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# A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials


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# A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials\*

Catherine M. Grosso & Barbara O'Brien\*\*

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\*\* Catherine Grosso and Barbara O'Brien are associate professors at the Michigan State University College of Law.

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## I. INTRODUCTION

Among those who laud its mission, it seems that the only people not disappointed in *Batson* are those who never expected it to work in the first place. Scholars, judges, and practitioners have criticized the decision for its failure to curb the role of racial stereotypes in jury selection.<sup>1</sup> Likewise, previous research in North Carolina has suggested both that race continues to play a role in jury selection and that courts are reluctant to enforce *Batson* rigorously.<sup>2</sup> Recently, however, the North Carolina General Assembly passed legislation aimed at curing this defect by providing trial courts a unique opportunity to consider the role of race in peremptory challenges from a different angle.

The North Carolina Racial Justice Act of 2009 (“RJA”) created a state claim for relief for defendants currently on death row who can show that race was a significant factor in the exercise of peremptory challenges in their cases.<sup>3</sup> A defendant who makes such a showing is entitled to have a death sentence reduced to life without parole.<sup>4</sup> The RJA expressly deems a broad range of evidence relevant by allowing claimants to prove their cases using “statistical evidence or other evidence, including, but not limited to, sworn testimony of attorneys, prosecutors, law enforcement officers, jurors, or other members of the criminal justice system or both.”<sup>5</sup> This Article presents the results of a study undertaken in order to evaluate the potential for statistical evidence to support claims under this part of the RJA.

In particular, we examined how prosecutors exercised peremptory challenges in capital trials of all defendants on death row in North Carolina as of July 1, 2010, to assess whether potential jurors’ race played any role in those decisions.<sup>6</sup> We found substantial disparities in which potential jurors prosecutors struck. Over the twenty-year period we examined, prosecutors struck eligible black venire members at about 2.5 times the rate they struck eligible venire members who were not black. These disparities remained consistent over time and across the state, and did not diminish when we

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1. See *infra* notes 19–21 and accompanying text.

2. See Amanda S. Hitchcock, Recent Development, “Deference Does Not by Definition Preclude Relief”: *The Impact of Miller-El v. Dretke on Batson Review in North Carolina Capital Appeals*, 84 N.C. L. REV. 1328 (2006) (reviewing North Carolina Supreme Court’s highly deferential approach to reviewing *Batson* claims in capital cases); Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 LAW & HUM. BEHAV. 695 (1999) (studying jury selection in one North Carolina county).

3. See N.C. GEN. STAT. §§ 15A-2010–12 (2011) (creating a cause of action if the court finds race was a significant factor in the prosecutor’s decision to seek or impose a death sentence).

4. *Id.* § 15A-2012(a)(3).

5. *Id.* § 15A-2011(b).

6. A list of current death row inmates is available at <http://www.doc.state.nc.us/dop/deathpenalty/deathrow.htm>.

controlled for information about venire members that potentially bore on the decision to strike them, such as views on the death penalty or prior experience with crime.<sup>7</sup>

In Part II, we review the prior research on jury selection, particularly on the issue of racial bias. In Part III, we present our study methodology and design. Part IV presents the statewide unadjusted racial disparities in prosecutors' exercise of peremptory strikes, and Part V presents the results of analyses controlling for other factors potentially relevant to jury selection.

## II. THE STUBBORN LEGACY OF RACE IN JURY SELECTION: THE RULES AND THE REALITY

The Supreme Court has grappled with barriers to racial diversity in juries for decades.<sup>8</sup> Indeed, even while characterizing the peremptory challenge as a tool vital to the accused, the *Swain v. Alabama* Court held that a prosecutor's systematic exclusion of black jurors was "at war with our basic concepts of a democratic society and a representative government."<sup>9</sup> Jurors, the Court asserted, "should be selected as individuals, on the basis of individual qualifications, and not as members of a race."<sup>10</sup> The Court elaborated this view in *Batson v. Kentucky*, when it noted that purposefully excluding people from jury service based on their race undermines public confidence in our justice system.<sup>11</sup> The Court later clarified that excluding jurors because of their race harmed not only the defendant, but the wrongly excluded jurors as well,<sup>12</sup> and that defense counsel must abide by the same rules as prosecutors.<sup>13</sup> The Court has extended the doctrine to prohibit gender-based strikes,<sup>14</sup> and some lower courts have prohibited strikes based on religious affiliation.<sup>15</sup>

While the Court established an elaborate three-step process for challenging a peremptory challenge as based on race (or gender), parties

7. Please see Part III.E and Appendix A for more information on this coding.

8. *Duren v. Missouri*, 439 U.S. 357 (1979); *Castaneda v. Partida*, 430 U.S. 482 (1977); *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (juries exist "to guard against the exercise of arbitrary power"); *Glasser v. United States*, 315 U.S. 60, 86 (1942) (juries must not be "the organ of any special group or class"), *superseded on other grounds by rule*, FED. R. EVID. 104(a), *as recognized in* *Bourjaily v. United States*, 483 U.S. 171 (1987).

9. *Swain v. Alabama*, 380 U.S. 202, 204 (1965) (quoting *Smith v. Texas*, 311 U.S. 128, 130 (1940)) (internal quotation marks omitted), *overruled by* *Batson v. Kentucky*, 476 U.S. 79 (1986).

10. *Id.* (quoting *Cassell v. Texas*, 339 U.S. 282, 286 (1950)) (internal quotation marks omitted).

11. *Batson*, 476 U.S. at 87.

12. *Powers v. Ohio*, 499 U.S. 400, 425 (1991).

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

14. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).

15. *United States v. Brown*, 352 F.3d 654 (2d Cir. 2003); Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 GEO. L.J. 945 (1998).

can readily defeat the challenge by proffering a plausible race-neutral reason for the strike decision.<sup>16</sup> Trial courts rarely reject these explanations (in the third step) as disingenuous, or “pretextual.”<sup>17</sup> Moreover, the Court designed the *Batson* regime to counter intentional discrimination. Significant psychological research suggests that racial bias can operate below the level of conscious awareness to affect people’s perceptions and behaviors.<sup>18</sup> As a result, a party who is subconsciously influenced by a juror’s race might offer in good faith a race-neutral reason for the strike. *Batson*’s focus on the credibility rather than reasonableness of the proffered explanation authorizes trial courts to uphold such strikes even though they may be actually (if unintentionally) driven by race.

The difficulty of uncovering racial bias—whether deliberate or unconscious—has led many to conclude that the *Batson* regime cannot counter discrimination in jury selection.<sup>19</sup> Many scholars and several judges have called for the wholesale abolition of peremptory challenges.<sup>20</sup> Others have suggested less drastic reforms, such as reducing the number of peremptories available to each side, so as to limit the opportunity for race-

16. In the first stage, the defendant carries the burden of establishing a prima facie case. In the second, the prosecution carries a burden of producing a race-neutral explanation for the strike or strikes. Finally, in the third stage, the defendant carries the burden of proving that the explanations offered by the prosecution with respect to one or more venire members were pretextual, thereby supporting an inference that one or more was racially motivated. *Batson*, 476 U.S. at 96–98.

17. *Miller-El v. Dretke*, 545 U.S. 231, 278 (2005) (Thomas, J., dissenting); Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 483–84 (1996).

18. Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, in THE HANDBOOK OF SOCIAL PSYCHOLOGY 357, 357–411 (Daniel T. Gilbert, Susan T. Fiske & Gardner Lindzey eds., 4th ed. 1998); Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5 (1989).

19. *Batson*, 476 U.S. at 102–08 (Marshall, J., concurring); Edward S. Adams & Christian J. Lane, *Constructing a Jury That Is Both Impartial and Representative: Utilizing Cumulative Voting in Jury Selection*, 73 N.Y.U. L. REV. 703, 706–07 (1998); Leonard L. Cavise, *The Batson Doctrine: The Supreme Court’s Utter Failure To Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501; Sheri Lynn Johnson, *Batson Ethics for Prosecutors and Trial Court Judges*, 73 CHI.-KENT L. REV. 475 (1998); Deborah Ramirez, *Affirmative Jury Selection: A Proposal To Advance Both the Deliberative Ideal and Jury Diversity*, 1998 U. CHI. LEGAL F. 161, 173–74.

20. *Batson*, 476 U.S. at 102–08 (Marshall, J., concurring); Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 199–211 (1989); William G. Childs, *The Intersection of Peremptory Challenges, Challenges for Cause, and Harmless Error*, 27 AM. J. CRIM. L. 49 (1999); Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge’s Perspective*, 64 U. CHI. L. REV. 809, 809 n.2 (1997) (listing and citing judges and academics who have voiced strong concerns about peremptory challenges); Vivien Toomey Montz & Craig Lee Montz, *The Peremptory Challenge: Should It Still Exist? An Examination of Federal and Florida Law*, 54 U. MIAMI L. REV. 451 (2000); Arielle Siebert, *Batson v. Kentucky: Application to Whites and the Effect on the Peremptory Challenge System*, 32 COLUM. J.L. & SOC. PROBS. 307 (1999).

based jury selection.<sup>21</sup> The RJA adopts none of these policy recommendations. Rather, it authorizes a new approach to examining the role of race in the exercise of peremptory challenges based on a broad range of evidence.

As noted earlier, the RJA created a state statutory claim for defendants facing a death sentence who can show that race was a significant factor in the exercise of peremptory challenges “in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed.”<sup>22</sup> The geographical scope of a potential claim makes it distinct from a typical *Batson* claim as does the range of evidence expressly authorized. Claimants may prove their cases using “statistical evidence or other evidence, including, but not limited to, sworn testimony of attorneys, prosecutors, law enforcement officers, jurors, or other members of the criminal justice system or both.”<sup>23</sup>

This Article presents evidence relevant to a claim under the RJA. Anecdotal evidence suggests that race weighs heavily in decisions to exercise peremptory strikes<sup>24</sup>—a conclusion bolstered by systematic research. Previous research on jury selection generally, and the role of race in the exercise of peremptory studies more specifically, typically evaluates different aspects of *Batson*’s legal framework. While this framework does not apply directly to an RJA claim, the central question remains constant: Did race play a significant role in the exercise of peremptory challenges?

#### A. EXPERIMENTAL AND MOCK-JURY STUDIES

Experimental and other laboratory work with mock jurors lends support to those who suspect that race continues to play a role in jury selection.<sup>25</sup> For example, a number of studies conducted before the *Batson* Court prohibited consideration of race in jury selection demonstrated its importance in decision making. George Hayden, Joseph Senna, and Larry Seigel examined the types of information relevant to prosecutorial decision making in voir dire among twenty randomly selected prosecutors from four Boston-area

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21. Adams & Lane, *supra* note 19; Amy Wilson, *The End of Peremptory Challenges: A Call for Change Through Comparative Analysis*, 32 HASTINGS INT’L & COMP. L. REV. 363 (2009).

22. N.C. GEN. STAT. § 15A-2011(a) (2011).

23. *Id.* § 15A-2011(b).

24. In a 1986 training video, Philadelphia District Attorney Jack McMahon emphasized the importance of striking certain black venire members, such as “blacks from low-income areas” and blacks who are “real educated.” Videotape: Jury Selection with Jack McMahon (DATV Prods. 1987), available at <http://video.google.com/videoplay?docid=-5102834972975877286>, cited in David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 41-43 (2001).

25. Samuel R. Sommers & Michael I. Norton, *Race and Jury Selection: Psychological Perspectives on the Peremptory Challenge Debate*, 63 AM. PSYCHOLOGIST 527, 533 (2008).

counties.<sup>26</sup> The researchers presented the prosecutors with categories of information about potential jurors for two hypothetical cases, one involving a black defendant and the other a white defendant.<sup>27</sup> Prosecutors could seek information about potential jurors from one category at a time, and then decide whether to strike the juror or to seek more information.<sup>28</sup> Prosecutors typically sought information about potential jurors' gender, age, residence, occupation, demeanor, and appearance.<sup>29</sup> In the case involving the black defendant, however, prosecutors sought information on race of the venire member significantly more often than they did in the case involving the white defendant.<sup>30</sup>

More recently, Michael Norton and Samuel Sommers presented three groups of study participants—college students, law students, and trial attorneys—with the facts of a criminal case involving a black defendant.<sup>31</sup> The researchers told participants to assume the role of the prosecutor, and that they had only one peremptory strike left to use in deciding which of two prospective jurors to strike.<sup>32</sup> The prospective jurors each had qualities that pretesting suggested would be troubling to prosecutors: one was a journalist who had investigated police misconduct and the other had indicated skepticism about statistics relevant to forensic evidence that the state would offer.<sup>33</sup> Participants were randomly assigned to one of two conditions: one in which the first prospective juror was black and the second white, and another in which the race of the prospective jurors was reversed.<sup>34</sup>

Participants challenged the black juror more often than the white juror, regardless of whether the juror was presented as the journalist or the statistics skeptic.<sup>35</sup> Yet, when asked to explain why they struck the juror they did, the study participants almost never mentioned race; participants tended to offer the first juror's experience writing about police misconduct when

26. George Hayden, Joseph Senna & Larry Siegel, *Prosecutorial Discretion in Peremptory Challenges: An Empirical Investigation of Information Use in the Massachusetts Jury Selection Process*, 13 NEW ENG. L. REV. 768 (1978).

27. *Id.* at 781–82.

28. *Id.* at 782–83.

29. *Id.* at 784–85, 784–85 tbl.II.

30. *Id.*

31. Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the Batson Challenge Procedure*, 31 LAW & HUM. BEHAV. 261, 266 (2007).

32. *Id.*

33. *Id.* at 265–66.

34. *Id.* at 266–67.

35. *Id.* at 267, 267 tbl.I. The effect was statistically significant for college ( $n = 90$ ) and law students ( $n = 81$ ) ( $p < .05$ ), and marginally significant in the smaller attorney sample ( $n = 28$ ). *Id.* at 266–67.



striking him, and cited the second juror's skepticism about statistics when striking him.<sup>36</sup>

In another study, Norbert Kerr and colleagues had attorneys view videotaped voir dire of mock jurors in a criminal case, and assigned each the role of judge, defense attorney, or prosecutor—usually based on their current position or past experience in the respective role.<sup>37</sup> They asked participants to rate the desirability of the potential jurors and to indicate which ones they would strike.<sup>38</sup> The researchers found that attorneys assigned the role of prosecutor were far more likely to strike black prospective jurors than jurors of another race.<sup>39</sup>

Studies that examine jury selection in hypothetical settings are limited by the artificial nature of the decision making.<sup>40</sup> Their strength, however, is that they allow researchers greater control over the variables in question in order to identify causal factors. These studies offer substantial evidence that race plays a significant role in jury selection, especially when considered in light of the research on jury selection in real trials set forth below.<sup>41</sup>

#### B. STUDIES EXAMINING JURY SELECTION IN ACTUAL TRIALS

Only a handful of published studies have examined how parties exercise peremptory challenges in actual trials. In one study, Billy Turner and colleagues examined strikes by both the prosecution and defense in 121 criminal trials in one Louisiana parish from 1976–1981.<sup>42</sup> The authors compared the percentage of struck jurors who were black (44%) to the percent of the population in the Louisiana parish that was black at the time of the study (18%), and inferred from this twenty-six-point disparity that jury selection was not race neutral.<sup>43</sup>

John Clark and colleagues analyzed jury selection in twenty-eight trials in two adjacent counties in a southeastern state.<sup>44</sup> Across the eleven criminal

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36. *Id.* at 267–68.

37. Norbert L. Kerr, Geoffrey P. Kramer, John S. Carroll & James J. Alfini, *On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity: An Empirical Study*, 40 AM. U. L. REV. 665, 676 (1991).

38. *Id.* at 677–78.

39. *Id.* at 692.

40. See Sommers & Norton, *supra* note 31, at 270–71 (noting limitations of experimental jury-selection studies).

41. See *id.* at 270 (noting convergence of experimental and archival data analysis of the effect of race in jury selection).

42. Billy M. Turner, Rickie D. Lovell, John C. Young & William F. Denny, *Race and Peremptory Challenges During Voir Dire: Do Prosecution and Defense Agree?*, 14 J. CRIM. JUST. 61, 63 (1986).

43. *Id.*

44. John Clark, Marcus T. Boccaccini, Beth Caillouet & William F. Chaplin, *Five Factor Model Personality Traits, Jury Selection, and Case Outcomes in Criminal and Civil Cases*, 34 CRIM. JUST. & BEHAV. 641, 647 (2007).

trials they examined, race was a statistically significant predictor of both prosecution and defense strikes, but in reverse patterns: the state struck disproportionately more black potential jurors while the defense struck disproportionately fewer.<sup>45</sup>

Mary Rose examined peremptory strike decisions in thirteen non-capital felony trials in North Carolina.<sup>46</sup> Prosecutors used 60% of their strikes against black jurors, who constituted only 32% of the venire.<sup>47</sup> In comparison, defense attorneys used 87% of their strikes against white jurors, who made up 68% of the venire.<sup>48</sup>

A third study conducted by Richard Bourke and Joe Hingston at the Louisiana Crisis Assistance center examined jury selection in 390 jury trials involving 13,662 prospective jurors in Jefferson Parish, Louisiana.<sup>49</sup> In both six- and twelve-person juries, prosecutors struck “black prospective jurors at more than three times the rate” they struck their white counterparts.<sup>50</sup>

David Baldus and colleagues examined strike decisions over a seventeen-year period in 317 Philadelphia County capital murder trials.<sup>51</sup> They found that prosecutors struck on average 51% of the black jurors they had the opportunity to strike, compared to only 26% of comparable non-black jurors.<sup>52</sup> Defense strikes exhibited a nearly identical pattern in reverse: defense counsel struck only 26% of the black jurors they had the opportunity to strike, compared to 54% of comparable non-black jurors.<sup>53</sup> The disparate effect of race on jury selection held even when the researchers controlled for various non-racial characteristics of the jurors, such as age, occupation, education, and responses to certain questions asked in voir dire.<sup>54</sup>

Journalists at the *Dallas Morning News* replicated the methodology of the Philadelphia study to examine the exercise of peremptory challenges in 108 of 381 non-capital felony trials in Dallas County, Texas, during the first ten months of 2002.<sup>55</sup> Like Baldus and colleagues, the journalists considered in

45. *Id.* at 651.

46. Rose, *supra* note 2, at 697.

47. *Id.* at 698–99.

48. *Id.*

49. RICHARD BOURKE & JOE HINGSTON, BLACK STRIKES: A STUDY OF THE RACIALLY DISPARATE USE OF PEREMPTORY CHALLENGES BY THE JEFFERSON PARISH DISTRICT ATTORNEY’S OFFICE 5 (2003).

50. *Id.* at 7–8.

51. David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 10 (2001).

52. *Id.* at 53.

53. *Id.*

54. *Id.* at 70–72.

55. Steve McGonigle et al., *A Process of Juror Elimination: Dallas Prosecutors Say They Don’t Discriminate, but Analysis Shows They Are More Likely To Reject Black Jurors*, DALL. MORNING NEWS, Aug. 21, 2005, at 1A [hereinafter *A Process of Juror Elimination*], available at 2005 WLNR

the analyses the impact of non-racial characteristics of potential jurors.<sup>56</sup> The *Dallas Morning News* study found that prosecutors “excluded eligible blacks from juries at more than twice the rate they rejected eligible whites.”<sup>57</sup> The disparate effect of race on jury selection held even when they controlled for non-racial characteristics of the jurors. The journalists concluded that “being black was the most important personal trait affecting which jurors prosecutors rejected.”<sup>58</sup>

A major strength of the Philadelphia and Dallas County studies was the inclusion of race-neutral factors about jurors that might bear on a party’s decision to strike.<sup>59</sup> One possible explanation for racial disparities in strike rates is that race is associated with other race-neutral factors that drive strike decisions. If members of one race are disproportionately less supportive of the death penalty, for example, prosecutors’ disproportionately high strike rates against that group may be driven by group members’ views rather than their race. Controlling for various race-neutral factors that may bear on the decision to strike allows the researcher to rule out at least some alternative explanations of racial disparities.

### C. STUDIES ANALYZING APPELLATE DECISIONS REVIEWING BATSON CLAIMS

We are aware of no study directly assessing *Batson*’s effectiveness in countering consideration of race in jury selection, such as by comparing strike rates against black jurors in trials before *Batson* was decided to those that came after. However, the consistency of researchers’ findings of racial disparities in studies spanning several decades suggests that *Batson* has not

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24658335 (presenting part of the findings of the study). The *Dallas Morning News* published the results of this research in a set of feature stories between Sunday, August 21 and Tuesday, August 23. See *About the Series*, DALL. MORNING NEWS, Aug. 21, 2005, at 19A, available at 2005 WLNR 24658085 (describing the series); *How the Analysis Was Done*, DALL. MORNING NEWS, Aug. 21, 2005, at 19A, available at 2005 WLNR 2457224 (reporting study design and methodology). The *Dallas Morning News* published a similar study on jury selection in Dallas County in 1986. See Steve McGonigle & Ed Timms, *Race Bias Pervades Jury Selection*, DALL. MORNING NEWS, Mar. 9, 1986, at 1A, available at 1986 WLNR 1683009. This study analyzed the impact of peremptory strikes on jury composition in “100 randomly selected felony” jury trials in 1983 and 1984 and found blacks largely excluded from jury service. *Id.* We are aware of one other study on peremptory challenges by journalists. This study reached similar results. Douglas Frantz, *Many Blacks Kept Off Juries Here*, CHI. TRIB., Aug. 5, 1984, at 1 (reporting on jury selection for all 31 criminal jury trials in Cook County Circuit Courts in July 1984).

56. *A Process of Juror Elimination*, *supra* note 55. The journalists consulted with David Baldus and George Woodworth, the principle authors of the Philadelphia study, in conducting this research. *Id.*

57. *Id.*; see also Steve McGonigle et al., *Jurors’ Race a Focal Point for Defense: Rival Lawyers Reject Whites at Higher Rates*, DALL. MORNING NEWS, Aug. 22, 2005, at 1A, available at 2005 WLNR 24659140 (presenting findings with respect to jury selection by defense attorneys).

58. *A Process of Juror Elimination*, *supra* note 55.

59. Baldus et al., *supra* note 51, at 65–72, tbls.6 & 7.

been especially successful in purging consideration of race from jury selection.

One possible reason *Batson* has been so ineffective is the ease with which parties can generate race-neutral explanations for challenged strike decisions. Research on the exercise of *Batson* challenges indicates that courts commonly accept reasons proffered to justify challenged strikes based on little more than stereotyping and guesswork.<sup>60</sup> Kenneth Melilli analyzed all published *Batson* decisions from 1986 to 1993, and concluded that proffered explanations were often grounded in stereotypes and, to a lesser degree, attorneys' intuition about favorability of a potential juror.<sup>61</sup> A second similar study concluded that the reasons courts often find acceptable may merely obfuscate race discrimination. Jeffrey Beilin and Junichi Semitsu surveyed all published and unpublished federal decisions from 2000 to 2009 that reviewed state or federal trial courts' denials of *Batson* challenges.<sup>62</sup> After reviewing decisions in 269 cases, they reported that their "most revealing discovery was the substantial list of acceptable reasons that could conceivably implicate a juror's likelihood of being impartial but were likely to disproportionately impact specific racial or ethnic groups."<sup>63</sup>

Two papers examining the implementation of *Batson* in North Carolina concluded that the significant deference the North Carolina Supreme Court gives to trial courts weakened *Batson's* impact in that state.<sup>64</sup> The first paper evaluated the first five years of *Batson* appeals in North Carolina and found that "[n]either the North Carolina Supreme Court nor the North Carolina Court of Appeals ever ha[d] held for a defendant on the merits of a *Batson* claim."<sup>65</sup> In particular, the paper documents the court's almost complete

60. See Melilli, *supra* note 17, at 484–502; see also Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson's Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1116–20 (2011). We are aware of one other study of appellate opinions concerning *Batson* challenges. This study noted that most litigants lose *Batson* appeals and that most of the venire members reviewed in *Batson* challenges were black. Shaun L. Gabbidon et al., *Race-Based Peremptory Challenges: An Empirical Analysis of Litigation from the U.S. Court of Appeals, 2002–2006*, 33 AM. J. CRIM. JUST. 59 (2008).

61. Melilli, *supra* note 17, at 487, 497 tbl.III-R (noting that 52.48% of the explanations involved group stereotypes); *id.* at 498 tbl.III-S (listing the group stereotypes employed and the frequency with which they were employed).

62. Bellin & Semitsu, *supra* note 60, at 1092.

63. *Id.* at 1092, 1096. The authors noted, for example, that overrepresentation of black males in prison and the finding that 32% of black men are likely to be imprisoned at least once during their lifetime (compared to much lower rates for white men, for example) suggest that "striking all persons with a relative who is or has been in prison will disproportionately exclude minority venirepersons." *Id.* at 1097.

64. Hitchcock, *supra* note 2, at 1356; Paul H. Schwartz, Comment, *Equal Protection in Jury Selection? The Implementation of Batson v. Kentucky in North Carolina*, 69 N.C. L. REV. 1533, 1577 (1991).

65. Schwartz, *supra* note 64, at 1535.

deference to prosecutors' proffered explanations.<sup>66</sup> In the second paper, Amanda Hitchcock reached a similar conclusion based on her analysis of North Carolina Supreme Court rulings in all sixty-one capital cases involving a *Batson* claim between 1986 and 2005.<sup>67</sup> The North Carolina court deferred to trial courts in almost every case "because *Batson* determinations often turn on the credibility of the prosecutor's stated reasons for the objectionable challenges."<sup>68</sup> Hitchcock documents the court's reluctance to rely upon statistical evidence to state a claim, its strict requirement of a complete match in side-by-side comparisons of jurors, and its lack of interest in claims based on disparate questioning.<sup>69</sup>

While the Supreme Court has established a framework intended to limit the consideration of race in the exercise of peremptory challenges, the research reviewed here suggests that it continues to play a role. The study we present below provides further evidence that race not only weighs in jury selection, but weighs heavily. Moreover, its influence cannot be explained by ostensibly race-neutral factors that happen to correlate with race.

### III. METHODOLOGY

The North Carolina RJA study follows the methodology used in the Philadelphia and Dallas County studies discussed above<sup>70</sup> by including analysis of race-neutral factors about jurors that might bear on a party's decision to strike. It improves on the Philadelphia study with more complete race and strike information.<sup>71</sup> In addition, unlike any of the studies presented above, this study includes cases from multiple counties. In fact, it includes data about jury selection in more than one-half of the counties in North Carolina.

We analyzed the role of race in strike decisions in two phases. First, we compared the rate at which prosecutors struck eligible black venire members to the rate at which they struck eligible venire members of other races. We then analyzed the role that characteristics other than race played in prosecutors' decisions to strike or pass potential jurors, and whether any of those characteristics could account for racial disparities in who gets struck.

#### A. STUDY POPULATION

We examined jury selection in at least one proceeding for each inmate who resided on North Carolina's death row as of July 1, 2010, for a total of

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66. *Id.* at 1561–63.

67. Hitchcock, *supra* note 2, at 1328–30.

68. *Id.* at 1344.

69. *Id.* at 1345–47, 1349–50.

70. *See supra* text accompanying notes 51–59.

71. Baldus et al., *supra* note 51.

173 proceedings.<sup>72</sup> For each proceeding, we sought to include every venire member who faced a peremptory challenge as part of jury selection. For the purposes of this study a “venire member” included anyone who was subjected to voir dire questioning and not excused for cause, including potential alternates. Each proceeding involved an average of 42.9 strike-eligible venire members, producing a database of 7,421 strike decisions. Of these, 3,952 (53.3%) were women, and 3,469 (46.7%) were men. The venire members’ racial composition was as follows: white (6,057, 81.6%); black (1,211, 16.3%); Native American (79, 1.1%); Latino (21, 0.3%); mixed race (20, 0.3%); Asian (13, 0.2%); other (11, 0.1%); Pacific Islander (2, 0.03%); and unknown (7, 0.1%).

### B. DATA COLLECTION

We created an electronic and paper case file for each proceeding in the study. The case file contains the primary data for every coding decision. The materials in the case file typically include some combination of juror seating charts, individual juror questionnaires, and attorneys’ or clerks’ notes. Each case file also includes an electronic copy of the jury selection transcript and documentation supporting each race coding decision.

### C. OVERVIEW OF DATABASE DEVELOPMENT

Staff attorneys completed all coding and data entry at Michigan State University College of Law in East Lansing, Michigan, under the direct supervision of the primary investigators.<sup>73</sup> Staff attorneys received detailed training on each step of the coding and data entry process.

We collected information about the proceeding generally, including the number of peremptory challenges used by each side, and the name of the judge and attorneys involved in the proceeding, as well as basic demographic and procedural information specific to each venire member.

Coding also required staff attorneys to determine strike eligibility for each potential juror. “Strike eligibility” refers to which party or parties had the chance to exercise a peremptory strike against a particular venire member. For instance, if the prosecution struck someone before the defense had a chance to question that person, that juror would be strike eligible to the prosecution only. Likewise, if a party had exhausted its peremptory challenges by the time it reached a potential juror, the failure to strike reveals nothing about how that party exercised its discretion. This

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72. We included proceedings for all current death-row inmates to ensure the inclusion of every defendant with a potential claim under the Racial Justice Act. We also focused our analysis on defendants with an active death sentence because of the availability of data in such cases. In addition, we were confident that the decision making in 173 proceedings would provide a large enough sample for meaningful statistical analysis. We were able to include all but one proceeding, Jeffrey Duke’s 2001 trial, in which the case materials are unavailable.

73. A total of twelve staff attorneys and five law students worked on this project.

determination refines the analysis of strike decisions to examine only those instances in which that party actually had a choice to pass or strike a juror, and excludes those when the decision was out of the party's hands.<sup>74</sup>

In the second part of the study, staff attorneys used juror questionnaires (when available) and jury selection transcripts to code information relating to the following: (1) demographic characteristics (e.g., gender, marital status, employment, and educational background); (2) prior experiences with the legal system (e.g., prior jury service and experience as a criminal defendant or victim); and (3) attitudes about potentially relevant matters (e.g., ambivalence about the death penalty<sup>75</sup> and skepticism about, or greater faith in, the credibility of police officers).

#### D. RACE CODING

In order to analyze potential racial disparities in peremptory strikes, it was necessary to identify the race of each venire member. Any potential findings about racial disparities in strike decisions would turn on the accuracy of this coding. Strike information was straightforward in that it could be extracted directly from the transcripts. As explained more fully below, race information was equally straightforward in a good number of cases. But for the cases that required the staff attorneys to look deeper to determine the race of venire members, we implemented a rigorous protocol to produce data in a way that is both reliable and transparent.

We obtained information about potential jurors' race from three sources. First, we collected juror questionnaires for many of the venire members in our study. These questionnaires almost always asked the venire member's race, and the vast majority of respondents provided that information. We considered potential venire members' self-reports of race to be highly reliable and were able to get this information from juror questionnaires for 62.3% (4,623/7,421) of the eligible venire members.

For a second group of venire members, race was noted explicitly in the trial record. More than six percent (6.4%, 478/7,421) stated their race on

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74. In one case (Gary Trull), the defense successfully challenged the prosecution's exercise of a peremptory strike against a black venire member, and the court seated him as an alternate juror. Thus, although this venire member ultimately served on the jury, we nevertheless treated him as struck by the prosecution in the analysis.

75. A court could properly remove for cause a venire member who expressed unwillingness to impose the death penalty under any circumstances under *Lockhart v. McCree*, 476 U.S. 162 (1986), *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and *Witt v. Wainwright*, 470 U.S. 1039 (1985), and thus such venire members are not included in our analysis. Sometimes, however, a venire member expressed reservations or ambivalence about the death penalty that fell short of outright opposition. Such a venire member would still be eligible to serve on the jury, but a prosecutor could reasonably base a decision to exercise a peremptory strike on this basis. See *Witherspoon v. Illinois*, 391 U.S. 510, 519-20 (1968). Accordingly, this is one of the many venire member characteristics we included in our analysis.

the record in a manner that appears in the voir dire transcript.<sup>76</sup> Similarly, a court clerk's chart noting the race of potential jurors that was officially made part of the trial record or a statement by an attorney on the record provided race information for a smaller percent of the venire members (0.5%, 40/7,421).<sup>77</sup>

Finally, for the remaining 30.6% (2,273/7,421) of venire members, we used electronic databases to find race information and record the race and source of race information. Staff attorneys used the North Carolina State Board of Elections website, LexisNexis "Locate a Person (Nationwide) Search Non-regulated," LexisNexis Accurint, and the North Carolina Department of Motor Vehicles online database. Many of the case files included juror-summons lists with addresses, which allowed staff attorneys to match online records to the information about the potential juror with a high level of certainty.

The primary investigators prepared a strict protocol for use of these websites for race coding and trained staff attorneys on that protocol in a half-day session. One objective of this protocol was to minimize the possibility of researcher bias. In addition, staff attorneys who searched for venire members' information on electronic databases were (whenever possible) blind to strike decisions.<sup>78</sup>

Throughout this process, we instructed staff attorneys to code a venire member's race as "unknown" unless they were able to meet strict criteria ensuring that the person identified in the public record was in fact the venire member and not just someone with the same name.<sup>79</sup> Staff attorneys were not to rely on a record containing information that was not wholly consistent with whatever information we had about a particular venire member. For instance, staff attorneys would not rely on a public record in which the person's middle initial was inconsistent with that of the venire

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76. In these instances, the judges asked potential jurors to state their race for the record.

77. Importantly, we did not rely on clerks' or attorneys' observations about potential jurors' race unless incorporated into the record and thus subject to dispute if a party or the court objected to the classification. For instance, we considered reliable an attorney's mention of a potential juror's race during an argument regarding a *Batson* challenge with the assumption that the other party or the court would challenge that assessment if the attorney was mistaken. In contrast, we did not rely on a clerk's notes about the race of potential jurors on a jury chart unless it was clear that the parties had a chance to review that document and challenge any perceived inaccuracies.

78. Staff attorneys seeking race information from public sources knew about strikes only when they had to turn to the transcript for information to help them find that venire member's race. For instance, venire members often indicated during voir dire precisely where they lived and for how long. For cases lacking a summons list with addresses, this information was useful in public records searches where we lacked direct information about race.

79. For instance, staff attorneys were instructed to use information such as the venire member's middle name or year of birth to link the venire member to records of someone with the same name. When at all in doubt, staff attorneys were instructed to code the venire member's race as unknown.



member, unless they were able to document a name change to account for the discrepancy (for instance, a record that indicated that a venire member started using her maiden name as a middle name). If staff attorneys found someone with the same name as the venire member but with a different address, they were to use that record only if they could trace the person's address back to that of the venire member. Staff attorneys saved an electronic copy of all documents used to make race determinations.<sup>80</sup>

Because of the importance of the race coding, we conducted a reliability study on this methodology. Staff attorneys and law students used public records to code race for 1,897 venire members for whom we also had juror questionnaires reporting race or express designations of race in a voir dire transcript.<sup>81</sup>

We then compared the data from public records to the presumably more reliable self-reported data in the jury questionnaires. Staff attorneys using public records were unable to determine a venire member's race to the level of reliability required by the study protocol in 242 of 1,897 cases (12.8%).<sup>82</sup> In the remaining 1,655 cases, the race extracted from the public records matched that taken from the presumably more reliable sources for 97.9% of the venire members. This suggests that the method we used is highly reliable.

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80. For instance, if a staff attorney identified the race of a venire member through the North Carolina Board of Elections website, he or she would save the record with the venire member's race designation (usually as an Adobe Acrobat file but sometimes as a screen shot). If the staff attorney relied upon an address provided in the juror-summons list to identify a venire member had moved since the time of the trial, the staff attorney would also save records of the venire member's change of addresses over the years. This information was often available in the Lexis-Nexis Locate a Person Database, which allowed the staff attorney to trace the venire member's address from the juror-summons list to his or her current address reflected in the North Carolina Board of Elections website. For each step in the process linking current information about each venire member to information recorded at the time of the trial, staff attorneys saved a copy of the electronic record.

81. The staff attorneys did not have access to the questionnaires or voir dire transcripts when they conducted the public-records research.

82. We instructed staff attorneys to code a venire member's race as unknown unless they could rule out the possibility that the record on which they were relying referred to someone besides the venire member. In cases where we had juror summons lists with addresses, a staff attorney usually had no trouble identifying the venire member from two people with the same name. Lacking specific identifying information, however, staff attorneys were sometimes unable to meet the strict criteria for extracting race. We expected that this method of extracting data on race would lead to a moderate amount of missing data.

In the full study, we expended additional efforts to find the missing data. In most instances, our staff attorneys reviewed transcripts more closely to gather identifying information that allowed them to link the venire members to the appropriate public records. For example, venire members often stated in voir dire where they lived and worked. This additional information often allowed staff attorneys to narrow down public records for people with the same name even when we lacked a juror-summons list.

Staff attorneys and law students did not expend this level of effort in tracking down race through public-record databases solely for the reliability check.

The methods described in this section allowed us to document race for all but 7 of the 7,421 eligible venire members in our study. In other words, our database includes race information for 99.9% of the eligible venire members, as well as the source of that information for each venire member.

*E. CODING RACE-NEUTRAL CONTROL VARIABLES (DESCRIPTIVE INFORMATION)*

Strike and race information allows for the calculation of strike rates by race. To account for other factors that might bear on the decision to strike, more detailed information about individual venire members must be considered. Thus, in addition to basic demographic information about each eligible venire member, we coded more detailed information on approximately sixty-five variables for a random sample of venire members. We sought to identify the variables that consistently and reliably predicted whether the state would strike or pass a potential juror. Appendix A provides a partial list of our race-neutral control variables. These variables document information such as views on the death penalty; education, marital, and employment status; religious affiliation; and experience with crime.

Because this process is labor intensive,<sup>83</sup> we drew a random sample of venire members from the database<sup>84</sup> and coded detailed descriptive information for almost a quarter of the venire members in the database (1,753/7,421).<sup>85</sup>

The following sections of this Article present the research in increasing levels of analytical complexity. We start with the unadjusted racial disparities in prosecutorial strikes, and then present disparities controlling, one at a time, for potentially relevant race-neutral variables. Finally, we present the disparities that emerge via fully controlled logistic regression analysis of a randomly selected sample of a quarter of the study population for whom we coded detailed individual-level information.

83. We instituted procedures for double coding of descriptive information to ensure accuracy and intercoder reliability.

84. We used the SPSS random-select function to draw the sample. The demographic profile of the random sample strongly resembled that of the complete study population. Of these 1,753 jurors, 1,749 were eligible to be struck by the state. We determined the race of all but two jurors (83.6% non-black (1,465), 16.3% black (286), and 0.1% missing (2)). These percentages mirror those in the full sample (83.6% non-black (6,203), 16.3% black (1,211), and 0.1% missing (7)). The random sample also reflects the relative proportions of men and women: The smaller sample included 51.9% women (910) and 48.1% men (843); the full data set included 53.3% women (3,952) and 46.7% men (3,469).

85. A few of the venire members who were randomly selected to be included in the sample could not be coded due to the poor quality or unavailability of the case materials. The transcript for the case of Wayne Laws was too faded to be made searchable, and no venire members were coded for descriptive information. No transcript was available in the more recent case of Michael Ryan.

*F. STATEWIDE UNADJUSTED PROSECUTORIAL STRIKE PATTERNS*

The statewide database includes information about 7,421 venire members. Of those, 7,400 (99.7%) were eligible to be struck by the state. We analyzed prosecutorial-strike patterns using only those venire members who were eligible to be struck by the state. Among strike-eligible venire members, the overwhelming majority were either white (6,039, 81.6%) or black (1,208, 16.3%); just 2.0% (153) were other races. As noted above, we are missing race information for 7 (0.1%) venire members.

Prosecutors exercised peremptory challenges at a significantly higher rate against black venire members than against all other venire members. As seen in Table 1, across all strike-eligible venire members in the study, prosecutors struck 52.6% (636/1,208) of eligible black venire members, compared to only 25.7% (1,592/6,185) of all other eligible venire members.<sup>86</sup>

In addition, Table 2 shows that the average rate per case at which prosecutors struck eligible black venire members is significantly higher than the rate at which they struck other eligible venire members.<sup>87</sup> Of the 166 cases that included at least one eligible black venire member, prosecutors struck an average of 56.0% of eligible black venire members, compared to only 24.8% of all other eligible venire members.<sup>88</sup>

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86. See *infra* Table 1. This difference is statistically significant,  $p < .001$ ; put differently, there is less than a one in one thousand chance that we would observe a disparity of this magnitude if the jury selection process were actually race neutral. Several different chi-squared tests (Pearson Chi-Squared, Continuity Correction, Likelihood Ratio, Fischer's Exact Test, and Linear-by-Linear Association) were used to calculate the  $p$ -values, and the results were consistent regardless of the test used.

87. The analyses presented in Tables 1 and 2 are very similar, but differ in their unit of analysis. Table 1 shows strikes against all venire members in the study pooled across cases (7,400 strike eligible venire members across 173 cases). Table 2 compares the strike rates calculated per case. Thus, only those cases with at least one eligible black venire member (166) were included, and each case represents one data point. We present both ways of calculating these disparities to demonstrate that the effect is robust and does not depend on which method is used.

88. See *infra* Table 2. This difference is statistically significant,  $p < .001$ . When we exclude those venire members whose race we coded from public records, the pattern is substantially the same: Of 139 cases, prosecutors struck an average of 55.7% of eligible black venire members compared to only 22.1% of all other eligible venire members. This difference is statistically significant,  $p < .001$ . This suggests that the patterns we observed are not skewed in some way by the source of information about potential jurors' race.

The disparities between mean prosecutorial strike rates against eligible black venire members versus those of other races are consistent across time: 57.4% versus 25.9%,  $p < .001$  (1990–1994, forty-two cases); 54.7% versus 24.0%,  $p < .001$  (1995–1999, eighty cases); 57.2% versus 25.0%,  $p < .001$  (2000–04, twenty-nine cases); and 56.4% versus 25.4%,  $p < .01$  (2005–2010, fifteen cases).

**TABLE 1**  
**Statewide Prosecutorial Peremptory Strike Patterns**  
*(Strikes against venire members aggregated across cases)*

		A	B	C	D
		Black Venire Members	All Other Venire Members	Unknown	Total
1.	<b>Passed</b>	572 (47.4%)	4,593 (74.3%)	3 (42.9%)	5,168 (69.9%)
2.	<b>Struck</b>	636 (52.6%)	1,592 (25.7%)	4 (57.1%)	2,232 (30.1%)
3.	<b>Total</b>	1,208 (100.0%)	6,185 (100.0%)	7 (100.0%)	7,400 (100.0%)

\*Chi-squared tests (Pearson Chi-Squared, Continuity Correction, Likelihood Ratio, Fischer's Exact Test, and Linear-by-Linear Association) indicate that these differences in strike rates are significant at  $p < .001$ .

**TABLE 2**  
**Statewide Average Rates of State Strikes**  
*(Strike rates calculated in individual cases and averaged across cases)*

		A	B
		Average Strike Rate	Number of Cases Averaged
1.	<b>Strike Rates Against Black Qualified Venire Members</b>	56.0% ( $SD = 24.6\%$ )	166
2.	<b>Strike Rates Against All Other Qualified Venire Members</b>	24.8% ( $SD = 7.0\%$ )	166

\*A paired-sample t-test indicates that this difference in strike rates is significant at  $p < .001$ .

As seen in Table 3, disparities were even greater in cases involving black defendants. In cases with non-black defendants, the average strike rate was 51.4% against black venire members and 26.8% against all other venire members.<sup>89</sup> In cases with black defendants, the average strike rate was 60.0% against black venire members and 23.1% against other venire members.<sup>90</sup>

89. See *infra* Table 3. Out of 166 cases with black eligible venire members, ninety involved black defendants and seventy-six involved defendants of other races.

90. See *infra* Table 3.

The difference in the magnitude of the disparity between black and other defendants is statistically significant.<sup>91</sup> In other words, although state strike rates are always higher against black venire members than against other venire members, the disparity is significantly greater in cases with black defendants.

TABLE 3

**Disparities in Strike Patterns by Race of Defendant***(Strike rates calculated in individual cases and averaged across cases)*

	A	B	C
Race of Defendant	Strikes Against	Average Strike Rate	Number of Cases Averaged
1. Black	Black Qualified Venire Members	60.0% ( <i>SD</i> = 30.0%)	90
	All Other Qualified Venire Members	23.1% ( <i>SD</i> = 6.9%)	
3. Non-Black	Black Qualified Venire Members	51.4% ( <i>SD</i> = 25.8%)	76
	All Other Qualified Venire Members	26.8% ( <i>SD</i> = 6.6%)	

\*Analysis of variance (*F*-test) indicates that this difference between the disparities in strike rates by race of defendant is significant at  $p < .03$ .

#### IV. THE EFFECT OF RACE AFTER CONTROLLING FOR VENIRE MEMBERS' PERSONAL CHARACTERISTICS ON THE EXERCISE OF PEREMPTORY STRIKES

The disparate strike rates in the first stage of the analysis are compelling evidence of racial discrimination in jury selection, but testing alternative explanations for the observed disparities provides a more complete picture. For instance, Baldus and colleagues found that jurors who expressed concern about imposing the death penalty faced markedly higher odds of being struck by the prosecution.<sup>92</sup> Public opinion research indicates that attitudes about the death penalty differ across racial groups.<sup>93</sup> By collecting

91. Note, however, that we were unable to find a statistically significant effect of defendant's race on the likelihood that a black potential juror would be struck in a fully controlled model.

92. Baldus et al., *supra* note 51.

93. For example, a 2003 Gallup poll of 1,017 randomly sampled adults found that 67% of white respondents supported the death penalty compared to only 39% of African American respondents. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL

and controlling for information about a wide variety of juror characteristics, we can examine the possibility that variables that happen to correlate with race (rather than race itself) account for the observed disparities.<sup>94</sup>

We first controlled for race-neutral variables by analyzing strike disparities within subsets of the study population. For example, we excluded all of the venire members who expressed any ambivalence about the death penalty and then analyzed the strike patterns for the remaining venire members. Because none of the remaining venire members expressed ambivalence about the death penalty, any racial disparity in strike patterns we observed could not be attributable to the possibility that relevant attitudes vary along racial lines. We looked at five different subsets in this manner, removing (1) venire members who expressed any reservations about the death penalty, (2) unemployed venire members, (3) venire members who had been accused of a crime or had a close relative accused of a crime, (4) venire members who knew any trial participant, and finally, (5) all venire members with any one of the first four characteristics. The disparities identified through the unadjusted analysis persisted in each and every subset, as seen in Table 4.

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JUSTICE STATISTICS 2003, at 146, tbl.2.52, *available at* <http://www.albany.edu/sourcebook/pdf/section2.pdf>.

94. Our analysis did not include any potential jurors removed for cause. As a result, any characteristic that would make someone ineligible to serve on a death penalty jury (such as categorical opposition to the death penalty) has already been “controlled for” in that people with these characteristics are not included in the analysis.

**TABLE 4**  
**Strike Patterns when State-Strike Eligible Venire Members with Potentially Explanatory Variables Are Removed from Equation**

	A	B	C	D
Variable	Number of Venire Members Removed from Analyses	Strike Rates	Strike Rate Ratio	<i>p</i> -value*
1. Venire Member with Death Penalty Reservations	185	44.5% (Black VMs) vs. 20.8% (All others)	2.1	<.001
2. Unemployed Venire Member	25	49.0% (Black VMs) vs. 24.7% (All others)	2.0	<.001
3. Venire Member or Close Other Accused of Crime	398	50.3% (Black VMs) vs. 23.7% (All others)	2.1	<.001
4. Venire Member Knew a Trial Participant	47	53.2% (Black VMs) vs. 25.4% (All others)	2.1	<.001
5. Venire Member with Any One of Above Characteristics	580	39.7% (Black VMs) vs. 19.0% (All others)	2.1	<.001

\*Chi-squared tests (Pearson Chi-Squared, Continuity Correction, Likelihood Ratio, Fischer's Exact Test, and Linear-by-Linear Association) were used to calculate the *p*-values.

The disparities in prosecutorial strike rates against eligible black venire members persist even when other characteristics one might expect to bear on the decision to strike are removed from the equation. Table 4 provides a simple way of comparing apples to apples. However, the decision to strike or pass a potential juror can turn on a number of factors in isolation or combination. In the following section, we provide the results of a fully controlled logistic regression model, taking into account a number of

potentially relevant factors to examine whether the racial disparities can be explained by some combination of race-neutral factors.

As noted above, we collected individual-level descriptive information for a significant randomly selected portion (1,753/7,421) of the venire members in the study. Even after controlling for other factors potentially relevant to jury selection, a black venire member had 2.48 times the odds of being struck by the state as did a venire member of another race.<sup>95</sup> In other words, while many factors one might expect to bear on the likelihood of being struck did matter, none—alone or in combination—accounts for the disproportionately high strike rates against qualified black venire members.<sup>96</sup>

The coding process described above produced close to sixty-five variables potentially relevant to whether a venire member was struck or passed. We sought to identify the variables that consistently and reliably predicted whether the state would strike or pass a potential juror. The resulting model combines those factors to distinguish venire members based on how objectionable (or desirable) they were to prosecutors as potential jurors.

Using the Logistic Regression command in SPSS, we started the analysis with a simple model using only venire members' race<sup>97</sup> and tested each candidate control variable both individually and in small groups. This process allowed us to identify the most important control variables for the decision to strike or pass an eligible venire member. This process produced about twenty-five variables that bore a significant relation (either in isolation

95. We used a logistic regression model with the dependent variable that the strike-eligible venire member was struck or passed on by the state. A few words are in order about the choice of this model in lieu of a multilevel model. One assumption of logistic regression is that the data are independent. That assumption comes into question in this context, as a party's decision to use one of its strikes is likely to be affected by who else is in the pool. This can present a problem in that it might increase the risk of Type I error; that is, it could increase the chances that the researcher will improperly find a result statistically significant. One way to gauge whether a particular dataset presents such a risk is to look at interclass correlations. If subjects (i.e., venire members) nested within settings (i.e., trials) are in fact more similar to each other than are subjects between settings, the researcher should use a multilevel model. We examined the interclass correlations for the 173 cases in this study and found a negative interclass correlation. That means that venire members within a case were no more alike as to the outcome of interest (struck or passed) than were venire members between cases. In fact, that the interclass correlation was negative suggests that the results of the logistic regression analysis are likely conservative. For this reason, using a multilevel model was unnecessary and a traditional logistic regression model was appropriate. See David A. Kenny, Deborah A. Kashy & Niall Bolger, *Data Analysis in Social Psychology*, in THE HANDBOOK OF SOCIAL PSYCHOLOGY 237 (Daniel T. Gilbert, Susan T. Fiske & Gardner Lindzey eds., 4th ed. 1998).

96. See *infra* Table 5.

97. Including the race variable in this model helps to identify which variables are potentially significant in the complete model independent of race. To get the clearest picture possible, we also tested potential control variables without including race in the model, but this did not produce a different list of potential control variables.



or in combination) to the odds of being struck. We then tested these variables in various combinations, both by forcing them into the model and by allowing the computer program to assess which of the candidate variables provided the best fitting model. Through this process, we were able to build a model estimating the effects of various venire member characteristics on strike decisions.

Table 5 presents the final logistic regression model for prosecutorial strike decisions. A venire member is coded “1” if struck by the state and “0” if strike-eligible but not struck. The “Black” variable in Row 2 shows the regression coefficient, the standard error of that estimated coefficient, the odds ratio, the confidence interval for that odds ratio, and the *p*-value for the effect that being black has on the odds of being struck by the state. This model estimates that after controlling for several other race-neutral factors, black venire members face odds of being struck by the state that were 2.48 times those faced by all other venire members.<sup>98</sup>

The results of the logistic regression model are consistent with the unadjusted disparities we observed looking simply at the relative strike rates against black and other venire members. None of the factors we controlled for in the regression analysis eliminated the effect of race in jury selection. While we found many non-racial factors that were highly relevant to the decision to strike, none was so closely associated with race or so frequent that it could serve as an alternative explanation of the racial disparities. Note that throughout the process of building this model, we found no factor or combination of factors that rendered the effect of race non-significant. In other words, the statistically significant influence of race on the odds of being struck was robust; its predictive power did not depend on the inclusion or exclusion of any particular variable or variables in the model.<sup>99</sup> A black venire member was still more than twice as likely (2.48 to 1) to be struck by the state even when other relevant characteristics were held constant.

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98.  $p < .001$ . See *infra* Table 5.

99. If we were missing data for an individual juror regarding *any* of the variables under analysis, this model excluded that juror from the analysis completely (even though we have data about that juror for some of the other variables). To determine whether exclusion of these cases with missing data skewed the model, we used a method known as multiple imputation. See DONALD B. RUBIN, MULTIPLE IMPUTATION FOR NONRESPONSE IN SURVEYS 2 (1987); J.L. SCHAFER, ANALYSIS OF INCOMPLETE MULTIVARIATE DATA 104-05 (1997). This method allows us to use the information we do have about a juror to impute a value for the missing variable using what we know about other jurors for whom we have complete information on the variable in question. We then conducted another logistic regression analysis using these data (original data supplemented by imputed values for the missing). This model produced estimates that were very close to the estimates presented in Table 5, in which we used only jurors for whom we have complete information. This suggests that the information we were missing about venire members was missing randomly, and thus did not skew the analysis.

This finding is notable because it speaks to the concern that we have failed to account for other race-neutral factors that might explain the disparity. For instance, while we have accounted for many race-neutral factors that bear on jury selection, we cannot account for a venire member's physical appearance or body language—factors litigators often cite as relevant to their decision to strike.<sup>100</sup> But factors like these should generally be unrelated to the race of the venire member. Moreover, even if these factors were associated more with some racial groups than others, that association would have to be very strong and the factor quite frequent to explain the observed racial disparities.

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100. See, e.g., Ben Rubinowitz & Evan Torgan, *Jury Selection: Time Constraints and Weaknesses in Cases*, N.Y. L.J., Aug. 29, 2007, at 8 (emphasizing the importance of a "juror's demeanor [and] ability to maintain eye contact" in assessing potential bias); Jeff Strange, *Jury Selection in 30 Minutes or Less*, PROSECUTOR (Tex. Dist. & Cnty. Atty's Ass'n, Austin, Tex.), Sept.–Oct. 2009, available at <http://www.tdcaa.com/node/5267> (emphasizing the importance of noting how a potential juror dresses and interacts with other members of the panel to assess whether they are "conformists who accept societal norms and expect others to do the same").

**TABLE 5**  
**Statewide Fully Controlled Logistic Regression Model**

	A	B	C	D	E	F	G
	Variable Name	Variable Description	Coefficient	S.E.	Odds Ratio	C.I.	<i>p</i> -value
1.	<b>Intercept</b>		-1.714	0.137	0.16		<.001
2.	<b>Black</b>	<b>Venire member is black</b>	<b>0.906</b>	<b>0.19</b>	<b>2.48</b>	<b>1.71, 3.58</b>	<b>&lt;.001</b>
3.	<b>DP_Reservations</b>	Venire member expressed reservations about the death penalty	2.437	0.23	11.44	7.23, 18.09	<.001
4.	<b>SingleDivorced</b>	Venire member is not married	0.543	0.17	1.72	1.23, 2.41	<.01
5.	<b>JAccused</b>	Venire member accused of a crime	0.730	0.23	2.07	1.33, 3.24	<.01
6.	<b>Hardship</b>	Venire member worried serving would impose a hardship	1.094	0.31	2.99	1.61, 5.54	<.01
7.	<b>Homemaker</b>	Venire member is a homemaker	0.799	0.32	2.22	1.18, 4.17	<.02
8.	<b>JLawEnf_all</b>	Venire member or close other works in law enforcement	-0.466	0.19	0.63	0.44, 0.90	<.02
9.	<b>JKnewD</b>	Venire member or venire member's immediate family knew the defendant	2.156	0.66	8.63	2.37, 31.41	<.01
10.	<b>JKnewW</b>	Venire member knew a witness	-0.615	0.25	0.54	0.33, 0.88	<.02
11.	<b>JKnewAtt</b>	Venire member knew one of the attorneys in the case	0.744	0.25	2.11	1.29, 3.44	<.01
12.	<b>LeansState</b>	Venire member expresses view that suggests view favorable to state (e.g., problems with presumption of innocence, right not to testify)	-1.966	0.54	0.14	0.05, 0.40	<.001
13.	<b>PostCollege</b>	Venire member went to graduate school	0.996	0.27	2.71	1.59, 4.63	<.001
14.	<b>VeryYoung</b>	Venire member is 22 or younger	0.920	0.40	2.51	1.14, 5.55	<.03

R<sup>2</sup> = .32

## V. CONCLUSION

How North Carolina courts interpret and apply the RJA to claims of racial bias in jury selection is an open question pending the outcome of cases currently in litigation.<sup>101</sup> In the past, North Carolina trial courts have not been especially willing to sustain *Batson* objections, and reviewing courts have shown almost complete deference to those rulings.<sup>102</sup> The RJA's express authorization to look at patterns that emerge in strike decisions across cases shifts the focus from a question of a particular prosecutor's credibility in a particular case to what the data tell us about what drives strike decisions generally. Justifications for strike decisions that seem plausible in the limited context of a single case—even with the aid of side-by-side comparisons of struck and unstruck jurors authorized by *Miller-El v. Dretke*—might not hold up when the universe of potential comparators expands to include jury selection in other cases.<sup>103</sup>

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101. The study presented in this Article was the focus of a two-and-a-half week hearing in Cumberland County, North Carolina in early 2012. Death row inmate Marcus Robinson's RJA claim as to racial disparities in prosecutors' use of peremptory strikes in capital jury selection was the first such claim to go to a hearing. On April 20, 2012, the trial court issued its ruling that race had been a significant factor in the state's decision to exercise peremptory strikes, finding the analyses presented here "to be a valid, highly reliable, statistical study of jury selection practices in North Carolina capital cases between 1990 and 2010." Order Granting Motion for Appropriate Relief at 45, *State v. Robinson*, No. 91 CRS 23143 (N.C. Super. Ct. Apr. 20, 2012), available at [http://www.aclu.org/files/assets/marcus\\_robinson\\_order.pdf](http://www.aclu.org/files/assets/marcus_robinson_order.pdf). The defendant's death sentence was vacated, and he was resentenced to life in prison without the possibility of parole.

102. See Amanda S. Hitchcock, *Recent Development*, "Deference Does Not by Definition Preclude Relief": *The Impact of Miller-El v. Dretke on Batson Review in North Carolina Capital Appeals*, 84 N.C. L. REV. 1328 (2006) (reviewing North Carolina Supreme Court's highly deferential approach to reviewing *Batson* claims in capital cases).

103. See Sommers & Norton, *supra* note 31, at 269 (finding evidence of racial bias in mock jury selection experiment but noting that "[w]e observed bias against Black venire members only when examining decisions made by several participants; indeed, for any given participant, we are unable to determine whether the peremptory was influenced by race or whether the justification provided was valid").

## APPENDIX A

## PARTIAL LIST OF VARIABLES FROM DATA COLLECTION INSTRUMENT

**Part A. General Codes**

<b>Variable Name</b>	<b>Label</b>
<i>DName</i>	Defendant's name
<i>VM_Name</i>	Juror's name
<i>VM_Race</i>	Juror's race
<i>SourceRace</i>	Source of race information (e.g., juror questionnaire, public record)
<i>StrikeState</i>	StrikeState = 1 if state used a peremptory strike against the juror (all else = 0)
<i>StrikeDef</i>	StrikeDef = 1 if defense used a peremptory strike against the juror (all else = 0)
<i>Status</i>	Juror's ultimate status (e.g., struck, seated as an alternate juror)
<i>Gender</i>	0 = Female; 1 = Male
<i>Age</i>	Juror's age in years
<i>Marital</i>	Juror's marital status (e.g., married, widowed, single)
<i>Children</i>	0 = No children; 1 = Children
<i>ReligiousOrg</i>	1 = Belongs to a religious organization; 0 = all else
<i>Education</i>	Juror's education level (e.g., high school graduate, attended graduate school)
<i>Military</i>	1 = Served in military; 0 = all else
<i>Employment</i>	See below for a portion of the coding appendix used to code jurors' employment
<i>SpouseEmployment</i>	Employment of married jurors' spouses (same codes used for jurors' employment)
<i>Descriptives</i>	Up to 10 codes used to capture experiences and attitudes expressed in jury selection. See below for a partial list of codes.

**Part B. Employment Codes**

(excluding subparts capturing different types of jobs within those listed as examples)

<b>Code</b>	<b>Category</b>	<b>Examples</b>
10	<i>Management &amp; Professional</i>	Management and business; computers; legal; medical; engineering
20	<i>Sales and Office Occupations</i>	Sales; office and administrative support
30	<i>Farming, Fishing, and Forestry</i>	
40	<i>Service</i>	Healthcare support; fire fighting; law enforcement; food preparation
50	<i>Military</i>	Enlisted or officer
60	<i>Construction, Extraction, Maintenance, &amp; Repair</i>	
70	<i>Production &amp; Transportation</i>	
80	<i>Outside of Labor Force</i>	Student; retired; homemaker; unemployed

**Part C. Codes for Juror Characteristics**

(excluding subparts capturing more detailed juror characteristics)

<b>Code</b>	<b>Category</b>	<b>Examples</b>
100	<i>Hardship</i>	Emotional difficulty; caretaking obligation
300	<i>Juror/Friend/Family Was Victim of Crime</i>	
400	<i>Juror/Friend/Family Was Accused of Criminal Activity</i>	
700	<i>Admitted Bias or Other Reason S/he Could Not Be Fair</i>	Premature opinion; admitted bias
800	<i>Expressed View Contrary to Applicable Law, Not Including Death Qualification</i>	Difficulty presuming innocence; draws adverse inferences from failure to testify
900	<i>Prior Familiarity with Parties</i>	Knows parties or attorneys
1200	<i>Moral or Religious Reservations about Imposing the Death Penalty</i>	Ambivalence about death penalty (short of refusal to impose under any circumstances)