IS A GREEN TIE ENOUGH? – TRUTH AND LIES IN THE COURTROOM

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> *Twenty-six years after* Batson*, a growing body of evidence shows that racial discrimination remains rampant in jury selection.*
>
> — Justice Charles Wiggins in State v. Saintcalle, 309 P.3d 326, 329 (2013)

I. Introduction

A. What Does Jury Selection Have to Do With Green Ties?

In 1997, *Hicks v. Westinghouse* was argued before the Ohio Supreme Court.[1] The issue presented in the case was whether Ohio state courts were required to apply *Batson* in state court civil jury selection proceedings. If so, then the court had to decide "whether the trial court conducted a proper constitutional analysis as outlined in *Batson v. Kentucky*[2] in determining that appellees were not racially motivated in excluding an African American from the jury through the use of a peremptory challenge."[3] For the Ohio Supreme Court, this was a case of first impression.

In *Batson*, the U.S. Supreme Court recognized that purposeful racial discrimination by the prosecution's exercise of a peremptory strike in jury selection raises significant constitutional questions.[4] These questions undermine public confidence in the jury trial system.[5] Traditionally, the peremptory strike of a prospective juror could be exercised for virtually any reason without explanation. In *Batson,* however, the Court departed from this longstanding practice in criminal proceedings and held that, where the rationale for the strike is based solely on race, the Constitution prohibits a peremptory challenge.[6] The racially motivated use of peremptory challenges violates the Equal Protection Clause because:

> Just as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors, so it forbids the States to strike black veniremen on the assumption that they will be

1. Hicks v. Westinghouse Materials Co., 676 N.E.2d 872 (Ohio 1997).
2. 476 U.S. 79 (1986).
3. *Hicks*, 676 N.E.2d at 98.
4. *See* 476 U.S. at 85-89.
5. *Id.* at 99.
6. *Id.* at 96-98.

> biased in a particular case simply because the defendant is black.[7]

Under *Batson* and its progeny, the Equal Protection Clause prohibits purposeful discrimination on the basis of race or sex in the exercise of peremptory challenges.[8] According to the Supreme Court, *Batson* challenges to peremptory strikes proceed in three specific stages: (1) the party opposing the peremptory strike must make a prima facie case of proscribed discrimination; (2) if established, the party who made the strike tenders a race-neutral or sex-neutral explanation for the strike; and (3) once such an explanation is offered, the challenger must prove that this justification is pretextual.[9]

During the oral arguments in *Hicks*, I described the difference between the requirements at the second and third steps of the *Batson* process, specifically related to offering of a race-neutral, persuasive explanation for the peremptory strike.[10] In doing so, I pointed the Ohio Supreme Court to *Purkett v. Elem*, where the Supreme Court indicated that at the second stage of the *Batson* process, the explanation offered for the use of the peremptory challenge need not be persuasive or plausible.[11] In fact, at the second stage

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7. *Id.* at 97.

8. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 129 (1994) (sex); *Batson*, 476 U.S. at 86 (race).

9. Purkett v. Elem, 514 U.S. 765, 767–68 (1995).

10. *See* Oral Argument at 28:00, Hicks v. Westinghouse Materials Co., 676 N.E.2d 872 (No. 1995-2314) (Ohio 1997), https://ohiochannel.org/video/case-no-1995-2314 (statement of Jack B. Harrison).

11. *Purkett*, 514 U.S. at 767-68. As the Court stated:

> Under our *Batson* jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination. The second step of this process does not demand an explanation that is persuasive, or even plausible. "At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral."
>
> The Court of Appeals erred by combining *Batson*'s second and third steps into one, requiring that the justification tendered at the second step be not just neutral but also at least minimally persuasive, *i.e.*, a "plausible" basis for believing that "the person's ability to perform his or her duties as a juror" will be affected. It is not until the *third* step that the persuasiveness of the justification becomes relevant—the step in which the trial court determines

of the *Batson* process, the explanation offered for using the peremptory challenge might even be "silly or superstitious."[12]

At that point in the *Hicks* oral argument, the late Justice Francis Sweeney expressed incredulity that just any explanation had to be accepted by the trial court at this second step, asking whether it would be an acceptable explanation to say that "Mr. Smith has a green tie."[13] "Is that enough?," Justice Sweeney asked.[14] Given the language used by the Supreme Court in *Purkett*, I had to answer that, indeed, at the second step of the *Batson* analysis, it would be enough to offer as an explanation for the use of a peremptory strike the fact that "Mr. Smith has a green tie."[15] The "second step of this process does not demand an explanation that is persuasive, or even plausible."[16] As the Court stated in *Purkett*:

> At that stage [step three], implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination. But to say that a trial judge *may choose to disbelieve* a silly or superstitious reason at step three is quite different from saying that a trial judge *must terminate* the inquiry at step two when the race-neutral reason is silly or superstitious. The latter violates the principle that the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.[17]

Yes, at times, a green tie will, indeed, be enough.

B. So, What Then Is the Problem?

Another Supreme Court case illustrates the peremptory problem. Curtis Flowers was tried six times for the murder of four employees of a furniture store in Winona, Mississippi (population 5,000).[18] Flowers is African

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> whether the opponent of the strike has carried his burden of proving purposeful discrimination.

Id. (citations omitted).

12. *Id.* at 768.

13. Oral Argument at 29:06, *Hicks*, 676 N.E.2d 872 (statement of Justice Francis Sweeney).

14. *Id.* (statement of Jack B. Harrison).

15. *Id.* (statement of Jack B. Harrison) (quotation reflects statement of Justice Francis Sweeney at 29:06).

16. *See id.* at 28:55 (statement of Jack B. Harrison).

17. *Purkett*, 514 U.S. at 768.

18. Flowers v. Mississippi, 139 S. Ct. 2228, 2234, 2236 (2019).

American, while three of the four victims were white.[19] The same District Attorney served as lead prosecutor in each of Flowers's trials.[20] At the first four trials, the prosecutors used peremptory challenges to strike all qualified African American prospective jurors.[21] In the first three trials, the all-white or nearly all-white juries convicted and sentenced him to death.[22]

All three convictions were later reversed based on prosecutorial misconduct.[23] Flowers's fourth and fifth trials ended in mistrials.[24] In Flowers's sixth trial, prosecutors exercised six peremptory strikes, five against African American prospective jurors.[25] Again, he was convicted and sentenced to death by a jury of eleven white jurors and one African American juror.[26] Ultimately, the U.S. Supreme Court reversed Flowers's conviction, concluding that prosecutors' use of peremptory challenges showed clear discriminatory intent.[27]

Historically, a party may exercise a peremptory strike during jury selection for almost any reason, including reasons that are implausible, fantastic, silly, or superstitious.[28] While peremptory challenges are deeply rooted in our nation's understanding of what may be required to seat an impartial jury, peremptory challenges are not constitutionally required and certainly present an opportunity for explicit and implicit bias to play out in voir dire.[29] In *Batson* and its progeny, however, the Court held that the Equal Protection Clause prohibits purposeful discrimination on the basis of race and sex.[30]

In his concurring opinion in *Batson*, Justice Thurgood Marshall identified two fundamental shortcomings in the *Batson* analysis: (1) a lawyer who intends to discriminate purposefully in jury selection can easily provide an unprejudiced reason for the strike; and (2) a lawyer who does not intentionally discriminate may still be consciously, or unconsciously,

19. *Id.*
20. *Id.* at 2234.
21. *Id.* at 2236-37.
22. *Id.*
23. *Id.* at 2236 (explaining that the misconduct cited by the Supreme Court of Mississippi included mentioning facts not in evidence, expressing baseless grounds for attacking the credibility of witnesses, and racial discrimination in jury selection).
24. *Id.* at 2237.
25. *Id.*
26. *Id.*
27. *Id.* at 2235.
28. Purkett v. Elem, 514 U.S. 765, 768 (1995).
29. Batson v. Kentucky, 476 U.S. 79, 97-98 (1986).
30. *Id.* at 86 (race); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 129 (1994) (sex).

motivated by discriminatory reasons.[31] These flaws led Justice Marshall to argue for the abolition of the peremptory challenge entirely, despite the practice's deep historical roots.[32]

Thus, since *Batson,* both jurist and scholars have critiqued the doctrine for its shortcomings in addressing the discriminatory use of peremptory challenges during jury selection.[33] Much of the commentary has focused on *Batson*'s failure to address the implicit biases that are inherently present in jury selection.[34] Like in Flowers's case, these biases can be life or death.

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31. *See Batson*, 476 U.S. at 106 (Marshall, J., concurring). Justice Marshall also argued that a judge's ruling on a peremptory challenge could similarly be distorted by "conscious or unconscious racism." *Id.*; *see also* Timothy J. Conklin, Note, *The End of Purposeful Discrimination: The Shift to an Objective* Batson *Standard*, 63 B.C. L. REV. 1037, 1038-39 (2022) (describing Justice Marshall's arguments in his concurring opinion); Annie Sloan, Note, *"What to Do About* Batson*?": Using a Court Rule to Address Implicit Bias in Jury Selection*, 108 CALIF. L. REV. 233, 239-41 (2020) (same).

32. *Batson*, 476 U.S. at 107; *see* Sloan, *supra* note 31, at 241 (discussing Justice Marshall's argument to end the practice of peremptory challenges in criminal cases).

33. *See, e.g.*, Miller-El v. Dretke, 545 U.S. 231, 266-67 (2005) (Breyer, J., concurring) (advocating for the abolition of peremptory strikes and citing Justice Marshall); Ronald F. Wright et al., *The Jury Sunshine Project: Jury Selection Data as a Political Issue*, 2018 U. ILL. L. REV. 1407, 1419, 1423-29 (describing "remarkable" racial disparities in use of peremptory strikes by prosecutors and defense attorneys in North Carolina felony trials); Jonathan Abel, Batson*'s Appellate Appeal and Trial Tribulations*, 118 COLUM. L. REV. 713, 716-23 (2018) (describing *Batson*'s trial court failings); 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, 1093 (2011) (describing *Batson* as "ineffective as a lone chopstick"); Leonard L. Cavise, *The* Batson *Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501, 501 (criticizing *Batson*'s "infinitely cumbersome procedural obstacle course" and "toothless bite").

34. *See, e.g.*, Antony Page, Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 160-61, 187-88 (2005) (presenting an overview of decision-making in the brain and discussing how implicit bias shapes those decisions); Mark W. Bennett, Essay, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson*, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 166-67 (2010); Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate* Batson *Record*, 94 N.C. L. REV. 1957, 1961 (2016) (pointing out that in the thirty years following *Batson,* the North Carolina Supreme Court never found discrimination against a juror of color); Anna Roberts, *Asymmetry as Fairness: Reversing a Peremptory Trend*, 92 WASH. U. L. REV. 1503, 1538-39 (2015) (arguing for an asymmetrical allocation of peremptory challenges where the defense has more available strikes than the prosecution); Abbe Smith, *A Call to Eliminate Peremptory Challenges by Prosecutors*, 27 GEO. J. LEGAL ETHICS 1163, 1164 (2014) (arguing for complete elimination of the prosecution's use of peremptory challenges); Brian W. Stoltz, *Rethinking the Peremptory Challenge: Letting Lawyers*

Commentators and courts alike have offered varied solutions to correct *Batson's* shortcomings, aiming to eliminate discrimination in jury selection.[35] Courts have consistently held that there is great constitutional value in diverse juries.[36] No doubt, courts are correct in this assessment. The question addressed in this Article, however, is whether the continuation of the peremptory challenge, particularly in criminal proceedings, furthers or inhibits this goal. Our democracy fundamentally requires "that all citizens have the opportunity to participate in the organs of government,

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Enforce the Principles of Batson, 85 TEX. L. REV. 1031, 1034, 1047 (2007) (calling for the creation of a new system of peremptory "blocks"). *See generally* Michael Selmi, *The Paradox of Implicit Bias and a Plea for a New Narrative*, 50 ARIZ. STATE L.J. 193, 199-200, 199 n.21 (2018) (addressing scholarly research on implicit biases).

35. *See* Jeb C. Griebat, *Peremptory Challenge by Blind Questionnaire: The Most Practical Solution for Ending the Problem of Racial and Gender Discrimination in Kansas Courts While Preserving the Necessary Function of the Peremptory Challenge*, 12 KAN. J. L. & PUB. POL'Y 323, 337-38 (2003) (arguing for a system of blind peremptory challenges); Jean Montoya, *The Future of the Post*-Batson *Peremptory Challenge: Voir Dire by Questionnaire and the "Blind" Peremptory*, 29 U. MICH. J. L. REFORM 981, 1015-16 (1996) (proposing a similar system of blind peremptory challenges); Donna J. Meyer, Note, *A New Peremptory Inclusion to Increase Representativeness and Impartiality in Jury Selection*, 45 CASE. W. RES. L. REV. 251, 255-56, 280 (1994) (offering an alternative model allowing for the inclusion of a juror by the defense, without contest or removal by the prosecution); Bellin & Semitsu, *supra* note 33, at 1110-13 (offering a new remedy for reseating improperly stricken jurors); Alafair S. Burke, *Prosecutors and Peremptories*, 97 IOWA L. REV. 1467, 1483-84 (2012) (recommending that prosecutors' offices implement implicit bias training as a way to neutralize biases that might lead to discriminatory strikes); Andrew G. Gordon, Note, *Beyond* Batson v. Kentucky*: A Proposed Ethical Rule Prohibiting Racial Discrimination in Jury Selection*, 62 FORDHAM L. REV. 685, 713 (1993) (calling for a provision in the Model Rules of Professional Conduct prohibiting race-based peremptory strikes); Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099, 1117, 1122 (1994) (asserting the need for increased sanctions for prosecutors who use discriminatory strikes).

36. *See, e.g.*, State v. Holmes, 221 A.3d 407, 428 (Conn. 2019). The Supreme Court of Connecticut agreed with the Supreme Court of Washington when it supported the

> "constitutional value in having diverse juries," insofar as "equally fundamental to our democracy is that all citizens have the opportunity to participate in the organs of government, including the jury. If we allow the systematic removal of minority jurors, we create a badge of inferiority, cheapening the value of the jury verdict. And it is also fundamental that the defendant who looks at the jurors sitting in the box have good reason to believe that the jurors will judge as impartially and fairly as possible. Our democratic system cannot tolerate any less."

Id. (quoting State v. Saintcalle, 309 P.3d 326 (Wash. 2013) *overruled in part on other grounds by* Seattle v. Erickson, 398 P.3d 1124 (Wash. 2017)).

including the jury."[37] But, "[i]f we allow, for example, the systematic removal of minority jurors or female jurors or LGBTQ jurors, we create a badge of inferiority, cheapening the value of the jury verdict."[38] Studies suggest that when compared to diverse juries, all-white juries tend to "spend less time deliberating, make more errors, and consider fewer perspectives."[39] On the other hand, "diverse juries were significantly more able to assess reliability and credibility, avoid presumptions of guilt, and fairly judge a criminally accused."[40] The integrity of the legal system is likewise fundamental: a defendant sitting in the dock looking at the jurors in the box should *believe* that the jurors will judge as impartially and fairly as possible.

Existing jury selection procedures, even after *Batson*, fail to protect these important constitutional interests. Recently, in response to the continued pervasiveness of implicit bias in jury selection, states have begun to undertake significant reviews of the jury selection system in their states, particularly related to the use of peremptory strikes and the application of *Batson*.[41]

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37. *Saintcalle*, 309 P.3d at 337.

38. *Id.*

39. *Id.*

40. *Id.*; *see, e.g.*, Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 CONN. L. REV. 1, 60–61 (2000) (suggesting that jury diversity is necessary to address "[d]emeanor [g]ap," which undermines accuracy of cross-racial credibility determinations).

41. *See, e.g.*, WASH. CT. GEN. R. 37(e) (2018) (adopting a standard that establishes a peremptory challenge is impermissible if "an objective observer could view race or ethnicity as a factor in the use of the . . . challenge"); CAL. CIV. PROC. CODE § 231.7(d)(1) (West 2021) (adopting a standard that establishes a peremptory challenge is impermissible if "there is a substantial likelihood that an objectively reasonable person would view race [or other identities] . . . as a factor in the use of the peremptory challenge"); *Holmes*, 221 A.3d at 436-37 (establishing Connecticut's task force for "propos[ing] necessary solutions to the jury selection process in Connecticut"); Order Amending Rules 18.4 and 18.5 of the Rules of Criminal Procedure, and Rule 47(e) of the Rules of Civil Procedure, No. R-21-0020, 3-6 (Ariz. 2021) [hereinafter Order Abolishing Strikes], https://www.azcourts.gov/Portals/20/2021%20Rules/R-21-0020%20Final%20Rules%20Order.pdf?ver=gEgExz7HPP5mts4Uj8D8nw%3d%3d; Hassan Kanu, *Arizona Breaks New Ground in Nixing Peremptory Challenges*, REUTERS (Sept. 1, 2022, 1:52 PM CDT), https://www.reuters.com/legal/legalindustry/arizona-breaks-new-ground-nixing-peremptory-challenges-2021-09-01; *see also* Willamette Univ. Coll. of L. Racial Justice Task Force, *Remedying* Batson*'s Failure to Address Unconscious Juror Bias in Oregon*, 57 WILLAMETTE L. REV. 85, 85–87 (2021) [hereinafter Willamette, Batson's *Failure*] ("[This report] was prepared by The Willamette University College of Law Racial Justice Task Force, primarily comprised of diploma privilege recipients from the Willamette College of Law class of 2020.") (noting that the

This Article seeks to guide these inquiries in light of the historical record and the examples set by states that have grappled with this issue. Parts II and III explore the historical development of the jury trial and the evolution of peremptory challenges in England through the common law process. Parts IV and V examine the emergence of the peremptory strike in America and its transformation during the Reconstruction era following the Civil War. Parts VI and VII trace the development of the peremptory strike into a tool of oppression and white supremacy during the post-Reconstruction and Jim Crow era during the twentieth century. Part VIII reviews the history leading to the Supreme Court's decision in *Batson*, where the Court attempted to create a process to reduce or eliminate racial discrimination by using peremptory strikes in jury selection. Part IX evaluates the experience in jury selection before and after the requirements of *Batson* in voir dire for both U.S. criminal and civil trials. Part IX concludes that, on balance, *Batson* has failed to reduce or eliminate discrimination in the jury selection process because it fails to consider the intractability of implicit bias in the courtroom and it is in tension with the basic ethical duties and loyalties of attorneys. Part X reviews various state efforts to reform the *Batson* process to improve its effectiveness in reducing discrimination in jury selection. The Article then addresses the decision of the Arizona Supreme Court to eliminate peremptory strikes entirely from the jury selection process in the state. Using Arizona as a template, this Article concludes by arguing, much like Arizona and Justices Marshall, Breyer, for the elimination of peremptory challenges.

II. Origin of the Jury Trial and Juror Challenges in England

Looking at the development of criminal jury trials and juror strikes, with a particular focus on peremptory strikes, the breadth of the undertaking is quickly apparent. The relevant historical record stretches from the reign of Henry II to after the American Civil War. While the focus remains on criminal jury trials, it is necessary to discuss the jury's role in civil disputes in medieval England to understand the acceptance of the jury trial in the decades after 1215 as an essential feature of the justice system. This section explains the common law rationale for peremptory strikes and its frustration by Colonial-Era legislation in the United States.

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report was the result of work done pursuant to a charge from The Committee on Bias in the Oregon Justice System to the Task Force to propose a rule that would reduce racial discrimination in Oregon's criminal jury selection process).

While precursors of the jury trial existed in other feudal nations,[42] in England, the procedure of a trial by a jury of one's peers was formalized during the reign of King Henry II (1154-1189).[43] When Henry II ascended to the throne, England had recently endured an eighteen-year civil war (often referred to as the Anarchy, 1135-1153).[44] At the same time, many English feudal lords had left their lands to fight in the Second Crusade (1147-1150).[45] As a result of these generational wars, the power of the English crown had weakened, the power of the great lords had increased,[46] and the number of land disputes between both private parties and the Church had increased, requiring the involvement of the Crown.[47]

A common issue in private disputes was that, without a recognized claim to the land, a new lord would move in and prevent the prior lord from occupying his tract.[48] In medieval English parlance, when the lord was forced out of possession, he would be considered disseised. The act or process itself was known as disseisment.[49] To address these disputes, to prevent self-help reclamation of land[50] and to renew the crown's power, Henry II instituted a series of reforms in both the civil and the criminal legal systems, resulting in more accessibility to the courts for the average English citizen.[51]

Before Henry II instituted these reforms, trial by combat[52] was the primary method of settling disputes across England.[53] In 1164, the Constitutions of Clarendon mentioned the jury for the first time in English

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42. *See generally* Robert von Moschzisker, *The Historic Origin of Trial by Jury [Part III]*, 70 U. PA. L. REV. 159, 170 (1921) (discussing the origins of the trial by jury as the "net result of the customs of . . . various peoples who contributed to English civilization").

43. Thomas J. McSweeney, *Magna Carta and the Right to Trial by Jury*, *in* MAGNA CARTA: MUSE AND MENTOR 139, 139-41 (Randy J. Holland ed., 2014).

44. *See id.*

45. *See* FRANK BARLOW, THE FEUDAL KINGDOM OF ENGLAND 1042-1216, at 230 (4th ed. 1988).

46. Joseph Biancalana, *For Want of Justice: Legal Reforms of Henry II*, 88 COLUM. L. REV. 433, 439 (1988).

47. *Id.*

48. J. E. R. Stephens, *The Growth of Trial by Jury in England*, 10 HARV. L. REV. 150, 156 (1896).

49. *Id.*

50. Biancalana, *supra* note 46, at 466.

51. McSweeney, *supra* note 43, at 140.

52. Peter T. Leeson, *Trial by Battle*, 3 J. LEGAL ANALYSIS 341, 342 (2011) (noting that a trial by battle was a fight for property rights). In England, judges used this form of combat "to decide property disputes from the Norman Conquest to 1179." *Id.*

53. Stephens, *supra* note 48, at 154, 156.

statutory law.[54] These documents called for the "recognition of twelve lawful men" to decide all land disputes between the Church and laypeople.[55]

It is likely that the Constitutions of Clarendon merely codified preexisting practice, where parties used a jury to determine whether land belonged to the layperson or the Church.[56] The prior use of juries, however, does not diminish the importance of the role of the Constitutions of Clarendon in elevating the jury trial. Just two years later in 1166 Henry II—in consultation with his inner circle—promulgated the famous Assize of Clarendon which regulated the process for landowners to reach the King's court.[57]

The Assize of Clarendon expanded the jury's role to include settling disputes of disseisment between private parties and regulating the procedure for reaching the king's court.[58] A typical suit progressed in the following manner. First, the demandant, corresponding to a modern-day plaintiff,[59] would declare in court that a tenant, the modern-day defendant, unlawfully occupied the demandant's land.[60] Next, the demandant would support his claim with one or two champions who would testify from their personal knowledge to the demandant's claim on the land in question.[61] If there were no objections to the declaration of the champion, the next step

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54. Murray S. Y. Bessette, *On the Genesis and Nature of Judicial Power*, 15 EIDOS 206, 208 (2011), http://www.scielo.org.co/pdf/eidos/n15/n15a09.pdf (quoting JOHN T. APPLEBY, HENRY II: THE VANQUISHED KING 95 (1962)) ("*The Constitutions* [of Clarendon] are . . . 'the first rational code of laws in England, as opposed to either tribal custom or a rambling set of unrelated "liberties", and [. . .] although the Constitutions came to almost nothing, they contain the seeds of some of Henry's most important reforms and innovations [. . .] [e.g.,] the use of the jury of accusation.'" (alterations in original)).

55. Stephens, *supra* note 48, at 156.

56. *See id.*

57. *See id.*; *see also Assize of Clarendon*, BRITANNICA, https://www.britannica.com/event/Assize-of-Clarendon (last updated Sept. 6, 2007).

58. *See* WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY 101-02 (James Appleton Morgan ed., 2d ed. 1878).

59. *Id.* at 102.

60. *Id.* Forsyth states the language "declared" by a demandant in court was:

> I claim against A. two carucates of land in the town of B. as my right and inheritance, of which my father (or grandfather) was seized in his demesne as of fee in the time of king Henry I. (or after the coronation of our lord the king), and of which he has taken the profits to the value of five shillings at the least. And this I am ready to prove by (the body of) this my freeman C., and if any mischance happens to him, then by another, D.

Id.

61. *Id.*

required the demandant to purchase a writ from the king granting the sheriff the power to empanel jurors.[62] The empaneled jury consisted of twelve knights who determined the facts of the claim and ultimately decided whether the demandant had been disseised.[63]

Occasionally, the current tenant would object to the champion selected by the demandant at the declaration stage.[64] Tenants commonly raised the issue that both parties were, in fact, related by a common ancestor.[65] In these situations, the standard solution required trial by combat, with the belief that God would interfere on behalf of the party who was telling the truth about the demandant's champion.[66]

Henry II further innovated the process to allow the defendant to reject trial by combat at this preliminary stage, opting instead for a fact-finding trial overseen by the king's court to determine the disputed facts.[67] After the court's investigation, the parties accepted the court's facts and the case proceeded according to the decision.[68]

A member of a jury empaneled to determine one of these disputes called a recognitor.[69] Demandants and tenants alike could object to the recognitor's presence on the jury for cause.[70] According to historian William Forsyth, objectionable causes included: a prior conviction for perjury, serfdom, relation to a party, "affinity, enmity, or close friendship."[71]

In addition to the civil advances promulgated through the Assize of Clarendon, the Assize also codified the use of a jury in criminal proceedings with the jury of presentment, defined as a "lay accusation made on oath in the presence of royal officials."[72] The text of the Assize empowered "twelve of the more lawful men" of the community to inquire

62. *Id.* at 104; *see also* DONALD W. SUTHERLAND, THE ASSIZE OF NOVEL DISSEISIN 5 (1973).

63. SUTHERLAND, *supra* note 62, at 5-6.

64. FORSYTH, *supra* note 58, at 102.

65. *Id.* at 103-04.

66. *See id.*

67. *See id.* at 103.

68. *Id.* at 104.

69. Id. at 113.

70. *Id.*

71. *Id.* at 114. Forsyth notes these causes were consistent with the disqualifications for giving testimony as a witness at that time. *Id.* at 113.

72. *See* THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200-1800, at 7 (1985); *see also* McSweeney, *supra* note 43, at 142; State *ex rel.* Miller v. Smith, 285 S.E.2d 500, 503 (W. Va. 1981).

among themselves whether anyone "has been charged or published as being a robber or murderer or thief; or anyone who is a harbourer of robbers or murderers or thieves."[73] Whenever the king's justices visited the selected jurors' community, the jurors used their personal knowledge to bring suspected criminals to the Crown's attention.[74]

Despite the jury of presentment having some similarities to America's grand jury today, England's criminal procedure lacked certain features commonplace in contemporary law.[75] First, rather than pulling from a cross-section of society, a requirement under the Sixth and Fourteenth Amendments of the United States Constitution,[76] the medieval presentment jury was exclusively composed of "lawful" free men.[77] Women served only in limited circumstances.[78] The majority of the English population was not considered free, and only a subset of that population would be considered lawful, defined as "worthy of making an oath."[79] Accordingly, even though some aspects of the criminal legal system had been delegated from the Crown to English citizens, that power was not evenly distributed among society.[80]

Additionally, unlike a modern jury, the jury of presentment would not determine the guilt or innocence of the accused.[81] Instead, the usual method for determining guilt was the trial by ordeal of water.[82] The water ordeal, which has survived in the public consciousness,[83] was designed to extract a confession by placing the criminally accused under intense religious pressure.[84]

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73. *Assize of Clarendon, 1166*, YALE L. SCH.: THE AVALON PROJECT, https://avalon.law.yale.edu/medieval/assizecl.asp (last visited June 12, 2023) (providing English translation); WILLIAM STUBBS, SELECT CHARTERS AND OTHER ILLUSTRATIONS OF ENGLISH CONSTITUTIONAL HISTORY FROM THE EARLIEST TIMES TO THE REIGN OF EDWARD THE FIRST 143 (7th ed. 1890) (providing text in original language).

74. McSweeney, *supra* note 43, at 143.

75. *See id.* at 144.

76. *See* Taylor v. Louisiana, 419 U.S. 522, 526, 528 (1975).

77. McSweeney, *supra* note 43, at 142.

78. *Id.*

79. *Id.*

80. *See id.* at 146.

81. *See* Stephens, *supra* note 48, at 156.

82. *Id.*

83. *See* Browningate, *Monty Python Witch Burning Trial Clip HD*, YOUTUBE (Dec. 31, 2013), https://youtu.be/X2xlQaimsGg (showing a famous fictionalized movie scene where villagers attempt to determine whether a woman is a witch based on her ability to float in water).

84. McSweeney, *supra* note 43, at 144.

A typical ordeal of water began with a priest giving a mass for the accused, reminding the accused he should not take communion if he had "done or consented to or know who did this thing."[85] After mass, the priest would ask the accused to take an oath that he had not committed the crime.[86] Once under oath, the potential criminal was tied up and placed in an "ordeal pit[]" filled with water specifically designed for this purpose.[87] If the accused sank, he was deemed innocent and saved from the water; if the accused floated, he would be found guilty.[88] Execution was the only sentence available to criminals who floated during the ordeal.[89] Even if a defendant survived the ordeal and was judged not guilty, the law required the acquitted to leave the kingdom within forty days.[90] Forsyth noted that this shows the nation's belief in the jury of presentment's ability to sniff out "atrocious crimes."[91]

The next major development for the evolution of juries in a criminal trial occurred in 1215 when Pope Innocent III called the Fourth Lateran Council with the goal of further separation of the Church from secular affairs.[92] Canon Eighteen, adopted at the Council, forbade clerics from "bestow[ing] any blessing or consecration on a purgation by ordeal of boiling water or of cold water or of the red-hot iron."[93] With priests now forbidden from participating in the ordeal, the ordeal became less useful in compelling a criminal defendant's confession.[94] Only the mechanism of trial by combat remained to determine the guilt or innocence of the accused, and yet the legal culture was moving away from battle as a valid mechanism to achieve justice.[95] This development led to much confusion and consternation on the part of the Crown as to how to mete out justice.[96]

The confusion is apparent in a writ issued to judges in 1219, which began with a discussion of the uncertainty as to by "what trial those are to

85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *See id.* ("By the early thirteenth century, anyone convicted of a felony was hanged.").
90. FORSYTH, *supra* note 58, at 162-63.
91. *Id.*
92. McSweeney, *supra* note 43, at 149-50.
93. *Id.* at 150.
94. *See id.*; *see also* FORSYTH, *supra* note 58, at 162.
95. LEONARD W. LEVY, THE PALLADIUM OF JUSTICE: ORIGINS OF TRIAL BY JURY 16-17 (1999).
96. *Id.* at 17.

be judged who are accused of robbery, murder, arson, and similar crimes, since the trial by fire and water has been prohibited by the Roman Church."[97] The writ instructed judges that so-called "notorious criminals" should be sent to prison, while those accused of more moderate crimes, but who seemed unlikely to offend again, should be sent away or banished from the community.[98] Individuals accused of minor crimes could be released contingent upon a "pledge of fidelity and keeping our peace."[99] Suddenly, with the elimination of trial by ordeal, judges had much more discretion as regarding the method of punishment. As the writ stated, "We have left to your discretion the observance of this aforesaid order according to your own discretion and conscience."[100]

Over time, the trial by jury slowly appeared to replace trial by ordeal or by combat.[101] The petit jury, twelve men responsible for determining a criminal defendant's guilt or innocence, became the chosen method to try an accused person.[102] There is evidence that the jury was already in use, at least in some parts of the country, by 1210 when King Henry III ordered his justices in the northern counties not to try defendants by the judgment of fire or water.[103] Over the next half century, the jury trial completely supplanted the ordeal. By the middle of the thirteenth century, trial by ordeal was not mentioned as a current practice in Bracton's legal treatise, influential at the time.[104]

In a concession to barons disturbed by the apparent shift in the balance of power, King John signed the Magna Carta in 1215, which stated in chapter 39 of the original agreement:

> No free man shall be taken or imprisoned or disseised [deprived of his land] or outlawed, or exiled, or in any way ruined, nor will we go against or send against him, except by the lawful judgment of his peers, or by the law of the land.[105]

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97. *Id.*
98. Forsyth, *supra* note 58, at 164.
99. *Id.*
100. *Id.*
101. *See id.*
102. *Id.*
103. *Id.* at 162.
104. *Id.*
105. McSweeney, *supra* note 43, at 146. McSweeney noted that a later version of the Magna Carta, signed in 1225, listed the supposed right to a jury trial in chapter 29. *Id.*; *see also* FORSYTH, *supra* note 58, at 91-92.

To modern eyes, this may seem like a guarantee of a jury trial. Indeed, William Blackstone expressed just that opinion.[106] Most modern commentators, however, dispute this claim for two primary reasons.[107]

First, as Forsyth noted, "peers," or in the original Latin *pares*, did not mean peers as currently understood in the trial context (a cross-section of society).[108] Instead, Forsyth found that *pares* referred to "the members of the county and other courts, who discharged the function of judges, and who were the peers or fellows of the parties before them."[109] In other words, chapter 39 may merely guarantee a right to community justice rather than referring to a specific right of trial by jury.[110]

Second, as legal scholar Thomas J. McSweeney describes in detail, the last clause *vel per legem terrae* "by the law of the land" can only reasonably be interpreted as offering a defendant a trial *or*, in the alternative, whatever form of justice was customary in the defendant's county.[111] McSweeney did not definitively define "the law of the land" but considered that it may refer to the defendant's ability to take an oath to face his charges.[112] While the Magna Carta may or may not have mentioned a jury trial, Pope Innocent III's decision to ban the clergy from participation in ordeals was still a far more significant development for the purposes of propagating jury trials across England.[113]

In the transition away from trial by ordeal, a common problem arose when one or more accusers from the presentment jury also sat on the petit jury.[114] Many defendants rightfully thought this conflict was unfair and attempted to challenge jurors who had brought the accusation.[115] The king's justices were unwilling to allow such a challenge because they believed an accuser would be more likely to bring a guilty verdict.[116] In the 1340s, the House of Commons[117] twice debated whether to exclude accusers from the

106. McSweeney, *supra* note 43, at 139.
107. *Id. See generally* LEVY, *supra* note 95, at 15-29.
108. *See* FORSYTH, *supra* note 58, at 92.
109. *Id.*
110. *See id.* at 91-92; *see also* McSweeney, *supra* note 43, at 148.
111. McSweeney, *supra* note 43, at 148.
112. *Id.*
113. *See id.* at 150.
114. *See* FORSYTH, *supra* note 58, at 160-61; *see also* GREEN, *supra* note 72, at 13.
115. LEVY, *supra* note 95, at 21-22.
116. *Id.* at 122.
117. Separation of the petit jury and the presentment jury was an early objective of the House of Commons. It first met in 1332 in a combined session with the King and his Nobles. The House of Commons met separately from the nobles starting in 1341. *See Rise of the*

petit jury and, in 1352, the king finally agreed to a statute that allowed criminal defendants to challenge a juror at his trial because he had sat on the jury of presentment.[118]

Also during this period, the public did not regard a jury trial as a right protecting the defendant but rather a novel procedure to which parties had to consent.[119] When a criminal defendant refused to consent to a jury trial, some judges nevertheless continued with the trial, while others deemed a refusal to participate as an admission of guilt.[120] Most judges, however, were unwilling to go so far as to imply guilt, so with trial by ordeal now outlawed, the lack of consent would occasionally grind a trial to a halt.[121] A statute in 1275 resolved this roadblock by giving the courts the right to imprison defendants who did not consent to a jury trial.[122] On the other hand, even if a defendant accused of a felony wanted a jury trial, it was not always available to him.[123] Originally, a jury trial was only available after a defendant purchased a writ from or gifted chattel to the king.[124]

By the mid-fourteenth century, a petit jury, now separate from the jury of presentment, began routinely sitting in on felony criminal trials. The courts tasked the petit jury with determining the truth of the charges against the accused.[125] Unlike today, where first-hand knowledge of the facts of a case may be cause for dismissal,[126] judges still expected the petit jury to have

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Commons, UK PARLIAMENT, https://www.parliament.uk/about/living-heritage/evolutionofparliament/originsofparliament/birthofparliament/overview/riseofcommons/ (last visited June 12, 2023).

118. *See* LEVY, *supra* note 95, at 20–22.

119. *Id.* at 18-20.

120. *Id.* at 20.

121. *Id.*

122. *Id.* The relevant text of the statute is:

> [T]hat notorious felons who are openly of evil fame and who refuse to put themselves upon inquests of felony at the suit of the King before his justices, shall be remanded to a hard and strong prison as befits those who refuse to abide by the common law of the land; but this is not to be understood of persons who are taken upon light suspicion.

Id.

123. FORSYTH, *supra* note 58, at 166.

124. *Id.*

125. *See id.* at 171. Forsyth cites the oath the petit jurors would take as: "Here this, ye justices! [T]hat we will speak the truth of those things which ye shall require from us on the part of our lord the king, and will by no means omit to speak the truth, so help us God!" *Id.*

126. *See* ADMINISTRATIVE OFF. OF THE U.S. CTS., HANDBOOK FOR TRIAL JURORS SERVING IN THE UNITED STATES DISTRICT COURTS 11-13 (2012), https://www.uscourts.gov/sites/default/files/trial-handbook.pdf. According to the handbook prepared for trial jurors serving in the U.S. district courts, jurors are "not to rely on any private source of information." *Id.* at

insider knowledge of the case.[127] If the trial jury did not have such knowledge, or had doubt about the source of their knowledge, it was the jury's duty to investigate and interrogate fact witnesses who might know the truth.[128]

The shift from jury reliance on first-person knowledge or personal investigations, to jury reliance on only evidence from inside the courtroom vetted by a trial judge was a remarkably slow transition.[129] Nineteenth century legal scholar J.E.R. Stephens found that the first mention of fact witnesses separate from the petit jury occurred during the reign of Edward III around 1349.[130] Amidst the formalization of the rules of evidence,[131] judges allowed jurors to use their personal knowledge as their source for a guilty verdict up until the reign of King George I (1714-1727).[132]

III. The Development and Evolution of the Peremptory Challenge in England

English common law has long recognized challenges to jurors, both for cause and peremptorily. Challenges for cause seem to have arisen simultaneously with the concept of a trial by jury.[133] As discussed previously, a tenant in a land dispute had the right to challenge the demandant's champion when the tenant believed there was bias.[134] Bracton's contemporaneous legal treatise noted four types of challenges to individual jurors in civil trials for cause: (1) because a lord of parliament

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11. If a juror learns of some fact about the case, he "should inform the court. The juror should not mention any such matter in the jury room." *Id.* Additionally, individual jurors should not inspect "the scene of an accident or of any event in the case" nor should they conduct individual research on the matter. *Id.* Accordingly, "The Sixth Amendment's guarantee of a trial by an impartial jury requires that a jury's verdict must be based on nothing else but the evidence and law presented to them in court." *Id.* at 12; *see also How Courts Work: Steps in a Trial: Selecting the Jury*, AM. BAR ASS'N (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/juryselect/.

127. Stephens, *supra* note 48, at 157-58.

128. Forsyth, *supra* note 58, at 171-72.

129. *See* Stephens, *supra* note 48, at 159.

130. *Id.* (noting a reference in "Year Books of 23 Edward III").

131. *Id.* Notably, during the reign of Henry IV (1399-1413), all evidence was presented at the bar of the court, allowing the trial judge to exercise discretion over which evidence to admit. This led to the development of formalized rules of evidence, as well as an increased role for the trial advocate. *Id.*

132. *Id.*

133. *See* FORSYTH, *supra* note 58, at 161-62.

134. *See id.* at 103-04.

was empaneled; (2) because a juror was incompetent, as defined as a foreigner or a person who did not own a sufficient amount of land to serve on the jury; (3) because of a well-grounded suspicion of bias; or (4) because the juror had previously been convicted of an offense which hurts his credibility.[135]

In addition to causal challenges, English common law has long recognized that there are times when a juror may be suspected of partiality toward one party. This type of implicit or potential bias may not be readily put into a cause.[136] To address bias, the defendant was permitted thirty-five peremptory challenges in criminal trials where the defendant faced a death sentence.[137] In his treatise *On Juries*, Francis Bacon noted that thirty-five was the number chosen because it is one less than three full juries.[138] Thus, the law afforded a thirteenth-century defendant some recourse when he suspected jurors may harbor some hidden bias against him.[139]

By comparison, the standard procedure afforded the prosecution much more power to choose the petit jury that sat at trial.[140] The Crown was not limited to thirty-five, as the law afforded the prosecution an unlimited number of challenges.[141] To exercise this power, all the king must say was "quod non boni sunt pro rege," which roughly translates to "they are not good for the king."[142] Sir Edward Coke writing on the subject in the seventeenth century said that the ability to make unlimited challenges tended to delay the trial and was unfair to the criminal defendant.[143]

In 1305, responding to this perceived unfairness, the English Parliament passed a statute that eliminated the Crown's ability to challenge jurors

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135. *Id.* at 148-49.

136. JOHN PROFFATT, A TREATISE ON TRIAL BY JURY § 155, at 207 (1877).

137. FORSYTH, *supra* note 58, at 191.

138. PROFFATT, supra note 136, § 155, at 207–08. Bacon's full quote, as recorded by Proffatt was:

> And this was because the trial by the petit jury came instead of the ordeal, and the petit jury of twelve being after the manner of the canonical purgation, and because the whole *pares* were not on his jury, but only a select number was chosen by the criminal himself, as was usual among the canonists, therefore they took a middle way, and gave the defendant liberty to challenge peremptorily any number under three juries, four juries being as many, as generally appeared, to make the total *pares* of the county.

Id. at 208.

139. *Id.*

140. FORSYTH, *supra* note 58, at 192.

141. PROFFATT, supra note 136, § 159, at 211–12.

142. *Id.*

143. FORSYTH, *supra* note 58, at 192.

without cause and stated that peremptory challenges were "mischievous to the subject, tending to infinite . . . danger."[144] Under the new statute, the prosecution could only remove a juror when it could "assign of their Challenge a Cause certain."[145] Importantly, this legislation left unchanged the common-law tradition that granted the defendant thirty-five peremptory challenges in felony or treason cases.[146] Nineteenth century author John Proffatt noted "the evident design of the statute was to deny any right of peremptory challenge to the king."[147]

Historians agree that the 1305 statute was intended to protect the defendant's right to a fair trial.[148] Coke said as much.[149] Influential legal writers like Blackstone also agreed that a defendant's right to an impartial jury could not be protected unless there was a process for removing jurors when the defendant felt a juror would be biased against him, even without further justification.[150] Blackstone continued, somewhat loftily, by noting that the peremptory challenge existed because English law required a "tenderness and humanity [to prisoners]."[151] Proffatt agreed that the purpose of the peremptory challenge was as a tool for the criminal defendant at common law when he said, "The right of a peremptory challenge is deemed a most essential one to a prisoner, and is highly esteemed and protected in law."[152]

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144. Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 9 (1990); *see also* Jon M. Van Dyke, *Peremptory Challenges Revisited*, 12 NAT'L BLACK L.J. 114, 118-19 n.21 (1991).

145. Colbert, *supra* note 144, at 9. Proffatt quotes the text of the 1305 statute that all

> inquests to be taken before any of the justices, and wherein our lord the king is a party, ... notwithstanding it be alleged by them that sue for the king, that the jurors of those inquests, or some of them, be not indifferent for the king, yet such inquests shall not remain untaken for that cause; but, if they that sue for the king will challenge any of those jurors, they shall assign of their challenge a cause certain, and the truth of the same challenge shall be inquired of according to the custom of the court.

PROFFATT, *supra* note 136, § 159, at 211–12 (quoting (33 EDW. 1, STAT. 4).

146. Van Dyke, *supra* note 144, at 118.

147. PROFFATT, supra note 136, § 160, at 212-13.

148. Colbert, *supra* note 144, at 9.

149. *See* SIR EDWARD COKE, A COMMENTARY UPON LITTLETON 156–57 (14th ed. 1791).

150. *Id.* at 9-10 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *346-47).

151. *Id.*

152. PROFFATT, supra note 136, § 155, at 207.

The number of available peremptory challenges has been altered over time by statute.[153] In 1531, Parliament, likely deciding that a defendant deserved the possibility of a tougher jury in serious cases, limited a defendant facing charges of petit treason, high treason, murder, or felony to twenty challenges.[154] In 1554, parliament passed a new statute that stated all trials for treason should follow common law, which restored the number of challenges for both high and petty treason to thirty-five but left the number for all other crimes at twenty.[155]

Though the English Parliament had earlier barred challenges without cause, judicial interpretation of the statute frustrated its purpose with the creation of the procedure of "standing-aside."[156] When the Crown disliked a juror in the pool but could not articulate why, prosecutors could challenge the juror without explaining a cause until *after* the whole juror panel had been exhausted.[157] In practice, this meant that the criminal prosecution retained peremptory challenges so long as both parties could agree on twelve jurors.[158] Only if the jury pool had been exhausted would the prosecution have to assign cause to these jurors it chose to stand aside.[159] On the other hand, the practice still required criminal defendant to give cause or state that the challenge was peremptory before the juror was sworn in.[160] With the development of a "stand-aside," the prosecution did not need peremptory challenges for a favorable petit jury, just a large jury pool.[161]

Prosecutors made more use of stand-asides as the size of juror pools increased during the eighteenth and nineteenth centuries.[162] In 1722, a defendant raised the issue that the size of the jury pool gave the Crown an unfair advantage, but by the end of the century, the courts resolved that question in favor of the prosecution.[163]

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153. *Id.* § 156, at 208.

154. *See id.*

155. *See id.*

156. *See* R. Blake Brown, *Challenges for Cause, Stand-Asides, and Peremptory Challenges in the Nineteenth Century*, 38 OSGOODE HALL L.J. 453, 459 (2000).

157. FORSYTH, *supra* note 58, at 192.

158. *Id.*

159. PROFFATT, supra note 136, § 160, at 212.

160. *See id.*

161. Brown, *supra* note 156, at 463-64

162. *Id.* at 463.

163. *Id.*; *see also* Trial of Christopher Layer, (1722) 16 Howell's State Trials 93, 134-35 (K.B.), https://perma.cc/2EPD-RUFV.

At John Horne Tooke's treason trial in 1794, Tooke argued that the 1305 statute eliminated the Crown's ability to make peremptory challenges.[164] The court disposed of this argument by saying that "stand-asides" were "so established that we must take it to be the law of the land."[165] The court was sympathetic to Tooke's argument that stand-asides were unfair when the Crown had access to large jury pools. Yet the court did not create any safeguards, noting the Crown had only stood aside seven jurors in Tooke's case.[166] No meaningful change came to the number of stand-asides available to English prosecutors until much later.[167] Even today, in the UK the prosecution retains the right to stand aside a juror but is limited to using the power only with the express consent of the Attorney General in cases involving national security or terrorism.[168]

Moreover, English defendants did not often use their allotted challenges.[169] For one, the typical trial only lasted thirty minutes, functionally limiting a party's opportunity to use their challenges.[170] Next, English criminal defendants did not have a right to counsel until the passing of the Prisoner's Counsel Act of 1836,[171] and so few lawyers represented

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164. Brown, *supra* note 156, at 463-64; *see also* Trial of John Horne Tooke, (1794) 25 Howell's State Trials 1, https://perma.cc/QZH3-P4ZW.

165. *Trial of Tooke*, 25 Howell's State Trials at 25.

166. *Id.*

167. *See* Brown, *supra* note 156, at 465-66.

168. *Guidance: Jury Vetting: Right of Stand by Guidelines*, GOV.UK (Nov. 30, 2012), https://www.gov.uk/guidance/jury-vetting-right-of-stand-by-guidelines--2#guideline. The introduction to this guidance states:

> In 1988 the defence right to challenge jurors without cause was abolished, the prosecution right to do so was, however, retained. This means that the prosecution can object to a potential juror without giving any reason. It is recognised that this is an exceptional power and so the Attorney General, therefore, issues guidance to prosecutors on its use.
>
> In essence, the use of the right of stand by is limited to those cases which involve national security or terrorism. The guidelines outline the circumstances in which it is appropriate for the prosecution to exercise this power and the procedure which is to be followed. The guidelines make clear that the authority to use this power is limited to the Attorney General.

Id.

169. *See* Brown, *supra* note 156, at 459-60.

170. *Id.*

171. 6 & 7 Will. 4, c. 14 (1836); *see also* Cerian Charlotte Griffiths, *The Prisoners' Counsel Act 1836: Doctrine, Advocacy and the Criminal Trial*, 4 LAW, CRIME & HIST., no. 2, 2014, at 28. As described by Griffiths:

> The Prisoners' Counsel Act 1836 . . . was arguably the most significant development in criminal trial procedure during the nineteenth century. The Act

defendants at trial before the Act.[172] Although the clerk informed the defendant of his right to challenge a juror, the defendant may not have known of her right or have been too fearful of it to exercise.[173]

IV. The Peremptory Challenge in America Prior to the Civil War

Colonial-era Americans viewed the jury trial as a necessary tool to prevent future tyranny in the United States[174] but curiously did not include any mention of peremptory challenges in the text of the Constitution.[175] Indeed, the Framers recorded no discussion of peremptory challenges at the Constitutional Convention nor in the debate surrounding the Bill of Rights.[176] On the other hand, a criminal jury trial is mentioned three times in Article III, Section 2, Clause 3,[177] Amendment V,[178] and Amendment VI.[179]

> gave prisoners in felony trials the right to delegate the presentation of their defence to professional counsel. Prior to this alteration prisoners could only rely on advocates to examine and cross examine witnesses and this was at the discretion of the trial judge. Should the prisoner have wished to put forward any defence to the court by way of an explanation or coherent narrative, they could only do this personally in a system labelled by John Langbein as the 'Accused speaks' trial. Such a trial relied almost exclusively upon the prisoner for an explanation of any possible defence. By forcing the prisoner to address the court, it was believed that the innocent accused was in the best position to demonstrate their innocence to the court. Theoretically, this was a genuinely truth-seeking measure but in reality, the terrified, inarticulate or mentally less adroit prisoner was rarely able to offer the court any information beyond pleading for mercy, whether they had committed the offence or not.

Id. at 28-29.

172. *See* Brown, *supra* note 156, at 460.

173. *Id.*

174. *See id.* at 469.

175. Amy Wilson, Note, *The End of Peremptory Challenges: A Call for Change Through Comparative Analysis*, 32 HASTINGS INT'L & COMP. L. REV. 363, 365 (2009).

176. *Id.*

177. In full:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

U.S. CONST. art. III, § 2, cl. 3.

178. In relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of

Peremptory challenges only became law by a federal statute, the Crimes Act of 1790,[180] which granted criminal defendants twenty peremptory challenges for certain capital felonies and thirty-five peremptory challenges in treason trials.[181] Importantly, this federal statute continued the English practice of not allowing the prosecution peremptory challenges.[182]

One major difference between English and nineteenth-century American views on juror challenges was the American treatment of stand-asides.[183] The Crimes Act of 1790 did not mention stand-asides,[184] leaving the question of whether stand-asides existed at federal common law up for debate.[185] In 1827, the influential Justice Joseph Story asserted in dicta that stand-asides existed at common law and had always existed at common law.[186] Decades later, the Supreme Court cleared up any confusion and found stand-asides had no basis in federal common law in its 1855 decision,

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War or public danger.

U.S. CONST. amend. V.

179. In full:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

180. *See* An Act for the Punishment of Certain Crimes Against the United States, ch. 9, § 30, 1 Stat. 112, 119 (1790).

181. Wilson, *supra* note 175, at 366. The civil jury trial in America was not originally seen as being as important as criminal jury trials. This is evidenced by the fact that the right to a civil jury trial was not included in the original articles of the Constitution. Anti-Federalists pointed to this as evidence that the Constitution would abolish the civil jury trial. Federalists, however, argued that throughout the states varied forms of civil jury trials already existed, making it unnecessary for a federal promulgation of law regarding civil juries. *See* Forsyth *supra* note 58, at 290-91. As a result of this dispute, a compromise was reached in the form of the Preservation Clause of the Seventh Amendment, which states: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved . . . ." U.S. CONST. amend. VII.

182. Colbert, *supra* note 144, at 11.

183. Brown, *supra* note 156, at 470-71.

184. *See* April J. Anderson, *Peremptory Challenges at the Turn of the Nineteenth Century: Development of Modern Jury Selection Strategies as Seen in Practitioners' Trial Manuals*, 16 STAN. J. C.R. & C.L. 1, 18 (2020).

185. Van Dyke, *supra* note 144, at 120; *see also* United States v. Marchant, 25 U.S. (12 Wheat.) 480, 483 (1827).

186. Van Dyke, *supra* note 144, at 120; *see also* Anderson, *supra* note 184, at 18 n.114.

United States v. Shackleford.[187] The Court held "the right of challenge by the prisoner recognized by the act of 1790, does not necessarily draw along with it this qualified right [of stand-asides], existing at common law, by the government."[188] Instead of recognizing stand-asides at federal common law, the Court determined that stand-asides should only exist where states recognized them.

Over the nineteenth century, states began replacing judicially created stand-asides with peremptory challenges for the prosecution, starting with the Southern states of Alabama in 1820, Georgia in 1833, and the trio of Missouri, Tennessee, and Mississippi in the 1840s.[189] Mississippi's statute notably stated that the state's law only applied to the "trial of any white person."[190] In the 1850s, ten more states gave the prosecution the right to peremptorily challenge jurors.[191] Rhode Island became the first Northern state to pass such a statute in 1854.[192] By the end of the Civil War, every state had passed a law granting its prosecutors a limited number of challenges.[193]

In 1865, which legal author Douglas L. Colbert notes as the same year Congress approved the Thirteenth Amendment, the federal legislature followed suit and passed a law that gave the prosecution five challenges in capital and treason cases and two for non-capital felonies.[194] Importantly, even in this federal Act the defense retained significantly more challenges than the prosecution, namely twenty challenges for capital and treason cases and ten in non-capital offenses.[195] Although it may be tempting to conclude that peremptory challenges for the prosecution returned at the federal level for fear of newly emancipated African American men serving on the jury, other factors were also at work. Colbert noted two other factors: more strikes reduced sympathy for the defendant by the jury; and Congress's attempt to codify some prosecutorial power to challenge without cause after the Supreme Court created doubt regarding stand-asides in its 1855 *Shackleford* opinion.[196]

187. 59 U.S. (18 How.) 588 (1855).
188. Anderson, *supra* note 184, at 18 n.114 (quoting *Shackleford*, 59 U.S. at 590).
189. Colbert, *supra* note 144, at 11 n.39.
190. *Id.* at 11 n.39 (citation omitted).
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. *See id.* at 11–12.

In his groundbreaking work on this period, R. Blake Brown identifies four significant differences between the approaches taken by the English and Americans regarding the law of peremptory challenges during the nineteenth century.[197] These differences were:

- In the United States, the practice of stand-asides was replaced over time by allowing peremptory challenges for the prosecution.[198]
- Variations in the number of peremptory challenges available to defendants began to emerge within the states, with some of the variance being driven by the seriousness of the offense and the severity of the possible punishment.[199]
- Related to this second change was the extension of the availability of peremptory strikes to those defendants charged with misdemeanors.[200]
- Finally, during this period, the available rationales under which a juror could be challenged for lack of partiality expanded to include those who had a prejudicial opinion of guilt or innocence even without bearing ill will toward the defendant, which had been required under English common law.[201]

The expansion of voir dire in the early 1800s in the U.S. gave peremptory challenges even more power.[202] At English common law, parties were not permitted to ask about a potential juror's prejudice, which resulted in peremptory strikes with less utility.[203] In America, by contrast, Chief Justice John Marshall opened the door to expanded voir dire in 1807 when he ruled that defense counsel for former Vice President Aaron Burr could ask jurors if they had any preconceived notions about Burr's guilt.[204]

197. Brown, *supra* note 156, at 470–72.

198. *Id.* at 470-71; *see also* 1 SEYMOUR D. THOMPSON, A TREATISE ON THE LAW OF TRIALS IN ACTIONS CIVIL AND CRIMINAL 44-46 (Chicago, T.H. Flood & Co., 1889). Thompson noted that in some states stand-asides continued to be used even after the prosecution was granted peremptory challenges but noted that "its retention cannot be defended upon principle." *Id.* at 46.

199. Brown, *supra* note 156, at 471-72; *see, e.g.,* 102 Laws of N.Y. 261, ch. 60, § 9; 1871 Mich. Comp. Laws § 7951; 1873 Ky. Acts 572; *see also* PROFFATT, *supra* note 136, at 209.

200. Brown, *supra* note 156, at 472; *see also* THOMPSON, *supra* note 198, at 37 n.3.

201. Brown, *supra* note 156, at 472; *see also* THOMPSON, *supra* note 198, at 67-68.

202. Anderson, *supra* note 184, at 20.

203. *Id.* at 14.

204. *Id.* at 20; *see also* Brown, *supra* note 156, at 473.

Chief Justice Marshall ruled that a potential juror's opinion, rather than the previous standard of "ill will," was sufficient cause for his removal.[205] With this decision, federal jurisdictions followed suit, resulting in permissive questions by counsel about a juror's potential prejudices as well as a lower judicial standard for granting causal challenges.[206]

Although the *United States v. Burr* decision related to for-cause challenges because it allowed counsel to ask potential jurors about prejudice, it also created more opportunities for attorneys to use peremptory challenges.[207] In 1817, the Vermont Supreme Court directly addressed the intersection of peremptory challenges and voir dire when it stated that after *Burr*, a party "is permitted to ask a Juror if he has formed his opinion, in order to enable him to decide upon his peremptory challenges."[208] By 1863, the California Supreme Court agreed and noted that the purpose of voir dire included "elicit[ing] facts to enable the party to decide whether or not he will make a peremptory challenge; . . . ."[209] Accordingly, by the time the Civil War began, the prosecutor not only had peremptory challenges available but also had available an expanded voir dire, enabling him to sniff out hints of prejudice in a way not available at common law before.

It is impossible to write on the development of the jury trial and peremptory challenges in the period between the American Revolution and the Civil War without mentioning that these rights were only granted to white men.[210] Free African American citizens accused of a crime who were lucky enough to get some semblance of due process would go before an all-white jury in both the North and the South.[211] White juries convicted African American defendants in nearly every case where the defendant was

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205. Anderson, *supra* note 184, at 20; *see also* United States v. Burr, 25 F. Cas. 55, 58-59 (C.C.D. Va. 1807). While certainly breaking with the English tradition, Marshall indicated his belief that a completely impartial jury was impossible to achieve:

> The opinion which has been avowed by the court is, that light impressions which may fairly be supposed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions which will close the mind against the testimony that may be offered in opposition to them, which will combat that testimony, and resist its force, do constitute a sufficient objection to him.

Burr, 25 F. Cas. at 51; *see also* Brown, *supra* note 156, at 474.

206. Anderson, *supra* note 184, at 21.

207. *Id.* at 21-22.

208. *Id.* at 22 (quoting State v. Godfrey, Brayt. 170, 1817 WL 443 (Vt. 1817).

209. *Id.* (quoting Watson v. Whitney, 23 Cal. 376, 378 (1863)).

210. Colbert, *supra* note 144, at 20.

211. *Id.* at 21.

accused of injuring a white person.[212] North Carolina went so far as to permit white men to extrajudicially "impose summary discipline on any 'insolent' black person without it constituting a crime."[213]

Enslaved people who faced the criminal legal system as defendants were subject to even harsher criminal proceedings than free African American defendants.[214] An enslaved person could not testify against or contradict a white person in court.[215] A number of Southern states enacted so-called "slave courts" to render their version of justice quickly rather than fairly.[216] Only when the state charged an enslaved person with a capital offense, and his white master faced the prospect of losing valuable property, did the courts treat the enslaved person with a modicum of due process.[217] In a study by Professor A. E. Keir Nash, enslaved African American defendants had their convictions reversed in 136 of 238 appeals, a remarkable rate.[218] Rather than understanding this as compassion for the enslaved class, it is best to understand this as the judicial system protecting the interests of the white owners of human property.[219]

Jury selection of African American men was essentially non-existent in this period between wars.[220] A person must have been an eligible voter to serve as a juror, severely restricting the number of eligible African American jurors.[221] Prior to 1860, the only states where an African-American man could have served on a jury were Maine, Massachusetts, Michigan, New Hampshire, New York, Ohio, and Vermont.[222] Despite this legal possibility, according to Colbert, none in fact did serve.[223] The racial barrier for sitting on a jury only broke in 1860 at a trial in Worcester, Massachusetts, and this remained the exception to the rule of all-white juries for decades to come.[224]

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212. *Id.* at 22.

213. *Id.* at 23.

214. RANDALL KENNEDY, RACE, CRIME, AND THE LAW 76-81 (1997).

215. *Id.* at 77.

216. Kennedy mentions Virginia, South Carolina, and Louisiana as examples of states with these tribunals. *Id.*

217. *Id.* at 78.

218. A. E. Keir Nash, *Fairness and Formalism in the Trials of Blacks in the State Supreme Courts of the Old South*, 56 VA. L. REV. 64, 79 (1970).

219. KENNEDY, *supra* note 214, at 78.

220. Colbert, *supra* note 144, at 31.

221. *Id.*

222. *Id.*

223. *See id.*

224. *See id.*

V. The Peremptory Challenge in America During Reconstruction

Despite the nominal equality of the Civil War Amendments, the results were far from equal. State and federal legislatures had already given prosecutors a tool, the peremptory challenge, to eliminate the few African American jurors eligible for the jury pool. The fact that peremptory challenges were available for the prosecution was especially remarkable because a prosecutor did not have access to peremptory challenges for the five-hundred-year period between 1305-1790.[225] The Framers held the right to a jury trial for criminal defendants in such high esteem that they included it once in the body of the Constitution and twice in the Bill of Rights, yet chose not to include any constitutional power for prosecutors to peremptorily challenge jurors, nor for any right to stand-aside.[226]

Southern states, however, led the way in passing statutes granting prosecutors this power, reasoning that the jury may be too sympathetic to the defendant unless prosecutors could challenge jurors without cause.[227] This reasoning is antithetical to the defendant-friendly rationale given by Coke and Blackstone when they considered the subject.[228] Thus, originators of peremptory strikes never intended for the prosecution to wield this power. Once given to the prosecutor, it significantly hindered African American citizens' constitutional right to a jury of their peers long after General Robert E. Lee's surrender at Appomattox Court House.

The law historically excluded African Americans from voir dire as they did not have the right to participate in jury service.[229] The Sixth Amendment[230] granted African Americans the right to a fair trial, the

225. *Id.* at 10.

226. Wilson, *supra* note 175, at 365.

227. Colbert, *supra* note 144, at 11.

228. FORSYTH, *supra* note 58, at 192; Colbert, *supra* note 144, at 9-10.

229. John J. Francis, *Peremptory Challenges,* Grutter*, and Critical Mass: A Means of Reclaiming the Promise of* Batson, 29 VT. L. REV. 297, 305 (2005). An African American did not sit on the jury until 1860. *Id.* at 306; Colbert, *supra* note 144, at 12.

230. The Sixth Amendment guarantees:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

Thirteenth Amendment[231] banned slavery, the Fourteenth Amendment[232] limited state power in order to protect the privileges and immunities of United States citizens protected African Americans. Yet, prosecutors continued to routinely remove African Americans from jury venire panels[233] as wealthy white men filled the jury seats.[234] As a result, peremptory challenges quickly became an instrument for race and gender discrimination.[235]

A. Impact of the Thirteenth Amendment on Jury Trials

The U.S. Constitution of 1787 scarcely discussed the issue of slavery and bondage, despite it being at the core of many of the compromises implicit in the founding document for the new country. Nevertheless, while President Abraham Lincoln's Emancipation Proclamation declared an end to slavery, he still needed legal support to eradicate the oppressive institution.[236] Thus, in the aftermath of the Civil War, the Thirty-Eighth Congress passed the Thirteenth Amendment in January of 1865.[237] In the eyes of its proponents, the Amendment not only ended slavery but also established "fundamental human rights for freed slaves and other people in the United States."[238]

The Union victory did not, however, end the plight of slavery as states in the defeated Confederacy quickly moved to adopt Black Codes, a series of

231. The Thirteenth Amendment declares: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1. Further, Congress has the "power to enforce this article by appropriate legislation." *Id.* amend. XIII, § 2.

232. Section 1 of the Fourteenth Amendment states:

> 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.

233. *See* Francis, *supra* note 229, at 305.

234. Kayley A. Viteo, Comment, *"We" the Jury: The Problem of Peremptory Strikes as Illustrated by* Flowers v. Mississippi, 52 ST. MARY'S L. REV. 223, 225 (2020) (quoting Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 165 (1989)).

235. Montoya, *supra* note 35, at 982.

236. Proclamation No. 17, 12 Stat. 1268 (Jan. 1, 1863).

237. U.S. CONST. amend. XIII.

238. Rebecca E. Zietlow, *James Ashley's Thirteenth Amendment*, 112 COLUM. L. REV. 1697 (2012).

laws used to restore and reinforce white control in the post-Civil War South.[239] The Black Codes forced brutal labor contracts[240] onto the ex-slave population and imposed serious punishment if the contract was broken.[241]

The Black Codes also permitted African Americans to testify at trial during cases where one party was African American, but prosecutors often told jurors to discount or reject the testimony of African American individuals.[242] As a result, the "Black Codes perpetuated the exclusion of black people from juries, and several states reinforced this practice by passing specific laws that limited jury eligibility to whites only."[243]

B. A Federal Response to the Black Codes: The Civil Rights Act of 1866

The violent response to the Thirteenth Amendment prompted the adoption of the Civil Rights Act of 1866. The Act made clear that the color of one's skin did not determine one's citizenship status.[244] As a result, "any

239. *See* Colbert *supra* note 144, at 41-42. The purpose of the Black Codes was to limit the rights of African Americans following the Civil War. They were designed to limit the employment opportunities available to African Americans and their ability to own property. "The Reconstruction Act of 1867 weakened the effect of the Black codes by requiring all states to uphold equal protection under the 14th Amendment, particularly by enabling Black men to vote. (U.S. law prevented women of any race from voting in federal elections until 1920.)" *The Black Codes and Jim Crow Laws*, NAT'L GEOGRAPHIC, https://education.nationalgeographic.org/resource/black-codes-and-jim-crow-laws (last visited June 12, 2023). Following the end of the Reconstruction era,

> [e]fforts to enforce white supremacy by legislation increased, and African Americans tried to assert their rights through legal challenges. However, this effort led to a disappointing result in 1896, when the Supreme Court ruled, in *Plessy v. Ferguson,* that so-called "separate but equal" facilities—including public transport and schools—were constitutional. From this time until the Civil Rights Act of 1964, discrimination and segregation were legal and enforceable.

Id.

240. According to the Mississippi Black Codes of 1866, "Every civil officer shall, and every person may, arrest and carry back to his or her legal employer any freedman, free negro, or mulatto who shall have quit the service of his or her employer before the expiration of his or her term of service without good cause." *(1866) Mississippi Black Codes*, BLACKPAST (Dec. 15, 2010), https://www.blackpast.org/african-american-history/1866-mississippi-black-codes/.

241. Christopher R. Adamson, *Punishment After Slavery: Southern State Penal Systems, 1865-1890*, 30 SOC. PROBS. 555, 559 (1983) (explaining how individuals who did not form labor contracts or who broke their agreements were "prosecuted as vagrants and sentenced to hard labor on local plantations").

242. Colbert, *supra* note 144, at 42-43.

243. *Id*. at 43.

244. *See* Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27.

state law or practice explicitly or implicitly denying citizenship to free blacks was contrary to the Act."[245] The Act afforded African American citizens the same rights as white citizens regardless of a "law, statute, ordinance, regulation, or custom" that was "to the contrary."[246] Thus, the Act directly challenged the Black Codes as unlawful.[247]

The Act did not formally address the growing trend of all-white juries, but it did provide that African American citizens would enjoy "full and equal benefit of all laws and proceedings for the security of person and property."[248] One month after the Act passed, its impact was seen in *United States v. Rhodes*.[249]

In *Rhodes*, a Kentucky circuit court examined a case in which white men "feloniously and burglariously" broke into the house of an African American woman.[250] The United States Attorney asserted that since the woman was Black, she did not have the right to testify against the white defendants.[251] The court responded by turning to the newly passed Civil Rights Act of 1866.[252] The court noted that when Congress passed the act, every state had ample procedures for enforcing the law against persons of color.[253] The court explained that the situation was vastly different where the defendant was white and the complaining party was African American.[254]

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245. G. Edward White, *The Origins of Civil Rights in America*, 64 CASE W. RSRV. L. REV. 755, 773 (2014).

246. Civil Rights Act of 1866, § 1, 14 Stat. at 27.

247. White, *supra* note 245, at 774.

248. Civil Rights Act of 1866 § 1, 14 Stat. at 27.

249. 27 F. Cas. 785 (C.C.D. Ky. 1866).

250. *Id.* at 785.

251. *See id.* at 786.

252. *See id.* at 786–87.

253. *Id.* at 787.

254. *Id.* In addressing this issue, the court stated:

> The difficulty was that where a white man was sued by a colored man or was prosecuted for a crime against a colored man, colored witnesses were excluded. This in many cases involved a denial of justice. Crimes of the deepest dye were committed by white men with impunity. Courts and juries were frequently hostile to the colored man, and administered justice, both civil and criminal, in a corresponding spirit. Congress met these evils by giving to the colored man everywhere the same right to testify 'as is enjoyed by white citizens,' abolishing the distinction between white and colored witnesses, and by giving to the courts of the United States jurisdiction of all causes, civil and criminal, which concern him, wherever the right to testify as if he were white is denied to him or cannot be enforced in the local tribunals of the state.

Id.

The Majority opinion explained that the Thirteenth Amendment "destroyed the most important relation between capital and labor in all the states where slavery existed. It affected deeply the fortunes of a large portion of their people."[255] The Amendment created a conflict that only continued to grow. The opinion, however, declared that the Amendment was not created with a vengeance but with a desire for security "against the recurrence of a sectional conflict."[256] The opinion further asserted that when a crime is committed with such impunity by any class of persons, society "is reduced to a level of barbarism."[257] Thus, "Every right given is to be the same 'as enjoyed by white citizens.'"[258]

By 1867, the year after the decision in *Rhodes*, the administration of justice had markedly changed in the South in that "a black person's testimony was not only heard, but it was evaluated by a jury consisting of black, as well as white, jurors."[259] In the years following, juries consisting of both African American and white men began to appear in many southern states. By the early 1870s, integrated juries returned verdicts addressing the crimes committed by white supremacists and the Ku Klux Klan.[260]

The substantial progress made to an equal, integrated courtroom, however, was short-lived. Post reconstruction, the Supreme Court began to narrowly interpret the application of the Thirteenth and Fourteenth Amendments. In 1873, the Supreme Court in the *Slaughter-House Cases*[261] "returned control for enforcing civil rights to the same state forces that had previously enslaved African-Americans."[262]

In the *Slaughter-House Cases*, white butchers argued that a Louisiana law that restricted slaughterhouse operations to a single corporation created

255. *Id.* at 788.

256. *Id.*

257. *Id.* at 787.

258. *Id.* at 788 (quoting Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27).

259. Colbert, *supra* note 144, at 54.

260. James Forman, Jr., Essay, *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895, 925-26 (2004). In 1871, the Republican Congress passed the Ku Klux Klan Act to combat the terrorism experienced by African Americans and white Republicans, primarily in the South. *Id.* at 923. As a result, the federal government was highly successful in its efforts to prosecute members of the Klan. *Id.* at 925. "Federal prosecutors achieved over 500 jury convictions in 1872, compared to only forty-three in 1870." *Id.* at 926. However, this success was short-lived due to Supreme Court decisions limiting the power of Reconstruction amendments and statues and political opposition to the government's Reconstruction efforts. *Id.* As a result, Klan prosecutions "declined after 1873 and were eventually abandoned in 1877." *Id.*

261. 83 U.S. (16 Wall.) 36 (1872).

262. Colbert, *supra* note 144, at 59.

an involuntary servitude and thus deprived them of their ability to pursue their occupation.[263] In a five-to-four decision, the Supreme Court determined that the state law did not violate the Thirteenth or Fourteenth Amendments. Instead, the Court determined that "the Fourteenth Amendment applied only to the privileges and immunities of national citizenship, and that the protection of the rights of state citizenship must be left to the states themselves."[264] The *Slaughter-House* decision "provided a glimpse of the sweeping restrictions that the Court would later place on the Thirteenth Amendment's prohibition against badges and incidents of slavery in the *Civil Rights Cases*."[265]

C. Congress Tries Again: The Civil Rights Act of 1875

Following the Supreme Court's decision in the *Slaughter-House Cases*, mob violence continued to grow in the South, as all-white juries absolved individuals involved in violence against African American citizens.[266] As a result, Congress adopted one of the last Reconstruction statutes, the Federal Civil Rights Act of 1875. The Act specifically addressed the exclusion of jurors, stating that no person "shall be disqualified for service as a grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude."[267] The Act made it a punishable offense for an official to discriminate during jury selection.[268]

As the Reconstruction period drew to a close, however, a number of states adopted laws designed to prevent African American individuals from serving on juries. For example, after the Civil Rights Act was passed in 1875 preventing jury discrimination, the Supreme Court addressed a statute

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263. *See Slaughter-House*, 83 U.S. at 50-51.

264. James M. McPherson, *Abolitionists and the Civil Rights Act of 1875*, 52 J. AM. HIST. 493, 504 (1965) (citing *Slaughter-House*, 83 U.S. at 36).

265. Colbert, *supra* note 144, at 60 (citing 109 U.S. 3 (1883)). In the *Civil Rights Cases*, the Court held unconstitutional sections 1 and 2 of the Civil Rights Act of 1875, which prohibited "racial discrimination in public accommodations. It expressly left in place Section 4 of the Act, however, which outlawed racial discrimination in the selection of juries 'in any court . . . of any State' on account of 'race, color, or previous condition of servitude.'" Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1600-01 (2018) (alteration in original) (footnote omitted) (quoting 109 U.S. at 24).

266. Colbert, *supra* note 144, at 62.

267. Civil Rights Act of 1875, ch. 114, § 4, 18 Stat. 335, 336-37 (current version codified at 18 U.S.C. § 243).

268. *Id.*; *see also* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 892 (1994).

restricting the ability of African Americans to serve on juries in West Virginia.[269]

In *Strauder v. West Virginia*, an African American man was indicted for murder.[270] The defendant sought to appeal the case because

> by virtue of the laws of the State of West Virginia no colored man was eligible to be a member of the grand jury or to serve on a petit jury in the State; that white men are so eligible, and that by reason of his being a colored man and having been a slave, he had reason to believe, and did believe, he could not have the full and equal benefit of all laws and proceedings in the State of West Virginia for the security of his person as is enjoyed by white citizens.[271]

In reversing the conviction, the Supreme Court noted that the West Virginia statute was "such a discrimination [that it] ought not to be doubted. Nor would it be if the persons excluded by it were white men."[272] The court noted:

> The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.[273]

The Court insisted that the Amendments assured the extension of all constitutional rights to all persons, regardless of skin color. This included the intent "to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States."[274] Not only were the amendments designed to give "citizenship and the privileges of citizenship to persons of color," but also prohibited states from adopting

269. Francis, *supra* note 229, at 306.
270. 100 U.S. 303, 304 (1879).
271. *Id.*
272. *Id.* at 308.
273. *Id.*
274. *Id.* at 306.

laws that denied African Americans "the equal protection of the laws" and gave Congress the power to enforce that protection through legislation.[275]

The result following the Court's decision in *Strauder* should have been the removal of barriers to the rights of African Americans to serve on juries.[276] The actual result, however, was far different.[277]

VI. The Peremptory Challenge as a Tool of Oppression in Post-Reconstruction America and the Emergence of a System of Discretionary Jury Selection

The final federal troops withdrew from the South in 1877.[278] Without a robust military presence, violence against the African American population dramatically increased, "as white southerners sought to reverse the changes brought about by Reconstruction [in order] to restore the social order."[279]

Amidst this legacy of violence, the 1880 holding in *Strauder* served as a peak for African American progress toward an integrated jury, as the federal courts almost immediately retreated from enforcing the rights of African American jurors.[280] Courts occasionally recognized racial discrimination in the jury selection process, particularly where the court made express findings of intentional exclusion of African American jurors.[281] In most situations, however, defendants could not meet the heavy evidentiary burden to show intentional racial discrimination in the jury selection.[282]

Strauder shocked and surprised whites in the South.[283] The Virginia Senate expressed outrage at the decision, asserting that it "destroy[ed] every

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275. *Id.* at 306–07.

276. Alschuler & Deiss, *supra* note 268, at 894. By enforcing the Civil Rights Act of 1875 and the Amendments, the "Supreme Court and Congress had effectively (if indirectly) recognized the right of African-Americans to serve on juries. Yet the right remained unenforced for most of a century." *Id.*

277. *See id.*

278. Amy Louise Wood, T*he Spectacle of Lynching: Rituals of White Supremacy in the Jim Crow South*, 77 AM. J. ECON. & SOC. 757, 762 (2018).

279. *Id.*

280. Frampton, *supra* note 265, at 1604 (citing MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 40 (2004)).

281. *Id.* at 1605 (citing KLARMAN, *supra* note 280, at 39, 41); *see* Colbert, *supra* note 144, at 69.

282. Frampton, *supra* note 265, at 1604

283. ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 147 (2019).

vestige of state sovereignty."[284] In *Strauder*, however, Justice William Strong expressly stated that the states were not without authority to establish qualifications for juries, so long as those restrictions were not explicitly based on race.[285] As a result, former Confederate states began to cleverly implement laws throughout the 1880s and 1890s designed to exclude African Americans from juries, including laws to "disenfranchise blacks and to prevent them from sitting as jurors."[286]

For example, in *Williams v. Mississippi*,[287] the Supreme Court upheld an 1892 Mississippi law allowing for discretionary jury selection by the state.[288] In *Williams*, an all-white grand jury indicted an African American defendant on murder charges.[289] The defendant contended that his Equal Protection rights had been violated since Mississippi law placed such high qualifications on African American individuals to be able to serve on a jury that it disqualified most of the 190,000 African American Mississippi voters.[290] The law granted state officials the ability to select jurors based on their "good intelligence, sound judgment, and fair character."[291] While race was not expressly mentioned in the statute, in application, the law allowed

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284. *Id.*

285. Strauder v. West Virginia, 100 U.S. 303, 310 (1879). In addressing this issue, Justice Strong wrote:

> We do not say that within the limits from which it is not excluded by the amendment a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the Fourteenth Amendment was ever intended to prohibit this.

Id.

286. Colbert, *supra* note 144, at 75; *see also* FONER, *supra* note 283, at 147-48; Frampton, *supra* note 265, at 1605.

287. 170 U.S. 213 (1898).

288. Francis, *supra* note 229, at 306–07.

289. *Williams*, 170 U.S. at 213.

290. *Id.* at 215. For example, in addition to being required to know how to read and write,

> Section 241 of the constitution of 1890 prescribes the qualifications for electors; that residence in the state for two years, one year in the precinct of the applicant, must be effected; that he is twenty-one years or over of age, having paid all taxes legally due of him for two years prior to 1st day of February of the year he offers to vote, not having been convicted of theft, arson, rape, receiving money or goods under false pretenses, bigamy, embezzlement.

Id. at 221.

291. *Id.* at 220–21 n.1 (quoting MISS. CODE ANN. § 2358 (1892)); *see also* Francis, *supra* note 229, at 306.

white officials to exclude African Americans from the jury pool based on "white stereotypes of black characteristics."[292]

The defendant asserted that, while the law may be facially neutral and impartial,[293] when the law is applied by the state "with an evil eye and an unequal hand," the result is injustice and discrimination that violates the Constitution.[294]

The Court rejected the defendant's argument, noting that the Mississippi laws "do not on their face discriminate between the races, and it has not been shown that their actual administration was evil; only that evil was possible under them."[295] The Court reasoned that the Mississippi "constitution and its laws is not limited by their language or effects to one race. They reach weak and vicious white men as well as weak and vicious black men . . . ."[296] In short, the Court concluded that because the Mississippi law was facially neutral, without actual proof of evil administration of the laws in a racially discriminatory fashion, the defendant had failed to show that they were unconstitutional.[297]

Following the *Williams* decision, several southern states incorporated voting requirements into their state constitutions.[298] As a result, all-white juries became the norm throughout the South, even though African Americans had served on juries during Reconstruction.[299]

VII. The Rise of Jim Crow and an Increase in Public Lynching Further Entrench Discrimination in the Jury Selection Process

The *Williams* decision allowed states to solidify the power of all-white juries to decide the fate of African Americans. At the same time, African Americans received little protection as white violence in the southern states increased.[300] Known as the Jim Crow period or the lynching era,[301] white

292. Francis, *supra* note 229, at 306.

293. *Williams*, 170 U.S. at 225.

294. *Id.*

295. *Id.*

296. *Id.* at 222.

297. *See id.* at 222-25.

298. Colbert, *supra* note 144, at 77 (explaining that by 1910, Oklahoma, South Carolina, North Carolina, Alabama, Georgia, Louisiana, and Virginia adopted state constitutions with voting requirements preventing an integrated jury); *see also* Francis, *supra* note 229, at 307.

299. Francis, *supra* note 229, at 307.

300. *See* Wood, *supra* note 278, at 757–62 (noting that from the 1890s to the 1930s white mobs killed thousands of African Americans by lynching in order to maintain white dominance throughout the South).

mob violence and terror increased throughout the southern states during the 1890s, as these states further "institutionalized racial segregation into law."[302] Yet even with this dramatic increase in crimes directed against African Americans, people of color were still "more likely than whites to be arrested and incarcerated, or legally executed, with little cause and with few due process rights."[303] During this period, the "overwhelming majority of executed [persons] in southern states were African American,"[304] while all-white juries and local law enforcement proceeded to "absolve virtually every responsible white attacker"[305] who committed a vicious crime.[306]

From 1880 to 1935, it was a futile exercise to object to courts about the exclusion of African Americans as jurors.[307] In the 1935 *Norris v. Alabama*[308] decision, however, the Supreme Court "provided a basis for court challenges to the systematic exclusion of blacks and other racial minorities from the venire of prospective grand and petit juries."[309]

In *Norris*, the Court reversed the conviction of an African American young man by an all-white jury, who was one of nine young men convicted of raping two white women.[310] The defendant argued that he was denied

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301. *Id.* at 760. Professor Michael J. Klarman reported that there were over a hundred lynchings reported annually during the late 1880s and early 1890s, and, in some years, the number increased to over two hundred. Michael J. Klarman, *Scottsboro*, 93 MARQ. L. REV. 379, 381 (2009) [hereinafter Klarman, *Scottsboro*].

302. *See* Wood, *supra* note 278, at 762.

303. *Id.* at 758.

304. *Id.* at 771.

305. Colbert, *supra* note 144, at 79.

306. *See, e.g.*, Wood, *supra* note 278, at 771 ("In Mississippi, for example, the only men executed for rape from 1890 to 1930 were black."); Klarman, *Scottsboro*, *supra* note 301, at 420 ("Every one of the fifteen black men executed by the border state of Kentucky between 1940 and 1962 had been convicted of a crime against a white person by an all-white jury.)".

307. Colbert, *supra* note 144, at 81. Despite the appearance of an anti-lynching movement following the Reconstruction era, the U.S. Congress never passed anti-lynching legislation during this period. Wood, *supra* note 278, at 781. In fact, anti-lynching legislation was not passed by the Congress until 2022, with the passage of the Emmett Till Antilynching Act. *See* Emmitt Till Antilynching Act, Pub. L. No 117-107, 136 Stat. 1125 (2022).

308. 294 U.S. 587 (1935).

309. Colbert, *supra* note 144, at 81.

310. *Norris*, 294 U.S. at 588. Nine African American youths ranging from the ages of thirteen to twenty were falsely accused of raping two white women on a train in Alabama in March of 1931. *Id.* The subsequent cases became known as the Scottsboro trials. Despite contradictory evidence and a retraction by one of the women, all-white juries consistently delivered guilty verdicts. In the first round of trials, eight of the nine men convicted received death sentences. *See* Klarman, *Scottsboro*, *supra* note 301, at 379-420 (providing a thorough

due process of law, and offered the courts uncontradicted evidence of unconstitutional and systematic discrimination in the jury selection process.[311] The defendant offered evidence showing that "no negro had served on any grand or petit jury in that county within the memory of witnesses who had lived there all their lives,"[312] even though plentiful evidence existed showing that there was an abundance of African Americans who were qualified to sit as jurors.[313] The Alabama jury commissioner asserted that the explanation for this dearth of African Americans on juries within the county was because there were no African Americans in the community who were "generally reputed to be honest and intelligent" or fit to "discharge the duties of a juror."[314]

The Supreme Court disagreed with Alabama's argument and found it "impossible to accept such a sweeping characterization of the lack of qualifications."[315] In its decision, the Court lessened the evidentiary burden required to show purposeful discrimination in such cases. The Court concluded that if a defendant offered statistical evidence showing the total exclusion of African Americans from juries, the burden then shifts to the state to offer race-neutral reasons for the reality that only white people had served as members of either grand or petit juries.[316]

While *Norris* appeared to challenge the traditional legal landscape, all-white juries remained. Where an African American person made it onto a grand jury, an occasional occurrence at best, their votes would be significantly diluted by the white majority.[317] Additionally, in order to adhere to the equal protection standard for selecting jurors, courts would include a limited number of African Americans on the panel from which the ultimate jury would be chosen.[318]

For example, in *Pierre v. Louisiana*, African Americans accounted for nearly 50% of the population of the small, rural parish where the crime took

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historical recount of the event). Over the course of nearly twenty years, the men's cases were tried and appealed, not only in Alabama, but also before the Supreme Court. *Id.*; *see also* J. Thomas Sullivan, *The Demographic Dilemma in Death Qualification of Capitol Jurors*, 49 WAKE FOREST L. REV. 1107, 1111 (2014).

311. *Norris*, 294 U.S. at 588.
312. *Id*. at 591.
313. *Id*. at 597.
314. *Id.* at 598-99.
315. *Id.* at 599.
316. Colbert, *supra* note 144, at 83.
317. *Id.* at 85.
318. *See id.*

place.[319] Yet, in its effort to comply with *Norris'* requirements, the state simply offered the names of three African Americans (one of whom was deceased) to a jury venire consisting of 300 total people.[320] During this period, on the rare occasion that voir dire placed an African American person into the jury box, "the prosecutor's peremptory challenge became the principle weapon for striking prospective black jurors."[321] Instead of ensuring that a fair trial would be given to the accused by the presence of an impartial jury, the peremptory challenge became another mechanism through which African Americans were denied justice.[322] Juries in the South failed to integrate for another generation.[323]

By the 1950s, the practice of public lynching had virtually disappeared in the South, with legal lynching as a form of punishment restricted to limited areas in the Deep South.[324] Still, African Americans did not serve on juries in cases of "black-on-white" crime.[325] All-white juries in the South "applied unwritten substantive liability rules decreeing that only black men could be executed for raping white women and only whites were permitted to kill other whites in self-defense."[326] As a result, African American men were convicted by all-white juries, with punishments imposed that a white defendant would not have likewise faced.[327] For some time, these informal liability rules stymied any movement toward equal protection or an integrated jury despite the clear injustices they created. The use by prosecutors of the peremptory challenge became the state's primary tool for maintaining all-white juries.

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319. 306 U.S. 354, 359 (1939); *see also* Klarman, *Scottsboro*, *supra* note 301, at 419.

320. *Pierre*, 306 U.S. at 359.

321. Colbert, *supra* note 144, at 91-92.

322. Francis, *supra* note 229, at 307.

323. Klarman, *Scottsboro*, *supra* note 301, at 420.

324. *Id.* at 428. By the year 1930, the number of "reported lynchings had declined dramatically—from an average of 187.5 per year in the 1890s to 16.8 in the later years of the 1920s." *Id.* at 381. This reduction was attributed to a variety of factors, including federal anti-lynching legislation, the decreasing isolation of the South, "more professional law enforcement, and better education." *Id.* at 382. A portion of this decline may be due to the presence of quick trials and rapid executions. *Id.* ("Some jurisdictions actually enacted laws designed to prevent lynchings by providing for special terms of court to convene within days of alleged rapes and other incendiary crimes. In many instances, law enforcement officers explicitly promised would-be lynch mobs that black defendants would be quickly tried and executed if the mob desisted, and prosecutors appealed to juries to convict in order to reward mobs for good behavior and thus encourage similar restraint in the future.").

325. *Id.* at 428.

326. *Id.*

327. *Id.*; *see* KLARMAN, *supra* note 280, at 281–82.

In *Swain v. Alabama*, thirty years after *Norris*, an African American defendant convicted of rape challenged his conviction and sentencing, where he had been sentenced to death by an all-white jury.[328] In using the peremptory challenge to remove all six qualified African American jurors from the venire, the defendant argued that the prosecution had violated his Fourteenth Amendment rights.[329]

In its decision in *Swain*, the Supreme Court noted that the Constitution did not entitle a defendant to a "proportionate number of his race on the jury which tries him nor on the venire or jury roll from which petit jurors are drawn."[330] As a result, the Court concluded that it was not required to consider evidence provided by the defendant to prove that the jury selection process was rife with invidious discrimination in violation of the Fourteenth Amendment.[331] The Court noted that the jury roll and the venire did not need to be a "perfect mirror of the community."[332] While the Court acknowledged that the preemptory strike limited the ability to obtain an integrated jury, it reasoned that "an imperfect system is not equivalent to purposeful discrimination based on race."[333]

The defendant argued that the use of the peremptory challenge by the state was the reason that no African American had served on a jury in Talladega County for almost fifteen years.[334] While the Court acknowledged the underlying merits of the defendant's claim, it rejected the defendant's argument, in that "[t]he presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court."[335] The Court concluded that in order to prove that the state engaged in invidious racial discrimination in violation of a defendants rights under the Fourteenth Amendment, the defendant must show "that a prosecutor in a county, in case after case, had removed African Americans who were qualified as jurors."[336]

Swain made it virtually impossible for an African American defendant to prove that the prosecution misused the peremptory challenge. As a result,

328. 380 U.S. 202, 203 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986).

329. *Id.* at 203–04.

330. *Id.* at 208.

331. *See id.* at 206 ("Nor do we consider the evidence in this case to make out a prima facie case of invidious discrimination under the Fourteenth Amendment.").

332. *Id.* at 208.

333. *Id.* at 209 (citing Thomas v. Texas, 212 U.S. 278, 283 (1909)).

334. *Id.* at 205.

335. *Id.* at 222.

336. Francis, *supra* note 229, at 308.

for the next twenty years, the burden imposed upon criminal defendants in *Swain* made evidencing discrimination in jury selection virtually impossible. This situation continued for two decades, until the Court modified the required burden of proof for challenging the use of a peremptory challenge.[337]

III. Batson v. Kentucky*: A Breakthrough or a Promise Unfulfilled*

Throughout the twentieth century, courts examined the issue of race and the systemic discrimination in the jury selection process. It was not until 1986, however, that the Supreme Court in *Baston v. Kentucky* ruled that the Fourteenth Amendment prohibited the use of peremptory strikes in a racially based manner.[338]

In *Batson*, the state of Kentucky charged an African American man with second degree burglary and receipt of stolen goods.[339] The prosecutor used four of his five peremptory challenges to strike all four African Americans on the venire, leaving an all-white jury.[340] The trial judge dismissed the defendant's motion attacking the prosecutor's challenges on Equal Protection and Sixth Amendment grounds, observing that the parties could use their peremptory challenges to "strike anybody they want to."[341] An all-white jury convicted Batson of both counts.[342] The Kentucky Supreme Court affirmed the convictions.[343]

On review at the Supreme Court, *Batson* established a new evidentiary requirement for establishing a prima facie case of purposeful racial discrimination in the jury selection process. First, the defendant or opponent of the peremptory challenge must show that she is a member of a recognized racial group.[344] Second, the defendant or opponent of the peremptory challenge must show that the prosecutor or other proponent of the challenge utilized the peremptory challenges to remove those in the venire who shared a racial background with the defendant or opponent of the peremptory challenge.[345] Then lastly, the defendant or opponent of the

337. Sullivan, *supra* note 310, at 1112.

338. 476 U.S. 79 (1986). *See generally* Joseph B. Kadane, *Statistics for* Batson *Challenges*, 17 LAW, PROBABILITY & RISK 1 (2018).

339. *Batson*, 476 U.S. at 82.

340. *Id.* at 83.

341. *Id.*

342. *Id.*

343. *Id.* at 84.

344. *Id.* at 96.

345. *Id.*

peremptory challenge must show that, based on the facts and the circumstances from the case and the jury selection process create an inference that the prosecutor used peremptory challenges to remove specific persons from the jury venire based on their race.[346]

According to *Batson*, once the opponent of the use of the peremptory challenge makes this prima facie case of discrimination, the burden shifts to the movant of the strike to offer a race-neutral explanation.[347] "By shifting the evidentiary burden of proof to the prosecutor, the Court eliminated the prior insurmountable hurdle that had required defendants to prove the historical discriminatory practice of their prosecutors."[348]

Once the proponent of the peremptory challenge offered a race-neutral explanation for the strike, the burden shifts back to the opponent of the challenge, most often the defendant, to show that the proffered explanation is merely a pretext for race.[349] It is at this third step in the Batson process "that the persuasiveness of the justification becomes relevant."[350] It is at this step where "the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination."[351]

In theory, the Court sought in *Batson* to resolve centuries of discrimination in jury selection, while confronting the reality of future injustice. As the Court stated, "The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community."[352] More broadly, "[s]election procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice."[353]

Justice Marshall's concurrence, however, sounded a warning that "[m]erely allowing defendants the opportunity to challenge the racially discriminatory use of peremptory challenges in individual cases will not end the illegitimate use of the peremptory challenge."[354] As the first and only African American on the Court at the time of *Batson*, Justice Marshall offered a more cynical view. Justice Marshall understood—and expected—

346. *Id.*

347. *Id.* at 97; *see also* Purkett v. Elem, 514 U.S. 765, 767-68 (1995).

348. Colbert, *supra* note 144, at 96.

349. *See* Hernandez v. New York, 500 U.S. 352, 363 (1991) (plurality opinion) (discussing how disproportionate racial impact creates a plausible inference that a prosecutor's given reasons may simply be a pretext for a race-based challenge).

350. *Purkett*, 514 U.S. at 767-68.

351. *Id.*

352. *Batson*, 476 U.S. at 87.

353. *Id.*

354. *Id.* at 105 (Marshall, J. concurring).

that a prosecutor or other proponent of a peremptory challenge could "easily assert facially neutral reasons for striking a juror" and that the trial courts would be "ill equipped to second-guess those reasons."[355] Justice Marshall had little faith in the ability of courts to ferret out the race-neutral lies told to explain a particular peremptory challenge. Additionally, and well before the idea of implicit bias had really been explored, Justice Marshall noted that a prosecutor or a judges' own "conscious or unconscious racism" could result in an unfair peremptory strike.[356] As a result of these concerns, Justice Marshall concluded that it was futile to attempt to remove the consideration of race from the jury selection process, particularly as related to the use of peremptory challenges.[357] Justice Marshall asserted that the only way to remedy this problem was to eliminate the use of peremptory challenges altogether.[358]

IX. The Intractability of Racial Discrimination in the Courtroom and the Failure of Batson

Time has shown just how prescient Justice Marshall was and how intractable the reality of race is in the jury selection process in America, particularly when it comes to the use of peremptory challenges. This sad reality has been confirmed both by courtroom observations and in study after study.

Trial courts have, for example, rejected a defendant's objection to the use of a peremptory strike, accepting the explanation that "the potential black

355. *Id.* at 106.
356. *Id.*
357. *Id.* at 107-08.
358. *Id.* at 107. As Justice Marshall stated:

> The inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal justice system. Justice Goldberg, dissenting in *Swain*, emphasized that "[w]ere it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former." I believe that this case presents just such a choice, and I would resolve that choice by eliminating peremptory challenges entirely in criminal cases.

Id. (alteration in original) (citations omitted) (quoting Swain v. Alabama, 380 U.S. 202, 244 (1965) (Goldberg, J., dissenting)).

juror was young and single,"[359] or was "of age and married but was too pregnant,"[360] or had a last name similar to the defendant's last name.[361] Other courts have accepted a wide range of explanations for the peremptory dismissal of African American jurors, such as they were unemployed[362] or underemployed;[363] or they worked as social workers,[364] or federal employees,[365] or scientists,[366] or associates of radio or television stations that aired programs considered to be anti-law enforcement.[367] Courts have also approved a prosecutor's dismissal of an African American juror simply because of his looks,[368] posture,[369] or lack of eye contact.[370]

In his concurrence in *Batson*, Justice Marshall clearly stated his skepticism about whether the process articulated in the majority opinion would eliminate racial bias from the use of peremptory challenges in jury selection.[371] In showing that the use of peremptory challenges to exclude African Americans from juries was pervasive and pernicious, Justice Marshall pointed to the limited data that existed at the time in support of his assertion.[372] As evidence of this reality, he offered the following examples:

- In 1974 in fifteen criminal cases with African American defendants in the Western District of Missouri, prosecutors peremptorily challenged 81% of African American prospective jurors.[373]

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359. Colbert, *supra* note 144, at 97 (quoting United States v. Lance, 853 F.2d 1177, 1180 (5th Cir. 1988)). Professor Colbert's 1990 scholarship provides thorough research of early post-*Batson* caselaw as cited in this Article *infra* notes 360–77.

360. *Id.* (citing United States v. David, 844 F.2d 767, 768 (11th Cir. 1988)).

361. *Id.* (citing United States v. Tindle, 860 F.2d 125, 129 (4th Cir. 1988)).

362. *Id.* (citing United States v. Cartlidge, 808 F.2d 1064, 1070 (5th Cir. 1987)).

363. *Id.* (citing *Cartlidge*, 808 F.2d at 1071).

364. *Id.* (citing Williams v. State, 507 N.E.2d 997, 999 (Ind. Ct. App. 1987)).

365. *Id.* (citing United States v. David, 662 F. Supp. 244, 245 (N.D. Ga. 1987), *aff'd*, 844 F.2d 767).

366. *Id.* (citing Branch v. State, 526 So. 2d 605, 606-07 (Ala. Crim. App. 1986)).

367. *Id.* (citing Chisolm v. State, 529 So. 2d 635, 638 (Miss. 1988)).

368. *Id.* at 99 (citing Branch v. State, 326 So. 2d 605, 606 (Ala. Crim. App. 1986)) (noting how the African American juror was dismissed because he had a "dumbfounded or bewildered look").

369. *Id.* (citing United States v. Forbes, 816 F.2d 1006, 1010-11 (5th Cir. 1987) (analyzing a case involving an African American juror who was dismissed because she had a hostile "posture and demeanor"); United States v. Power, 881 F.2d 733, 740 (9th Cir. 1989) (involving a juror who was excused for "fidgeting" while sitting in the jury box)).

370. *Id.* (citing United States v. Cartlidge, 808 F.2d 1064, 1071 (5th Cir. 1987)).

371. Batson v. Kentucky, 476 U.S. 79, 102-03 (1986) (Marshall, J., concurring).

372. *Id.* at 103-04.

373. *Id.* at 103 (citing United States v. Carter, 528 F.2d 844, 848 (8th Cir. 1975)).

- In fifty-three criminal cases with African American defendants where the venire consisted of only 25% African American jurors, federal prosecutors used 68.9% of their peremptory challenges against African American prospective jurors.[374]
- From 1970 through 1971 in Spartanburg County, South Carolina prosecutors peremptorily challenged 82% of African American prospective jurors in thirteen criminal trials with African American defendants.[375]
- In Dallas County, Texas, the prosecutor's office provided explicit instructions to trial attorneys to conduct jury selection with a goal of eliminating any individual who was a member of a minority group.[376]
- In Dallas County in 1983-1984 in 100 felony trials, prosecutors peremptorily struck 405 out of 467 eligible African American prospective jurors in 100 felony trials; resulting in the odds of a qualified African American person sitting on a jury one in ten, as compared to one in two for a white person.[377]

Recent evaluations of the use of peremptory strikes, however, reveal a picture remarkably similar to that described by Justice Marshall. For example, the Baldus study covering 1981, five years before *Batson*, through 1997 examined 317 capital murder trials in Philadelphia.[378] The findings from this study showed that the Supreme Court decision in *Batson*, explicitly banning racially motivated peremptory challenges, appeared to have only resulted in a "marginal impact" on racial bias in jury selection.[379] Additional studies have only confirmed these findings:

- A review of capital cases in South Carolina from 1997-2012 showed that of the 307 jurors who were struck from the venire, the prosecution used peremptory strikes to eliminate 12% of white

374. *Id.* (citing United States v. McDaniels, 379 F. Supp. 1243 (E.D. La. 1974)).

375. *Id.* (citing McKinney v. Walker, 394 F. Supp. 1015, 1017-18 (S.C. 1974)).

376. *Id.* at 104 (citing JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 152 (1977)).

377. *Id.*

378. *See* 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, 10 (2001); *see also* Caren Myers Morrison, *Negotiating Peremptory Challenges*, 104 J. CRIM. L. & CRIMINOLOGY 1, 35 (2014).

379. Baldus et al., *supra* note 378, at 10; Morrison, *supra* note 385, at 35–37, 41–42.

potential jurors who went through the voir dire process without being removed for cause or other reason, as compared to 35% of African American potential jurors who did the same. The use of peremptory strikes by the defense was also skewed, in that the defense used peremptory strikes to eliminate 35% of whites who were not removed during voir dire and 3% of African Americans.[380]

- In North Carolina, a study found that the state prosecutors used 60% of their peremptory strikes against African American jurors, who constituted only 32% of the venire. Defense attorneys used 87% of their strikes against white jurors, who made up 68% of the venire.[381]
- In examining capital cases from Philadelphia County from 1981-1997, one study found that "prosecutors struck on average 51% of the African American jurors they had the opportunity to strike, compared to only 26% of comparable non-African American jurors. Defense strikes exhibited a nearly identical pattern in reverse: defense counsel struck only 26% of the African American jurors they had the opportunity to strike, compared to 54% of comparable non-African American jurors."[382]
- In reviewing the jury selection process in eight states in the South, one study by the Equal Justice Initiative identified some counties where prosecutors "excluded nearly 80% of African Americans qualified for jury service."[383]

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380. Ann M. Eisenberg, *Removal of Women and African Americans in Jury Selection in South Carolina Capital Cases, 1997-2012*, 9 NE. U. L. REV. 299, 337-38 (2017); *see also* Ann M. Eisenberg et al., *If It Walks like Systematic Exclusion and Quacks like Systematic Exclusion: Follow-Up on Removal of Women and African-Americans in Jury Selection in South Carolina Capital Cases, 1997-2014*, 68 S.C. L. REV. 373 (2017).

381. Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post*-Batson *North Carolina Capital Trials*, 97 IOWA L. REV. 1531, 1539 (2012).

382. *Id.*

383. EQUAL JUST. INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 4 (2010), https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf. The states examined were Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, South Carolina, and Tennessee. *Id.* Specifically, the researchers found that between 2005 and 2009, prosecutors in Houston County, Alabama, used their peremptory strikes to remove 80% of African-American jurors from jury venires, and in Dallas County, Alabama, prosecutors had used 157 out of 199 strikes—that is, about

- An evaluation of 390 felony jury trials in one Louisiana parish between 1994 and 2002 concluded that prosecutors struck African American jurors at more than three times the rate they struck white jurors.[384]
- [T]he North Carolina Conference of District Attorneys hosted training sessions in 1995 and 2011 to train prosecutors in using peremptory strike [against African American] prospective jurors without triggering judicial scrutiny.[385]
- A 2016 edition of a Santa Clara County, California prosecutors' training manual provides a list of justifications previously found acceptable for striking people of color, including the prospective juror's "clothing, hairstyle, or other accoutrements."[386]
- A 2020 evaluation of racial discrimination in California courts found that prosecutors used racial stereotypes about demeanor to justify peremptory strikes in more than 40% of cases.[387]

As seen in the case of Curtis Flowers, the failure of *Batson* to eliminate or reduce racial bias in the exercise of peremptory challenges has real and significant consequences in the courtroom.[388] For example, cases tried

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80% of them—against African-American venire members in the twelve reported cases since *Batson*. *Id.* at 5, 14.

384. *See* RICHARD BOURKE ET AL., LA. CRISIS ASSISTANCE CTR., BLACK STRIKES: A STUDY OF THE RACIALLY DISPARATE USE OF PEREMPTORY CHALLENGES BY THE JEFFERSON PARISH DISTRICT ATTORNEY'S OFFICE (2003), https://capitalpunishmentincontext.org/files/resources/race/BlackStrikes.pdf. In the eighteen murder trials in Jefferson Parish following *Batson* where the result was a death sentences and where there was a record the race of the jurors' race, "10 had no black members. Seven had one. One had two. None had three." Adam Liptak, *Oddity in Picking Jurors Opens Door to Racial Bias*, N.Y. TIMES (June 4, 2007), https://www.nytimes.com/2007/06/04/us/04bar.html. This comes out to 4% participation by African-American jurors in a parish where the population in 2000 was 23% African-American. *Id.*

385. EQUAL JUST. INITIATIVE, RACE AND THE JURY: ILLEGAL DISCRIMINATION IN JURY SELECTION 43 (2020), https://eji.org/wp-content/uploads/2005/11/race-and-the-jury-digital.pdf.

386. *Id.* (quoting SANTA CLARA CNTY. DIST. ATTY'S OFF., THE INQUISITIVE PROSECUTOR'S GUIDE 67 (2016), https://countyda.sccgov.org/sites/g/files/exjcpb1121/files/IPG19%20BATSON-WHEELER%20OUTLINE.pdf).

387. *Id.* at 44 (citing ELISABETH SEMEL ET AL., BERKELEY L. DEATH PENALTY CLINIC, WHITEWASHING THE JURY BOX: HOW CALIFORNIA PERPETUATES THE DISCRIMINATORY EXCLUSION OF BLACK AND LATINX JURORS 15 (2020), https://www.law.berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-Jury-Box.pdf).

388. See *supra* notes 16-25 and accompanying text.

before all-white juries are more likely to result in guilty verdicts. In capital cases where the defendant is African American, an all-white jury is more likely to impose the death penalty.[389]

As *Batson* jurisprudence has developed over the years, courts have held *Batson* to apply "regardless of the race of the defendant,[390] that it applies to civil as well as criminal cases,[391] and that lawyers can raise *Batson* challenges with strikes based on gender as well as race."[392] Violations of the *Batson* process have been seen as "assaults on the judiciary itself because they undermine the fairness of the jury verdicts on which everything else relies."[393] Despite this, Justice Marshall's predictions have remained true, and the presence of an integrated jury is still an anomaly in the justice system.[394] As a result, courts and scholars are left wondering whether *Baston* is broken beyond repair.[395]

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389. Morrison, *supra* note 378, at 40-42. Morrison describes studies supporting this conclusion as follows:

> A study of 340 capital trials in fourteen states found that the presence of one or more black men on the jury was markedly associated with lower death sentencing rates for black defendants. In cases in which the victim was black, jurors imposed the death penalty 66.7% of the time when the jury included no black men versus 42.9% of the time when the jury included one or more black men. In cases in which the victim was white, jurors imposed the death penalty 71.9% of the time when the jury had no black men, but only 42.9% of the time if the jury included one black man and 36.4% of the time when the jury included two black men. The most recent study, of 785 felony jury trials in Florida between 2000 and 2010, showed that juries drawn from all-white pools were more likely to convict black defendants than white defendants; when one or more black prospective jurors were included in the pool, the conviction rates for black and white defendants were nearly identical.

Id. (first citing William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 189, 192 tbl.1, panels B & C (2001); and then citing Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Q.J. ECON. 1017, 1027 (2012)).

390. Anna L. Tayman, Note, *Looking Beyond* Batson*: A Different Method of Combating Bias Against Queer Jurors*, 61 WM. & MARY L. REV. 1759, 1766 (2020) (citing Powers v. Ohio, 499 U.S. 400, 416 (1991)).

391. *Id.* (citing Edmonson v. Leesville Concrete Co., 500 U.S. 614, 630 (1991)).

392. Tayman, *supra* note 390, at 1766.

393. Jonathan Abel, Batson*'s Appellate Appeal and Trial Tribulations*, 118 COLUM. L. REV. 713, 758 (2018).

394. In 2005, Justice Breyer joined Justice Marshall in calling for the abolition of peremptory challenges. Miller-El v. Dretke, 545 U.S. 231, 266-67 (2005) (Breyer, J., concurring); *see also* Rice v. Collins, 546 U.S. 333, 342-44 (2006) (Breyer, J., concurring) (advocating the same position); Johnson v. California, 545 U.S. 162, 173 (2005) (Breyer, J., concurring) (affirming the views expressed in *Miller-El*). In reaching this changed

X. Can Batson *Be Salvaged?*

Several states have reviewed the efficacy of *Batson* to address racial discrimination in jury selection in their respective state courts, specifically focusing on the failure of *Batson* to eliminate—or even reduce—racial bias in the use of peremptory challenges. Since 2018, state courts in Arizona, California, Colorado, Connecticut, Iowa, Massachusetts, New Jersey, New York, Oregon, Utah, and Washington have considered the effect that implicit bias has on the efficacy of *Batson*.[396] Additionally, Arizona, California, Connecticut, New Jersey, and Washington commissioned

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perspective, Justice Breyer pointed to several empirical studies confirming that discriminatory jury selection practices are very much in use. *Miller-El*, 545 U.S. at 268-69 (Breyer, J., concurring). Justice Breyer also agreed that in the exercise of peremptory challenges, a lawyer's adversarial duty and the Equal Protection Clause often "work at cross-purposes." *Id.* at 272. Justice Breyer quotes from Justice Goldberg's dissent in *Swain* asserting that were a choice required between the Fourteenth Amendment and the right to exercise peremptory challenges, "the Constitution compels a choice of the former." *Id.* at 273 (quoting Swain v. Alabama, 380 U.S. 202, 244 (Goldberg, J., dissenting)).

395. As Justice Breyer explained in his concurrence in *Miller–El*, citing to a number of sources showing that *Batson* has done very little to make juries more diverse or to prevent prosecutors from exercising race-based challenges.:

> Given the inevitably clumsy fit between any objectively measurable standard and the subjective decisionmaking at issue, I am not surprised to find studies and anecdotal reports suggesting that, despite Batson, the discriminatory use of peremptory challenges remains a problem.

Id. at 268–69 (citations omitted).

396. Batson *Reform: State by State*, BERKELEY L. https://perma.cc/EYH6-CLDP (last visited June 14, 2023); *see also* State v. Andujar, 254 A.3d 606, 623, 630–31 (N.J. 2021) (discussing the harmful role implicit bias plays in peremptory challenges); Commonwealth v. Sanchez, 151 N.E.3d 404, 428-29 (Mass. 2020) (Lowy, J., concurring) (same); People v. Rhoades, 453 P.3d 89, 148 (Cal. 2019) (Liu, J., dissenting) (same); State v. Holmes, 221 A.3d 407, 411 (Conn. 2019) (same); State v. Veal, 930 N.W.2d 319, 340 (Iowa 2019) (Cady, C.J., concurring) (same); *Veal*, 930 N.W. 2d at 343 (Appel, J., concurring in part and dissenting in part) (same); State v. Jefferson, 429 P.3d 467, 476 (Wash. 2018) (same); *id.* at 481 (Yu, J., concurring) (same); State v. Curry, 447 P.3d 7, 14 (Or. App. 2019) (same), *adhering to on reconsideration*, 461 P.3d 1106 (Or. App. 2020); State v. Aziakanou, No. 20180284, 2021 WL 4468427, at *14 (Utah Sept. 30, 2021) (same). *See generally, e.g.*, Conklin, *supra* note 31, at 1066-92; Bennett, *supra* note 34, at 152-66 ("Lawyers, judges, and other legal professionals need to heighten their awareness and understanding of implicit bias . . . ."). The Willamette University College of Law Racial Justice Task Force on the Use of Peremptory Challenges during Criminal Jury Selection in Oregon, a group consisting of very recent Willamette Law graduates, issued a report in April 2021 that recommended the elimination of peremptory challenges in Oregon courts. *See* Willamette, Batson's *Failure*, *supra* note 41.

working groups or task forces to study, among other problems, the role of implicit bias in jury selection. The states encouraged these groups to recommend solutions to the *Batson* framework.[397] From this work, Washington, California, and Arizona have adopted reforms related to the application of *Batson* in their state courts.[398]

As an example of a rules-based reform effort, Washington's review process began in 2013 in *State v. Saintcalle*, where the Washington Supreme Court expressed dismay and consternation over the failure of the *Batson* process to address the reality of racial bias in jury selection.[399] In its opinion, the court first raised the issue of using its rulemaking authority to address the problems present in the application of *Batson*.[400] Out of this opinion grew a discussion between prosecutors, progressive advocacy groups including the ACLU, and the criminal defense bar.[401] Not surprisingly, these groups were at an impasse over what, if any, reforms

397. Batson *Reform: State by State*, *supra* note 396.

398. *Holmes*, 221 A.3d at 436-37 (following the Washington Supreme Court's approach and establishing a jury selection working group while noting that "implicit bias may be equally as pernicious and destructive [as purposeful discrimination] to the perception of the justice system"); *Andujar*, 254 A.3d at 612, 631 (ordering "a Judicial Conference on Jury Selection to convene this fall [of 2021]"); PROPOSED NEW GR 37—JURY SELECTION WORKGROUP, FINAL REPORT 1 (2018) [hereinafter WASH. FINAL REPORT], https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/OrderNo25700-A-1221 Workgroup.pdf (noting that the Jury Selection Workgroup was formed by the state's Supreme Court); Press Release, Sup. Ct. of Cal., Announcement of Jury Selection Work Group Charge (Jan. 29, 2020) [hereinafter Cal. Sup. Ct. Press Release], https://newsroom.courts.ca.gov/sites/default/files/newsroom/2020-11/SupCt20200129.pdf; Merrill Balassone, *Supreme Court Announces Jury Selection Work Group*, CAL. CTS. NEWSROOM (Jan. 29, 2020), https://newsroom.courts.ca.gov/news/supreme-court-announces-jury-selection-work-group (announcing the creation of the California Jury Selection Work Group); *see also* Sloan, *supra* note 30, at 250 (detailing how Washington's jury selection group formed). The Utah Supreme Court delegated the task of studying and recommending changes to their *Batson* doctrine to their rules committee. *Aziakanou*, 2021 WL 4468427, at *14 n.12.

399. State v. Saintcalle, 309 P.3d 326, 335, 339 (Wash. 2013) (en banc) (noting *Batson's* inability to prevent implicit biases and suggesting that a court rule that "strengthen[s] our procedures for *Batson* challenges . . . may be the most effective way to reduce discrimination and combat minority underrepresentation in our jury system"), *abrogated on other grounds by* City of Seattle v. Erickson, 398 P.3d 1124 (Wash. 2017); Sloan, *supra* note 31, at 245-46 (providing a detailed description of *Saintcalle*'s holding and its role in the creation of GR 37).

400. *Saintcalle*, 309 P.3d at 337–38; Sloan, *supra* note 31, at 245-46.

401. Conklin, *supra* note 31, at 1067.

were needed.[402] As a result of the gridlock in the discussions between these groups, the Washington Supreme Court created the jury selection working group.[403] The instructions to the working group from the court were to either reach a consensus on a reform proposal or, if a consensus could not be reached, to present the court with competing positions that were fully researched and comprehensive.[404]

In its final report issued in 2018, the work group offered recommendations based on the areas where the competing interests had reached a consensus.[405] The workforce also presented to the court those areas where disagreement remained.[406] The work group reached consensus on the following issues:

- Proposed revisions to the operation of the *Batson* process should reflect a low threshold at step one so that the striking party must always provide a group-neutral reason for the strike.[407]

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402. WASH. FINAL REPORT, *supra* note 398, at 8; *see also* Conklin, *supra* note 31, at 1067; Sloan, *supra* note 31, at 236 (indicating that the American Civil Liberties Union's (ACLU) initial proposed rule in response to *Saintcalle* primarily addressed the issue of implicit bias, but included a list of "presumptively invalid reasons for a strike"). In the public comment period on the proposed rule, the Washington Association of Prosecuting Attorneys (WAPA) severely criticized the proposed rule, asserting that "the rule was 'slanted' against the State because it could require prosecutors to seat jurors biased against [them]." Sloan, *supra* note 29, at 248 n.101 (quoting Wash. Ass'n of Prosecuting Att'ys, Comment Letter on Proposed Rule GR 36, at 3-4 (Jan. 4, 2017), https://www.courts.wa.gov/court_Rules/proposed/2016Nov/GR36/Pam%20Loginsky.pdf [https://perma.cc/9XWD-65P2])).

403. WASH. FINAL REPORT, *supra* note 398, at 1. The work group included a broad representation from the community, including members of the ACLU, WAPA, the criminal defense bar, and various judge and affinity-group bar associations. *Id.* at 16. The full membership consisted of members of the ACLU, Asian Bar Association of Washington, Administrative Office of the Courts (of Washington), Courts of Limited Jurisdiction Jury Administrator, District and Municipal Court Judges' Association; Korematsu Center for Law and Equality, Latina/o Bar Association of Washington, Legal Voice, Loren Miller Bar Association of Washington; Superior Court Judges' Association, Superior Court Jury Administrator, Washington Association of Criminal Defense Lawyers, WAPA, Washington Defense Trial Lawyers, and the Washington State Association for Justice. *Id.*

404. *Id.* at 1, 3–5 (outlining areas of consensus); *id.* at 5-6 (identifying areas of disagreement); *id.* at 7-9 (detailing recommended reforms based on the findings of the work group); *see* Conklin, *supra* note 31, at 1067-68

405. WASH. FINAL REPORT, *supra* note 398, at 3-5.

406. *Id.* at 7–9.

407. *Id.* at 4; Sloan, *supra* note 31, at 250.

- Proposed revisions to the operation of the *Batson* process should target more than just purposeful discrimination but should reach the reality of implicit bias.[408]
- Proposed revisions to the operation of the *Batson* process should be objective, in that the determination of whether the exercise of a peremptory challenge was related to race or ethnicity should be from the perspective of an objective observer, rather than the subjective perspective of the attorney exercising the peremptory challenge.[409]

Most of the working group agreed that the judgment regarding the validity of a peremptory challenge should be from the standpoint of an objective observer.[410] There was no consensus, however, over the correct standard to be employed. The unresolved question of the working group was whether a peremptory challenge would be invalid if an objective observer "could view" or "would view" race or ethnicity a factor in the strike?[411] A number of members of the working group felt that the "could view" approach was so ambiguous that it would allow every peremptory challenge to be declared invalid.[412] Others argued that the "could view" point of view was a stricter standard, which would further the goal of eliminating discrimination in the jury selection process.[413]

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408. WASH. FINAL REPORT, *supra* note 398, at 3.

409. *See id.* at 7 (addressing alternative objective standards); *see also* Sloan, *supra* note 31, at 251; Conklin, *supra* note 31, at 1068.

410. *See* WASH. FINAL REPORT, *supra* note 398, at 6; *see also* Conklin, *supra* note 31, at 1068-69; Sloan, *supra* note 31, at 251.

411. WASH. FINAL REPORT, *supra* note 398, at 6 (describing the topic as "one of the most significant areas of disagreement within the workgroup").

412. Individual Statement by Hon. Franklin L. Dacca (Feb. 16, 2018), *in* WASH. FINAL REPORT, *supra* note 398, at app.2 (PDF file page 25) (asserting that the "could view" standard "is unworkable and will virtually result in the denial of every [strike]"); *see also* Sloan, *supra* note 31, at 251, 257 (noting that some members of the work group expressed concern that the "could view" threshold was "too vague and hypothetical"); Conklin, *supra* note 31, at 1068.

413. Statement of American Civil Liberties Union of Washington, Washington Association of Criminal Defense Lawyers, Fred T. Korematsu Center for Law & Equality, Legal Voice, Loren Miller Bar Association, and Latina/o Bar Association of Washington (Feb. 16, 2018), *in* WASH. FINAL REPORT, *supra* note 398, at app.2 (PDF file page 28) (asserting that the "would view" standard is less accusatory, permitting denial "without suggesting that the party *actually* exercised the peremptory challenge based on race"). Members also failed to reach consensus over the justifications that would be treated as presumptively invalid if offered at step two to explain the rationale for the peremptory

On April 5, 2018, the Washington Supreme Court adopted a version of the proposed rule that included the "could view" standard of proof.[414] The court likewise adopted the list of presumptively invalid reasons for striking a juror but proffered no guidance on the appropriate standard of review or remedy.[415] Step one under the rule provides an opportunity to a party to raise a *Batson* objection by citing the Washington rule[416] Step two under the rule identifies presumptively invalid reasons that cannot be used to justify a peremptory strike because of their close linkage to historical rationales that eliminate jurors of color. These presumptively invalid reasons are:

- having prior contact with law enforcement officers;
- expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling;
- having a close relationship with people who have been stopped, arrested, or convicted of a crime;
- living in a high crime neighborhood;
- having a child outside of marriage;
- receiving state benefits; and
- not being a native English speaker.[417]

Additionally, the party exercising the peremptory challenge must give some semblance of reasonable notice to the judge and opposing party if they plan to use a prospective juror's conduct or demeanor during jury selection as the reason for the peremptory challenge.[418] Examples of such

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challenge. *Id.* at 5–6. Likewise, the group failed to reach consensus over other topics, including the inclusion of gender and sexual orientation in *Batson*'s protections and a requirement for judges to explain their rulings on the record. *Id.* For a complete description of the internal debates of the work group, see Sloan, *supra* note 31, at 250-53; *see also* Conklin, *supra* note 31, at 1069-70.

414. Order In the Matter of the Proposed New Rule 37—Jury Selection, No. 25700-A-1221 (Wash. Sup. Ct. Apr. 5, 2018); WASH. CT. GEN. R. 37.; Conklin, *supra* note 31, at 1070.

415. Conklin, *supra* note 31, at 1070.

416. WASH. CT. GEN. R. 37(c), (d).

417. WASH. CT. GEN. R. 37(h)(i)–(vii).

418. *See* WASH. CT. GEN. R. 37(i) (identifying that reasonable notice would be required where the rationale offered for the peremptory challenge involved "allegations that the prospective juror was sleeping, inattentive, or staring or failing to make eye contact; exhibited a problematic attitude, body language or demeanor; or provided unintelligent or confused answers"); *see also* Conklin, *supra* note 31, at 1070; Sloan, *supra* note 31, at 236

conduct might include failing to make eye contact or having a problematic attitude.[419] Providing this advance notice affords the judge and the opposing party the opportunity to look for the conduct identified and gives the judge a basis for determining the validity of the excuse offered for the peremptory challenge.[420]

Following these developments in Washington, California subsequently created a task force to address shortcomings of *Batson* in the jury selection process.[421] In 2020, following the work of its task force, California adopted Rule AB 3070, much like the rule adopted in Washington.[422]

Under AB 3070, effective January 1, 2022 for criminal trials and January 1, 2026 for civil trials, California courts will no longer seek to determine whether a peremptory challenge was exercised as a result of purposeful discrimination.[423] Rather, under this new process, the court determines whether there is a substantial likelihood that an objectively reasonable person "would view," rather than could view, the peremptory strike as being based on the juror's "race, ethnicity, gender, gender identity, sexual orientation, national origin or religious affiliation."[424] An objectively reasonable person in this context is defined as a person who is aware of unconscious bias and its impact on the legal system.[425] Thus, AB 3070 mandates that courts focus not on the actual, subjective motivations of the attorney exercising the peremptory challenge, but rather focus on the objective facts which a reasonable person, aware of and sensitive to the issues of unconscious bias, would view the juror challenge.

Several of the states reviewing the efficacy of *Batson* in reducing or eliminating discriminatory jury selections, particularly related to the use of peremptory challenges, focused on rule changes similar to those adopted by Washington.[426] But Arizona decided that the adoption of such an incremental rule change would not address the fundamental failure of *Batson*. On March 10, 2021, the Arizona Supreme Court created the Task

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(noting GR 37's heightened procedure for reliance on particular conduct observed during voir dire).

419. WASH. CT. GEN. R. 37(i).

420. *Id.*

421. Cal. Sup. Ct. Press Release, *supra* note 399; Balassone, *supra* note 398 (announcing the creation of the California Jury Selection Work Group).

422. CAL. CIV. PROC. § 231.7(d)(1) (2022).

423. *Id.*

424. *Id.*

425. *Id.* § 231.7(d)(2)(A).

426. *See* Batson *Reform: State by State*, *supra* note 396.

Force on Jury Data Collection, Practices, and Procedures.[427] The court assigned the Task Force to review the efficacy of *Batson* in reducing or eliminating discriminatory jury selections, particularly related to the use of peremptory challenges.[428] The Task Force's purpose was to identify best practices for jury selection and to outline potential, proper training to ensure that voir dire occurred in a manner sufficient to secure a fair and impartial jury.[429]

During its work, the Task Force reviewed a series of proposals related to the use of peremptory strikes in the jury selection process and considered two in particular.[430] The first of these proposals, the Petition to Adopt New Rule 24 favored reform consistent with Washington rule and California's AB 3070.[431] The second proposal, the Petition to Amend Rules 18.4, 18.5, and 47(e) called for the complete abolition of peremptory challenges in Arizona courts. After many meetings, and after receiving many public comments on the two reform proposals, on October 4, 2021, the Task Force issued its initial Report and Recommendations in which it recommended by a 12-4 vote that the Arizona Supreme Court abolish peremptory challenges and "set forth policy, procedures, and, if necessary, rules that require a more robust rule to secure better for-cause strikes."[432] The Task Force explained its recommendation as follows:

> The task force also considered alternatives, such as a reduction in the number of peremptory challenges coupled with more robust questioning of prospective jurors to assist parties in learning more about a juror's potential for being biased or unfair. Opponents of peremptory challenges often allege that in deciding whether to exercise peremptory strikes, attorneys rely heavily on stereotypes and generalizations because of the limited information gathered during the jury selection process and a lack

427. Establishment of the Task Force on Jury Data Collection, Practices, and Procs., Admin. Order No. 2021–35 (Ariz. 2021), https://www.azcourts.gov/Portals/22/admorder/Orders21/2021-35.pdf?ver=2021-03-10-130444-153.

428. *Id.*

429. *See id.*

430. *See* ARIZ. TASK FORCE ON JURY DATA COLLECTION, POLICIES & PROC., REPORT AND RECOMMENDATIONS 36-38 (2021) [hereinafter ARIZ. TASK FORCE], https://www.azcourts.gov/Portals/74/Jury%20TF/Resources/Final%20Report%20Posting%20JTF%20100421.pdf?ver=2021-10-04-171251-953.

431. *R-21-0008 Petition to Amend the Arizona Rules of Supreme Court to Adopt New Rule 24 on Jury Selection*, AZ. CTS. (Jan. 8, 2021, 11:51 AM), https://www.azcourts.gov/Rules-Forum/aft/1196.

432. ARIZ. TASK FORCE, *supra* note 430, at 36, 38.

> of any reliable way to determine prospective jurors' subtle biases. Scholars frequently argue this reliance on stereotypes and generalizations is often unconscious.[433]

Even before the Task Force Report and Recommendations were issued, however, work had already begun on revising Arizona's jury selection process. In January 2021, Judges Peter Swann and Paul McMurdie of the Arizona Court of Appeals filed a petition with the Arizona Supreme Court seeking the complete elimination of peremptory strikes, which they described as "[t]he primary tool by which [unlawful] discrimination is practiced.[434] In their petition, the judges offered three rationales in support of their "argument for abolition":

- First, "[p]eremptory strikes predate our Constitution, but they are not constitutionally required. What *is* constitutionally required is that juries be selected from "a representative cross section of the community [which] is an essential component of the Sixth Amendment right to a jury trial." If this constitutional rule is to have integrity, it cannot be interpreted to mean that the initial panel must be representative while the parties are free to strive for a favorable imbalance on the final jury.[435]
- Second, "[s]tudy after study shows that peremptories are exercised in a discriminatory fashion in states throughout the United States," indicating that the peremptory challenge was one of the reasons why individual members of minority groups were underrepresented on Arizona juries.[436]
- Third, "[a]bandoning peremptory challenges will demonstrably eliminates bias in all directions," thus increasing public confidence in the fairness and impartiality of the judicial system.[437]

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433. *Id.* at 37 (citations omitted).

434. *In re* Petition to Amend Rules 18.4 and 18.5 of Rules of Criminal Procedure and Rule 47(e) of the Arizona Rules of Civil Procedure at 2, 7, No. R–21–0020 (Ariz. 2021) [hereinafter Swann & McMurdie Petition], https://www.azcourts.gov/Rules-Forum/aft/1208 (click the attachment "Peremptory Petition Final.pdf" to download the source).

435. *Id.* at 7-8 (first citing Ross v. Oklahoma, 487 U.S. 81, 88 (1988) ("We have long recognized that peremptory challenges are not of constitutional dimension."); and then quoting Taylor v. Louisiana, 419 U.S. 522, 528 (1975)).

436. *See id.* at 9–12.

437. *Id.* at 13-14.

Judges Swann and McMurdie rejected the "*Batson* plus" approach adopted by Washington and California.[438] They simply disagreed that such an approach would be effective in reducing or eliminating racial bias in jury selection.[439] Further, they concluded that that while such an approach might lead to some increase in the number of successful challenges to peremptory strikes, it would definitely "generate years of collateral litigation over strikes."[440] Ultimately, Judges Swann and McMurdie rejected what they saw as a half measure, in that the "*Batson* plus" approach "is not a death blow to the racially inappropriate use of peremptory strikes."[441] *Baston* plus approaches do "nothing to redress the indignity to which we currently subject large numbers of our citizens."[442] Instead, the current systems seem to be "telling them that though there is no cause to think they would be unfair, their participation is unwelcome simply because a lawyer dislikes the cut of their jib."[443]

After several months of discussion and public comment over the proposal offered by the judges in their Petition, on August 30, 2021, the Arizona Supreme Court granted the petition, striking all language from the state's civil and criminal procedure rules that provided for peremptory strikes.[444] Litigants certainly retain the ability to challenge prospective jurors "for cause." Litigants seeking to challenge a prospective juror "for cause," however, must establish "by a preponderance of the evidence that the juror cannot render a fair and impartial verdict."[445] Under the terms of this Order, effective January 1, 2022, litigants in Arizona state courts may no longer strike prospective jurors without providing reasons and establishing cause.[446]

XI. Conclusion

However well-reasoned these reform efforts may be, the forty-year experience of courts using the three-step *Batson* process indicate that, apart from Arizona, they are likely doomed from the start. Simply creating another procedural layer on an already cumbersome process does not

438. *Id.* at 14-15
439. *See id.*
440. *Id.* at 15.
441. *Id.*
442. *Id.*
443. *Id.*
444. Order Abolishing Strikes, *supra* note 41, at 3–6.
445. *Id.* at 4.
446. See *id.* at 1, 3.

address the primary reasons that *Batson* has failed. The intractability of race as a factor in the court process and *Batson* create too large a conflict with the fundamental duties of a lawyer toward her client.[447]

As Justice Clarence Thomas reminds us in his dissent in *Flowers*, "race matters in the courtroom."[448] It matters not only because of express racial prejudice by one group against another, but also because of what Justice Marshall recognized as the seemingly immoveable reality of implicit racial prejudice or implicit bias.[449]

Justice Marshall was certainly aware that even where the process articulated in *Batson* was followed scrupulously, an attorney inclined toward express racial bias could simply lie when forced to offer a race

447. Morrison, *supra* note 378, at 30-37.

448. Flowers v. Mississippi, 139 S. Ct. 2228, 2271 (2019) (Thomas, J., dissenting) ("I would return to our pre-*Batson* understanding—that race matters in the courtroom—and thereby return to litigants one of the most important tools to combat prejudice in their cases."). Justice Thomas views peremptory challenges as a tool that African American defendants may use to remove prospective white jurors they perceive as prejudiced against them. *Id.* at 2274 ("[T]he Court continues to apply a line of cases that prevents, among other things, black defendants from striking potentially hostile white jurors."); *see also* Georgia v. McCollum, 505 U.S. 42, 60 (1992) (Thomas, J., concurring) (arguing that applying *Batson* to criminal defendants hurts Black litigants specifically because it will "inexorably . . . lead to the elimination of peremptory strikes"); *see also* Susan N. Herman, *Why the Court Loves* Batson*: Representation-Reinforcement, Colorblindness, and the Jury*, 67 TUL. L. REV. 1807, 1828 (1993) (discussing Justice Thomas's view that peremptory challenges can be used affirmatively to combat bias on juries). *See generally* Thomas Ward Frampton, *What Justice Thomas Gets Right About* Batson, 72 STAN. L. REV. ONLINE 1 (2019), https://review.law.stanford.edu/wp-content/uploads/sites/3/2019/09/72-Stan.-L.-Rev.-Online-Frampton.pdf.

449. Batson v. Kentucky, 476 U.S. 105, 106-07 (1986) (Marshall, J., concurring). As Justice Marshall wrote in his concurrence in *Batson*:

> "[I]t is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal." A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective African American juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported. As Justice Rehnquist concedes, prosecutors' peremptories are based on their "seat-of-the-pants instincts" as to how particular jurors will vote. Yet "seat-of-the-pants instincts" may often be just another term for racial prejudice. Even if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels—a challenge I doubt all of them can meet.

Id. (alteration in original) (citations omitted) (quoting King v. Cnty. of Nassau, 581 F. Supp. 493, 502 (E.D.N.Y. 1984)).

neutral explanation for the strike.[450] More importantly, Justice Marshall recognized that racial bias was so intractable, so deeply embedded into the fabric of the country, that an attorney exercising a peremptory challenge might not even recognize the racial bias underlying her understanding or explanation for the strike.[451]

The "unconscious racism" that Justice Marshall described in *Batson* is understood today as implicit bias. In other words, implicit bias is seen as a way of viewing the world that involuntarily relies upon stereotypes, myths, and generalities about certain groups.[452] These unconscious views are cognitive shortcuts to aid in decision making by linking particular generalizations to a discrete group.[453] While these generalizations and stereotypes form a belief system that aids in individual understandings of the world, they lead to errors about people and groups.[454]

Recent research indicates that implicit bias, while perhaps not immutable, does have a very strong influence on the way people move through the world.[455] The process established in *Batson* for testing potential bias in the use of peremptory challenges in jury selection completely ignores the reality of implicit bias—a reality that both Justice Marshall and Justice Thomas recognize as figures on opposite sides of the debate.

The *Batson* process focuses on identifying express biases that might impact an attorney's choice of which potential jurors to strike using peremptory challenges. It seems folly, however, to expect an attorney to identify her own implicit racial biases and explain how the race of a juror impacted her decision to exercise a peremptory strike. While most of us

450. *Id.* at 106.

451. *Id.*

452. *See id.* (asserting that the perception of race-neutral reasons offered in the courtroom can be skewed by "unconscious racism"); *see also* Michael Selmi, *The Paradox of Implicit Bias and a Plea for a New Narrative*, 50 ARIZ. ST. L.J. 193, 199-200 (2018).

453. Page, *supra* note 34, at 160, 187 (discussing how implicit bias shapes decision-making in the brain).

454. *Id.* at 186-88.

455. Bennett, *supra* note 34, at 166. In some studies, researchers instructed participants to participate in a video game simulation requiring them to identify and shoot an armed suspect in a crowd. *Id.* at 155. In the study, participants were more likely to "shoot Black perpetrators more quickly and more frequently than white perpetrators and to decide not to shoot White bystanders more quickly and frequently than Black bystanders." *Id.* (quoting Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 357 (2007)). Other studies compared the outcomes of the public and police officers, concluding that members of the public were more likely to shoot African American individuals than white people in both the armed or unarmed conditions. *Id.* at 156.

would likely agree that judging individuals based upon their race is not socially or legally acceptable today, studies consistently show that even individuals who see themselves as being firmly committed to equality can nonetheless hold negative views about racial minorities in general and African Americans in particular.[456]

In addition to failing to address the reality of implicit bias and the intractability of race in the courtroom, *Batson* also fails to seriously account for the ethical and professional obligations of attorneys in an adversarial system. Under the Model Rules of Professional Conduct, an attorney's primary duties and obligations are to her client.[457] Attorneys are to represent their client with loyalty and diligence, with the interest of the client always at the forefront.[458]

The requirement to represent a client with a high degree of loyalty, diligence, and zeal is at times in conflict with the requirements of *Batson*. Attorneys whose primary commitment is to their client, particularly in a criminal defense context, may find it impossible to represent a client with

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456. Studies examining implicit social cognition have determined that "[w]e are not perceptually, cognitively, or behaviorally colorblind." Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 468 (2010). Rather, what the research shows is that "most of us have implicit biases against racial minorities notwithstanding sincere self-reports to the contrary." Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1490 (2005). As Caren Myers Morrison has written,

> But what is most striking about these findings is the wide dissociative gap between what we believe our feelings to be and what they actually are. We want others to see us, and we want to think of ourselves, as unbiased and open-minded. This motivation is powerful, sometimes to the extent that people deny that race matters to them or that they even noticed race.

Morrison, *supra* note 378, at 32.

457. MODEL RULES OF PRO. CONDUCT pmbl. (AM. BAR ASS'N 2020). The duties of the lawyer are stated in the Preamble to the Model Rules of Professional Conduct as follows:

> As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

Id.; *see also* RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 16 (AM. L. INST. 2000).

458. Morrison, *supra* note 378, at 36; *see also* Barbara Allen Babcock, Commentary, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175, 184 (1983-84) (noting the criminal defense "tradition of unmitigated devotion to the client's interest").

"devotion and zeal," while fighting racial and cultural stereotypes.[459] As Professor Abbe Smith, Director of Georgetown Law's Criminal Defense and Prisoner Advocacy Clinic, wrote:

> The adversarial system is the best system for defending the rights of the criminally accused and protecting the rights of the poor. Strong advocacy—going to the mat for one's client—is the best way to ensure that client's liberty and dignity. Demonstrating zeal on behalf of those accused of crime is an expression of fidelity to those who have no one else. There is virtue in this.
>
> . . . .
>
> It is in this context that the criminal lawyer "discriminates." It is in this context that the criminal lawyer will note the prevailing cultural sensibilities, stereotypes, and prejudices and use them on behalf of clients who are typically the unhappy targets of these sensibilities, stereotypes and prejudices.
>
> . . . .
>
> No matter how personally distasteful or morally unsettling, zealous advocacy demands that criminal defense lawyers use whatever they can, including stereotypes, to defend their clients. Criminal lawyers are "not allowed to refrain from lawful advocacy simply because it offends" them.[460]

Thus, it certainly should not be surprising that attorneys choose to honor their ethical obligations to their client by exercising peremptory challenges in a manner inconsistent with the goal of *Batson* to reduce racial bias in the use of peremptory challenges. This is especially true when the messy requirements of *Batson* often result in outcomes inimical to client loyalty.[461]

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459. *See* Morrison, *supra* note 378, at 36.

460. Abbe Smith, *"Nice Work if You Can Get It": "Ethical" Jury Selection in Criminal Defense*, 67 FORDHAM L. REV. 523, 564-65 (1998) (quoting Eva S. Nilsen, *The Criminal Defense Lawyer's Reliance on Bias and Prejudice*, 8 GEO. J. LEGAL ETHICS 1, 17 (1994)).

461. Following his empirical work examining capital murder trials in Philadelphia, Baldus found that that prosecutors in capital cases overwhelmingly struck African American jurors and defense counsel overwhelmingly struck white jurors, leading him to the conclusion that, "in Batson, the United States Supreme Court completely misunderstood the conviction of both prosecutors and defense counsel that race and gender discrimination are rational, ethical, and necessary strategies to protect the interests of their clients." Baldus et al., *supra* note 378, at 124; *see also* Morrison, *supra* note 378, at 34-37.

Attorneys desire to be successful on behalf of their clients. Nowhere is this truer than in the trial context, where the margins are narrow and the risks the greatest.[462]

Studies have found that *Batson* has failed to eliminate discriminatory bias—either express or implicit—from the exercise of peremptory challenges in jury selection. Attorneys simply have no problem in conjuring up neutral and nondiscriminatory explanations for the exercise of the peremptory challenge, even if those reasons are as silly and implausible as a so-called offensive green tie. Among the varied reasons courts have accepted as valid neutral reasons explaining the exercise of a peremptory strike are:

- unkempt hair and a beard;[463]
- rented rather than owned their home;[464]
- lived in a neighborhood where exposure to drug traffickers was likely;[465]
- nodded at the defendant's brother outside the courtroom;[466] and
- "wore a beret one day and a sequined cap the next."[467]

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462. Morrison writes, describing this dilemma, as follows:

> As one trial lawyer admitted, once the burden shifts to him to justify a peremptory strike, "then you are tempted to engage in that thing which is absolutely horrible: lying in a courtroom. You have an ethical duty to be candid to the court, and yet we all know that pretext is the name of the game here." The end result is that it is "highly unlikely that many attorneys will cite race in justifying peremptories, even if they are aware of its influence." Ultimately, as one attorney suggested, the *Batson* analysis does not seem to be honest, given the fact that there may not be "any such thing as a racially neutral 'anything' in America."

Morrison, *supra* note 378, at 37 (footnotes omitted) (first quoting Raymond Brown, *Peremptory Challenges as a Shield for the Pariah*, 31 AM. CRIM. L. REV. 1203, 1209 (1994); then quoting Samuel R. Sommers & Michael I. Norton, *Race and Jury Selection: Psychological Perspectives on the Peremptory Challenge Debate*, 63 AM. PSYCHOLOGIST 527, 532 (2008); and then quoting Brown, *supra*, at 1204).

463. Purkett v. Elem, 514 U.S. 765, 769 (1995) (per curiam).

464. United States v. Gibson, 105 F.3d 1229, 1231–32, 1232 n.2 (8th Cir. 1997); People v. Mack, 538 N.E. 2d 1107, 1113 (Ill. 1989).

465. United States v. Uwaezhoke, 995 F.2d 388, 393 (3d Cir. 1993).

466. United States v. Jones, 195 F.3d 379, 381 (8th Cir. 1999).

467. Smulls v. Roper, 535 F.3d 853, 856, 862 (8th Cir. 2008).

Both prosecutors and defense counsel are trained to offer race-neutral reasons for a peremptory challenge and to challenge proffered race-neutral explanations.[468]

468. In North Carolina, for example, prosecutors actually received a cheat sheet called "Batson Justifications: Articulating Juror Negatives." Gilad Edelman, *Why Is It So Easy for Prosecutors to Strike Black Jurors?*, NEW YORKER (June 5, 2015), https://www.newyorker.com/news/news-desk/why-is-it-so-easy-for-prosecutors-to-strike-black-jurors. North Carolina defense counsel also have resources designed to address *Batson* issues in jury selection. For example, the book *Raising Issues of Race in North Carolina Criminal Cases* explains:

> The following strike justifications may be suggestive of pretext, as illustrated by the cases cited:
>
> - Age. *See, e.g., Richmond v. State*, 590 So. 2d 384, 385 (Ala. Crim. App. 1991) (age as reason for peremptory strikes is "'highly suspect because of its inherent susceptibility to abuse'" (citation omitted)); *Washington v. Commonwealth*, 34 S.W.3d 376, 379 (Ky. 2000) ("[c]ertainly age was not a sufficient reason to strike a 43-year-old man"). *But see State v. Caporasso*, 128 N.C. App. 236, 244 (1998) (no error where trial judge allowed prosecutor to peremptorily challenge a Black juror based on prosecutor's explanation that the juror was excused based on his "young age and lack of maturity"; the prosecution is allowed to "seek jurors who are stable and mature").
> - Facial expressions or other non-verbal behavior. *Bernard v. State*, 659 So. 2d 1346 (Fla. Dist. Ct. App. 1995) (fact that juror made facial expression during another juror's comment insufficient reason for strike where expression not observed by trial judge and not confirmed by judge in record); *Somerville v. State*, 792 S.W.2d 265 (Tex. Ct. App. 1990) (reversing conviction where State improperly struck juror who prosecutor thought had muttered under his breath, purportedly showing disrespect for judge, and who was member of NAACP); *Avery v. State*, 545 So. 2d 123, 127 (Ala. Crim. App. 1988) (reasons such as looks, body language, and negative attitude are susceptible to abuse and must be "closely scrutinized" by courts); *Harris v. Hardy*, 680 F.3d 942, 965 (7th Cir. 2012) ("Demeanor-based explanations for a strike are particularly susceptible to serving as pretexts for discrimination.").
> - Clothing or jewelry. *See Rector v. State*, 444 S.E.2d 862 (Ga. Ct. App. 1994) (case reversed where prosecutor struck juror because she had gold tooth); *People v. Bennett*, 614 N.Y.S.2d 430 (N.Y. App. Div. 1994) (prosecutor struck an African American juror who was wearing a headscarf because it showed "a certain disrespect for the proceedings"; pretextual basis found and conviction reversed); *Roundtree v. State*, 546 So. 2d 1042, 1044–45 (Fla. 1989) (prosecutor's reasons for striking two African American jurors were an "obvious pretext" where prosecutor asserted that he struck the jurors based on their clothing, "specifically commenting that the first juror was wearing maroon socks and 'pointy New York shoes'").
> - Intelligence. *See* Golphin Order at 115–16 (noting that in several cases,

Data continuously shows that *Batson* fails to reach the issue of implicit bias in the courtroom and to take seriously the competing duties of loyalty faced by the attorney in representing her client. Peremptory challenges or any process related to such challenges are not constitutionally required in American courtrooms. Still, it is constitutionally required that a jury be selected from "a representative cross section of the community [which] is an essential component of the Sixth Amendment right to a jury trial."[469] Yet peremptory challenges, by their very nature, are designed to achieve "a favorable imbalance" tilted toward one party or the other, not "a representative cross section of the community" on the jury.[470] As Judges Swann and McCurdie argued in their petition to the Arizona Supreme Court calling for the abolition of peremptory challenges:

> Indeed, peremptories resemble a vestigial organ—they can be safely excised from the system, curing the harm without damaging the host. Though developed as a means of ensuring impartiality, anyone who has competently tried a case in the last century knows that the practical use of peremptories is to achieve some (perhaps illusory) partiality in the final jury. Lawyers can justify such aims to themselves by pointing to the equal opportunity that both sides have in Arizona to distort the jury pool. And to an advocate who believes in her cause, it might seem only natural that the jury should be predisposed to that cause as well. But while peremptories might be an irresistible tool for trial tacticians, it is exceedingly difficult to argue that the practice of striking jurors who pass a challenge for cause is

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prosecutors justified strikes of Black jurors by stating that they were not articulate, smart, or educated enough to serve as jurors, and concluding that "[t]hese explanations evoke the troubling stereotype of African-American inferiority").

- Lack of community connection. *See* Golphin Order at 117–18 (observing that this justification is "evocative of a time when African Americans were not citizens and full members of the communities in which they lived").

[Chapter] 7.4: Litigating a Batson *Challenge*, *in* ALYSON A. GRINE & EMILY COWARD, UNIV. OF N.C. SCH. OF GOV'T, RAISING ISSUES OF RACE IN NORTH CAROLINA CRIMINAL CASES ch. 7.4, at 7-23, 7-32 (2014), https://defendermanuals.sog.unc.edu/sites/default/files/pdf/20140457_chap%2007_Final_2014-10-28.pdf.

469. Swann & McMurdie Petition, *supra* note 434, at 8 (quoting Taylor v. Louisiana, 419 U.S. 522, 528 (1975)).

470. *Id.*

> consonant with the constitutional imperative of ensuring that the jury is comprised of a "representative cross section."[471]

As implicitly acknowledged by the Arizona Supreme Court, the abolition of peremptory challenges necessitates changes in the jury selection process.[472] Perhaps the most important reforms to the jury selection process required by the abolition of peremptory challenges are fundamental changes to the voir dire process itself, so that challenges for cause become more fulsome and meaningful.[473]

Expansive voir dire not only allows actual bias among jurors to be rooted out, but it moves the focus of the jury selection process away from stereotypes or hunches or matters external to the issues before the court. A more rigorous voir dire process, coupled with a more expansive view of who is theoretically qualified' to serve as a juror, would allow for greater consideration of familiar persons, closer to the situation. Namely, the process would identify "those harboring strong views about specific laws or law enforcement generally, those with prior convictions, and even those who disclose good-faith reservations about their own partiality."[474]

While scholars raise valid concerns by the argument that a more extensive voir dire process might antagonize potential jurors in response to attorneys' questioning, particularly by being aggressive or overly invasive, these concerns could be ameliorated by changes in the voir dire process itself.[475] Further, questioning potential juries more extensively may have a very different impact on jurors, in that it may serve to further educate them about the trial process, the jury's role in that process, the seriousness of the

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471. *Id. See generally* Robert William Rodriguez, Comment, Batson v. Kentucky*: Equal Protection, The Fair Cross-Section Requirement, and the Discriminatory Use of Peremptory Challenges*, 37 EMORY L.J. 755 (1988).

472. *See* Order Abolishing Strikes, *supra* note 41, at 3–6.

473. *See* Brent J. Gurney, Note, *The Case for Abolishing Peremptory Challenges in Criminal Trials*, 21 HARV. C.R.-C.L. L. REV. 227, 257 (1986).

474. *See* Thomas Ward Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, 118 MICH. L. REV. 785, 785 (2020) ("Challenges for cause as they exist today—effectively standardless, insulated from meaningful review, and racially skewed—do more harm than good. They hinder, more than help, the jury in its central roles: (1) protecting the individual against governmental overreach; (2) allowing the community a democratic voice in articulating public values; (3) finding facts; (4) bolstering the perceived legitimacy and fairness of criminal verdicts; and (5) educating jurors as citizens.").

475. Gurney, *supra* note 473, at 253-54; *see also* Valerie P. Hans & Alayna Jehle, *Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 CHI.-KENT L. REV. 1179, 1198-1201 (2003) (suggesting four different means of changing the voir dire process).

process in which they are involved, and the need to preserve impartiality and neutrality in their individual roles as jurors.[476]

Other changes to the voir dire process may bolster the efficacy of for cause challenges. For example, in the absence of peremptory challenges an increased use of written juror questionnaires could improve for cause challenges.[477] Increased use of written juror questionnaires as part of the voir dire process has several advantages in responding to concerns about jury antagonism and privacy. They place the juror in a private, non-confrontational context in which to answer questions that might otherwise be perceived as invasive or confrontational.[478] Another change that might strengthen the voir dire process is alterations to the manner in which questions are asked of the jury, including a movement toward increased individual questioning of jurors. This alternative expands the very nature of questions that are asked of potential jurors in a way that takes advantage of current psychological research concerning decision-making, and increased opportunities for attorney questioning of potential jurors.[479] All of these

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476. Nancy S. Marder, *Juror Bias, Voir Dire, and the Judge-Jury Relationship*, 90 CHI.-KENT L. REV 927, 940 (2015); *see also* Gurney, *supra* note 473, at 253–54. As author Brent Gurney notes:

> Even if persistent questioning does create some hostility, an aggressive *voir dire* may nonetheless improve a litigant's position before the jury. Questioning the jurors may educate them about the need to approach the trial with an open mind. One researcher compared the voting patterns of jurors who had been subjected to *voir dire* with the voting patterns of jurors who had not. The results indicated that "*voir dire* heightens jurors' commitment to the law and to due process." Because of *voir dire*, "a greater number of . . . jurors assume a critical stance of neutrality, wary of newspaper headlines, and 'official' sources of information such as the police, prosecuting attorneys and others." To be sure, lawyers may abuse *voir dire* by using it to ingratiate themselves with the jurors, orate about the case, or force jurors to pre-commit themselves, but an expansive *voir dire* need not be a free-for-all.

Id. (footnotes omitted) (quoting Alice M. Padawer-Singer, *Justice or Judgments?*, *in* THE AMERICAN JURY SYSTEM: FINAL REPORT 45, 59 (Chief Justice Earl Warren Conference on Advocacy in the United States, 1978)).

477. Hans & Jehle, *supra* note 475, at 1198-99.

478. *See id.*

479. *Id.* at 1198-1201. In examining the types of questions that are asked during *voir dire*, Hans & Jehle write:

> In limited voir dire, it is typical to ask only a question or two, if that, pertaining to the subject matter of the case. More often, a general question about the potential for bias (e.g., "Is there anything that would prevent you from being a fair and impartial juror in this case?") is all that is asked. For greater effectiveness, the voir dire should include a larger number and broader

changes would strengthen the voir dire process and make the use of "for cause" challenges more impactful, both of which would be necessary after the abolition of peremptory challenges.

In post-Civil War America, the peremptory challenge became an instrument of white supremacy and Black oppression in courtrooms across the nation.[480] Over time, the targets of discrimination by peremptory challenges expanded beyond race to include, among other things, gender, sexual orientation, and religion. This expansion and discrimination removed the peremptory challenge far from the goal of achieving a jury representing a true cross section of the community. In *Batson*, the Supreme Court sought to create a process that would eliminate or reduce discrimination in the exercise of peremptory challenges.[481] As we have seen from the research of scholars and the experience of attorneys and judges, that effort has failed.[482]

Racial discrimination is "a familiar and recurring evil," one that "can and does seep into the jury system".[483] Certainly "perfect statistical parity is not in itself the measure of a nondiscriminatory justice system."[484] Further, not

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> range of case-specific questions. The items should incorporate some open-ended questions in which prospective jurors are encouraged to describe their views and experiences in their own words. Diane Wiley provides an example with automobile accident injuries that combines yes/no close-ended questions with opportunities for potential jurors to explain the relevant events in their own words:
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> > *Have you even been seriously injured or has anyone close to you been seriously injured or killed in an automobile accident. . . ? If yes, please describe the circumstances. Was a complaint, lawsuit, or claim of some sort made about this? If yes, please explain. How was that complaint or claim resolved? How do you feel about that resolution?*
>
> In developing a set of questions, we recommend using case-specific questions that are linked to key issues and factors in the upcoming trial. A great deal of psychological research indicates that case-specific attitudes are most closely linked to actual decisions. Thus, these types of queries are most likely to be productive in developing information for peremptory and for-cause challenges. Questions specifically linked to issues in the current case should be less likely to arouse questions about relevance among prospective jurors.

Id. at 1200-01 (emphasis added) (footnotes omitted) (quoting Diane Wiley, *Pre-Voir Dire, Case-Specific Supplemental Juror Questionnaires*, *in* A HANDBOOK OF JURY RESEARCH 16-1, 16-30 (Walter F. Abbott & John Batt eds., 1999)).

480. *See supra* notes 227-338 and accompanying text.

481. *See supra* notes 339-358 and accompanying text.

482. *See supra* notes 359-443 and accompanying text.

483. Tharpe v. Ford, 139 S. Ct. 911, 913 (2019) (Sotomayor, J., concurring in denial of cert.) (quoting Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 868 (2017)).

484. Swann & McMurdie Petition, *supra* note 434, at 13.

all the imbalances described throughout this Article are solely the result of the abuse of peremptory challenges. While it is certain that a wide variety of reasons contribute to the imbalances seen in jury selection and jury configuration, "only one device allows *intentional* imbalances—the peremptory strike."[485] Justice Sotomayor reminds us that "[t]he work of 'purg[ing] racial prejudice from the administration of justice,' is far from done."[486] Abolishing the peremptory challenge is a necessary step in that long road to eliminating prejudice from our courts.

485. *Id.*

486. *Tharpe*, 139 S. Ct. at 913 (Sotomayor, J., concurring in denial of cert.) (quoting *Peña-Rodriguez*, 137 S. Ct. at 867).