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# Expanding Reach: The Importance of *Batson v. Kentucky* Thirty Years On

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## PREFACE

### Expanding Reach: The Importance of *Batson v. Kentucky* Thirty Years On

Melynda J. Price<sup>1</sup>

When the call came from the KENTUCKY LAW JOURNAL soliciting suggestions for the 2016 Symposium, I proposed a commemoration of *Batson v. Kentucky* on the thirtieth anniversary of this landmark Supreme Court decision.<sup>1</sup> I have written about *Batson v. Kentucky* throughout my career.<sup>2</sup> The decision and the structures put in place to enforce that decision fundamentally changed the way in which voir dire was conducted in United States courtrooms. It had long been understood that litigants had a constitutional right to challenge jurors with legally permitted causes typically delineated by statute. Peremptory challenges, because of their discretionary nature, extended the scope of removal beyond those articulated in the statute.

Although peremptory strikes are considered an important part of the art of lawyering, they have been much more debated and less regulated than challenges for cause. *Batson* marks a steep departure from the broad discretion lawyers have had in using hunches, experience, and/or instincts in making critical decisions

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<sup>2</sup> See generally *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that the Equal Protection Clause forbids prosecutors from challenging jurors solely on account of race).

<sup>2</sup> See, e.g., MELYNDA J. PRICE, AT THE CROSS: RACE, RELIGION, & CITIZENSHIP IN THE POLITICS OF THE DEATH PENALTY 41-68 (2015) (discussing *Batson* hearings in the context of capital jury selection); Melynda J. Price, *Performing Discretion or Performing Discrimination: Race, Ritual, and Peremptory Challenges in Capital Jury Selection*, 15 MICH. J. RACE & L. 57 (2009) (examining use of *Batson* hearings in capital trials) [hereinafter Price, *Performing Discretion or Performing Discrimination*]; Melynda J. Price, *Policing the Borders of Democracy: The Continuing Role of *Batson* in Protecting the Citizenship Rights of the Excluded*, 97 IOWA L. REV. 1635 (2012).

about jury composition. *Batson* follows previous unsuccessful attempts to push the Court on the idea that substantial intervention was required in this historic practice.<sup>3</sup> The Court had long articulated a clear rule that Blacks could not be struck for cause based on race.<sup>4</sup> Not wanting to see the replication of the conditions of slavery through statutory regimes, the Court viewed the restriction of access to the jury as an important right, and it was one of the few participatory rights protected during that period. It is important to remark that the ferocity of Jim Crow meant the Supreme Court's decisions had little effect in practice until the sweeping changes in the Civil Rights movement of the 1960s. The changes associated with these larger political movements removed bureaucratic and formal barriers to the jury box, but had little impact on discretionary tools like peremptory challenges. Peremptory challenges were still utilized as a highly effective tool to deny Blacks access to the jury box.<sup>5</sup>

*Batson* brought the question of whether the Constitution forbids the use of race as a factor in discretionary strikes to the Supreme Court.<sup>6</sup> The Court answers with a resounding yes, making clear that racially motivated peremptory challenges are unconstitutional.<sup>7</sup> *Batson* was not the first to recognize this; but *Batson* was the first to make clear that the harm to the defendant could be evaluated by the

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<sup>3</sup> In *Swain*, the court explains peremptory challenges with the following: "The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control." *Swain v. Alabama*, 380 U.S. 202, 220 (1965) (citing *State v. Thompson*, 206 P.2d 1037 (Ariz. 1949); *Lewis v. United States*, 146 U.S. 370, 378 (1892)).

<sup>4</sup> *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879), *abrogated by Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) ("Concluding, therefore, that the statute of West Virginia, discriminating in the selection of jurors, as it does, against negroes because of their color, amounts to a denial of the equal protection of the laws to a colored man . . .").

<sup>5</sup> Peremptory challenges were also used to exclude women in significant numbers. *See, e.g., J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143-44, 146 (1994). It is always important to mention that this right of citizenship was not fully extended to African American women at the time *Strauder* was decided, and for all women, the right to participate and juries would not be expanded until the 1970s. For example, Louisiana had a statute excluding women from jury service unless they filed a declaration saying they wanted to be considered for service. LA. CODE CRIM. PROC. ANN. art. 402 (1966) (repealed 1974). The Court found, at the time of the petitioner's trial in *Taylor v. Louisiana*, there were no women on the venire despite being fifty-three percent of the population in the judicial district. 419 U.S. 522, 525-26 (1975). In 1979, the Supreme Court held a Missouri law that permitted women to be exempted from jury duty, if they wished, to be unconstitutional. *Duren v. Missouri*, 439 U.S. 355, 360 (1979). The law resulted in only 14.5% of the post-summons venire being comprised of women, and the petitioner claimed the paucity of women in the venire denied his right to have his case heard by a fair cross-section of the community. *Id.* at 362-63. The Supreme Court did not recognize female jurors of all races as having a right against sex discrimination in the use of peremptory challenges until *J.E.B. v. Alabama ex rel. T.B.* *See* 511 U.S. at 129-31. Despite attaining suffrage, women were barred from jury service completely in many states with Alabama being one of the last to recognize the specific jury rights of women in 1966. *Id.* at 131 n.3.

<sup>6</sup> *See Batson*, 476 U.S. at 82.

<sup>7</sup> *See id.* at 99-100.

behavior of the lawyers within a particular trial.<sup>8</sup> Prior to *Batson*, the amount of time and effort, as well as the high legal standard, made a showing of discrimination often an insurmountable obstacle to making a successful objection. In his concurring opinion in *Batson*, Justice Thurgood Marshall provides several examples where defendants attempted to mount such claims.<sup>9</sup> In one instance, the defendant's claim included evidence that during a single year in Dallas County, Texas, prosecutors struck 405 out of 467 black jurors with peremptory challenges.<sup>10</sup> Even this showing was not sufficient proof of racially motivated peremptory challenges under the leading decision at the time, *Swain v. Alabama*.<sup>11</sup> Most defendants could not afford the investigation required to prove systematic discrimination.<sup>12</sup> *Batson* created a new process for evaluating the use of peremptory challenges against racial minorities in particular cases where that harm occurs.<sup>13</sup>

*Batson* focuses the question of proof on an inquiry of racial discrimination in *the case and the prosecutor before the court*, removing the need to prove discrimination across cases and across time. To make a showing of racial bias in the prosecutor's use of peremptory challenges, according to *Batson*, defendants must demonstrate 1) they are a "member of a cognizable racial group"<sup>14</sup> and "that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race"<sup>15</sup>; 2) "peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate';"<sup>16</sup>

<sup>8</sup> See, e.g., *Swain*, 380 U.S. at 223. *Swain* is mentioned more than thirty-five times in the majority opinion in *Batson*. See generally *Batson*, 476 U.S. 79.

<sup>9</sup> See *Batson*, 476 U.S. at 103–04 (Marshall, J., concurring).

<sup>10</sup> *Batson*, 476 U.S. at 104. The Dallas County Prosecutor used a manual for jury selection that encouraged prosecutors to eliminate "any member of a minority group." See *id.* (quoting J. VAN DYKE, JURY SELECTION PROCEDURE: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 152 (1977)). "An earlier jury-selection treatise circulated in the same county instructed prosecutors: 'Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated.'" *Id.* at n.3 (quoting Steve McGonigle & Ed Timms, *Race Bias Pervades Jury Selection: Prosecutors Routinely Bar Blacks, Study Finds*, DALL. MORNING NEWS, Mar. 9, 1986, at 1A); see also *Tompkins v. Texas*, 774 S.W.2d 195, 203 (Tex. Crim. App. 1987).

<sup>11</sup> *Swain*, 380 U.S. at 228–29.

<sup>12</sup> See *Batson*, 476 U.S. at 103 (Marshall, J., concurring).

<sup>13</sup> *Batson*, 476 U.S. at 129 (Burger, C.J., dissenting) ("Prosecutors and defense attorneys alike will build records in support of their claims that peremptory challenges have been exercised in a racially discriminatory fashion . . .").

<sup>14</sup> *Id.* at 96. This part of the rule is from *Swain* and was first articulated in *Castaneda*. See *Castaneda v. Partida*, 430 U.S. 460, 494–95 (1977).

<sup>15</sup> *Batson*, at 96.

<sup>16</sup> *Batson*, 476 U.S. at 96 (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)). This part of the rule is now considered an indisputable fact in the legal analysis of the use of peremptory challenges in the removal of racial minorities. In *Avery v. Georgia*, the Supreme Court held that once a defendant made a prima facie case of discriminatory jury selection, it is the responsibility of the state to disprove the discrimination. See 345 U.S. at 563. In *Georgia* at that time, jury commissioners would print the names of Whites on white paper and Blacks on yellow paper. *Id.* at 560. The slips were placed in a box and a judge would pull them out and hand them to the sheriff. The sheriff would give them to a clerk to type and arrange. *Id.* at 560–61. In *Avery's* case, the judge pulled approximately sixty slips from the box.

and 3) these facts and other “relevant circumstances raise an inference” that the prosecutor used peremptory challenges to remove members of the defendant’s race from the trial jury.<sup>17</sup>

What has resulted in practice is referred to as the *Batson* hearing. In *Batson* hearings, the defendant’s lawyer can object if he or she believes the prosecutor is using peremptory challenges to strike jurors based on race.<sup>18</sup> First, the proceedings are halted. The trial judge then questions the prosecutor as to his or her reasons for striking the black jurors in question using peremptory challenges. The prosecutor articulates reasons for the removals. These reasons must be race neutral.<sup>19</sup> Though on opposite sides of the *Batson* holding, Justice Marshall and Chief Justice Warren Burger both predicted what would later become the clear problem with *Batson*: proof is very difficult.<sup>20</sup>

Most of the Supreme Court decisions since 1986 can be characterized as attempts to clarify what constitutes evidence of racially motivated strikes sufficient to sustain a challenge under *Batson*. This has led to the Supreme Court looking beyond the *Batson* hearing to other aspects of the voir dire in determining the legitimacy of the race-neutral explanations offered by counsel. For example, the Supreme Court urged lower courts to look beyond to the “broader patterns of practice” during jury selection<sup>21</sup> and encouraged an interpretive approach to evaluating how peremptory challenges were used. *Miller-El* calls for analysis of the cultural context in which the strikes occur (e.g., racist history and practices of the Dallas County District Attorney), a comparative analysis of differences in treatment between those jurors seated and those removed (e.g., comparison of Blacks and Whites in the venire), and attention to what is physically taking place in

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*Id.* at 561. The judge testified that he did not discriminate selecting the slips from the box, yet no African Americans were on the panel. *Id.* Justice Frankfurter, in his concurring opinion, concludes, “The mind of justice, not merely its eyes, would have to be blind to attribute such an occurrence to mere fortuity.” *Id.* at 564 (Frankfurter, J., concurring).

<sup>17</sup> *Batson*, 476 U.S. at 96.

<sup>18</sup> See PRICE, *supra* note 2, at 47.

<sup>19</sup> *Id.* at 98 (“The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried.”).

<sup>20</sup> See *id.* at 105 (Marshall, J., concurring) (“[D]efendants cannot attack the discriminatory use of peremptory challenges at all unless the challenges are so flagrant as to establish a prima facie case.”); see also *id.* at 127–28 (Burger, C.J., dissenting) (“Anything short of a challenge for cause may well be seen as an ‘arbitrary and capricious’ challenge.”).

<sup>21</sup> *Miller-El v. Dretke*, 545 U.S. 231, 240, 253 (2005). In 1985, Thomas Miller-El was sentenced to death by an all-white jury in Dallas, Texas, after the prosecutor dismissed ten qualified black jurors by peremptory challenge. *Id.* at 236. The trial court found under *Swain*, the guiding case at the time, no evidence of “systematic exclusion of blacks as a matter of policy” existed. *Id.* at 236. Miller-El was tried prior to *Batson*. See *id.* While his case was on appeal, the *Batson* decision changed the standard of review. *Id.*; see also *Batson*, 476 U.S. at 96 (changing the applicable standard in 1986). Miller-El’s case was remanded and the trial court held new hearings where the prosecutor justified his removal of the jurors in question. *Miller-El*, 545 U.S. at 236. Miller-El continued to argue the *Batson* claims as his case worked its way through the state and federal court systems until it made it to the Supreme Court a second time. See *id.* at 236–37.

the courtroom (e.g., jury shuffles).<sup>22</sup> Justice David Souter, who wrote for the majority, focused on two of the practices used in selecting the *Miller-El* jury as demonstrative of how other associated practices must be taken into account to evaluate *Batson* challenges: the first, known in Texas as the jury shuffle; and the second, the provision of different prefatory statements to black and white members of the venire panel about the death penalty.<sup>23</sup>

The jury shuffle allows either party to request that the clerk of the court literally shuffle the cards bearing the jurors' names.<sup>24</sup> In *Miller-El*, a number of the black jurors were seated at the beginning of the panel, so the prosecutor requested a shuffle, moving the Blacks at the beginning to the end.<sup>25</sup> The prosecution and the defense spent several weeks literally shuffling the venire panel to arrange jurors in ways they thought advantageous to their case.<sup>26</sup> The legal commitments and rules in place to prevent racial discrimination in peremptory strikes had little impact in the courtroom, as prosecutors used other tactics to attempt to consistently position Blacks for exclusion.<sup>27</sup>

The second practice the Court identified in *Miller-El* was evidence of discriminatory juror practices that support a *Batson* challenge was the use of different prefatory statements for Blacks and Whites when the prosecutor described the jurors' role in capital trials.<sup>28</sup> The statements were offered just prior to questioning jurors' personal views on the possibility of the death penalty if Thomas Miller-El were to be convicted.<sup>29</sup> Ninety-four percent of white jurors heard a fairly straightforward rendition of the process by which the state would prove Miller-El guilty and that the jurors would be asked to provide an "affirmative" answer on "capital murder."<sup>30</sup> Alternatively, fifty-three percent of African American venire

<sup>22</sup> *Miller-El*, 545 U.S. at 253–66.

<sup>23</sup> *Id.* at 253 ("The first clue to the prosecutors' intentions, distinct from the peremptory challenges themselves, is their resort during *voir dire* to a procedure known in Texas as the jury shuffle."); see also *id.* at 255 ("Some of these prefatory statements were cast in general terms, but some followed the so-called graphic script, describing the method of execution in rhetorical and clinical detail.").

<sup>24</sup> Either defense counsel or the prosecution can make requests to shuffle the jury. See TEX. CODE CRIM. PROC. ANN. art. 35.11 (West 2017).

<sup>25</sup> *Miller-El*, 545 U.S. at 254.

<sup>26</sup> The record reflects that both the prosecution and defense asked for shuffles. See *id.* The Court found the fact that the defense actually asked for more shuffles than the prosecution irrelevant. See *id.* at 255 n.14. Justice Souter wrote that the uses of the jury shuffle by the defense did not negate a suspicion of racial discrimination on the part of the prosecutor. *Id.*

<sup>27</sup> See, e.g., *id.* at 253; see also Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1178 (1995) (arguing that racially motivated peremptory challenges "even in the hands of a defendant, violate the Fifteenth Amendment").

<sup>28</sup> *Miller-El*, 545 U.S. at 255.

<sup>29</sup> See *id.* at 255–56.

<sup>30</sup> The full text of the statement was:

I feel like it [is] only fair that we tell you our position in this case. The State of Texas is . . . actively seeking the death penalty in this case for Thomas Joe Miller-El. We anticipate that we will be able to present to a jury the quantity and

members and six percent of the white venire members heard what the Court described as a more “graphic” statement where the prosecutor mentions the “death house” and the specific method of execution.<sup>31</sup> The state argued the prefatory statements provided were based on the jurors’ ambivalence toward the death penalty in an attempt to expose jurors who were “uncertain” about the death penalty, not the jurors’ race.<sup>32</sup> The Court found this reason did not fit the facts of the case, given that black jurors were more likely to hear the latter “graphic” statement about the death penalty than Whites regardless of their opinion on the death penalty.<sup>33</sup> The Court concluded that the behavior of the prosecutors in the *Miller-El* jury selection, coupled with the Dallas County Prosecutor’s history of racially discriminatory jury practices, was more than sufficient find a *Batson* violation.<sup>34</sup>

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type of evidence necessary to convict him of capital murder and the quantity and type of evidence sufficient to allow a jury to answer these three questions over here in the affirmative. A yes answer to each of those questions results in an automatic death penalty from Judge McDowell.

*Id.* at 255–56.

<sup>31</sup> The full text of the statement was:

I feel like you have a right to know right up front what our position is. Mr. Kinne, Mr. Macaluso and myself, representing the people of Dallas County and the state of Texas, are actively seeking the death penalty for Thomas Joe Miller-El . . . . We do that with the anticipation that . . . at some point Mr. Thomas Joe Miller-El—the man sitting right down there—will be taken to Huntsville and will be put on death row and at some point taken to the death house and placed on a gurney and injected with a lethal substance until he is dead as a result of the proceedings that we have in this court on this case.

*Id.* at 256.

<sup>32</sup> *Id.* at 256–57.

<sup>33</sup> *Id.* at 258. It is important to note that the majority and separate opinions in *Miller-El* turn on the Justices’ different characterizations of the venire members’ responses to the jury questionnaire. The majority opinion says as much with the following:

The dissent has conducted a similar statistical analysis that it contends supports the State’s argument that the graphic script was used to expose the true feelings of jurors who professed ambivalence about the death penalty on their questionnaires. A few examples suffice to show that the dissent’s conclusions rest on characterizations of panel members’ questionnaire responses that we consider implausible.

*Id.* at 258 n.17 (internal citation omitted).

The fact that the Court, with the primary responsibility for articulating the rules on the use of peremptory challenges, is divided on how the individual responses of jurors should be interpreted is telling of the vagaries of evaluating discrimination in the peremptory challenges.

<sup>34</sup> See *id.* at 264–66.

It was not just that the Court felt the need to attend to these other practices. They were also concerned with the cottage industry of legal training to avoid *Batson* error while continuing to use peremptory challenges in discriminatory ways. In his concurring opinion, Justice Stephen Breyer outlines the way “bar journal article[s],” “trial consulting firm[s],” and “materials” from legal organizations have more broadly systematized “the use of race- and gender-based stereotypes in the jury-selection.”<sup>35</sup> The levels of discrimination in peremptory strikes also persist largely due to the type of how-to training in avoiding *Batson* error. For example, a study of peremptory strikes between 2003 and 2012 in Caddo Parish, Louisiana, found that prosecutors used peremptory strikes to remove forty-six percent of black qualified potential jurors.<sup>36</sup> Yet, prosecutors only used peremptory strikes against fifteen percent of other qualified jurors.<sup>37</sup> The study also found that in “93 percent of trials, prosecutors struck a higher percentage of Blacks than of others.”<sup>38</sup> I agree with Justice Breyer’s concurrence in *Miller-El* and his concern about the difficulties of proving that the prosecutors’ motives are race neutral when using peremptory challenges,<sup>39</sup> a point first brought to the Court’s attention by Justice Marshall in *Batson*.<sup>40</sup> The view that one must look beyond the dialogue between attorney and juror to determine whether race has been used impermissibly in selecting a capital jury was reaffirmed in the 2008 United States Supreme Court decision in *Snyder v. Louisiana*.<sup>41</sup> The Court looked at the dialogue between prosecutor and the venire person and other aspects of selection including the handling of other jurors who offered similar testimony.

*Snyder* makes clear that the entirety of the jury selection process could be used to determine whether the reasons proffered are truly race neutral. The Court’s analysis, however, was confined to the on-the-record tactics, or those actions taken as part of litigation visible to all parties in the courtroom, used by the litigants (e.g., prefatory statements, comparative analysis, numbers of peremptory strikes used against one particular race).<sup>42</sup> *Foster v. Chatman*, decided three decades after

<sup>35</sup> *Id.* at 270–71 (Breyer, J., concurring).

<sup>36</sup> Ursula Noye, *Blackstrikes: A Study of the Racially Disparate Use of Peremptory Challenges by the Caddo Parish District Attorney’s Office*, REPRIEVE AUSTRALIA 2, 8 (Aug. 2015), [https://blackstrikes.com/resources/Blackstrikes\\_Caddo\\_Parish\\_August\\_2015.pdf](https://blackstrikes.com/resources/Blackstrikes_Caddo_Parish_August_2015.pdf) [<https://perma.cc/H4YB-BFPW>] [hereinafter “Noye Study”].

<sup>37</sup> *Id.* at 8.

<sup>38</sup> Adam Liptak, *New Questions on Racial Gap in Filling Juries*, N.Y. TIMES, Aug. 17, 2015, at A1 (citing Noye Study, *supra* note 36, at 9).

<sup>39</sup> See *Miller-El*, 545 U.S. at 266–68 (Breyer, J., concurring) (illustrating the practical problems of proof that Justice Marshall described).

<sup>40</sup> See *Batson v. Kentucky*, 476 U.S. 79, 102–03 (1986) (Marshall, J., concurring).

<sup>41</sup> See *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008). The Court looks at the dialogue between prosecutor and the venire person and other aspects of selection including the handling of other jurors who offered similar testimony. See *id.* The entirety of the jury selection process is used to determine whether the reasons proffered are truly race neutral. See *id.*

<sup>42</sup> *Id.*



*Batson*, extends the review of a case to materials and actions not performed openly.<sup>43</sup>

Timothy Foster was convicted of capital murder in Georgia in 1987.<sup>44</sup> Prosecutors used peremptory challenges to strike all of the black jurors who could not be struck for cause during Foster's trial.<sup>45</sup> Foster raised a *Batson* challenge during trial and empaneled the jury.<sup>46</sup> After sentencing, Foster raised the *Batson* claim as part of a motion for a new trial.<sup>47</sup> The trial court again rejected the claim after an evidentiary hearing, and Foster appealed.<sup>48</sup> Foster submitted several requests under the Georgia Open Records Act to gain access to the state's file from his trial.<sup>49</sup> The State of Georgia turned over files that included documents related to jury selection.<sup>50</sup> Among those documents were: 1) four copies of the jury venire list with "[a] legend in the upper right corner of the lists indicat[ing] that the green highlighting 'represents Blacks'" and "[t]he letter 'B' also appeared next to each black prospective juror's name";<sup>51</sup> 2) a hand-written document titled, "definite NOs" with a list of six juror including five black jurors first;<sup>52</sup> 3) "A handwritten document titled 'Church of Christ[.]" and "[a] notation on the document read: 'NO. No Black Church'";<sup>53</sup> and 4) "[t]he questionnaires that had been completed by several of the black prospective jurors" with each one indicating his or her race circled.<sup>54</sup> The prosecutor's notes indicated the desire to prevent the black jurors from being seated and that these materials were widely circulated through the prosecutor's office. There were significant objections by trial attorneys who argued that they had not made the markings and that they "did not rely on the highlighted jury venire list in making [the] decision on how to use . . . peremptory strikes."<sup>55</sup>

The Court reviewed the race-neutral reasons the prosecutors offered during the *Batson* hearing in Foster's trial, but reaffirmed that these reasons must be evaluated in the context of an additional of showing "purposeful discrimination" as outlined in *Snyder v. Louisiana*.<sup>56</sup> The Court concludes that the strikes of at least two of the

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<sup>43</sup> Foster v. Chatman, 136 S. Ct. 1737, 1753, 1755 (2016).

<sup>44</sup> *Id.* at 1740.

<sup>45</sup> *Id.* at 1742.

<sup>46</sup> *Id.* at 1743.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*; see also GA. CODE ANN. §§ 50-18-70 to 50-18-77 (West 2017).

<sup>50</sup> Foster, 136 S. Ct. at 1743.

<sup>51</sup> Foster, 136 S. Ct. at 1744.

<sup>52</sup> *Id.*; see also Crimesider Staff, *Supreme Court Throws Out Death Sentence from All-White Jury*, CBS NEWS (May 23, 2016, 12:53 PM), <http://www.cbsnews.com/news/supreme-court-throws-out-death-sentence-from-all-white-jury/> [<https://perma.cc/P7QZ-5FSR>] ("The sixth person on the list was a white woman who made clear she would never impose the death penalty . . . [a]nd yet even that woman ranked behind the black jurors.").

<sup>53</sup> Foster, 136 S. Ct. at 1744.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 1745.

<sup>56</sup> See *id.* at 1747 (citing *Snyder v. Louisiana*, 552 U.S. 472, 476-77 (2008)).

black jurors were “motivated in substantial part by discriminatory intent.”<sup>57</sup> Were it not for the release of the notes and materials associated with jury selection, this component may have been impossible to prove in Foster’s case. It is clear from the evidence in pre-*Batson* cases that cultures of discrimination were deeply entrenched and the continued patterns of peremptory strikes against Blacks offers no evidence of any significant cultural shifts.<sup>58</sup> Although the *Batson* hearing was a significant intervention, it remains a weak instrument to resolve ongoing problems of discriminatory uses of peremptory challenges.<sup>59</sup> Ferreting out motivations has always been the challenge in determining the discriminatory uses of peremptory challenges. Justice Thurgood Marshall was waving this cautionary flag about the nearly impossible task of proving discrimination in these cases in his concurrence in *Batson*.<sup>60</sup> Justice Marshall argues that the “seat-of-the-pants instincts” lauded as the benefit of peremptory challenges to trial lawyers “may often be just another term for racial prejudice.”<sup>61</sup> Marshall states that “[e]ven if all parties approach the Court’s mandate with the best of conscious intentions,” the levels of subconscious racism an individual possesses on which these “instincts” might be based and that exist in the larger society requires a high level of awareness on the part of the prosecutor and the courts.<sup>62</sup> What we have seen instead is a high level of systematic resistance to the Court’s laudable aims in *Batson*. Stephen Bright, attorney for Foster and keynote speaker to the KENTUCKY LAW JOURNAL 2016 Symposium on this topic, argues that the dynamics of the current system make successful claims

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<sup>57</sup> *Foster*, 136 S. Ct. at 1754 (quoting *Snyder*, 552 U.S. at 478, 485).

<sup>58</sup> See, e.g., Gilad Edelman, *Why Is it So Easy for Prosecutors to Strike Black Jurors?*, NEW YORKER (June 5, 2015), <http://www.newyorker.com/news/news-desk/why-is-it-so-easy-for-prosecutors-to-strike-black-jurors> [https://perma.cc/753X-ZD3Y]. Many suggested the *Batson* hearing was not sufficient:

In a 1996 opinion, an Illinois appellate judge, exasperated by “the charade that has become the *Batson* process,” catalogued some of the flimsy reasons for striking jurors that judges had accepted as “race-neutral”: too old, too young; living alone, living with a girlfriend; over-educated, lack of maturity; unemployed, employed as a barber; and so on. The judge joked, “New prosecutors are given a manual, probably entitled, ‘Handy Race-Neutral Explanations’ or ‘20 Time-Tested Race-Neutral Explanations.’”

*Id.* Studies in Florida, Louisiana, North Carolina, and Pennsylvania have pointed to the disproportionate use of peremptory challenges against Blacks. See, e.g., 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, 43–45 (2001); see also *supra* note 10 and accompanying text.

<sup>59</sup> Price, *Performing Discretion or Performing Discrimination*, *supra* note 2, at 96.

<sup>60</sup> See *Batson v. Kentucky*, 476 U.S. 79, 105–07 (1986) (Marshall, J., concurring).

<sup>61</sup> *Id.* at 106.

<sup>62</sup> *Id.* The maintenance of peremptory challenges not only requires a high level of self-awareness of a litigator’s possible racial bias, as Justice Marshall suggests, but also an ability, from visual assessments, to appropriately categorize members of the venire by race. See *id.* Most jurisdictions do not include race as a question on juror forms which is likely why the lawyers put handwritten markings on the juror questionnaires in *Foster*. See *Foster v. Chatman*, 136 S. Ct. 1737, 1744 (2016).

difficult. Bright suggests, "It's very hard politically with elected judges, very hard psychologically with judges and prosecutors who work together all the time, for a judge to make that finding."<sup>63</sup>

So, what are we to make of *Batson v. Kentucky* thirty years later? What have we learned? The critical lesson is the Supreme Court's enduring commitment to a particularized inquiry and remedy to racially biased uses of peremptory challenges. Even as the composition of the Court has changed, the Court has continued to find *Batson* error, or the unconstitutional use of race in in peremptory strikes, based on an expanding understanding of what constitutes proof in the immediate case. Even with very strong dissents over the years, the Court has stayed the course in *Batson*. I believe *Batson* has been so consistently upheld for the reasons articulated by Justice Lewis Powell in the majority opinion. The decision's requirement that "trial courts . . . be sensitive to the racially discriminatory use of peremptory challenges . . . enforces the mandate of equal protection and furthers the ends of justice."<sup>64</sup> Justice Powell also makes clear that "[i]n view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race."<sup>65</sup>

Similar to the aftermath of *Batson v. Kentucky*, each successive iteration of the Court's decision on racial bias in the use of peremptory challenges has left questions about how far the inquiry extends. How far do we go beyond the *Batson* hearing to establish an error? *Foster* represents the greatest expansion thus far. It will be the rare case that can put forward the kind of proof *Foster* accessed through state open records laws. But the use of the prosecutor's handwritten notes begs the question of what kind of evidence will be permitted next. Is it permissible to provide evidence of purposeful discrimination once the defendant has established a prima facie case of racially motivated peremptory strikes? Legal scholars and activists like Michelle Alexander have pointed to the role of bias in the criminal justice system and its impact on mass incarceration.<sup>66</sup> Could the social scientific research that points to systemic bias at some point be utilized to provide evidence of purposeful discrimination under *Snyder*?

Prior Supreme Court decisions make the success of systemic arguments too broad,<sup>67</sup> but what about similar studies closer to the events of a defendant's trial?

<sup>63</sup> Nina Totenberg, *Supreme Court Takes on Racial Discrimination in Jury Selection*, NAT'L PUB. RADIO (Nov. 2, 2015, 5:00 AM), <http://www.npr.org/2015/11/02/452898470/supreme-court-takes-on-racial-discrimination-in-jury-selection> [https://perma.cc/VX99-8G6T].

<sup>64</sup> *Batson*, 476 U.S. at 99.

<sup>65</sup> *Id.*

<sup>66</sup> *See generally* MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (rev. ed. 2012) (analyzing mass incarceration in the criminal justice system in the context of the caste system).

<sup>67</sup> In *McCleskey v. Kemp*, the court rejects the use of large statistical studies as proof of discrimination in a particular case. *See* 481 U.S. 279, 313 (1987), *reh'g denied*, 482 U.S. 920 (1987) ("In light of the safeguards designed to minimize racial bias in the process, the fundamental value of jury trial

Would the extensive research on the experiences of all persons who enter and conduct business at the courthouse, with particular attention to jury service, conducted by the Racial Fairness Commission of Jefferson County, Kentucky, be closely enough linked to a particular defendant's case to show a purposeful intent of discrimination?<sup>68</sup> This question is particularly salient given that this is the jurisdiction where *Batson* originated. Almost three decades later, the courts and the community that brought this question to the Supreme Court are still working out how to provide fair access to the jury box for their black citizens and fair trials to defendants who have a right to a jury untainted by racial bias.<sup>69</sup>

At some point the Supreme Court will find evidence that suggests bias too attenuated from the trial of the defendant to sustain a *Batson* claim. As yet, we do not know where that line is. The challenge of *Batson* is to continue in our efforts to ensure access to the jury box is unimpeded by racial discrimination.

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in our criminal justice system, and the benefits that discretion provides to criminal defendants, we hold that the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process.”).

<sup>68</sup> The Racial Fairness Commission was organized to focus on four areas: sentencing, bail issues, courtroom environment, and jury selection. See *Commission on Racial Fairness in the Courts Resolution*, KY.GOV (Jan. 23, 2009), <http://migration.kentucky.gov/NR/rdonlyres/54878A2B-3013-4688-A40E-825974475005/184178/RacialFairnessCommissionResolution12309.pdf> [<https://perma.cc/6XFD-EXKS>]. Kentucky Court of Appeals Judge Denise Clayton says, “African Americans should make up about 21 percent of a jury panel in Jefferson County. But earlier this month, it was more like 15 percent.” *Kentucky Lawmaker Pushing for Larger Jury Pool, Higher Pay for Jurors*, WDRB (Sept. 27, 2016, 5:36 PM), <http://www.wdrb.com/story/33263247/ky-lawmaker-pushing-for-larger-jury-pool-higher-pay-for-jurors> [<https://perma.cc/AE7X-E9SQ>]. The Racial Fairness Commission was created in 2001 by the then Chief Justice of the Kentucky Supreme Court, Joseph Lambert, to “examine the judicial process in Jefferson County” and to be “composed of a diverse collection of judges, lawyers, civil rights proponents, and leaders within the African American community.” See *Commission on Racial Fairness in the Courts Resolution*, *supra*.

<sup>69</sup> See, e.g., Martha Neil, *Was Judge Right to Dismiss Jury Due to Lack of Black Members? Top State Court To Decide*, ABA J. (Oct. 26, 2015, 5:45 AM), [http://www.abajournal.com/news/article/was\\_judge\\_right\\_to\\_dismiss\\_jury\\_due\\_to\\_lack\\_of\\_black\\_members\\_top\\_state\\_cour](http://www.abajournal.com/news/article/was_judge_right_to_dismiss_jury_due_to_lack_of_black_members_top_state_cour) [<https://perma.cc/57RM-GFW9>] (analyzing the controversy in Jefferson County, Kentucky, over a circuit court judge's dismissal of a jury because it had no black jurors).

