In other work, I consider which factors predict overall satisfaction with jury selection and willingness to return in the future. Results suggest privacy protection plays a role in overall satisfaction, especially among those excused; individual desire to serve on a jury and race were correlated with willingness to return to serve in the future. See Mary R. Rose, Compelling Disclosures: Jury Selection and the Distribution of a Duty (2003) (unpublished manuscript, on file with author).
had been dismissed from a jury, the group of jurors interviewed for this study felt that they had been treated fairly.

What accounts for these high marks? A partial explanation may lie in how jurors describe the meaning of fair treatment in this setting. This is a useful question to ask not only as a way to understand the quantitative ratings of fair treatment, but also to gain a better understanding of the dimensions of fairness underlying jury selection. After all, although this court received high ratings, perhaps other courts may not perform so admirably, and this study presents an opportunity to understand on what bases jurors assess fair treatment.

Immediately after they made their fair treatment ratings, I asked all jurors: “What specifically made you feel that potential jurors were treated either fairly or unfairly?” I looked for clusters of responses and considered in particular how often jurors made reference to decisions made about whom to excuse—either positively or negatively—in defining fair or unfair treatment. Because I asked about the treatment of all potential jurors, the inquiry here is not limited to the perceptions of those excused. The particulars of fair treatment as seen by those selected is included in order to gain the most comprehensive view of fair treatment.¹¹⁰

B. Results: Qualitative Descriptions of Fair Treatment

An issue that is clearly important to jurors is the observation that authorities are even-handed with people: eighty-one people made reference to the extent to which the court treated everyone the same either in the types of questions asked or how people were treated more generally.¹¹¹ For instance, one juror describes being impressed during the voir dire of a well-known local news anchor:

They questioned him for a long time, and they were going to keep him until he said he may have read some things through his work that wouldn’t go into evidence. I thought it was interesting that they were seriously considering this guy even though he has this

¹¹⁰. Selected jurors had slightly higher ratings, on average, than those excused. The selected group’s rating was 6.62 (SD = 0.68), the excused group’s was 6.27 (SD = 1.19). Although small, this difference is statistically significant: \( t = 2.58, p < .05 \).

prominent job in town. I thought, "He's being treated just like the rest of us." 112

As the quantitative ratings of fair treatment suggested, comments about even-handedness were overwhelmingly positive. Only 12% of people discussed consistency of treatment in a negative light. Two people thought questioning had not been consistent across people; four people thought they observed differentiations in treatment on the basis of race; four people thought that upper-class or better-educated people were favored; and one person questioned whether summoning to the box for questioning was truly done on a random basis (although this person did not suggest what alternative system might have been used).

As critics of the peremptory suspect, how selection decisions are made does emerge as an issue of fair treatment. Sixty-two people (about 30% of the sample) defined fair treatment in terms of decisions about whom to excuse, and 44% of these people held a negative view of how these decisions were made or carried out. As it turns out, however, the bulk of negative responses were not directed at the attorneys' decisions, but rather at those of the judge. When asked what constituted fair treatment, thirty-one people mentioned the handling of hardship cases, fully half \( n = 16 \) viewing these in a negative light. Further, in these negative comments the judge was criticized for being overly harsh or unsympathetic when people gave what these jurors saw as legitimate reasons for being unable to serve.

In other words, decision making as an issue of fair treatment concerned not whether some people were dismissed when they should not have been, but rather whether people were inappropriately required to serve. When service presented a difficult conflict for people in terms of lost wages or care-giving responsibilities, jurors expected the court to make allowances. For example, the judge in one case refused a for cause challenge for a woman who was a single mother, who cleaned homes for a living, and who would go without money for the length of the trial. A juror disapproved, saying, "I don't think that was fair. They should have let her off. She's not living on the welfare system." 113 Likewise, those complimenting the

112. Interview, supra note 53, No. 912. The respondent's assessment of why the news anchor was excused (by the defense) may be correct, but I would note that the juror also stated initially that he expected a defendant to testify in his own defense. After some follow-up questioning he maintained that he preferred the defendant to do so but did not require it.

113. Id. No. 601.
court on this dimension consistently did so by noting that people were not “forced” to serve when it would be difficult for them. Only two people felt that hardship excuses were too easy to obtain, suggesting the court accepted the “lamest excuses” in letting people off.

The other thirty-one people who discussed decision making as an issue of fair treatment mentioned whether it seemed like the people selected or excused could have “done the job.” Of these people, nearly two-thirds reported that decisions were appropriate, i.e., that the people excused were the ones who should have been. About one-third (n = 11) said they either could not understand why some people were dismissed or felt that it was unfair not to tell people why they had been excused. As one of these people said: “Am I ugly? Am I crazy? . . . They should be able to tell a person.”

Generally speaking, however, just a small minority of people expressed puzzlement over, or outright criticism of, decisions to excuse people through the peremptory when defining fair treatment; far more said that treatment was fair because they felt they understood why people were dismissed. There was no indication that excused persons were more likely to make reference to decision outcomes in defining fair treatment than those selected. Of the thirty-one people who mentioned this issue, fourteen had been excused.

The remaining ways in which fair treatment was defined concerned the extent to which court personnel were polite and respectful (n = 46 people), whether questioning was thorough and jurors were listened to (n = 32), and whether privacy was protected, either by questioning being appropriate and relevant (n = 21 people) or by limiting the intrusiveness of public questioning (n = 28).

114. Id. No. 803.
115. Id. No. 303.
116. Of note, these comments were frequently phrased in quite general ways (e.g., “The decisions seemed all right.”). It is conceivable that these people were referring to any decision about whom to excuse, whether through the challenge for cause or the peremptory challenge. This means that the number of people who mention issues related to the challenge for cause could be an undercount.
117. Id. No. 905.
118. The general issue of privacy protection during jury selection, and its relationship to the peremptory challenge, is discussed in more detail in Rose, supra note 6.
C. Summary: Being Excused and Issues of Fair Treatment

In sum, this study provides little support for those who worry that excused jurors will feel that they have been treated unfairly at the hands of the court. All jurors, including those who had been excused, had high ratings of fair treatment. Further, in qualitative comments about fair treatment, only a handful of jurors considered either the peremptory challenge itself or unfounded dismissals from the jury as instances of unfair treatment—even though nearly half the sample had been excused from a trial through the peremptory. Thirty-one people (15% of the sample) discussed fair treatment in terms of how judges handled hardship cases, with jurors consistently expecting mercy towards those whose life circumstances conflicted with service.

IV. JURORS DEFEND THE ADVERSARY SYSTEM AND THEIR OWN INTERESTS

There are several issues this study cannot address. This project cannot determine whether decisions about whom to excuse were, in any objective sense, appropriate. Without access to the true reasoning behind the decisions, and without some way to measure how this group of excused jurors would have viewed the same cases, I cannot say whether the decisions were discriminatory, wise, unfortunate, or inspired.\footnote{For an excellent example of a study that measured how an excused group of jurors might have voted, see Zeisel & Diamond, \textit{supra} note 3.} Second, because I surveyed within a single courthouse, I cannot determine whether one particular style of jury selection—the tone, the sequential method, the length of time spent—was responsible for the views of jurors reported here, or indeed, whether results are likely to generalize to a wide variety of other jurisdictions and courthouses.\footnote{It is worth noting, for instance, that under a sequential method of questioning, it is always evident who is excusing which juror. In a “strike system,” in which all peremptories are exercised at the same time, jurors are more likely to be ignorant not only of the reason for their dismissal but also of who exercised the challenge. It is possible that jurors in the strike system would view their outcomes or the peremptory challenge less favorably. However, to date, no empirical data has examined this question.} Finally, because I did not interview people prior to voir dire, I cannot say definitively whether anything about jury
selection practices changed the views of those who observed them; indeed, several competing explanations are possible.\textsuperscript{121}

What this study can do, however, is to systematically document and analyze the voice of the juror as it pertains to debates about the peremptory challenge's place within jury selection. In this study, I spoke with over a hundred jurors who had been dismissed under a wide variety of circumstances. The current study can indicate whether excused jurors' reports of their jury selection experience tended to be positive, negative, or neutral, and, importantly, whether these views support commentators' fears or optimism. This study does not suggest that jurors are never upset over being excused, never resentful toward the court and attorneys, or never annoyed over the "waste" their dismissal represents in terms of their time or their talents. There were jurors I spoke to who were quite unhappy about their time in jury selection.\textsuperscript{22} However, rather than focusing on highly memorable trials involving abuse of peremptory challenges, and rather than privileging encounters with jurors who are disappointed or dismayed over a decision, this study concerns itself with the views of typical (or average) jurors dismissed from this court.

121. The critics of the peremptory are essentially positing a "harm hypothesis," claiming that observing jury selection and the use of peremptory damages the legitimacy of the court in the jurors' eyes. However, a contrasting possibility is that jury selection seeks out and identifies those who have pre-existing negative views about the courts or other case-related issues—what might be termed a "bad attitude hypothesis." If the peremptory challenge successfully eliminates this group of people, it would not be surprising to learn that they view the court in a negative light because this was precisely the characteristic that contributed to their dismissal in the first place. Without measuring attitudes prior to jury selection, it is not possible to determine whether any low ratings of the experience reflect harm or bad attitudes. Two unpublished studies are suggestive, however. A doctoral student surveyed northern California jurors prior to voir dire and after service was complete, measuring, among other things, their views of the court. She found little change in perceptions among those excused, but an improved view of the court on the part of those who served on a case. This suggests that excusing people may not harm opinions so much as deny people an opportunity to have a positive experience that may improve their view of the court. See Paula Consolini, Learning By Doing Justice: Jury Service and Political Attitudes (1992) (unpublished Ph.D. dissertation, University of California at Berkeley) (on file with author). This is consistent with the findings of an unpublished, court-sponsored survey of southern California jurors done in the 1970s. Harvey P. Grody, Final Report: Criminal Trial Jury Communication Feedback Project (1976) (unpublished report, Orange County Office of the Public Defender) (on file with author) ("The challenge experience has little impact upon the overall distribution of responses to the questions asking respondents about their general satisfaction with the system."). Of course such results do not obviate concern about the peremptory entirely, for it is certainly a good thing to provide people with a positive impression of the court, and one would hope that lost opportunities are kept to a minimum. However, this type of "harm" may be remedied when people serve on a case in the future.

122. In discussing his extreme dislike for the peremptory, one juror said, "All they say is, 'See you next year.' You won't see me." Interview, supra note 53, No. 905.
In this study, jurors reflected on jury selection in four important ways: (1) they reported why they thought they had been excused; (2) they provided their post-hoc assessments of their abilities to have been fair and whether decisions seemed fair and were satisfactory; (3) they rated their satisfaction with the court, their willingness to return, and their sense of having been treated fairly; (4) and all jurors elaborated on what it means for the court to treat jurors fairly. Each subsection found only mixed—and more often little—support for the basic charge that jurors who have been dismissed will inevitably perceive problems with the peremptory challenge will be resentful and alienated, or will feel ill treated. Although excused jurors acknowledge the use of stereotyping, in general the results suggest a "generally accepting" assessment of jury selection. This acceptance seems tied to a comfortable recognition of both the adversarial aspects of jury selection and a view that the proceedings do not revolve entirely around jurors' particular interests.

In several ways, these jurors seemed comfortable with the idea that jury selection involves an adversarial element. Based on the questions posed and knowledge of who dismissed them, the majority could at least guess why they had been eliminated, and most cited reasons that seemed to reflect plausible theories about the competing parties' concerns. Thus, many people expressed a self-awareness of how they presented themselves during jury selection and that either their small hesitations or long diatribes on relevant questions probably alienated one party or the other. Further, in addition to the twenty-seven people who cited legal experiences as the basis for their outcome, several of the people in the Personal Characteristics category mentioned associations with lawyers or law enforcement. Attorneys are perhaps wrong to be nervous about the effects of people's prior encounters with the legal system or their associations with legal actors—such assumptions may indeed be the results of unfounded stereotyping—but jurors were nevertheless cognizant that these issues might make attorneys nervous. Jurors' awareness of adversaries' pet theories about jurors is perhaps best reflected in the

124. It is always possible that those with knowledge of the legal system will have the most open-minded and nuanced views, allowing them to entertain possibilities that a given party might not expect (e.g., that police lie on occasion).
occasional stories of jurors searching for or anticipating profiling information that might result in their being subject to a peremptory.\textsuperscript{125}

But most important, the evidence suggests that (jurors interviewed in this study distinguished between the wisdom of the attorneys’ decisions and general impressions of the jury selection system. In the end, people’s explanations for their dismissals differed in levels of support for the decision itself, but in no other way (overall satisfaction with jury selection, willingness to return in the future, or fair treatment). This suggests not only an awareness of the adversarial system of jury selection, but also an acceptance of it. Jurors seemed to realize that jury selection is only partly about them. Such a perspective is perhaps best summed up by one juror, who reflected on the experience of being excused:

\begin{quote}
I feel all right. I’m just a person like that. Let me explain: If I brought you a piece of cake, and you didn’t want to have it, that’s all right with me. It’s OK with me if you want to eat it or feed it to the dog or whatever. So I feel like I went and offered my services, and if they don’t want them, that’s OK with me.\textsuperscript{126}
\end{quote}

For the above woman, dismissal from the jury apparently has no more implication or meaning than discovering that a friend does not fancy her baking. Her job is to give her time; the attorney’s job is to decide if her time is needed.

The above sentiment also seems consistent with the perspective—suggested in many ways—that the average person viewed jury duty as just that: a duty. Ratings of overall satisfaction and willingness to return in the future were not in the highest, most positive ranges of their scales. This indicates that jury duty was probably not an activity most would have chosen to undertake on their own. Even given this, most jurors took their duty seriously. Note how reluctant the potential hardship cases were to shirk their responsibility outright and to declare that they refused to even try to maintain fairness and impartiality. In all likelihood, it is not only psychologically difficult or embarrassing to refer to oneself as biased, but also may seem wrong in a moral sense when so many others accept their duty. Even if plagued by ambivalence or other conflicts, these people wanted to be good jurors, once again recognizing that the proceedings involve interests besides their own.

\textsuperscript{125} See \textit{supra} notes 91–94 and accompanying text.

\textsuperscript{126} Interview, \textit{supra} note 53, No. 810. This is the woman who guessed she had been dismissed because she has sons and grandsons. See \textit{supra} note 78 and accompanying text.
The reality of jury service as a duty may explain why hardship circumstances were not infrequently cited as examples of fair or unfair treatment. Elsewhere I have argued that a social exchange of sorts underlies jury selection, an agreement between citizen and state that amounts to the following: We come here; you look after our interests. I have suggested this contributes to the attention people pay to privacy protection during voir dire because jurors are not in a good position to protect their own privacy and therefore expect the courts to take care of this issue. The same might be true of serious hardship conflicts that can arise in jury service, as jurors must depend upon the courts’ compassion for consideration of their difficulties. To state publicly and explicitly that the court does not care about the realities of jurors’ lives would be inconsistent with protecting jurors’ interests when they are vulnerable. This is not to say that such a perspective is the correct one, for it ignores the fact that being merciful sometimes violates another fairness expectation—namely, treating people consistently—when individual circumstances must be evaluated. Nevertheless, this sample of jurors frequently expected mercy when income or time was scarce for fellow jurors, and instances in which hardship requests were denied outright seemed to be a salient issue for this group. Results are only suggestive, but it may be that jurors are even more sensitive to this issue than to the vagaries of adversaries’ use of the peremptory challenge.

In sum, according to this “voir dire of voir dire,” excused jurors appeared cognizant of the adversarial interests behind peremptory decisions and were generally at peace with jury selection practices. Similar to the expectations we might have of people who are selected for juries, the respondents had clear opinions about the wisdom of attorneys’ and the courts’ decisions. Regardless of these views, however, most described themselves as having been prepared to sacrifice their own interests to those of the court. In short, if the peremptory challenge causes harm to the views of those excused, it was difficult to find it in the voices of this group.

127. Rose, supra note 109.
128. Id.