7.5 Beyond Litigation

Criticism of the *Batson* framework has been widespread. *See, e.g.*, *Rice v. Collins*, 546 U.S. 333, 343 (Breyer, J., concurring); Leonard L. Cavise, *The* Batson *Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 199 WIS. L. REV. 501 (1999); Antony Page, Batson's *Blind-Spot: Unconscious Stereotyping and The Peremptory Challenge*, 85 B.U. L. REV. 155, 161 (2005); 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) (noting widespread disappointment).

Some jurists have expressed concern about detecting discrimination in jury selection because it commonly occurs at an unconscious level and is therefore difficult to identify. *See, e.g.*, *Rice v. Collins*, 546 U.S. 333, 343 (2006) (Breyer, J., concurring) (observing that "sometimes, no one, not even the lawyer herself, can be certain whether a decision to exercise a peremptory challenge rests upon an impermissible racial, religious, gender-based, or ethnic stereotype," and wondering, under such circumstances, "[h]ow can trial judges second-guess an instinctive judgment the underlying basis for which may be a form of stereotyping invisible even to the prosecutor?"). For this reason, some have proposed eliminating peremptory strikes altogether. *See, e.g.*, *Batson v. Kentucky,* 476 U.S. 79 at 108 (Marshall, J., concurring) (proposing eliminating peremptory strikes altogether); *Rice v. Collins*, 546 U.S. 333 at 343–44 (Breyer, J., concurring) (joining in Justice Marshall's call to abolish the peremptory strike); *State v. Saintcalle*, 309 P.3d 326, 350 (Wash. 2013) (Gonzalez, J., concurring) (identifying several shortcomings of the *Batson* framework, including the difficulty facing trial judges in determining whether a strike is discriminatory, and calling for the elimination of the peremptory strike in Washington state). The proposal to eliminate peremptory challenges suffers from problems of its own, including the disadvantage to defendants of losing the opportunity to strike jurors who cannot be struck for cause but who may have difficulty accepting the defendant's theory of the case. Eliminating peremptory challenges also may have little support among prosecutors or defense attorneys, making it unlikely to occur.

In addition to vigorously enforcing the rights afforded by *Batson*, other measures have been suggested as ways to reduce the potential for racial bias in jury selection and to strengthen the judiciary's ability to respond to bias, including:

- Videotaping of voir dire, so that demeanor-based explanations for peremptory strikes can be assessed meaningfully.
- Trainings for court actors on the influence of implicit bias on decision-making.
- Explicit recognition that peremptory strikes motivated by implicit biases violate equal protection within the meaning of *Batson*.
- Disciplinary action by the State Bar or court against attorneys who engage in racial discrimination in jury selection. EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 7 (2010).

- Engagement with civil attorneys who share concerns about racial discrimination in jury selection, as *Batson* challenges can be raised in civil as well as criminal cases.
- State legislation providing "remedies to people called for jury service who are illegally excluded on the basis of race." *Id*.
- Examination of the role implicit biases play in one's own decision-making. *See, e.g.,* Andrea D. Lyon, *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 SEATTLE U. L. REV. 755, 765 (2012) (because defense attorneys mostly represent non-White clients, there is a tendency to "falsely assume that we are less likely to have racial bias").
- Investigation of patterns of discrimination by the Justice Department under 18 U.S.C. § 243, which prohibits racial discrimination in jury selection and imposes civil penalties for violations.
- Supplemental state law procedures to strengthen *Batson*. For example, in Florida, prosecutors must provide a race-neutral justification for a challenged strike any time a defendant makes a timely challenge to the strike of a potential juror belonging to a distinct racial group; the defendant does not need to establish a prima facie case of discrimination at step one. *Melbourne v. State*, 679 So. 2d 759, 764 n.5 (Fla. 1996) (explaining that a prior case "eliminated the requirement that the opponent of the strike make a prima facie showing of racial discrimination"). Also, some Florida decisions have held that a prosecutor's race neutral justification will be accepted only where supported by the record. *See, e.g., State v. Slappy*, 522 So. 2d 18 (Fla. 1988) ("when the state engages in a pattern of excluding a minority without apparent reason, the state must be prepared to support its explanations with neutral reasons based on answers provided at voir dire or otherwise disclosed on the record itself"); *Reeves v. State,* 632 So. 2d 702 (Fla. Dist. Ct. App. 1994) (where the State defended its peremptory strikes of two Black employees of the Department of Health and Rehabilitative Services by stating that the employees would be hostile to the prosecution, but the potential jurors were not questioned about their feelings toward the prosecutor's office, the strike justification was not supported by the record and the strikes were therefore impermissible); *see also* EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 23 (2010) (citing *Cobb v. State*, 825 So. 2d 1080 (Fla. Dist. Ct. App. 2002)).