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Pallavi addresses criticism of the current method for rooting out racial discrimination in jury selection, known as the *Batson* test. After careful examination of *Batson's* application in recent cases, she concludes that the test itself is not perfect, but functions as well as can be expected. She then explains why she believes *Batson's* critics should be directing their challenge to the true root of the problem, which lies in subjective elements of the jury selection process itself.

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# A Critique of BATSON: Regulating the Jury System or Hindering its Intent?

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## INTRODUCTION

Interpreting the constitutional guarantee of due process has created numerous disagreements in the criminal court system, in turn leading to potentially differing results in the application of that concept. Jury selection can be crucial to the outcome of a case because each party could attempt to create a jury that is more likely to rule in its favor. This can be done through various devices available in the jury selection process, such as jury shuffling, differential questioning and polling methods, or "for-cause" and "peremptory" strikes to remove specific jurors. The system of peremptory challenges goes so far as to allow the parties to request the removal of a potential juror without providing any particular explanation.

The peremptory challenge system can, and has, led to the unfortunate side effect of allowing the unconstitutional removal of jurors based on factors such as race. To prevent this potentially discriminatory practice, the United States Supreme Court established the *Batson* test. Many argue that the *Batson* test does not adequately regulate the system, but rather is as flawed as the system itself, if not more so.

This article will explore the peremptory challenge system and the *Batson* test in detail. It will first present the *Swain* standard, from which the *Batson* test was derived, then explain exactly what the *Batson* test is and how it operates. After examining the evolution of the standard, this article will turn to two cases in which *Batson* was implemented: *Miller-El v. Dretke* and *Purkett v. Elem.* These cases will be compared and contrasted with one another to illustrate the application of *Batson.* Lastly, this article will address whether the *Batson* test efficiently prevents illegal discrimination in the use of peremptory challenges during the jury selection process.

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Through this analysis, it can be seen that while the *Batson* test is not perfect, it does allow for a fair process by which most racially-motivated peremptory challenges can be identified. Thus, the greatest flaw of the *Batson* test is not its nature or its application, but the inherently problematic system of peremptory challenges that it cannot fully and completely regulate.

## *SWAIN V. ALABAMA:* EARLY RESTRICTIONS ON THE PEREMPTORY CHALLENGE

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution requires that no state shall "deprive any person of life, liberty or property, without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws."[1] Accordingly, it has been found that a state may not restrict a citizen's rights in any manner that is racially discriminatory. One aspect of the court system that has been particularly prone to this problem is the use of peremptory challenges. Peremptory challenges are a component of the jury selection process that allow each party to reject a limited number of potential jurors without providing any particular justification. Limits on this mechanism of jury selection, meant to prevent its racially discriminatory use, have gradually developed through a series of cases.

The evolution of the peremptory challenge regulation began in 1965 with a requirement created by the *Swain v. Alabama* decision.[2] Robert Swain, an African American man, was convicted of rape and sentenced to death in an Alabama trial court. Swain later challenged the jury selection process used at his trial, claiming a violation of his Equal Protection rights under the Fourteenth Amendment. His claim was based upon the fact that the prosecution

[1] The Amendment specifically provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. § 1.

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

had used peremptory challenges to strike all eight of the potential African-American venire members.[3]

Swain claimed that the prosecutor's use of peremptory strikes[4] against those specific venire members was racially motivated. The Supreme Cort rejected Swain's argument, stating that "[a] defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury that tries him"[5] and "purposeful discrimination may not be assumed or merely asserted [without more concrete evidence]."[6] In other words, a simple showing of a particular race being underrepresented in one jury is not enough.[7] In order to establish an Equal Protection violation, the *Swain* Court required that a defendant show a long-standing or systemic pattern of discrimination.[8]

Over twenty years later in 1986, the Supreme Court decided in *Batson v. Kentucky*[9] that the *Swain* standard had "placed on defendants a crippling burden of proof"[10] and that "prosecutors' peremptory challenges [had become] largely immune from constitutional scrutiny."[11] The Court stated: "[W]e reject this [requirement] as inconsistent with standards that have been developed since *Swain* for assessing a *prima facie* case[12] under the Equal Protection Clause."[13] The perceived difficulty for the defendant in proving *Swain's* 'systemic pattern of discrimination' prompted the *Batson* Court to create its own new test.

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[3] A member of the *venire* is a person selected as a potential juror. The *venire panel* is the group of citizens summoned by the court from which the actual jury is later selected. Black's Law Dictionary 1079 (6th ed. 1991).

[4] *Peremptory challenges*, otherwise referred to as *peremptory strikes*, are a tool of jury selection that allows both the prosecution and defense to eliminate a limited number of potential venire members without being required to offer any explanation. Black's Law Dictionary 597 (6th ed. 1991). This tool allows attorneys to strike jurors on a hunch.

[5] *Id.* at 208.

[6] *Id.* at 205.

[7] *Id.* at 209.

[8] *Batson v. Kentucky*, 476 U.S. 79, 84 (1986).

[9] *Id.* at 82.

[10] *Id.* at 92.

[11] *Id.* at 92-93.

[12] A *prima facie case* refers to sufficient evidence of a particular point, which can prevail unless otherwise contradicted. Black's Law Dictionary 825 (6th ed. 1991).

[13] *Batson,* 476 U.S. at 93.

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## THE *BATSON* TEST

James Batson, an African-American indicted on burglary charges, challenged the jury selection process used during his trial. Peremptory challenges had been used to strike all four African-American venire members, leaving a completely Caucasian jury. Batson claimed that this was racial discrimination by the prosecution, violating his right to Equal Protection under the Fourteenth Amendment. The Supreme Court overruled the *Swain* standard's requirement that the defendants prove a 'systemic pattern of discrimination,' holding that it was sufficient to introduce evidence simply stemming from Batson's own trial to establish a *prima facie* case for discrimination. In the process, a three-step legal standard was laid out, know known as the *Batson* test, whereby the defendant is given the opportunity to contest the prosecution's use of peremptory challenges in his own case.

Justice Powell, writing on behalf of the Court in *Batson*, stated that "Step 1" of the test is designed to allow the defendant to provide statistical or other evidence that suggests racial discrimination in the selection of jury members. Justice Powell explained: "[S]ince the decision in *Swain*, this Court has recognized that a defendant may make a *prima facie* showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection *in his case*."[14] For example, purposeful discrimination may be alleged by showing that the prosecution's questions and statements used during the jury selection process were administered unequally to potential jurors on the basis of race.

With regard to "Step 2" of the *Batson* test: "Once the defendant makes a *prima facie* showing, the burden shifts to the State to come forward with a neutral explanation for challenging [the African-American] jurors."[15] It is not sufficient for the prosecution to assume that an African-American juror would be biased in a specific case simply because of his or her race, nor is it sufficient for the prosecution to dismiss a juror solely for that reason.[16] Accepting such an explanation would turn the Equal Protection guarantee into nothing more than "a vain and illusory requirement."[17]

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[14] *Id.* at 95 (emphasis in original).

[15] *Id.* at 97.

[16] *Id*.

[17] *Id.* at 98 (internal citation omitted).

Thus, after the defendant has established a *prima facie* case of potential racial discrimination in jury selection, the burden of proof shifts to the prosecution (in Step 2) to provide a race-neutral explanation for its peremptory strikes. It is in "Step 3," the final step of the *Batson* test, that the court determines if purposeful discrimination has actually been proven. In doing so, the court considers all the arguments presented under the two previous steps. Step 3 necessitates that the court evenly weigh the evidence presented by each party. The court must decide through this balance to either accept the prosecution's race-neutral explanation for eliminating potential jurors, or to rule that the defendant has successfully demonstrated the existence of purposeful racial discrimination.[18] To summarize, the evidentiary burden shifts back and forth between the parties as the test proceeds step by step in the following manner:

Step 1: The defendant makes a *prima facie* showing of apparent discrimination.

Step 2: The prosecution offers race-neutral reason(s) for the strike(s).

Step 3: The court must determine whether to believe the prosecution, or to rule that the defendant has proven purposeful discrimination.

In this manner, the *Batson* test is designed to ensure that no one is excluded from serving on a jury based solely on his or her race, while still maintaining the race-neutral availability of peremptory challenges as a tool for jury selection.[19]

## *BATSON* APPLIED IN *PURKETT V. ELEM*

### *Case Background*

In 1995, the Supreme Court applied the *Batson* test in *Purkett v. Elem.* Jimmy Elem, an African-American man, was charged and later convicted of robbery in Missouri. Elem subsequently challenged the prosecution's use of peremptory challenges to exclude two African-American venire members from the jury pool. By basing his case on the loss of these two veniremen, Elem was able to make a *prima facie* showing of potential racial discrimination. This case

[18] *Id.*

[19] *Id.* at 98-99.

illustrates that *Batson* makes it much simpler to initiate a discrimination challenge than had been possible under the previous *Swain* standard.

In response to Elem's challenge, the prosecution explained the strikes by stating that one of the excluded jurors, Juror 22, had "long, curly hair [which was] the longest hair of anybody on the panel by far."[20] The prosecutor asserted: "He appeared to me to not be a good juror for that fact, the fact that he had long hair hanging down shoulder length, curly, unkempt hair. In addition to his unkempt hair, Juror 22 also had a mustache and a goatee type beard."[21] The prosecutor then explained the reasoning behind striking Juror 24, stating it was also based on the juror having "a mustache and goatee type beard."[22] The prosecutor elaborated: "Those are the only two people on the jury … with the facial hair … [a]nd I don't like the way they looked, with the way the hair is cut, both of them. And the mustaches and the beards look suspicious to me."[23]

The prosecutor further asserted that the exclusion of Juror 24 was due in part to the fact that Juror 24 had once experienced a supermarket robbery in which a sawed-off shotgun had been aimed at him. The prosecutor stated that this information prompted a concern that Juror 24 would be biased in the immediate case, since no gun had been used, and the juror might deem a robbery to be legitimate only if a gun were involved.[24]

Upon hearing the explanation given by the prosecution, the state trial court overruled Elem's objection and kept the established jury. The Missouri Court of Appeals supported this ruling, finding that the "state's explanation constituted a legitimate 'hunch' and … the circumstances failed to raise the necessary inference of racial discrimination."[25] The defendant then filed a petition for habeas corpus relief in federal district court, which in turn led to a recommendation by the magistrate judge that there had been inadequate proof of intentional discrimination.

Elem continued to pursue his claim of discrimination, and the Court of Appeals for the Eighth Circuit reversed and remanded the case, concluding that

[20] *Purkett v. Elem*, 514 U.S. 765, 766 (1995).
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.* (quoting the Missouri Court of Appeals, who further quotes the state court).

the prosecution's explanation for striking Juror 22 did *not* satisfy the *Batson* test. The Eighth Circuit felt that the prosecution's justifications for striking the African-American jurors were unreasonable. As such, the Circuit Court ruled that the prosecution had failed to meet its evidentiary burden of offering a race-neutral justification for its behavior under "Step 2" of the *Batson* test. This being the case, the Circuit Court did not see the need to proceed to "Step 2" of the *Batson* test and weigh the credibility of the prosecution's justifications against Elem's argument that the prosecution's motivations were actually based on race. The Supreme Court then accepted the case for further review.

*Misapplication of the BATSON Test*

According to the Supreme Court, the Eighth Circuit incorrectly applied the *Batson* test by prematurely combining Steps 2 and 3. Specifically, with regard to Step 2, the Supreme Court found that the Eighth Circuit had placed an improper expectation of plausibility and persuasiveness on the prosecution's reasons for exercising the peremptory strike. The Court explained that the credibility of the prosecution's explanation should only be gauged when considering Step 3 of *Batson*, and that Step 2 is satisfied as soon as the prosecution offers *any* possible race-neutral justification for its behavior. It is then under Step 3 of the test that the court should weigh all the arguments presented and determine whether the prosecution's justification is satisfactory, or whether that alleged justification appears to be nothing more than a pretext for discrimination. Thus, because the prosecutor did offer *some* non-racial justification for striking the potential jurors in question (long beards and disheveled appearance), the Eighth Circuit should have proceeded to Step 3 of the *Batson* test rather than ruling against the prosecution prematurely.[26]

*Importance of Separate Steps in the BATSON Test*

In *Purkett v. Elem*, the Supreme Court emphasized the differences between Steps 2 and 3 of the *Batson* test. Specifically, the Majority stated in its analysis that the Eighth Circuit incorrectly "seized on"[27] its warning in *Batson* regarding the rebuttal of a *prima facie* case, in which the prosecution "must give a 'clear and reasonably specific' explanation of the 'legitimate reasons' for

[26] *Id.* at 767-68.
[27] *Id.* at 768.

exercising [its peremptory] challenges."[28] The Eighth Circuit had interpreted these specific words to mean that the race-neutral reasons proffered by the prosecution must be genuine and sensible. The Supreme Court clarified that its words were meant "to refute the notion that a prosecutor could satisfy his burden of proof by merely denying that he had a discriminatory motive or by merely affirming his good faith." [29] This is where Step 3 becomes crucial, in that *it* is the proper point in the *Batson* process for the court to evaluate the actual merit of the prosecution's explanation.

The *Purkett* Majority reasoned that the Eighth Circuit improperly merged Steps 2 and 3 of the *Batson* analysis. Furthermore, the Supreme Court reasoned that the state court's finding of a non-racial motive had not been properly debunked by the Eighth Circuit. Consequently the Supreme Court remanded the case to the trial court, where Step 3 would need to be evaluated.

Justices Stevens and Breyer noted in dissent that the Court's broader interpretation of Step 2 was a serious readjustment to its original ruling in *Batson.*[30] Step 2 stipulates that a prosecutor "must articulate a neutral explanation related to the particular case to be tried."[31] Thus, the Court's acceptance of the prosecution's reasoning behind striking one of the jurors simply due to his disheveled appearance and long hair did not seem to comport with the expectations set out in *Batson*. Moreover, the dissenters argued, "It is not too much to ask that a prosecutor's explanation for his strikes be race neutral, reasonably specific, and trial related."[32]

## *BATSON* REVISITED IN *MILLER-EL*

### *Case Background*

Amidst the clarifications to the *Swain* standard that resulted in creation of the new *Batson* test, the cases of *Miller-El v. Cockrell* and *Miller-El v. Dretke* were decided based upon the application of both standards. These cases

[28] *Batson*, 476 U.S. at 98 (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 258 (1981)).

[29] *Purkett*, 514 U.S. at 769.

[30] *Purkett*, 514 U.S. at 766 (Stevens, J., dissenting).

[31] *Batson,* 476 U.S. at 98.

[32] *Purkett*, 514 U.S. at 775.

involved two parts: originally in *Miller-El v. Cockrell*, the Supreme Court had to determine whether the evidence was adequately debatable to warrant the issuance of a Certificate of Appealability (COA).[33] The case continued and was later reheard by the Court under the new title of *Miller-El v. Dretke.*[34] In that instance, the Court went further to determine whether the defendant was entitled to relief for constitutional violations in the prosecution's usage of peremptory strikes.[35]

Thomas Joe Miller-El, along with his wife, Dorothy, and another man, Kenneth Flowers, were accused of robbing a Holiday Inn in Dallas, Texas. After emptying the cash drawers, the robbers proceeded to order the two employees, Doug Walker and Donald Hall, to lie on the floor. Then, the two employees were gagged with pieces of fabric and bound hand and foot. Miller-El proceeded to shoot Walker twice in the back and Hall in the side, leaving Walker dead and Hall paralyzed.[36]

Miller-El was charged with capital murder and a jury trial was scheduled in a Texas state court. During jury selection the prosecutor used his allotted peremptory strikes to exclude 10 out of 11 (or 91%) of the qualified African-American venire members.[37] In response to these figures, Miller-El claimed that the strikes were race-based, and thus violated his constitutional rights under the Equal Protection Clause. The trial court examined his claim under the standard set by *Swain,* which stated that peremptory challenges were considered unlawful if there was a showing of systematic juror exclusion on the basis of race. The Texas trial court found no such evidence and rejected Miller-

[33] A Certificate of Appealability, or COA, is a certificate that grants the defendant the right to file an appeal. The certificate is granted when there is a 'substantial showing of the denial of constitutional rights.' *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003), *rev'g Miller-El v. Johnson*, 261 F.3d 445 (5th Cir. 2001).

[34] The case name was updated when Cockrell was replaced by Dretke as Director of the Texas Department of Criminal Justice.

[35] The facts presented here pertain to both *Miller-El v. Cockrell* and *Miller-El v. Dretke*, which will hereinafter be referred to collectively as the *Miller-El* case.

[36] *Cockrell*, 537 U.S. at 327-28 (2003).

[37] *Id.* at 331.

El's request for the selection of a new jury. Miller-El was ultimately convicted and sentenced to death.[38]

In 1986, while Miller-El was in the process of appealing his conviction, the Supreme Court rendered the *Batson v. Kentucky* decision, which provided its new test that replaced the *Swain* standard previously used in *Miller-El*. Under the new *Batson* test, it was no longer Miller-El's responsibility to show a systemic pattern of jury discrimination over time; instead, he could use the new 3-step process to argue as to a constitutional violation based on his own trial. Due to this new development, the Texas Court of Criminal Appeals remanded the *Miller-El* case back to the trial court to determine whether Miller-El could provide a *prima facie* case that the prosecutor used peremptory challenges to exclude venire members on the basis of race during his own trial.[39]

The trial court, under the new *Batson* test, concluded that the evidence still did not prove race-based discrimination in the selection of Miller-El's jury. The Court of Criminal Appeals affirmed, stating it "found 'ample support' in the *voir dire*[40] record for the race-neutral explanations offered by prosecutors for the peremptory strikes."[41] Miller-El then sought federal review of his claim.[42] Following a convoluted procedural process, the Supreme Court ultimately ruled in favor of Miller-El, finding that the prosecutor's use of peremptory challenges to exclude certain jurors violated his constitutional rights.[43]

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[38] *Miller-El v. Dretke*, 125 S. Ct. 2317, 2321-322 (2005), *rev'g*, 361 F.3d 849 (5th Cir. 2004).

[39] *Dretke*, 125 S. Ct. at 2322-23.

[40] *Voir dire* is a preliminary examination of potential jurors; thus, a *voir dire* record is a record of that examination. *Cockrell*, 537 U.S. at 328.

[41] *Dretke*, 125 S. Ct. at 2323.

[42] See 28 U.S.C. § 2254. The Antiterrorism and Effective Death Penalty Act of 1996 amended the habeas corpus statute, 28 U.S.C.S. §§ 2241 so that 28 U.S.C.S. §2253 "mandated that a state prisoner seeking habeas corpus relief under 28 U.S.C.S. § 2254 had no automatic right to appeal a federal district court's denial of such relief. Instead, the prisoner first had to seek and obtain a certificate of appealability (COA). Also, under 28 U.S.C.S. §2253(c)(2), a prisoner seeking a COA had to demonstrate a substantial showing of the denial of a federal constitutional right."

[43] The federal district court also denied Miller-El relief, and the Court of Appeals for the Fifth Circuit prevented further appeal by denying a certificate of appealability. After the denial by the Fifth Circuit, the Supreme Court granted certiorari. In *Miller-El*

*The Supreme Court's 3-Step Analysis*

*STEP 1: Prima Facie Evidence Suggesting Discrimination*

In making its decision in the *Miller-El* case, the Supreme Court specifically considered the prosecution's substantial use of jury shuffling,[44] disparate questioning methods, unequal treatment of potential jurors and evidence of a long-standing pattern of discrimination.[45] When interpreting the *Miller-El* facts in light of the *Batson* Test, the Court first examined whether Step 1, which requires the defendant to provide a *prima facie* showing of discrimination, had been satisfied. The Court determined that the prosecution's frequent use of jury shuffles to decrease the likelihood that an African-American would reach the front of the pool[46] was an indicator of *prima facie* discrimination satisfying the defendant's burden of proof for Step 1. The Court found that on at least two occasions the prosecution requested and utilized shuffles when African-Americans were sitting near the front of the panel. The Court also referenced another occasion when "the prosecutors complained about the purported inadequacy of the jury shuffle by a defense lawyer but lodged a formal objection only after the post-shuffle panel composition revealed that African-American prospective jurors had been moved forward."[47] Thus, the Court reasoned that this evidence suggested the prosecution had used shuffles to manipulate the panel so that African-American venire members were in the back, making them less likely to be selected.

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*v. Cockrell*, the Supreme Court decided that Miller-El *was* entitled to an appeal because "the merits of the *Batson* claim were, at the least, debatable by jurists of reason." Thus, the Supreme Court sent the case back to the Fifth Circuit for further review. The Fifth Circuit once again rejected Miller-El's *Batson* claim and the Supreme Court accordingly granted certiorari once more. *Dretke*, 125 S. Ct. at 2321-322.

[44] "In the State's criminal practice, either side may literally reshuffle the cards bearing panel members' names, thus rearranging the order in which members of a venire panel are seated and reached for questioning." *Id.* at 2332.

[45] *Id.* 2351.

[46] This is the Texas criminal procedure practice which allows "parties to rearrange the order in which members of the venire are examined so as to increase the likelihood that visually preferable venire members will be moved forward and empanelled." Shuffling affects jury composition because those jurors who are not able to be questioned during *voir dire* are "dismissed at the end of the week." *Cockrell*, 537 U.S. at 334.

[47] *Id*.

In addressing the issue of disparate treatment, the Court also took note of evidence illustrating that 8 out of 15 (or 53%) African-American veniremen were first given a detailed and graphic description of the execution process in Texas before they were questioned.[48] This description preceded the prosecution's question regarding whether the venire members could deliver a death sentence. In contrast, only 3 out of 49 (or 6%) of the potential Caucasian jurors were given the descriptive preface.[49] Thus, the Court reasoned that this evidence demonstrated an apparent attempt to manipulate the answers offered by potential venire members according to race.[50]

Miller-El provided further evidence of disparate questioning between the African-American and Caucasian veniremen. The Court examined the manner in which the prosecution had questioned members of the venire about their willingness to impose a particular sentence for murder. As the evidence demonstrated, 34 out of 36 (or 94%) of the Caucasian venire members were presented with the sentencing minimum of five years imprisonment,[51] compared with only 1 out of 8 (or 12.5%) of the African-American venire members receiving this information. In other words, when facing Caucasian venire members the prosecution provided the statutory minimum sentence of five years in its line of questioning; however, when facing African-American venire members, the prosecution withheld this information from 7 out of 8 (or 87.5%) of the prospective jurors.[52] Thus, the Court reasoned that this disparity helped to confirm Miller-El's *prima facie* case of discrimination.

Lastly, the Court referred to evidence that demonstrated a pattern of historical discrimination by the prosecution. Specifically, Miller-El provided evidence that the District Attorney's Office had once enacted a *formal policy* aimed at excluding minorities from jury service. A 1963 circular instructed prosecutors to exclude minorities through the use of their peremptory strikes: "Do not take Jews, Negroes, Dagos, Mexicans, or members of any minority race on a jury, no matter how rich or how well educated."[53] Witnesses confirmed the use of racially biased prosecutorial conduct over a number of

[48] *Id.* at 332.
[49] *Id.*
[50] *Id*. at 332.
[51] *Id.* at 333.
[52] *Id.*
[53] *Id.* at 334-35.

years."[54] This evidence further contributed to the finding that Miller-El had shown a *prima facie* case of discrimination under Step 1 of *Batson*.

*STEP 2: The Prosecution's Race-Neutral Justifications*

Under the next step of the *Batson* test, the Supreme Court allowed the prosecution to offer 'race-neutral justifications' for its exercise of peremptory challenges against a statistically significant number of African-American venire members. In this regard, the prosecution argued that it had excluded potential jurors on the basis of their ambiguity toward willingness to issue the death penalty, rather than their race. Thus, rather than asking the Court to simply trust their motives, the prosecutors had offered some further detail. In this regard, the Court was able to move on to *Batson's* next step and weigh the credibility of the prosecutors' justifications.

*STEP 3: The Court's Overall Assessment*

Under the final step of *Batson*, the Court weighed the information brought up in Steps 1 and 2 of the test to render a decision as to whether the evidence conclusively indicated that the prosecution acted in a discriminatory manner during jury selection. The Court specifically outlined its role in Step 3 as follows: "If a prosecutor's proffered reason for striking an African-American panelist applies just as well to an otherwise-similar [non African-American] who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step."[55]

Ultimately, the Court found the supposed race-neutral reasons for striking African-American jurors offered by the prosecution to be inconsistent with the actual method used to strike those jurors. The Court examined the questioning of one juror, Billy Jean Fields, for part of its analysis. Fields was an African-American venire member who was struck peremptorily by the prosecution and who the Court found to have "expressed unwavering support for the death penalty." During one point in questioning, Mr. Fields indicated that the potential for rehabilitation could be relevant when determining whether the defendant would likely commit future acts of violence. The Court further stated that after Fields expressed this opinion, he claimed that although he felt

[54] *Id.* at 35.

[55] *Dretke,* 125 S. Ct. at 2325.

anyone could be rehabilitated, this possibility would not keep him from imposing a death sentence.[56] He was then peremptorily struck by the prosecution.

Sandra Hearn, a Caucasian venire member, expressed more equivocal support for the death penalty "if a criminal cannot be rehabilitated and continues to commit the same type of crime." The Court, however, found that despite her ambiguity regarding the death penalty, the prosecution did not respond to Hearn's remarks in the same way that it had responded to Fields, who had stated that he had no problem with imposing a death sentence. Although the prosecution offered explanations for excluding jurors according to their ambiguity toward the death penalty, the Court found that this justification was not applied consistently, and was therefore not "race-neutral"[57]

The Court also considered the examination of African-American venire member Joe Warren, who responded to the death penalty question as follows:

> I don't know. It's really hard to say because I know sometimes you feel that it might help to deter crime and then you feel that the person is not really suffering. You're taking the suffering away from him. So it's like I said, sometimes you have mixed feelings about whether or not this is punishment or, you know, you're relieving personal punishment.[58]

The prosecution stated that its reasons for striking Joe Warren were on account of the inconsistencies in his responses. The Court assessed this race-neutral reason as facially valid, but again mentioned the disparate treatment of other African-American venire members as opposed to other venire members who displayed similar inconsistencies but were not challenged by the prosecution.[59] Thus, the Court's assessment of the evidence exposed racial disparity that transcended the prosecution's stated reasons for use of its peremptory challenges. Hence, the prosecution's assertion that venire members who expressed reluctance or hesitation when asked if they could impose capital punishment were stricken did not explain the evidence which suggested that the

[56] *Id.* at 2326-27.
[57] *Id.* at 2327-328.
[58] *Id.* at 2329.
[59] *Id.* at 2329-30.

"manner in which members of the venire were questioned varied by race."[60]

In its analysis, the Court found that the prosecution's proffered race-neutral reasons for striking the jurors in question "[did] not hold up and are so far at odds with the evidence that pretext is the fair conclusion, indicating the very discrimination the explanations were meant to deny."[61] Thus, the Court found that the juxtaposition of the prosecution's reasons for the strikes and the evidence of the various *voir dire* practices demonstrated an imbalance too great for pretext to not be involved.

The Court specifically stated that the strikes pertaining to Joe Warren and Billy Jean Fields "correlate[d] with no fact as well as they correlate with race, and they occurred during a selection infected by shuffling and disparate questioning that race explains better than any race-neutral reason advanced by the state."[62] Essentially, the Court's analysis in Step 3 led to the conclusion that the prosecution did not meet its burden of providing race-neutral justifications for its peremptory challenges, and thus the *prima facie* showing of potential racial discrimination presented in Step 1 substantially outweighed the explanations offered in Step 2. [63]

All in all, the Supreme Court found that the prosecution's inability to explain the disparity in methods of questioning and treatment, repeated jury shuffling, and evidence of historical discrimination within the District Attorney's Office all indicated that racial discrimination could very well have

[60] *Cockrell*, 545 U.S. at 331-32. The Court found that three of the State's proffered race-neutral reasons for striking African-American jurors were also "pertinent" to some of the Caucasian jurors, who, despite their similar answers, were not challenged and ultimately served on the jury. This inconsistency led to an inference that the State's proffered reasons were not truly race-neutral after all. *Id. at* 343.

[61] *Dretke*, 125 S. Ct at 2339.

[62] *Id.* at 2340.

[63] Ultimately, the *Miller-El* Court concluded that the statistical evidence itself could raise a legitimate debate regarding whether the prosecution used a race-neutral basis to conduct its peremptory strikes. Also, the Court examined the evidence stating that the prosecution used its peremptory strikes to exclude 91% of the African-American venire members, in which only one member ultimately served as a juror. Moreover, the Court noted that ten of the prosecution's fourteen peremptory strikes were issued against African-American venire members. In response to this evidence the Court stated, "Happenstance is unlikely to produce this disparity." *Cockrell*, 537 U.S. at 342.

taken place in the composition of Miller-El's jury.[64] Therefore, when balancing all the arguments given in Steps 1 and 2, the Court found in Step 3 that the prosecution's proffered race neutral reasons did not legitimate the disparities found regarding the venire strikes.

*Key Differences Between MILLER-EL and PURKETT*

The *Miller-El* Majority's decision appears well supported when considering all the evidence presented, including the prosecution's use of repeated, erratic jury shuffling, manipulative questioning and a prior history of systematic discrimination. In contrast, the prosecutors' supposed race-neutral justifications for their peremptory strikes of potential African-American jurors were insufficient, and therefore correctly discounted. If they had actually applied their peremptory challenges on the basis of the potential jurors' death penalty views, in a consistent manner, they could have shown a race-neutral explanation for their behavior. However, the facts showed that this did not actually happen. In this case, the *Batson* test appropriately protected Miller-El's rights under the Equal Protection Clause of the Fourteenth Amendment.

Use of the test in the *Purkett* case, on the other hand, did not lead to a ruling against the prosecution. This outcome also makes sense under the *Batson* test. The prosecutor's justification for striking jurors on the basis on their 'disheveled appearance'[65] presented a race-neutral explanation for their behavior. Their behavior might seem arcane and irrational, but it was not necessarily grounded in racial discrimination. Because the facts supported the possibility that this concern over hair care was applied consistently, it was possible that something other than overt discrimination coincidentally created the racial disparity in Elem's jury. Once again, the *Batson* test arguably fulfilled its function in protecting constitutional rights while preserving the use of the peremptory challenge system.

By comparing the application of the *Batson* Test in *Purkett* and *Miller-El,* it is fair to note that *Batson* does have its flaws. Technically, the prosecution could offer a race-neutral reason as a fabrication to mask actual racial manipulation of the jury. In *Purkett v. Elem*, a bias against unkempt beards was considered race-neutral because the Court could find no

[64] *Id.* at 343-46.

[65] *Purkett*, 514 U.S. at 767.

overwhelming evidence to dispute the accuracy of the prosecution's statements. Whether that concern truly motivated the removal of potential African-American jurors can never be determined (by the courts) with exact certainty. Given this inherent flaw, it is important to ask: despite having served its purpose as best as possible in *Purkett* and *Miller-El*, is *Batson* an invalid test or is it the best method to manage a systemic problem?

## THE FUTURE OF JURY MANIPULATION

The purpose for maintaining a peremptory challenge system is to allow counsel for each party to dismiss certain venire members without being required to offer an explanation. Often prosecutors may base these challenges on intuition or hunches that are difficult to articulate. Since peremptory challenges, by nature, allow for the removal of venire members on an arbitrary basis, it seems inevitable that this practice will continue to provoke legal challenges. This system affords attorneys the ability to remove potential jurors, thereby perhaps influencing the outcome of entire trials, while remaining unaccountable for providing a detailed explanation for their behavior. This practice thus raises the question: how can prejudice be avoided in a system that is predicated on subjective intuition? Interestingly enough, criticism of the *Batson* test seems to be receiving more attention that criticism of the peremptory challenge system itself.

### *Is BATSON to Blame?*

After dissecting the complex application of the *Batson* test in *Purkett* and *Miller-El*, it is relevant to ask whether the test itself is to blame for the convoluted nature of these cases, or whether the test merely exposes the inherent deficiencies within the peremptory challenge system. Justice Breyer, in his concurrence in *Miller-El*, noted that the application of *Batson* in determining the validity of a peremptory strike is certainly problematic.[66] Breyer also argued that the *Batson* test is inefficient in carrying out its function. He states: "The complexity of this process reflects the difficulty of finding a legal test that will objectively measure the inherently subjective reasons that

[66] *Dretke,* 125 S. Ct. at 2340 (Breyer, J., concurring).

underlie use of a peremptory challenge ... but *Batson* embodies defects intrinsic to the task."[67]

A Harvard Law Review article titled, "Judging the Prosecution: Why Abolishing Peremptory Challenges Limits the Dangers of Prosecutorial Discretion," parallels Justice Breyer's concern. The author states, "Although the Supreme Court had expanded *Batson*'s scope significantly since 1986, the doctrine has been largely ineffective."[68] Primarily the author believes that the *Batson* test affords the prosecution certain leeway that is not available to the defendant. This is because most of the race-neutral reasons offered by the prosecution would satisfy the minimal requirement of offering some sort of justification under Step 2 of *Batson*, and a large number of these cases "[turn] on credibility determinations made at [Step 3]."[69] Because the prosecution is often able to consistently appear before judges in particular jurisdictions, it can become very difficult for an individual defendant to convince that judge that the prosecutors have been dishonest and manipulative during jury selection. In a close case, the author argues that many judges would give the prosecution the benefit of the doubt.[70] Thus, even though the *Batson* test is less burdensome for the defendant than its predecessor, the *Swain* test, even *Batson* may not offer the defendant a completely clean slate to test his or her claims of jury manipulation.

However, despite these concerns with the *Batson* test, it is not the actual root of the problem. The test provides a comprehensive guide for analysis, given the difficult nature of identifying racial bias in such an amorphous context. *Batson* offers both sides an opportunity to present their case. The ultimate decision as to whether discrimination has been proven rests, as it must, in the hands of the judges who have the benefit of each party's submissions. Hence, *Batson* is as comprehensive as it can be, provided the enormous subjectivity of peremptory challenges in general.

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[67] *Id.* (Breyer, J., concurring).

[68] *Judging the Prosecution: Why Abolishing Peremptory Challenges Limits the Dangers of Prosecutorial Discretion*, 119 Harv. L. Rev. 2121, 2134 (discussing the ineffectiveness of the *Batson* test).

[69] *Id.* at 2135.

[70] *Id*.

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*Is the Peremptory Challenge, Itself, the Root of the Problem?*

Peremptory challenges inherently contain elements that cannot be fully analyzed by any objective measure or standard. The idea that the inherent problems of the peremptory challenge system can be solved with a fixed test or standard is the reason for *Batson*'s apparent "failure." The *Batson* test allows for a comprehensive review of all sides of the case to an extent that cannot be outdone. However, since the peremptory challenge system itself was constructed such that the prosecution and defense can use strikes for reasons that do not need to be expressly stated, it seems rather counterintuitive that the judiciary can set limitations as to what constitutes a "fair" dismissal. In other words, because the peremptory challenge system itself was crafted in order to allow some flexibility in jury composition, how can the court set restrictions on something which by design is to be personal, intuitive, somewhat arbitrary, and perhaps even, as a result, discriminatory?

If discrimination, by definition, means to show bias or a certain inclination or disinclination towards something or someone, then it seems that the peremptory challenges are in essence a means of discrimination. One cannot chastise the *Batson* test as being the source of the problem when it essentially attempts to compensate for the flaws and deficiencies inherent to the peremptory challenge system itself.

Considering the problematic nature of the peremptory challenge system and the difficulty in regulating it, a future remedy might be the elimination of peremptory challenges altogether. As the author of the Harvard Law Review article stated, "Ultimately, the result of abolition would be a less discriminatory, more efficient allocation of prosecutorial resources and a system that the whole of society would deem far more legitimate than the one we have now."[71] On the other hand, maintaining a peremptory challenge system allows the prosecution to "impanel an all-white or nearly all-white jury,"[72] augmenting its chances for success when prosecuting a minority defendant. While this sort of practice does indeed warrant serious consideration, it should also be noted that not every trial where peremptory challenges were used will be a product of racial manipulation: we cannot say for certain that discrimination is the rule rather than the exception.

[71] *Id.* at 2142.
[72] *Id.*

Unfortunately, the mere possibility of racial manipulation in the criminal justice system is severely problematic, and the strong possibility that peremptory challenges will continue to contribute to this outcome makes a problematic system into a flawed one. On the other hand, it is quite possible that more frequent use of the *Batson* test will root out much of this discrimination, ultimately providing a strong deterrent toward further discrimination in the future. Overall, it seems wisest to recognize that the peremptory challenge system has its benefits in the pursuit of justice, as well as allowing the potential for discrimination. Continued use of the *Batson* test is a strong weapon to allow room for these benefits while also addressing this ingrained problem.

## CONCLUSION

Despite what appears to be reasonable use of the *Batson* test to resolve the disputes found in the *Purkett* and *Miller-El* cases, the test still remains subject to much legal scrutiny. However, the *Batson* test provides a comprehensive analysis of all factors, by allowing each party the opportunity to present its case before the court weighs all the relevant evidence. By affording the criminal defendant an opportunity to present his or her case, and then giving the prosecution a chance for rebuttal, *Batson* is a fair approach to solving a complex problem inherent in the current jury selection process. There seems to be no better way to regulate the use of peremptory challenges, unless man is suddenly endowed with the ability to read others' minds. Thus, criticism should be shifted away from the *Batson* test, and should instead be directed toward the system which the test does its best to regulate.

It is the actual practice of peremptory challenges in jury selection that creates the real controversy. Since its very nature involves human intuition, as well as certain degrees of secrecy, the concurrent potential for discrimination seems rather obvious. Thus, for those who truly believe reform is in order, despite a loss of flexibility in the current jury selection process, that energy should be directed at eradication of the actual process that enables humans to act on their subjective intuition in the first place.