

1-1-2013

# Beyond *Batson's* Scrutiny: A Preliminary Look at Racial Disparities in Prosecutorial Preemptory Strikes Following the Passage of the North Carolina Racial Justice Act

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## Recommended Citation

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 UC Davis L. Rev. 1623 (2013).

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# Beyond *Batson's* Scrutiny: A Preliminary Look at Racial Disparities in Prosecutorial Preemptory Strikes Following the Passage of the North Carolina Racial Justice Act

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

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\*\* Copyright © 2013 Catherine M. Grosso. Catherine Grosso is an associate professor of law at Michigan State University College of Law. This article would not have been possible without the ongoing data collection assistance by capital defense attorneys in North Carolina. Their unwavering support for precise reliable empirical research on the role of race in capital punishment inspires us to continue. As always, our research would not be possible without the outstanding research support by our project manager Abijah Taylor and our research librarians.

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## INTRODUCTION

The exercise of peremptory challenges remains the least regulated area of jury selection, largely left to the wisdom or whimsy of each litigator. One need not look back far to find a time when litigators brazenly used peremptory strikes to prevent black citizens from serving on juries.<sup>1</sup> In fact, all-white juries remain common in 2012, even in jurisdictions with a substantial African-American population.<sup>2</sup> Our paper explores whether the North Carolina Racial Justice Act might provide a better tool to mitigate the tenacious influence of race in the selection of juries.

The U.S. Supreme Court has grappled with the pernicious role of race in jury selection repeatedly since at least 1880.<sup>3</sup> Indeed, even while characterizing the peremptory challenge as a tool vital to the accused — in that it allows defendants a measure of independent control over who ultimately judges them — the 1965 *Swain* Court held that a prosecutor's systematic exclusion of black jurors was “at war with our basic concepts of a democratic society and representative government.”<sup>4</sup> Jurors, the Court asserted, “should be selected as individuals, on the basis of individual qualifications, and not as members of a race.”<sup>5</sup>

In 1986, in *Batson v. Kentucky*, the Supreme Court set forth a new method in its continuing effort to block race-based peremptory challenges.<sup>6</sup> More than twenty-five years later, a widespread consensus has emerged among judges, practitioners, and academics that this method is “indeterminate, unprincipled, and generally ineffective.”<sup>7</sup>

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<sup>1</sup> In 2010, the Equal Justice Initiative (EJI) released a report documenting ongoing patterns of racially disparate strikes and underrepresentation of minorities in capital trials in Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, South Carolina, and Tennessee. See EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 11-13 (2010), available at <http://www.eji.org/files/EJI%20Race%20and%20Jury%20Report.pdf?q=ejifiles/EJI%20Race%20and%20Jury%20Report.pdf>.

<sup>2</sup> See, e.g., *id.* at 14-27 (noting that numerous jurisdictions lack effective black representation on juries even though black citizens comprise over twenty percent of the population in these areas).

<sup>3</sup> See *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879) (holding that exclusion of blacks from juries because of their race violated the Equal Protection Clause); see also *Batson v. Kentucky*, 476 U.S. 79, 85 (1986); *Duren v. Missouri*, 439 U.S. 357, 363-64 (1979); *Casteneda v. Partida*, 430 U.S. 482, 492 (1977); *Taylor v. Louisiana*, 419 U.S. 522, 532 (1975); *Swain v. Alabama*, 380 U.S. 202, 203-04 (1965); *Glasser v. United States*, 315 U.S. 60, 86 (1942).

<sup>4</sup> *Swain*, 380 U.S. at 204 (quoting *Smith v. Texas*, 311 U.S. 128, 130 (1940)).

<sup>5</sup> *Id.* (quoting *Cassell v. Texas*, 339 U.S. 282, 286 (1950)).

<sup>6</sup> 476 U.S. 79 (1986). The three-step *Batson* process is described in detail later in the paper. See *infra* text accompanying notes 36-49.

<sup>7</sup> David C. Baldus et al., *Statistical Proof of Racial Discrimination in the Use of*

Legislators in North Carolina's General Assembly studied this issue and recognized the limitations of *Batson's* inadequate scrutiny as practiced in North Carolina.<sup>8</sup> This recognition prompted them to create a unique statutory claim based on the influence of race in decisions to exercise peremptory challenges as part of the North Carolina Racial Justice Act of 2009 (RJA).<sup>9</sup>

The North Carolina General Assembly boldly created an entirely new means to detect and purge the influence of race on the exercise of peremptory challenges. The RJA initially authorized claimants to use statistical or other evidence to prove discrimination by showing race influenced peremptory challenges in the county, prosecutorial district, Superior Court division, or the state at the time of the trial.<sup>10</sup> Even after amendments in 2012 narrowed the geographic scope to the county or district,<sup>11</sup> claimants may use the tools of statistical analysis to identify bias in and across cases.<sup>12</sup> While some recent Supreme Court jurisprudence suggests that this kind of systemic analyses are relevant to *Batson* claims, no legislature or court before had so clearly endorsed this approach.<sup>13</sup>

Our paper evaluates whether, at first review, the RJA's method succeeds where *Batson* failed and, thereby, suggests useful amendments to the *Batson* regime. Although it is difficult to gauge fully the effectiveness of the RJA so soon after its passage, there are

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*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 (2012) [hereinafter *Statistical Proof*] (collecting cases and articles researching this conclusion).

<sup>8</sup> See Amanda S. Hitchcock, Recent Developments, "Deference Does Not by Definition Preclude Relief": *The Impact of Miller-El v. Dretke on Batson Review in North Carolina Capital Appeals*, 84 N.C. L. REV. 1328, 1344-55 (2006) (reviewing North Carolina Supreme Court's highly deferential approach to reviewing *Batson* claims in capital cases); see also Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 LAW & HUM. BEHAV. 695, 698-99 (1999) (studying jury selection in one North Carolina county).

<sup>9</sup> 2009 N.C. Sess. Laws 464, § 15A-2011(b)(2) (codified as amended at N.C. GEN. STAT. § 15A-2011(b)(2) (2012) (since amended in part)).

<sup>10</sup> *Id.*

<sup>11</sup> 2012 N.C. Sess. Laws 136, § 15A-2011(c).

<sup>12</sup> N.C. GEN. STAT. § 15A-2011(d) (2012) (providing that "[e]vidence relevant to establish a finding that race was a significant factor in decisions to seek or impose the sentence of death in the county or prosecutorial district at the time the death sentence was sought or imposed may include statistical evidence derived from the county or prosecutorial district where the defendant was sentenced to death . . .").

<sup>13</sup> See, e.g., *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) (noting that the issuance of a certificate of appealability can be supported by any evidence demonstrating that the peremptory strikes in the final analysis were race based).

reasons to be optimistic. The RJA introduces a qualitatively different kind of accountability on lawyers exercising peremptory strikes — one where all of the decisions in the processes of selecting a jury can be brought to bear on the analysis. As such, the *entire* process of selection comes under review. Psychologists who study the effectiveness of different kinds of accountability have suggested that focusing on the decision making process as a whole, rather than the outcome alone, can broaden the impact of accountability on behavior.<sup>14</sup> The RJA also formally created a space to talk about race and criminal justice both in the community and in the courtroom.<sup>15</sup> An additional body of research has demonstrated that making race salient to decision makers can limit the influence of race on decision making.<sup>16</sup> Based on this research, we hypothesize that capital cases litigated after the passage of the RJA would show less disparity in strikes against qualified black venire members compared to venire members of other races.

This paper builds on our 2011 study on the role of race in prosecutors' exercise of peremptory challenges in capital cases in North Carolina between 1990 and 2010.<sup>17</sup> The 2011 study found that black qualified jurors consistently faced a significantly higher risk of strike than all other qualified jurors.<sup>18</sup> This disparity remained consistent over time and location.<sup>19</sup> The disparity also remained theoretically and statistically significant when we controlled for information about qualified jurors that potentially bore on the decision to strike them.<sup>20</sup> More than 150 capital defendants have submitted affidavits based on the results of our 2011 study in support of RJA jury selection claims.<sup>21</sup>

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<sup>14</sup> See Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255, 258 (1999).

<sup>15</sup> See Barbara O'Brien & Catherine Grosso, *Confronting Race: How a Confluence of Social Movements Convinced North Carolina to Go Where the McCleskey Court Wouldn't*, 2011 MICH. ST. L. REV. 463, 495-98 (2011).

<sup>16</sup> See Samuel R. Sommers & Phoebe C. Ellsworth, *Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1367, 1376-78 (2000) [hereinafter *Race in the Courtroom*]; Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201, 221 (2001) [hereinafter *White Juror Bias*].

<sup>17</sup> Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Capital Jury Selection in 173 Post-Batson North Carolina Capital Trials*, 97 IOWA L. REV. 1531, 1533 (2012).

<sup>18</sup> *Id.* at 1548-50 (presenting the study findings).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 1550-51.

<sup>21</sup> The first claimant to advance to a hearing, Marcus Robinson, succeeded in his

Reaching beyond the claims of individual litigants, our study provides a damning review of the *Batson* regime. All 173 jury selections included in our 2011 study took place under *Batson*, yet race was clearly important to strike decisions. Our findings converge with a large literature in both law reviews and social science journals demonstrating that race continues to play a role in jury selection notwithstanding *Batson*'s prohibition.<sup>22</sup> What remains to be seen, however, is whether the additional measures for detecting and remedying bias under the RJA might prove more effective. Seven capital cases have resulted in a death sentence since the passage of the RJA.<sup>23</sup> This paper suggests that the RJA may provide a better approach, but also makes clear that additional research is warranted.<sup>24</sup>

The first section of our paper reviews research on the importance of racial diversity to juries, the operation and limitations of the *Batson* regime, and the key changes the RJA represents. The second section presents our analysis of the strike decisions in the seven capital cases that resulted in death sentences since the RJA's passage and compares the racial disparities evident in these decisions with those prior to the passage of the act. The third section presents two lines of psychological research suggesting why the RJA may be more effective than *Batson* in preventing discrimination. Finally, we consider the limitations of this preliminary project and possible directions for future research.

## I. RACE BIAS, RACIAL DIVERSITY, AND JURY SELECTION

The persistent role of racial bias in jury selection harms the judicial system in multiple ways. First and foremost, the experience of being

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claim. The court issued its decision on April 20, 2012. Order Granting Motion for Appropriate Relief at 44-46, *North Carolina v. Robinson*, No. 91 CRS 23143 (Sup. Ct. N.C. Apr. 20, 2012), available at [http://www.aclu.org/files/assets/marcus\\_robinson\\_order.pdf](http://www.aclu.org/files/assets/marcus_robinson_order.pdf). Three more claimants succeeded on December 13, 2012. Order Granting Motions for Appropriate Relief at 2, *North Carolina v. Golphin et al.*, No. 97 CRS 47314-15 (Sup. Ct. N.C. Dec. 13, 2012), available at <http://www.law.msu.edu/racial-justice/Golphin-et-al-RJA-Order.pdf>.

<sup>22</sup> See generally 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 (2001) (reporting the role of race in the exercise of peremptory challenges in Philadelphia County); Rose, *supra* note 8 (reporting the role of race in the exercise of peremptory challenges in one North Carolina county); Billie M. Turner et al., *Race and Peremptory Challenges During Voir Dire: Do Prosecution and Defense Agree?*, 14 J. CRIM. JUST. 61 (1986) (reporting the role of race in the exercise of peremptory challenges in Calcasieu Parish, Louisiana).

<sup>23</sup> Two of those cases were included in the 2011 study.

<sup>24</sup> See *infra* Part II.B.

excluded based on race and racial stereotypes harms excluded jurors individually. As Bryan Stevenson and his colleagues documented, “‘race-neutral’ explanations and the tolerance of racial bias by court officials have made jury selection for people of color a hazardous venture, where the sting of exclusion often is accompanied by painful insults and injurious commentary.”<sup>25</sup>

Second, 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.<sup>26</sup> Broad participation in the judicial process legitimizes the criminal justice system in the public's view.<sup>27</sup> Including a range of people and perspectives on a jury may increase the likelihood that the public will accept a particular verdict as legitimate.<sup>28</sup> Scholars have documented a strong relation between perceived fairness and perceptions of legitimacy.<sup>29</sup>

Finally, scholars have also noted that jury heterogeneity may alter the fact finding process by diversifying the perspectives and values included in the decision making process, and that this diversity may

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<sup>25</sup> See Bryan Stevenson, *Illegal Racial Discrimination in Jury Selection*, 37 FALL HUM. RTS. 5, 5 (2010).

<sup>26</sup> See Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041, 1045 (1995) [hereinafter *Beyond Gender*]; Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 727 (1992).

<sup>27</sup> See Jeffrey S. Brand, *The Supreme Court, Equal Protection and Jury Selection: Denying that Race Still Matters*, 1994 WIS. L. REV. 511, 518-20 (1994); Shari S. Diamond et al., *Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge*, 6 J. EMPIRICAL LEGAL STUD. 425, 426 (2009); Leslie Ellis & Shari S. Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.-KENT L. REV. 1033, 1040 (2003); Hiroshi Fukurai & Darryl Davies, *Affirmative Action in Jury Selection: Racially Representative Juries, Racial Quotas, and Affirmative Juries of the Hennepin Model and the Jury de Medietate Linguae*, 4 VA. J. SOC. POL'Y & L. 645, 645-46 (1997); Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 871 (1997); Nancy J. King, *The Effects of Race-Conscious Jury Selection on Public Confidence in the Fairness of Jury Proceedings: An Empirical Puzzle*, 31 AM. CRIM. L. REV. 1177, 1182-86 (1994); Marder, *Beyond Gender*, *supra* note 26, at 1045; Deborah A. Ramirez, *Affirmative Jury Selection: A Proposal to Advance Both the Deliberative Ideal and Jury Diversity*, 1998 U. CHI. LEGAL F. 161, 164-66 (1998); Underwood, *supra* note 26, at 727; Harold A. McDougall, Note, *The Case for Black Juries*, 79 YALE L.J. 531, 531 (1970).

<sup>28</sup> See Ellis & Diamond, *supra* note 27, at 1049; Marder, *Beyond Gender*, *supra* note 26, at 1045; Nancy S. Marder, *Juries, Justice & Multiculturalism*, 75 S. CAL. L. REV. 659, 661 (2002).

<sup>29</sup> See Ellis & Diamond, *supra* note 27, at 1040; Robert J. MacCoun & Tom R. Tyler, *The Basis of Citizens' Perceptions of the Criminal Jury: Procedural Fairness, Accuracy, and Efficiency*, 12 LAW & HUM. BEHAV. 333, 349-51 (1988).

improve the reliability of verdicts.<sup>30</sup> Undoubtedly, individual jurors bring their personal biases with them into the courtroom. Yet it is possible to form an impartial jury by including a variety of backgrounds and experiences.<sup>31</sup> For example, one area of research suggests that avoiding the selection of all-white juries may mitigate the risk of certain white juror biases.<sup>32</sup> This benefit appears most clearly in cases where race is not expressly at issue, and thus racial bias is more likely to be implicit and go unchallenged.<sup>33</sup> Related to this finding is the argument that the presence of multiple and diverse groups with multiple and diverse biases may minimize the impact of affinity biases in group decision making.<sup>34</sup>

Eliminating the influence of race on jury selection would benefit our society at many levels. Recognizing how hard this is to achieve under the current system, however, many have called for the elimination of peremptory challenges altogether.<sup>35</sup>

#### A. *The Emergence of the Batson Regime*

As noted above, the Supreme Court decided *Batson v. Kentucky* after decades of grappling with barriers to racial diversity in juries.<sup>36</sup> In

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<sup>30</sup> See Ellis & Diamond, *supra* note 27, at 1049; Phoebe C. Ellsworth, *Are Twelve Heads Better than One?*, 52 LAW & CONTEMP. PROBS. 205, 205-06 (1989); Marder, *Beyond Gender*, *supra* note 26, at 1044; Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597, 606-08 (2006); Hans Zeisel & Shari Seidman Diamond, *The Jury Selection in the Mitchell-Stans Conspiracy Trial*, 1976 L. & SOC. INQUIRY 1, 173-74 (1976); McDougall, *supra* note 27, at 532.

<sup>31</sup> See Ellis & Diamond, *supra* note 27, at 1041-42.

<sup>32</sup> See Sommers, *supra* note 30, at 606-08.

<sup>33</sup> Sommers & Ellsworth, *Race in the Courtroom*, *supra* note 16, at 1376-78; Sommers & Ellsworth, *White Juror Bias*, *supra* note 16, at 221.

<sup>34</sup> Anthony L. Antonio et al., *Effects of Racial Diversity on Complex Thinking in College Students*, 15 PSYCHOL. SCIENCE 507, 509 (2004); J.L. Bernard, *Interaction Between the Race of the Defendant and That of Jurors in Determining Verdicts*, 5 LAW & PSYCHOL. REV. 103, 109-10 (1979); Zeisel & Diamond, *supra* note 30, at 174.

<sup>35</sup> See, e.g., 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, 1106-08 (2011) (collecting critics).

<sup>36</sup> *Duren v. Missouri*, 439 U.S. 357, 367-68 (1979) (noting jury selection cannot "result in the disproportionate exclusion of a distinctive group"); *Castaneda v. Partida*, 430 U.S. 482, 492-93 (1977) (discussing the importance of representative juries); *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (juries exist "to guard against the exercise of arbitrary power"); *Swain v. Alabama*, 380 U.S. 202, 204-05 (1965); *Glasser v. United States*, 315 U.S. 60, 86 (1942) (juries must not be "the organ of any special group or class").

*Batson*, the Court again recognized that purposefully excluding people from jury service based on their race undermines public confidence in our justice system.<sup>37</sup>

The *Batson* regime adopts three steps borrowed from employment discrimination litigation.<sup>38</sup> In the first step, the moving party carries the burden to establish a prima facie case of race discrimination.<sup>39</sup> If a prima facie case is established, in the second step, the prosecution must provide evidence that the challenged strike had a legitimate, nondiscriminatory basis.<sup>40</sup> The proffered reason need not be "persuasive, or even plausible,"<sup>41</sup> but merely facially valid.<sup>42</sup> In the final step, the defendant must prove that the explanation offered by the prosecution was pretextual, masking race-based motivations.<sup>43</sup> In assessing the credibility of the proffered justification, the court may consider its factual basis, the prosecutor's questioning patterns, or whether similar facts applied equally to jurors of other races who were not struck.<sup>44</sup> Many courts focus narrowly on an individual potential juror in an individual case in making this determination.<sup>45</sup>

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<sup>37</sup> See *Batson v. Kentucky*, 476 U.S. 79, 87-88 (1986). The Court later clarified that excluding jurors because of their race harmed not only the defendant, but the wrongly excluded jurors as well. See *Powers v. Ohio*, 499 U.S. 400, 406-07 (1991). Further, it clarified that defense counsel faced the same limitations as the prosecution. See *Georgia v. McCollum*, 505 U.S. 42, 49-50 (1992). The Supreme Court has extended the doctrine to prohibit gender-based strikes and some lower courts have prohibited strikes based on religious affiliation. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130-31 (1994); see, e.g., *United States v. Brown*, 352 F.3d 654, 666-69 (2d Cir. 2003) (holding that peremptory challenges based on religious affiliation violate the Equal Protection Clause); Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 88 GEO. L.J. 945, 987 (1997-98) (discussing how a state court refused to extend *Batson* to challenges based on religion).

<sup>38</sup> *Batson*, 476 U.S. at 96-98; see also Baldus et al., *Statistical Proof*, *supra* note 7, at 1430 (explaining and documenting the employment discrimination connection).

<sup>39</sup> *Batson*, 476 U.S. at 96-97. For simplicity, this explanation assumes a criminal defendant raised the *Batson* challenge and the prosecution is responding to the challenge.

<sup>40</sup> *Id.* at 97-98.

<sup>41</sup> *Purkett v. Elem*, 514 U.S. 765, 767-68 (1995).

<sup>42</sup> *Hernandez v. New York*, 500 U.S. 352, 360 (1991).

<sup>43</sup> See *Batson*, 476 U.S. at 98; see also *Johnson v. California*, 545 U.S. 162, 170-71 (2005).

<sup>44</sup> See generally *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008) (stating that a trial judge should assess the factual basis for the proffered reason for the strike in determining whether it is pretextual); *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005) (stating that "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step").

<sup>45</sup> Baldus et al., *Statistical Proof*, *supra* note 7, at 1431 & n.19 ("Some have made similar efforts to reduce the *Batson* analysis to a series of individual disparate

Courts commonly accept reasons proffered to justify challenged strikes based on little more than stereotyping and guesswork.<sup>46</sup> Kenneth Melilli analyzed all published *Batson* decisions from 1986 to 1993 and concluded that proffered explanations were often based on stereotypes.<sup>47</sup> Jeffrey Beilin and Junichi Semitsu surveyed all 269 published and unpublished federal decisions from 2000 to 2009 that reviewed state or federal trial courts' *Batson* decisions.<sup>48</sup> They reported that their "most revealing discovery was the substantial list of acceptable reasons that could conceivably implicate a juror's likelihood of being impartial but were likely to disproportionately impact specific racial or ethnic groups."<sup>49</sup>

Our earlier study provided only the latest evidence that the regime largely fails to protect prospective jurors from discrimination.<sup>50</sup> We found that although the reasons prosecutors commonly proffer to justify strikes do predict strike decisions, prosecutors do not apply those factors consistently across people of different races.<sup>51</sup> For instance, prosecutors are more likely to strike a juror of any race who expresses ambivalence about the death penalty or who has a criminal history — commonly cited reasons for strikes. But even among jurors

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treatment cases, i.e., one such analysis for each venire member, with each defendant limited strictly to the facts of his or her case."). Recent Supreme Court jurisprudence squarely rejects this approach, but it is not yet clear that this rejection has changed practice. See *id.* at 1431 & n.20 (citing *Miller-El v. Cockrell*, 537 U.S. 322, 340-41 (2003)). For a review of *Batson* cases and the reasons courts typically deny *Batson* claims, see generally Bellin & Semitsu, *supra* note 35, at 1113 (discussing how courts often reject *Batson* claims when there is no attorney misconduct).

<sup>46</sup> Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 484-502 (1996); see also Bellin & Semitsu, *supra* note 35, at 1116-20 (noting that courts often accept justifications for challenges based on gut feelings and little supporting evidence). Another study of appellate opinions focused on *Batson* challenges. This study noted that most litigants lose *Batson* appeals and that most of the venire members reviewed in *Batson* challenges were black. See Shaun L. Gabbidon et al., *Race-Based Peremptory Challenges: An Empirical Analysis of Litigation from the U.S. Court of Appeals, 2002-2006*, 33 AM. J. CRIM. JUST. 59, 66 (2008).

<sup>47</sup> Melilli, *supra* note 46, at 487, 497 tbl. III-R (noting that 52.48% of the explanations involved group stereotypes); *id.* at 498 tbl. III-S (listing the group stereotypes employed and the frequency with which they were employed).

<sup>48</sup> Bellin & Semitsu, *supra* note 35, at 1092.

<sup>49</sup> *Id.* at 1092, 1096. The authors noted, for example, that overrepresentation of black males in prison and the finding that 32% of black men are likely to be imprisoned at least once during their lifetime (compared to much lower rates for white men, for example) suggest that "striking all persons with a relative who is or has been in prison will disproportionately exclude minority venire persons." *Id.* at 1097.

<sup>50</sup> See Grosso & O'Brien, *supra* note 17, at 1550-52.

<sup>51</sup> *Id.*

with these characteristics, we found substantial racial disparities in whom they struck.<sup>52</sup>

### B. *The Racial Justice Act: A Different Tact*

In 2012, a trial court in North Carolina held two evidentiary hearings on claims by four capital defendants that race was a significant factor in the exercise of peremptory challenges.<sup>53</sup> These proceedings provide the first opportunity to observe the RJA regime in action.<sup>54</sup>

The RJA expressly deems a broad range of evidence relevant by allowing claimants to prove their cases using evidence that “may include but not is limited to, sworn testimony of attorneys, prosecutors, law enforcement officers, jurors, or others involved in the criminal justice system.”<sup>55</sup> This is particularly unique with respect to the use of statistical evidence. Criminal courts have been leery of statistical proof of discrimination.<sup>56</sup>

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<sup>52</sup> *Id.* Among nonblack potential jurors who expressed hesitation about imposing the death penalty, prosecutors passed (that is, declined to strike) 26.4%. In contrast, prosecutors passed only 9.7% of black potential jurors who expressed hesitation. Likewise, prosecutors passed 63.8% of nonblack potential jurors who had been accused of a crime, but passed only 36.7% of their black counterparts.

<sup>53</sup> For the first proceeding, see Order Granting Motion for Appropriate Relief at 1, *North Carolina v. Robinson*, No. 91 CRS 23143 (Sup. Ct. N.C. Apr. 10, 2012), available at [http://www.aclu.org/files/assets/marcus\\_robinson\\_order.pdf](http://www.aclu.org/files/assets/marcus_robinson_order.pdf). For the second, see Order Granting Motion for Appropriate Relief at 1, *North Carolina v. Golphin, et al.*, No. 97 CRS 47314-15 (Sup. Ct. N.C. Dec. 13, 2012), available at <http://www.law.msu.edu/racial-justice/Golphin-et-al-RJA-Order.pdf>.

<sup>54</sup> One issue for these claimants was the scope of their claims. The 2009 RJA created possible relief from a death sentence for any claimant who could show that race was a significant factor in the exercise of peremptory challenges in their cases “[i]n the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed.” See N.C. GEN. STAT. § 15A-2010 (2012) (creating a cause of action if the court finds race was a significant factor in the prosecutor’s decision to seek or impose a death sentence). The 2012 amendments eliminated the division and statewide claims, but maintained the focus on system-wide analyses. 2012 N.C. Sess. Laws 136.

<sup>55</sup> See N.C. GEN. STAT. § 15A-2011(d) (2012).

<sup>56</sup> See *Ballew v. Georgia*, 435 U.S. 223, 246 (1978) (Powell, J., concurring in judgment) (criticizing reliance on “numerology derived from statistical studies” in assessing the adequacy of a five-person jury); Baldus et al., *Statistical Proof*, *supra* note 7, at 1434 n.37 (2012) (collecting cases in which courts restricted its *Batson* inquiry solely to strikes in the case at hand); see also Stephen Breyer, *Introduction* in FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 1, 4 (3d ed. 2011), available at [http://www.au.af.mil/au/awc/awcgate/fjc/manual\\_sci\\_evidence.pdf](http://www.au.af.mil/au/awc/awcgate/fjc/manual_sci_evidence.pdf) (“[M]ost judges lack the scientific training that might facilitate the evaluation of scientific claims or the evaluation of expert witnesses who make such claims.”).

The 2012 RJA claimants introduced our 2011 study as the primary evidence in support of their claims.<sup>57</sup> One of the authors, Professor O'Brien, testified in detail about the study design, methods, and conclusions, as did other statisticians and scholars.<sup>58</sup> In the first hearing, Professor Joseph Katz testified for the state, challenging the methods in our 2011 study.<sup>59</sup> The court also heard comparative juror analyses; testimony from prosecutors about jury selection in the cases under review and other cases relevant to the analysis; evidence about the psychological processes that not only contribute to racial bias in jury selection, but make it difficult to detect;<sup>60</sup> and evidence of harm to the unfairly excluded jurors.<sup>61</sup> In the second hearing, the defense offered additional evidence of prosecutors' race consciousness. The court considered prosecutors' handwritten pretrial notes about black potential jurors,<sup>62</sup> as well as evidence that prosecutors strongly favored black jurors in two racially charged murder trials with black victims.<sup>63</sup>

The defense was able to proffer this broad range of evidence largely because the RJA treads new ground by expressly recognizing the importance of analyzing the role of race in decision making across cases. Indeed, under either the 2009 or the more geographically limited 2012 version of the law, claimants are expressly allowed to offer analyses beyond the scope of their specific cases. This broadened scope of a potential claim distinguishes it from a typical *Batson* claim.<sup>64</sup> Our

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<sup>57</sup> BARBARA O'BRIEN & CATHERINE M. GROSSO, REPORT ON JURY SELECTION STUDY 16 (Dec. 15, 2011), available at <http://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1330&context=facpubs> (presenting results for Cumberland County).

<sup>58</sup> See Order Granting Motion for Appropriate Relief at 6, *Robinson*, No. 91 CRS 23143; Order Granting Motion for Appropriate Relief at 136, *Golphin et al.*, No. 97 CRS 47314-15.

<sup>59</sup> See Order Granting Motion for Appropriate Relief at 10-11, *Robinson*, No. 91 CRS 23143.

<sup>60</sup> See Transcript of Testimony of Samuel Sommers at 721-24, *North Carolina v. Robinson*, No. 91 CRS 23143 (Sup. Ct. N.C. Feb. 2, 2012) (on file with the authors) (presenting research published in Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the Batson Challenge Procedure*, 31 LAW & HUM. BEHAV. 261, 266 (2007)).

<sup>61</sup> Transcript of Testimony of Bryan Stevenson at 890-94, *North Carolina v. Robinson*, No. 91 CRS 23143 (Sup. Ct. N.C. Feb. 2, 2012) (on file with the authors).

<sup>62</sup> These notes were made before trial, not during voir dire. They focused disproportionately on black venire members, noting things like the racial composition and levels of drug use on the venire member's neighborhoods. For instance, one potential juror was described as "blk. Wino — drugs" and another as from "a respectable blk family." Order Granting Motion for Appropriate Relief at 51-52, *Golphin*, No. 97 CRS 47314-15.

<sup>63</sup> *Id.* at 54-59.

<sup>64</sup> A *Batson* claim typically focuses on a single juror or a single case. See Baldus et

2011 study analyzed jury selection at multiple levels. We offered analyses of strike decisions from cases spanning different time periods, from the full study period (1990-2010) to shorter periods spanning specific cases. We also analyzed strike decisions for larger geographic areas, from the full statewide sample to defendants' specific counties.<sup>65</sup>

In addition, the RJA explicitly provides a remedy, unlike *Batson* where the Court specified no remedy. A defendant who makes such a showing is entitled to have a death sentence reduced to life without parole or to have death removed as a potential punishment.<sup>66</sup> Marcus Robinson was the first defendant whose RJA claim went to a full evidentiary hearing.<sup>67</sup> The court found that race was a significant factor in the exercise of peremptory strikes at the time of his trial and resentenced him to life without parole.<sup>68</sup> The court followed in December 2012 by vacating the death sentences of three more defendants.

In these proceedings, the RJA provided a remedy where *Batson* had failed.<sup>69</sup> Our question, however, is whether the new regime might curtail discrimination from occurring in the first place. While North Carolina has imposed only seven death sentences since the RJA's passage, these seven cases each contain dozens of strike decisions and thus provide a first look at the impact of the new regime.

## II. STUDYING THE FIRST SEVEN CASES

North Carolina courts have issued seven death sentences since the RJA's passage. This Article uses data collected as part of our 2011 study and expands it to include all of the post-RJA cases.

### A. Data and Methods

Our Article, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials*, in the *Iowa Law Review* thoroughly describes the data collection and

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al., *Statistical Proof*, *supra* note 7, at 1434 n.37 (collecting cases).

<sup>65</sup> *Id.* at 16.

<sup>66</sup> N.C. GEN. STAT. § 15A-2011(g) (2012).

<sup>67</sup> See Order Granting Motion for Appropriate Relief at 1-2, 8-9, *Golphin*, No. 97 CRS 47314-15.

<sup>68</sup> Order Granting Motion for Appropriate Relief at 44-46, 166-67, *North Carolina v. Robinson*, No. 91 CRS 23143 (Sup. Ct. N.C. Apr. 10, 2012), available at [http://www.aclu.org/files/assets/marcus\\_robinson\\_order.pdf](http://www.aclu.org/files/assets/marcus_robinson_order.pdf).

<sup>69</sup> Two of the four defendants who received relief under the RJA argued on appeal that the state violated *Batson* in their trials but did not receive relief. *State v. Golphin*, 533 S.E.2d 168, 215 (N.C. 2000); *State v. Augustine*, 616 S.E.2d 515, 522 (N.C. 2005).

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coding procedures for our 2011 study.<sup>70</sup> We coded the new cases included in this analysis following the same procedures. We therefore provide only a limited description of that process here.

The 2011 study examined jury selection in at least one proceeding for each inmate who resided on North Carolina's death row as of July 1, 2010, for a total of 173 proceedings. For each proceeding, we sought to include every venire member who faced a peremptory challenge as part of jury selection. A "venire member" included anyone who was subjected to voir dire questioning and not excused for cause, including potential alternates. Each proceeding involved an average of 42.9 strike-eligible venire members, producing a database of 7,421 strike decisions. Of these, 3,952 (53.3%) were women, and 3,469 (46.7%) were men. The venire members' racial composition was as follows: white (6,057, 81.6%); black (1,211, 16.3%); Native American (79, 1.1%); Latino (21, 0.3%); mixed race (20, 0.3%); Asian (13, 0.2%); other (11, 0.1%); Pacific Islander (2, 0.03%); and unknown (7, 0.1%).

We created an electronic and paper case file for each proceeding in the study. The case file contains the primary data for every coding decision. The materials in the case file typically include some combination of juror seating charts, individual juror questionnaires, and attorneys' or clerks' notes. Each case file also includes an electronic copy of the jury selection transcript and documentation supporting each race-coding decision.

We coded information about each proceeding generally, including the number of peremptory challenges used by each side and the names of the judge and attorneys involved in the proceeding, as well as basic demographic and procedural information specific to each venire member. Coding also required staff attorneys to determine strike eligibility for each potential juror. "Strike eligibility" refers to which party or parties had the chance to exercise a peremptory strike against a particular venire member. This determination refines the analysis of strike decisions to examine only those instances in which that party actually had a choice to pass or strike a juror.

In order to analyze potential racial disparities in peremptory strikes, it was necessary to identify the race of each venire member. Any potential findings about racial disparities in strike decisions would turn on the accuracy of this coding. Strike information was straightforward in that it could be extracted directly from the transcripts. Race information was equally straightforward in a good

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<sup>70</sup> Grosso & O'Brien, *supra* note 17, at 1542-48.

number of cases because we had self-reported race in jury questionnaires. For the cases that required additional research to identify race, we implemented a rigorous protocol to produce data in a way that is both reliable and transparent.

We included two post-RJA cases in the original study under the procedures described above and in the *Iowa Law Review*. For this paper, we coded race and strike information for eligible venire members in five additional post-RJA cases using the same procedures as the first study. All of the race information in the new post-RJA cases is based on the venire members' self-report of race.

### B. Results

We examined the data in several ways. In each analysis, we compared how frequently prosecutors struck black potential jurors versus those of other races. The results suggest that although racial disparities persisted following the RJA's passage, the disparities decreased somewhat. The relatively small number of post-RJA cases available to date, however, makes our findings preliminary and perhaps raises as many questions as it resolves. For example, as we will show, the reduction in disparities we observed occurred primarily in cases with white defendants. In cases with black defendants, disparities remained unchanged following the RJA. Will this pattern persist across cases over time?

#### 1. Comparison of Strike Patterns

The expanded statewide database includes information about 7,641 venire members in 178 cases. Seven cases were tried after the passage of the RJA, and 171 spanned the twenty-year period before its passage. Of the 7,641 venire members eligible to serve in the 178 cases, 7,619 (99.7%) were eligible to be struck by the state. We analyzed prosecutorial strike patterns for only those venire members who were eligible to be struck by the state. Among strike-eligible venire members, the overwhelming majority were either white (6,216, 81.6%) or black (1,247, 16.4%). Just 2.0% (156) were other races. We are missing race information for only 7 (0.1%) venire members.

Prosecutors exercised 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 178 cases, prosecutors struck 52.4% (654/1,247) of eligible black venire members, compared to only 25.9% (1,648/6,365) of all other eligible

venire members. This difference is statistically significant ( $p < .001$ ).<sup>71</sup> (See Table 1, Row 1.)

Table 1. Statewide Prosecutorial Peremptory Strike Rates, Full Twenty Years and Pre-/Post-RJA  
(strikes against venire members aggregated across cases)

A	B Black	C Non-Black	D Difference (B - C)	E Ratio (B / C)	F p
1. All Cases (178 cases)	52.4% (654/1,247)	25.9% (1,648/6,365)	26.5	2.02	<.001
2. Pre-RJA Cases (171 cases)	52.9% (635/1,201)	25.7% (1,568/6,106)	27.2	2.06	<.001
3. Post-RJA Cases (7 cases)	41.3% (19/46)	30.9 (80/259)	10.4	1.34	ns

We see a somewhat different picture when we compare strikes in cases predating the RJA in Row 2 to those that came after its passage in Row 3. In the 171 pre-RJA cases, prosecutors struck 52.9% (635) of

<sup>71</sup> Several different chi square tests (Pearson Chi-Square, Continuity Correction, Likelihood Ratio, Fischer's Exact Test, and Linear-by-Linear Association) were used to calculate the  $p$ -values, and the results were consistent regardless of the test used. When we include only those venire members who self-reported race, the pattern is substantially the same: prosecutors struck an average of 50.9% of eligible black venire members (497/976) compared to only 24.4% of all other eligible venire members (1,060/4,343),  $p < .001$ .

The analysis discussed in the text and presented in Table 1 shows strikes against all venire members in the study, pooled across cases (7,619 strike eligible venire members across 178 cases). We also analyzed each disparity using the strike rates calculated per case. In this analysis, only those cases with at least one eligible black venire member (171) were included, and each case represents one data point. We present the disparities in the average rates per case throughout the paper in the footnotes to demonstrate that the effect is robust and does not depend on which method is used.

Across all strike-eligible venire members in the study, the average rate per case at which prosecutors struck eligible black venire members is significantly higher than the rate at which they struck other eligible venire members. Of the 171 cases that included at least one eligible black venire member, prosecutors struck an average of 55.5% of eligible black venire members, compared to only 24.9% of all other eligible venire members. This difference is statistically significant,  $p < .001$ .

the 1,201 strike-eligible black venire members, compared to 25.7% (1,568) of the 6,106 strike eligible venire members of other races. This difference is statistically significant ( $p < .001$ ). In the seven post-RJA cases, the disparity is somewhat less: they struck 41.3% (19) of the 46 strike-eligible black venire members, compared to 30.9% (80) of their 259 counterparts of other races. This difference, however, was not statistically significant. A comparison of 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. The difference in strike rates reported in Column D drops from 27.2 pre-RJA to 10.4 after the RJA passed, a difference of 16.8 points. Furthermore, the ratio between the strike rates in Column E drops by 35 percent, from 2.06 to 1.34.

An analysis of variance (ANOVA) provides a more precise way to evaluate whether prosecutors exercised their peremptory strikes differently after the RJA's passage. We tested the effect of venire member race (black or other), timing of the case in relation to the passage of the RJA (pre-RJA or post-RJA), and an interaction between race and timing on the strike decision.<sup>72</sup> As expected, the RJA had no effect on how often prosecutors exercised strikes in general; prosecutors exercised their strikes no more or less frequently after the RJA ( $M = .30$  (pre-RJA) vs.  $.32$  (post-RJA),  $F < 1$ ). Likewise, across all the cases (both pre- and post-RJA), prosecutors struck black venire members at a higher rate than all other venire members ( $M = .53$  (black venire members) versus  $.26$  (other venire members),  $F = 26.43$ ,  $p < .001$ ). The interaction between venire member race and time of the

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<sup>72</sup> A few words are in order about the choice of this model in lieu of a multilevel model. One assumption of ANOVA is that the data are independent. That assumption comes into question in this context, as a party's decision to use one of its strikes is likely to be affected by who else is in the pool. This tendency can present a problem in that it might increase the risk of Type I error; that is, it could increase the chances that the researcher will improperly find a result statistically significant. One way to gauge whether a particular dataset presents such a risk is to look at interclass correlations. If subjects (i.e., venire members) nested within settings (i.e., trials) are in fact more similar to each other than are subjects between settings, a multilevel model is appropriate. We examined the interclass correlations for the cases in this study and found a negative interclass correlation. That means that venire members within a trial were no more alike as to the outcome of interest (struck or passed) than were venire members between cases. In fact, that the interclass correlation was negative suggests that our results are likely conservative. For this reason, using a traditional ANOVA model instead of multilevel model was appropriate. See David A. Kenny, Deborah A. Kashy & Niall Bolger, *Data Analysis in Social Psychology*, in *THE HANDBOOK OF SOCIAL PSYCHOLOGY* 233, 237 (Daniel T. Gilbert, Susan T. Fiske & Gardner Lindzey eds., 4th ed. 1998).

case was, however, statistically significant (pre-RJA  $M = .53$  (black venire members) versus  $.26$  (other venire members), post-RJA  $M = .41$  (black venire members) versus  $.31$  (all other venire members),  $F = 5.26$ ,  $p < .05$ ). In other words, while black eligible venire members were struck consistently more than those of other races, this disparity was significantly less after the passage of the RJA.

## 2. Comparison of Strike Patterns — Cases Five Years Pre- and Post-RJA

Although one might expect that over time race would play a less prominent role in the decision to strike, the racial disparities in prosecutorial strikes we observed in the 2011 study were remarkably consistent over the twenty years preceding the RJA.<sup>73</sup> Nevertheless, cases litigated in the years just prior to the RJA's passage arguably provide a more appropriate point of comparison to those tried after its passage. We therefore conducted the same analysis set forth in subsection 1, but limited the pre-RJA cases to those tried during the five years before its passage. These results appear in Table 2.

The study 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 following the RJA, as noted above, they struck 41.3% (19) of the 46 eligible black venire members, and 30.9% (80) of the 259 venire members of other races, a ratio of 1.34:1 (ns). (Compare Table 2, Line 1 with Table 2, Line 2.) The ANOVA produced results similar to those from the full sample of pre-RJA cases; there was a main effect of race on strike decision ( $p < .001$ ), but here the interaction between race and time was only marginally statistically significant ( $p < .08$ ).<sup>74</sup>

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<sup>73</sup> Grosso & O'Brien, *supra* note 17, at 1548 n.88 (reporting disparities for sequential five-year periods).

<sup>74</sup> In the five years prior to the RJA, prosecutors struck an average of 55.5% of eligible black venire members and 24.7% of eligible venire members of other races. In the seven cases tried after the act's passage, prosecutors struck an average of 43.6% of eligible black venire members and 30.1% of venire members of other races. Although these numbers are quite close to those of the full twenty year period, the difference in the average strike rates pre- and post-RJA is not statistically significant. This result is not surprising given that the number of cases is much smaller (171 versus 20 cases in which there was at least one strike eligible black venire member and a disparity could be calculated).

Table 2. Statewide Prosecutorial Peremptory Strike Rates, Five-Year Window

*(strikes against venire members aggregated across cases)*

A	B Black	C Non-Black	D Difference (B - C)	E Ratio (B / C)	F p
1. Five Years Pre-RJA (13 cases) (January 2005- August 2009)	52.5% (62/118)	26.4% (147/556)	26.1	1.99	<.001
2. Post-RJA (7 cases) (August 2009 - present)	41.3% (19/46)	30.9% (80/259)	10.4	1.34	ns

### 3. Strike Disparities by County

Just as we found in our previous study that racial disparities in strike rates were consistent over time, disparities were also fairly consistent across the state of North Carolina.<sup>75</sup> Nevertheless, we sorted the post-RJA cases by county and compared them to the pre-RJA cases litigated in the same county. The post-RJA counties were tried in Forsyth, Gaston, Guilford, Iredell, McDowell and Stanly counties. No case from McDowell County appears in the pre-RJA sample.

Overall, prosecutors struck 51.3% (81) of the 158 eligible black venire members, and 26.2% (242) of the 922 venire members of other races in this subset of pre-RJA cases (i.e., all of the counties in which at least one post-RJA case appears). In the cases following the RJA, they struck 41.9% (18) of the 43 eligible black venire members, and 29.9% (63) of the 211 venire members of other races. As we found in the ANOVA of the full sample of cases, there was a main effect of race on strike decision ( $p < .001$ ), but not for time of case (pre- versus post-RJA). In this subsample, however, the interaction between race and time does not reach statistical significance ( $p = .13$ ).

Table 3 presents the strike rate disparities overall in this subset and in each county. This analysis suggests a more complicated situation. In Iredell County (Line 5), for example, the strike rate disparity increased in the post-RJA period from 48 points to 78 points. Guilford County, on the other hand, shows a very small 2 point change between the two periods. At the same time, Forsyth, Gaston, and Stanly show large decreases in strike disparities. The extent of county-level variation

<sup>75</sup> Data on file with authors.

could be better understood with more data. Are these cases unique in some way? Or, did the RJA impact different counties in different ways? It will be important to continue to monitor these issues.

Table 3. County-Level Prosecutorial Peremptory Strike Rates Pre-RJA (1990 – July 2009) and Post-RJA (August 2009 – present) (strikes against venire members aggregated across cases)

A	B	C	D	E	F	G	H
County	Time Period	No. of Cases	Black	Non-Black	Difference (B – C)	Ratio (B / C)	p
1. Overall	Pre-RJA	26	51% (81/158)	26% (242/922)	25 points	1.96	<.001
	Post-RJA	6 <sup>76</sup>	42% (18/43)	30% (63/211)	12 points	1.40	ns
2. Forsyth	Pre-RJA	13	54% (45/84)	25% (112/455)	29 points	2.16	<.001
	Post-RJA	1	33% (4/12)	26% (7/27)	7 points	1.27	ns
3. Gaston	Pre-RJA	6	40% (15/37)	31% (67/218)	9 points	1.29	ns
	Post-RJA	2	20% (2/10)	36% (30/83)	-16 points	0.55	ns
4. Guilford	Pre-RJA	4	50% (15/30)	24% (32/134)	26 points	2.08	<.01
	Post-RJA	1	47% (7/15)	23% (6/26)	24 points	2.04	ns
5. Iredell	Pre-RJA	1	75% (3/4)	27% (10/37)	48 points	2.78	.09
	Post-RJA	1	100% (3/3)	22% (9/41)	78 points	4.54	<.02
6. McDowell	Pre-RJA	0	N/A	N/A			
	Post-RJA	1	33% (1/3)	35% (17/48)	-2 points	0.94	ns
7. Stanly	Pre-RJA	2	100% (3/3)	27% (21/78)	73 points	3.70	<.03
	Post-RJA	1	67% (2/3)	32% (11/34)	35 points	2.09	ns

#### 4. Strike Patterns by the Defendant's Race

The patterns reported above also become more complicated when we consider the race of the defendant. In cases tried before the RJA, prosecutors struck black potential jurors at a higher rate than those of other races across all cases, but the disparity was significantly greater in cases with black defendants.<sup>77</sup> In the seven post-RJA cases, the

<sup>76</sup> Because there are no pre-RJA cases from McDowell County in the study, we excluded the single post-RJA McDowell County case from this summary analysis.

<sup>77</sup> Prosecutors struck an average of 59.7% of black potential jurors in the 89 pre-

defendant's race seemed to have an even more pronounced effect. In the four cases with white defendants, prosecutors struck only 22.9% of the eligible black venire members; in the three cases with black defendants, however, they struck an average of 71.1% of the eligible black venire members.<sup>78</sup>

It appears that while the passage of the RJA was associated with a reduction in the rate prosecutors struck black potential jurors, this difference is driven entirely by their strike decisions in cases with white defendants. In the three post-RJA cases with black defendants, prosecutors struck black potential jurors at an even higher rate than they did in pre-RJA cases.<sup>79</sup>

In sum, our analyses suggest that the passage of the RJA has mitigated prosecutors' tendencies to strike black potential jurors more often than those of other races. But the limitations of this study warrant caution in interpreting the results. Again, we are limited by the small number of post-RJA cases included in the analyses. More data would allow us to examine these patterns more precisely. Nonetheless, in the next section we explore two lines of psychological research that lend credence to the suggestions of positive change. In

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RJA cases with a black defendant and in which there was at least one black strike-eligible venire member, compared to 51.8% of the black eligible venire members in the 75 pre-RJA cases with a nonblack defendant.

<sup>78</sup> We conducted an ANOVA to examine the effect of defendant race, time of the case relative to the RJA (pre- versus post-RJA), and interaction between defendant race and timing on the average rate at which prosecutors struck eligible black potential jurors. There was a main effect for defendant race ( $M = .60$  (black defendant) versus  $M = .50$  (defendant of another race)) and a significant interaction between defendant race and timing of the case, in that the rate prosecutors struck eligible black jurors was lower in post-RJA cases with nonblack defendants but higher black defendant cases ( $p < .05$ ).

<sup>79</sup> The pattern is similar when we look at the difference in average strike rates between black potential jurors and those of other races. In the pre-RJA cases with nonblack defendants, we observed a 25.1 point difference in the strike rates against black eligible venire members and their counterparts of other races in cases; in pre-RJA cases with black defendants, there was a 36.6 point disparity. In the post-RJA cases, however, the disparity was -10.5 points for white defendant cases, but 45.3 points in black defendant cases. In other words, prosecutors struck nonblack potential jurors at a higher rate than their black counterparts in post-RJA cases with white defendants. Yet in black defendant cases tried after the RJA's passage, they struck black potential jurors at an even higher rate than they did in the cases that preceded the RJA. We conducted an ANOVA with the same variables noted above, but with the difference in average strike rates against black venire members and other venire members as the dependent variable. Again, we found that the overall disparity was greater in black defendant cases, and a significant interaction between race of defendant and timing of the case ( $p < .05$ ).

the final section, we explore more completely the limitations of this project and the ways that future analyses will tell us more.

### III. PSYCHOLOGICAL RESEARCH SUGGESTING THE RJA MIGHT WORK

Two areas of psychological research suggest that the RJA's approach might be more effective at preventing attorneys from relying on race in exercising peremptory challenges. The first area of research has documented that different kinds of accountability have different effects on decision making. In particular, it suggests that reaching beyond holding people accountable for simply a tally of outcomes to accountability for the process leading to the outcomes may be more effective at changing behavior.<sup>80</sup> The RJA makes relevant statistical and other evidence about decision making over time and across cases. This approach necessarily reaches beyond the outcome of one individual juror or even one individual case and, in doing so, may impose accountability for the decision making process as a whole in a manner that may prove more effective.

A second research field examines the ways decision making changes when race becomes particularly salient or prominent. As described in more detail below, some of this research has found that race salience can mitigate racial bias.<sup>81</sup> The passage, amendment, and use by capital defendants of the RJA all brought the role of race in the criminal justice system into prominence in North Carolina in a new way. Separately, the legislature's explicit recognition that race may infect the system and its creation of a statutory remedy for race discrimination in capital cases brought race to the forefront in individual courtrooms across the state. It is possible that this attention contributes to the potential for the RJA to mitigate racial bias in jury selection.

#### A. *Accountability for the Process of Making Decisions*

Enforcement of any legal prohibition requires some way of holding people accountable. Indeed, greater accountability is often touted as a panacea for combatting self-serving or lackluster performance by any actor whose behavior and decisions affect others.<sup>82</sup> But systems of

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<sup>80</sup> See Lerner & Tetlock, *supra* note 14, at 256-59.

<sup>81</sup> Sommers & Ellsworth, *Race in the Courtroom*, *supra* note 16, at 1376; Sommers & Ellsworth, *White Juror Bias*, *supra* note 16, at 220-21.

<sup>82</sup> See, e.g., No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified in scattered sections of 20 U.S.C.) (amending the Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 6301-6578 (2006)); see also Kristi L. Bowman, *Before School Districts Go Broke: A Proposal for Federal Reform*, 79 U. CIN. L.

accountability can vary greatly, with different and sometimes counterproductive effects on those held accountable. Psychologists who have studied the effects of different kinds of accountability have found that some systems can improve decision making by minimizing biases and fostering rational thinking, while others can undermine it by exacerbating certain biases and promoting self-serving justifications for suboptimal decisions.<sup>83</sup> Viewing the *Batson* and RJA regimes through the lens of this research suggests that the latter may provide a more effective system of holding lawyers accountable for improperly considering race in their peremptory strike decisions.

Accountability means that one feels pressure to justify judgments or decisions to others.<sup>84</sup> Accountability can improve decision making if the decision maker is accountable for the process, rather than the outcome, of the decision.<sup>85</sup> For instance, Simonson and Nye found that people who were accountable for their decisions' outcomes defended their decisions because they felt a need for self-justification.<sup>86</sup> In the context of peremptory strikes, *Batson* focuses almost exclusively on outcomes. A party responding to a *Batson* claim must justify the strike only after the fact.<sup>87</sup>

In contrast, Simonson and Staw found that people who were accountable primarily for the process by which they made their decisions were less adamant. Because they did not feel the same need to self-justify, they evaluated alternatives more thoroughly and were

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REV. 895, 937 (2011) (noting that accountability "has been a growing focus of federal education policy since the 1980s").

<sup>83</sup> Lerner & Tetlock, *supra* note 14, at 256-59; Karen Siegel-Jacobs & J. Frank Yates, *Effects of Procedural and Outcome Accountability on Judgment Quality*, 65 *ORG. BEHAV. & HUM. DECISION PROCESSES* 1, 2-3 (1996).

<sup>84</sup> *OXFORD AMERICAN DICTIONARY* 7 (First Avon Printing 1980).

<sup>85</sup> Lerner & Tetlock, *supra* note 14, at 259-62 & tbl. 1.

<sup>86</sup> Itamar Simonson & Peter Nye, *The Effect of Accountability on Susceptibility to Decision Errors*, 51 *ORG. BEHAV. & HUM. DECISION PROCESSES* 416, 419-20 (1992); see also Frederick V. Fox & Barry M. Staw, *The Trapped Administrator: Effects of Job Insecurity and Policy Resistance upon Commitment to a Course of Action*, 24 *ADMIN. SCI. Q.* 449, 465, 467 (1979). Similarly, Siegel-Jacobs and Yates found that participants accountable for the process by which they made judgments took into account more available information, which improved accuracy when that information was relevant to the target judgment. Siegel-Jacobs & Yates, *supra* note 83, at 14-15; see also William T. Bielby, *Minimizing Workplace Gender and Racial Bias*, 29 *CONTEMP. SOC.* 120, 123-24 (2000) [hereinafter *Minimizing Workplace*]; William T. Bielby, *Promoting Racial Diversity at Work: Challenges and Solutions*, in *DIVERSITY AT WORK* 53, 68-72 (Arthur P. Brief ed., 2008) (reviewing the literature).

<sup>87</sup> See *Batson v. Kentucky*, 476 U.S. 79, 97 (1986) (holding that the burden shifts to the prosecution to articulate a race-neutral reason for the strike after the defendant makes a prima facie case of discrimination).

less committed to earlier decisions. It is not clear that the RJA deliberately shifts attention from the outcome to the process of decision making. But by shifting attention to behavior across cases, across time, and even across prosecutors, it shifts the attention from individual idiosyncratic peremptory strikes to the pattern or practice of strikes. This shift approximates process accountability in important ways. Decisions cannot stand in isolation. As evidenced in the first RJA decisions, even adamant ad hoc and post hoc justifications for race disparities did not defeat practically and statistically significant disparities. Moreover, prosecutors were called upon to explain inconsistencies in strike decisions across cases.<sup>88</sup> This level of accountability may cause prosecutors to evaluate black jurors more thoroughly and to rely less on stereotypes, and might mitigate the influence of race.

Separately, because process accountability promotes a more thorough evaluation of the evidence and a reduced need for self-justification, it should, in turn, counteract confirmation bias, which is the tendency to seek information that confirms rather than contradicts an initial hypothesis.<sup>89</sup> Accordingly, people who expect to justify the process by which they reached a decision should seek more information that conflicts with an initial hypothesis than people who are asked solely to justify the final decision.<sup>90</sup> Prosecutors who know they will be responsible for decisions across time and across cases may actually seek more complex information about black potential jurors

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<sup>88</sup> See Order Granting Motion for Appropriate Relief at 56, *North Carolina v. Golphin et al.*, No. 97 CRS 47314-15 (Sup. Ct. N.C. Dec. 13, 2012), available at <http://www.law.msu.edu/racial-justice/Golphin-et-al-RJA-Order.pdf> (comparing prosecutor's strike decisions in cases involving a racially motivated killing of black victims to those in other cases).

<sup>89</sup> See generally Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175 (1998) (reviewing the psychological research on confirmation bias).

<sup>90</sup> Indeed, Jonas and colleagues found that participants who focused more on the process by which they reached a decision and not the outcome displayed less preference for hypothesis-consistent information than did those who did not. Eva Jonas, Stefan Schulz-Hardt, Dieter Frey & Norman Thelen, *Confirmation Bias in Sequential Information Search After Preliminary Decisions: An Expansion of Dissonance Theoretical Research on Selective Exposure to Information*, 80 J. PERSONALITY & SOC. PSYCHOL. 557, 569 (2001); see also Itamar Simonson & Barry M. Staw, *Deescalation Strategies: A Comparison of Techniques for Reducing Commitment to Losing Courses of Action*, 77 J. APPLIED PSYCHOL. 419, 425 (1992) (finding that study participants were less committed to earlier decisions when judged by the process rather than the outcome of their decision making).

and work to identify those jurors who do not match jury-selection stereotypes.

In the employment context, best practices for preventing discrimination include establishing and publishing specific hiring criteria and job evaluation guidelines a priori.<sup>91</sup> These practices result in accountability for the process as well as the outcome. While the RJA does not require litigators to articulate the characteristics of an ideal juror in advance or as a matter of general policy, authorizing the use of systemic statistical analyses evaluates and holds prosecutors accountable for the de facto policy. The relevance of statistical analyses that identify the role of race after taking common race-neutral explanations into account may also encourage prosecutors to look beyond stereotypes by exposing what factors really do matter and the ongoing importance of race.<sup>92</sup>

This field of research suggests that the RJA's wide definition of relevant evidence and its express endorsement of system-wide statistical evidence may improve the chances that it will succeed in mitigating the influence of race on jury selection. In this way, it suggests that the patterns observed in the early cases may be replicated in a more complete study.

Importantly, in *Miller-El v. Cockrell*, the Supreme Court provided support and guidance for the use of similar statistical pattern-and-practice evidence in *Batson* claims.<sup>93</sup> Furthermore, Justice Kennedy recognized that district-wide evidence is "of course . . . relevant" to understanding the role of race in an individual strike.<sup>94</sup> To the extent that the first seven cases provide preliminary support for the RJA, they also support the Supreme Court's recent approach to *Batson*.

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<sup>91</sup> See Bielby, *Minimizing Workplace*, *supra* note 86, at 124 (noting the importance of clearly articulated criteria and "a mechanism . . . for holding decision makers accountable for the process they have used and criteria they have applied in making their judgments"); Melissa Hart, *The Possibility of Avoiding Discrimination: Considering Compliance and Liability*, 39 CONN. L. REV. 1623, 1639-40 (2007).

<sup>92</sup> A researcher with rich data on individual qualified jurors can assess what factors are consistently associated with the decision to strike. If prosecutors consistently rely on certain criteria in making strike decisions, those criteria should emerge as significant predictors of strike behavior. If prosecutors do not consistently rely on that factor in deciding whom to strike, it will not come into the model. Moreover, the researcher can control for multiple factors at once, including race. A model that shows a statistically significant effect of race on strike decisions, even controlling for other factors, provides strong evidence that race motivated strike decisions.

<sup>93</sup> *Miller-El v. Cockrell*, 537 U.S. 322, 342 (2003).

<sup>94</sup> *Id.* at 346-47.

B. *The Benefits of Making Race Salient*

A second area of psychological research provides an entirely different basis for thinking that the RJA may be an important model for reducing consideration of race in peremptory strikes. This research suggests that making race salient might mitigate a decision maker's racial biases. It is possible that the RJA makes (or has made) race salient in a way that will mitigate the influence of race on the exercise of peremptory strikes.

Sommers and Ellsworth presented mock jurors with trial materials involving an interracial assault. Jurors who reviewed evidence that suggested that the assault was racially charged were less influenced by the race of the defendant than jurors who reviewed the same evidence with no mention of the incident being racially charged.<sup>95</sup> Sommers and Ellsworth's findings suggest that making norms about race salient could mitigate racial bias.<sup>96</sup> A number of scholars replicated this study and reached similar results.<sup>97</sup> As Sommers and Ellsworth have noted, however, this body of research manipulates race salience almost exclusively via the presence or absence of racially charged issues at trial.<sup>98</sup>

Bucolo and Cohn sought to test whether making race salient in a different way could mitigate racial bias by varying whether defense counsel remarked about race in opening and closing statements in an interracial case.<sup>99</sup> In this study, when defense counsel remained silent on race in opening and closing statements, white mock jurors' ratings of guilt did not differ for black and white defendants. In other words, they found no evidence of racial bias in the control condition where

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<sup>95</sup> Sommers & Ellsworth, *Race in the Courtroom*, *supra* note 16, at 1376; Sommers & Ellsworth, *White Juror Bias*, *supra* note 16, at 220.

<sup>96</sup> See sources cited *supra* note 95; see also CHERYL THOMAS & NIGEL BALMER, DIVERSITY AND FAIRNESS IN THE JURY SYSTEM, U.K. MINISTRY OF JUSTICE RESEARCH SERIES 2/07 at 201-02 (June 2007), available at <http://4wardeveruk.org/wp-content/uploads/2009/08/p.Diversity-Fairness-in-the-Jury-System.pdf> (finding that white mock jurors showed no racial bias when trial evidence depicted a racially motivated assault, but clear bias when no evidence of a racial motive was presented).

<sup>97</sup> See generally Samuel R. Sommers & Phoebe C. Ellsworth, "Race Salience" in *Juror Decision-Making: Misconceptions, Clarifications, and Unanswered Questions*, 27 BEHAV. SCI. & L. 599 (2009) (reviewing studies and noting that almost all subsequent studies have manipulated whether the crime in question was racially charged in a manner similar to that used in the original studies).

<sup>98</sup> *Id.*

<sup>99</sup> Donald O. Bucolo & Ellen S. Cohn, *Playing the Race Card: Making Race Salient in Defence Opening and Closing Statements*, 15 LEGAL & CRIMINOLOGICAL PSYCHOL. 293, 296 (2010).

race was not made salient. As a result, it was not possible to measure the mitigating influence of racial salience on bias.<sup>100</sup> When the defense counsel mentioned race in the opening and closing statements, however, white mock jurors' ratings of the black defendant's guilt were significantly lower than they had been when defense counsel remained silent.<sup>101</sup> This suggests that making race salient had some influence on juror decision making, but the effect is unclear.

In North Carolina, race has become more salient not due to differences in the nature of the crimes at issue, but rather due to changes in discourse and the prevailing legal regime. We documented in an earlier article the remarkable confluence of social movements that ushered the RJA into law in 2009.<sup>102</sup> These social movements framed their campaign as a movement to mitigate the invidious role of race in the criminal justice system.<sup>103</sup> The campaigns brought concerns about race and criminal justice into the public domain — raising the issue in public speeches and rallies, in churches and at universities, in newspaper stories and editorials, and repeatedly in legislative testimony.<sup>104</sup> The discourse continued after the act became law in August 2010.<sup>105</sup> This discussion clearly touched a nerve, as the RJA figured prominently in attacks on legislators who supported it during the 2010 elections for North Carolina's General Assembly. In addition, repeal efforts and coverage of the initial RJA hearings dominated the media throughout 2011 and 2012, and RJA-based attacks reemerged in election campaigns in 2012.<sup>106</sup>

Although concern about the role of race in the death penalty was not novel, the passage of the RJA made the issue especially salient. That a majority of legislators felt it was necessary to provide additional means of proving discrimination suggests that there was some

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<sup>100</sup> *Id.* at 299.

<sup>101</sup> *Id.*

<sup>102</sup> See generally O'Brien & Grosso, *supra* note 17, at 500-01 (describing how both supporters and opponents of the RJA sought to mobilize support).

<sup>103</sup> *Id.* at 498.

<sup>104</sup> *Id.* at 498-500.

<sup>105</sup> For example, RJA supporters sponsored a statewide campus tour titled Race, Wrongful Convictions, and the Death Penalty. At each stop, panel members — including exonerees, attorneys, religious leaders, and other activists — focused on the role of race in capital punishment and how the RJA might address it. *Id.* at 500.

<sup>106</sup> *Id.* at 500-01; see also Austin Baird, *McCrory, Dalton Trade Barbs on Tax Policy, Racial Justice Act*, NEWS & OBSERVER, Oct. 17, 2012, <http://www.newsobserver.com/2012/10/17/2416731/mccrory-dalton-trade-barbs-on.html>; Paul Woolverton, *Disagreement after Racial Justice Act Commutations over when Murder Cases Went Wrong*, FAYETTEVILLE OBSERVER, Dec. 16, 2012, <http://www.fayobserver.com/articles/2012/12/16/1224206?sac=fo.local>.

skepticism about the system's racial fairness.<sup>107</sup> The title of the RJA, "The North Carolina Racial Justice Act of 2009," states clearly that concerns about racism underlie this new claim. The opening section follows in a similar vein: "No person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race."<sup>108</sup> The RJA's very language and purpose raised the specter that prosecutors' decisions in both whom they charged capitally and whom they struck from capital juries would face deeper and more systematic scrutiny than ever before.

A prosecutor trying a capital case in the wake of the RJA's passage would undoubtedly have been aware that statistical evidence of racial disparities in peremptory strikes could support a claim that race was a significant factor in the decision to seek or impose a death in a defendant's case.<sup>109</sup> Moreover, in many people's minds, the RJA's proponents were essentially implying that prosecutors were considering race, an accusation they vehemently denied.<sup>110</sup>

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<sup>107</sup> For instance, one of the bill's sponsors, Rep. Larry Womble, argued during a legislative debate, "People do not shed their personal experiences, or their personal prejudice, or their biases at the courtroom door. Race is still a matter in this state." James Romoser, *Racial Justice Bill Moves On: House Gives Tentative OK; Second Vote Scheduled for Today*, WINSTON-SALEM J., July 15, 2009, [http://www.journalnow.com/news/state\\_region/article\\_56a996f9-4c12-5789-be50-55fc1d843073.html](http://www.journalnow.com/news/state_region/article_56a996f9-4c12-5789-be50-55fc1d843073.html). Another sponsor argued that the RJA was "critically needed to correct any type of conduct that might be impermissible when it comes to the imposition of the death penalty." James Romoser, *Racial Justice Act Passes, Now Goes to Purdue*, WINSTON-SALEM J., Aug. 6, 2009, <http://www.deathpenaltyinfo.org/racial-justice-act-passes-north-carolina> (quoting Sen. Floyd McKissick).

<sup>108</sup> N.C. GEN. STAT. § 15A-2010 (2012).

<sup>109</sup> In addition to the ongoing public debate about the RJA, Assistant Attorney General William Hart requested information from the authors on the RJA-related research underway at Michigan State University College of Law to present at the fall meeting of the North Carolina Conference of State Attorneys.

<sup>110</sup> For instance, Forsyth County Prosecutor Cal Colyer asserted in his closing argument at Marcus Robinson's RJA hearing that "[t]he goals may be admirable with respect to this legislation but it is an insult to the prosecutors and to the judges of this state and, yes, even to the defense attorneys of this state." Transcript of Proceedings, *North Carolina v. Robinson*, No. 91 CRS 23143, at 2575 (Feb. 15, 2012) (on file with the authors). Along similar lines, former Forsyth County District Attorney, Tom Keith, was reported as characterizing the RJA as falsely implying that prosecutors are racist. James Romoser, *Racial Justice? Bill that may be voted on this week would allow judges to throw out death penalties*, WINSTON-SALEM J., July 12, 2009, [http://www.journalnow.com/news/local/article\\_ee1d6504-6c25-5547-926f-da09c588a523.html](http://www.journalnow.com/news/local/article_ee1d6504-6c25-5547-926f-da09c588a523.html). A federal Racial Justice Act introduced in 1991 (which failed to pass) prompted similar characterizations of potential claims of racial bias as "attacks." Tom Charron, then president-elect of the National District Attorneys Association, wrote in a letter to the Senate that, "[a]s a

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Prosecutors heard this implication, and many responded with adamant denials that race plays any role in their decision making. In sum, prosecutors were likely to have been both especially motivated to dispel any suspicion of racism and keenly aware that their decisions would come under intense scrutiny.

If making race salient in a mock trial mitigates juror bias by activating people's motivation to avoid discrimination, then the focus brought by the RJA to prosecutors' behavior may have provided even stronger motivation on their part to avoid any appearance of bias. It is possible, however, that these changes do not impact prosecutors in the same way that varying whether a defendant's alleged crime was racially charged impacted mock jurors. In addition, although the passage of the RJA changed the conditions under which prosecutors made their decisions, this change does not occur in the context of a controlled experiment. Many different factors influence the salience of race at the same time. This complexity makes it difficult to assess whether or how race salience might arise from the RJA. Moreover, to the extent that the RJA does make race salient, it is difficult to know whether its effects would persist over time and whether race would remain salient if every state passed a racial justice act.

In addition, our study differs from prior research in that it concerns prosecutorial rather than juror decision making. Only one scholar has conducted experimental research on the impact of race salience on prosecutorial strikes, and her results suggest that the findings may not extend to this context. In an unpublished dissertation study, Kennard sought to test the effect of race salience in strike decisions using a variation of the racially-charged crime manipulation introduced by Sommers and Ellsworth.<sup>111</sup> She found that making race salient to prosecutors did not reduce racial bias in strike decisions.<sup>112</sup>

Despite the concerns discussed above, reasons remain to think that the RJA's passage and the language of the act itself made the issue of racism salient in a way that may have affected prosecutors much like the racially charged cases seemed to have affected the mock jurors in the studies discussed above. If that theory is correct, race disparities in jury selection should diminish after the RJA passed.

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prosecutor who has tried 22 death penalty cases, I can assure you that Sen. Biden's bill would abolish the death penalty because it would place upon the prosecutor the burden of having to justify an attack of racial bias with no supporting evidence." Andrew McBride, *Loopholes, Crime and Blandishment*, WASH. TIMES, June 21, 1991, at F1.

<sup>111</sup> Julia Clara Busso Kennard, *Psychological Mechanisms Underlying Race-Based Peremptory Challenges* 46 (2011) (unpublished Ph.D. dissertation, City University of New York), available at <http://gradworks.umi.com/34/69/3469879.html>.

<sup>112</sup> *Id.* at 57-61 (discussing study results).

## DISCUSSION &amp; CONCLUSIONS

This paper takes a first look at seven North Carolina capital trials that ended in a death sentence after the passage of the RJA to evaluate whether the RJA provides a better model for reform. As noted above, it provides some such evidence, but leaves much unclear. This ambiguity is not surprising given the limitations of the data available at this time.

Some limitations are the number of cases and the risk that individual prosecutors, particular county effects, or characteristics of individual cases could skew our analysis. Indeed, there have been relatively few death sentences issued since the passage of the RJA. It may, however, be possible to expand our study design to include cases that faced a capital trial but resulted in a life sentence. There were sixteen capital trials that did not end in a death sentence in 2012 alone.<sup>113</sup>

A second limitation of this preliminary research is that we have not coded for detailed descriptive information about venire members in the post-RJA cases. Without this coding, we were unable to conduct a controlled analysis to rule out alternative explanations for the patterns we observed. This level of analysis adds precision to our understanding and makes it easier to rule out idiosyncrasies of individual cases, prosecutors, or counties. Thus, future research should involve completing this descriptive coding for the post-RJA cases. Even without more cases, this coding analysis would enhance our understanding.

One of the ways an expanded study or controlled analyses could enhance our understanding relates to the role of the defendant's race in jury selection post-RJA. While prosecutors struck relatively fewer black eligible venire members after the RJA, as reported above, that reduction was due to a change in behavior in cases with white defendants. The RJA appeared to have no effect on prosecutorial strike decisions in cases with black defendants. This finding we neither expected nor can fully explain without additional cases to analyze.

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<sup>113</sup> Anne Blythe, *No one sentenced to death in North Carolina this year*, CHARLOTTE OBSERVER, Nov. 9, 2012, <http://www.charlotteobserver.com/2012/11/09/3656043/no-one-sentenced-to-death-in-north.html>. Though prosecutors' strike decisions in capital cases that did not result in a death verdict would undoubtedly be informative, we did not include those cases in this analysis to maintain consistency between the pre- and post-RJA cases in the study. The original study included at least one proceeding from each defendant on death row as of August 2010; thus every pre-RJA case in the study ended in a death sentence.

These seven cases may be unusual, and the inclusion of future cases could change the overall pattern. Alternately, the RJA may have affected different prosecutors differently. Two of the three post-RJA cases showing a negative disparity (that is, where prosecutors struck black eligible venire members at a lower rate than their non-black counterparts) were tried in Gaston County. Moreover, the negative disparities were larger in the two Gaston County cases than in the third such case in McDowell County.<sup>114</sup> Gaston County strike patterns changed following the passage of the RJA: there was a 9-point disparity in the six 2011 study cases from Gaston County that preceded the RJA, compared to a -16-point disparity in the two cases that came after its passage. In other words, it was not the case that Gaston was one of the few counties in the study where prosecutors were historically evenhanded in their strike decisions. However, it is possible that the hypothesized psychological effects of the RJA's passage that we discussed above took hold in some but not all prosecutors' offices, and that it just so happened that the defendants the affected prosecutors tried following the RJA were white.

It is also possible that competing motivations were at play, and the strength of those motivations varied depending on the defendant's race. In cases preceding the RJA, the disparity was consistently more pronounced in cases with black defendants. This disparity suggests that prosecutors may be more motivated to strike black potential jurors when the defendant is black out of a concern that black jurors would be more sympathetic to defendants of their own race.<sup>115</sup> If prosecutors believe that black jurors tend to favor black defendants and are less likely to vote for a death sentence, the motivation to keep black jurors off the jury may trump other concerns such as appearing fair. In cases with defendants of other races, the desire to minimize the number of black jurors may be less urgent, and thus prosecutors' decision making may be more sensitive to heightened accountability and the desire to appear evenhanded.

These limitations provide an important frame through which we must view the observed changes. Nevertheless, the reduction in the racial disparity — even if driven by the white defendant cases — is

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<sup>114</sup> In Gaston County, the differences in average strike rates against black potential jurors and those of other races were -11 points and -36 points, compared to -2 points in the third case tried in McDowell County.

<sup>115</sup> *Batson v. Kentucky*, 476 U.S. 79, 97 (1986) (noting “the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption — or his intuitive judgment — that they would be partial to the defendant because of their shared race”).

substantial. In only 11.0% (18) of the 164 pre-RJA cases with at least one eligible black venire member were strike rates lower for black eligible venire members than for venire members of other races. In contrast, 42.9% (3) of the 7 post-RJA cases had a disparity favoring black potential jurors. Looking at just the cases with non-black defendants, in only 12 (16.0%) of the 75 pre-RJA cases with at least one eligible black venire member was the disparity negative, compared to 75.0% (3) of the 4 non-black defendant cases post-RJA.

We look forward to an opportunity to study a broader sample of capital jury selection proceedings in the future. The relative rarity of death sentences suggests that this expanded study should include cases resulting in life and death sentences from before and after the passage of the RJA. The difficulty and expense of both collecting and coding data presents the greatest limitation to conducting such studies. In this light, we again support the suggestions of others that jurisdictions implement systems to collect and preserve data relating to jury selection and voir dire.<sup>116</sup> These systems need not be elaborate or expensive. We also encourage courts reviewing *Batson* claims to take seriously the suggestions in the *Miller-El* line of cases that statistical evidence, much like that endorsed by the RJA, is relevant and important in all *Batson* claims.<sup>117</sup>

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<sup>116</sup> See Alafair S. Burke, *Prosecutors and Peremptories*, 97 IOWA L. REV. 1467, 1485-87 (2011) (urging prosecutors' offices to maintain records on peremptory strikes); Melynda J. Price, *Policing the Borders of Democracy: The Continuing Role of Batson in Protecting the Citizenship Rights of the Excluded*, 97 IOWA L. REV. 1635, 1640-43 (2012) (praising the work of Jefferson County, Kentucky courts in tracking the use of peremptory strikes in an effort to reduce discrimination); Donna Walter, *Missouri Supreme Court Judge Suggests New Limit to Peremptory Challenges*, ST. LOUIS DAILY REC., Mar. 2, 2002 (reporting Professor Peter Joy's proposal that prosecutors keep records of peremptory strikes patterns to allow courts to find patterns of discrimination).

<sup>117</sup> See Baldus et al., *Statistical Proof*, *supra* note 7, at 1438-46.