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A Call to Criminal Courts: Record Rules for *Batson*

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A Call to Criminal Courts: Record Rules for *Batson*

*Catherine M. Grosso & Barbara O'Brien*¹

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INTRODUCTION

No one paying attention needs to be told the verdict on *Batson v. Kentucky*.¹ *Batson* intended to eliminate the influence of race on jury selection,² which is essential both to conducting fair and just trials³ and to protecting the reputation of the justice system.⁴ *Batson* failed.⁵ A growing collection of empirical studies documents this failure.⁶ Dozens of articles analyze the reasons for the failure,⁷ and at least one report documents the humiliation suffered when qualified jurors appear

¹ See generally 476 U.S. 79 (1986).

² See *id.* at 84–85, 84 n.3 (noting that *Batson* builds upon an earlier case that “laid the foundation for the Court’s unceasing efforts to eradicate racial discrimination” from jury selection).

³ *Id.* at 86–87 (reviewing the important role of citizens in the system of justice).

⁴ *Id.* at 87–88.

⁵ See David C. Baldus et al., *Statistical Proof of Racial Discrimination in the Use of Peremptory Challenges: The Impact and Promise of the Miller-El Line of Cases as Reflected in the Experience of One Philadelphia Capital Case*, 97 IOWA L. REV. 1425, 1427 & n.1 (2012) [hereinafter Baldus et al., *Statistical Proof of Racial Discrimination*] (collecting cases and articles reaching this conclusion).

⁶ See 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, 22–28 (2001) [hereinafter Baldus et al., *Use of Peremptory Challenges in Capital Murder Trials*] (reporting on the first “five [academic] empirical studies of the use of peremptory challenges in actual cases”); Ann M. Eisenberg, *Removal of Women and African-Americans in Jury Selection in South Carolina Capital Cases, 1997–2012*, NE. U. L.J. (forthcoming) (manuscript at 24, 26, 32–41), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2832370 (follow “Download this Paper” hyperlink) (reporting findings of an empirical study of the use of peremptory challenges in South Carolina capital cases); Catherine M. Grosso & Barbara O’Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials*, 97 IOWA L. REV. 1531, 1533–34, 1542–43, 1548–50 (2012) [hereinafter Grosso & O’Brien, *A Stubborn Legacy*] (reporting findings in an empirical study of the use of peremptory challenges in North Carolina capital cases); see also Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson’s Net to Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1078, 1090–93 (2011) (reporting on a survey of federal judicial decisions reviewing *Batson* challenges).

⁷ Based on February 13, 2017, WestLaw search, over 3,000 law reviews and journals cite *Batson v. Kentucky*.

for jury service only to be excluded in a situation that appears to be driven by race.⁸ Many have called for the abolition of peremptory challenges as the only fix.⁹

The United States Supreme Court seems fully aware of *Batson*'s shortcomings.¹⁰ In fact, the Court has been more open to cases alleging race discrimination in the exercise of peremptory strikes, and more likely to rule in favor of criminal defendants in these cases, than in any other context.¹¹ Yet, the Court has not abolished the peremptory challenge. Supreme Court decisions in recent years—starting with the *Miller-El* cases more than ten years ago and continuing through *Foster v. Chatman* in 2016—have tried instead to strengthen the *Batson* framework by recognizing valid claims and expanding the evidentiary framework.¹² In light of this history, our Article seeks to rouse criminal courts to accept a modest but fundamental proposal to expand the standard trial court record to include jury

⁸ See EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 28–31 (2010), <http://eji.org/sites/default/files/illegal-racial-discrimination-in-jury-selection.pdf/> (providing testimonies of African Americans “excluded from jury service across the Southeast to document the impact of discrimination on citizens denied the right to serve”). In contrast, actually serving on a jury may improve citizens’ impressions of the judiciary and lead them to report greater confidence in the government. Judith S. Kaye, *My Life as Chief Judge: The Chapter on Juries*, N.Y. ST. B. ASS’N J., Oct. 2006, at 10, 12 (“Invariably the most satisfied jurors are those who have actually served to verdict on a well-run trial—they are more likely to have a favorable impression of service and feel that they have made a contribution.”); Judith S. Kaye, *Shaping State Courts for the New Century: What Chief Judges Can Do*, 61 ME. L. REV. 355, 359–60 (2009) (“Jury service offers us a unique opportunity to show a cynical, distrustful public a government institution that really does work well and values them. It is truly a rare opportunity in today’s world to promote public trust and confidence in our courts—an opportunity we simply cannot squander.”).

⁹ Grosso & O’Brien, *supra* note 6, at 1535 & nn.19–20 (collecting calls for the abolition of peremptory challenges by judges and scholars).

¹⁰ See *Miller-El v. Dretke*, 545 U.S. 231, 239–40 (2005) (“Although the move from *Swain* to *Batson* left a defendant free to challenge the prosecution without having to cast *Swain*’s wide net, the net was not entirely consigned to history, for *Batson*’s individualized focus came with a weakness of its own owing to its very emphasis on the particular reasons a prosecutor might give.”).

¹¹ See Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2467–68 (2003) (arguing that the Court “has departed from its [c]onventional [e]qual [p]rotection rules . . . in cases involving racial discrimination in the selection of jurors” and “exhibited a greater suspicion of discretion than is evident in other areas of equal protection law”) (internal citations omitted). Compare, e.g., *United States v. Armstrong*, 517 U.S. 456, 463–64 (1996) (establishing a high evidentiary threshold for defendants alleging selective prosecution even to get discovery on relative prosecution rates), and *McCleskey v. Kemp*, 481 U.S. 279, 312–13 (1987) (holding that Georgia’s capital sentencing system did not violate equal protection despite evidence of its racially disparate impact), with *Foster v. Chatman*, 136 S. Ct. 1737, 1748, 1755 (2016) (finding the prosecutor’s race-neutral explanations for peremptory strikes against potential black jurors pretextual and refusing to “blind” themselves to all the relevant evidence), and *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008) (emphasizing that “in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted” (citing *Miller-El v. Dretke*, 545 U.S. 231, 239–40 (2005))).

¹² *Foster*, 136 S. Ct. at 1754–55; *Snyder*, 552 U.S. at 477, 485–86; *Miller-El v. Dretke*, 545 U.S. at 239, 265–66; *Johnson v. California*, 545 U.S. 162, 173 (2005); *Miller-El v. Cockrell*, 537 U.S. 322, 342–47 (2003).

selection data. This narrow expansion is necessary to give these decisions proper influence.

The Court's rulings applying *Batson*, among other things, clarified the scope of evidence that can be used to challenge a peremptory strike as discriminatory.¹³ In particular, these rulings made clear that, in addition to comparative juror analyses, statistical analyses of the pattern and practice of jury selection in a given jurisdiction are relevant to establishing a prima facie case of discrimination, and also should inform a court's evaluation of any race-neutral response the proponent offers.¹⁴ Overall, these cases invite use of statistical proof and archival data.

It is not possible, however, to implement these rulings or to test their effectiveness in diminishing the influence of race without a clear record of jury selection. Yet, to date, jury selection data is available only in rare circumstances and through extraordinary efforts of counsel and researchers.¹⁵ In fact, the five Supreme Court decisions expanding *Batson's* evidentiary framework involved capital cases and some of the best capital defense lawyers in the country. These lawyers often got the jury selection information necessary to support the *Batson* claims through discovery motions, persistence, and luck—not as a matter of course.¹⁶ It would be surprising to learn of more than a handful of criminal courts that have a system for tracking this basic trial information.¹⁷

This reality exposes a failure on the part of criminal courts and runs counter to fundamental principles of public access to the justice system and the right to a fair and public trial.¹⁸ The Supreme Court has noted the value of transparency generally, and in the jury selection process particularly, both for enhancing the fairness of trials and for fostering the appearance of fairness that is necessary for

¹³ See Baldus et al., *Statistical Proof of Racial Discrimination*, *supra* note 5, at 1429–46 (explaining the analytical and evidentiary model established by *Batson* and subsequent cases).

¹⁴ *Id.* at 1439–46.

¹⁵ See, e.g., Baldus et al., *Use of Peremptory Challenges in Capital Murder Trials*, *supra* note 6, at 46 (reporting issues with missing jury records and unavailable files in the Philadelphia judicial system); Mary R. Rose & Jeffrey B. Abramson, *Data, Race, and the Courts: Some Lessons on Empiricism from Jury Representation Cases*, 2011 MICH. ST. L. REV. 911, 954–56 (2011) (reporting the poor quality of juror data available from courts).

¹⁶ See generally ALYSON A. GRINE & EMILY COWARD, UNC SCH. OF GOV'T, INDIGENT DEFENSE MANUAL SERIES, 7-23 to 7-26, 7-28 to 7-29, (John Rubin ed., 2014), http://defendermanuals.sog.unc.edu/sites/defendermanuals.sog.unc.edu/files/pdf/20140457_chap%2007_Final_2014-10-28.pdf (explaining various methods defense attorneys can use to better present and support their *Batson* claims through jury selection information).

¹⁷ Our review of court rules did not find any rule defining this information as part of the standard court record. Indeed, silence in the record about the race of potential jurors can present a problem for litigants who later challenge racially biased jury selection on appeal. See, e.g., *United States v. Atkins*, 843 F.3d 625, 629 n.1 (6th Cir. 2016) (noting that the record did not disclose the seated jurors' races, which defense counsel determined and disclosed during oral argument on the defendant's *Batson* claim).

¹⁸ *Batson v. Kentucky*, 476 U.S. 79, 87–88 (1986).

public confidence in the criminal justice system.¹⁹ The failure to preserve and provide public access to jury selection data marginalizes fairness and harms the reputation of the justice system.

Moreover, access to data about jury selection may help *Batson* achieve its goals. If so, the duty of criminal courts to preserve and provide access to this data is even more pressing. In 2009, the North Carolina General Assembly passed the North Carolina Racial Justice Act (“RJA”), which created a statutory claim for sentencing relief based on statistical evidence demonstrating that race was a significant factor in the exercise of peremptory challenges during jury selection.²⁰ This focus on statistical evidence stimulated the data collection necessary for evaluating patterns of racial discrimination in jury selection in past cases. The underlying data is also relevant, however, to assessing whether *Batson* is more effective when the Court’s evidentiary guidelines are taken seriously.

Lawyers in North Carolina have used analyses based on updated RJA data to bring attention to the constitutional prohibition on race-based peremptory challenges and to fortify *Batson* claims.²¹ Their cases provide an ongoing case study on the utility of the Court’s strengthened evidentiary framework. In the next section of this Article we present modest evidence from the North Carolina case study, which suggests that the regular availability of statistical evidence might mitigate racial disparities in jury selection.

If this is true, the need for trial courts to meet the duty of preserving and providing access to jury selection data crystallizes and becomes more pressing. A basic statistical study of the role of race in the exercise of peremptory challenges in a given jurisdiction requires a complete record of jury selection not only in the case in which the *Batson* motion is being litigated, but also in other similar cases within the jurisdiction. Trial courts should preserve this information as a matter of course.

The third section of this Article examines why courts should play this role and why court records can accommodate this modest expansion. Courts “are uniquely

¹⁹ *Press-Enterprise Co. v. Superior Court of California, Riverside Cty.*, 464 U.S. 501, 509 (1984) “[P]ublic proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct by jurors fairly and openly selected.”; *see also Presley v. Georgia*, 130 S. Ct. 721, 724 (2010) (stating that “the accused does have a right to insist that the *voir dire* of the jurors be public” and that “[exceptions to this right] will be rare” (quoting *Waller v. Georgia*, 467 U.S. 39, 45 (1984))); *United States v. Hasting*, 461 U.S. 499, 505 (1983) (explaining how courts are permitted to create rules that promote the maintenance of the judicial process’s integrity).

²⁰ *See* North Carolina Racial Justice Act (“RJA”), N.C. GEN. STAT. ANN. §§ 15A-2010, 15A-2011 (West, effective Aug. 11, 2009) (repealed 2013), § 15A-2012 (West, effective Aug. 11, 2009) (repealed 2012). Specifically, § 15A-2011(b) authorized reliance on statistical evidence to show race “was a significant factor in . . . seek[ing] or impose[ing]” death sentences.

²¹ E-mail from Gretchen Engel, Exec. Dir., Center for Death Penalty Litigation, to authors (Sept. 30, 2016) (on file with authors) (listing North Carolina capital cases in which authors provided affidavits on the influence of race on jury selection).

structured to afford . . . a fair forum[.]”²² Court records play a central (if humble) role in this undertaking. Most fundamentally, complete and consistent court records can document fidelity to the core values of “[e]quality, fairness, and integrity.”²³ As the Court recognized in *Batson*, equality, fairness, and integrity in jury selection matter to individual cases and to our court system as a whole.²⁴ Including jury selection data in court records furthers these core purposes.

It also seems that this reform would impose little cost. While piecing together the jury selection process after the fact is time consuming and expensive, retaining this information as a matter of course is not. Court clerks typically prepare jury selection data during trial.²⁵ The question then becomes how to convince courts to move in this direction. The final section of this Article explores several avenues for reform.

I. FORTIFYING *BATSON* CLAIMS WITH STRIKE DATA: A CASE STUDY

The North Carolina General Assembly’s recognition of *Batson*’s limitations as a tool for eradicating the influence of race in jury selection in North Carolina created a path to begin evaluating the impact of allowing stronger evidence to support *Batson* claims. Specifically, the RJA provided a state statutory claim for defendants facing the death penalty²⁶ and initially authorized claimants to use “statistical or other evidence” to prove discrimination by showing that race influenced peremptory challenges in the county, prosecutorial district, Superior Court division, or state at the time of the trial.²⁷ This focus on data also allowed us to launch an ongoing case study examining whether *Batson* can be more effective when bolstered with clear statistical data. This section presents the next set of data and developments in this project.

Our 2011 North Carolina jury selection study (the RJA jury study) provides an important backdrop to this case study. The RJA jury study found that black qualified jurors consistently faced a significantly higher risk of peremptory challenge than all other qualified jurors.²⁸ This disparity remained consistent over time and location.²⁹ The disparity also persisted when we controlled for

²² Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2062 (2016).

²³ NAT’L CTR. FOR STATE COURTS, BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, NCJ 161570, TRIAL COURT PERFORMANCE STANDARDS WITH COMMENTARY 16 (1997), <https://www.ncjrs.gov/pdffiles1/161570.pdf> [hereinafter NAT’L CTR. FOR STATE COURTS, TRIAL COURT PERFORMANCE STANDARDS].

²⁴ See *Batson*, 476 U.S. at 87 (“Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.”).

²⁵ See ROGER HAYDOCK & JOHN SONSTENG, TRIAL ADVOCACY BEFORE JUDGES, JURORS, AND ARBITRATORS 235, 240–43 (5th ed. 2015) (describing jury selection procedures).

²⁶ N.C. GEN. STAT. ANN. §§ 15A-2010, 15A-2011.

²⁷ § 15A-2011(a), (b)(3).

²⁸ Grosso & O’Brien, *A Stubborn Legacy*, *supra* note 6, at 1548.

²⁹ *Id.* at 1533–34.

information about qualified jurors that potentially bore on the decision to strike them.³⁰

In a previous article, we sought to assess whether the passage of the RJA mitigated the influence of race in jury selection and reported relative strike rates in the first seven cases tried after the RJA.³¹ The RJA allows for evidence that parallels the Court's expanded evidentiary framework. Evidence that heightened attention to the RJA mitigated racial disparities in jury selection may implicitly support the Court's approach. North Carolina juries have sentenced five defendants to death since that article went to press.³² Section *A* presents analysis for four of the five capital cases and updates the data presented in the earlier article to reflect the current trend.³³ The evidence in Section *B* addresses more directly the important role of complete data in *Batson*. This section presents partial data and some anecdotal evidence showing the impact of introducing systemic jury selection data during jury selection at capital trials on the influence of race.

Despite the admittedly small sample of cases analyzed in Sections *A* and *B*, our results indicate that use of archival and statistical data in jury selection really may reduce the influence of race.

A. Analogizing the RJA

This section compares the influence of race in peremptory strikes in cases before and after the passage of the RJA. We use the RJA in this section as a proxy for *Batson* and ask what might happen if a trial court focused systematically and persistently on the influence of race in jury selection.³⁴

Our original RJA jury study analyzed jury selection in 173 capital cases reflecting a total of 7,421 strike decisions.³⁵ A second study in 2013 presented disparities based on five additional cases for a total of 178 cases reflecting a total of 7,641 strike decisions.³⁶ The analysis presented in this Article for the first time

³⁰ *Id.* at 1533–34, 1550–54.

³¹ See generally Barbara O'Brien & Catherine M. Grosso, *Beyond Batson's Scrutiny: A Preliminary Look at Racial Disparities in Prosecutorial Preemptory Strikes Following the Passage of the North Carolina Racial Justice Act*, 46 U.C. DAVIS L. REV. 1623 (2013).

³² Death Row Roster, N.C. DEPT PUBLIC SAFETY, <https://www.ncdps.gov/Adult-Corrections/Prisons/Death-Penalty/Death-Row-Roster> (last visited Feb. 20, 2017) (Mario McNeil, Juan C. Rodriguez, Jonathon Richardson, and Antwan Anthony). One more person, Bernard Lamp, received a death sentence in 2014 and died of natural causes in 2016. List-Removed from Death Row, N.C. DEPT PUBLIC SAFETY, <https://www.ncdps.gov/our-organization/adult-correction/prisons/death-penalty/list-removed-death-row> (last visited May 30, 2017).

³³ We had not been able to get jury selection data for Antwan Anthony's case by the time this Article went to press.

³⁴ See Crespo, *supra* note 22, at 2092–93 (noting the potential of courts to bring systematic facts to bear on jury selection).

³⁵ Grosso & O'Brien, *A Stubborn Legacy*, *supra* note 6, at 1543.

³⁶ O'Brien & Grosso, *supra* note 31 at 1637.

includes jury selection data for four additional cases for a total of 182 cases and 7,810 strike decisions.³⁷

This research focuses on prosecutor strike decisions. We, therefore, analyzed prosecutorial strike patterns for only the 7,804 venire members whom the state had an opportunity to strike.³⁸ The overwhelming majority of strike-eligible venire members were either white (6,361, 81.5%) or black (1,277, 16.4%). Just 2.0% (155) were other races. We are missing race information for 11 (0.1%) venire members.

Prosecutors continue to exercise peremptory challenges at a significantly higher rate against black venire members than against all other venire members. Across all strike-eligible venire members in the 182 cases, prosecutors struck 52.3% (668/1,277) of eligible black venire members, compared to only 25.9% (1,688/6,516) of all other eligible venire members. This reflects a strike ratio of 2.02. This difference is statistically significant ($p < .001$). (See Table 1, Row 1.)

Table 1

A	B Black	C Non-Black	D Difference (B-C)	E Ratio (B/C)	F p
1. All Cases (182 cases)	52.3% (668/ 1,277)	25.9% (1,688/ 6,516)	26.4	2.02	<.001
2. Pre-RJA Cases (171 cases)	52.7% (633/ 1,202)	25.7% (1,572/ 6,117)	27.0	2.05	<.001
3. Post-RJA Cases (11 cases)	46.7% (35/ 75)	29.1% (116/ 399)	17.6	1.60	< .01

The pattern is somewhat different when we compare strikes in cases predating the RJA in Row 2 to strikes in cases after its passage in Row 3. In the 171 pre-RJA cases, prosecutors struck 52.7% (633) of the 1,202 strike-eligible black venire members, compared to 25.7% (1,572) of the 6,117 strike-eligible venire members of other races. This difference is statistically significant ($p < .001$).

The disparity falls in the eleven post-RJA cases. Prosecutors struck 46.7% (35) of the 75 strike-eligible black venire members, compared to 29.1% (116) of their 399 counterparts of other races. This difference remains statistically significant ($p <$

³⁷ We intentionally use parallel language to describe the statistical findings in each of the three articles. This makes following the evolving dataset easier.

³⁸ *Id.* at 1636-37.

.01). A comparison of the magnitude of the disparity in Rows 2 and 3 in Table 1 lends some support to the hypothesis that the presence of the RJA mitigated the effect of race on prosecutorial strike decisions. Black venire members face strikes six percent less frequently in Post-RJA cases than in Pre-RJA cases (52.7%–46.7%). (Compare Column B, Rows 2 and 3.) The difference in strike rates reported in Column D drops from 27.0 pre-RJA to 17.6 after the RJA was passed, a difference of 9.4 points. Moreover, the ratio between the strike rates in Column E drops from 2.05 to 1.60, a more than 20% drop.

One might expect that race would play a less prominent role in the decision to strike over time, but the racial disparities in prosecutorial strikes we observed in the RJA jury study were consistent over the twenty years preceding the RJA.³⁹ Nevertheless, cases litigated in the years just before the RJA's passage may provide a more appropriate point of comparison to those tried later. We therefore conducted the same analysis described above, but limited the pre-RJA cases to those tried during the five years before its passage. These results appear in Table 2.

The analysis includes thirteen cases tried between 2005 and the RJA's passage in August 2009. In these thirteen cases, prosecutors struck 52.5% (62) of the 118 eligible black venire members, and 26.4% (147) of the 556 venire members of other races, a ratio of 2:1 ($p < .001$). In the cases tried after the RJA, as noted above, they struck 46.7% (35) of the 75 eligible black venire members, and 29.1% (116) of the 399 venire members of other races, a ratio of 1.6 ($p < .01$). (Compare Table 2, Line 1 with Table 2, Line 2.) Again the rate at which black qualified venire members faced a prosecutorial strike (Column B) and the relative rate at which black versus all non-black qualified venire members faced strikes (Column E) declined. This drop is consistent but weaker.

Table 2

	A	B Black	C Non-Black	D Difference (B – C)	E Ratio (B/C)	F <i>p</i>
1.	Five Years Pre-RJA (January 2005– August 2009) (13 cases)	52.5% (62/118)	26.4% (147/556)	26.1	1.99	<.001
2.	Post-RJA Cases (August 2009 – present) (11 cases)	46.7% (35/75)	29.1% (116/399)	17.6	1.60	< .01

³⁹ *Id.* at 1640 & n.73 (citing Grosso & O'Brien, *A Stubborn Legacy*, *supra* note 6, at 1548 n.88).

Given the small number of capital trials in the years since the RJA, we interpret the modest reduction in the racial disparity cautiously. Many counties included in the study held only one post-RJA capital trial, and there are differences in the relative strike rates across counties. Nevertheless, these numbers provide modest support for the proposition that analyzing the data and paying close attention to the influence of race in jury selection might strengthen *Batson*.

B. Using Archival and Statistical Evidence at Trial

In the shadow of the RJA, we began to look for opportunities to introduce this kind of evidence earlier in the capital trial process. With the cooperation of the Center for Death Penalty Litigation and the ACLU Capital Punishment Project, we have provided detailed statistical evidence on the influence of race on the exercise of peremptory challenges for specific counties to defense counsel before jury selection in every capital trial in North Carolina since early 2014.

We have provided affidavits in approximately two dozen capital cases. We have only limited information about how any single affidavit was used or even the extent to which the court and prosecutor were made aware of its presence. At least ten of these cases either reached a plea agreement that removed the possibility of a death sentence or were declared not death eligible before trial, but after we provided the affidavit. At least eleven cases with affidavits went to jury selection and trial with the state seeking a death sentence. Three of the eleven resulted in a death sentence (27%). For a rough comparison, consider that 44.5% of the cases where the state went to trial seeking a death sentence in North Carolina between 1990 and 2009 resulted in death.⁴⁰

Our affidavits include tables showing the past use of peremptory challenges by race for the county and, where possible, the individual prosecutor.⁴¹ They also include fully controlled regression analyses where the data permits it.⁴² The Center for Death Penalty Litigation and the ACLU Capital Punishment Project train and consult with trial attorneys to help them use this evidence pre-emptively as jury selection begins. This is not easy. There is no procedural spot where it clearly belongs. Nonetheless, attorneys have succeeded in making this evidence visible during the jury selection process. Attorneys in North Carolina reported to us that

⁴⁰ See Barbara O'Brien, Catherine M. Grosso, George Woodworth, & Abijah Taylor, *Untangling the Role of Race in Capital Charging and Sentencing in North Carolina, 1990–2009*, 94 N.C. L. REV. 1997, 2010–11, 2036 (2016) (reporting the penalty trial sentencing rate as equal to the capital trial sentencing rate because of the study design).

⁴¹ Cf. Office of Indigent Defense Servs., *Peremptory Challenges: Affidavit of Catherine M. Grosso & Barbara O'Brien Regarding MSU Study*, RACE MATERIALS BANK 20–23, <http://www.ncids.org/racebank/Sentencing/Affidavit%20of%20Catherine%20M%20Grosso%20%20Barbara%20O'Brien%20Regarding%20MSU%20Study.pdf> (last visited Mar. 14, 2017) (providing examples of tables included in affidavit).

⁴² See generally *id.* (providing an example of the data included in the authors' affidavits).

attorneys found a procedural avenue to use the affidavits during trial in at least six cases.

In at least one instance, a defense lawyer used an affidavit we provided to support a *Batson* objection.⁴³ The venire in that case included very few black members. When the state moved to strike the first black juror seated, the defense lawyer objected and cited the archival and statistical evidence in our affidavit in support of his objection. Our affidavit showed that race had a significant role historically in the prosecution's exercise of peremptory challenges. The judge found that defense counsel had established a prima facie case for a *Batson* violation and asked the state to respond. Though the motion was ultimately unsuccessful, this example is noteworthy because judges almost never find a prima facie case when defense counsel raises a *Batson* objection so early in jury selection.⁴⁴ Historic evidence provided context and fortified the objection.

In a second case, defense counsel gave formal notice of his intent to object to "any peremptory challenges in violation of the law" and provided all parties with a copy of our county- and prosecutor-specific affidavit before trial.⁴⁵ The prosecutor objected and asked the court to seal the motion and the affidavit. The court initially denied the request, but then sealed it with the defense's consent when the prosecutor, clearly upset, raised the issue again several hours later.

Jury selection began with a concern about discrimination prominent in the parties' minds. The state passed the first black juror seated. Defense counsel credited the affidavit under seal. This was really only the beginning. Jury selection continued for weeks. The state struck eight of the first eleven black jurors seated (73%), compared with six of the first 43 qualified white jurors (14%). The ratio between these numbers (5:1) exceeds the 2.26:1 ratio reported in our statewide analysis of jury selection.⁴⁶

Defense counsel monitored this disparity and continued to update the court. When it came time to select the final juror, a black person came forward for questioning. The judge asked the prosecutors to tell him in advance if they intended to strike. Defense counsel heard this as an expression of concern that striking this juror might violate *Batson*. The state passed. The seated jury included three black members and nine white members.

⁴³ Email from Gretchen Engel, Exec. Dir., Center for Death Penalty Litigation, to authors (Feb. 26, 2016) (on file with authors).

⁴⁴ The state provided a "race neutral" explanation for the strike. The judge then overruled the objection.

⁴⁵ Email from Gretchen Engle, Exec. Dir., Center for Death Penalty Litigation, to authors (May 10, 2014) (on file with authors); email from Gretchen Engle, Exec. Dir., Center for Death Penalty Litigation, to authors (May 12, 2014) (on file with authors); Email from Gretchen Engle, Exec. Dir., Center for Death Penalty Litigation, to authors (May 20, 2014) (on file with authors); Email from Gretchen Engle, Exec. Dir., Center for Death Penalty Litigation, to authors (June 19, 2014) (on file with authors); Email from Gretchen Engle, Exec. Dir., Center for Death Penalty Litigation, to authors (July 23, 2014) (on file with authors).

⁴⁶ Grosso & O'Brien, *A Stubborn Legacy*, *supra* note 6, at 1548–49.

It is difficult to measure the impact of clear statistical evidence on jury selection in a case like this. Certainly, race continued to influence selection at some level, given the stark unadjusted disparity. But the disparity may have been even more pronounced and the jury less diverse if the defense counsel had not had the evidence of historical discrimination at his disposal. Dismissed jurors may also have been aware of the importance counsel place on their ability to serve.

We continue to provide affidavits and to seek more information about jury selection in these cases. The ongoing case study at least suggests that attention to race and to the historic influence of race documented through archival and statistical data may create a stronger platform from which attorneys can monitor and challenge the persistent role of race. Our updated analysis of the post-RJA cases is consistent with our findings a few years after the RJA passed and provides some basis for optimism that simply signaling that racial disparities in strikes would face deeper scrutiny mitigates (although does not eliminate) disparities.⁴⁷ Our limited observations about the use of this data at trial provide some positive anecdotal evidence. This case study suggests that tracking data juror by juror, case by case, may prove to be an effective means to protect jurors from race-based strikes in a manner that is also consistent with the Court's focus on strengthening the *Batson* evidentiary framework.⁴⁸

II. AN UNDERTAKING FOR TRIAL COURTS

Our limited evidence suggests that the regular availability of statistical evidence might mitigate racial disparities in jury selection. If this is true, criminal courts need to recognize their obligation to preserve and provide access to jury selection data for all criminal trials. The challenges and expense of accessing reliable data persist in trial courts across the nation.⁴⁹ The lack of national, or even state-level, norms and best practices for data maintenance and availability makes documenting the persistent influence of race in jury selection unnecessarily difficult. Others have raised this concern and proposed remedies from different angles.

Nancy Leong explored the benefits of encouraging struck jurors to bring civil rights claims about discriminatory peremptory strikes and reviewed several such

⁴⁷ See *supra* Section II.A.; see generally O'Brien & Grosso, *supra* note 31.

⁴⁸ See *supra* notes 11–13 and accompanying text.

⁴⁹ See Peter A. Joy & Kevin C. McMunigal, *Racial Discrimination and Jury Selection*, 31 A.B.A. CRIM. JUST. 43, 45 (2016) (urging that “every jurisdiction needs to do a better job of collecting data both on the composition of the jury venires and on the use of peremptory challenges”); Russell D. Covey, *The Unbearable Lightness of Batson: Mixed Motives and Discrimination in Jury Selection*, 66 MD. L. REV. 279, 322 (2007) (“*Batson* challenges occur in a virtual evidentiary vacuum—there is extremely little evidence available even in a full-blown *Batson* hearing to shed much light on the question of whether an explanation is credible.”); see also Rose & Abramson, *supra* note 15, at 954–55 (reporting the poor quality of juror data available from courts).

cases.⁵⁰ Leong notes that “[r]egular civil discovery rules would apply,” providing courts with a more complete record, including the kinds of data necessary to monitor the influence of race on the exercise of peremptory challenges.⁵¹ She reasons, “enhanced information regarding the circumstances in which peremptory strikes take place, would create a climate . . . in which trial judges do not simply rubber stamp a lawyer’s explanation for exclusion.”⁵²

Even with these strengths, this approach faces overwhelming “informational, motivational, and doctrinal obstacles.”⁵³ For example, consider the challenges of organizing struck jurors as plaintiffs.⁵⁴ Potential jurors likely do not know why they were struck or that a pattern of discrimination exists, and often feel relieved upon learning they will not suffer the inconvenience of serving.⁵⁵ Civil cases raising *Batson* violations seem almost necessarily to involve institutional plaintiffs who have the capacity to address the multitude of barriers.⁵⁶

Alafair Burke urged prosecutors’ offices “to collect and publish both individual and office-wide data regarding the exercise of peremptory challenges” as a “method of identifying and neutralizing bias during the peremptory challenge process.”⁵⁷ She notes prosecutors’ “special role” as both advocates and ministers of justice, and argues that transparency fosters perceptions of fairness and thus bolsters the legitimacy of the convictions prosecutors get.⁵⁸ Leong echoes this suggestion, noting that “in other situations governmental actors and agencies have taken actions that favor transparency.”⁵⁹ Encouraging prosecutorial self-monitoring provides the additional benefit of “rais[ing] internal awareness about the importance of race-neutral jury selection, making clear that avoiding the distorting

⁵⁰ See generally Nancy Leong, *Civilizing Batson*, 97 IOWA L. REV. 1561 (2012) (proposing that suits by prospective jurors may provide an avenue for overcoming the informational obstacles to *Batson* challenges).

⁵¹ *Id.* at 1574.

⁵² *Id.* at 1574; see *id.* at 1573 (citing Jeffery Bellin & Junichi P. Semitsu, *Widening Batson’s Net to Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1093–96 (2011), as evidence that judges’ acceptance of a wide range of allegedly race-neutral explanations may explain the dearth of *Batson* violation findings).

⁵³ *Id.* at 1576.

⁵⁴ *Id.* at 1577 (noting that jurors do not know why they have been struck or anything about the “larger pattern of peremptory strikes”).

⁵⁵ *Id.* at 1577–78.

⁵⁶ For example, *Hall v. Valeska*, 509 F. App’x 834, 834 (11th Cir. 2012), was argued by the Equal Justice Initiative of Alabama, and *Atherton v. D.C. Office of Mayor*, 567 F.3d 672, 680–81 (D.C. Cir. 2009), was argued by students at the Duke University Appellate Litigation Clinic.

⁵⁷ Alafair S. Burke, *Prosecutors and Peremptories*, 97 IOWA L. REV. 1467, 1485 & n.97 (2012) (citing proposals in the press requiring prosecutors to maintain these statistics).

⁵⁸ *Id.* at 1474–76 (citing *Berger v. United States*, 295 U.S. 78, 88 (1935)).

⁵⁹ Leong, *supra* note 50, at 1578.

influence of race . . . is a separate and valuable objective.”⁶⁰ It also might counter the influence of implicit biases and facilitate institutional accountability.⁶¹

Similarly, we regularly urge defense counsel to maintain and monitor jury selection data in each case. Colleagues in North Carolina started by teaching defense counsel how to organize the underlying data from our RJA jury study and to supplement it, if possible, with additional data.⁶² Defense counsel also can file pre-trial motions seeking *Batson* related discovery⁶³ and asking the court to note the race of every potential juror in the record.⁶⁴ Counsel should retain jury questionnaires and data about strikes after trial and make them available to other attorneys. Counsel can review previous *Batson* challenges in their county and be prepared to move in relevant orders from the prior cases where a court found differential treatment.⁶⁵ Focused work by counsel to develop *Batson* evidence can lead to cases like *Foster v. Chatman*, which contained a rich and detailed record to support a claim of discrimination.⁶⁶

Again, however, these approaches face significant challenges. Neither prosecutors nor defense counsel are institutionally equipped to maintain and provide public access to this kind of data.⁶⁷ Moreover, placing the onus on the parties to litigation to maintain this data sets an adversarial tone—particularly when it is defense counsel keeping the records—toward a matter implicating core

⁶⁰ Burke, *supra* note 57, at 1486.

⁶¹ See *id.* at 1486–87; see also Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 U.C. IRVINE L. REV. 843, 861 (2015) (collecting research on race salience and implicit bias).

⁶² See GRINE & COWARD, *supra* note 16, at 10–11 to 10–13, <http://defendermanuals.sog.unc.edu/race/106-jury-selection-peremptory-challenges>.

⁶³ For instance, counsel should request the prosecutor’s notes and pre-trial investigation for the venire members. There is no guarantee that the state will provide all of these materials, even if the court grants the motion, but it creates a record and signals that counsel will litigate *Batson* zealously. North Carolina’s Indigent Defense Services website makes available model charts, motions, and orders. See Office of Indigent Defense Servs., *Race Materials Bank: Peremptory Challenges*, N.C. CT. SYS., <http://www.ncids.org/racebank/mainlinks.htm?c=Training%20%20and%20%20Resources.%20Race%20Materials%20Bank> (last visited Mar. 6, 2017) [hereinafter Office of Indigent Defense Servs., *Peremptory Challenges*].

⁶⁴ Even if the court agrees to do so, however, counsel should also track in her own files the race and gender of every person struck.

⁶⁵ Prepared jury selection charts based on previous *Batson* challenges provide concrete examples of past discrimination to facilitate comparative juror analyses in a current case. Contemporaneously recording basic information about each potential juror allows counsel to rebut the state’s proffered race-neutral reason with specific facts about venire members the state chose to pass, should counsel raise a *Batson* objection later in the jury selection process. Having on hand a count of all unemployed white jurors the state passed, for example, is persuasive evidence that the state’s assertion that it struck a black juror due to his lack of employment is a pretext for discrimination. Counsel in future cases can build upon this historical data in satisfying the first prong of *Batson* and potentially use it to bolster comparative juror analysis.

⁶⁶ *Foster v. Chatman*, 136 S. Ct. 1737, 1743–44 (2016) (detailing evidence of discrimination in the case).

⁶⁷ Note, for example, that defense counsel in North Carolina receive institutional support from the Office of Indigent Defense Services. See generally Office of Indigent Defense Servs., *Peremptory Challenges*, *supra* note 63. This kind of support is not typically available.

values of the system as a whole rather than a particular party's interest in a specific case.

In contrast, consider the role and function of courts and court records, that is, those “documents that remain after a case has been resolved and become part of the permanent, *public* record.”⁶⁸ Courts prepare and maintain records in order to preserve “all relevant court decisions and actions” on the grounds that doing so will advance “[e]quality, fairness, and integrity.”⁶⁹ The maintenance of complete and accurate files “directly affects the timeliness and integrity of case processing.”⁷⁰

Given the importance of complete records to a well-functioning system, court records have been the subject of reform efforts since at least the 1970s.⁷¹ Proposed changes encouraged clear standardized practices, such as uniform case numbering systems and published record retention schedules.⁷² A national conference on the judiciary founded the National Center on State Courts in 1971 expressly “to improve the administration of justice in the state courts.”⁷³ By 1978, the reform movement identified “internal organization and procedures of the courts” as an important focus area.⁷⁴

Court reform efforts have also focused on the jury and jury selection.⁷⁵ The right to trial by jury forms a cornerstone of our criminal justice system.⁷⁶ Selecting the jury forms the first stage of a public trial. As the Court has stated, “[t]he

⁶⁸ Amanda Conley et al., *Sustaining Privacy and Open Justice in the Transition to Online Court Records: A Multidisciplinary Inquiry*, 71 MD. L. REV. 772, 780–81 (2012) (defining court records).

⁶⁹ NAT'L CTR. FOR STATE COURTS, TRIAL COURT PERFORMANCE STANDARDS, *supra* note 23, at 16.

⁷⁰ NAT'L CTR. FOR STATE COURTS, COURTTOOLS: TRIAL PERFORMANCE MEASURES, *Measure 6: Reliability and Integrity of Case Files* (2005), http://www.courttools.org/~media/Microsites/Files/CourTools/courttools_Trial_measure6_Reliability_And_Integrity_Of_Case_Files.ashx.

⁷¹ See Sue K. Dosal et al., “Administration of Justice Is Archaic”—*The Rise of Modern Court Administration: Assessing Roscoe Pound's Court Administration Prescriptions*, 82 IND. L.J. 1293, 1301–02 (2007) (reporting on early reform efforts through court unification in Minnesota).

⁷² See Randall T. Shepard, *Indiana Law, the Supreme Court, and a New Decade*, 24 IND. L. REV. 499, 515 (1991) [hereinafter Shepard, *Indiana Law*].

⁷³ Paul C. Reardon, *Introduction to State Court Reform*, 31 AM. U. L. REV. 207, 208–09 (1982).

⁷⁴ *Id.* at 210–11 (discussing the National Center's various reform efforts, but highlighting its 1978 conference which “focused on [i]nternal [o]rganization and [p]rocedures of the [c]ourts”).

⁷⁵ See, e.g., K Royal & Darra L. Hofman, *Impaneled and Ineffective: The Role of Law Schools and Constitutional Literacy Programs in Effective Jury Reform*, 90 DENV. U. L. REV. 959, 967 (2013) (noting that at least 38 states were engaged in jury reform in 2013); Judith S. Kaye, *Albany Law Review Symposium: Refinement or Reinvention, the State of Reform in New York: The Courts*, 69 ALB. L. REV. 831, 842–43 (2006) (noting that important jury reforms in New York eliminated automatic disqualifications and expanded juror source lists, thereby adding a half million potential new jurors to the rolls); Randall T. Shepard, *State Court Reform of the American Jury*, 117 YALE L.J. POCKET PART 166 (Mar. 18, 2008), <http://yalelawjournal.org/forum/state-court-reform-of-the-american-jury> (reporting on jury reforms in New York and Arizona designed to improve jury deliberations and include more minority citizens in the jury pool).

⁷⁶ U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial, by an impartial jury of the State and district wherein the crime shall have been committed.”).

process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system.⁷⁷ The history of race discrimination brought to light by jury selection data makes clear the role of this information in protecting the fairness and integrity of trials.⁷⁸ Equally, if not more importantly, it protects the equal protection interests of the excluded jurors.⁷⁹

Including jury selection records in court records would advance these interests at relatively little cost. These facts are part and parcel of the “systemic facts” of a criminal court.⁸⁰ Court clerks prepare the official record as the trial unfolds. The same people organize and document jury selection, as the data is generated in the course of selecting a jury.⁸¹ They keep track of which jurors are called and questioned, juror questionnaires, the exercise of peremptory strikes, and excusals for cause as a matter of course.⁸² Our North Carolina files are full of notes, charts, and tables prepared by court clerks. Many of these charts tabulate cause dismissals and peremptory challenges by party.

Alternately, jury selection is part of an open trial. Federal and most local statutes require that jury selection be recorded and available for transcription.⁸³ As long as race is reported on the record, a transcript can provide the necessary information. A court rule could require that jury selection transcripts from all criminal cases that go to a jury be available in the state law library.

⁷⁷ *Press-Enterprise Co. v. Superior Court of California, Riverside Cty.*, 464 U.S. 501, 505 (1984).

⁷⁸ See O'Brien & Grosso, *supra* note 31, at 1626–30 (discussing how the use of statistical evidence to challenge race-based jury strikes may be necessary to overcome *Batson's* inability to eliminate the detrimental effects of race in jury selection).

⁷⁹ The Court recognizes that race-based and gender-based peremptory strikes violate the excused juror's constitutional right to equal protection. *Id.* at 1625 n.3, 1631 n.37. Scholars and activists have begun to document the ways in which this constitutional violation harms individual jurors and society. *Id.* at 1628–30. We noted two levels of harm in our 2013 paper. First, we noted, “the experience of being excluded based on race and racial stereotypes harms excluded jurors individually.” *Id.* at 1628–29. Second, the “exclusion of people based on their group identity undermines the criminal justice system's foundational ideals, such as individuality, citizen participation, and equal access to the government.” *Id.* at 1629. Both of these harms undermine personal and shared understandings of procedural justice. *Id.*

⁸⁰ Crespo, *supra* note 22, at 2069–70 (defining systemic facts as “caches of actual data” that “reside within the official records, internal case files, transcripts, audio recordings, and administrative metadata routinely generated” by trial courts).

⁸¹ See HAYDOCK & SONSTENG, *supra* note 25, at 235, 240–44 (describing the jury selection process and the court clerk's role in administering it).

⁸² *Cf.* Crespo, *supra* note 22, at 2093–95, 2094 n.194 (using the Superior Court of the District of Columbia to illustrate criminal courts' data collection potential during jury selection).

⁸³ See, e.g., 28 U.S.C. § 753(b) (2015) (“Each session of the court and every other proceeding designated by rule or order of the court or by one of the judges shall be recorded verbatim Proceedings to be recorded under this section include (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall agree specifically to the contrary; and (3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court as may be requested by any party to the proceeding.”).

The Louisiana Uniform Rules of the Courts of Appeal Rule 2-1.9 requires that the record on appeal include the transcript of the voir dire examination of prospective jurors, if designated on appeal.⁸⁴ The rule continues in detail:

If the voir dire examination of prospective jurors is requested, it shall be accompanied with an index setting forth the names of the prospective jurors in the order called and the volume and page numbers of their examination. This index shall also list whether the prospective juror was challenged, whether the challenge was for cause or peremptory, who raised the challenge and whether the juror was released or accepted.⁸⁵

Judge Max Tobias at the Louisiana Fourth Circuit Court of Appeal confirmed that this rule arose from both the difficulty of enforcing *Batson* in his district and the impossibility of reviewing a *Batson* issue on appeal without data.⁸⁶ Rule 2-1.9 is the only court rule that we identified requiring a trial court to produce something close to the *Batson* data that we argue courts should routinely collect. Note, however, that the rule does not mention juror race.⁸⁷

At a minimum, the record must include the race of potential jurors and a description of what happened to them. Comparative juror analyses or a controlled study, like our work in North Carolina, also require information about additional venire member characteristics. This information starts in the hands of the court. It seems at least possible that including this information in court records would require only minimal administrative investment.

In either case, this data need not include juror names or other identifying information if privacy is a concern. We take seriously the concerns raised by courts and scholars about the privacy and safety of jurors.⁸⁸ These concerns, however, must be understood in the context of a strong presumption for open criminal trials

⁸⁴ See LA. CT. APP. UNIF. R. 2-1.9.

⁸⁵ LA. ST. A. CT. UNIF. R. 2-1.9.

⁸⁶ Telephone interview with Max Tobias, Judge, La. Fourth Circuit Court of Appeal (Oct. 17, 2016).

⁸⁷ See LA. ST. A. CT. UNIF. R. 2-1.9.

⁸⁸ See MICH. SUPREME COURT, MICHIGAN TRIAL COURT CASE FILE MANAGEMENT STANDARDS 31–35, 37 (Apr. 2016), http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/cf_stds.pdf (limiting general public access to jury records). See generally David S. Ardia & Anne Klinefelter, *Privacy and Court Records: An Empirical Study*, 30 BERKELEY TECH. L.J. 1807 (2015) (analyzing court records submitted to the North Carolina Supreme Court and discussing privacy issues arising from public access to court records); Conley et. al., *supra* note 68 (discussing policy and privacy issues surrounding digitized court records accessible to the public online); Kenneth J. Melilli, *Disclosure of Juror Identities to the Press: Who Will Speak for the Jurors?*, 8 CARDOZO PUB. L., POL'Y, & ETHICS J. 1, 2–5 (2009) (listing steps that should be taken in cases where there exists a potentiality of the privacy interests of jurors being subordinated to the “desires of the press”); Peter A. Winn, *Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information*, 79 WASH. L. REV. 307 (2004) (evaluating current rules and practices courts use to strike a balance between public disclosure of information during judicial proceedings and the safety and privacy of individuals participating in judicial proceedings).

and for free public access to criminal trials.⁸⁹ Openness “ensur[es] that our system of justice functions fairly and is accountable to the public.”⁹⁰ Nancy King suggests that “[j]uror questionnaires, voir dire proceedings, and all other records and proceedings accessible to the parties, counsel, or the public . . . contain references to jurors by number rather than by name.”⁹¹ This would work well. Machine reading and modern technology reduce the costs in time and money of this approach.

A side element to our call has to do with standardization of practice.⁹² We collected data from 100 courthouses in North Carolina. In some courts we found jury selection data, in others none. In some we had to file a special request to obtain the records, in others we did not.⁹³ Jury selection transcripts in North Carolina sometimes resided at the home of the court reporter who recorded the case.⁹⁴ In South Carolina, we could not even get a proper list of eligible cases from the court.⁹⁵ This pattern likely repeats across the country.⁹⁶ A standard that requires that complete anonymous jury selection information be included the court record and available for public review would reduce costs and increase accountability.

At the bottom line, trial courts can and should preserve this information as a matter of course. Courts both better satisfy their obligations to conduct fair and just trials, and enhance their standing in the community when they take on reforms like this one that promote transparency, enhance fairness, and protect constitutional values.

⁸⁹ *Press-Enterprise Co. v. Superior Court of California, Riverside Cty.*, 464 U.S. 501, 508 (1984) (“Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.”).

⁹⁰ *Ardia & Klinefelter*, *supra* note 88, at 1818; *see also* Conley et al., *supra* note 68, at 774 (“[C]itizens are presumed to have a right to inspect [trial records] to ensure that courts are exercising their powers not only competently and fairly but also within the limits of their mandate.”).

⁹¹ Nancy J. King, *Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Trials*, 49 VAND. L. REV. 123, 135 (1996).

⁹² *See* Shepard, *Indiana Law*, *supra* note 72, at 515.

⁹³ We collected data for the jury study and a charging and sentencing study simultaneously. *See* O’Brien, Grosso, Woodworth, & Taylor, *supra* note 40, at 2014–15 n.96–97 (detailing the data collection process).

⁹⁴ *See, e.g.*, email from Kristen Wouk, Center for Death Penalty Litigation, Legal Researcher & Investigator, to Catherine Grosso (Oct. 30, 2012) (on file with author) (detailing the data collection process including contacting the court reporter directly); *see also* N.C. OFF. OF INDIGENT SERV., Appellate Motions (Non-Capital) Motion for Production of Transcript (Model), <http://www.ncids.org/MotionsBankNonCap/AppellateMotions/ProductionTranscript.doc> (last visited May 30, 2017) (seeking an order directing private court reporters to prepare transcripts from trial).

⁹⁵ *See generally* Respondent’s Motion for Special Interrogatories and Concomitant Requests for Production of Documents, *Dickerson v. South Carolina*, C/A No. 2012-CP-10-03216 (S.C. Ct. Com. Pl., Ninth Cir., Sept. 30, 2016) (on file with authors) (recounting efforts to establish the universe of cases).

⁹⁶ *See, e.g.*, Shari Seidman Diamond, *Race and Jury Selection: The Pernicious Effects of Backstrikes*, 59 HOW. L. J. 705, 714–15 (2016) (noting difficulty in locating complete race and strike information for many cases in a study of racial bias in jury selection in 476 cases in Caddo Parrish, Louisiana).

CONCLUSION: ENCOURAGING RECORD REFORMS

Turning then, to our last point: it is remarkably difficult to figure out how to advance this proposal. That is, what would be the most effective way to convince state and federal criminal courts all across the country to preserve complete anonymous jury selection information in the court record and to provide this information to the public? As lawyers, our minds turned first to litigation. We studied the New York City *Terry* stop litigation, which forced the police to keep better track of data and to make that data available.⁹⁷ The data documented the race patterns for police stops and led to the dismantling of the NYPD's stop and frisk program.⁹⁸ It is possible that well-targeted lawsuits could advance our proposal.⁹⁹

A second approach would be to target individual jurisdictions and seek to amend court rules. Perhaps the best approach of all might be to enlist the resources of an organization like the National Center for State Courts ("NCSC") or one of its subcommittees on state court practice.¹⁰⁰ The NCSC works closely with state court judges and administrators, who may be in the best position to evaluate the costs and benefits of our proposal, and, if persuaded, to promote its adoption.¹⁰¹

⁹⁷ *Floyd v. City of New York*, 959 F. Supp. 2d 668, 681–83 (S.D.N.Y. 2013) (ordering changes to how New York Police Department officers record information about stops and requiring that the data be retained and available for further review); *Floyd v. City of New York*, No. 08 Civ. 1034(SAS), 2008 WL 4179210, at *5 (S.D.N.Y. Sept. 10, 2008) (granting plaintiffs' motion to retain data).

⁹⁸ *Floyd*, 959 F. Supp. 2d at 672, 690–91.

⁹⁹ *But see* Leong, *supra* note 50, at 1577–78 (discussing issues associated with *Batson* challenges and civil litigation).

¹⁰⁰ For general information about the National Center for State Courts ("NCSC"), see NAT'L CTR. FOR STATE COURTS, www.ncsc.org/About-us.aspx (last visited Mar. 6, 2017) ("The National Center for State Courts is an independent, nonprofit court improvement organization founded at the urging of Chief Justice of the Supreme Court Warren E. Burger. He envisioned NCSC as a clearinghouse for research information and comparative data to support improvement in judicial administration in state courts."). NCSC Center for Jury Studies regularly engages in training and research with state courts. *See, e.g.*, Paula Hannaford-Agor & Chris Connelly, *Jury Innovation in Practice: The Experience in New York and Elsewhere*, N.Y. ST. B. ASS'N J., Oct. 2006, at 19, 21 (discussing an NCSC jury innovation project in New York); Paula L. Hannaford-Agor, *Judicial Nullification? Judicial Compliance and Non-Compliance with Jury Improvement Efforts*, 28 N. ILL. U. L. REV. 407, 410–13 (2008) (discussing the NCSC State-of-the-States Survey of Jury Improvement Efforts). The NCSC Court Services Division provides training and support for CourTools, an online set of trial court performance measures. *See* Nat'l Ctr. for State Courts, *Trial Court Performance Measures*, COURTOOLS, courtools.org/Trial-Court-Performance-Measures (last visited Mar. 6, 2017). Similarly, NCSC sponsors "Courting Justice," a "multi-city town hall series that invites state supreme, appellate and trial court judges to step down from the bench and listen to new perspectives on how the United States court system can better deliver justice for all." Nat'l Ctr. for State Courts, *Judges Team Up for Courting Justice 'Listening Tour'*, NAT'L CTR. FOR STATE COURTS, <http://www.ncsc.org/Conferences-and-Events/Courting-Justice> (last visited Mar. 6, 2017).

¹⁰¹ The NCSC advises trial courts to collect basic demographic information from potential jurors as a way to ensure that jury pools are representative. *See* William Caprathé, Paula Hannaford-Agor, Stephanie McCoy Loquvam, & Shari Seidman Diamond, *Assessing and Achieving Jury Pool Representativeness*, 55 JUDGE'S J. 16, 17 (2016).

We do not think the lack of consistency or the failure to keep data arises by design. Some jurisdictions have taken measures to promote transparency in the context of jury selection with an eye toward enforcing *Batson* more effectively.¹⁰²

Requiring that court records include this information should cost little, but having this information systematically and predictably available from the official record might strengthen the *Batson* regime. Making this information available in this manner advances the Sixth Amendment mandate for open trials but also, more importantly, makes it possible to defend the equal protection rights of citizens who have been required to present themselves for jury duty.

These measures may not be wholly effective, but they should not be dismissed lightly.¹⁰³ Racism needs to be addressed directly and if little else, *Batson* sets up a structure in which to talk about race in jury selection.¹⁰⁴ Providing the means to do so with the most complete and accurate information available is essential to that conversation.

¹⁰² See, e.g., LA. ST. A. CT. UNIF. R. 2-1.9 (“In criminal cases, the record must also contain all or any portion of the following designated by the defendant, the state, or the trial judge: . . . voir dire examination of prospective jurors If the voir dire examination of prospective jurors is requested, it shall be accompanied with an index setting forth the names of the prospective jurors in the order called and the volume and page numbers of their examination. This index shall also list whether the prospective juror was challenged, whether the challenge was for cause or preemptory, who raised the challenge and whether the juror was released or accepted).”

¹⁰³ But see Melynda J. Price, *Performing Discretion or Performing Discrimination: Race, Ritual, and Peremptory Challenges in Capital Jury Selection*, 15 MICH. J. RACE & L. 57, 60-61 (2009) (questioning the validity of *Batson* and arguing that *Batson* has created a ritual that legitimizes the removal of African American jurors rather than preventing discrimination).

¹⁰⁴ See generally Laura I. Appleman, *Reports of *Batson's* Death Have Been Greatly Exaggerated: How the *Batson* Doctrine Enforces a Normative Framework of Legal Ethics*, 78 TEMP. L. REV. 607, 610 (2005) (explaining how “a legal ethics approach to *Batson* provides the best means of understanding why . . . courts have adopted this specific doctrine to enforce the two critical rights of criminal jury selection: the right of the defendant to a bias-free jury and the right of the potential juror to serve.”).