

WHEN WILL RACE NO LONGER MATTER IN JURY SELECTION?

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We are coming upon the twenty-fifth anniversary of the Supreme Court's opinion in *Batson v. Kentucky*, which made clear that our Constitution does not permit prosecutors to remove prospective jurors from the jury pool because of their race.¹ The legal question in *Batson*—when, if ever, can governmental race discrimination in jury selection be tolerated?—was easy. The lingering factual question, however—when will prosecutors cease to discriminate on the basis of race?—has proven far more difficult to answer. The evidence that district attorneys still exclude minorities because of their race is so compelling that it is tempting to assume that race will *always* factor into lawyers' decisions about whom to keep on the jury and whom to exclude. Yet, until the Supreme Court holds lower courts accountable when they fail to meaningfully enforce the protections of *Batson*, we cannot know if the law goes far enough, and race will continue to permeate jury selections. Only when the law is properly enforced will we be able to determine if Justice Thurgood Marshall's observation was correct:

The Court's opinion also ably demonstrates the inadequacy of [requiring] "justice . . . sit supinely by" and be flouted in case after case before a remedy is available. . . . 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.

When lawyers select a jury for an upcoming criminal trial, they have two mechanisms to remove prospective jurors from the jury pool: cause challenges and peremptory strikes. Jurors can be removed for cause because they lack the ability to remain fair and impartial. For example, a person whose sibling works for the district attorney's office may be excludable for cause; similarly, a person who indicates that she would never credit a police officer's testimony could similarly be challenged for cause. Both prosecutors and defense lawyers have an unlimited number of cause challenges because no biased jurors should be seated. Additionally, most states provide the two parties with a certain number of peremptory strikes (typically twelve for each party selecting jurors for a twelve-person jury). The lawyers

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1. See *Batson v. Kentucky*, 476 U.S. 79 (1986).

can use these strikes to exclude anyone they wish, for almost any reason. A party's decision to remove a prospective juror with a peremptory strike, however, cannot be motivated by race.

In *Batson v. Kentucky*, the Supreme Court revisited its decision in *Swain v. Alabama*,² in which the Court imposed a “crippling burden of proof” on those who argued that prosecutors discriminated against African American jurors in jury selection. *Swain* essentially demanded that defendants prove that prosecutors eliminated African Americans from juries in case after case before an equal protection claim would have any chance to prevail. *Batson* removed this requirement and established a three-step process to decide claims that a party used its peremptory challenges to intentionally discriminate on the basis of race. First, the party making the allegation must establish a prima facie case to support the claim. The burden is not a high one.³ Second, if the trial court finds a prima facie case has been made, the other party (whose peremptory strikes are in question) must supply a race-neutral explanation for the strike. Third, assuming the supplied reasons are actually race-neutral, the trial court must then determine whether it finds them credible and legitimate. If it does, the strike is allowed and the juror is excluded from the jury pool. If the court finds the reasons given for the strike to be illegitimate, implausible, or non-race-neutral, the peremptory strike is prohibited and the juror is allowed to serve on the jury.

Although every Supreme Court pronouncement raises some complicated questions at the margins, the *Batson* framework provides reasonable guidance. Nonetheless, judges have demonstrated that they are either unable or unwilling to enforce it to ferret out racism in their courtrooms. According to *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, a recent report published by the Equal Justice Initiative, “Racially biased use of peremptory strikes and illegal racial discrimination in jury selection remains widespread, particularly in serious criminal cases and capital cases.” In other words, when the stakes are highest, the state is most willing to play fast and loose with prospective jurors' equal protection rights. And in these cases, courts have often refused to intercede. Trial courts, intermediate appellate courts, and even state supreme courts have shirked their duty to take seriously these recurring claims of racial discrimination. Although the U.S. Supreme Court reassured us in *Purkett v. Elem* that “implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination,” that statement appears now to be aspirational, not descriptive. Some recent eye-opening examples reflect the problem's magnitude.

In 2004—in one of the many trials in the saga of the State's highly publicized prosecution against Curtis Flowers—the trial court found no discrimination where the prosecutors used all fifteen of its peremptory strikes against African Americans and held that the prosecutors could rely

2. *Swain v. Alabama*, 380 U.S. 202 (1965).

3. *See Johnson v. California*, 545 U.S. 162, 170 (2005).

on things that other jurors said to justify the strike of an African American.⁴ The trial court's clearly erroneous *Batson* rulings led to an enormous drain on resources, as the Mississippi Supreme Court rightly ordered a new trial three years later.

In the recent 2009 second-degree murder trial of rap artist Corey Miller, the state singled out African American jurors to find out if they ever listened to rap music. Then, when making a peremptory strike that triggered one of the defense lawyer's *Batson* objections, the prosecutor provided as a "race-neutral" explanation that the stricken juror was not removed because of her race, but because of her enjoyment of "the rap music." Nonetheless, the trial court failed to identify the pretext.

These are just two examples of judicial intransigence among hundreds that have arisen in trial courts across the country in the past few years, but they demonstrate how the judiciary can render a Supreme Court opinion hollow in practice. Even the Supreme Court's 2005 opinion in *Miller-El v. Dretke*, which gave a new trial to a man convicted of murder in the 1980s, has not done enough to protect *Batson* from judicial evisceration.

The Mississippi Supreme Court's 2007 decision in *Flowers v. State* provides some weight to the counter-argument that appellate courts play a corrective role when trial courts falter, but the reality is that they too have been reluctant to enforce *Batson*. For example, in *Dressner*, a case with a petition for certiorari currently pending before the U.S. Supreme Court, the Louisiana Supreme Court botched its *Batson* analysis.⁵ Although the defendant expended significant time and effort briefing its discrimination claim, the court buried the issue in an "unpublished appendix" to the opinion.⁶ Moreover, the court approved of all of the state's peremptory strikes even though seven of nine were used to exclude African Americans; the prosecutor used contradictory reasons to explain the strikes; the prosecutor mischaracterized jurors' answers; and the prosecutor repeatedly claimed that he struck African Americans because they gave answers indicating they would favor the state. Corey Miller's case is on appeal in Louisiana, and the Louisiana Supreme Court's opinion in *Dressner* raises the possibility that the court may hold that an African-American juror's like of "the rap music" is as credible a reason as the prosecutor's astonishing claim that he removed an African American juror because she was likely to ignore the defense attorney's plea for mercy to spare the defendant from the death penalty.

The U.S. Supreme Court's recent ruling in *Thaler v. Haynes*—which apparently limited the force of previous cases favorable to criminal defendants—has exacerbated appellate courts' unwillingness to find *Batson* violations.⁷ Indeed, in *Dressner*, the Louisiana Supreme Court, which had been reversed by the U.S. Supreme Court in *Snyder v. Louisiana*, expressly

4. See *Flowers v. State*, 947 So. 2d 910, 925–26 (Miss. 2007).

5. Bidish Sarma and the Capital Appeals Project represent Mr. Dressner on his appeals.

6. *State v. Dressner*, 45 So. 3d 127 (La. 2010).

7. *Thaler v. Haynes*, 130 S.Ct. 1171 (2010) (per curiam).

noted that *Haynes* proved that *Snyder* “left [the *Batson*] landscape completely unchanged.” Other courts have relied on *Haynes* to deny relief in federal habeas and state post-conviction proceedings.

Every case presents unique facts and considerations. However, the dearth of recent cases in which courts have actually found racial discrimination in jury selection suggests not that such discrimination doesn’t occur, but that the judiciary has failed to identify and remedy it. As the Mississippi Supreme Court observed in *Flowers*, “[R]acially motivated jury selection is still prevalent twenty years after *Batson* was handed down.” Statistics collected in jurisdictions across the South and compiled in *A Continuing Legacy* suggest that prosecutors still disproportionately strike prospective African American jurors—sometimes at an alarming 80 percent clip. The statistics are so powerful that they simply cannot be fully explained on grounds that exclude race.

It seems that we may be slipping back into the *Swain* era, when in practice prosecutors were never prevented from eliminating African Americans from the jury pool. As the *Batson* Court put it, the *Swain* era was one in which “prosecutors’ peremptory challenges [were] largely immune from constitutional scrutiny.” Where trial courts defer to prosecutors, no matter how implausible the justification for a strike, and where appellate courts ignore startling statistics and the differential treatment of white jurors, *Batson* becomes toothless.

Discrimination in jury selection touches on two recurring themes in the continued struggle for equal justice: (1) the exclusion of African Americans from integral parts of our democracy and (2) judicial indifference to the Equal Protection Clause’s demands. Today’s battle may not be as public as the hard-fought struggles to guarantee African Americans access to the ballot box and integrated classrooms, but it is just as important. If the courts continue to allow state actors to remove 70%, 80%, or even 90% of qualified African American jurors without scrutiny, the system’s legitimacy will be called into question. We may be left with no choice but to acknowledge that Justice Marshall’s warning was correct, not because *Batson* itself failed, but because we failed *Batson*.