BLACK LIVES MATTER IN THE JURY BOX: ABOLISHING THE PEREMPTORY STRIKE

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Abstract

Since its creation, the Batson Challenge has been widely criticized as a failure. It does not prevent discrimination in the jury selection process, has no bite, and does not serve as an adequate incentive to prevent discriminatory practices. The Supreme Court of the United States has had multiple opportunities in the last thirty years to strengthen the Challenge's framework to better achieve the intended results with the creation of the Batson Challenge but has refused to do so. This Note acknowledges the need for change and explores the implications that the Black Lives Matter Movement has on the sense of urgency for reform as the United States faces mass protests and public discussion on the Black Lives Matter Movement.

The Black Lives Matter Movement has brought criminal justice reform to the forefront of American politics and public debate. As the Movement becomes more recognized, its members, supporters, and opposition will inevitably become part of the jury selection process in some capacity. Following a "Summer of Protests" in 2020, thousands of protestors have already been arrested and will soon be defendants who have a right to a fair jury. On the other side of the counsel table, proponents and opponents of the Black Lives Matter Movement will be among the jury pools selected across the country. The current Batson Challenge framework is wholly inadequate to protect the rights of defendants and potential jurors. As a correction to this issue, this Note recommends abolishing the peremptory strike and suggests redrafting Federal Rule of Criminal Procedure 24 to expand the strike for cause.

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INTRODUCTION

Born from the Supreme Court case *Batson v. Kentucky*,[1] the "Batson Challenge" serves as a method for defendants to dispute the use of peremptory strikes during the jury selection process.[2] Peremptory strikes are a tool used by attorneys that allows them to remove a potential juror from the jury pool without having to provide a justification for doing so.[3] The Batson Challenge enables the defense to challenge the peremptory strike of a potential juror from opposing counsel if the defense believes that the strike is based on discriminatory intent.[4] The Court had high hopes for the Batson Challenge at the time of its creation.[5] But, almost thirty years later, the Batson Challenge has been widely regarded as a failure.[6]

The Black Lives Matter Movement (the BLM Movement), founded in 2013, is an organization advocating against police brutality and mass incarceration of Black Americans.[7] Since its inception, the BLM Movement has provided a platform to advocate for criminal justice reform. This Note contends that the discussion on criminal justice reform and equality cannot exist without revisiting the framework of the Batson Challenge. Yet, the Batson framework's apparent failure and the barriers it presents for access to justice and equal protection are not widely recognized in the mainstream discussion of the BLM Movement or criminal justice reform, generally.

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1. 476 U.S. 79 (1986).

2. *Id.* at 85.

3. C.J. Williams, *Proposing a Peremptory Methodology for Exercising Peremptory Strikes*, 54 AM. CRIM. L. REV. 277, 277 (2017).

4. *Batson*, 476 U.S. at 93.

5. *Id.* at 97–98 ("The core guarantee of equal protection . . . would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' race.").

6. Johnathan Abel, Batson's *Appellate Appeal and Trial Tribulations*, 118 COLUM. L. REV. 713, 717 (2018).

7. Black Lives Matter, https://Blacklivesmatter.com/about/ [https://perma.cc/L3M9-BECD].

The Supreme Court has had many opportunities since *Batson* to add force to the Batson Challenge framework but has plainly refused to do so.[8] In fact, in the recent *Flowers v. Mississippi* decision,[9] Justice Brett Kavanaugh appears to be one of the only legal professionals to claim, "*Batson* ended the widespread practice in which prosecutors could (and often would) routinely strike all black prospective jurors in cases involving black defendants."[10] Although the Batson Challenge has been criticized since its creation,[11] the Court's consistent refusal to meaningfully revisit the Batson Challenge framework indicates disinterest in adding any bite to it.

Critics of the Batson Challenge have called for elimination of the peremptory strike altogether.[12] The peremptory strike has existed for quite some time in this country's justice system and it is assumed that prosecutors may use peremptory challenges for virtually any reason.[13] However, there is no established procedure for using them.[14] Despite being unwilling to strengthen the Batson Challenge framework, members of the Court have mused over the idea of eliminating the peremptory challenge in the face of the Batson Challenge's failure.[15] With the BLM Movement gaining traction, and countless members and supporters participating in the justice system as defendants and potential jurors, the Batson Challenge does not provide an adequate safeguard for equal protection. Thus, it is time for the peremptory challenge to be eliminated altogether for the original goals of *Batson* to be realized.

I. DISCUSSION

Part A of this Note discusses how the Batson Challenge currently operates, the inherent failures within the framework, and the three primary reasons why it fails to protect Black Americans from racial discrimination in the jury selection process. Part B focuses on the BLM Movement, particularly the implications that support for and involvement in the BLM Movement have on the jury selection process within the Batson Challenge framework. This Part also discusses how the BLM

8. *See* Flowers v. Mississippi, 139 S. Ct. 2228, 2235 (2019); Miller-El v. Dretke, 545 U.S. 231, 251–52 (2005); Purkett v. Elem, 514 U.S. 765, 767 (1995) (per curiam).

9. 139 S. Ct. 2228 (2019).

10. *Flowers*, 139 S. Ct. at 2242.

11. *Miller-El*, 545 U.S. at 270 ("[T]he use of race- and gender-based stereotypes in the jury selection process seems better organized than ever before.") (Breyer, J., concurring).

12. Batson v. Kentucky, 476 U.S. 79, 102–03 (1986) ("The decision today will not end the racial discrimination that preemptories inject into the jury-selection process. That goal can be accomplished only by eliminating preemptory challenges entirely.") (Marshall, J., concurring).

13. *Id.* at 89 (quoting United States v. Robinson, 421 F. Supp. 467, 473 (Conn. 1976)).

14. Williams, *supra* note 3, at 277–78.

15. *Miller-El*, 545 U.S. at 266–67 ("Today's case reinforces Justice Marshall's concerns.") (Breyer, J., concurring).

Movement has, perhaps unintentionally, managed to pinpoint the exact irony of the Batson Challenge framework's ultimate ability to permit the continued practice of racial discrimination. Finally, Part C looks toward a solution by proposing an amendment to Federal Rule of Criminal Procedure 24 to eliminate the peremptory challenge, expand the challenge for cause, and achieve the goals the Batson Challenge was constructed to attain.

Before diving in too deeply, it is essential to first differentiate between the peremptory strike and its alternative, a strike for cause. A strike for cause may be used to remove a prospective juror from the venire once that juror has expressed either an inability to be impartial or to have some sort of relationship, connection, or interest from which actual bias may be presumed.[16] Attorneys have unlimited use of the strike for cause, but it is a difficult standard to meet. Mere preconceived notions are insufficient for a strike for cause—the potential juror must confirm that they are unable to set their opinions aside and render a fair verdict.[17] The implied bias standard is even more rigorous. For example, a potential juror simply knowing or being distantly related to a party in the litigation is insufficient to assume an implied bias.[18]

In contrast, a peremptory strike may be used to remove a prospective juror "for any reason or for no reason at all," no questions asked.[19] This is quite obviously a lower standard to meet than the strike for cause, and thus has made the use of the peremptory strike popular among prosecutors. However, one crucial caveat to the "no questions asked" theoretically lives within the Batson Challenge: the use of the peremptory strike may not be based on race, gender, ethnicity, or religion.[20] Use of the peremptory strike is also limited. In federal criminal court, each side has twenty peremptory strikes when the death penalty is sought; each side has three peremptory strikes for misdemeanor cases; and in all other cases, the government has six while the defendant(s) has ten.[21] In Florida, each side has ten peremptory strikes when the offense is punishable by life imprisonment or death; each side has six if the offense is another felony; and each side has three if the offense is a misdemeanor.[22]

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16. Jonathan S. Tam, *Westlaw Practice Page: Overview of the Jury Selection Process, Exercising Juror Challenges*, THOMSON REUTERS, https://1.next.westlaw.com/1-613-5747?__lrTS=20211108204216006&transitionType=Default&contextData=%28sc.Default%29 [https://perma.cc/W27K-NEFS].

17. *See, e.g.*, Bruner-McMahon v. Jameson, 566 F. App'x 628, 636 (10th Cir. 2014) (affirming the lower court's refusal to strike a juror for cause after the juror repeatedly stated she could set her initial impressions aside and decide the case based on the evidence at trial).

18. *See, e.g.*, Allen v. Brown Clinic, P.L.L.P., 531 F.3d 568, 573 (8th Cir. 2008).

19. Williams, *supra* note 3, at 277.

20. Batson v. Kentucky, 476 U.S. 79, 99 (1986).

21. FED. R. CRIM. P. 24(b).

22. FLA. R. CRIM. P. 3.350(a).

A. *The "Batson Challenge"*

The jury selection process is where the Batson Challenge is used, and it typically includes three phases.[23] The first phase consists of summoning members of the community to the courthouse for potential service.[24] The second phase includes calling subgroups of members from the first phase into courtrooms for different cases.[25] At that point in the process, the judge may ask jurors questions and dismiss them from jury duty based on their responses.[26] The final phase consists of counsel for either side attempting to remove jurors they do not want on the jury by using challenges.[27] This includes the use of strikes for cause and peremptory strikes discussed above.

The Batson Challenge was born from the 1986 Supreme Court ruling, *Batson v. Kentucky*. In *Batson*, the Supreme Court reflected on its "unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which individuals are drawn."[28] In doing so, the Court established a method for challenging the use of peremptory strikes when the defendant believes the prosecutor is eliminating prospective jurors based on racial discrimination,[29] thus making it a "challenge against a challenge." The Batson Challenge was formulated with the intent to serve the important purpose of implementing equal protection rights and promoting trust in the justice system.[30] Unfortunately, the Batson Challenge has not lived up to its promise but instead simply developed a new set of formalities that the courts must follow that do not in actuality prevent racial discrimination.[31]

1. *Batson v. Kentucky*

The facts of *Batson* highlight how pervasive and damaging the persistent use of racial discrimination in jury selection had become by 1986. However, the purposeful exclusion of Black Americans from juries was hardly a new idea.[32] Prior to 1860, no Black person had ever served

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23. Flowers v. Mississippi, 139 S. Ct. 2228, 2238 (2019).
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. Batson v. Kentucky, 476 U.S. 79, 85 (1986).
29. *Id.* 96–98.
30. *Id.* at 87.
31. MICHELLE ALEXANDER, THE NEW JIM CROW 121 (Rev. ed. 2010) ("The practice of systematically excluding black jurors has not been halted by *Batson*; the only thing that has changed is that prosecutors must come up with a race-neutral excuse for the strikes—an exceedingly easy task.").
32. Strauder v. West Virginia, 100 U.S. 303, 304 (1879), abrogated by Taylor v. Louisiana, 419 U.S. 522, 95 S. Ct. 692 (1975).

on a jury in the United States.[33] Even after the Supreme Court outlawed legislation restricting jury service to white Americans, race-based exclusion from juries remained a consistent problem.[34] For example, the Black American population in many areas was so low that the number of peremptory strikes afforded to a prosecutor was more than enough to remove all Black potential jurors from the selection pool.[35]

Batson was charged with second-degree burglary and receipt of stolen goods.[36] During jury selection, the prosecutor used his permitted peremptory challenges to remove all four Black members of the pool, resulting in an all-white jury.[37] Despite Batson's attorney requesting a hearing to determine whether race discrimination was at play, the judge chose to uphold the standard of using peremptory challenges for any reason without requiring the prosecutor to give cause.[38] At the time, Supreme Court precedent mandated that a defendant demonstrate racial discrimination in jury selection only after establishing a pattern of the prosecutor using peremptory strikes to remove Black jurors in other cases.[39] After Batson's conviction, the case eventually made its way to the Supreme Court.

The Court reversed Batson's conviction[40] and developed the three-step process now famously known as the Batson Challenge. The first step for a defendant asserting a Batson Challenge is making a prima facie case of purposeful discrimination, which is based on any relevant circumstances that raise the inference that the prosecutor removed those jurors on account of their race.[41] To do so, the defendant must show that they are a member of a protected class—in this case, a racial group—and that members of the defendant's racial group have been removed from the jury pool through peremptory challenges.[42] Evidence in support of the prima facie showing can include proof of disproportionate impact[43] or systematic exclusion of members of the defendant's racial group from the jury selection process itself.[44] The evidence can also include a pattern of the use of peremptory strikes against jurors in the same racial group as the defendant, or even certain questions used by the prosecutor during

33. ALEXANDER, *supra* note 31, at 119.
34. U.S. COMMISSION ON CIVIL RIGHTS REPORT 89–90g (Book 5: Justice, 1961).
35. Flowers v. Mississippi, 139 S. Ct. 2228, 2239–40 (2019).
36. Batson v. Kentucky, 476 U.S. 79, 82 (1986).
37. *Id.* at 83.
38. *Id.*
39. Swain v. Alabama, 380 U.S. 202, 227–28 (1965), *overruled* by *Batson*, 476 U.S. at 93.
40. *Batson*, 476 U.S. at 84.
41. *Id.* at 96.
42. *Id.*
43. *Id.* at 93.
44. *Id.* at 94–95.

examination.[45] This first step alone drastically expanded the Court's prior rule from *Swain v. Alabama*, requiring a demonstration of a pattern of discrimination across multiple cases. Now, defendants could rely solely on the circumstances surrounding their case instead of meeting the much higher burden of demonstrating a pattern of discrimination across multiple cases.

For step two, the prosecutor must provide a race-neutral reason for dismissing the jurors.[46] However, the explanation given does not have to rise to the level of justifying the peremptory strike for cause.[47] As previously noted, the entire purpose of the peremptory strike is to allow counsel to remove prospective jurors without cause. The Court specifically mentioned that the prosecutor cannot claim they assumed race-loyalty was at play[48] or merely reaffirm their good faith use of the strike.[49] While these may seem obvious, such examples provided by the Court could indicate suspicion that the use of peremptory challenges would continue to be abused without at least some guidance.

For the final step of the Batson Challenge, the judge determines whether the explanation is pretextual.[50] However, the Court failed to identify a framework for how judges should make such a determination. Instead, the Court merely remarked, "We have confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors."[51]

The immediate criticism of the Batson Challenge was that it did not seriously prevent racial discrimination from occurring during the jury selection process.[52] Indeed, Professor Sheri Lynn Johnson said that, "If prosecutors exist who . . . cannot create a 'racially neutral' reason for discriminating on the basis of race, bar examinations are too easy."[53] The failures of the Batson Challenge require further analysis to understand why the current framework is unable to serve as a strong defense to the use of racial discrimination in juries and highlight why the peremptory challenge itself must be eliminated.

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45. *Id.* at 97.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* at 98.
50. *Id.*
51. *Id.* at 97.
52. ALEXANDER, *supra* note 31, at 121.
53. Sheri Lynn Johnson, *The Language and Culture (Not to Say Race) Of Preemptory Challenges*, 35 WM. & MARY L. REV. 21, 59 (1993).

2. Why the Batson Challenge Framework Fails

The first major failing of the Batson Challenge is that the Court provided no clear framework for determining the outcomes of these Challenges and gave too much discretion to trial judges.[54] Indeed, the Court explicitly stated in *Batson*, "We decline . . . to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenge."[55] This can lead to unequal application of the Challenge's rules and different standards throughout the country, much less within a single courthouse. Equally as dangerous, the lack of clarity in procedure can also lead to less successful Batson Challenges because judges may use whatever criteria they find appropriate when determining whether racial discrimination is present. Further, the lack of clarity in procedure leaves courtrooms in chaos as continued discriminatory practices are permitted to continue while judges are apprehensive about accusing prosecutors of lying during a Batson Challenge analysis.

Flowers v. Mississippi provides one of the most egregious examples of this major flaw within the Batson Challenge framework. By the time the case reached the Supreme Court in 2019, the defendant, Curtis Flowers, had been tried six times for a murder occurring in 1996.[56] Within those six convictions, the Mississippi Supreme Court found that the prosecutor was racially discriminatory in jury selection for three of the trials.[57] Additionally, four of the six convictions were overturned as a direct result of findings of prosecutorial misconduct.[58] The Court found that in all of the trials combined, the prosecutor used peremptory challenges against forty-one of the forty-two total Black potential jurors.[59] The Court identified the prosecutor's use of disparate questioning between white and Black jurors to find pretextual reasons for dismissing Black jurors by the prosecutor in the sixth trial.[60] It is almost impossible to find a clearer example of persistent and purposeful racial discrimination on behalf of a prosecutor in jury selection. The fact that such egregious racial discrimination occurred so pervasively in this case demonstrates how ineffective the Batson Challenge is in the long run and how the lack of structure for procedure causes chaos.[61]

Part of the reason *Flowers* is so important to the analysis of the Batson Challenge and the use of peremptory challenges is that the Court had the perfect opportunity to illustrate a more definitive process for the Batson

54. *See Batson*, 476 U.S. at 97.
55. *Id.* at 99.
56. Flowers v. Mississippi, 139 S. Ct. 2228, 2234 (2019).
57. *Id.* at 2235.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.* at 2236–37.

Challenge framework and chose not to.[62] Justice Kavanaugh instead accepted the general assumption that the Batson Challenge effectively eliminated the use of peremptory challenges to further racially discriminatory agendas by prosecutors.[63] This opinion on the effectiveness of the Batson Challenge simply did not square with the facts of the case before the Court at the time. If the Batson Challenge truly ended the practice of racial discrimination in juries, how did *Flowers* even get to the Court? How was a prosecutor able to racially discriminate against Black potential jurors so consistently and effectively without any actual repercussions? The Court must eventually ask these questions, even if they lead to the inevitable conclusion that the peremptory challenge itself must be abolished.

The second major issue of the Batson Challenge is that the current framework makes it too easy for prosecutors who are racially discriminatory in jury selection to mask their practices and escape consequences. One key component of the framework that is not immediately apparent from the three-step process discussed above is the highly deferential review given to trial judges.[64] As the Court has pointed out, "Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference."[65] While the deferential level of appellate review respects the notion that the trial court is in the best position to make an accurate determination on whether racial discrimination is taking place, the absence of meaningful secondary review limits the Batson Challenge's effectiveness. During a Batson Challenge, prosecutors know they only have to convince the judge that their use of a peremptory strike was not pretextual. Once a trial judge makes that determination, appellate review almost never leads to reversal. For example, a 2020 study analyzing Batson Challenge appeals in California from 2006 to 2018 demonstrated that prosecutors used peremptory strikes against Black jurors 75% of the time, while the appellate courts only found errors in 2.6% of those strikes.[66]

This problem can also be exacerbated by implicit bias. While explicit biases can be easier to spot, implicit biases can infect the criminal justice process even more effectively because implicit biases are unknown to the

62. *Id.* at 2235.

63. *Id.* at 2242.

64. *Id.* at 2244.

65. Batson v. Kentucky, 476 U.S. 79, 98 n.21 (1986).

66. Andrew Cohen, *New Report Shows Ongoing Racial Discrimination in CA Jury Selection*, BERKELEY L. (June 14, 2020), https://www.law.berkeley.edu/article/new-report-shows-ongoing-racial-discrimination-in-ca-jury-selection/ [https://perma.cc/MXL4-NRSD].

person who has them.[67] And unfortunately, "Jurors, lawyers, and judges do not leave behind their implicit biases when they walk through the courthouse doors."[68] Thus, while the judge may truly believe they are considering the evidence fairly and coming to an accurate determination on whether racial discrimination is present in the jury selection system, implicit bias may nevertheless disrupt that process and affect the judge's ultimate determination. Some legal scholars are calling for a large-scale analysis and swift response to the problem of implicit bias in the criminal justice system,[69] but this crucial issue remains largely unexplored.[70] Implicit bias does not end at the bench either. The current Batson Challenge framework allows implicit biases among attorneys on both sides of the dispute to prevail and create a false sense of race-neutrality in the court system.[71]

It is simply too easy for prosecutors with racially discriminatory motives to get away with the improper use of peremptory strikes, even in the face of the Batson Challenge. Prosecutors can accept one Black juror to obscure their intent[72] or use different sets of questions for jurors of different races to find pretextual reasons to excuse Black jurors while keeping white ones.[73] Indeed, a 1986–1992 study demonstrated that among all published decisions involving Batson Challenges in that time frame, prosecutors were able to provide a satisfactory race-neutral reason for the strikes in almost every single situation.[74]

Demonstration of this failure can be found in *Miller-El v. Dretke*.[75] Out of the twenty total Black members of the jury panel for Miller-El's trial, only one was selected to serve on the jury.[76] Beyond that statistic, what the Court found most compelling was the obviously different treatment of potential jurors based on their race. For example, prosecutors questioned a Black juror more extensively than white jurors on similar

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67. Harvard University developed Project Implicit, which examines implicit biases and provides various tests to determine one's own implicit biases. According to Project Implicit, implicit biases are internal opinions of stereotypes, attitudes, and biases that are relatively inaccessible to conscious awareness and control. *Project Implicit FAQ*, HARVARD UNIV., https://implicit.harvard.edu/implicit/faqs.html#faq1 [https://perma.cc/ KFD4-C5PA].

68. Judge Mark W. Bennett, *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, 150 (2010).

69. Justin D. Levinson, et al., *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63, 72 (2017).

70. *Id.* at 65–66.

71. Bennett, *supra* note 68, at 150.

72. Miller-El v. Dretke, 545 U.S. 231, 250 (2005).

73. *Id.* at 255–56.

74. Michael J. Rafael & Edward J. Ungvarsky, *Excuses, Excuses: Neutral Explanations Under* Batson v. Kentucky, 27 UNIV. OF MICH. J. L. REFORM 229, 234–35 (1993).

75. 545 U.S. at 266.

76. *Id.* at 240.

topics.[77] Ultimately, the prosecutor struck that juror and explained to the court that it was because of concerns over the juror's opinion on the death penalty.[78] Yet, multiple white jurors were kept on the jury after expressing virtually the same opinions on the death penalty.[79] Additionally, more Black jurors were given a graphic description of the death penalty than white jurors.[80] Further, Black jurors were asked what sentence they would impose for murder without being informed on the state's minimum sentencing requirements while white jurors were informed and were then able to give a more informed answer.[81] Thus, the Court found that all the prosecutor's explanations for their use of peremptory strikes against Black jurors were pretextual because the explanations also applied to white jurors who were not struck.[82] The Court also found that evidence of keeping one Black juror actually suggested an intent to obscure discrimination.[83]

While the Court found racial discrimination was present, which may suggest success for the Batson Challenge, the context of the Court's decision paints a different picture. Miller-El's trial occurred in 1985, and the issue in his case was not examined by the Supreme Court until 2005.[84] And in that time frame, the trial court, on three occasions, found no evidence of racial discrimination in the jury selection process,[85] and the appellate court affirmed these findings on two occasions.[86] The fact that a successful Batson Challenge took Miller-El ten years and multiple appeals demonstrates the failure of the Batson Challenge's framework to meaningfully protect defendants from racial discrimination.

The third core issue within the Batson Challenge framework is that the rule has no bite; it has been consistently undermined by the Court since its inception. As the discussions on *Flowers* and *Miller-El* demonstrates, the consequence of simply renewing the jury selection process following a successful Batson Challenge is not strong enough to compel prosecutors to avoid using racial discrimination in jury selection. This issue initially stems from the original framework developed in *Batson*, but it was revisited by the Court in *Purkett v. Elem*.[87]

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77. *Id.* at 243–45, 247–48.

78. *Id.* at 243.

79. *Id.* at 244–45.

80. *Id.* at 255–56.

81. Twenty-seven percent of non-Black members were subjected to the trick question, whereas one hundred percent of Black members were subjected to it. *Id.* at 261–63.

82. *Id.* at 245–48.

83. *Id.* at 249–50.

84. *Id.* at 235–37.

85. *Id.* at 236–37.

86. *Id*.

87. 514 U.S. 765, 767–68 (1995).

In *Purkett*, the defendant was convicted of second-degree robbery after an unsuccessful Batson Challenge during jury selection.[88] Purkett raised the objection after two Black jurors were struck from the jury panel.[89] For the second step in the Batson Challenge framework, the prosecutor offered the following reasons for the use of peremptory strikes: one juror had long hair, the other juror would likely believe a gun is required for an armed robbery due to a personal experience, and both jurors had facial hair.[90] An in-depth legal analysis is unnecessary to understand that these explanations are irrelevant to a person's fitness to serve as a juror. In fact, prior to the case being heard in the Supreme Court, the U.S. Court of Appeals for the Eighth Circuit reversed the original decision, finding that such explanations do not constitute legitimate race-neutral reasons for striking a juror.[91]

After a brief recitation of the language from *Batson*, the Court added a new component for the second step of the Challenge's framework, stating that a prosecutor's explanation for striking the juror or jurors does not have to be "persuasive, or even plausible."[92] This ruling directly undermines the integrity of the Batson Challenge. The only support provided for such an addition to the framework came from a previous plurality opinion from the Court, where five Justices disagreed with the majority's analysis on this exact issue.[93] In *Purkett*, the Court found that the appellate court erred by requiring the prosecutor's explanation to be "at least minimally persuasive."[94] The Court did not discuss how a Batson Challenge could be considered a serious safety net to preserve constitutional rights against discrimination while also giving courts the opportunity to believe "silly" or "superstitious" explanations in the face of alleged racial discrimination.[95] Instead, the Court backtracked on the Batson Challenge framework by describing a "legitimate reason" as one that does not technically deny equal protection, not one that is actually believable.[96]

The Court's opinion was met with further criticism by Justices John Paul Stevens and Stephen Breyer, who commented that it was inappropriate for the Court to overrule a critical portion of *Batson* without

88. *Id.* at 766.
89. *Id.*
90. *Id.*
91. *Id.* at 767.
92. *Id.* at 767–68.
93. Hernandez v. New York, 500 U.S. 352, 372 (1991) (O'Connor, J., with whom Scalia, J. joins, concurring); *id.* at 375 (Blackmun, J., dissenting); *id.* at 376 (Stevens, J., with whom Marshall, J. joins, dissenting).
94. *Purkett*, 514 U.S. at 768.
95. *Id.*
96. *Id.* at 769.

even ordering full briefing and arguments on the merits.[97] Noting how the majority's opinion perverted the original Batson Challenge framework, the dissent added, "we do not believe the Supreme Court intended a charade when it announced Batson."[98] Allowing judges to accept silly, ridiculous, or superstitious reasons as non-pretextual incentivizes discriminatory practices in jury selection and sends a message to prosecutors that the rule has no real bite. Since the inception of the Batson Challenge in 1986, the Supreme Court has had ample opportunity to clarify, strengthen, and improve the Challenge's framework but has consistently chosen not to do so. This failure directly contributes to the present-day pervasiveness of racial discrimination in jury selection in courthouses across the country.

The next Part of this Note investigates the impact that the failure of the Batson Challenge might have in relation to the BLM Movement, particularly following the 2020 "Summer of Protest."[99] As BLM supporters, members, and critics participate in the judicial system as defendants, jurors, judges, and attorneys, rethinking the Batson Challenge framework has become as timely as ever.

B. *BLM: Implications for Jury Selection*

As discussed in the introductory section of this Note, the BLM Movement was founded in 2013.[100] Following the acquittal of George Zimmerman for the killing of Trayvon Martin, the BLM Movement was born from a Facebook post that included the phrase, which was authored by co-founder Alicia Garza.[101] Thus, from its very inception, the BLM Movement has been primarily focused on perceived failures of the criminal justice system. Many of the central goals of the BLM Movement remain intimately tied to transforming the nature of America's criminal justice system.[102] From racial profiling and police brutality to ensuring equal protection in jury selection, trial, and sentencing, the BLM Movement is committed to ensuring Black people are treated with dignity

97. *Id.* at 770 (Stevens, J., dissenting).

98. *Id.* at 773 (Stevens, J., dissenting) (quoting State v. Antwine, 743 S.W.2d 51 (Mo. 1987)).

99. Colleen Long, et al., *Summer of protest: Chance for Change, but Obstacles Exposed*, ASSOCIATED PRESS (Sept. 6, 2020), https://apnews.com/article/election-2020-shootings-race-and-ethnicity-or-state-wire-racial-injustice-9035ecdfc58d5dba755185666ac0ed6d [https://perma.cc/ERQ4-7XY2].

100. *See supra* INTRODUCTION.

101. IBRAM X. KENDI, STAMPED FROM THE BEGINNING, 502 (2016).

102. Martin Austermuhle, *Here's What Black Lives Matter D.C. Is Calling For, And Where the City Stands*, NPR (June 9, 2020), https://www.npr.org/local/305/2020/06/09/872859084/here-s- what-Black-lives-matter-d-c-is-calling-for-and-where-the-city-stands [https://perma.cc/5NB8-ZAV5].

and equality within the justice system.[103] This goal is more important than ever with mass arrests occurring at BLM protests.[104] While analysis on how racial discrimination pervades police practices and sentencing guidelines are important aspects of justice reform, "[s]entencing . . . is not the end, but just the beginning."[105] Revisiting the problems of the Batson Challenge are equally important, yet it is far from center stage when discussing such reform.

The voir dire process presents an underappreciated snapshot of how inequality can pervade the justice system. Because of the flaws of the current Batson Challenge framework, BLM protestors and supporters may be discriminated against both as defendants and as potential jurors. This Part reviews the central components of the BLM Movement as they relate to the justice system and analyzes how the voir dire process and Batson Challenge framework fail to ensure equal protection in our nation's courtrooms. Additionally, this Part discusses how the BLM Movement can get to the heart of the matter when it comes to analyzing the failures of the Batson Challenge. This is because the two competing ideologies have been boiled down to their core: on one side are those who believe everyone in this country should be treated equally and given an equal right to justice, and on the other are those who seek to use nefarious tactics to ensure they attain juries that will convict. This leads to the ultimate conclusion that because of the Batson Challenge's failures and the Supreme Court's unwillingness to strengthen the framework, serious consideration of eliminating the peremptory challenge is crucial to the goals of the BLM Movement and equal protection.

1. The Movement

The connection between the BLM Movement and the justice system goes beyond theoretical bounds. In 2014, when protests erupted following the killing of Mike Brown in Ferguson, Missouri, 172 protestors were arrested within twelve days.[106] In 2015, hundreds of protestors were arrested in Baltimore during protests for the killing of Freddie Gray by a police officer.[107] In 2016, over one hundred protestors were arrested in Baton Rouge during protests following the killing of

103. ALEXANDER, *supra* note 31, at 119.

104. Emily Olson, *Antifa, Boogaloo Boys, White Nationalists: Which Extremists Showed Up to the U.S. Black Lives Matter Protest*, ABC NEWS (June 27, 2020), https://www.abc.net.au/news/2020-06-28/antifa-boogaloo-extremists-at-us-floyd-protests/12388260 [https://perma.cc/ZSJ9-D77X].

105. ALEXANDER, *supra* note 31, at 115.

106. KEEANGA-YAMAHTTA TAYLOR, FROM #BLACKLIVESMATTER TO BLACK LIBERATION, 155 (2016).

107. Justin Fenton & Kevin Rector, *Freddie Gray: The Death That Shook the City*, BALT. SUN (Dec. 27, 2015), https://www.baltimoresun.com/maryland/bs-md-yir-freddie-gray-20151224- story.html [https://perma.cc/MH8S-MCQ2].

Alton Sterling by police.[108] Over a dozen protestors were arrested in 2017 following the acquittal of the police officer who shot and killed Philando Castile in front of his girlfriend and daughter.[109] In 2020, following the murder of George Floyd, approximately 14,000 protestors were arrested nationwide between May 25th and July 27th.[110]

The influx of BLM protestors entering the criminal justice system presents a heightened need to reexamine the Batson Challenge framework. A report released in June 2020 by the Berkeley Death Penalty Clinic revealed that prosecutors continue to use the peremptory strike to disproportionally exclude Black and Latinx jurors.[111] Based on empirical evidence, the Berkeley Death Penalty Clinic concluded that the use of peremptory strikes continues to be overwhelmingly based on racial stereotypes and the appellate courts have accepted the Black and Latinx communities' distrust of law enforcement as an acceptable race-neutral use of the strike.[112] In the thirty years since *Batson* was decided, the California Supreme Court reviewed 152 *Batson* claims and found violations only three times.[113]

The exclusion of Black Americans from juries extends far beyond California.[114] It is a nationwide issue that must be addressed quickly. BLM Movement supporters and dissenters have been, are currently, and will continue to participate in the justice system as defendants, jurors, attorneys, and judges. The answers to very uncomfortable questions must be demanded. When can a juror proclaim that Black Lives Matter? And if they cannot, why? Critically reviewing how the peremptory strike and Batson Challenge affects equal protection concerns is crucial to the

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108. Ken Daley, *43 of 102 Arrested Protesters from Outside Baton Rouge, Police Say*, TIMES-PICAYUNE (July 11, 2016), https://www.nola.com/news/crime_police/article_57022895-66eb-58c0-b034-9bb62029bf59.html [https://perma.cc/HUN7-9CXB].

109. Bill Kirkos & Ralph Ellis, *Philando Castile Shooting: 18 Arrested as Thousands Protest Verdict*, CNN (June 17, 2017), https://www.cnn.com/2017/06/16/us/philando-castile-verdict-protests/index.html [https://perma.cc/8UVT-767S].

110. Olson, *supra* note 104.

111. BERKELEY LAW DEATH PENALTY CLINIC, WHITEWASHING THE JURY BOX: HOW CALIFORNIA PERPETUATES THE DISCRIMINATORY EXCLUSION OF BLACK AND LATINX JURORS, iv (June 2020).

112. *Id.* at v.

113. *Id.* at vii.

114. *See* CONN. JURY SELECTION TASK FORCE, REP. OF THE JURY SELECTION TASK FORCE TO CHIEF JUST. RICHARD A. ROBINSON 19 (2020), https://jud.ct.gov/Committees/jury_taskforce/ReportJurySelectionTaskForce.pdf [https://perma.cc/A58J-GP3L] (exploring exclusion of POC from juries in Connecticut); JURY INNOVATIONS COMM. OF THE SUP. CT. OF FLA., FINAL REP. 38–39 (2001) [hereinafter JURY INNOVATIONS], https://www.floridasupremecourt.org/content/download/343997/file/01-1226_petition.pdf [https://perma.cc/88BJ-8GD7] (exploring exclusion of POC from juries in Florida); Nina W. Chernoff, *No Records, No Right: Discovery & the Fair Cross-Section Guarantee*, 101 IOWA L. REV. 1719, 1723–24, 1729 (July 2016) (discussing errors in automated jury selection resulting in exclusion of POC in juries in Connecticut and Indiana).

improvement of the justice system and guaranteeing those associated with BLM Movement the right to a fair jury.

2. Juries

The selection of a jury sets the stage for trial, and the Sixth Amendment guarantees the right to trial by an impartial jury of one's peers.[115] When a prosecutor selects jurors based on racially discriminatory ideas and practices, the entire trial becomes infected. The Supreme Court has interpreted the Sixth Amendment to require a fair cross-section representation of the local community among the jury venire.[116] From that venire, the jury is selected. This interpretation begs the question: how could an all-white jury selected from an all-white venire be a fair cross-sectional representation of any local community other than one that is one hundred percent white? Advocacy groups have proposed ways of promoting or requiring more racially diverse jury pools.[117] However, such programs do not resolve the issue of the peremptory challenge itself.[118]

Discrimination against Black Americans within the jury system is not a modern idea. Prior to the Civil Rights Act of 1875, Black Americans were excluded from jury pools entirely and continued to be excluded at widespread rates after the Act passed.[119] While such blatant action is now outlawed, less obvious discriminatory practices continue to plague the justice system. For example, in the 1990s in Connecticut, jury-selection software included a mistake resulting in every potential juror from the cities of Hartford and New Britain, which combined made up sixty-five percent of the state's Black population, being skipped for jury selection for nearly three years.[120] In 2002, the computer program used to create jury pools in Allen County, Indiana, included an inherent flaw that resulted in seventy-five percent of the county's Black population almost never having the opportunity to appear on a jury panel.[121] Problems like these continue to occur across the country. With such widespread difficulty for Black Americans to even make it into the jury pool in the first place, protecting their right to be there is essential.

Since the creation of the BLM Movement, there have been multiple cases demonstrating how support for or involvement in the Movement

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115. U.S. CONST. amend. VI.

116. Berghuis v. Smith, 559 U.S. 314, 319 (2010).

117. Hiroshi Fukurai, *Social De-Construction of Race and Affirmative Action in Jury Selection*, 4 AFR.-AM. L. & POL'Y REP. 17, 64 (1999).

118. *Id.*

119. *Juries: Last Week Tonight with John Oliver* 3:55 (HBO Aug. 16, 2020).

120. Chernoff, *supra* note 114.

121. *Id.* at 1729.

has impacted the jury selection process.[122] In 2016, prosecutors removed a Black woman, Crishala Reed, from a jury pool after writing "Black Lives Matter" on a voir dire questionnaire.[123] After seeing the note, the prosecutor then asked Reed if she supported destroying private property, to which she responded no.[124] After an unsuccessful argument to the judge that Reed's note signified support for criminal activity, the prosecutor nonetheless struck Reed through a peremptory challenge.[125] At that time, the prosecutor used peremptory challenges exclusively to strike six potential jurors of color.[126]

Reed's removal from the jury is currently on appeal in California's First District Court of Appeal.[127] The MacArthur Justice Center and American Civil Liberties Union have filed a joint amicus brief in the case, which argues that support for BLM is inherently tied with race and does not make a potential juror unfit.[128] The brief also alleges that the trial court erred in rejecting the defendant's Batson Challenge to the strike because part of the prosecutor's proffered "race-neutral" reason for striking Ms. Reed was due to her apparent discomfort when being interrogated about BLM, which is not in fact race-neutral.[129]

Crucial to the analysis of BLM-related questions within the Batson Challenge framework is the language itself. "Black lives matter" has become the name of a popular social justice group, which may include various connotations, but the plain language is merely a pronouncement that Black lives have value. The judiciary must ask: what other racial groups are questioned about their lives' value in jury selection? How can "I matter" be equated to being inherently unfit to serve on a jury? Was the Batson Challenge framework designed to root out this type of discrimination or to allow it to fly under the radar? These difficult questions do not start and end with Ms. Reed.

In 2018, the Supreme Court of Nevada found that a trial judge erroneously handled a Batson Challenge by terminating the inquiry at step one.[130] In the appellant's brief, he noted that of only three potential Black jurors, the prosecutor used peremptory challenges for two of them,

122. Andrew Karpan, *When Can a Juror Say Black Lives Matter?*, LAW360 (Aug. 9, 2020), https://www.law360.com/access-to-justice/articles/1299398/when-can-a-juror-say-Black-lives-matter- [https://perma.cc/EZ4L-S27J].

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. Brief for Roderick and Solange MacArthur Justice Center, ACLU et al. as Amici Curiae Supporting Appellants at 23, People v. Silas et al., No. A150512 (July 31, 2020).

129. *Id.* at 14.

130. Cooper v. State, 432 P.3d 202, 205–06 (2018).

and the remaining Black juror was white-passing.[131] Additionally, the peremptory challenge for one of the potential Black jurors was used after the prosecutor asked her if she was a sovereign citizen and followed up with, "[h]ow about the Black Lives Matter Movement?"[132] Further, the district court came up with its own reasons why the prosecutor may have wanted to strike those jurors and never required the prosecutor to actually provide any himself.[133]

In 2016, the Minnesota Court of Appeals rejected a Batson appeal in *State v. Gresham* when the prosecutor preemptively struck a potential Black juror after asking multiple "race-based" questions and making multiple failed attempts to strike that juror for cause.[134] The questions included whether she participated in any BLM protests, whether she believed there are a disproportionate amount of people of color sent to prison, and whether she believed her son had ever been racially profiled.[135] One year later, in the same court, the Minnesota Court of Appeals affirmed a trial judge's decision not to allow a Black defendant to question any potential jurors about the BLM Movement at all.[136] In those same Minnesota courts, prospective jurors in the Derek Chauvin trial were specifically asked about the BLM Movement, the protests in the summer of 2020, and police practices.[137] Derek Chauvin is the police officer charged with the murder of George Floyd,whose death is credited as the kick-starter for the Summer of Protests.[138]

Renewed BLM protests have occurred nationwide since the murder of George Floyd in late May 2020.[139] As a result, many protestors have been arrested, and their cases are beginning to move through the criminal justice system.[140] For example, Colinford Mattis and Urooj Rahman, both

131. Brief of Appellant at 21, Cooper v. State, 432 P.3d 202 (2018) (No. 72091).

132. *Id.* at 27.

133. *Cooper,* 432 P.3d at 206.

134. State v. Gresham, No. A15-1691, 2016 WL 7338718, at *1–2 (Minn. Ct. App. Dec. 19, 2016).

135. *Id.* at *2–4.

136. State v. Collins, No. A16-0783, 2017 WL 1055974, at *1 (Minn. Ct. App. Mar. 20, 2017).

137 Wyatte Grantham-Philips, *Potential jurors in upcoming George Floyd trial asked about Black Lives Matter, experience with police*, USA TODAY (Dec. 23, 2020), https://www.usatoday.com/story/news/nation/2020/12/23/george-floyd-trial-blm-police-questionnaire-jurors/4024579001/ [https://perma.cc/JMR6-VF24].

138. *Id.*

139. *Demonstrations & Political Violence In America: New Data For Summer 2020*, ARMED CONFLICT LOCATION & EVENT DATA PROJECT (Sept. 3, 2020), https://acleddata.com/2020/09/03/demonstrations-political-violence-in-america-new-data-for-summer-2020/ [https://perma.cc/JQN6-RG75].

140. Olson, *supra* note 104.

men of color, were arrested for bringing Molotov cocktails to a protest.[141] Despite their arrest occurring in Brooklyn, the two were indicted by a grand jury from Long Island, a less-diverse community in New York.[142]

The tenants of the BLM Movement have highlighted with expert precision the exact problem with the Batson Challenge framework. How is it possible that a system that supposedly removes all instances of racial bias allows prosecutors to systematically exclude potential jurors because of their simple belief that Black lives matter? Prosecutors across the country can remove a potential juror from the venire for simply participating in BLM protests or merely supporting the Movement.[143] The fact that a prosecutor may remove a potential juror from the venire based on her support for the uplifting and equality of Black people in America undermines the integrity of the entire judicial process. Defendants who witness these instances of blatant racial discrimination against those selected to determine their fate receive a very clear message: the cards are stacked against them, and the Batson Challenge process serves as a facade of fairness while discrimination continues to run rampant.

With such an important social justice group at the forefront of public discussion on U.S. criminal justice practices, revisiting the Batson Challenge's failures and the peremptory strike have the potential to become center stage in the plight for criminal justice reform. The wiggle room for discrimination that the Batson Challenge framework allows is fatal to the integrity of the criminal justice system and must be dealt with on a large scale, especially when facing an influx of BLM-related criminal cases nationwide.

C. *Looking Forward: Strengthening the Batson Challenge vs. Eliminating the Peremptory Strike*

Since the Batson Challenge's creation almost forty years ago, it has been a widespread failure in promoting fairness and equal protection within the criminal justice system. The Batson Challenge has developed into more of a facade, allowing legal professionals to demonstrate their commitment to judicial fairness and equality for all while actively allowing discrimination and prejudice to seep through the cracks. Instead of resting on the false sense of fairness and racial sensitivity the Batson Challenge created, the U.S. legal system must develop a stronger force in the face of discrimination and bias.

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141. Cara Bayles, *Can You Get A Fair Jury Trial During The Pandemic?*, LAW360 (Aug. 30, 2020), https://www.law360.com/articles/1305161/can-you-get-a-fair-jury-trial-during-the-pandemic-?hp_promo_a2j=1 [https://perma.cc/LUN8-KLE8].

142. *Id.*

143. Karpan, *supra* note 122.

One of the prominent issues within the current Batson Challenge framework is its failure to identify implicit biases. Indeed, some legal scholars suggest that the current framework actually worsens the problem of implicit bias in the judicial system.[144] For example, imagine a prosecutor uses a peremptory strike against a potential Black juror because the defendant is Black and the victim is white. The defense counsel raises a Batson Challenge, to which the prosecutor responds with an off-the-cuff, race-neutral explanation, such as the potential juror is wearing red, and the attorney superstitiously does not trust jurors who wear red. The judge then rejects the Batson Challenge. In this situation, the judicial system perpetuates the legal fiction that the attorney's superstition is not pretextual, which allows the attorney's implicit bias against Black Americans to affect the judicial process.

Rather than abolishing the peremptory strike altogether, some scholars suggest better training for judges and lawyers on implicit bias and effective jury selection procedures.[145] This alternative presents two interesting questions. Would this training become part of the law school curriculum or job training? And how much of the training would focus on implicit bias? Another alternative to abolishing the peremptory challenge lies within strengthening the Batson Challenge itself. For example, the threat of automatic sanctions against attorneys found to be discriminating in the jury selection process under a Batson Challenge could serve as a good deterrent. However, this option continues to ignore the role implicit bias plays in discrimination and the fact that almost any decent attorney can come up with a non-pretextual, race-neutral explanation for the use of a peremptory strike.

Another way to strengthen the Batson Challenge is for an entity—such as a judicial body, Congress, or the Supreme Court—to formulate and release a set of guidelines or standards for judges to use when evaluating race-neutral explanations in a Batson Challenge. For example, New York appellate courts have established certain race-neutral reasons that are to be assumed as pretextual.[146] These include the juror's employment, age, or clothing; the attorney's concern for a balanced jury; the juror living in the same or adjacent community as the defendant; the attorney's belief the juror would be unfair; and the attorney's feeling the juror dislikes him. The court also established reasons that are not to be assumed as pretextual: the juror's police-related job, the juror giving

144. Bennett, *supra* note 68, at 150.

145. Richard Gabriel, *Understanding Bias: Preserving Peremptory Challenges, Preventing Their Discriminatory Use, and Providing Fairer and More Impartial Juries*, NYU SCH. OF L. CIV. JURY PROJECT, https://civiljuryproject.law.nyu.edu/understanding-bias-preserving-peremptory-challenges-preventing-their-discriminatory-use-and-providing-fairer-and-more-impartial-juries/ [https://perma.cc/YA27-6FQ4].

146. Minetos v. City Univ. of N.Y., 925 F. Supp. 177, 184 (S.D.N.Y. 1996).

inconsistent statements, the juror's familiarity with the defendant or crime scene, the juror's criminal record, and others.[147] However, this alternative also ignores the role of implicit bias among judges, and it fails to account for the fact that since *Batson* was decided, neither Congress nor the Supreme Court have indicated any interest in strengthening its framework. Further, confusion surrounding analysis of what reasons are pretextual may persist without publication of an exhaustive list of guidelines.

Some state supreme courts have found other ways to strengthen the Batson Challenge. In 2017, the Washington Supreme Court commented that its "*Batson* protections [were] not robust enough to effectively combat racial discrimination during jury selection."[148] When given the opportunity to amend and strengthen the state's Batson analysis, the court held that the peremptory strike of a juror who is the only member of a racial group present constitutes a prima facie showing of racial discrimination as required by *Batson*.[149] In a concurring opinion, Justice Debra L. Stephens expressed skepticism about the ruling's ability to achieve such a large goal of effectively eliminating discrimination from the jury selection process.[150] In a separate concurring opinion, Justice Mary Yu stated that the *Batson* framework does not work and called for abolishing the peremptory strike altogether.[151] The Washington Supreme Court then developed a new procedural rule allowing courts to find improper bias without evidence of purposeful discrimination.[152]

In 2019, the Connecticut Supreme Court created a Jury Selection Task Force to consider measures intended to promote the selection of diverse juries as a direct way to strengthen the Batson Challenge analysis in state courts.[153] The Task Force released a final report on December 31, 2020, which recommended a new procedural rule allowing attorneys to object to the use of a peremptory strike made by opposing counsel specifically alleging improper bias.[154] After the objection, "The court shall then evaluate from the perspective of an objective observer . . . the reason given to justify the peremptory challenge in light of the totality of the circumstances."[155] The report also indicated that evidence of purposeful discrimination is not required, which could aid state courts in weeding out implicit bias among attorneys.[156]

147. *Id.*
148. Seattle v. Erickson, 398 P.3d 1124, 1126 (Wash. 2017).
149. *Id.*
150. *Id.* at 1132 (Stephens, J., concurring).
151. *Id.* at 1134 (Yu, J., concurring).
152. WASH. GEN. RULE 37.
153. State v. Holmes, 221 A.3d 407, 412 (Conn. 2019).
154. CONN. JURY SELECTION TASK FORCE, *supra* note 114, at 16.
155. *Id.*
156. *Id.*

1. Why Eliminating the Peremptory Strike is More Appropriate than Strengthening the Batson Challenge

Calls for eliminating the peremptory strike are not particularly new. In 2001, the Florida Supreme Court–appointed Innovations Committee released a report recommending a study be conducted to revisit eliminating the peremptory strike by analyzing the use of peremptory strikes and their resulting verdicts.[157] The report indicated that the Committee was essentially deadlocked on whether to recommend reducing the ability to use the peremptory strike or eliminating it altogether.[158] The report stated that in conjunction with elimination of the peremptory strike, the strike for cause should be further developed to enable more widespread removal of jurors who are unable to fairly evaluate a particular case.[159] In 2013, the Washington Supreme Court Justice Steven Gonzalez commented that

> the use of peremptory challenges contributes to the historical and ongoing underrepresentation of minority groups on juries, imposes substantial administrative and litigation costs, results in less effective juries, and unfairly amplifies resource disparity among litigants—all without substantiated benefits. The peremptory challenge is an antiquated procedure that should no longer be used.[160]

In 2018, Judge Elsa Alcala of the Texas Court of Criminal Appeals commented that the *Batson* framework has proven to be "so ineffective that alternate approaches to race-neutral jury selection have been proposed,including eliminating peremptory challenges altogether."[161]

Despite its harsh criticism, the peremptory strike provides value in jury selection. It gives parties control over the selection process, allows lawyers to search for biases without alienating potential jurors, and serves as a backup for failed challenges for cause.[162] These are important aspects of the criminal justice system, and abolishing the peremptory strike must address their preservation. Arguably, the peremptory strike's most important benefit is successfully preventing biased persons from serving

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157. JURY INNOVATIONS, *supra* note 114, at 38.

158. *Id.*

159. *Id.*

160. State v. Saintcalle, 309 P.3d 326, 348 (Wash. 2013) (Gonzalez, J., concurring), *abrogated by* City of Seattle v. Erickson, 398 P.3d 1124 (Wash. 2017).

161. Tennyson v. State, No. PD-0304-18, 2018 WL 6332331, n.6 (Tex. Crim. App. Dec. 5, 2018) (Alcala, J., dissenting).

162. *Should The Peremptory Challenge Be Abolished?*, L. LIBR.—JRANK, https://law.jrank.org/pages/7925/Jury-SHOULD-PEREMPTORY-CHALLENGE-BE-ABOLISHED.html [https://perma.cc/Z4ER-RZ9G].

on juries.[163] It allows attorneys to strike potential jurors suspected of bias that could not be fully fleshed out during voir dire.[164]

The simplest way to achieve these goals is by expanding the strike for cause. Justice Stevens has commented, "A citizen should not be denied the opportunity to serve as a juror unless an impartial judge can state an acceptable reason for the denial. A challenge for cause provides such a reason; a peremptory challenge does not."[165] Because we allow the use of peremptory strikes, judges can avoid direct scrutiny of the biases of potential jurors by simply rejecting strikes for cause with the knowledge that if the concern of bias is serious enough, the attorney will use a preemptive strike on that juror.[166] By abolishing the peremptory strike and expanding the criteria for the strike for cause, judges must take on the challenge of examining bias but will also be able to strike jurors under less stringent requirements. Further, eliminating the peremptory strike would relieve courts of the anxieties related to a characteristic inherent to the strike: to reject it, the court must essentially label the attorney providing a race-neutral reason for the strike as a liar.[167] By eliminating this label from the analysis, courts have the freedom to take a more meaningful approach to identifying potential bias.

Judicial efficiency is a key factor to consider when theorizing on strengthening the courts' ability to weed out discriminatory practices in jury selection.[168] Proponents of the peremptory strike rest on the assumption that requiring courts to meticulously examine every potential juror in every case for risks of bias decreases judicial efficiency.[169] However, the peremptory strike also requires the expense of time and energy among courts to exercise those strikes and their challenges.[170] Additionally, peremptory challenges can spawn expensive litigation separate from the initial trial.[171] While it is important to promote policies that support judicial efficiency, it is even more important to promote policies that ensure Fourteenth Amendment protections for everyone involved in the justice system. Justice Lewis F. Powell Jr. argued that public respect for the justice system and enforcement of equal protection

163. CONN. JURY SELECTION TASK FORCE, *supra* note 114, at 30–31.

164. *See, e.g.*, *id.*

165. John Paul Stevens, *Foreword*, 78 CHI-KENT L. REV. 907, 907–08 (2003).

166. Kenneth J. Melilli, *Batson in Practice: What We Have Learned about Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 486 (1996).

167. Bennett, *supra* note 68, at 162.

168. Batson v. Kentucky, 476 U.S. 79, 98–99 (1986).

169. *See, e.g.*, JURY INNOVATIONS, *supra* note 114, at 38.

170. Jere W. Morehead, *When a Peremptory Challenge Is No Longer Peremptory: Batson's Unfortunate Failure to Eradicate Invidious Discrimination from Jury Selection*, 43 DEPAUL L. REV. 625, 639 (1994).

171. Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369, 371 (1992).

are of utmost importance.[172] While there could likely be some growing pains, concerns for judicial efficiency alone in examining bias is an inadequate argument against expanding the strike for cause and abolishing the peremptory strike.

A study conducted from 1986 to 1993 of all cases involving Batson Challenges in the United States found sixteen major categories of accepted reasons for the use of a peremptory strike: prior involvement in criminal conduct/litigation, behavior during voir dire, possession of extra judicial information/bias, difficulty following instructions, age, employment/training, economic characteristics, family situation, education/intelligence, location of home or workplace, incapacity, personal appearance, prior jury service, gender, miscellaneous characteristics, and a neutral explanation that did not involve any objection to the challenged potential juror.[173] The researchers found that a significant portion of peremptory strikes used should have also resulted in a strike for cause.[174] The remaining peremptory strikes fell into two categories: those based on a subjective assessment of the individual potential juror after a Batson Challenge was raised and those based on a stereotypical assessment of the potential juror because of that person's inclusion in some identifiable group.[175]

The research shows that a system abolishing the peremptory strike and expanding the strike for cause is not only possible but can also successfully weed out the exact uses of peremptory strikes that are at issue.[176] For example, many of the reasons listed under the "behavior during voir dire" category include descriptions of potential jurors being inattentive, expressing their desire to avoid jury service or their overenthusiasm to participate, and strange or erratic behavior.[177] Under a judicial system that has expanded the strike for cause and eliminated the peremptory strike, all of these instances of conduct could be successfully dealt with on the record by the court. If a juror appears too eager or too disinterested in the case at hand, the court can investigate whether and determine that the behavior sufficiently demonstrates bias or inability to serve on the jury. Further, the court can conduct such analysis without the additional time required for a Batson Challenge from opposing counsel or concerns about labeling the prosecutor as a liar. Particularly most important, eliminating the peremptory strike would allow the entire court system and the jurors, attorneys, and judges alike, to have a more honest and nuanced discussion about race. Instead of simplifying the argument

172. Batson, 476 U.S. at 99.
173. Melilli, *supra* note 166, at 485 tbl. III-A.
174. *Id.* at 487.
175. *Id.*
176. *Id.*
177. *Id.* at 489.

to whether the juror was struck because of their race or experience with law enforcement, the court can directly assess the potential juror's possible biases against the specific issues of the case. As a result, the court can come to a much more reasoned decision than having blind faith in a prosecutor's discretion in striking jurors without explanation.

A sense of urgency in the calls for abolishing the peremptory strike comes from the direct race-related issues present in countless criminal cases nationally and from the BLM Movement. When support or opposition for a social justice group promoting equal treatment of Black lives comes directly into question as part of a case, how can use of the peremptory strike be considered anything other than race-related? With limited information from voir dire to go on, attorneys must frequently strike potential jurors based on little more than a hunch or guesswork.[178] Research has shown that these "hunches" easily serve as a cloak of impartial judicial decision-making, concealing reliance on stereotypes and implicit biases.[179]

Further, it is widely understood that peremptory challenges are not used to develop an impartial jury, but a favorable one.[180] A simple scan of any trial-strategy publication shows that the discussion is not focused on creating the most impartial and virtuous jury imaginable, but on creating a jury that is theoretically most likely to side with that attorney's client.[181] The blanket assumption that peremptory strikes are used to

178. Michael Kavanaugh, *Opinion: Jurors Who Favor the Death Penalty Are Fairer; Peremptory Challenges*, N.Y. TIMES (May 24, 1986), https://www.nytimes.com/1986/05/24/opinion/l-jurors-who-favor-the-death-penalty-are-fairer-peremptory-challenges-152486.html [https://perma.cc/EFR9-S4VM] ("The decision to exercise a peremptory challenge is usually based on a hunch and at best represents an educated guess by the attorney on a potential juror's ability to serve."); *see also* Bennett, *supra* note 68, at 160 (arguing that because voir dire is typically dominated by judges, and attorneys typically know the issues in their cases better than judges, attorneys struggle to identify potential biases among jurors based on the limited information elicited from them by judges).

179. Statistics from the mid-1970s demonstrate that 68.9% of preemptive challenges by federal prosecutors in Louisiana were used against Black potential jurors, 82% of Black jurors were challenged by state prosecutors in South Carolina, and 86.7% of Black jurors were challenged by state prosecutors in Dallas County, Texas. Batson v. Kentucky, 476 U.S. 79, 103–04 (1986) (Marshall, J., concurring). From 1981–1997, Philadelphia prosecutors struck 51% of Black jurors and 26% of Non-Black jurors, while defense attorneys struck 26% of Black jurors and 54% of Non-Black jurors. Miller-El v. Dretke, 545 U.S. 231, 268 (2005) (Breyer, J., concurring). From 2006–2018 California prosecutors struck Black jurors 75% of the time, with appellate courts finding error in only 2.6% of those strikes. Cohen, *supra* note 66.

180. Carol A. Chase & Colleen P. Graffy, *A Challenge for Cause Against Peremptory Challenges in Criminal Proceedings*, 19 LOY. L.A. INT'L & COMP. L.J. 507, 508 (1997).

181. During a recent interview, a jury selection specialist informed PBS that in a case where the defendant is a police officer, the prosecution is likely looking for jurors who harbor misgivings toward the police, have negative feelings or experiences with the police, and let emotions guide their decisions. *Jury Selection Strategy: What Prosecutors, Defense Look For*, PBS: CHI. TONIGHT

promote the ethical and righteous ideals of American democracy instead of as a litigation tool to stack the cards in one's favor promotes a legal fiction and facade of nobility within the modern-day criminal justice system.

2. Suggested Redrafted Rule 24

Based on the analysis discussed in this Note, it is clear that the Supreme Court is not going to "save" the Batson Challenge through case law and strengthen its effect. Even if the Supreme Court did demonstrate a willingness to tackle this issue through that avenue, the more appropriate avenue would be to redesign Federal Rule of Criminal Procedure 24[182] in a way that effectively eliminates the peremptory strike and provides guidelines or considerations for expansion of the strike for cause. For example, the following redrafted version of the relevant portions of Rule 24 may serve as a springboard for consideration:

> Rule 24. Trial Jurors
>
> Strikes for cause. Each side is entitled to strike a potential juror from the venire due to concerns of bias or other inability to impartially serve on the jury.
>
> In general. The court may deal with strikes for cause as they come up in voir dire. In the interest of preventing hostility from the potential jurors sought to be stricken, the court may require all arguments for strikes for cause to be made outside the presence of the venire or provide instructions to the venire that moves to strike are not personal and do not reflect counsel's dislike or ill-will towards the potential juror.
>
> Procedure. Once the strike for cause has been made, counsel proposing the strike must articulate the reasoning behind the desired strike. Opposing counsel may then argue that the cause for the strike is inappropriate or misleading. The court is encouraged to consider all relevant factors to the case and issues at hand, particularly whether the stated cause is relevant to the facts of the case and whether the potential juror can adequately set those biases or experiences aside in delivering a just verdict.
>
> Scope. Appropriate causes to strike a potential juror expand beyond a juror's explicit statement that they cannot set their

(Sept. 10, 2018), https://www.pbs.org/video/jury-selection-strategy-what-prosecutors-defense-look-f5u3hc/ [https://perma.cc/W23G-N55A]. All of which are commonly cited as reasons the peremptory challenge theoretically exists to weed potential jurors out for, and none of which would be considered as means of seeking an unbiased jury. *Id.*

182. FED. R. CRIM. P. 24.

biases or experiences aside to render a just verdict. The following list, though non-exhaustive, provides examples for appropriate cause:

juror's prior involvement in criminal conduct or litigation

juror's inappropriate behavior during voir dire

juror's possession of extrajudicial information or bias, including admission of inability to set biases aside

juror's incapacity or difficulty following instructions

juror's occupation or training

juror's limitations in education or literacy

suspicion that juror is under the influence of drugs or alcohol

Sanctions. In the event that the court finds that counsel has attempted to strike a potential juror or multiple potential jurors based on racial discrimination or stereotypes, opposing counsel may file a motion for sanctions to recover attorney's fees and expenses related to the entirety of the voir dire process.

Alternate Jurors.

(4) Voir dire of alternate jurors. As part of their designation as an alternate juror, each alternate will be identified and subject to the same questioning and scrutiny as selected jurors during the voir dire process.

Committee Notes on Rules – 2021 Amendment

Portions of Rule 24 have been eliminated in conformance with the decision to abolish the peremptory strike. In redrafting Rule 24, the Committee deleted portions of the rule which allow for the use of peremptory strikes against potential and alternate jurors. The purpose of eliminating these portions is to eradicate the unfair exclusion of potential jurors based on racial discrimination and stereotypes and promote societal trust in criminal procedure. In addition to eliminating the original section (b) of the Rule, which authorized the use of peremptory challenges, the Committee has added a new section (b) which outlines the procedure for courts to meaningfully assess potential jurors for explicit and implicit biases, both of which are equally dangerous and equally inappropriately existing within the criminal justice system. Instead of using peremptory strikes, the Committee has expanded the use of strikes for cause. The reformulated Rule also encourages courts to take a hands-on approach to

> evaluate potential biases on a case-by-case basis and target the issues at hand in individual cases.

While the redrafted Rule does not have authority in state courts, redrafting Rule 24 can set a standard for other states to follow and encourage state courts to follow suit in abolishing the peremptory strike altogether. States often adopt similar procedural rules to those created for federal courts.[183]

CONCLUSION

The Batson Challenge has been a resounding failure to address the particular evil it sought to eradicate: racism in the jury selection process. Not only has *Batson* failed, but the Supreme Court has slowly but surely chipped away at its strength in subsequent case law.[184]

Because of the inherent flaws within the Batson Challenge framework, it does not and cannot bear the burden of eradicating racism from the criminal justice system. To effectively combat racism, improve the public's faith in the criminal justice system, and promote a more transparent and reliable procedure in jury selection, the peremptory strike must be abolished, and the strike for cause must be expanded.

In the wake of a national uprising against racism in all forms by the BLM Movement, the failures of the Batson Challenge and the at best, outdated (but at worst, nefarious) reasoning behind the peremptory challenge cannot escape serious discussion. To put it plainly, there is no room for the peremptory strike in a fair and equal justice system. "[T]he peremptory's utility in furthering the objective of a fair trial [has never] been demonstrated. . . . The evils it propagates, however, are well-documented."[185] We have reached a point in American society where the blanket claim that the peremptory strike plays a pivotal role in ensuring an impartial jury can no longer be said with a straight face. The most appropriate measure of reform is redrafting Federal Rule of Criminal Procedure 24 in order to redesign the procedure for striking potential jurors.

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183. For example, the state of Florida has amended Florida Rule of Civil Procedure 1.350 to reflect the updated methods of discovery to electronic formats as amended in Federal Rule of Civil Procedure, 34. FLA. R. CIV. P. 1.350.

184. *See*, *e.g.*, Purkett v. Elem, 514 U.S. 765, 768 (1995) (allowing prosecutors to use "silly" or "superstitious" reasons for peremptorily striking jurors).

185. Broderick, *supra* note 171, at 370.