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Batson v. Kentucky Reflections Inspired by a Podcast

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Batson v. Kentucky: Reflections Inspired by a Podcast

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ABSTRACT

An episode of More Perfect, a podcast devoted to the U.S. Supreme Court, focused on Batson v. Kentucky, *which just marked its thirtieth anniversary. This podcast serves as the starting point for reflections on* Batson v. Kentucky, *a case in which the Court maintained the peremptory challenge while trying to eliminate discriminatory peremptory challenges. The podcast contributes to our understanding of* Batson *in several ways. First, it allows listeners to hear from participants in the case and how they viewed their situation at the time. Second, it considers whether* Batson *has been effective in ridding jury selection of race-based peremptory challenges. A growing number of academics and judges take the view that* Batson *should be abandoned and peremptory challenges should be eliminated. Third, the podcast raises the question whether eliminating the peremptory challenge represents a loss of faith in America, as one lawyer suggests. This Article challenges that notion and argues that eliminating the peremptory challenge represents a faith in America and in Americans to perform their role as jurors.*

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INTRODUCTION

An episode of *More Perfect*, a podcast devoted to the U.S. Supreme Court,[1] focused on *Batson v. Kentucky*.[2] In the segment entitled *Object Anyway*,[3] reporter Sean Rameswaram wanted to learn more about *Foster v. Chatman*,[4] which was then before the Supreme Court. *Foster* raised the simple question whether there had been a *Batson* violation when the prosecutors in the case used four peremptory challenges to strike the four African-American prospective jurors remaining on the venire.[5] As a result of those peremptory challenges, Foster was tried by an all-white jury, which convicted him and sentenced him to death. The trial judge held that there had been no *Batson* violation,[6] and the Georgia Supreme Court affirmed.[7] Years later, the state habeas court denied Foster's *Batson* claim[8] and the Georgia Supreme Court denied Foster's application for a Certificate of Probable Cause to appeal.[9] Neither court was persuaded that there had been a *Batson* violation, even though Foster had obtained and presented new evidence from the prosecutors' notes indicating that the prosecutors had been motivated by race throughout the jury selection.[10] The U.S. Supreme Court reversed, and in a seven-to-one decision, held that there had been a *Batson* violation during jury selection at Foster's trial,

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[1] *Radiolab Presents: More Perfect*, WNYC STUDIOS (July 16, 2016), http://www.wnyc.org/shows/radiolabmoreperfect [https://perma.cc/23ND-9S58].

[2] Batson v. Kentucky, 476 U.S. 79 (1986).

[3] Sean Rameswaram, *Object Anyway*, *Radiolab Presents: More Perfect*, WNYC STUDIOS (July 16, 2016), http://www.wnyc.org/story/object-anyway/ [https://perma.cc/NZ6M-YHVA].

[4] Foster filed a petition for writ of certiorari on January 30, 2015, and the U.S. Supreme Court granted the petition for writ of certiorari on May 26, 2015. *See* Petition for Writ of Certiorari, Foster v. Chatman, 136 S. Ct. 1737 (2016) (No. 14-8349); *Foster v. Chatman Docket File*, SUP. CT. U.S., https://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/14-8349.htm [https://perma.cc/H8FC-QBR7] (last visited Mar. 26, 2017). The Court heard oral argument on November 2, 2015, and issued an opinion on May 23, 2016. *See Foster v. Chatman Docket File supra.*

[5] Petition for Writ of Certiorari at i, *Foster*, 136 S. Ct. 1737 (No. 14-8349).

[6] Section of trial transcript including argument on objection pursuant to Batson v. Kentucky, Joint App. Vol. I at 58, *Foster*, 136 S. Ct. 1737 (No. 14-8349) ("Well, the Court is satisfied that Batson has been satisfied. The motion is overruled.") (quoting Judge John A. Frazier, Jr., Superior Court, Floyd County, Rome, Georgia). After his trial, Foster also renewed his *Batson* challenge in a motion for a new trial, but the trial judge denied the motion. *See* Order on Motion for New Trial, Joint App. Vol. I at 131, 144, *Foster*, 136 S. Ct. 1737 (No. 14-8349).

[7] Foster v. State, 374 S.E.2d 188, 191–92 (Ga. 1988).

[8] *Foster*, 136 S. Ct. at 1743, 1745 (noting that the state habeas court order denied Foster's petition for habeas relief, including his *Batson* claim); *see* Order Denying Petitioner's Request for Habeas Relief, No. 1989-V-2275 (Ga. Super. Ct. Dec. 4, 2013).

[9] *See Foster*, 136 S. Ct. at 1745.

[10] The prosecutors' notes, obtained through the Georgia Open Records Act, included a venire list in which African-American prospective jurors' names were highlighted in green marker, juror cards in which African-American prospective jurors were indicated as "B#1," "B#2," and "B#3," and a "definite NO's" list, which included the names of the remaining African-American prospective jurors. *Foster*, 136 S. Ct. at 1743–44; *see* GA. CODE ANN. § 50-18-70 (West 2016).

which had occurred almost thirty years ago.[11] To understand *Foster*, it was necessary to go back to *Batson*, and that is exactly what the podcast *Object Anyway* did.

With its exploration of *Batson*, the podcast makes several contributions to our understanding of the case and it seems appropriate to reflect on these contributions on this thirtieth anniversary of *Batson*. One contribution of the podcast is that it takes us back to the people involved in the case and how they viewed their situation at the time. It is all too easy when a case establishes a procedure—"a *Batson* challenge," which is governed by an elaborate three-step test[12]—to lose sight of the people who were involved in the case and how it affected them. A second contribution is that the podcast teaches listeners that there is a possible solution: the elimination of the peremptory challenge. The podcast provides arguments by lawyers and academics in favor of and against that remedy. A third contribution is that the podcast raises a provocative question to which it does not provide an answer: Would the elimination of the peremptory challenge represent a loss of faith in America?

The podcast's question is worthy of further reflection and exploration. In my view, the elimination of the peremptory challenge shows faith in America, rather than loss of faith. *Batson* and its progeny[13] permit lawyers, when challenged, to give reasons for their peremptory challenges that sound neutral, but are not. They have learned how to circumvent *Batson*. The problem is that it is hard to show that seemingly neutral reasons are based on purposeful discrimination. Thirty years ago, the Court recognized that the test it had created in *Swain v. Alabama*[14] required a "crippling burden of proof,"[15] and so it refashioned the test in *Batson*, hoping that it would prove to be less onerous. This has not been the case, however. A test that does not do what it is supposed to do should be abandoned.

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[11] *Foster*, 136 S. Ct. at 1755.

[12] Batson v. Kentucky, 476 U.S. 79, 96–97 (1986); *see also* discussion *infra* Part I (describing the three-step test in *Batson*).

[13] The *Batson* test initially applied to the defense attorney's challenge of the prosecutor's exercise of peremptories when the defendant was African American and the prosecutor sought to exclude African-American prospective jurors from the petit jury. *See Batson*, 476 U.S. at 82-83. However, after subsequent cases, which I refer to as "the *Batson* progeny," the test became applicable to defense attorneys and civil parties and prohibited all parties of any race, gender, or ethnicity from using peremptories to exclude prospective jurors based on these characteristics. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994) (applying *Batson* to peremptory strikes exercised on the basis of gender); Georgia v. McCollum, 505 U.S. 42, 59 (1992) (holding that criminal defendants were precluded by the Fourteenth Amendment from exercising discriminatory peremptory challenges); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 616 (1991) (applying *Batson* in civil cases); Powers v. Ohio, 499 U.S. 400, 409 (1991) (extending *Batson* so that a criminal defendant can challenge a prosecutor's exercise of peremptories based on race and need not be the same race as the excluded juror).

[14] 380 U.S. 202, 222–24 (1965) (holding that a peremptory challenge exercised on the basis of race violated the Equal Protection Clause of the Fourteenth Amendment, but to prevail the defendant had to show that the prosecutor had exercised discriminatory peremptories in case after case).

[15] *Batson*, 476 U.S. at 92.

Not only should *Batson* be abandoned, but peremptories should be eliminated.[16] As long as peremptories exist, lawyers will continue to use them in a discriminatory manner. Discriminatory peremptories pose a threat to the jury. Some defendants who observe this practice will believe the jury will be stacked against them and that they will not receive a fair trial. Some prospective jurors who are struck for discriminatory reasons will believe that they have been denied their right to serve on a jury because of their race, gender, or ethnicity. Discriminatory peremptories also will lead the larger community to question the jury. Members of the community usually accept a jury verdict, even when they disagree with it, because they believe the process is fair. To the extent that discriminatory peremptories undermine the fairness of jury selection, and make the jury look less like America, they call into question the integrity of the jury and leave the jury open to attack.

Parties, excluded jurors, and communities should not have to wait any longer for a solution to this problem. They should be able to have faith in the jury and faith in the fairness of the trial. Faith in the jury will contribute to faith in America. The *Swain* test endured slightly more than twenty years and the *Batson* test is now celebrating its thirtieth anniversary. Fifty years of experimentation should be sufficient to establish that these tests do not work—they have not eliminated discriminatory peremptory challenges. The only way to eliminate discriminatory peremptories is to eliminate the peremptory challenge.[17]

The Court in *Batson* expressed a commitment to a noble goal: ensuring nondiscriminatory peremptory challenges. The Court believed that the test it devised would accomplish this goal and allow the peremptory challenge to endure. The aspirations expressed in *Batson*, and repeated in the opinions that expanded *Batson*'s reach[18]reinforced the Court's commitment to nondiscrimination during jury selection. As Justice Kennedy explained in *Powers v. Ohio*, the very integrity

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[16] I have urged the elimination of peremptory challenges in earlier articles as well. *E.g.*, Nancy S. Marder, Batson *Revisited*, 97 IOWA L. REV. 1585 (2012) (explaining why peremptory challenges should be eliminated because the trial provided other mechanisms for ensuring impartial jurors) [hereinafter Marder, Batson *Revisited*]; Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041 (1995) (examining the Supreme Court's expansion of *Batson* to gender and the problems with *Batson* and peremptory challenges) [hereinafter Marder, *Beyond Gender*]; Nancy S. Marder, *Justice Stevens, the Peremptory Challenge, and the Jury*, 74 FORDHAM L. REV. 1683 (2006) (examining Justice Stevens's views on the jury and how those views are consistent with eliminating peremptory challenges, even though he did not adopt that position) [hereinafter Marder, *The Peremptory Challenge*]; Nancy S. Marder, *Two Weeks at the Old Bailey: Jury Lessons from England*, 86 CHI.-KENT L. REV. 537, 551–56 (2011) (suggesting that the United States could learn from England and Wales's experience and eliminate peremptory challenges as those countries had done) [hereinafter Marder, *Two Weeks at the Old Bailey*].

[17] *See, e.g.*, *Batson*, 476 U.S. at 102, 108 (Marshall, J., concurring) ("[O]nly by banning peremptories entirely can such discrimination be ended.").

[18] *See supra* note 13 (describing the *Batson* progeny).

of the jury depends on rooting out the discriminatory peremptory challenge.[19] The Court's commitment to nondiscriminatory peremptories did not falter, but the practice in the courtroom has not lived up to the hopes expressed in *Batson* and its progeny.

At some point—and the thirtieth anniversary seems an appropriate point—the Court needs to revisit the *Batson* experiment and to note the disjuncture between the goal of *Batson*, which is admirable, and how *Batson* plays out in the courtroom, where it falls woefully short of its goal. If the Court were to take note of this failing in the courtroom and abandon the *Batson* test and the peremptory challenge, it would enable jury selection to work the way that the Court had envisioned in *Batson* but had never achieved in practice. The failure of *Batson* in the courtroom remains a threat to the jury. The elimination of the peremptory challenge, and with it the discrimination that it continues to mask, is an antidote that can restore faith in the American jury.

This Article, which will use the podcast *Object Anyway* as a jumping-off point for reflections on *Batson*, will proceed in three parts. Part I will look back and consider the people involved in *Batson* and the way they understood their situation. Part II will look forward and consider the remedy that a number of lawyers and academics, many of whom were interviewed for the podcast, have long recommended. They now join Justice Marshall, who wrote a concurrence in *Batson*[20] suggesting the elimination of the peremptory challenge. Finally, Part III will pick up where the podcast left off and seek to answer the question raised at the end of the podcast, which was: does the elimination of peremptory challenges represent a loss of faith in America? One lawyer at the end of the podcast argued against eliminating the peremptory challenge because it represents to him a loss of faith in America. I argue that eliminating the peremptory challenge will help restore Americans' faith in the jury system. Maintaining the *Batson* test, which is ineffective in practice in spite of its lofty goals, will lead to cynicism about the jury and a loss of faith in this important American institution.

I. LOOKING BACK

One of the contributions that the podcast *Object Anyway* makes to our understanding of *Batson v. Kentucky* is that it focuses on the people involved in the case and includes interviews with them. Once a case has become famous as a legal procedure it is easy to lose track of the people who were involved and the difference the case made to their lives. The podcast reporter, Sean Rameswaram, traveled to

[19] 499 U.S. 400, 412 (1991) ("The overt wrong [of the discriminatory peremptory], often apparent to the entire jury panel, casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause.").

[20] *Batson*, 476 U.S. at 102 (Marshall, J., concurring).

Louisville, Kentucky, and interviewed the two parties involved in the case.[21] Their story is important because it allows us to see how peremptory challenges affected the people in the courtroom and how they perceived the fairness of the jury system.

James Kirkland Batson, an African-American man who is still a resident of Louisville, Kentucky, was the defendant in *Batson v. Kentucky*.[22] He was charged with burglary.[23] He grew up in a rough part of Louisville and had no money.[24] He began stealing soda bottles to buy a pair of shoes.[25] He continued to steal small items from houses—anything that could fit in his pockets—which earned him the nickname "the pants pocket burglar."[26] One day he was stopped by the police while he was driving his car in an area where there had been a rash of burglaries, and he was arrested.[27] He thought that the state would not have much of a case against him because he had not been caught breaking and entering a house.[28] He requested a jury trial.[29]

The state was represented by Prosecutor Joe Guttman, also from Louisville, Kentucky and a newly-minted lawyer at the time.[30] He told Rameswaram that James Batson's case came up within his first six months in the Prosecutor's Office.[31] He had already lost his first eight trials.[32] The first time Batson's case went to trial there was a hung jury.[33] The hold-out juror, an African-American woman, spoke to Batson after the trial and told him that she did not think he was guilty, which is why the jury ended up as a hung jury.[34] Guttman decided to retry Batson.[35] At the second trial, however, Guttman used four of his eight peremptory challenges to strike the four African-American prospective jurors on the venire.[36] This meant that Batson was tried by an all-white jury.[37] Thirty years later, Guttman does not remember why he struck those four African-American prospective jurors, but he told Rameswaram that "they were not stricken because of race."[38]

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[21] I am grateful to Sean Rameswaram, who provided me with a transcript of the podcast *Object Anyway*. All citations to the podcast will be from this unofficial transcript. *See* Transcript: *Object Anyway* at 2, (July 16, 2016) (copy on file with author and law journal).

[22] *Id.*

[23] *See id.* at 6.

[24] *Id.* at 4.

[25] *Id.* at 4–5.

[26] *Id.* at 5.

[27] *Id.* at 5–6.

[28] *Id.* at 6.

[29] *Id.*

[30] *Id.* at 7.

[31] *Id.*

[32] *Id.*

[33] *Id.* at 8.

[34] *Id.*

[35] *Id.*

[36] *Id.* at 11.

[37] *Id.*

[38] *Id.* at 12 (quoting former prosecutor Joe Guttman).

Batson was in the courtroom and watched as Guttman used four peremptory challenges to remove all four African-American prospective jurors from the venire.[39] As Rameswaram describes the scene in the podcast: "[W]hat's important for our story is to know that James Batson is sitting there in the [court]room as all of this is happening."[40] Batson could see that after the four African-American prospective jurors were struck, "[e]verybody in the courtroom was white[,]" except for Batson.[41] Batson's lawyer was white; the prosecutor was white; the judge was white, and after the peremptory challenges, all twelve jurors on his jury were white.[42] Batson described the moment as follows: "And I'm like Ah! That's completely – They struck all the blacks off the jury pool. It ain't right. I told my lawyer, I said object to that . . . ."[43] His lawyer said that he had no basis to object, but Batson insisted.[44] Batson told his lawyer to "object anyway," and that is what his lawyer did.[45] The case was able to reach the Supreme Court because of that objection.[46]

The lower court judges did not find any merit to the objection raised by Batson's lawyer.[47] The trial judge said that the prosecutor did not have to explain his peremptories; the law did not require any explanation.[48] The jury convicted Batson and the judge sentenced him to twenty years in prison.[49] The first thing Batson did when he was in prison in Danville, Kentucky was to appeal the judgment of the court below.[50] He was represented on appeal by David Niehaus from the Public Defender's Office in Jefferson County, Kentucky.[51] Niehaus started looking at other jurisdictions and found that prosecutors in many states were using their peremptories to strike African-American prospective jurors from the venire.[52] He raised the issue on appeal and framed it as a violation of the Sixth and Fourteenth Amendments to the U.S. Constitution; the U.S. Supreme Court agreed to hear the case.[53]

In *Batson v. Kentucky*, the Court held that peremptories exercised on the basis of race violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.[54] In a compromise, which Chief Justice Burger described in his

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[39] *Id.*
[40] *Id.* (quoting reporter Sean Rameswaram).
[41] *Id.* at 13 (quoting James Batson).
[42] *Id.* at 12–13.
[43] *Id.* at 12 (quoting James Batson).
[44] *Id.*
[45] *Id.* at 13 (quoting James Batson).
[46] *Id.* at 15.
[47] *Id.* at 13.
[48] *Id.*
[49] *Id.* at 14.
[50] *Id.*
[51] *Id.*
[52] *Id.* at 14–15.
[53] *Id.* at 16.
[54] Batson v. Kentucky, 476 U.S. 79, 89 (1986).

dissent as a "curious hybrid,"[55] the Court tried to maintain the tradition of peremptory challenges and eliminate race-based peremptory challenges by the prosecutor. The two goals, as Chief Justice Burger recognized in his dissent, were incompatible and on a collision course. The essence of a peremptory challenge is that it can be exercised for any reason at all without the attorney having to give an explanation.[56] *Batson* required some peremptories to be explained.[57] However, the Court tried to limit the number of peremptories that would require explanation by creating a test that the defendant would have to satisfy in order to challenge the prosecutor's peremptory successfully.[58]

The Court in *Batson* established a three-step test to determine if a peremptory challenge was discriminatory.[59] In step one, the defendant has to establish a prima facie case that the prosecutor exercised a peremptory challenge based on race.[60] The defendant could rely on the fact that he was a member of a cognizable group and that the prosecutor had struck a prospective juror who was also a member of that group. The defendant could also rely on the fact that peremptories provide a means for "those to discriminate who are of a mind to discriminate."[61] The defendant could also rely on other facts to try to establish a prima facie case of purposeful discrimination. If the defendant meets this burden, then step two requires the prosecutor to give reasons for his peremptory challenge.[62] The reasons have to be race neutral and "related to the particular case to be tried."[63] They do not have to rise to the level of a for cause challenge,[64] but the prosecutor cannot just say that he had a hunch[65] or an "intuitive judgment."[66] Finally, at step three, the trial judge decides whether the reason was pretextual or not; the burden remains with the defendant to show that the prosecutor engaged in purposeful discrimination.[67]

The podcast, with its emphasis on the people involved in the case, makes clear that the U.S. Supreme Court's decision in *Batson* had real-life consequences for the two parties. For James Batson, his twenty-year sentence was vacated and he was

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[55] *Id.* at 112, 126 (Burger, C.J., dissenting).

[56] *Id.* at 126–27.

[57] *Id.* at 127.

[58] *See id.* at 96–97 (providing guidance for establishing a prima facie case of a discriminatory peremptory and describing the three-step test to establish a discriminatory peremptory challenge).

[59] *Id.* at 96-97.

[60] *Id.*

[61] *Id.* at 96 (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).

[62] *See id.* at 97.

[63] *Id.* at 98.

[64] *Id.* at 97 ("[W]e emphasize that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause.").

[65] *Id.* at 98 ("Nor may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive or 'affirm[ing] [his] good faith in making individual selections.'") (quoting Alexander v. Louisiana, 405 U.S. 625, 632 (1972)).

[66] *Id.* at 97.

[67] *Id.* at 98.

released from prison.[68] For Joe Guttman and other prosecutors throughout the country, they immediately began to learn how "to get around *Batson*."[69]

Shortly after *Batson* was decided, another prosecutor, Jack McMahon, made a video of his training for new prosecutors, and that video can be found on YouTube.[70] One of the lessons that McMahon teaches new prosecutors is that they can still use peremptory challenges to strike African-American prospective jurors but they have to be able to give race-neutral reasons. During the training session, he advises new prosecutors to question African-American jurors at length during voir dire and "mark something down you can articulate [at a] later time . . . if something happens."[71] As long as the prosecutor does not give race as a reason—and prosecutors quickly learned that lesson—*Batson* will not be a barrier to discriminatory peremptory challenges. *Batson* only requires that a prosecutor give a race-neutral reason and seemingly any race-neutral reason will do. McMahon explained to Rameswaram on *Object Anyway* that his job as a prosecutor is to win.[72] He feels an obligation to strike those prospective jurors who will be "more questioning of [his] witnesses."[73] He believes African Americans are more likely to question police testimony and so he uses peremptories to remove them.[74] His view is: "[Y]ou're given the opportunity through peremptory challenges to strike [those who will question your witnesses]. Why wouldn't you? You'd be a fool not to."[75] As he explains to the young prosecutors he is lecturing, your job is to win; it is not to be noble.[76]

II. LOOKING FORWARD

Another contribution that the podcast makes is to look forward and to ask lawyers and academics how to address *Batson*'s failings. *Batson* has failed because it is easy for lawyers to evade and difficult for judges to enforce. The only adequate remedy, as Justice Marshall suggested in his *Batson* concurrence, is the elimination of peremptory challenges. In the thirty years since *Batson*, a growing number of lawyers, judges, and academics have joined Justice Marshall in his view that the only way to stop discrimination during jury selection is to eliminate peremptory challenges. The podcast points to this solution going forward, but also raises some lawyers' reservations about pursuing such a course.

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[68] Transcript: *Object Anyway*, *supra* note 21, at 18.

[69] *Id.* at 19 (quoting attorney Bryan Stevenson).

[70] Jack McMahon, *Jury Selection with Jack McMahon*, YOUTUBE, https://www.youtube.com/watch?v=Ag2I-L3mqsQ [https://perma.cc/5L5X-FXD3].

[71] *Id.* at 58:03.

[72] Transcript: *Object Anyway*, *supra* note 21, at 27.

[73] *Id.* (quoting Jack McMahon).

[74] McMahon, *supra* note 70, at 39:15.

[75] Transcript: *Object Anyway*, *supra* note 21, at 27 (quoting Jack McMahon).

[76] McMahon, *supra* note 70, at 37:48.

A. Reasons Are Easy for Lawyers to Give

Although *Batson* provided defense attorneys with a way to challenge prosecutors' discriminatory peremptory challenges, it soon became apparent that it would be hard for them to succeed on a *Batson* challenge. The prosecutor only had to give a reason that was seemingly race neutral and related to the case to be tried.[77] After *Purkett v. Elem*, the reason did not even have to be related to the case.[78] As long as the prosecutor gave a seemingly race-neutral reason, it would be difficult, and in some jurisdictions impossible, for a defendant to establish purposeful discrimination. Some defendants did not even try. Others tried and found their efforts thwarted, either by the prosecutor's seemingly race-neutral reason or the judge's willingness to accept any reason at all, no matter how "silly,"[79] as long as it did not explicitly mention a prospective juror's race.

Over time, a litany of acceptable reasons developed, and prosecutors could choose from among these reasons and be confident that the judge would typically view any of these reasons as race neutral. Indeed, one judge compiled a list of reasons, all supported by Illinois case law, that he thought prosecutors could distribute under the title "'Handy Race-Neutral Explanations' or '20 Time-Tested Race-Neutral Explanations,'" which included such reasons as: "too old, too young, divorced, 'long, unkempt hair,' free-lance writer, religion, social worker, renter, lack of family contact, attempting to make eye-contact with defendant, 'lived in an area consisting predominantly of apartment complexes,' single, [and] over-educated . . . ."[80]

The podcast included an interview with Bryan Stevenson, a lawyer who often represents African-American defendants in capital cases in the South.[81] He gave examples of reasons that were farfetched and yet were accepted by judges as race neutral. Stevenson, when he worked for the Southern Prisoners Defense Committee in Atlanta, Georgia, had one case in which the prosecutor had used his peremptories to exclude all the African-American prospective jurors on the venire.[82] Stevenson objected and pointed to the *Batson* decision; the judge understood it to mean that the prosecutor had to give race-neutral reasons, and the prosecutor was ready with his race-neutral reasons.[83] The prosecutor explained that he struck one African-American woman "because she looks just like the defendant," even though she was an African-American woman and the defendant

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[77] Batson v. Kentucky, 476 U.S. 79, 98 (1986).

[78] *See* 514 U.S. 765, 768–69 (1995) (per curiam).

[79] *Id.* at 768.

[80] People v. Randall, 671 N.E.2d 60, 65–66 (Ill. App. Ct. 1996) (internal footnotes omitted).

[81] *See Bryan Stevenson*, EQUAL JUST. INITIATIVE, http://eji.org/bryan-stevenson [https://perma.cc/SN3S-EBE8] (last visited Mar. 28, 2017); Transcript: *Object Anyway*, *supra* note 21, at 22–23.

[82] Transcript: *Object Anyway*, *supra* note 21, at 22.

[83] *Id.*

was an African-American man.[84] Stevenson recounted the judge's response: "And the judge said, [o]h, I see that" and accepted the prosecutor's reason as race neutral.[85] With another peremptory, Stevenson recalled that the prosecutor said that he struck an African-American prospective juror because the man said that he was a mason and the prosecutor said that he did not want anybody who belonged to a Masonic lodge on his jury.[86] When Stevenson put the prospective juror back on the stand and asked him if was a member of a Masonic lodge, the man said: "No. I'm not . . . I'm a brick mason!"[87] Nevertheless, the judge accepted the reason and let the prosecutor strike the man from the jury.[88]

Batson was intended to stop prosecutors from exercising their peremptories against African-American prospective jurors so that African-American defendants would not be denied their right to equal protection to have members of their own race on the jury. However, *Batson* has not stopped prosecutors from exercising race-based peremptories, and African-American defendants continue to be denied their right under the Equal Protection Clause. Stevenson pointed not only to his own cases, but also to statistics collected by the Equal Justice Initiative (EJI), for which he serves as director.[89] For example, EJI reported that Tennessee has not reversed a single case under *Batson* in thirty years.[90] In Houston County, Alabama, eighty percent of the African Americans who qualified for jury duty were struck during a five-year period.[91]

B. Enforcement Is Difficult for Judges To Do

Not only is it easy for lawyers to give seemingly race-neutral reasons for peremptory challenges, but also it is difficult for judges to question whether lawyers' reasons are really race neutral. *Batson* put trial judges in the difficult position of having to decide whether the explanation a prosecutor offers is pretextual or not. After the prosecutor has given a reason according to step two of the *Batson* test, the trial judge must decide if it is race neutral in step three.[92] Few prosecutors will give race as an explicit reason for exercising a peremptory

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[84] *Id.*

[85] *Id.*

[86] *Id.* at 23.

[87] *Id.*

[88] *Id.*

[89] *Id.* at 19.

[90] EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 22 (Aug. 2010), http://eji.org/sites/default/files/illegal-racial-discrimination-in-jury-selection.pdf [https://perma.cc/WG4M-TK5R] ("More than 100 criminal defendants have raised *Batson* claims on appeal in Tennessee, but this state's courts have *never* reversed a criminal conviction because of racial discrimination during jury selection.").

[91] *Id.* at 14 ("From 2005 to 2009, in cases where the death penalty has been imposed, prosecutors in Houston County, Alabama, have used peremptory strikes to remove 80% of the African Americans qualified for jury service.").

[92] Batson v. Kentucky, 476 U.S. 79, 97–98 (1986).

challenge. Almost all other reasons will appear to be race neutral, even if the judge does not see the relevance of the reason.[93] The reason only has to be race neutral; it does not have to be compelling.[94]

Few trial judges will press the prosecutor on his reasons. After all, the prosecutor is a repeat player and an officer of the court. If the prosecutor gives a reason that does not mention race explicitly, then it is hard for the judge to impugn the integrity of the prosecutor by asking whether the prosecutor is really exercising his peremptory based on race. As psychologists have pointed out, it is difficult for people to recognize bias in themselves,[95] and it is also difficult for one person to discern bias in another person.[96] Thus, the prosecutor might not even be aware of his actual motivation, and in any event, it would be difficult for the judge to discern that actual motivation.

The Supreme Court gave trial judges the responsibility of implementing *Batson*. Justice Lewis Powell, writing for the majority in *Batson*, expressed faith that trial judges would figure out how to proceed.[97] Only Chief Justice Warren Burger, writing in dissent, expressed grave reservations about the difficult task that the Court had assigned to trial judges to perform.[98] On the one hand, it makes sense to leave such a determination to the trial judge, who is in the courtroom and can see the prospective juror and the prosecutor and has heard their exchange during voir dire. On the other hand, the trial judge is in the thick of things and does not have much time to make a decision. In addition, the trial judge cannot study the record in the same way as an appellate judge can and make comparisons

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[93] *See, e.g.*, Order on Motion for New Trial, *supra* note 6, at 138–41, 144 (describing the trial judge's finding that even though some of the prosecutors' reasons were unlikely predictors of a juror's behavior, the trial judge nevertheless found that the prosecutors' reasons were race neutral; therefore, Timothy Tyrone Foster had failed to establish a *Batson* violation).

[94] *See* Purkett v. Elem, 514 U.S. 765, 768–69 (1995) (stating that even if a reason is "silly or superstitious," as long as it is race neutral it will not be prohibited by the Equal Protection Clause).

[95] *See, e.g.*, Regina Schuller & Neil Vidmar, *The Canadian Criminal Jury*, 86 CHI.-KENT L. REV. 497, 522 (2011) ("More specifically, research related to aversive racism suggests that people may be unaware of existing biases and often maintain that they are personally fair and egalitarian . . . .") (footnote omitted); Neil Vidmar, *When All of Us Are Victims: Juror Prejudice and "Terrorist" Trials*, 78 CHI.-KENT L. REV. 1143, 1150 (2003) ("[T]he juror may not be self-cognizant of his or her own biases.").

[96] *See, e.g.*, Regina A. Schuller & Caroline Erentzen, *The Challenge for Cause Procedure in Canadian Criminal Law*, 6 OÑATI SOCIO-LEGAL SERIES 315, 329 (2016) ("It is difficult to recognize one's own prejudice, and even more difficult to admit to it in open court. It is perhaps more difficult yet to recognize it in another person . . . .").

[97] *Batson*, 476 U.S. at 97, 99 ("We have confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors. . . . We decline, however, to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges.").

[98] *Id.* at 131 (Burger, C.J., dissenting) ("The Court essentially wishes these judges well as they begin the difficult enterprise of sorting out the implications of the Court's newly created 'right.' I join my colleagues in wishing the Nation's judges well as they struggle to grasp how to implement today's holding.").

between reasons the prosecutor gave to strike African-American prospective jurors and whether those same reasons applied to any white jurors who were permitted to serve.[99] That comparison has proven to be one of the few ways to succeed on a *Batson* challenge, but it requires having white jurors and black jurors with the same characteristics.

The Supreme Court also instructed appellate courts to defer to trial judges when reviewing *Batson* challenges.[100] This means that appellate judges typically do not make a very searching inquiry when reviewing *Batson* challenges, though there have been some exceptions. Appellate judges explain that they have only the cold, hard record before them, whereas the trial judge can see the participants, hear the exchanges during voir dire, and observe the prosecutor as he or she gives reasons for the peremptory. As the Seventh Circuit explained, "[t]he trial judge is clearly in the best position to make that factual determination"[101] and the Seventh Circuit would not disturb such a factual finding unless it is "completely outlandish or there is other evidence [of] its falsity."[102] As a result, appellate review does not serve as much of a check on the trial judge's determination in a *Batson* challenge.

C. The Only Adequate Remedy: Eliminate Peremptory Challenges

Batson, though noble in purpose, has proven ineffective in practice and should be abandoned; the only remedy that is adequate to the task is the elimination of the peremptory challenge. Justice Marshall proposed this remedy thirty years ago in his concurrence in *Batson*.[103] He was forward-looking for his time, and still today. The podcast pointed to this remedy and noted support for it among some academics and lawyers, though support is far from universal. As one lawyer in the podcast described Justice Marshall, "he was basically a fortune teller."[104]

Justice Marshall recognized that *Batson* would be easy to circumvent. Prosecutors could give reasons that would satisfy *Batson* even if they were actually motivated by race.[105] Judges would be reluctant to push them to discover their true

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[99] *See, e.g.*, Snyder v. Louisiana, 552 U.S. 472, 478–80, 483–85 (2008) (noting that when a lawyer gives one explanation for striking an African-American prospective juror, but does not exercise a strike against a white prospective juror to whom that same reason applies, then that suggests the reason justifying the strike was pretextual).

[100] *Batson*, 476 U.S. at 98 n.21 ("Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference.").

[101] Tinner v. United Ins. Co. of Am., 308 F.3d 697, 703 (7th Cir. 2002).

[102] *Id.* (quoting United States v. Stafford, 136 F.3d 1109, 1114 (7th Cir.), *and modified*, 136 F.3d 1115 (1998)).

[103] *Batson*, 476 U.S. at 102–03 (Marshall, J., concurring) ("The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely.").

[104] Transcript: *Object Anyway*, *supra* note 21, at 32 (quoting ACLU lawyer Jeff Robinson).

[105] *See Batson*, 476 U.S. at 106 ("Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons.").

reasons, and sometimes prosecutors would not even be aware of their true reasons. They could be motivated by unconscious biases that would lead them to strike African-American prospective jurors from juries.[106] For example, prosecutors might say they are striking African-American prospective jurors because they look sullen or aloof, but they might see these prospective jurors as sullen or aloof because of their race and not because of any ostensible body language.[107] *Batson* would not enable prosecutors or judges to discern the underlying reasons for striking a juror.[108] Thirty years of experimentation with *Batson* has proven Justice Marshall right.

Justice Marshall recognized that the *Batson* test would fall short and that the only adequate remedy would be the elimination of the peremptory challenge. With peremptory challenges, prosecutors would continue to exercise them based on race. Without peremptory challenges, prosecutors would have to seat African-American prospective jurors on the jury. The only way that prosecutors could remove them would be if they satisfied a for cause challenge. A for cause challenge is available for a limited number of reasons; the reasons have to be given in open court and the judge makes the decision.

Over time, a number of academics and lawyers began to see the ineffectiveness of *Batson* and the need to eliminate the peremptory challenge.[109] The reporter for the podcast, Sean Rameswaram, interviewed a few lawyers and academics who took this view. Attorney Stephen Bright, who often represents African-American criminal defendants facing the death penalty in the South, described the elimination of the peremptory as "a no-brainer."[110] He has seen prosecutors use their peremptories to remove all the African-American prospective jurors from the jury, so that his clients are tried by all-white juries, and judges never seem to find a

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[106] *Id.* ("A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is 'sullen,' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically.").

[107] *See id.*

[108] *Id.* ("A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported.").

[109] For a sampling of recent academic articles critical of *Batson*, see Sheri Lynn Johnson, Batson *from the Very Bottom of the Well: Critical Race Theory and the Supreme Court's Peremptory Challenge Jurisprudence*, 12 OHIO ST. J. CRIM. L. 71, 88–90 (2014); Marder, Batson *Revisited*, *supra* note 16, at 1586; Marder, *The Peremptory Challenge*, *supra* note 16, at 1683–84; Barbara O'Brien & Catherine M. Grosso, *Beyond* Batson*'s Scrutiny: A Preliminary Look at Racial Disparities in Prosecutorial Peremptory Strikes Following the Passage of the North Carolina Racial Justice Act*, 46 U.C. DAVIS L. REV. 1623, 1628 (2013); Antony Page, Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 156 (2005); Tania Tetlow, *Solving* Batson, 56 WM. & MARY L. REV. 1859, 1859 (2015). For an extensive collection of early articles critical of *Batson*, see People v. Bolling, 591 N.E.2d 1136, 1144–45 (1992) (Bellacosa, J., concurring) (providing citations).

[110] Transcript: *Object Anyway*, *supra* note 21, at 31 (quoting attorney Stephen Bright); *see Biography of Stephen B. Bright*, S. CTR. FOR HUM. RTS., https://www.schr.org/about_us/staff/stephen_b_bright [https://perma.cc/2FKM-J3BP] (last visited Apr. 2, 2017).

Batson violation.[111] Even Jack McMahon, the prosecutor who lectured new prosecutors about how to select favorable jurors and how to be prepared for *Batson* challenges, said that peremptories should just be eliminated: "Well, then don't give them at all then, for crying out loud. It's real simple. . . . Take them away."[112] But as long as McMahon is given peremptories, he will use them to remove jurors whom he thinks will be critical of his case, including African-American jurors.[113] He suggests that African-American jurors are likely to be critical of any police testimony he might use.[114] As long as *Batson* exists, McMahon recommends that new prosecutors question African-American prospective jurors extensively during voir dire and write down some reasons that they can give in case they face a *Batson* challenge.[115] He tells new prosecutors that they should use their peremptories to win, not for some noble purpose.[116] If peremptories exist, then he will use them in a discriminatory fashion; the only way he will change his practice is if peremptories do not exist.[117]

The podcast notes that many lawyers believe that the peremptory challenge is too important to be eliminated. Sean Rameswaram spoke to a number of lawyers who thought that peremptories were integral to a fair trial.[118] These lawyers did not want to leave it to judges to eliminate questionable prospective jurors, particularly when such prospective jurors said they could be fair.[119] Once judges hear that prospective jurors say they can be fair, they will not remove them.[120] Some lawyers believe that prospective jurors will not admit to bias in open court; others find that prospective jurors might be unaware of their own biases.[121] These lawyers want the opportunity to remove these prospective jurors on their own; they do not want to rely on the judge.

One group that is not heard from in this podcast is judges. It is unclear whether they were asked and declined to be interviewed, or whether they were not asked at all. There are a growing number of judges, at every level of the judiciary, who are beginning to question peremptory challenges. At the U.S. Supreme Court, Justice Breyer has begun to question whether peremptories should be eliminated because

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[111] *See* Transcript: *Object Anyway*, *supra* note 21, at 24, 28.

[112] *Id.* at 31–32 (quoting prosecutor Jack McMahon).

[113] *See id.* at 27.

[114] *Id.*

[115] *Id.* at 21–22.

[116] *See supra* note 76 and accompanying text.

[117] Transcript: *Object Anyway*, *supra* note 21, at 31.

[118] *Id.* at 33–35 (quoting ACLU lawyer Jeff Robinson, Legal Editor Elie Mystal, and Professor Sun Wolf, Santa Clara University).

[119] *Id.*

[120] *Id.* at 34–35.

[121] *Id.* at 35–37.

they continue to permit prosecutors to exercise discriminatory peremptories.[122] Justice Kennedy has not been as explicit in his opinions as Justice Breyer, but he has suggested that preserving peremptories might come at too high a price, particularly if they perpetuate racial stereotypes.[123] Justice Stevens, now retired from the Court, questioned whether peremptories are needed because for cause challenges are available.[124] Although he viewed peremptories as an "inalienable right" when he was a trial lawyer,[125] he came to view them from the perspective of a judge–first as a Seventh Circuit judge and then as a U.S. Supreme Court Justice. From his vantage point as a judge, he became less convinced of the need for peremptories and more focused on the plight of the excluded juror and the need to protect the integrity of the jury.[126] A growing number of trial judges in federal and state courts around the country have begun to suggest that it is time to eliminate the peremptory challenge.[127] This is not surprising given that trial judges are charged with *Batson* enforcement. They see how lawyers use peremptory challenges every day and they have begun to call into question the need for them.

Academics offer yet another perspective. Many worry about the effects of the discriminatory peremptory on the excluded juror, the parties, and the integrity of the jury as an institution. *Batson* was the subject of academic criticism from the beginning,[128] and the opinion has continued to draw criticism with each passing year.[129] Some academics have criticized *Batson* for its approach (Fourteenth

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[122] *See, e.g.*, Rice v. Collins, 546 U.S. 333, 344 (2006) (Breyer, J., concurring) ("I have argued that legal life without peremptories is no longer unthinkable. . . . I continue to believe that we should reconsider *Batson*'s test and the peremptory challenge system as a whole."); Miller-El v. Dretke, 554 U.S. 231, 272 (2005) (observing that "a jury system without peremptories is no longer unthinkable").

[123] Edmonson v. Leesville Concrete Co., 500 U.S. 614, 630 (1991) ("[I]f race stereotypes are the price for acceptance of a jury panel as fair, the price is too high to meet the standard of the Constitution.").

[124] *See* John Paul Stevens, *Foreword*, 78 CHI.-KENT L. REV. 907, 907–08 (2003).

[125] *Id.* at 907.

[126] *Id.* (recognizing that peremptory challenges "produce minimal benefits at best" and involve "significant cost[s]").

[127] *See, e.g.*, Minetos v. City Univ. of New York, 925 F. Supp. 177, 183 (S.D.N.Y. 1996) (opinion of Judge Constance Baker Motley) ("Time has proven Mr. Justice Marshall correct."); Commonwealth v. Rodriguez, 931 N.E.2d 20, 43–44 (Mass. 2010) (Marshall, C.J., concurring) (writing "separately to express . . . [her] concern about the continued use of peremptory challenges"); People v. Bolling, 591 N.E.2d 1136, 1142 (N.Y. 1992) (Bellacosa, J., concurring); Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson, *and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 167 (2010); Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369, 370 (1992); Arthur L. Burnett, Sr., *Abolish Peremptory Challenges: Reform Juries to Promote Impartiality*, 20 CRIM. JUST., Fall 2005, at 26, 27, 34; Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 810, 850 (1997); Gregory E. Mize, *On Better Jury Selection: Spotting UFO Jurors Before They Enter the Jury Room*, CT. REV., Spring 1999, at 10.

[128] *See Bolling*, 591 N.E.2d at 1144–45 (providing citations).

[129] *See* Bennett, *supra* note 127; Broderick *supra* note 127; Burnett *supra* note 127; Hoffman, *supra* note 127; Mize, *supra* note 127.

Amendment versus Sixth Amendment) or its ineffectiveness. *Batson* attempts to address discriminatory peremptories, but not in a way that makes a difference. Thirty years of *Batson* has led to thirty years of criticism of *Batson.* Although the podcast did a good job of giving voice to many lawyers' commitment to the peremptory, it gave short shrift to the extensive commentary and critique by academics and judges alike.

III. DOES ELIMINATING THE PEREMPTORY REPRESENT LOSS OF FAITH OR FAITH IN AMERICA?

Podcast reporter Sean Rameswaram, in the course of interviewing lawyers about the peremptory challenge, spoke with ACLU lawyer Jeff Robinson, who suggested that eliminating the peremptory challenge represents loss of faith in America.[130] The podcast did not explore this point very deeply, but ended with the possibility that Robinson might be right.[131] A perspective that the podcast did not consider is that eliminating the peremptory challenge represents faith in America and its jury system.

A. Eliminating the Peremptory Represents a Loss of Faith in America

ACLU lawyer Jeff Robinson argued that eliminating the peremptory challenge represents a loss of faith in America. In his view, the peremptory challenge is an invaluable tool and helps to ensure a fair trial.[132] He argues that trial lawyers should not have to relinquish this essential tool.[133] Rather, all of us should have faith in America and believe that someday lawyers will not use peremptory challenges in a discriminatory manner.[134] When that day arrives, the peremptory challenge will still be available as an essential tool that helps to produce fair trials. Robinson does not want to give up on his vision of America in which some time in the future Americans will see past race and lawyers will no longer exercise peremptory challenges in a discriminatory manner.

Robinson drew from his courtroom experience to explain why he thinks the peremptory challenge is an essential tool for a fair trial. He described one trial he had in the State of Washington that involved a coerced confession by some undercover police.[135] One of the prospective jurors was a police officer who said he knew some of the police officers who had investigated the case, but the police officer insisted that he could still be a fair juror in the case.[136] Robinson did not

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[130] Transcript: *Object Anyway*, *supra* note 21, at 19, 37.
[131] *See id.* at 37–38.
[132] *See id.* at 34.
[133] *See id.* at 37–38.
[134] *See id.*
[135] *Id.* at 34.
[136] *Id.* at 34–35.

want him on the jury, but he believed that the judge would not excuse him for cause.[137] In Robinson's view, "The judge would say, there's not a record for cause. I don't think any judge in this country would dismiss that juror."[138] Robinson argued that without the peremptory challenge he would have no choice but to have that police officer serve on his jury even though he was convinced that the police officer could not be fair.

Robinson also drew from his personal life and explained that he did not think either of his parents, both African Americans who had been active in the civil rights movement, should sit on a criminal jury and that he would use peremptory challenges to strike both of them from such a jury.[139] Robinson described his mother as someone who would blame the black criminal defendant for why she had to lock her doors at night and why she was not shown respect when she went out into the larger community.[140] He described his father as someone who would not believe what a police officer said even if the police officer "told [him] it was raining, and the water was coming down on [his] head."[141] Robinson did not think either of them should serve on a criminal jury. He did not want to leave that decision to a judge because the judge would say there was not a record for cause, just as there was "not a record for cause" in the case involving the prospective juror who was a police officer.[142] However, if a lawyer used a peremptory challenge to exclude either of Robinson's parents based on race, the lawyer would have failed to distinguish between his mother, who might have been pro-prosecution, and his father, who might have been pro-defense, according to Robinson's description. But of course, Robinson described his parents only in the abstract. Even Robinson does not know how his parents would have voted in a particular case, and they might have surprised him.

Robinson, an admirer of Justice Thurgood Marshall, nonetheless disagreed with his proposal to eliminate peremptory challenges. He suggested that Justice Marshall might have lost faith in America "to make these kinds of decisions."[143] In contrast, Robinson said that he still has faith in America and is "not prepared to concede" that "we are so divided by race that we will never be able to try and fix it."[144] His hope is that some day peremptory challenges will no longer be used in a discriminatory manner. When that day arrives, then we will still have peremptory challenges and they will finally be used for the purpose for which they were intended–to promote fair trials, not discrimination.

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[137] *Id.* at 35.
[138] *Id.*
[139] *Id.* at 37.
[140] *Id.*
[141] *Id.*
[142] *Id.* at 35.
[143] *Id.* at 37.
[144] *Id.* at 38.

B. Eliminating the Peremptory Represents Faith in America

Whereas Robinson sees the elimination of peremptory challenges as representing loss of faith in America, I see it as representing faith in America. Eliminating the peremptory challenge will mean that all citizens who meet the basic juror qualifications can serve as jurors.[145] When we eliminate peremptories, we will have eliminated the mechanism that continues to mask discrimination during jury selection and that keeps qualified citizens from their rightful place on juries. Excluded prospective jurors will no longer have to wait for some future day to exercise their right to serve as jurors. Parties, and especially African-American criminal defendants, will no longer have to wait for some future day to be tried by juries that include a diverse group of citizens. The larger community will no longer have to wait for some future day to see juries that are fairly selected and not selected based on stereotypical notions about who can serve and who cannot serve as jurors. The elimination of peremptories will mean that juries will have a better chance to look more like America than they currently do. Even without peremptories, jurors can act impartially. They usually try to fulfill their role as jurors as responsibly as possible. In my view, eliminating the peremptory challenge represents a faith in America and in Americans to perform their civic duty as jurors.

i. Peremptories Mask Discrimination During Jury Selection

Peremptories serve as a mask for discrimination. As the Supreme Court noted in *Batson*, peremptories are the mechanism by which those who are of a mind to discriminate can discriminate during jury selection.[146] If the peremptory were eliminated, then the means by which lawyers discriminate during jury selection would no longer exist. The peremptory provides cover for the discrimination; when the peremptory is eliminated, then the bad behavior during jury selection will also cease.

The podcast made clear that some lawyers will engage in discriminatory peremptories as long as peremptories exist because they want to win, but once peremptories have been eliminated, both sides are in the same position and neither side can engage in the discrimination that peremptories permit. Jack McMahon, the prosecutor who lectured new prosecutors on how to select a jury, said that he would continue to strike African Americans from his jury because he believed they would be unsympathetic jurors.[147] He regarded it as part of his job to select a jury that would favor his side. He would continue to use peremptories in this manner because he thought it advantageous. If peremptories were eliminated, however,

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[145] *See* 28 U.S.C. § 1865 (2016) (specifying qualifications for jury service in federal district courts).

[146] Batson v. Kentucky, 476 U.S. 79, 96 (1986) ("[P]eremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'") (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).

[147] Transcript: *Object Anyway*, *supra* note 21, at 27.

then he would no longer engage in discriminatory peremptories. The solution, he explained in the podcast, was to eliminate the peremptory, rather than to ask him to do something that was counter to his goal of winning.[148] In his view, discriminatory peremptories help him to win, but of course, he did not offer any empirical evidence to support his claim, just anecdotal experience.

With the end of discriminatory peremptories, the parties, the excluded jurors, and the larger community could have faith in the trial; they would not have to wait for some future date. Currently, parties, such as James Batson, have to sit in the courtroom during jury selection and watch as the prosecutor strikes every African-American prospective juror from their jury. As Batson observed during jury selection in his case, "[The prosecutors] struck all the blacks off the jury pool. It ain't right."[149] Although the *Batson* test is supposed to stop discriminatory peremptories, it falls short. It permits a party to object, but it is still hard for the objecting party to succeed. Batson was not a lawyer, but he knew that the practice of discriminatory peremptories was wrong. This intuition spurred him to tell his lawyer to "object anyway!"[150] With the elimination of the peremptory, Batson and others in his situation can have faith that the jury that tries them will not have been fashioned through discriminatory peremptories exercised during jury selection.

If peremptories are eliminated, then prospective jurors who have been excluded based on discrimination also will have renewed faith in the jury. They will no longer be excluded impermissibly. Even though judges explain to prospective jurors that each side has a certain number of peremptory challenges and the prospective jurors should not take it personally if they are struck by one side or the other, they are present in the courtroom and can see if people of one race, ethnicity, or gender are being excluded.[151] The *EJI Report* provided a number of accounts of African-American prospective jurors in Southern states who were struck for reasons that they knew to be false and that they viewed as a cover for racial discrimination. The experience left them feeling "unworthy,"[152] "false[ly] accus[ed],"[153] and convinced of the unfairness of the system, even years afterward.[154] As Melodie Harris, a prospective juror in the trial of Alvin Robinson, remarked about her exclusion and

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[148] *Id.* at 31 ("Well, then don't give [peremptory challenges] at all then, for crying out loud. It's real simple.") (quoting prosecutor Jack McMahon).

[149] *Id.* at 12 (quoting James Batson).

[150] *Id.* at 13 (quoting James Batson).

[151] *See* Mary R. Rose, *A Voir Dire of Voir Dire: Listening to Jurors' Views Regarding the Peremptory Challenge*, 78 CHI.-KENT L. REV. 1061, 1097 (2003) ("Jurors seemed to realize that jury selection is only partly about them.").

[152] EQUAL JUSTICE INITIATIVE, *supra* note 90, at 30 (describing excluded prospective juror Allen Mason).

[153] *Id.* at 29 (describing excluded prospective juror Brenda Greene).

[154] *Id.* ("Mrs. Greene desperately wanted to clear her family's name, even though the statements were made in 1992."); *id.* at 30 ("Nearly 20 years later, Mr. Mason grew emotional as he recalled how the prosecutor's racist actions made him feel unworthy.").

that of other blacks in the trial: "It was just so blatant."[155] In their eyes, jury selection was not operating fairly. Peremptories allowed prosecutors to act in a discriminatory manner, *Batson* notwithstanding. Only the elimination of peremptories will allow these citizens to serve on juries, which would at least provide a first step in restoring their faith in America.

Discriminatory peremptories reach beyond those in the courtroom and adversely affect the larger community's view of the fairness of the trial. The elimination of the peremptory would also begin to restore the larger community's faith in America. As Justice Kennedy observed in *Powers v. Ohio*, jury selection marks the beginning of the trial and if it is marred by discriminatory peremptories then it will cast doubt on the integrity of the entire trial.[156] The harm that is done during jury selection taints the entire proceeding and reaches beyond those in the courtroom. If the larger community is going to accept the verdict, even if it disagrees with it, then it needs to be convinced of the fairness of the process. Discriminatory peremptories undercut that fairness.

The elimination of the peremptory will allow those in the courtroom and those outside the courtroom to see that jury selection was conducted fairly. In contrast, a jury selection that is marred by discriminatory peremptories signals to trial participants and to the larger community that they have to wait for a fair system. The message is that there is "unequal justice"[157] and little that they can do to change the inequities now. The elimination of peremptories is not a panacea for all discrimination in the criminal justice system, but it is a first step for ending discrimination at the start of the trial.

ii. Jurors Take Their Role Seriously

Although everybody has biases, citizens who serve as jurors take their role seriously and try to perform it as responsibly as possible. They might not welcome their jury summons and they might enter the courtroom prepared to give their excuses to the judge,[158] but those who are selected to serve usually try hard to learn their role and to serve as impartial decision-makers. This view of jurors as performing their job ably suggests that we should have faith in Americans to perform this civic duty. Whereas Robinson is suspicious about people and their

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[155] *Id.* at 28 (quoting excluded prospective juror Melodie Harris).

[156] 499 U.S. 400, 411 (1991) ("[R]acial discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process,' . . . and places the fairness of a criminal proceeding in doubt.") (quoting Rose v. Mitchell, 443 U.S. 545, 556 (1979))).

[157] EQUAL JUSTICE INITIATIVE, *supra* note 90, at 29 (quoting excluded prospective juror Gerald Mercer).

[158] *See, e.g.*, D. GRAHAM BURNETT, A TRIAL BY JURY 17, 27–29 (2001) (describing jury duty, first as an "unwelcome interruption," but then during voir dire it became "a rare opportunity to participate in something important, weighty, [and] real").

biases and therefore needs the peremptory to allay his suspicions,[159] I rely on the power of the juror's role and the judge-jury relationship to ensure that those who are permitted to serve as jurors will, for the most part, perform their role responsibly. The role of juror and the education throughout the trial process enable the jurors to perform impartially, making the peremptory less needed than Robinson assumes.

In other writing, I have described the transformation of "reluctant citizens" into responsible jurors.[160] There is almost a palpable moment during voir dire when prospective jurors stop looking for hardship excuses and start thinking about serving as jurors.[161] They might have entered the courtroom eager to be excused, but as they sit in the jury box, and observe the formal setting, the parties before them, and the lawyers, judge, and other trial participants, they begin to understand and embrace the enormity of the task before them.[162] Although voir dire introduces jurors to their role, the lessons are reinforced at every stage of the proceedings–from the oath they take, to the instructions they hear, to the deliberations that they conduct behind closed doors, to the announcement of their verdict in open court.[163]

I attribute this transformation from reluctant citizen to responsible juror not only to the power of the role of juror, but also to the relationship between judge and juror throughout the trial. The judge is the authority figure in the courtroom. Most jurors look up to the judge and learn about the trial from the judge. The judge teaches jurors about their role throughout the entire trial. The judge begins this process of educating jurors during voir dire, and ends it, at least in some courtrooms, by meeting with the jurors after they have been dismissed, answering any remaining questions, thanking them for their service, and advising them that they are not required to talk to anyone, including the attorneys and the press, about their jury service; it is up to them to decide.[164] The jurors also look to the judge to learn about the law. Some judges give preliminary instructions about the case, as-

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[159] Transcript: *Object Anyway*, *supra* note 21, at 36–37 ("But the way Jeffrey Robinson put it to me was that if you're using peremptory challenges the right way, it forces you to be like equal opportunity suspicious, suspicious of everyone. And that's the only way to be fair.").

[160] *See* Nancy S. Marder, *Juror Bias, Voir Dire, and the Judge-Jury Relationship*, 90 CHI.-KENT L. REV. 927, 939–42, 955 (2015) [hereinafter Marder, *Juror Bias*].

[161] *Id.* at 939–42.

[162] *See, e.g.*, BURNETT, *supra* note 158, at 17, 26–31 (describing a prospective juror's experience during the voir dire process); Deborah J. Golder, *Reflections: A Different Duty*, AM. J. NURSING, Aug. 1990, at 92, 92 (describing feelings of being "relieved" but also "disappointed" when not chosen to sit on a criminal jury); Dan Hatfield, *Jury Service an Engaging Adventure*, JUDGES' J., Fall 2004, at 34, 36 ("Surprisingly, that [excusal] was a bittersweet moment for me. I had gone from wanting to get out of this [jury service], to a heartfelt obligation to serve.").

[163] *See* Marder, Batson *Revisited*, *supra* note 16, at 1601–06, 1610–11 (describing a "process view" of the jury in which jurors are educated about their role at every stage of the trial proceedings, from voir dire to instructions to deliberations).

[164] *See* Marder, *Juror Bias*, *supra* note 160, at 942–45, 948–55 (describing the ways in which the judge teaches the jury about its role throughout the trial process, beginning with voir dire and ending with a meeting after the trial has ended).

needed instructions during the trial, and then final instructions either before or after the attorneys' closing argument, but in any event, before the jury begins its deliberations.[165] The ongoing instructions are another way by which the judge continues to educate the jurors at every stage of the trial.

Polls and empirical studies show that jurors take their role seriously, try to perform it responsibly, and might even become more active citizens after having completed their jury service. One of the most enduring movie portrayals of the jury, *12 Angry Men*,[166] depicts jurors who are reluctant at first to deliberate, but who eventually embrace their role as jurors and perform it quite responsibly.[167] Polls of actual jurors who have completed jury service show that they believe they have done a good job and have taken their role seriously.[168] People also usually think more highly of the jury system after having served as jurors.[169] Some empirical studies have shown that citizens who serve on juries in some kinds of cases become more active citizens after serving. [170] For example, they engage in other civic responsibilities, such as voting.

The role of juror and the guidance provided by the judge lead ordinary citizens to take their juror responsibilities seriously and to perform as jurors as ably and as impartially as possible. Thus, the experience of being a juror can transform those who serve. It is not surprising that many who have served recall that experience years later.[171] Jurors learn throughout the trial how to be good jurors. It is an

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[165] *See id.* at 948–49.

[166] *See* 12 ANGRY MEN (Orion Nova Productions 1957).

[167] *See generally* Symposium, *The 50th Anniversary of* 12 Angry Men, 82 CHI.-KENT L. REV. 557 (2007).

[168] *See, e.g.*, Editorial, *The Perfect Juror?*, NAT'L L.J., May 2, 1994, at 14 ("As shown in last year's National Law Journal poll of nearly 1,000 jurors, most of them take their jobs seriously and try to follow the law as best they can.").

[169] *See, e.g.*, Stephanie Simon & Amy Dockser Marcus, *Jurors Don't Mind Duty, Survey Finds*, WALL ST. J., July 3, 1991, at B3 ("More than 80% [of jurors] said they came away with a favorable view of their service, according to the survey of 8,468 jurors by the National Center for State Courts."); *New Poll Shows Strong Support for Jury System; Incoming ABA President Calls on Americans to Act on Their Beliefs*, MEDIA.AMERICANBAR.ORG. (Aug. 9, 2004), https://americanbarassociation.wordpress.com/2004/08/09/new-poll-shows-strong-support-for-jury-system-incoming-aba-president-calls-on-americans-to-act-on-their-beliefs/ [https://perma.cc/3C5A-7TRH](describing the results of an ABA survey).

[170] *See, e.g.*, JOHN GASTIL ET AL., THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION 48–49 (2010) (finding that jury service in criminal trials increased voting among low-frequency voters); Valerie P. Hans et al., *Deliberative Democracy and the American Civil Jury*, 11 J. EMPIRICAL LEGAL STUD. 697, 712 (2014) (finding that jury service in civil trials increased voting, depending on jury size, unanimity rule, defendant identity, and case type).

[171] *See, e.g.*, Rick Rojas & Kate Pastor, *Retrial in Etan Patz Case Starts With a Tough Question: Who Can Sit on the Jury?*, N.Y. TIMES (Oct. 13, 2016), https://www.nytimes.com/2016/10/13/nyregion/etan-patz-retrial-jury.html?_r=0 [https://perma.cc/C6CK-8ALX] ("The people who serve on this case [the trial of Pedro Hernandez for the murder of Etan Patz] . . . will find this to be one of the more important things they do in their lives .

ongoing and educational experience. Most Americans can learn how to be good jurors–even Robinson's parents. However, for those people who cannot learn because their views are too fixed, there are always for cause challenges.

iii. Judges and More Flexible For Cause Challenges

With the elimination of peremptory challenges, judges are likely to be more generous with for cause challenges. As long as peremptories exist, judges can be strict about for cause challenges because they know that lawyers can always use a peremptory to remove a prospective juror about whom they have doubts. If peremptories were eliminated, then judges are likely to take a more generous view and not limit for cause challenges only to the traditional bases.

Traditionally, judges grant for cause challenges in only a limited number of circumstances. They grant them when there is a familial connection between the prospective juror and one of the trial participants, when the prospective juror has a financial stake in the outcome of the trial, or when the prospective juror says that he or she cannot be impartial.[172] One feature that distinguishes a for cause challenge from a peremptory challenge is that a reason must be given in open court for the for cause challenge, whereas a peremptory does not require any reason at all (unless challenged). Other distinguishing features between for cause challenges and peremptory challenges are that for cause challenges are not limited to a set number and the judge decides whether to grant them, in contrast to peremptory challenges, where a set number are allotted to each party and left to the attorney to exercise.

Attorneys worry that without the peremptory challenge they will simply be left with the for cause challenge that is decided by the judge and is granted in only a limited number of circumstances. They are reluctant to trust judges with this power and to cede control over who sits on their jury. They have little faith that judges will do the right thing. However, judges are likely to grant very few for cause challenges now because they know that lawyers have peremptory challenges. If a judge fails to grant a for cause challenge when he or she should have, the lawyer can correct the error by exercising a peremptory challenge.[173] If peremptory challenges were eliminated, however, judges would likely grant for cause challenges more readily, knowing there would no longer be any back-up mechanism if they made a mistake.

Attorneys assume that without peremptories, judges will grant for cause challenges the same way they do when there are peremptory challenges. However,

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. . . It's the kind of thing you can tell your grandchildren about.") (quoting Justice Wiley, who also presided over Hernandez's first trial).

[172] *See* Hopt v. Utah, 120 U.S. 430, 433 (1887).

[173] *See, e.g.*, United States v. Martinez-Salazar, 528 U.S. 304, 317 (2000) (holding that Martinez-Salazar's exercise of a peremptory challenge to remove a juror who should have been excused for cause did not violate Martinez-Salazar's exercise of peremptory challenges pursuant to Rule 24(b) of the *Federal Rules of Criminal Procedure* or his right to due process under the Fifth Amendment).

institutional practices are not fixed in stone. A change in one practice is likely to lead to changes in other practices. Just because for cause challenges are granted in only limited circumstances now does not mean that they would continue to be granted in such limited circumstances if peremptories were eliminated. Judges have discretion to decide when to grant a for cause challenge. They can exercise that discretion narrowly or broadly. Attorneys assume they will exercise this discretion narrowly if there were no peremptories, but judges are likely to err on the side of caution and exercise it broadly. It would behoove judges to do so, both to reassure lawyers and parties that only impartial jurors will be seated on the jury and also to avoid the possibility of a retrial. However, even if judges grant for cause challenges more generously if there are no longer peremptory challenges, the for cause challenge would not become a peremptory because a reason would still have to be given in open court.

iv. Diverse Juries

If peremptory challenges were eliminated, then juries would be more diverse. One benefit is that juries would then "look more like America" and help the public to have faith in the jury as an institution. Another benefit is that jurors, coming from different walks of life, would have different perspectives from which to view the evidence. Different viewpoints would lead to more thorough deliberations that could produce more well-reasoned verdicts.

If peremptories were eliminated, then jury selection would be random and would likely result in juries that are diverse. Currently, lawyers seem to use peremptories to strike African-American or other minority prospective jurors from the jury. Without this mechanism, jurors would be selected randomly and would only be removed for hardship or for cause. They could not be removed because of their race, gender, or ethnicity. Although *Batson* and its progeny are supposed to limit this practice, they are ineffective. Other countries, such as England and Wales, that wanted their juries to be more representative of their citizenry,[174] eliminated peremptory challenges.[175] As a result, they now have juries that appear to be more representative,[176] and citizens can see that change. Another benefit is that their jury selection proceeds quickly; the first twelve jurors, who are randomly selected, are permitted to serve.[177]

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[174] *See* Laura K. Donohue, *Terrorism and Trial by Jury: The Vices and Virtues of British and American Criminal Law*, 59 STAN. L. REV. 1321, 1345 (2007) ("A jury should represent a cross-section drawn at random from the community, and should be the means of bringing to bear on the issues the corporate good sense of that community.") (quoting DEPARTMENTAL COMM. ON JURY SERV., REPORT, 1965, Cmnd. 2627, ¶ 53).

[175] *See* Criminal Justice Act 1988, c. 33, § 118(1) (Eng. & Wales).

[176] *See, e.g.*, Marder, *Two Weeks at the Old Bailey*, *supra* note 16, at 552 (providing a description of how jury selection works at the Old Bailey and why juries are likely to be more diverse, but admittedly, it is based on a small number of juries over a two-week period).

[177] *Id.*

The elimination of peremptories not only gives juries the appearance of diversity but also gives juries the benefit of diversity during deliberations. The Supreme Court has described the benefit of having a sufficient number of jurors on the jury so that the group will benefit from different assessments of the evidence and recollections of the facts.[178] Other court opinions have tried to describe the benefits of having women[179] or African Americans on the venire[180] (though the Court stopped short of requiring petit juries that are representative).[181] Although these opinions have been careful to say that not all members of these groups will vote in any particular way,[182] they describe the benefits of having different points of view available for group consideration. Some psychologists have suggested that having jurors who can contribute different recollections of the facts or evidence or correct mistaken views of other jurors will lead to more robust deliberations.[183] Others have suggested that the presence of African Americans on the jury leads white jurors to engage in more careful and thorough deliberations.[184] In one study,

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[178] *See, e.g.*, Ballew v. Georgia, 435 U.S. 223, 232–38 (1978) (relying on empirical studies, the Supreme Court concluded that a jury consisting of fewer than six persons might impair jury fact-finding, be more susceptible to individual biases and group errors, produce more inconsistent and unreliable verdicts, decrease the likelihood of hung juries, and lead to less minority representation).

[179] *See, e.g.*, Taylor v. Louisiana, 419 U.S. 522, 525 (1975) (holding that the systematic exclusion of women from the venire violated a defendant's Sixth Amendment right to a jury drawn from a fair cross-section of the community); Ballard v. United States, 329 U.S. 187, 193 (1946) (relying on the supervisory powers of the federal courts, the Court held that the exclusion of women from the venire was impermissible); *id.* at 193 ("[I]f the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel?").

[180] *See, e.g.*, Peters v. Kiff, 407 U.S. 493, 505 (1972) (holding that if African-American men were systematically excluded from the venire such exclusion would be unconstitutional and that the challenge could be raised by a defendant regardless of his race); *id.* at 503 ("When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.").

[181] *See, e.g.*, *Taylor*, 419 U.S. at 538 ("[I]n holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community . . . .").

[182] *See, e.g.*, *Peters*, 407 U.S. at 503–04 ("It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.").

[183] *See, e.g.*, VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 50 (1986) ("[A] jury composed of individuals with a wide range of experiences, backgrounds, and knowledge is more likely to perceive the facts from different perspectives and thus engage in a vigorous and thorough debate.").

[184] *See, e.g.*, Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597, 604–06 (2006) (describing the findings of an empirical study using mock jurors in which white jurors on racially diverse juries discussed more facts, made fewer inaccurate statements, and considered more race-related topics than white jurors on homogeneous juries); *see also* Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1025 (2003) ("[M]embership on a racially heterogeneous jury might also influence White jurors' behavior during deliberations."); *id.* at 1028–29.

jurors on juries that were more diverse by gender (meaning more of a mix of men and women) found the deliberations to be more thorough and satisfying than jurors on juries that consisted mainly of women or mainly of men.[185]

Juries that look diverse and are diverse should be our aspiration. Such juries will lead the parties, jurors, and the broader community to have faith in the jury system. Peremptories stand in the way of that goal. Although peremptories are supposed to reassure the parties that the jury will be impartial, they do not serve that function as long as they are used in a discriminatory manner. Defendants like James Batson did not have faith in his jury as he watched prosecutor Joe Guttman exclude every African-American prospective juror on the venire through the exercise of peremptory challenges.[186] Batson felt that the process was unfair and that the jury was stacked against him. Similarly, prospective jurors like Melodie Harris did not have faith in the jury system as she and other African Americans were struck from the jury because of their race.[187] It is hard to see how the peremptory challenge represents faith in America to James Batson or Melodie Harris. If their experience in the courtroom demonstrates that jury selection is rigged, the larger community is likely to share that feeling and lack faith in this American institution.

CONCLUSION

It seems fitting on the thirtieth anniversary of *Batson v. Kentucky*[188] to assess how *Batson* is faring in terms of eliminating discriminatory peremptory challenges and to recognize that it is not doing well. The *Batson* test is all too easy to evade. A lawyer needs only to provide a seemingly race-neutral reason for the exercise of a peremptory challenge, and thirty years of *Batson* have provided many reasons from which to choose. In addition, *Batson* remains difficult for trial judges to enforce. They are being asked to do the impossible: to discern whether a seemingly race-neutral reason is in fact pretextual. Without a "smoking gun," there is little chance that trial judges will find the reason pretextual. Moreover, appellate courts tend to be deferential to the trial judge's determination. After all, the trial judge is present in the courtroom and able to see and hear the prospective jurors, which the appellate judges cannot do.

The podcast *Object Anyway*[189] has made several contributions to the debate on peremptory challenges; in particular, it has captured the voices and views of the participants in *Batson* and made them available to a wide audience, including lay people, lawyers, and law students. The podcast has also explained a technical area of the law—the law of peremptory challenges—in a way that both legal

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[185] Nancy S. Marder, *Juries, Justice & Multiculturalism*, 75 S. CAL. L. REV. 659, 663, 687–88, 692, 694 (2002).

[186] Transcript: *Object Anyway*, *supra* note 21, at 12.

[187] EQUAL JUSTICE INITIATIVE, *supra* note 90, at 28.

[188] 476 U.S. 79 (1986).

[189] *See generally* Transcript: *Object Anyway*, *supra* note 21.

professionals and lay people can understand. However, the podcast raises, but does not explore, ACLU lawyer Jeff Robinson's claim that peremptory challenges should endure because they represent faith in America.[190] To Robinson, peremptories are an invaluable tool for securing an impartial jury and should not be eliminated simply because they are exercised in a discriminatory manner.[191] He holds out hope that someday lawyers will exercise peremptory challenges fairly and then parties will benefit from having such a tool.

I disagree with Robinson's claim and suggest that eliminating peremptories represents faith in America and the American institution of the jury. Discriminatory peremptories leave parties feeling that the jury has been stacked against them, as James Batson explained in his interview with Sean Rameswaram.[192] Peremptories also leave excluded jurors feeling that they have been judged to be inferior and that the jury system cannot be fair if it impugns their integrity and ability to serve as jurors. Discriminatory peremptories also leave the community suspicious of jury selection and the trial that follows, as Justice Kennedy explained in *Powers v. Ohio*.[193]

When peremptories are eliminated and no group is excluded from serving on the jury because of their race, gender, or ethnicity, then jury selection will function as it should. Jurors will be selected randomly and juries will be more diverse than they are now. Although Jeff Robinson is suspicious about prospective jurors who say they can be impartial and he would prefer having peremptories to keep some prospective jurors off the jury, I maintain that these prospective jurors can serve and that they will try to perform their job as ably as possible. By virtue of jurors' role and the education the judge provides them throughout the trial, all jurors—including Robinson's parents—will perform their task responsibly. Robinson might criticize this view as naive or optimistic, but it reflects a faith in jurors and the American jury system that he fails to recognize. He looks to peremptory challenges for reassurance, whereas I look to jurors and the judge-jury relationship for support.

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[190] *Id.* at 37–38.

[191] *See id.* at 36–37.

[192] *See id.* at 12.

[193] 499 U.S. 400, 412–13 (1991) ("The composition of the trier of fact itself is called in question, and the irregularity may pervade all the proceedings that follow.").