

Fixing *Batson*

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Joe Gutmann was 26 years old, six months out of law school, and batting 0 and 8 in trials as a prosecutor in Louisville, Kentucky. He was sure his ninth case—a charge of second-degree burglary and receipt of stolen goods against a young Black man—would be a winner. It wasn't. The jury hung. The only holdout was a Black woman—the only Black person on the jury.

Gutmann had come close. Although after the trial he was having doubts about whether he was meant to be a lawyer, he decided that he would retry the case.

When jury selection in the retrial had whittled down the venire to 13, Guttman surveyed the potential jurors. Four of the remaining 13 were Black. The rest were white. Guttman used a peremptory strike on one Black prospective juror. And then another. And another, until, finally, all the Black prospective jurors had been struck from the jury.

The defendant turned to his lawyer and told him to object. His lawyer asked why. The defendant told the lawyer it wasn't right—how could the prosecutor strike all the Black prospective jurors and leave him with an all-white jury? The lawyer explained that the prosecutor could strike whomever he wanted, for whatever reason; those were simply the rules of the game. The client told him to object anyway. So the lawyer did.

The defense counsel told the judge that he wanted the prosecutor to explain why he had struck all four Black potential jurors.

Before the prosecutor could even respond, the judge ruled that the prosecutor didn't have to explain his strikes and that a party can “strike anybody they want to.”

The Supreme Court and the *Batson* Rule

The all-white jury convicted the defendant, James Batson. He was sentenced to 20 years in prison. But Batson appealed. First to the Supreme Court of Kentucky, which decided against adopting Batson's proposed rule that peremptory challenges based on race are unconstitutional. The U.S. Supreme Court saw it differently.

The Court held that while criminal defendants do not have the right to a jury of a certain racial composition, they do have the constitutional guarantee, through the Equal Protection Clause, that the government will not exclude jurors from serving because of their race. *Batson v. Kentucky*, 476 U.S. 79, 85–86 (1986). The Court held that allowing people to be excluded from juries because of their race harms not only the defendant; it also undermines the public's confidence in the fairness of the justice system itself. *Id.* at 87.

To address this problem, the Court announced the three-step *Batson* rule.

Step one: The defendant must clear the hurdle of showing an inference of a discriminatory purpose. A defendant could meet



this requirement by showing a pattern of strikes against Black jurors. *Id.* at 97. In addition, the Court stated that an attorney’s questions and statements during voir dire may show discriminatory purpose. The Court was confident that trial judges would be able to decide whether the facts and circumstances created a prima facie case.

To show a pattern, an attorney must wait until opposing counsel strikes at least two potential jurors of color from serving. In some jurisdictions, where there are fewer people of color in the jury pool, this requirement makes it difficult, if not impossible, to show a pattern. As to the second possible way of clearing this first hurdle, it is difficult to show an inference of discriminatory

purpose short of an attorney saying, “Black people shouldn’t be on juries.”

Step two: If the objecting party can convince the trial judge there is a prima facie showing of discriminatory intent, then the striking party must give a race-neutral reason for exercising the peremptory challenge. The Court made it clear that the following two explanations for using a peremptory challenge on a person of color will not defeat an objection. First, the striking party can’t simply say, “I did not use my peremptory because of the potential juror’s race.” *Id.* at 98. Similarly, the striking party can’t justify the peremptory challenge by saying that the prospective juror will be partial because the person is of the same race as the

Illustration by Stephanie Singleton

defendant. Short of providing one of those two responses, the requirement to state the race-neutral reason is not a high hurdle to clear. Indeed, the reasons given for excluding potential jurors of color from serving on juries are legion—e.g., the person has a child outside of marriage, receives state benefits, is not a native English speaker, or was sleeping or inattentive during jury selection. The list goes on. Shortly after *Batson* was decided, prosecutors began training one another on how to provide “race-neutral” reasons that would defeat a *Batson* challenge.

Step three: The party raising a *Batson* challenge has the burden of proving that the party using the peremptory challenge did so purposefully discriminating against the potential juror because of race. In other words, even after the party using the peremptory challenge has given a nondiscriminatory reason for excluding the potential juror, the opposing counsel must take the stance that the attorney is lying and excluded that person because of race. Moreover, for a *Batson* challenge to succeed, the trial judge must agree that the striking party was lying and that the person of color was excluded because of that person’s race. With that in mind, it is understandable, and frankly inevitable, that this is where *Batson* challenges fail.

As right as *Batson* was that people should not be excluded from juries because of their race, it was apparent even at the start that the three-step remedy the Court crafted probably wasn’t going to work.

Thurgood Marshall—the member of the Court most familiar with the issue of racial discrimination—while joining in the holding, noted that the Court’s “decision today will not end the racial discrimination that peremptories inject into the jury selection process.” *Id.* at 102–03. That, he contended, “can be accomplished only by eliminating peremptory challenges entirely.” *Id.* at 103.

Flaws in *Batson*’s Framework

Justice Marshall went on to explain the flaws in the *Batson* framework.

First, the defendant must clear the prima facie hurdle. As to showing a pattern of strikes against Black prospective jurors, Justice Marshall recognized that as long as the striking party kept peremptory challenges to some sort of acceptable level, e.g., two or three, they could be used in a discriminatory manner. *Id.* at 105. Indeed, in a jurisdiction like Washington, where there may only be one or two people of color in the jury pool, the *Batson* test is completely ineffective. If a party is unable to establish a “pattern,” the challenge ends right there.

Second, Justice Marshall recognized that trial judges would have the impossible task of determining an attorney’s intent for exercising the strike.

Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to

second-guess those reasons. How is the court to treat a prosecutor’s statement that he struck a juror because the juror had a son about the same age as defendant, or seemed “uncommunicative,” or “never cracked a smile” and, therefore “did not possess the sensitivities necessary to realistically look at the issues and decide the facts in this case”? If such easily generated explanations are sufficient to discharge the prosecutor’s obligations to justify his strikes on nonracial grounds, then the protection erected by the Court today may be illusory.

Id. at 106 (internal citations omitted).

Third, long before mainstream discussion of implicit and unconscious bias, Justice Marshall knew attorneys would exclude people because of their skin color without even realizing that is the reason. The unconscious biases that judges have compound this shortcoming in the *Batson* test.

Nor is outright prevarication by prosecutors the only danger here. “[It] is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal.” 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. A judge’s own conscious or unconscious racism may lead him to accept such an explanation as well supported.

Id. (internal citation omitted).

Justice Marshall was prescient. *Batson* doesn’t work. As Michigan State University law professors Catherine M. Grosso and Barbara O’Brien wrote, “[a]mong those who laud its mission, it seems that the only people not disappointed in *Batson* are those who never expected it to work in the first place.” 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 (2012). Their review noted a study in which North Carolina prosecutors used 60 percent of their peremptory challenges to strike Black jurors, who made up only 32 percent of potential jury members. *Id.* at 1539. The study found that defense attorneys used 87 percent of their strikes against white jurors, who made up 68 percent of the jury pool. *Id.*

A study by the Equal Justice Initiative (EJI) made similar findings. In a 2010 report, the EJI reviewed dozens of trial records and concluded, “There is no arena of public life . . . where racial discrimination is more widespread, apparent, and seemingly tolerated than in the selection of juries.” EQUAL JUSTICE INITIATIVE, *ILLEGAL RACE DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY* 4 (Aug. 2010).

Just as Justice Marshall predicted, the EJI found prosecutors routinely made unverifiable assertions about the demeanor of Black prospective jurors to justify peremptory challenges. For instance, lawyers frequently allege jurors are “inattentive.” *Id.* at 30. A “startlingly common” reason given for exclusion is alleged low intelligence. *Id.* at 17. The EJI concluded, “This problem has persisted for far too long, and respect for the law cannot be achieved until it is eliminated and equal justice for all becomes a reality.” *Id.* at 4.

And so, after nearly 30 years of seeing that *Batson* did little to curb all but the most egregious uses of race in jury selection, things have begun to change.

In 2013, the Washington Supreme Court considered a *Batson* challenge in *State v. Saintcalle*, 178 Wash. 2d 34 (2013). The prosecutor had used peremptory challenges to strike the only two prospective jurors of color from the panel. As to one, the prosecutor claimed, “she’s just not that intelligent—no offense.” As to the other, the prosecutor alleged the juror was “checked out” during jury selection even though she participated far more than any other juror. These “explanations” were consistent with those given in other Washington cases, consistent with those the EJI found were prevalent, and consistent with Justice Marshall’s warning in *Batson*.

The Washington Supreme Court held that nothing could be done about the problem under *Batson*. *Saintcalle*, 178 Wash. 2d at 58. Indeed, affirming trial court rulings denying *Batson* challenges was the norm in Washington: In more than 40 appeals, Washington appellate courts had *never* reversed a trial court’s denial of a *Batson* challenge. *Id.* at 45–46. The court recognized that racial discrimination remained rampant during the jury selection process and changes needed to be made.

However, we also take this opportunity to examine whether our *Batson* procedures are robust enough to effectively combat race discrimination in the selection of juries. We conclude that they are not. Twenty-six years after *Batson*, a growing body of evidence shows that racial discrimination remains rampant in jury selection. In part, this is because *Batson* recognizes only “purposeful discrimination,” whereas racism is often unintentional, institutional, or unconscious. We conclude that our *Batson* procedures must change and that we must strengthen *Batson* to recognize these more prevalent forms of discrimination.

Id. at 34–35.

Although not finding for the defendant, the court indicated there was a problem that needed to be solved and sought “[t]o enlist the best ideas from trial judges, trial lawyers, academics, and others to find the best alternative to the *Batson* analysis.” *Id.* at 52–53.

We were part of a group that began meeting in 2013 to see if we could do just that. Initially, we gathered a group of nearly 30

judges, criminal defense attorneys, academicians, and civil trial lawyers. By the time we finished some seven years later, there were just five of us.

Fixing the Problems

Even though we knew what the problem was, we first had to determine how best to fix it. Doing away with peremptory challenges altogether was ruled out early on because of strong opposition from several constituent organizations. The focus turned instead on how best to achieve a new test. Should we go through the legislature and seek a statutory fix, wait for the right appeal and seek to have the Washington Supreme Court adopt a new test based on the state constitution, or propose a new court rule? We chose the last option.

A new statute through the legislative process would be a lengthy attempt with too many points where a proposed bill could be killed. Waiting for the right case to come along to appeal is always problematic: There is uncertainty as to when the right case will come along and how the facts of that case may make any holding limited.

A new rule, adopted by the Washington Supreme Court, had none of these problems. Our group could craft what we thought the rule should look like, making it as ideal as possible. We could gather support for the rule throughout the legal community. We could speak with each state supreme court justice individually because, in the justices’ rule-making capacity, there were no ethical restrictions on discussing proposed rules. Finally, the court itself seemed to suggest this approach in the *Saintcalle* opinion.

We also had to consider what the rule would look like. We were given early advice by judges to make any proposed rule track the three-part *Batson* structure. Trial judges were accustomed to the *Batson* framework and would be more agreeable to a new rule if it followed along a familiar framework. Of course, even if we modeled the approach on *Batson*, we didn’t want to repeat its flaws.

Our group soon agreed that we wanted a rule that said that if there were any possibility that race was a factor in a peremptory challenge, that challenge would be disallowed. We knew racial discrimination exists within the legal system, just as it does in society at large. We knew there is both overt racism and implicit racism.

Taking these principles, we wanted a rule that would accomplish a few goals.

First, we wanted to eliminate *Batson*’s first step. Requiring a pattern had made *Batson* difficult to apply in jurisdictions where there were fewer people of color serving on juries, and in our view, this part of the test didn’t add anything. At best, it goes to the third part of the test—the discriminatory intent portion of *Batson*.

Still, keeping the basic framework of the *Batson* test required a first step. We made it simple and clear: Any party, and even the judge, can raise an objection to the use of a peremptory strike if it appears to the objecting party that race or ethnicity was part of the reason for the strike.

Our proposed second step tracked *Batson*, requiring the party using the peremptory challenge, after an objection is raised, to explain the reasons for the strike.

The third step is where we proposed significant changes.

Batson's major flaw is that it requires proof of an intentional discriminatory purpose. We wanted to eliminate that barrier because, as the *Saintcalle* court recognized, this standard does not reach unconscious or implicit bias. To eliminate the need to determine intent, we proposed a structure that is used when a party seeks to have a judge recuse: an appearance-of-fairness standard.

Accordingly, in crafting our proposed rule, we started with the premise that a peremptory challenge should not be allowed when someone looking at the strike could say that race was involved. Using that approach, an opposing attorney doesn't have to accuse, nor does the judge have to rule, that the attorney using the peremptory challenge did so with a discriminatory purpose. Instead, the standard is simply whether someone looking at the situation could say that race was a reason for the strike.

That led to the next major decision: Would the standard be that race *would* likely be viewed as the reason for the use of the strike—a fairly high bar? Or would the standard be lower—that race *could* likely be viewed as a factor in the use of the peremptory challenge?

Following our goal of eliminating race-based peremptory challenges, we decided that we wanted the rule to favor disallowing potentially discriminatory challenges. Thus, we proposed that if race *could* be viewed as a factor in the use of the peremptory challenge, then the use of the peremptory strike should be denied. The "would" standard was too close to *Batson*'s requirement of a showing of purposeful discrimination and would not have made a dent in the problem.

Our proposed rule also addressed many of the justifications commonly used to discriminate in jury selection. These fall into two broad categories: (1) negative experiences with the police or justice system and (2) demeanor-based justifications. As to the first category, prosecutors frequently justify excluding jurors of color based on their experiences of having been stopped by the police, having a relative in prison, or living in a "high crime" neighborhood. As a task force in Washington found, racial inequities "permeate" the criminal justice system. TASK FORCE ON RACE AND THE CRIMINAL JUSTICE SYSTEM, PRELIMINARY REPORT ON RACE AND WASHINGTON'S CRIMINAL JUSTICE SYSTEM (Mar.

SUA SPONTE

A Judge Comments

HON. GREGG COSTA

The author is a judge on the U.S. Court of Appeals for the Fifth Circuit.

Batson is broken. Thirty-five years in, racial discrimination still pervades jury selection. The court of appeals on which I serve, which includes the two states with the highest percentages of Black residents, has only twice found a *Batson* violation. Outside our circuit, things are much the same. According to a study aptly titled *Thirty Years of Disappointment*, as of 2016, North Carolina appellate courts had never found that a prosecutor violated *Batson*! So I laud efforts to find a better way to combat the persistent plague of discrimination in jury selection.

But half measures like Washington's General Rule 37 won't do. My experience in trying cases, then presiding over trials, and now reviewing them on appeal confirms that Justice Marshall was right: The only way to eliminate discrimination in the use of peremptory strikes is to eliminate peremptories.

Rule 37 correctly recognizes that the biggest impediment to a successful *Batson* challenge is the intentional discrimination

standard. But it is not just a matter of that standard's failure to capture unconscious bias. *Batson* has failed to capture even blatant intentional discrimination. Consider a case in which many of my colleagues refused to recognize discrimination despite overwhelming statistical (and other) evidence. The prosecution struck seven of the first eight Black venire members, yet accepted seven of the first eight whites; for the entire jury selection, the prosecution struck twice as many Black jurors as it accepted, while accepting four times as many whites as it struck. The chance that race-neutral strikes would result in that disparity? One in 100.

Why didn't the court recognize the discrimination those numbers revealed? As mathematically challenged as lawyers can be, more was at work. Judges don't like saying that lawyers discriminate. That aversion is unfortunate because it undermines the guarantee of equal protection, but it is understandable. Judges have relationships with lawyers who appear before them. In some jurisdictions, those lawyers are a source of votes and campaign funds. And judges favor collegial courtrooms free of personal criticisms. *Batson*'s failure to eradicate discrimination thus is largely a problem of judicial mentality and courage.

The unwillingness to recognize intentional discrimination also reflects a misunderstanding about that standard. Intention is not motive. A peremptory strike can violate *Batson* even if it isn't motivated by racial animus. A decision to strike jurors of a

2011). Thus, allowing peremptory strikes for these reasons simply perpetuates systemic discrimination. This type of reason, on its own, will not justify a peremptory challenge.

As to the second category, demeanor-based justifications, if a party believes a prospective juror is not paying attention, not responding intelligently, or nodding off, the party must alert the court to the issue at the time. No longer may allegations of improper demeanor be invoked after the fact to justify a peremptory challenge.

Building Support for a Rule Change

After many years of drafting and revising, we submitted our proposed rule to the Washington Supreme Court on July 29, 2016. We did gain the vocal support of some of our allies before we submitted the proposed rule. The Washington Defenders Association, the Washington Association of Criminal Defense Lawyers, and the Washington State Minority and Justice Commission all supported the basic concept. The court's rules committee, made up of five justices, makes an initial determination of whether a proposed rule has merit. If so, the court publishes the proposed rule for comment. We were elated when the proposal cleared that first hurdle, but our work wasn't done. The comments period would close on April 30, 2017, which meant we had just shy of six months to muster as much additional support as possible.

certain race may be a strategic choice rather than a racist one. As Georgetown's Paul Butler has explained, given well-known racial differences in how people view the criminal justice system, "[t]here are cases in which it would come close to legal malpractice for either the prosecutor or the defense to ignore race." Consider death penalty cases. Survey after survey shows that Black citizens are less supportive of capital punishment than white citizens. So in a capital case, a Black prosecutor might want to strike Black jurors, while a white defense lawyer might want to strike white jurors. Such strikes violate *Batson*—the lawyer is striking the juror because of race—but that doesn't mean the lawyer is racist. Yet, judges and lawyers seem to view *Batson* violations as charges of racism, a misperception that substantially contributes to *Batson*'s underenforcement.

Rule 37 may alleviate these related *Batson* problems—an unwillingness to attach stigma to lawyers and thinking the stigma is greater than it actually is. The rule requires only a showing that one "could" view race as contributing to the strike. But I'm skeptical. The notion that upholding a *Batson* challenge means the striking lawyer is racist is so ingrained that I doubt the lesser Rule 37 standard will capture what its framers hope, just as the *Batson* standard has hardly captured intentional discrimination. Rule 37 may root out more discrimination than *Batson*, but it is unlikely to come close to eliminating it.

As is true of any effort to make systemic change, especially a change that had not been made in any state, we knew that we would need support from every ally we could find. We started by talking with judges—a lot of them.

We met with individual justices of the supreme court. We spoke to the District and Municipal Court Judges Association Board of Governors. We gave our proposal to the Superior Court Judges Association. We presented to the appellate court judges. We presented at the statewide judicial meeting.

Our practice was if any group wanted to hear from us, we were there—any place, any time. We talked to groups and individuals in Seattle, where most of the state's legal community is found, and also throughout the state. We met with specialty bar associations such as the Loren Miller Bar Association, an affiliate of the National Bar Association; the Latina/o Bar Association of Washington; and the Asian Bar Association of Washington. We met with the Washington Association for Justice—the plaintiffs' bar. Many of those organizations came out in support of our proposed rule, usually criticizing it in some of its aspects but generally supporting the overall concept.

We reached out to the Washington Association of Prosecuting Attorneys, hoping that it would support the proposal or—at least—wouldn't be strongly against it. Ultimately, the association opposed the proposed rule.

There is a reform that would: eliminating peremptories. Why has this obvious solution not gained wider acceptance? Mostly, I think, because of something the supporters of Rule 37 saw in the opposition their more modest reform faced: Lawyers don't like changes that make lawyers less important. Lawyers believe they can use strikes to pick favorable juries; eliminating strikes removes that opportunity. There is another concern: Eliminating peremptories may result in more hung juries. And then there is Justice Holmes's observation that "[m]ost of the things we do, we do for no better reason than that our fathers have done them or our neighbors do them." Peremptories' common-law heritage dates back almost a thousand years to England (they were even used in Roman trials). Yet, in 1989, even England eliminated peremptories to ensure its juries would reflect the country's increasing diversity.

There is finally movement in that direction here. This year, Arizona became the first state to eliminate peremptories.

Perhaps the Washington experiment will prove more effective than I predict while also retaining the peremptories that lawyers love. But the surefire way to cleanse the stain of discrimination from our jury system is the full measure of eliminating peremptories. Only then will juries—the voice of "We the People" in our judiciary—reflect a cross-section of our communities. ■

We found out a lot too. Many trial lawyers didn't want any restrictions in their use of peremptory challenges and had a negative knee-jerk reaction to the proposed rule. When we reached out to gain support for the proposal, we were met with much hostility to any proposal that would limit the unfettered use of peremptory strikes. We would then remind practitioners that *Batson* was broken, and we could fix it either by limiting peremptory strikes or by eliminating them altogether. The prospect of losing peremptory strikes entirely ended up gaining us some unlikely allies.

As the Washington Supreme Court convened to consider the proposal, we felt that we had the broad support needed for passage and that the court would adopt the rule.

It didn't.

Batson's major flaw is that it requires proof of an intentional discriminatory purpose.

After the vote not to adopt the rule, Chief Justice Mary Fairhurst announced that the court would form a working group "in light of the comments received to carefully examine the proposed new rule with the goal of finding a meaningful, workable approach to eliminating bias in jury selection."

The five of us remaining from the original group that was organized after the *Saintcalle* decision were invited to participate, and three of us served on the court's new working group. The working group also included four trial judges, a prosecuting attorney, a superior court jury administrator, and an administrator of courts of limited jurisdiction.

The working group faced the same issues that the original group had dealt with during the previous four years: Should the rule be extended to gender? Shouldn't there be some showing that racial bias was indeed a cause of the peremptory challenge being used? We were told by at least one judge that we needed to compromise to achieve any relief from race-based uses of the peremptory strike. One judge said, "The perfect is the enemy of the good." We thought: "Good is the enemy of great." After much internal debate, we weren't going to compromise. We would rather face the prospect of failing to get any rule adopted, even after over four years of work, than to get a rule that only marginally improved the system.

In the end, the working group was divided on two major issues: the "could view" versus "would view" standard and the inclusion of the presumptively invalid justifications for peremptory strikes. The working group submitted a report to the court with two competing proposals. Individual group members and coalitions wrote statements in support of their favored proposals, and these statements were included in the report.

On April 5, 2018, the Washington Supreme Court announced that it would be adopting the more protective of the two proposed rules as General Rule 37. The one we had spent the last five years advocating had been adopted. All nine justices signed on to the adoption of the rule.

Instead of the *Batson* first step requiring a *prima facie* showing of discriminatory purpose, the new first step simply requires an objecting party to state "General Rule 37 objection." As with *Batson*, the party using the peremptory challenge then has to state the reasons the strike was used. The adopted version of the key change to the *Batson* standard states:

(e) Determination. The court shall then evaluate the reasons given to justify the peremptory challenge in light of the totality of circumstances. If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. The court need not find purposeful discrimination to deny the peremptory challenge. The court should explain its ruling on the record. . . .

Meaningful change had come.

There are no hard data yet that we know about, but there is anecdotal evidence of more diverse juries in Washington state courts. Judges are sustaining General Rule 37 objections. Several appellate decisions have enforced General Rule 37's broad mandate. Trial lawyers appear to be more aware of their implicit biases and more careful in exercising their peremptory challenges.

Change hasn't been limited to Washington. A handful of states have now considered proposals to fix *Batson's* shortcomings, with mixed results. California passed a law modeled on General Rule 37. Colorado rejected a similar rule proposal. Arizona eliminated peremptory challenges entirely by court rule. Other states are considering the issue as of this writing.

Still, there is much work to be done. We have no illusions that General Rule 37 is going to eliminate racial bias in jury selection, much less have a huge impact on the systemic racial bias that exists within our legal system. But it is a step. It will make it more difficult for parties, through their attorneys, to exclude people from serving on juries simply because of the color of their skin. ■