
COMPLICATING RACIAL JUSTICE NARRATIVES: THE PEREMPTORY ELIMINATION DEBATE

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ABSTRACT

Studies consistently show that prosecutors disproportionately use peremptory challenges to strike people of color from juries. Several states have endeavored to address this well-documented problem by fortifying the Batson framework. Arizona, however, recently took the radical step of eliminating peremptory challenges altogether. This groundbreaking move was praised by many as a bold effort to address racial discrimination. Now, other states are considering following Arizona's lead.

This Article argues that, despite its simplistic appeal, peremptory elimination is not necessarily a racial justice win. In fact, given the adaptability of racism, there are reasons to think prosecutors will innovate and find other ways to discriminate against jurors of color. Defendants, particularly defendants of color, will suffer too, as the wholesale elimination of peremptory strikes robs defendants of the ability to prevent potentially biased jurors from deciding their fate, and importantly, disempowers defendants in a system where the power dynamics are already incredibly lopsided.

Thus, this Article urges caution before scholars trumpet and policymakers promote proposals to eliminate peremptory strikes as a racial justice measure. In sounding this cautionary note, this Article hopes to serve as a broader meditation about looking to "simple" solutions to address discrimination without adequately considering the complexities of race and racial bias underlying the problem.

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INTRODUCTION

Racial discrimination in jury selection seems to be an intractable problem.¹ Despite it being unconstitutional to strike a juror because of their race,² studies from jurisdictions across the country show that peremptory challenges—challenges that do not require the prosecutor³ to give any justification for removal⁴—are disproportionately used to exclude people of color, particularly Black people, from juries.⁵ For decades, scholars and judges have bemoaned the problem of racial discrimination in jury selection, leading many to advocate for getting rid of peremptories altogether.⁶ Recently, several states have considered various policy solutions in an effort to address the problem, ranging from strengthening the *Batson*⁷ inquiry to better detect racial bias in peremptory strikes, to, more radically, jettisoning peremptory challenges altogether.⁸ On

¹ See, e.g., *Miller-El v. Dretke*, 545 U.S. 231, 270 (2005) (Breyer, J., concurring) (“[T]he use of race- and gender-based stereotypes in the jury-selection process seems better organized and more systematized than ever before.”); 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, 1077 (2011) (“[V]irtually every commentator (and numerous judges) who have studied the issue have concluded that race-based juror strikes continue to plague American trials.”).

² See *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (holding that striking jurors because of their race violates Equal Protection Clause of Fourteenth Amendment).

³ This Article focuses on criminal trials and the discriminatory use of peremptory strikes by prosecutors. Whether or not the concerns articulated in this Article play out the same in the civil context is beyond this Article’s scope. While not the primary focus, the use of peremptories by criminal defendants is discussed in Section III.C.

⁴ See *Peremptory Challenge*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining a peremptory challenge as “[o]ne of a party’s limited number of challenges that do not need to be supported by a reason unless the opposing party makes a prima facie showing that the challenge was used to discriminate on the basis of race, ethnicity, or sex”). I use the terms “peremptory challenges,” “peremptory strikes,” and “peremptories” interchangeably.

⁵ See, e.g., Anna Offit, *Race-Conscious Jury Selection*, 82 OHIO ST. L.J. 201, 239-41 (2021) (recalling various studies that have demonstrated persistent racial discrimination in jury selection); Whitney DeCamp & Elise DeCamp, *It’s Still About Race: Peremptory Challenge Use on Black Prospective Jurors*, 57 J. RSCH. CRIME & DELINQ. 3, 19-20 (2020) (conducting a study showing racial disparities in use of peremptory challenges in Mississippi).

⁶ See Thomas Ward Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, 118 MICH. L. REV. 785, 786 (2020) (“Peremptory strikes, and criticism of the permissive constitutional framework regulating them, have dominated the scholarship on race and the jury for the past several decades.”); *id.* at 793-98 (noting racial disparities in use of for-cause challenges).

⁷ *Batson*, 476 U.S. at 79.

⁸ Nancy S. Marder, *Race, Peremptory Challenges, and State Courts: A Blueprint for Change*, 98 CHI.-KENT L. REV. 67, 67 (2024) [hereinafter Marder, *Blueprint for Change*] (discussing how several different states have approached problem of curbing discriminatory use of peremptory challenges); Thomas Ward Frampton & Brandon Charles Osowski, *The End of Batson? Rulemaking, Race, and Criminal Procedure Reform*, 124 COLUM. L. REV. 1, 2-3 (2024) (noting how Arizona eliminated peremptory strikes and other states changed their approach by proscribing certain justifications for such strikes).

January 1, 2022, Arizona became the first state in the nation to eliminate peremptory challenges entirely.⁹ Many legal commentators and scholars praised Arizona's move, heralding it as "a bold new experiment to limit racist convictions."¹⁰

This Article complicates the racial justice narrative surrounding the elimination of peremptory challenges.¹¹ To do that, it is important to draw some parameters around what this Article means by "racial justice." As other scholars have explained, it is sometimes complicated to have debates regarding racial justice and racial discrimination given "[t]he indeterminacy of these terms."¹² Indeed, what counts as "racial justice" is woefully undertheorized in the literature.¹³

Eliminating peremptory strikes will, of course, end the discriminatory use of peremptory strikes, as there will be no more strikes to wield. Therefore, getting rid of peremptories "has the virtue of simplicity."¹⁴ But this Article thinks beyond this two-dimensional conception of racial justice. While not divining a comprehensive definition, this Article asserts that a meaningful racial justice measure must do *at least* one of two things: (1) address the logics that underlie racial bias and discrimination; or (2) progress society towards a more racially equitable—not merely formally equal—place. By those metrics, this Article

⁹ See *infra* Part II. Professor Richard Jolly argues that, based on the constitutional text, history, and tradition of the exercise of peremptories, the elimination of peremptory challenges for criminal defendants and civil litigants is unconstitutional. See Richard Lorren Jolly, *The Constitutional Right to Peremptory Challenges in Jury Selection*, 77 VAND. L. REV. 1529, 1535-36 (2024). This Article does not take a position on whether peremptories are constitutionally guaranteed and instead commends Jolly's article.

¹⁰ Ian Millhiser, *Arizona Launches a Bold New Experiment to Limit Racist Convictions*, VOX (Aug. 31, 2021), <https://www.vox.com/22648651/arizona-jury-race-batson-kentucky-peremptory-strikes-challenges-thurgood-marshall> (expressing optimism that Arizona's move to eliminate peremptory challenges may "lead to juries in that state being more racially diverse, and thus less likely to treat racial minorities more harshly"); see also *infra* Section II.C.

¹¹ As Professors Shari Seidman Diamond and Valerie Hans ask: "[W]ould eliminating peremptory challenges entirely be the classic version of 'throwing the baby out with the bathwater?'" Shari Seidman Diamond & Valerie P. Hans, *Fair Juries*, 2023 U. ILL. L. REV. 879, 934 (2023).

¹² R. Richard Banks, Jennifer L. Eberhardt & Lee Ross, *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CALIF. L. REV. 1169, 1190 (2006) (noting authors' disagreement on what constitutes racial bias and what non-discrimination would look like).

¹³ I plan on exploring this question further in future work. Philosopher Charles Mills argued that "corrective racial justice" should have three principles: (1) "End racially unequal citizenship"; (2) "End racial exploitation"; and (3) "End racial disrespect." Charles Mills, *The Tanner Lectures on Human Values, Theorizing Racial Justice* 49 (Feb. 12, 2020) (transcript available at <https://tannerlectures.org/lectures/theorizing-racial-justice/>).

¹⁴ Marder, *Blueprint for Change*, *supra* note 8, at 103 (describing how it is too soon to tell if Arizona's elimination of peremptory challenges is working to reduce racial discrimination in jury selection or if its appeal is based on simplicity).

suggests that eliminating peremptories may not be the boon for racial justice that many scholars and policymakers have suggested, for at least four reasons.

First, there is the question of whether peremptory elimination will actually affect the racial composition of juries. There is reason to be skeptical. As the literature explains, there are other factors in the jury formation process that lead to the underrepresentation of people of color in the venire¹⁵ (for example, juror qualification laws and the way venire lists are compiled), which in turn skew the racial makeup of the petit jury.¹⁶

Second, racism is adaptive, and there is reason to think that in the absence of peremptory strikes, racial discrimination will infiltrate other parts of the jury selection process.¹⁷ For instance, data shows that for-cause challenges—where the prosecutor gives a reason to exclude a juror that a judge accepts as disqualifying¹⁸—are also disproportionately used to exclude jurors of color.¹⁹ To this point, many reasons that prosecutors give for a cause challenge, such as negative interactions with law enforcement, are racially coded and therefore lead to the disparate exclusion of Black people and other people of color.²⁰ Doing

¹⁵ The venire is the “panel of persons selected for jury duty and from among whom the jurors are to be chosen.” *Venire*, BLACK’S LAW DICTIONARY (11th ed. 2019).

¹⁶ See, e.g., Mary R. Rose, Raul S. Casarez & Carmen M. Gutierrez, *Jury Pool Underrepresentation in the Modern Era: Evidence from Federal Courts*, 15 J. EMPIRICAL LEGAL STUD. 378, 400 (2018) (addressing how mass incarceration and excessive policing of Black people play a role in reducing jury-eligible population of Black people by labeling many folks as felons); Nina W. Chernoff, *Black to the Future: The State Action Doctrine and the White Jury*, 58 WASHBURN L.J. 103, 103 (2019) [hereinafter Chernoff, *Black to the Future*] (stating there is evidence jury pools do not reflect a fair cross-section of communities as Black people and Latine people are underrepresented).

¹⁷ See, e.g., Elise C. Boddie, *Adaptive Discrimination*, 94 N.C. L. REV. 1235, 1239 (2016) (setting forth a theory based on premise that “racial discrimination adapts to the legal and social environment by mutating to evade prohibitions against intentional discrimination” (emphasis omitted)); Daniel S. Harawa, *Lemonade: A Racial Justice Reframing of the Roberts Court’s Criminal Jurisprudence*, 110 CALIF. L. REV. 681, 709 (2022) (discussing example of adaptive racism in post-Civil War Southern States where criminal legal system was used to subjugate Black people); Angela Onwuachi-Willig, *The Boundaries of Whiteness: From Till to Trayvon*, in RACE, RIGHTS, AND REDEMPTION: THE DERRICK BELL LECTURES ON THE LAW AND CRITICAL RACE THEORY 331, 332 (Janet Dewart Bell & Vincent M. Southerland eds., 2021) (“[T]he fact that racism operates in different ways today than it did in the past . . . does not mean racism is not present.”). Social psychologist Dr. Jennifer Eberhardt’s explanation for how racial bias works helps explain why it is so adaptive. As she said: “Our experiences in the world seep into our brain over time, and without our awareness they conspire to reshape the workings of our mind.” JENNIFER L. EBERHARDT, *BIASED: UNCOVERING THE HIDDEN PREJUDICE THAT SHAPES WHAT WE SEE, THINK, AND DO* 15 (2019).

¹⁸ *Challenge for Cause*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining for-cause challenge as a “party’s challenge supported by a specified reason, such as bias or prejudice, that would disqualify that potential juror”).

¹⁹ See, e.g., Frampton, *supra* note 6, at 793-97 (noting racial disparities in use of for-cause challenges in Louisiana and Mississippi).

²⁰ See, e.g., Vida B. Johnson, *Arresting Batson: How Striking Jurors Based on Arrest Records Violates Batson*, 34 YALE L. & POL’Y REV. 387, 406-08 (2016) [hereinafter Johnson,

away with peremptory challenges does not alter the mindset that leads prosecutors to discriminate in the first place, such as their desire to win and their belief (wrongly or rightly) that race correlates with their preferred outcome in any given case.²¹ This matters when determining whether the elimination of peremptory strikes is a win for racial justice.

Third, before championing the elimination of peremptory strikes as a racial justice victory, it is important to consider what is lost. Thirty years ago, Professor Charles Ogletree urged us to “[j]ust say no” to proposals to eliminate peremptory challenges.²² Ogletree’s reasoning was straightforward: Eliminating peremptory challenges risked harming defendants.²³ As he explained: “Absent the peremptory challenge, some defendants may find themselves facing jurors who should not have been impaneled, jurors whom they hate or fear or believe on some arguably reasonable grounds to be seriously biased against them, but whom they are powerless to remove.”²⁴ This Article explains that those who propose eliminating peremptory challenges often do not treat Ogletree’s arguments with the gravitas they deserve.

Fourth, there is a separate issue grounded in autonomy that Ogletree did not discuss: Eliminating peremptory strikes disempowers defendants in a system where they already have very little power.²⁵ Even if a defendant’s use of a peremptory strike will not change the outcome of their trial, the *availability* of peremptory strikes gives defendants some agency in a proceeding designed to

Arresting Batson] (discussing disqualification of jurors based on arrest records and negative feelings towards police); Anna Offit, *The Character of Jury Exclusion*, 106 MINN. L. REV. 2173, 2173 (2022) [hereinafter Offit, *Jury Exclusion*] (“In American jury trials, cause challenges and peremptory strikes can be used to excuse otherwise eligible jurors based on their previous encounters with, or experience-based impressions of, the criminal justice system.”); ELISABETH SEMEL ET AL., BERKELEY L. DEATH PENALTY CLINIC, *WHITEWASHING THE JURY BOX: HOW CALIFORNIA PERPETUATES THE DISCRIMINATORY EXCLUSION OF BLACK AND LATINX JURORS* vi (2020) (“Prosecutors are trained to strike prospective jurors who have had or whose relatives have had a negative experience with law enforcement or are distrustful of the criminal legal system.”).

²¹ See *infra* Section III.C.1 (describing how prosecutors may become more imaginative in their reasons for for-cause challenges against jurors of color and may fall prey to their biases with elimination of peremptories).

²² Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099, 1099-1100 (1994) (recommending restrictions on use of peremptory challenges rather than eliminating them completely).

²³ *Id.* at 1100.

²⁴ *Id.* at 1145-46.

²⁵ See, e.g., Caren Myers Morrison, *Negotiating Peremptory Challenges*, 104 J. CRIM. L. & CRIMINOLOGY 1, 11-12 (2014) (“The most convincing justifications for the challenge rest on notions of party autonomy and participation—the theory that, by giving the litigants the chance to select their own juries, they are more likely to see the result reached by that jury as fair.”); see also Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant’s Right to Control the Case*, 90 B.U. L. REV. 1147, 1153 (2010) (describing criminal defendant autonomy as “the concept of private space within which a person can make and act upon decisions free from government intervention”).

decide their fate and in a process that is wholly agency stripping. As other scholars have noted, there are many aspects of the prosecutorial process that disempower and silence defendants.²⁶ Eliminating peremptory strikes only exacerbates this problem. In a society where criminal defendants are disproportionately people of color,²⁷ and in a system that is broadly acknowledged as being racially biased,²⁸ one cannot claim the elimination of peremptory challenges as a win for racial justice without also considering what criminal defendants *lose* by eliminating peremptory challenges.²⁹

This Article explores the racial justice complexities of peremptory elimination over the course of four Parts. Part I briefly traces the origins of peremptory strikes and the relevant jurisprudence before turning to *Batson v. Kentucky*,³⁰ where the Supreme Court held it is unconstitutional to strike a juror because of their race.³¹ Part I then catalogues the calls from judges and scholars to eliminate peremptory strikes, including Justice Thurgood Marshall's warning in *Batson* that the only way to prevent the discriminatory use of peremptory challenges is to end the peremptory practice altogether.³²

²⁶ See, e.g., Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1452-53 (2005) (noting how criminal defendants are silenced by their status as impoverished, undereducated people of color, by constitutional doctrines and criminal rules, and by their attorneys); M. Eve Hanan, *Talking Back in Court*, 96 WASH. L. REV. 493, 495-96 (2021) (stating criminal defendants rarely talk back in court to contest disposition of their case, instead agreeing to plead guilty, waive rights, and pay fines); Bennett Capers, *Bringing Up the Bodies*, 2022 U. CHI. LEGAL F. 83, 86-88 (2022) (acknowledging criminal defendants may not testify at trial to avoid opening door to evidence that would otherwise be excluded); Vida B. Johnson, *Silenced By Instruction*, 70 EMORY L.J. 309, 336-38 (2020) (discussing how factfinders rarely hear from defendants at trial since so few criminal defendants testify).

²⁷ See Jasmine B. Gonzales Rose, *Language Disenfranchisement in Juries: A Call for Constitutional Remediation*, 65 HASTINGS L.J. 811, 824 (2014) ("The U.S. criminal justice system has a long history of disproportionately prosecuting and incarcerating people of color."). To be sure, the racial pathologies of the criminal legal system hurt white defendants too. See JACK GREENBERG, *CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION* 443 (1994).

²⁸ Karen Sloan, *Is the Justice System Racially Biased? Depends on Who You Ask*, REUTERS (May 2, 2022), <https://www.reuters.com/legal/government/is-justice-system-racially-biased-depends-who-you-ask-2022-05-02/> [<https://perma.cc/6FJ5-8N3D>] (discussing a study that showed that a majority of Americans believed criminal legal system had "built-in racial biases").

²⁹ The dynamics are not the same for the government. See Toni M. Massaro, *Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C. L. REV. 501, 561 (1986) (explaining that "[i]f the state loses, it does not lose its liberty, as the defendant does if he or she loses").

³⁰ 476 U.S. 79 (1986).

³¹ *Id.* at 89.

³² *Id.* at 102-03 (Marshall, J., concurring) ("The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely.").

Part II then explains how these calls for elimination, once relegated to law review articles and judicial writings, have gained traction in policy debates. This Part canvasses various efforts to eliminate peremptory challenges across different states. It looks at proposed legislation in New York, taskforce reports from California and Oregon, and the debates that preceded the elimination of peremptories in Arizona. What this Part makes clear is that claims of racial justice are front and center in all these policy reform efforts.

Part III asserts that the calls urging the elimination of peremptory strikes as an important racial justice measure are underdeveloped—the racial justice dynamics of peremptory elimination are much more complicated than the conversations make it seem. Indeed, as this Part argues, there are measures other than eliminating peremptories that can address the problem of discrimination during jury selection that better protect the various racial justice interests.

Part IV concludes by drawing on the teachings of Professor Derrick Bell and asking what broader lessons we can learn from the debates around peremptory elimination. Ultimately, the story of peremptory elimination may serve as an allegory—a warning against the urge to reach for simple measures to solve the deeply entrenched, perhaps intractable problem of racial injustice in America. At a minimum, it cautions against too quickly adopting racial justice measures that seem easy to implement without carefully considering the countervailing perils and pitfalls. In making these arguments, Part IV is a reminder of the need to consider a variety of perspectives when contemplating criminal justice reform measures, especially the perspectives of those most impacted.

To be clear, this Article does not outright dismiss the elimination of peremptory challenges as a potential solution to the problem of racial discrimination in jury selection, although this Article does believe there are better first order solutions if the goal is in fact racial justice. Rather, this Article argues that the conversation requires nuance. There needs to be careful consideration of the *full* panoply of racial justice implications that accompany the elimination of peremptory challenges before pursuing such a drastic remedy.³³ The racial justice interests surrounding peremptory elimination are complicated. Therefore, any proposal to eliminate peremptory strikes should at the very least be sensitive to this fact.

³³ A quick word about language. Those who champion the elimination of peremptory strikes often do so in the language of abolition. I choose to not use the abolition framing for two reasons. One, there is a robust debate around abolition in criminal legal scholarship, and I do not wish for this Article to get confused or misused in that debate. Two, abolition is defined as ending or stopping something, and as this Article explains, eliminating peremptories will not abolish the discriminatory logics that drive their use. Rather, it will simply diffuse the discrimination, perhaps making it even harder to redress. And given that the term abolition is often associated with the ending of slavery, it seems a particularly inapt term to use here.

I. THE INTENSIFYING CALLS FOR ELIMINATING PEREMPTORY CHALLENGES

Peremptories have been around “for nearly as long as juries have existed.”³⁴ Although the practice can be traced back to the Roman Empire, like much of the U.S. jury system,³⁵ the American peremptory tradition was adopted from medieval England.³⁶ The history of peremptories, though interesting, is unnecessary to rehash here.³⁷ For our purposes, it is sufficient to note that nearly all of colonial America permitted criminal defendants the use of peremptory challenges, whereas the use of peremptories by the prosecution was far less settled.³⁸ Thus, while by 1790 most states guaranteed criminal defendants peremptory challenges by statute, it would not be until the mid-to-late 1800s that many states would enact laws granting peremptory challenges to the prosecution.³⁹ Today, besides Arizona, “every state recognizes some form of peremptory challenges for both sides in criminal and civil cases.”⁴⁰

Before Reconstruction, the use of peremptory challenges based on race was not an issue, given that many states legally prohibited racial minorities from serving on juries.⁴¹ However, after the Civil War and with the passage of the Fourteenth Amendment and the Civil Rights Act of 1875, states needed to go back to the drawing board, as they were now prohibited from such open discrimination.⁴² Peremptory challenges thus became an important tool of racial exclusion, working as “an incredibly efficient final racial filter.”⁴³ Given the persistence of racial discrimination in the exercise of peremptory challenges, judges and scholars alike have advocated for their end. This Part catalogues those calls, detailing the race-based and non-race-based reasons offered in support of peremptory elimination.

³⁴ *Batson*, 476 U.S. at 119 (Burger, C.J., dissenting).

³⁵ *Id.* (noting peremptory challenge was in use among Romans in criminal cases for centuries).

³⁶ See Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64. U. CHI. L. REV. 809, 823 (1997) (“Most American colonial courts accepted the English common law practice of giving a criminal defendant some peremptory challenges.”).

³⁷ For a detailed discussion of the history of peremptory challenges, see *id.* at 812-30.

³⁸ See *Swain v. Alabama*, 380 U.S. 202, 214-15 (1965) (noting that by 1790, defendants were entitled to thirty-five peremptories in trials for treason and twenty in trials for other specified felonies, while amount given to Government was unsettled); JON M. VAN DYKE, *JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS* 148-49 (1977).

³⁹ See *Swain*, 380 U.S. at 216-17.

⁴⁰ Hoffman, *supra* note 36, at 827.

⁴¹ *Id.* at 827-28.

⁴² *Id.* at 828-29.

⁴³ *Id.* at 829.

A. *From Strauder to Batson*

Before the ratification of the Fourteenth Amendment, Black people were legally prohibited from serving on juries in much of the United States.⁴⁴ To remedy this, the Civil Rights Act of 1875, designed to enforce the Fourteenth Amendment's promise, specifically forbade states from disqualifying people otherwise eligible for jury service based on race.⁴⁵

A few years later in *Strauder v. West Virginia*,⁴⁶ the Supreme Court confirmed what the law by then should have made clear: People of color "enjoy[] . . . all the civil rights that under the law are enjoyed by white persons."⁴⁷ The Court therefore held that a West Virginia statute limiting jury service to white men violated the Fourteenth Amendment.⁴⁸ In so holding, the Court did not focus on the rights of the people of color who were unable to serve on West Virginia juries. Rather, the Court focused on the rights of Black criminal defendants facing trial, asking, "how can it be maintained that compelling a colored man to submit to a trial . . . by a jury drawn from a panel from which the State has expressly excluded every man of his race . . . is not a denial to him of equal legal protection?"⁴⁹

Over a century would pass before the Court would hold in *Batson v. Kentucky* that prosecutors using peremptory challenges to strike jurors based on race violates the Fourteenth Amendment.⁵⁰ In reaching this decision, the Court developed a new framework for how a criminal defendant can prove discrimination in the use of peremptory challenges.⁵¹ The now well-known *Batson* framework has three parts. First, the defendant must make a *prima facie* showing that the prosecutor exercised their peremptory strikes based on race.⁵²

⁴⁴ See *Race and the Jury: Illegal Discrimination in Jury Selection*, EQUAL JUST. INITIATIVE (2021), <https://eji.org/report/race-and-the-jury/> [<https://perma.cc/56QP-QFWG>] (discussing underrepresentation of Black people and people of color in jury pools and subsequent impact on fairness of legal system).

⁴⁵ See 18 U.S.C. § 243 ("No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as 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 . . .").

⁴⁶ 100 U.S. 303 (1880).

⁴⁷ *Id.* at 306.

⁴⁸ *Id.* at 310.

⁴⁹ *Id.* at 309. As Professor Kenneth Nunn argues, the Court in *Strauder* "realized that allowing West Virginia's statute to stand would not only treat the Black defendant unequally, but would subject him to racial oppression." Kenneth B. Nunn, *Rights Held Hostage: Race, Ideology and the Peremptory Challenge*, 28 HARV. C.R.-C.L. L. REV. 63, 83-84 (1993).

⁵⁰ *Batson v. Kentucky*, 476 U.S. 79, 96-98 (1986) (holding defendant may establish *prima facie* case of purposeful discrimination in selection of petit jury solely on evidence concerning prosecutor's exercise of peremptory challenges at defendant's trial).

⁵¹ The Court therefore overruled in part *Swain v. Alabama*, 380 U.S. 202 (1965), rejecting the impossibly high standard *Swain* set for proving an equal protection claim. See *Batson*, 476 U.S. at 93.

⁵² *Id.* at 96-97.

Second, “[o]nce the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation” for the strikes.⁵³ Third, the judge must decide whether the defendant proved purposeful discrimination, including an assessment of whether the prosecutor’s race-neutral reasons were pretextual.⁵⁴

In reaffirming that the Constitution forbids racial discrimination in jury selection, the *Batson* Court made an important analytical shift: The Court adjusted its focus from the rights of the defendant that animated *Strauder* to the rights of the prospective juror and the community more broadly.⁵⁵ And consistent with this shift, since *Batson*, the Court often frames its jury discrimination precedents around the harms to prospective jurors and by extension, to society, while largely ignoring the rights of defendants and how discrimination in the jury formation process affects *their* fair trial rights.⁵⁶ This change in approach matters—peremptory strikes were originally designed to protect *defendants* from potential jurors’ biases. Now, the Court’s case law is trained at protecting *jurors* from *litigants*’, including defendants’, biases.⁵⁷

Concurring in *Batson*, Justice Thurgood Marshall predicted that despite its best efforts, the Court could never prevent the discriminatory use of peremptory strikes, leading him to call for the end of peremptories.⁵⁸ In his words: “Merely 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,” which was “both common and flagrant.”⁵⁹ Justice Marshall believed that “[t]he inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds

⁵³ *Id.* at 97.

⁵⁴ *Id.* at 98

⁵⁵ *Id.* at 87.

⁵⁶ See, e.g., *Powers v. Ohio*, 499 U.S. 400, 407 (1991) (describing jury service as a central democratic duty and opportunity for civic participation); *Flowers v. Mississippi*, 139 S. Ct. 2228, 2238 (2019) (“That blanket discretion to peremptorily strike prospective jurors for any reason can clash with the dictates of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.”).

⁵⁷ Tania Tetlow, *Why Batson Misses the Point*, 97 IOWA L. REV. 1713, 1718 (2012) [hereinafter Tetlow, *Why Batson*] (“[T]he Court elevates the interests of potential jurors against being stereotyped above the interests of defendants and victims in a fair criminal justice system.”); Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 728 (1992) (arguing that the Court’s post-*Batson* jurisprudence “is better understood as chiefly vindicating the equal protection right of the excluded jurors, a right in which the defendant has a strong strategic interest but no personal constitutional claim”); see also *Flowers*, 139 S. Ct. at 2273 (Thomas, J., dissenting) (“Peremptory strikes are designed to protect against fears of partiality by giving effect to the parties’ intuitions about jurors’ often-unstated biases.”). *Batson* would later be applied to criminal defendants’ use of peremptory strikes. See *Georgia v. McCollum*, 505 U.S. 42, 59 (1992) (extending *Batson*’s holding to criminal defendants).

⁵⁸ *Batson*, 476 U.S. at 102-03 (Marshall, J., concurring).

⁵⁹ *Id.* at 103, 105.

should ideally lead the Court to ban them entirely from the criminal justice system.”⁶⁰

Time has proven Justice Marshall right. Discrimination in the use of peremptories has persisted despite the Court’s efforts (best or otherwise).⁶¹ Since *Batson*, studies from jurisdictions across the country have found racial disparities in how prosecutors exercise peremptory challenges.⁶² Given the stubborn persistence of racial discrimination in jury selection, both judges and scholars have relied on Justice Marshall in support of their arguments to eliminate peremptories.

B. *The Non-Race-Based Calls for Peremptory Elimination*

Since *Batson*, a growing chorus of scholars and judges have championed the elimination of peremptory strikes, and while their reasons vary, many center themes of racial justice. Before turning to the racial justice arguments for eliminating peremptories, it’s worth briefly capturing the three non-race-based arguments commentators have made in favor of elimination: partiality (independent of race), efficiency, and public confidence (again, independent of race).

1. Partiality

Putting race aside, one key reason why certain commentators have called for the elimination of peremptory strikes is an argument that strikes stack the deck.⁶³ This partiality concern was perhaps best articulated by Professor Albert Alschuler shortly after *Batson* came down. In asking whether it was “[b]edtime for *Batson*,” Alschuler was resigned to the fact that “there appears to be no escape from [the] conclusion that Justice Marshall reached in [his] concurring

⁶⁰ *Id.* at 107.

⁶¹ This is true despite Justice Kavanaugh’s claim that “*Batson* ended the widespread practice in which prosecutors could (and often would) routinely strike all [B]lack prospective jurors in cases involving [B]lack defendants.” *Flowers*, 139 S. Ct. at 2242. See Bellin & Semitsu, *supra* note 1, at 1129 (“Unfortunately, there is little evidence that the primary guarantor of race-neutrality in jury selection, the three-part test set forth in *Batson v. Kentucky*, is equal to the critically important task it has been given.”).

⁶² See, e.g., *Miller-El v. Dretke*, 545 U.S. 231, 268-69 (2005) (Breyer, J., concurring); DeCamp & DeCamp, *supra* note 5, at 9-12; SEMEL ET AL., *supra* note 20.

⁶³ Professor Barbara Babcock made this point plainly: “Of course, neither litigant is trying to choose ‘impartial’ jurors, but rather to eliminate those who are sympathetic to the other side, hopefully leaving only those biased *for* him.” Barbara Allen Babcock, *Voir Dire: Preserving “Its Wonderful Power,”* 27 STAN. L. REV. 545, 551 (1975). See also Roger S. Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235, 286 (1968) (“True, both prosecutor and private counsel will seek to remove prospective jurors suspected of hostility to their cause. But their objective will not be simply a jury without bias which will decide exclusively on the evidence—a totally unrealistic goal—but rather the friendliest possible jury.”).

opinion” concerning the need to eliminate peremptory strikes.⁶⁴ Alschuler’s resignation was founded in the fact that prosecutors “use their peremptory challenges, not to secure impartial juries, but to secure juries likely to favor their positions.”⁶⁵ Thus, while parties may rationally use peremptory challenges to advance their goal of winning, such a strategy is not necessarily compatible with the Sixth Amendment’s command of impartiality.⁶⁶

Professor Akhil Amar made a similar argument in support of ending peremptories, except he framed his argument in democratic terms. He explained that peremptory challenges “allow repeat-player regulars—prosecutors and defense attorneys—to manipulate demographics and chisel an unrepresentative panel out of a cross-sectional venire.”⁶⁷ Amar therefore concluded that peremptories should be “eliminated” to ensure juries “represent the people, not the parties.”⁶⁸ Thus, as this flavor of argument goes, parties use peremptory strikes to skew the jury rather than balance it. This reality militates in favor of peremptory elimination.

2. Efficiency

Efficiency issues have also been raised as a reason to eliminate peremptory challenges, and perhaps it’s no surprise that judges have most forcefully articulated this concern. For example, one judge argued that the current peremptory regime “unquestionably require[s] lawyers and judges to expend increasing amounts of time in litigating whether the reason given by the trial lawyer for striking the potential juror was not a ‘pretext for discrimination.’”⁶⁹ As this judge saw it, the peremptory system requires judges to “devote[] more and more of [their] energy to sideshows and less and less to the merits of the

⁶⁴ 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, 169, 199 (1989).

⁶⁵ *Id.* at 203. Alschuler also explains, citing a study by Professors Hans Zeisel and Shari Seidman Diamond, that in attempting to stack the jury, prosecutors’ intuition about who may favor their position is often wrong—“prospective jurors whom government lawyers excluded were as likely to favor conviction as the jurors actually seated.” *Id.*

⁶⁶ *Id.* at 204. Professor Maureen Howard made a similar point when arguing that prosecutors should forgo the use of peremptory challenges. As she explained, “[a] defendant is guaranteed an impartial jury; a prosecutor attempts to thwart this constitutional guarantee when trying to seat a jury biased in her favor.” Maureen A. Howard, *Taking the High Road: Why Prosecutors Should Voluntarily Waive Peremptory Challenges*, 23 GEO. J. LEGAL ETHICS 369, 419 (2010).

⁶⁷ Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1182 (1995).

⁶⁸ *Id.*; see also Anna Roberts, *Asymmetry as Fairness: Reversing a Peremptory Trend*, 92 WASH. U. L. REV. 1503, 1510 (2015) (“The first critique is that to remove citizens from the jury in the absence of the kind of demonstrated bias that would justify a challenge ‘for cause’ is anti-democratic.”).

⁶⁹ Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369, 421 (1992).

case.”⁷⁰ This all led the judge to conclude that “[t]he cost to society in the use of trial time for procedures which accomplish no justiciable purpose . . . is certainly [a] reason to abolish peremptory challenges.”⁷¹

Other judges have said similar things. For example, another trial judge asserted that peremptories should “be banned as an unnecessary waste of time and an obvious corruption of the judicial process.”⁷² A New York Court of Appeals judge concluded that “[t]he proliferation of *Batson*-generated trial court colloquies” militated in favor of ending the peremptory practice.⁷³ A justice on the Supreme Court of Washington maintained that peremptories should be eliminated “to reduce wasteful administrative and litigation costs.”⁷⁴ And an intermediate appellate court judge from Florida stated that the current peremptory system was “extremely difficult to administer and, in [his] view, not worth preserving.”⁷⁵ In short, the cumbersome nature of the *Batson*-infused peremptory process has led many judicial commentators to conclude that peremptory strikes should be abandoned altogether.⁷⁶

3. Public Confidence

A final non-race-based reason commentators give in support of eliminating peremptory strikes is that they undermine public confidence in the jury system.⁷⁷ To this point, one Colorado trial judge lamented that the peremptory system can

⁷⁰ *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 645 (1991) (Scalia, J., dissenting); see also *United States v. Thompson*, 827 F.2d 1254, 1263 (9th Cir. 1987) (Sneed, J., dissenting) (opining that peremptory process is “time-consuming” and “encumbered” and therefore asserting that it might be better to eliminate peremptory challenges as “preferable to the costs elaborate *Batson* litigation will impose”).

⁷¹ Broderick, *supra* note 69. D.C. Superior Court Judge Arthur Burnett also argued peremptories should be abolished to “conserve valuable judicial resources.” Arthur L. Burnett, Sr., *Abolish Peremptory Challenges - Reform Juries to Promote Impartiality*, 20 CRIM. JUST. 26, 34 (2005).

⁷² *Minetos v. City Univ. of N.Y.*, 925 F. Supp. 177, 183 (S.D.N.Y. 1996).

⁷³ *People v. Bolling*, 591 N.E.2d 1136, 1144 (N.Y. 1992) (Bellacosa, J., concurring).

⁷⁴ *State v. Saintcalle*, 309 P.3d 326, 368 (Wash. 2013) (González, J., concurring).

⁷⁵ *Alen v. State*, 596 So. 2d 1083, 1088 (Fla. Dist. Ct. App. 1992) (Hubbart, J., concurring).

⁷⁶ Scholars have also made similar arguments. See, e.g., William T. Pizzi, *Batson v. Kentucky: Curing the Disease but Killing the Patient*, 1987 SUP. CT. REV. 97, 155 (1987) (“If one wanted to understand how the American trial system for criminal cases came to be the most expensive and time-consuming in the world, it would be difficult to find a better starting point than *Batson*.”); William H. Locke, *Only Good at Being Bad: Peremptory Challenges and the Holmesian Bad Guy*, 104 MASS. L. REV. 31, 36 (2023) (“[The] case-by-case method of enforcing the prohibition on discrimination in peremptory challenges has come at the great cost of years of litigation and imprisonment for those defendants wrongly convicted. Moreover, even after such an investment of time and resources, the continued provision of peremptory challenges allows a bad actor to simply change technique, and does not prevent them entirely.”).

⁷⁷ Indeed, Blackstone called peremptories “an arbitrary and capricious species of challenge[s].” 2 WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 346 (Katz ed., 1979).

lead to what he called the “balkanization” of the jury—with “six pro-prosecution jurors” and “six pro-defense jurors.”⁷⁸ And even when a jury is not in fact “balkanized,” the judge worried that peremptory challenges “create the unmistakable impression that balkanization is the goal.”⁷⁹ In this judge’s opinion, the very idea of the jury being balkanized undermines public confidence in the institution because the jurors who are excused will think they were excused precisely because they were unbiased.⁸⁰

Leading expert on the jury Professor Nancy Marder has made a similar point. She argues that “[a]lthough jurors are told that lawyers can exercise peremptories, and that they should not take it personally, it can still be demoralizing for jurors when they are excluded.”⁸¹ This demoralization undermines confidence in the jury system, Marder continues, because “the excluded jurors miss the opportunity to be seen as full citizens,” and when “jurors are excluded from the jury, they feel like second-class citizens.”⁸² Thus, the use of peremptories, according to Marder, can result in a broader distrust and therefore destabilization of the entire jury system.⁸³

C. *The Race-Based Calls for Peremptory Elimination*

While there are non-race-related reasons that commentators give for eliminating peremptories, the cries are usually made in terms of racial justice. As will become clear, some of the race-based reasons build on or are connected to the race-neutral reasons described above. Still, it is worth considering them separately. These race-based reasons for eliminating peremptories take three broad shapes. One, so long as there are peremptories, there will also be race-based discrimination. Two, the fact that peremptories are disparately used to strike people of color from juries leads to unjust outcomes—both in perception and fact—and undermines faith in the jury system. And three, the discriminatory use of peremptory challenges denies full citizenship to Black people and other people of color.

1. Inevitability

Scholars and judges have argued that peremptory challenges should be eliminated because so long as they are around, race-based discrimination is inevitable. There are two interlocking pieces to this inevitability argument: The current standard used to ferret out discrimination is ineffective and subject to manipulation, and, relatedly, it is nearly impossible to detect all racialized uses

⁷⁸ Hoffman, *supra* note 36, at 866.

⁷⁹ *Id.*

⁸⁰ *Id.* at 867.

⁸¹ Nancy S. Marder, *Batson Revisited*, 97 IOWA L. REV. 1585, 1609 (2012) [hereinafter Marder, *Revisited*].

⁸² *Id.*

⁸³ *See id.*

of peremptories, especially given what we now know about implicit and unconscious racial bias.

The first flavor of the inevitability argument begins with the notion that the standard the *Batson* Court set to remediate racial discrimination in the use of peremptory challenges was bound to be ineffectual. Justice Marshall made this very point in *Batson* when he pointed out that a defendant will only be able to prove racial discrimination under the standard the Court set if the discrimination is “flagrant.”⁸⁴ But even after a defendant clears this hurdle, Marshall continued, “trial courts face the difficult burden of assessing prosecutors’ motives” and “[a]ny prosecutor can easily assert facially neutral reasons for striking a juror” that “trial courts are ill equipped to second-guess.”⁸⁵

Scholars and judges consistently maintain that Justice Marshall was right: “*Batson*’s promise of protection against racially discriminatory jury selection has not been realized.”⁸⁶ Some commentators argue that the problem is the *Batson* framework itself. For instance, in looking at step two of the framework—the requirement that the government provide race-neutral reasons for its strikes after the defendant has made a prima facie case—scholars have pointed out that “prosecutors regularly respond to a defendant’s prima facie case of racially motivated jury selection with tepid, almost laughable ‘race-neutral’ reasons, as well as purportedly ‘race-neutral’ reasons that strongly correlate with race,” which courts then accept.⁸⁷ Other commentators have objected that *Batson* requires defendants to prove intentional discrimination, which is generally “difficult to prove,” and here, the difficulty is even more “pronounced” given that prosecutors have the opportunity “to muddy the waters by providing false justifications.”⁸⁸ Then there is the awkwardness of the whole enterprise, as “[n]o judge wants to be in the position of suggesting that a fellow professional whom the judge may have known for years is exercising peremptory challenges based

⁸⁴ *Batson v. Kentucky*, 476 U.S. 79, 105 (1986) (Marshall, J., concurring).

⁸⁵ *Id.* at 105-06.

⁸⁶ Camille A. Nelson, *Batson, O.J., and Snyder: Lessons from an Intersecting Trilogy*, 93 IOWA L. REV. 1687, 1689 (2008) (articulating *Batson*’s failure to live up to its intention of preventing racial discrimination); see also Catherine M. Grosso & Barbara O’Brien, *A Call to Criminal Courts: Record Rules for Batson*, 105 KY. L.J. 651, 652-53 (2017) (describing *Batson*’s shortcomings and empirical evidence demonstrating them).

⁸⁷ Bellin & Semitsu, *supra* note 1, at 1093 (describing prosecutors’ tactics for getting around *Batson*’s intended prevention of racial discrimination).

⁸⁸ Jonathan Abel, *Batson’s Appellate Appeal and Trial Tribulations*, 118 COLUM. L. REV. 713, 720 (2018).

on forbidden racial considerations.”⁸⁹ While the criticisms of *Batson* abound,⁹⁰ one scholar summed it up neatly: “The *Batson* doctrine has been rendered so ineffective a tool against racism . . . that *Batson* and its progeny have proven to be less an obstacle to discrimination than a roadmap to it.”⁹¹

But Justice Marshall also explained that his concerns reached beyond “outright prevarication by prosecutors.”⁹² A “prosecutor’s own conscious or unconscious racism may lead him easily to the conclusion that a prospective [B]lack juror” should be struck, and a “judge’s own conscious or unconscious racism may lead him to accept” that strike.⁹³ Any prosecutor intent on discriminating can easily get away with it under the *Batson* framework—indeed, some prosecutor offices have even created guides on how to discriminate in light of *Batson*.⁹⁴ But even if one could fix the *Batson* framework to more easily catch the *intentional* discriminators, there is still the problem of those who discriminate *unintentionally* or unconsciously.

Expanding on the latter point, scholars and judges contend that there is no way to maintain a peremptory system that adequately checks for implicit bias.⁹⁵ Professor Anthony Page elaborates on this point, stating that it’s a fact that

⁸⁹ *Coombs v. Diguglielmo*, 616 F.3d 255, 264 (3d Cir. 2010); *see also* Gregg Costa, *Fixing Batson: A Judge Comments*, 48 LITIG. 5, 5 (2022) (“Judges don’t like saying that lawyers discriminate. That aversion is unfortunate because it undermines the guarantee of equal protection, but it is understandable. Judges have relationships with lawyers who appear before them. In some jurisdictions, those lawyers are a source of votes and campaign funds. And judges favor collegial courtrooms free of personal criticisms. *Batson*’s failure to eradicate discrimination thus is largely a problem of judicial mentality and courage.”).

⁹⁰ For a helpful summary of the various critiques of the *Batson* framework, *see* Abel, *supra* note 88, at 718–22.

⁹¹ 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, 545; *see also* Hoffman, *supra* note 36, at 836; Nancy S. Marder, *Batson v. Kentucky: Reflections Inspired by a Podcast*, 105 KY. L.J. 621, 624 (2017) [hereinafter Marder, *Reflections*]; Alschuler, *supra* note 64, at 175.

⁹² *Batson v. Kentucky*, 476 U.S. 79, 106 (1986) (Marshall, J., concurring).

⁹³ *Id.* Justice Breyer echoed these points in his *Miller-El* concurrence and reiterated them in *Rice v. Collins*. *See* *Miller-El v. Dretke*, 545 U.S. 231, 266–69 (2005) (Breyer, J., concurring) (“*Batson* asks judges to engage in the awkward, sometime hopeless, task of second-guessing a prosecutor’s instinctive judgment—the underlying basis for which may be invisible even to the prosecutor exercising the challenge.”); *Rice v. Collins*, 546 U.S. 333, 341–42 (2006) (Breyer, J., concurring).

⁹⁴ *See, e.g.*, Bennett L. Gershman, *How Prosecutors Get Rid of Black Jurors*, SLATE (May 26, 2016, 5:51 AM), <https://slate.com/news-and-politics/2016/05/how-prosecutors-get-away-with-striking-potential-black-jurors.html> [<https://perma.cc/97SS-FVEK>] (describing trainings used by prosecutor offices to circumvent *Batson* and remove Black people from juries).

⁹⁵ *See, e.g.*, *State v. Holmes*, 221 A.3d 407, 411 (Conn. 2019) (“[T]he United States Supreme Court’s landmark decision in *Batson v. Kentucky* . . . has been roundly criticized as ineffectual in addressing the discriminatory use of peremptory challenges during jury selection, largely because it fails to address the effect of implicit bias . . .”).

“[p]eople habitually and automatically categorize others by race” and engage in unconscious race-based stereotyping.⁹⁶ Reviewing several psychological studies, Page explains that “[o]nce stereotypes have formed, they affect us even when we are aware of them and reject them.”⁹⁷ As such, an “attorney exercising the peremptory challenge will be unaware of this biased information processing and so will be unaware of her . . . race-based discrimination.”⁹⁸ In other words, “good people often discriminate, and they often discriminate without being aware of it.”⁹⁹ In light of the phenomenon of implicit and unconscious bias, Page and others believe that the “most extreme solution”—eliminating the peremptory—is the “best solution.”¹⁰⁰

2. Fairness & Faith

Scholars have also argued for the elimination of peremptory strikes by asserting that the disparate removal of people of color from juries is injurious to the fairness of trials and undermines faith in the jury system more broadly. When Alschuler argued for eliminating peremptories, he asserted that abandoning peremptories would allow for juries that reflect “the breadth of our communities rather than the group left over when lawyers had expended their peremptory challenges on pet hates.”¹⁰¹

To elaborate on Alschuler’s statement, studies have shown that having juries that reflect “the breadth of our communities” leads to more conscientious decision-making. “[R]acially mixed juries ha[ve] longer, more thorough deliberations than all-White juries.”¹⁰² The argument therefore goes that if we want higher-quality jury deliberations, then peremptories, which lead to more homogenous juries, should be eliminated.¹⁰³ Not only is the deliberative *process* more thorough when a jury is racially diverse, racially diverse jurors have a *substantive* impact, as studies show that the presence of even one Black person

⁹⁶ Antony Page, *Batson’s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 160, 184 (2005).

⁹⁷ *Id.* at 160.

⁹⁸ *Id.*

⁹⁹ *Id.* at 160-61.

¹⁰⁰ *Id.* at 245. Former federal judge Mark Bennett similarly thought that eliminating peremptory challenges was the only way “to eliminate lawyers’ tendency to strike jurors due to stereotype and bias.” 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, 167 (2010).

¹⁰¹ Alschuler, *supra* note 64, at 232.

¹⁰² Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1030 (2003).

¹⁰³ See, e.g., Morrison, *supra* note 25, at 40 (discussing empirical evidence of racially-mixed juries providing more accurate and in-depth deliberations).

on a jury can affect the outcome in any one case.¹⁰⁴ Given this data, it is argued that the elimination of peremptory strikes has the upshot of enhancing the process *and* substance of jury deliberations by clearing the way for more diverse juries which thus leads to fairer outcomes.

There is also the perception of fairness point that commentators raise. For instance, Marder argues that “[i]f peremptories were eliminated, then juries would be more diverse. One benefit is that juries would then ‘look more like America’ and help the public have faith in the jury as an institution.”¹⁰⁵ Given that the jury serves a “populist function,” racially diverse juries will lead to more “community acceptance of verdicts.”¹⁰⁶ When everyone can look to juries and see themselves reflected in those decisional bodies, then that is a visual demonstration of the fact that the institution is open to all, which in turn inspires confidence in its ability to operate fairly.¹⁰⁷

3. Citizenship

A final racial justice reason to eliminate peremptories that commentators raise is that the disparate removal of Black people and other people of color from juries deprives them of an important badge of citizenship. In its post-*Batson* jurisprudence, in shifting its focus from the rights of defendants to the rights of the jurors, the Court has consistently declared that, “with the exception of voting,

¹⁰⁴ Shamena Anwar, Patrick Bayer & Randi Hjalmarsson, *The Impact of Jury Race in Criminal Trials* 1-2 (Nat’l Bureau of Econ. Rsch., Working Paper No. 16366, 2012) (“The evidence regarding the impact of the jury pool on conviction rates is straightforward and striking: the presence of even one or two [B]lacks in the jury pool results in significantly *higher* conviction rates for white defendants and *lower* conviction rates for [B]lack defendants.”); Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 5 (1990) (“Historical evidence and recent sociological data show that all-white juries are unable to be impartial in cases involving the rights of African-American defendants or crime victims.”); Sheri Lynn Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21, 71 (1993) (“[C]onviction rate studies show a decrease in conviction rates following changes in jury selection procedures that resulted in the inclusion of more [B]lack and Latino jurors.”).

¹⁰⁵ Marder, *Reflections*, *supra* note 91, at 646.

¹⁰⁶ Nancy S. Marder, *Juries, Justice & Multiculturalism*, 75 S. CAL. L. REV. 659, 662 (2002) [hereinafter Marder, *Multiculturalism*].

¹⁰⁷ See Marder, *Reflections*, *supra* note 91, at 623-25 (“Parties, excluded jurors, and communities . . . should be able to have faith in the jury and faith in the fairness of the trial. Faith in the jury will contribute to faith in America.”); see also Stephen B. Bright, Opinion, *Our Jury System is Racially Biased. But It Doesn’t Have to Be That Way*, WASH. POST (Mar. 27, 2019), <https://www.washingtonpost.com/opinions/2019/03/27/our-jury-system-is-racially-biased-it-doesnt-have-be-that-way/> (“But people in communities who see members of their race being excluded from juries in case after case recognize it as discrimination even if the courts do not. They lose faith in the credibility and legitimacy of the courts.”); State v. Saintcalte, 309 P.3d 326, 368 (Wash. 2013) (González, J., concurring) (arguing for peremptory elimination because racial minorities “can be emotionally harmed, and the appearance of fairness is considerably eroded”).

for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.”¹⁰⁸ Thus, when Black people and other people of color are routinely denied the right to jury service through the discriminatory use of peremptory strikes, they are also denied the right to equal citizenship. For this reason, Professor Douglas Colbert argues that the “peremptory striking of prospective [B]lack jurors is a badge and incident of slavery because it perpetuates [B]lack inferiority.”¹⁰⁹ As Colbert continues: “When the peremptory challenge is used to systematically strike [B]lack citizens from the jury box, the message that [B]lack citizenship is inferior to white citizenship is resoundingly clear.”¹¹⁰ Scholars and judges have raised this citizenship point when promoting the elimination of peremptory strikes.¹¹¹

Derived from a storied English tradition, peremptory challenges have always been a feature of the U.S. jury system.¹¹² Now, with uncontroverted evidence that the strikes have persistently been used to discriminate against Black people and other people of color, the calls to end the peremptory practice are reaching a crescendo. While those calls were at one time mostly relegated to law review articles and judicial musings, recently, the calls have featured more prominently in policy debates. The next Part explores how the argument to eliminate peremptory strikes plays out in the policy arena, detailing how the policy arguments often center race and racial justice.

¹⁰⁸ *Powers v. Ohio*, 499 U.S. 400, 407 (1991); *see also* *Flowers v. Mississippi*, 139 S. Ct. 2228, 2238 (2019).

¹⁰⁹ Colbert, *supra* note 104, at 16.

¹¹⁰ *Id.* Colbert therefore argues that, under the Thirteenth Amendment, “two categories of peremptory challenges should be abolished: the prosecutor’s challenge in criminal cases against a [B]lack defendant (‘defendant-centered’) and the defense challenge in any case involving a white defendant and a [B]lack crime victim or civil rights plaintiff (‘victim-determinative’).” *Id.* at 8.

¹¹¹ *See, e.g.,* Marder, *Revisited*, *supra* note 81, at 1609 (describing jury duty as a badge of citizenship, and exclusion of Black jurors through peremptory challenges as denial of opportunity to be seen as full citizens); Broderick, *supra* note 69, at 422-23 (describing jury duty as “most important responsibility of citizenship”); Karen M. Bray, Comment, *Reaching the Final Chapter in the Story of Peremptory Challenges*, 40 UCLA L. REV. 517, 565 (1992) (stating excluding jurors with peremptory strikes suggests those jurors are incapable of fulfilling citizenship duties).

¹¹² Savanna R. Leak, Comment, *Peremptory Challenges: Preserving an Unequal Allocation and the Potential Promise of Progressive Prosecution*, 111 J. CRIM. L. & CRIMINOLOGY 273, 282-85 (2021) (dating peremptory challenges back to fourteenth century as part of England’s trial system).

II. THE RACIALIZED POLICY DEBATES SURROUNDING PEREMPTORY ELIMINATION

Amid 2020's summer of racial reckoning,¹¹³ state court systems across the country pledged introspection, promising to tackle the persistent problem of racial bias in the criminal legal system.¹¹⁴ Policymakers, too, were prompted to act, commissioning taskforces and introducing legislation designed to reduce the racial inequities in the administration of justice. In thinking about concrete steps forward, many policymakers (including court systems that have rulemaking authority)¹¹⁵ believed jury reform to be a logical place to start given the well-documented issues of racial bias.¹¹⁶ And while some states, in pursuing this racial justice charge, moved to rework the *Batson* standard to make it more effective at addressing racial discrimination in the use of peremptory challenges,¹¹⁷ other states considered (or are considering) eliminating peremptory challenges altogether. This Part surveys different policy proposals aimed at eliminating peremptory strikes and the racial justice arguments made in their support, with each proposal taking different forms. The Part first examines legislation proposed in New York. It then examines taskforce reports from California and Oregon. And it finally looks at the judge-initiated petition in Arizona. This Part demonstrates that as of late, there has been real movement on the policy front to translate the academic calls for peremptory elimination into concrete action, all in the name of racial justice.

¹¹³ Ailsa Chang, Rachel Martin & Eric Marrapodi, *Summer of Racial Reckoning*, NPR (Aug. 16, 2020, 9:00 AM), <https://www.npr.org/2020/08/16/902179773/summer-of-racial-reckoning-the-match-lit> [<https://perma.cc/QY35-A4Q9>] (describing race-conscious social movement following killings of George Floyd, Breonna Taylor, and Ahmaud Arbery).

¹¹⁴ See, e.g., Daniel S. Harawa, *The False Promise of Peña-Rodríguez*, 109 CALIF. L. REV. 2121, 2159 n.249 (2021) [hereinafter Harawa, *False Promise*] (urging reform in state courts to address racial bias); Vivian E. Hamilton, *Reform, Retrench, Repeat: The Campaign Against Critical Race Theory, Through the Lens of Critical Race Theory*, 28 WM. & MARY J. RACE, GENDER & SOC. JUST. 61, 66-70 (2021) (describing measures adopted by state and local governments, police agencies, and businesses to address racial inequality following police killing of George Floyd).

¹¹⁵ See generally James R. Wolf, *Inherent Rulemaking Authority of an Independent Judiciary*, 56 U. MIAMI L. REV. 507, 512 (2002) ("Since at least 1945, the overwhelming trend has been to grant specific constitutional authority for rulemaking to the judiciary.").

¹¹⁶ See, e.g., *infra* Part III.

¹¹⁷ UC Berkeley School of Law's Death Penalty Clinic has a helpful repository tracking *Batson* reform by state. See *Batson Reform: State by State*, BERKELEY L. DEATH PENALTY CLINIC, <https://www.law.berkeley.edu/experiential/clinics/death-penalty-clinic/projects-and-cases/whitewashing-the-jury-box-how-california-perpetuates-the-discriminatory-exclusion-of-black-and-latinx-jurors/batson-reform-state-by-state/> [<https://perma.cc/6HQR-CBEL>] (last visited Oct. 7, 2025).

A. *New York Legislation*

As of writing, twice since 2020, Democratic lawmakers have introduced legislation in New York attempting to end the use of peremptory challenges in criminal trials.

In the 2021-2022 legislative session, three Democratic senators introduced a bill to eliminate peremptory challenges and explicitly cited racial discrimination as the basis for the legislation.¹¹⁸ In justifying the legislation, the senators raised the inevitability of discrimination concern: “Theoretical and empirical evidence across disciplines such as psychology, sociology, criminology, and law agree, having concluded that peremptory challenges, by their very nature, are fertile ground for the influence of bias on jury selection.”¹¹⁹ They raised the problem of both explicit discrimination and implicit racial bias.¹²⁰ They asserted fairness and faith concerns: “[D]iverse jury compositions reduce bias and encourage more thorough jury deliberations,” whereas “homogenous juries that are not representative of their communities tend to elicit skepticism rather than confidence in the system.”¹²¹ And they surfaced citizenship concerns, explaining that the discriminatory use of peremptory challenges “further disenfranchises those who have historically been disproportionately harmed by the criminal justice system, namely young [B]lack men.”¹²² The senators therefore quoted Justice Marshall to conclude that “only by banning peremptories entirely can such discrimination be ended.”¹²³

In a committee hearing on the bill, a Republican senator who happened to also be a former district attorney spoke out in opposition. In his view, the bill would have “terrible unintended consequences,” in that it would “adversely affect” criminal defendants.¹²⁴ This senator thought it was unwise to eliminate peremptories because peremptory challenges allow attorneys to remove jurors who claim to be fair, even though their life experiences would suggest otherwise.¹²⁵ Acknowledging the discrimination concerns motivating the bill, the senator thought a better approach would be to tweak the *Batson* standard so that it could better redress any racial discrimination.¹²⁶

¹¹⁸ S.B. 6066, 2021 Leg., Reg. Sess. (N.Y. 2021).

¹¹⁹ Sen. Andrew Gounardes, *Senate Bill 6066: Sponsor Memo*, N.Y. STATE SENATE, <https://www.nysenate.gov/legislation/bills/2021/S6066> (last visited Oct. 7, 2025).

¹²⁰ *Id.* (stating that “the ability to strike without cause opens the door for that decision to be based on conscious or unconscious bias”).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Codes Meeting*, N.Y. STATE SENATE, at 29:48 (May 19, 2021), <https://www.nysenate.gov/calendar/meetings/codes/may-19-2021/codes-meeting> [<https://perma.cc/SFZ8-Z2LZ>].

¹²⁵ *Id.* at 30:28 (arguing for attorneys to have opportunity to use discretion in jury selection).

¹²⁶ *Id.* at 33:49 (proposing alternative to bill that would still meet goal of reducing racial discrimination).

The committee vote on the legislation broke down largely along party lines. Five Democratic senators voted for the legislation.¹²⁷ Three Republican senators voted against the legislation.¹²⁸ And five senators—four Democratic and one Republican—voted “aye with reservations,” essentially avoiding taking a position on the bill.¹²⁹

The 2021 bill ultimately stalled in committee.¹³⁰ As a result, two of the same three Democratic senators who sponsored the failed 2021 legislation introduced identical legislation in the 2023-2024 legislative session.¹³¹ And again, the senators provided the same racial justice justifications for the bill.¹³² The legislation similarly stalled in committee.¹³³

B. *California and Oregon Committee Reports*

1. California

Preceding the summer of racial reckoning, in January 2020, the Supreme Court of California announced the formation of the Jury Selection Work Group (“Work Group”).¹³⁴ The Work Group’s charge was to evaluate discrimination in the jury process, which included a review of the current peremptory challenge regime.¹³⁵ Because of the COVID-19 pandemic, the group did not actually convene until July 2020,¹³⁶ smack-dab in the middle of when racial justice

¹²⁷ *Senate Bill 6066: May 19, 2021 Codes Committee Vote*, N.Y. STATE SENATE, <https://www.nysenate.gov/legislation/bills/2021/S6066> (last visited Oct. 7, 2025).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *See id.*

¹³¹ S.B. 282, 2023 Leg., Reg. Sess. (N.Y. 2023).

¹³² Sen. Andrew Gounardes, *Senate Bill S282: Sponsor Memo*, N.Y. STATE SENATE, <https://www.nysenate.gov/legislation/bills/2023/S282> (last visited Oct. 7, 2025) (“History, science, and data have all clearly shown that peremptory challenges invite bias and discrimination to further permeate the criminal justice system.”); *see also supra* note 119 (using language identical to 2023 bill).

¹³³ *Senate Bill S282: Last Bill Status*, N.Y. STATE SENATE, <https://www.nysenate.gov/legislation/bills/2023/S282> (last visited Oct. 7, 2025). Additionally, the same senator who was the primary sponsor for the bill to eliminate peremptory strikes also introduced legislation to fortify the *Batson* standard. S.B. 5574, 2023 Leg., Reg. Sess. (N.Y. 2023). That bill seems to be moving more quickly through the legislative process. *See Senate Bill S5574*, N.Y. STATE SENATE, <https://www.nysenate.gov/legislation/bills/2023/S5574> [<https://perma.cc/6WJA-KG6T>] (last visited Oct. 7, 2025) (noting that bill has passed senate).

¹³⁴ KATHLEEN E. O’LEARY ET AL., JURY SELECTION WORK GROUP: FINAL REPORT TO THE SUPREME COURT OF CALIFORNIA 1 (2022), [hereinafter JURY SELECTION WORK GROUP] (describing Work Group’s foundational mission to take measures against racial discrimination in jury selection, as such discrimination harms defendants, jurors, and entire communities “upon whose confidence the fairness of our justice system depends”).

¹³⁵ *Id.*

¹³⁶ *Id.* at 2.

protests were roiling the world.¹³⁷ Before the Work Group had a chance to get fully off the ground, the California legislature passed a law that modified the *Batson* framework to try to make it more effective at redressing discrimination.¹³⁸

As part of its charge, the Work Group considered whether California should eliminate peremptory challenges altogether. The Work Group's report acknowledged that "[j]udges across the country have increasingly suggested the elimination of peremptory challenges as the remedy for bias in jury selection," as had a "significant" number of legal scholars.¹³⁹ The report also noted that other states have sought to eliminate peremptory strikes, highlighting the New York legislation just discussed, and the Arizona Supreme Court rule that will be discussed below.¹⁴⁰ The committee made clear there was no consensus on the issue, however, noting that task forces out of Connecticut and Washington recommended against eliminating peremptories.¹⁴¹

Ultimately, the Work Group punted, stating that it was "highlight[ing] this important issue" but not "propos[ing] any changes at this time."¹⁴² The Work Group thought it best to defer "further discussion of this issue to allow for time

¹³⁷ See, e.g., Leah Asmelash, *How Black Lives Matter Went from a Hashtag to a Global Rallying Cry*, CNN (July 26, 2020, 2:00 PM), <https://www.cnn.com/2020/07/26/us/black-lives-matter-explainer-trnd> [<https://perma.cc/5UST-3BKK>] (describing racial justice movement in July 2020 and how groups like Black Lives Matter worked across state lines to organize protests with global effect).

¹³⁸ JURY SELECTION WORK GROUP, *supra* note 134, at 2 ("[B]y the time the work group began to meet regularly meet [sic], groundbreaking legislation to modify the existing *Batson/Wheeler* framework had already taken shape and addressed some of the key questions outlined in the court's charge to the work group."). For a more in-depth discussion of states' attempts to beef up *Batson*, see *infra* Section III.C.

¹³⁹ See JURY SELECTION WORK GROUP, *supra* note 134, at 26.

¹⁴⁰ *Id.* at 27, n.84.

¹⁴¹ *Id.* A task force convened by the Chief Justice of the Connecticut Supreme Court and a work group formed by the Washington Supreme Court considered and recommended against eliminating peremptory challenges. The Connecticut task force provided four reasons that it found militate against getting rid of peremptory challenges: (1) it would require a constitutional amendment; (2) peremptories serve important goals; (3) eliminating peremptories would face backlash from the bench and bar; and (4) it's unclear whether eliminating peremptories would reduce discrimination. REPORT OF THE JURY SELECTION TASK FORCE TO CHIEF JUSTICE RICHARD A. ROBINSON 30-31 (2020), [https://jud.ct.gov/Committees/jury_taskforce/Report Jury Selection Task Force.pdf](https://jud.ct.gov/Committees/jury_taskforce/Report%20Jury%20Selection%20Task%20Force.pdf) [<https://perma.cc/Y4HK-2EZZ>]. The Washington work group, which was formed before the summer of 2020, found that eliminating peremptories was "not the preferred way to address juror discrimination" as peremptories "are still useful as long as they are not based on the race or ethnicity of potential jurors," and "the removal of peremptory challenges would force appellate courts to examine the challenges for cause, which could lead to an inconsistent or possibly unwanted outcome." PROPOSED NEW GR 37—JURY SELECTION WORKGROUP FINAL REPORT 3 (2018), <https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/OrderNo25700-A-1221Workgroup.pdf> [<https://perma.cc/Q5LW-BXEF>].

¹⁴² JURY SELECTION WORK GROUP, *supra* note 134, at 28.

for the impact of [the legislation amending the *Batson* framework] to be realized.”¹⁴³ Thus, if the new *Batson*-reform legislation does not wield any meaningful change, presumably the elimination of peremptory strikes will be back on the table in California.¹⁴⁴

2. Oregon

The Racial Justice Task Force formed in Oregon (“Task Force”) was far more bullish over what should be done about peremptory challenges. In the summer of 2020, Willamette University College of Law announced the launch of the Task Force.¹⁴⁵ “The Committee on Bias in the Oregon Justice System . . . charged the Task Force with proposing a rule that would reduce racial discrimination in Oregon’s criminal jury selection process.”¹⁴⁶ The Task Force’s first recommendation: Eliminate the peremptory challenge.¹⁴⁷

The Task Force believed that it was necessary to eliminate peremptory challenges because otherwise, “racial discrimination in juror selection will continue.”¹⁴⁸ The group thought it insufficient to fortify the existing *Batson* framework given that Oregon is “a state with deep roots in White supremacy,”¹⁴⁹ the history of which manifests in the Oregon jury system today.¹⁵⁰ The Task Force report was particularly motivated by concerns of implicit bias, with it deciding that even a strengthened *Batson* framework could not adequately address that issue.¹⁵¹ Situating itself alongside judges and scholars who have

¹⁴³ *Id.*

¹⁴⁴ Before the Work Group even released its report, California State Senator Tom Umberg, who chairs the Senate Standing Committee on the Judiciary, introduced a bill to eliminate peremptory challenges in criminal trials under the belief that amending the *Batson* framework was insufficient. See Cheryl Miller, *Key Lawmaker Proposes Eliminating Peremptory Challenges in Criminal Cases*, RECORDER (Mar. 11, 2021), <https://www.law.com/therecorder/2021/03/11/key-lawmaker-proposes-eliminating-peremptory-challenges-in-criminal-cases/> [https://perma.cc/AT37-XSY7]. The legislation was widely opposed by civil rights and public defense groups. See *Bill Analysis*, S.B. 212, CAL. LEGIS. INFO. (2021), <https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml> [https://perma.cc/YJK4-QXUD]. The bill died in committee. *Status*, S.B. 212, CAL. LEGIS. INFO. (2021), <https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml> [https://perma.cc/8J38-C7N4].

¹⁴⁵ See Sarah Bello, *Exploring New Paths to Attorney Licensure*, WILLAMETTE UNIV., (Dec. 9, 2022), <https://news.willamette.edu/library/2022/12/attorney-licensure-story.html> [https://perma.cc/5BWJ-Q3L2].

¹⁴⁶ Willamette Univ. Coll. L. Racial Justice Task Force, *Remedying Batson’s Failure to Address Unconscious Juror Bias in Oregon*, 57 WILLAMETTE L. REV. 85, 87 (2021).

¹⁴⁷ *Id.* at 117.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 117-19.

¹⁵¹ *Id.* at 117-18 (concluding a resolution short of elimination would perpetuate racial discrimination “even if the *Batson* standard is modified to reduce the presence of implicit bias in jury selection”).

called for the elimination of peremptory challenges,¹⁵² the Task Force concluded:

For Oregon to move forward from its racist origins and continuing perpetration of racial injustice, it needs to take a hard line against the persistent racial discrimination enabled by the use of peremptory challenges. . . . Eliminating the peremptory challenge does more than simply eliminate a tool that has been wielded against historically disadvantaged groups—it sends a powerful message of inclusion and progress in the justice system.¹⁵³

The Oregon Council on Court Procedures, which promulgates court rules, considered the Task Force’s report when contemplating reforms to Oregon’s jury selection process,¹⁵⁴ and noted that it received “strong recommendations to eliminate peremptory challenges entirely.”¹⁵⁵ Ultimately, the council proposed strengthening jury selection procedures to better “promote diversity on jury panels and provide protection against bias” instead of eliminating peremptories altogether.¹⁵⁶

C. *Arizona Judge-Initiated Petition*

As of writing, one state has eliminated peremptory strikes: Arizona. But the road to ending peremptories in the Grand Canyon State was slightly peculiar.¹⁵⁷ As was the case with many states, a working group was established to study the efficacy of *Batson*.¹⁵⁸ This working group, formed by the Arizona Bar Association, recommended strengthening the *Batson* inquiry such that it would be better at capturing racial discrimination.¹⁵⁹ Two Arizona Court of Appeals judges did not believe the recommendation went far enough. Using an Arizona Supreme Court rule that allows “any interested person or entity” to petition the Arizona Supreme Court to amend its rules of procedure,¹⁶⁰ Judges Peter Swann

¹⁵² *Id.* at 117.

¹⁵³ *Id.* at 119. Alternatively, the Task Force proposed adopting a rule strengthening the *Batson* framework. *Id.* at 120-22.

¹⁵⁴ Meeting Minutes, Or. Sup. Ct. Council on Inclusion & Fairness (Nov. 19, 2021) (on file with the Oregon Supreme Court).

¹⁵⁵ OR. COUNCIL ON CT. PROCS., RECOMMENDATION REGARDING ORCP 57, at 5 (2021).

¹⁵⁶ *Id.*

¹⁵⁷ For a fascinating exploration of the lead up to Arizona eliminating peremptories, see Frampton & Osowski, *supra* note 8, at 35-49.

¹⁵⁸ *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 (Ariz. 2021)*, 135 HARV. L. REV. 2243, 2244 (2022) [hereinafter *Ariz. Rule Amendment Order*].

¹⁵⁹ *Id.*

¹⁶⁰ ARIZ. R. SUP. CT. 28(a)(1) (“Any person may petition the Arizona Supreme Court to adopt, amend, or abrogate a court rule that has statewide application.”).

and Paul McMurdie urged the court to abandon the practice of peremptories altogether.¹⁶¹

In arguing that the Arizona Supreme Court should consider amending the rules of procedure to eliminate peremptory challenges, the judges noted that the “current system is not only ineffective at combatting the use of race in jury selection—it is also inefficient.”¹⁶² According to these judges, “[d]ecades of litigation over *Batson* challenges have consumed countless hours of attorney time and judicial resources. Yet in Arizona, only five cases have been reversed over a *Batson* challenge.”¹⁶³ The judges asserted that the use of peremptories frustrates the constitutional requirement of juries being comprised of a representative cross-section of the community, explaining that Black, Native American, and Hispanic jurors are vastly underrepresented on Arizona juries.¹⁶⁴ To the judges, a rule fortifying *Batson* would not be “a death blow to the racially inappropriate use of peremptory strikes.”¹⁶⁵ They therefore proposed a “neutral rule” abandoning peremptory challenges altogether, claiming that the rule would better build “public trust and confidence,” and “eliminate[] bias in all directions.”¹⁶⁶

The Arizona Bar’s opposition to this proposal “was nearly unanimous,”¹⁶⁷ with both prosecutors and defense lawyers writing in to oppose the proposal. The Maricopa County Attorney’s Office, the largest prosecutor’s office in the

¹⁶¹ Petition to Amend Rules 18.4 and 18.5 of the Arizona Rules of Criminal Procedure and Rule 47(e) of the Arizona Rules of Civil Procedure at 1-4, No. R-21-0020 (Ariz. Jan. 11, 2021) (advocating for elimination of peremptories as “constitutional,” “forward-thinking,” and means to “substantially streamline the jury system itself”).

¹⁶² *Id.* at 11.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 12 (citing data that showed Arizona’s white juror seats “varied only 3% from their representation in the population,” while “[B]lack jurors were underrepresented by 16%, Native American jurors were underrepresented by 51% and Hispanic jurors were underrepresented by 21%”).

¹⁶⁵ *Id.* at 15.

¹⁶⁶ *Id.* at 13 (capitalization omitted). “Several trial court judges voiced support for Judges Swann and McMurdie’s proposal.” *Ariz. Rule Amendment Order*, *supra* note 158, at 2245; *see, e.g.*, Comment of the Comm. on Super. Ct. at 1-4, No. R-21-0020 (Ariz. Apr. 12, 2021) (declaring majority of committee members believed importance of ensuring juries fairly reflected their communities outweighed concerns regarding increased litigation and loss of valuable litigation tool for attorneys); Comment by John Napper, Presiding Judge for Yavapai Cnty. Superior Ct., No. R-21-0020 (Ariz. Apr. 15, 2021) (suggesting “additional pragmatic and significant benefits created by eliminating the use of peremptory strikes” such as reduced size of potential jury pool and promotion of “happier jurors”).

¹⁶⁷ *Ariz. Rule Amendment Order*, *supra* note 158, at 2245; *see, e.g.*, Comment of the Ariz. Att’y Gen.’s Off., No. R-21-0020 (Ariz. May 3, 2021) (“Wholesale removing preemptory [sic] challenges without corresponding changes to the jury selection procedure will not ensure fair and impartial juries.”); Comment of the State Bar of Ariz., No. R-21-0020 (Ariz. Apr. 30, 2021) (arguing elimination of peremptories would lengthen voir dire, operate dissimilarly to other peremptory-free court systems due to disparate power and discretion of juries across borders, and deprive capital defendants of essential tool).

state,¹⁶⁸ warned that eliminating peremptories will “ultimately lead to trials that are less fair for all sides.”¹⁶⁹ As that office saw it, “[p]eremptory challenges allow a litigant to remove a prospective juror who has revealed deeply held biases even if the juror has said the magic words that they think they can be fair and impartial.”¹⁷⁰ The Arizona Prosecuting Attorneys’ Advisory Council opposed ending peremptories for much the same reason, explaining that “[p]arties typically use peremptory strikes on jurors who have given answers during the jury selection process that suggest that they would potentially favor the opposing side, do not respect the gravity of the process, or are just not interested in being jurors.”¹⁷¹

As for the defense bar, the National Lawyers Guild (“NLG”) opposed the proposal by declaring “it will do nothing to eliminate explicit and implicit bias from the jury selection process.”¹⁷² In support of its position, the NLG argued that eliminating peremptories shifts the responsibility to jurors to openly recognize and articulate their bias, and then shifts the power to judges to strike those jurors for cause.¹⁷³ As the NLG explained, history shows that jurors are not good at recognizing their own biases and judges have proven incompetent in striking jurors for bias.¹⁷⁴

The Arizona defense bar was not unanimous in its total opposition to the proposal, however. The Arizona Attorneys for Criminal Justice (“AACJ”), the state affiliate of the National Association of Criminal Defense Lawyers, took a somewhat different position.¹⁷⁵ While this group preferred the proposal seeking to reform *Batson*, it viewed the elimination of peremptory challenges as preferable to the “status quo.”¹⁷⁶ Said the AACJ, while getting rid of peremptories “may not be ideal, and it does look a lot like ‘throwing the baby out with the bathwater,’ . . . as [Judges Swann and McMurdie] aptly state, it would definitively solve the problem of discriminatory strikes.”¹⁷⁷ The AACJ further explained that if “given the choice between the current practice of

¹⁶⁸ *About MCAO*, Maricopa Cnty. Att’y’s Off., <https://maricopacountyattorney.org/277/About> [<https://perma.cc/3966-F96G>] (last visited Oct. 7, 2025) (“The Maricopa County Attorney’s Office (MCAO) is the third largest public prosecutorial agency in the nation, serving nearly four million residents in the fourth largest county in the U.S.”).

¹⁶⁹ Maricopa Cnty. Att’y’s Comment in Opposition at 1, No. R-21-0020 (Ariz. May 3, 2021).

¹⁷⁰ *Id.* at 4.

¹⁷¹ Comment of the Ariz. Prosecuting Att’y’s Advisory Council at 1-2, No. R-21-0020, 1-2 (Ariz. Apr. 30 2021).

¹⁷² See Comment of the Cent. Ariz. Nat’l Laws. Guild Opposing the Abolition of Peremptory Strikes at 1, No. R-21-0020 (Ariz. Apr. 30, 2021) [hereinafter NLG Comment].

¹⁷³ See *id.* at 6-7.

¹⁷⁴ See *id.* at 6-9.

¹⁷⁵ See generally Comment of Ariz. Att’ys for Crim. Just., No. R-21-0020 (Ariz. May 3, 2021).

¹⁷⁶ *Id.* at 4.

¹⁷⁷ *Id.* at 2.

prosecutors striking venirepersons based on race or gender and an alternative where no strikes are permitted, it seems that the latter may be preferable.”¹⁷⁸

Mere months after receiving the petition, the Arizona Supreme Court entered “a simple order that contained no reasoning” that eliminated peremptory challenges in both civil and criminal trials.¹⁷⁹ With no fanfare, Arizona became the first state to take the massive step of peremptory elimination for which Justice Marshall advocated decades ago.

Legal scholars applauded Arizona’s ending of peremptories. Professor Nancy Marder praised Arizona’s decision for its “simplicity and the potential for effectiveness,” labeling it a “blueprint” that states could follow.¹⁸⁰ Professor Jack Harrison similarly urged states to use Arizona “as a template.”¹⁸¹ Professor Robert Chang was “shocked but happy the [Arizona Supreme Court] went for abolishment.”¹⁸² And Professors Colleen Graffy, Harry Caldwell, and Gautam Sood called the Arizona model “the best path to follow if our goal is to end discrimination in the jury selection process rather than simply hide it.”¹⁸³ The arguments long made in law reviews were finally coming to fruition.

When states debate whether to eliminate peremptory strikes or take other measures to reform jury selection, they recognize that the jury system is an intransigent site of racial discrimination. Thus, those championing eliminating peremptories, like Justice Marshall before them, do so out of a belief that it is the only way to prevent racial discrimination. While legal scholars and commentators more broadly have championed eliminating peremptories as a racial justice win, the next Part cautions: not so fast. The racial justice implications of peremptory elimination are much more complicated than the literature and policy debates often make it seem.

¹⁷⁸ *Id.* at 2-3. AACJ did also propose other solutions, such as getting rid of strikes for prosecutors or suspending strikes for a short period of time to collect data. *Id.* at 3.

¹⁷⁹ *Ariz. Rule Amendment Order*, *supra* note 158, at 2246; *see* Order Amending Rules 18.4 and 18.5 of the Ariz. Rules of Crim. Proc. and Rule 47(e) of the Ariz. Rules of Civ. Proc. at 3-6, No. R-21-0020 (Ariz. 2021).

¹⁸⁰ Marder, *Blueprint for Change*, *supra* note 8, at 103.

¹⁸¹ *See* Jack B. Harrison, *Is A Green Tie Enough? - Truth and Lies in the Courtroom*, 75 OKLA. L. REV. 687, 695 (2023).

¹⁸² Hassan Kanu, *Arizona Breaks New Ground in Nixing Peremptory Challenges*, REUTERS (Sept. 1, 2021, 2:52 PM), <https://www.reuters.com/legal/legalindustry/arizona-breaks-new-ground-nixing-peremptory-challenges-2021-09-01/> [<https://perma.cc/3SH9-GJRQ>]; *see also* Locke, *supra* note 76, at 41 (urging states to follow Arizona’s lead and abolish peremptory challenges); Millhisser, *supra* note 10 (expressing optimism that Arizona’s move to eliminate peremptory challenges will “lead to juries in that state being more racially diverse, and thus less likely to treat racial minorities more harshly”).

¹⁸³ Colleen P. Graffy, Harry M. Caldwell & Gautam K. Sood, *First Twelve in the Box: Implicit Bias Driving the Peremptory Challenge to the Point of Extinction*, 102 OR. L. REV. 355, 403 (2024).

III. THE COMPLICATED RACIAL JUSTICE PICTURE OF PEREMPTORY ELIMINATION

The debate over peremptory elimination at one point seemed just an academic exercise. Now, there is real movement on the policy front.¹⁸⁴ And in light of Arizona eliminating peremptory challenges and other states considering the same, scholars still claim peremptory elimination as a racial justice measure. This Part urges caution in that assessment. As this Part explains, those who champion ending peremptories as a racial justice measure often fail to consider the countervailing racial justice interests that militate in favor of *retaining* peremptories. Focusing first on prospective jurors, this Part explains that ending peremptories as a fix for discrimination would likely be ineffectual given other mechanisms in the jury formation process that allow racial bias to flourish. Then, turning to defendants, it explains that eliminating peremptories may only perpetuate racial *injustice*, as it may allow for more biased decision-making and will disempower defendants, who are disproportionately people of color. As such, this Part looks to other solutions, such as amending the *Batson* standard and asymmetric peremptory elimination, that may better address competing racial justice interests. On balance, eliminating peremptory challenges may better serve racial justice efforts than retaining them would, but before one can make that call, it is important to interrogate the *full* set of racial justice interests at play.

A. *Against Elimination: Racial Justice & Jurors*

In *Georgia v. McCollum*,¹⁸⁵ Justice Thomas warned “that [B]lack criminal defendants will rue the day that this Court ventured down this road [of *Batson*] that inexorably will lead to the elimination of peremptory strikes.”¹⁸⁶ Thomas’s opinion was grounded in the reality that “the racial composition of a jury may affect the outcome of a criminal case.”¹⁸⁷ As he said, “Simply stated, securing

¹⁸⁴ Social justice thinktanks have also championed eliminating peremptory strikes. *See, e.g.*, N.J. INST. SOC. JUST., STATEMENT OF THE NEW JERSEY INSTITUTE FOR SOCIAL JUSTICE DISSENTING FROM RECOMMENDATIONS 13 & 25 IN THE JUDICIAL CONFERENCE ON JURY SELECTION COMMITTEE REPORT 50-51 (2022) (“We are in an opportune moment where we can ensure that New Jersey’s juries are as diverse as the state is. . . . The Institute believes that by eliminating peremptory challenges, New Jersey can meet this moment.”); Nicole Rinconeno, Haleigh Sinclair & Eden Kinlock, *Striking Peremptory Challenges in Jury Trials: Costs, Benefits and the Restoration of Rights*, D.C. JUST. LAB, <https://dcjusticelab.org/wp-content/uploads/2022/09/Striking-Peremptory-Challenges-in-Jury-Trials.pdf> [<https://perma.cc/NPM4-MLR6>] (last visited Oct. 7, 2025) (assessing costs and benefits of peremptory challenges and recommending their elimination).

¹⁸⁵ 505 U.S. 42 (1992).

¹⁸⁶ *Id.* at 60 (Thomas, J., concurring).

¹⁸⁷ *Id.*

representation of the defendant's race on the jury may help to overcome racial bias and provide the defendant with a better chance of having a fair trial."¹⁸⁸

The literature proves Justice Thomas right—jury diversity is substantively (not to mention symbolically) important.¹⁸⁹ Studies show that majority-white juries (both mock and real) are harsher on Black and Latino defendants than racially diverse juries.¹⁹⁰ Diverse juries also engage in better and more thorough deliberations.¹⁹¹ Thus, those who argue for peremptory elimination generally do not do so just because peremptories are used discriminatorily (although that is a good reason to get rid of them). Rather, they also explain that in addition to ending discrimination, peremptory elimination will lead to more diverse juries, which in turn will lead to more just outcomes for criminal defendants.¹⁹²

But there are other barriers in place that skew the racial composition of juries before selection even takes place. And even without peremptory strikes, preliminary studies show that for-cause challenges are also disproportionately used to remove Black people from juries. In other words, there are structural issues with jury formation, and other sites in the jury selection process, that allow for bias and discrimination that would need to be fixed to ensure juror diversity. Ending peremptories alone cannot be the solution if jury diversity is the goal to which scholars and policymakers aspire.

1. Jury Composition

Legal scholars have long discussed the many ways in which the jury system's structures lead to the routine underrepresentation of people of color. Start with the qualifications required to become a juror. Jury service is limited to U.S.

¹⁸⁸ *Id.* at 61. Justice Thomas made a similar point in a dissent almost thirty years later. *See* *Flowers v. Mississippi*, 139 S. Ct. 2228, 2268-74 (2019) (criticizing *Batson* and asserting that peremptory strikes are essential to racial justice while defending exclusion of jurors intuitively perceived as less sympathetic to defendant's case).

¹⁸⁹ *See* Jeffrey Abramson, *Four Models of Jury Democracy*, 90 CHI.-KENT L. REV. 861, 876-77 (2015) (explaining that jury diversity not only fosters public confidence in verdicts but also enhances deliberative problem-solving by incorporating wider range of experiences and viewpoints).

¹⁹⁰ *See* Samuel R. Sommers, *Determinants and Consequences of Jury Racial Diversity: Empirical Findings, Implications, and Directions for Future Research*, 2 SOC. ISSUES & POL'Y REV. 65, 84-85 (2008).

¹⁹¹ *See* Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCH. 597, 606 (2006) ("Consistent with a traditional information exchange prediction, heterogeneous groups deliberated longer and considered a wider range of information than did homogeneous groups.").

¹⁹² *See, e.g.,* Tania Tetlow, *Solving Batson*, 56 WM. & MARY L. REV. 1859, 1922 (2015) ("Most scholars, however, urge ending peremptories in order to protect jury diversity, not color blindness. A system closer to random selection would necessarily result in more jury diversity than a system that allows lawyers the opportunity to eliminate minorities."); *see also supra* Section I.C.

citizens.¹⁹³ This requirement “excludes the estimated 13.1 million lawful permanent residents in the United States” from jury service,¹⁹⁴ operating to disproportionately exclude Asian, Latino, and, increasingly, Black residents.¹⁹⁵ Most states prohibit people from serving on juries if they have past felony convictions.¹⁹⁶ “In the United States, there are roughly nineteen million people with a felony conviction—8 percent of the total population, and studies estimate that close to a quarter of the Black population has a felony conviction, including one-third of Black men.”¹⁹⁷ Thus, this particular qualification disproportionately excludes Black people from jury service. Most states also exclude people with limited English proficiency from jury service, which “further limits the number of racial minorities eligible for jury service.”¹⁹⁸ In short, the way the law contemplates who is eligible to be a juror frustrates any hope of racially diverse juries.

Then, even when people of color are qualified to be jurors, the way jury pools are sourced leads to their systematic exclusion. For instance, most jurisdictions rely on voter registration lists to compose their jury pools,¹⁹⁹ and available data show that white people are registered to vote at higher rates than any other

¹⁹³ See Amy R. Motomura, Note, *The American Jury: Can Noncitizens Still Be Excluded?*, 64 STAN. L. REV. 1503, 1504 n.1 (2012).

¹⁹⁴ Diamond & Hans, *supra* note 11, at 909.

¹⁹⁵ See Motomura, *supra* note 193, at 1508; see also Christine Tamir, *Key Findings About Black Immigrants in the U.S.*, PEW RSCH. CTR. (Jan. 27, 2022), <https://www.pewresearch.org/short-reads/2022/01/27/key-findings-about-black-immigrants-in-the-u-s/> [<https://perma.cc/GA5L-J2R3>].

¹⁹⁶ See, e.g., Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 157 (2003) (“Thus the clear majority rule, used by the federal government and thirty-one states, is to exclude felons from juries for life, unless their rights have been restored pursuant to discretionary clemency rules.”); James M. Binnall, *Convicts in Court: Felonious Lawyers Make a Case for Including Convicted Felons in the Jury Pool*, 73 ALB. L. REV. 1379, 1379 (2010) (“Currently, in twenty-nine states and the federal court system, a convicted felon can practice law, but cannot serve on a jury.”); Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 MINN. L. REV. 592, 595-99 (2013) (“Colorado and Maine are the only two states without any statutory provisions permitting the exclusion of potential jurors on the basis of criminal convictions.”).

¹⁹⁷ Harawa, *False Promise*, *supra* note 114, at 2141 n.130.

¹⁹⁸ Gonzales Rose, *supra* note 27, at 818-19 (noting that forty-one states require English proficiency for jury service, further limiting eligibility of racial minorities).

¹⁹⁹ See, e.g., Alexander E. Preller, *Jury Duty is a Poll Tax: The Case for Severing the Link Between Voter Registration and Jury Service*, 46 COLUM. J.L. & SOC. PROBS. 1, 2 (2012) (conducting fifty-state survey and finding that “[c]ompiling names from voter registration records is the near-universal method of creating a jury list; forty-two out of fifty states use voter registration lists to form jury lists”); Stephanie Domitrovich, *Jury Source Lists and the Community’s Need to Achieve Racial Balance on the Jury*, 33 DUQ. L. REV. 39, 42 (1994) (“While many jurisdictions rely exclusively on voter registration lists as the source for potential jurors, these lists are neither inclusive nor representative because they reduce minority participation at a critical stage of the jury process.”).

demographic.²⁰⁰ Studies also show that “even though most jurisdictions randomly choose which qualified potential jurors to summon as veniremembers, the summoning process itself sometimes yields a lower percentage of minorities than whites.”²⁰¹

Finally, consider the burden of jury service. “Research suggests that disparities in the number of individuals who report for jury service, based on race, often correspond to concern about the financial consequences of participating.”²⁰² Most states and the federal government do not require employers to pay their workers for time spent in jury service, and the pay that courts provide jurors for their service often does not equal what a juror would make working an 8-hour day earning minimum wage.²⁰³ Thus, for many jurors, jury service results in significant financial hardship, which is disproportionately felt by poorer jurors, who are more likely to be people of color.²⁰⁴ There are also transportation costs, childcare costs (if needed), and other ancillary costs associated with jury service that go uncompensated.²⁰⁵ Thus, the financial

²⁰⁰ See Chernoff, *Black to the Future*, *supra* note 16, at 117 (“In many cases, the racial disparity in the jury system is allegedly or demonstrably caused by the jury system’s use of voter registration rolls as a source list for juror names. Voter registration rolls typically underrepresent African-Americans and Latinos.”); *see also* Harawa, *False Promise*, *supra* note 114, at 2141 n.131 (providing racial demographic breakdown for voter registration rates for 2018 election cycle).

²⁰¹ Nancy J. King, *Racial Jurymantering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. REV. 707, 717 (1993); *see also* Chernoff, *Black to the Future*, *supra* note 16, at 120-22. Professor Nina Chernoff provides some examples of how jury office procedures, though race-neutral and innocuous on their face, lead to the systematic exclusion of people of color from venires. *See* Nina W. Chernoff, *No Records, No Right: Discovery & the Fair Cross-Section Guarantee*, 101 IOWA L. REV. 1719, 1729-32 (2016) [hereinafter Chernoff, *No Records*].

²⁰² Anna Offit, *Benevolent Exclusion*, 96 WASH. L. REV. 613, 630 (2021) [hereinafter Offit, *Benevolent Exclusion*].

²⁰³ Evan R. Seamone, *A Refreshing Jury Cola: Fulfilling the Duty to Compensate Jurors Adequately*, 5 N.Y.U. J. LEGIS. & PUB. POL’Y 289, 296 (2002) (“Throughout the nation, legislators have set jurors’ average per diem compensation at nearly half the minimum wage and well below the daily equivalent of the poverty threshold . . . most states do not require employers to cover the difference . . .”); Joanna Sobol, Note, *Hardship Excuses and Occupational Exemptions: The Impairment of the “Fair Cross-Section of the Community,”* 69 S. CAL. L. REV. 155, 171-72 (1995) (“Obviously, a person forgoing a regular source of earned income in order to serve on a jury is very likely to suffer a substantial loss for the period served.”).

²⁰⁴ *See* Offit, *Benevolent Exclusion*, *supra* note 202, at 630-31 (highlighting higher poverty rates among Black and Hispanic Americans compared to non-Hispanic white Americans, and resulting correlation with lower jury duty appearance rates).

²⁰⁵ *See, e.g.,* Rose Jade, *Voter Registration Status As a Jury Service Employment Test: Oregon’s Retracted Endorsement Following Buckley v. American Constitutional Law Foundation, Inc.*, 39 WILLAMETTE L. REV. 557, 596 n.105 (2003) (“Low juror pay and the lack of court-funded childcare and public transportation can turn jury service into a real hardship for the poor or for single parents who work outside the home.”).

hardship attendant to jury service is yet another barrier to racially (not to mention socioeconomically) representative juries.

As the above shows, there are important structural issues with jury service that demand attention to ensure equal representation, many of which are eminently fixable or, at the very least, can be easily improved upon. These issues are just as urgent as the issue of eliminating peremptories, if not more so. While peremptories rely on individual decision-makers acting on bias (consciously or not), structural flaws show that bias is embedded in the jury system itself—making racially representative juries more illusory than real.

To be sure, there are jurisdictions experimenting with ways to both increase the diversity of jury pools and alleviate the hardships of jury service, offering models that other states can look to for guidance. For example, to increase diversity, New Mexico looks beyond voter registration and driver's license records to include state income tax records when forming its jury rolls.²⁰⁶ To ease the burden of service, the District of Columbia offers free childcare for jurors.²⁰⁷ These are just a couple of examples of many from which states can draw.²⁰⁸ But while there are jurisdictions that are experimenting with how to diversify jury service, a recent report from the National Center of State Courts found that the number of jurisdictions adopting jury reform efforts has *decreased* in the past two decades, even with 2020's racial reckoning.²⁰⁹ Given this trend, a call to eliminate peremptories to ensure jury diversity without calling out and addressing these other issues seems wildly insufficient if the goal is to make this important marker of citizenship equally accessible to everyone.

²⁰⁶ N.M. STAT. ANN. § 38-5-3 ("The department of information technology shall program the merger of the registered voter, driver's license and personal income tax filer databases from each county . . . so that a random selection of jurors can be made.").

²⁰⁷ *Child Care*, D.C. CTS., <https://www.dccourts.gov/childcare> [<https://perma.cc/V3K7-ZK7D>] (last visited Oct. 7, 2025).

²⁰⁸ As for other examples, not all states permanently exclude people with felony convictions from jury service. *See, e.g.*, Erik Ortiz, *Most Former Felons in California Are Now Eligible for a New Role: Jury Duty*, NBC NEWS (Jan. 1, 2020, 4:33 AM), <https://www.nbcnews.com/news/us-news/most-former-felons-california-are-now-eligible-new-role-jury-n1108726>. Some states have recently taken steps to increase juror pay. *See Following NCSC Report, Six States Increase Juror Pay*, NAT'L CTR. FOR STATE CTS. (July 5, 2023), <https://ncsc.contentdm.oclc.org/digital/api/collection/p16501coll2/id/865/download> [<https://perma.cc/DH4Y-2UTG>]. Additionally, some jurisdictions have taken steps to increase diversity in the response to jury summonses. *See, e.g.*, *Courts Seek to Increase Jury Diversity*, U.S. CTS. (May 9, 2019), <https://www.uscourts.gov/news/2019/05/09/courts-seek-increase-jury-diversity> [<https://perma.cc/24TR-SDPM>].

²⁰⁹ PAULA HANNAFORD-AGOR & MORGAN MOFFETT, NAT'L CTR. FOR STATE CTS., 2023 STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS 10 (2023), <https://www.ncsc.org/resources-courts/state-states-survey-jury-improvement-efforts> [<https://perma.cc/A7LM-E38P>].

2. Adaptable Racism

Beyond the structural barriers that stymie jury diversity, the adaptability of racism means that the racial bias that manifests during the exercise of peremptory strikes will likely not disappear when peremptories are eliminated; the bias will just resituate elsewhere. One place the racial bias might readily relocate (to the extent that it's not already there): the for-cause challenge.

Professor Thomas Frampton recently examined whether there are racial disparities in the use of for-cause challenges.²¹⁰ As he explained, jury scholarship is so focused on racial bias in the peremptory process that the literature often overlooks other points in the jury selection process where bias may exist.²¹¹ Frampton reviewed 317 Louisiana jury trials and found that “prosecutors overwhelmingly used challenges for cause to exclude nonwhite jurors.”²¹² According to the data, “[B]lack jurors were 3.24 times more likely than white jurors to be excluded by the government for cause.”²¹³ Frampton found similar racial disparities when looking at for-cause challenges in Mississippi.²¹⁴ Looking at the data from eighty-three trials, “prosecutors were 6.8 times more likely to initiate a challenge for cause against any given [B]lack prospective juror than any given white prospective juror.”²¹⁵ Another interesting finding by Frampton—in Mississippi, *judges* would often initiate for-cause removal, and they did so to disproportionately exclude Black jurors.²¹⁶ Frampton’s study is important in that it shows that both a judge’s *and* a prosecutor’s racial bias can manifest in the for-cause challenge process. Understanding the adaptability of racism,²¹⁷ it is easy to see how.

Recall that for-cause challenges are supposed to ensure impartiality by allowing an unlimited number of strikes to remove jurors who are irredeemably biased.²¹⁸ But the reasons given to strike jurors for cause are often racially coded or skewed. For instance, even if felony convictions do not automatically disqualify one from jury service, prior arrests can form the basis of a for-cause challenge.²¹⁹ Given the disparities in policing and prosecution, this leads to the disproportionate exclusion of Black people and other people of color.²²⁰

²¹⁰ Frampton, *supra* note 6, at 785.

²¹¹ *See id.* at 788.

²¹² *Id.* at 794.

²¹³ *Id.* at 795.

²¹⁴ *Id.* at 796.

²¹⁵ *Id.* at 797.

²¹⁶ *Id.*

²¹⁷ Boddie, *Adaptive Discrimination*, *supra* note 17, at 1239 (explaining that racial discrimination is “adaptive” in that it “morphs to avoid legal and social sanction”).

²¹⁸ *See generally* sources cited *supra* notes 56-57.

²¹⁹ *See, e.g.*, Johnson, *Arresting Batson*, *supra* note 20, at 389; Roberts, *supra* note 196, at 602.

²²⁰ *See* Daniel S. Harawa, *Whitewashing the Fourth Amendment*, 111 GEO. L.J. 923, 925 (2023) [hereinafter Harawa, *Whitewashing*] (noting racial disparities in policing and prosecution).

Likewise, financial hardship is often the basis of for-cause challenges, which, given wealth and income gaps, leads to the disparate exclusion of Black people and other people of color.²²¹ Familiarity with parties to the case can also lead to for-cause removal,²²² and in a racially-segregated society where criminal defendants are disproportionately people of color, this, too, leads to the disparate removal of jurors of color.²²³

There are also certain racially-coded experiences or opinions that are deemed to render potential jurors partial and thus unfit to serve. As an example, distrust of or negative interactions with law enforcement or the belief that the criminal legal system is racially biased have all been grounds that judges have found to justify for-cause challenges.²²⁴ Layer on top of this the fact that judges have near-unfettered discretion to remove jurors for cause, and are often the final arbiter over what makes a potential juror too partial to serve,²²⁵ and it becomes clear how racial bias can influence for-cause challenges too. As far as I know, no one who advocates for the elimination of peremptories also urges the elimination of for-cause challenges. After all, there needs to be *some* mechanism to ensure jury impartiality.

Without question, many who champion getting rid of the peremptory challenge also recognize the need to overhaul the jury formation and selection process to better ensure racial diversity.²²⁶ Arizona itself implicitly recognized the adaptability of racism, because at the same time it eliminated peremptories, a workgroup commissioned by the Arizona Supreme Court recommended changes to the voir dire process to help protect against the discriminatory use of for-cause challenges.²²⁷

²²¹ See Offit, *Benevolent Exclusion*, *supra* note 202, at 629 (“Judges’ uses of cause challenges to excuse prospective jurors who raise hardship concerns results in juries that are socio-economically and racially homogenous.”).

²²² See, e.g., Frampton, *supra* note 6, at 828.

²²³ See generally Deborah N. Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, 118 MICH. L. REV. 173, 173 (2019) (“America is profoundly segregated along racial lines. We attend separate schools, live in separate neighborhoods, attend different churches, and shop at different stores.”).

²²⁴ See, e.g., Offit, *Jury Exclusion*, *supra* note 20, at 2188 (“Prospective jurors may be dismissed from jury service using cause challenges and peremptory strikes based on their experience with, or recognition of, racism as a feature of the legal system.”). In capital trials, opposition to the death penalty leads to the disproportionate striking of jurors of color. See Aliza Plener Cover, *The Eighth Amendment’s Lost Jurors: Death Qualification and Evolving Standards of Decency*, 92 IND. L.J. 113, 118 (2016).

²²⁵ See 50A C.J.S. *Juries* § 370 (“The trial court has broad discretion in determining the competency or qualifications of a juror for the trial of a case, and in determining whether to exclude a juror from the jury for cause, as in the case of a challenge for cause.”); see also Ogletree, *supra* note 22, at 1143-44.

²²⁶ See, e.g., Marder, *Blueprint for Change*, *supra* note 8, at 100-01 (noting suggestions made for reforming voir dire in Arizona after it eliminated peremptories).

²²⁷ See Hailey Badger Gordon, Note, *Evaluating the Elimination of Peremptory Challenges in Arizona*, 58 U. MICH. J. L. REFORM 229, 247-48 (2024).

But a system that is operated by people and that necessarily involves discretion is *always* going to be susceptible to racial bias, no matter how comprehensive any one fix may be.²²⁸

B. *Against Elimination: Racial Justice & Defendants*

Legal scholars and policymakers advocating for the elimination of peremptories often center potential *jurors*. This focus flows from *Batson* itself,²²⁹ as the decision's central focus was not on the defendant, but on "the harms to the excluded juror and the community."²³⁰ Thus, as in the jurisprudence, in legal scholarship, the concerns of the defendant often come second in debates over peremptory elimination.

To the extent the interests of the defendant are discussed in the conversations about peremptory elimination, the discussion is often framed in terms of the absence of peremptories hampering a defendant's ability to remove biased people from their jury.²³¹ This, of course, is important, and should counterbalance any proposal to end the practice of peremptories. There is a second interest of the defendant that often gets lost in the debate, however: the interest of autonomy. The availability of peremptories gives defendants a small amount of control in an otherwise autonomy-stripping, dehumanizing process. Disallowing defendants this last modicum of control in the name of racial justice should not be done lightly in a world where criminal defendants are disproportionately poor people of color, and where the criminal legal system writ large serves a racially subordinating function.

1. *Racially Biased Jurors*

The most vocalized opposition to peremptory elimination centering racial justice is rooted in the purpose of peremptories themselves: Without peremptories, it is more likely that biased jurors will be seated. The Supreme Court has described the purpose of peremptories as an "effective means of obtaining more impartial and better qualified jurors," assuring "the parties that the jurors before whom they try the case will decide on the basis of the evidence

²²⁸ See generally *State v. Veal*, 930 N.W.2d 319, 343 (Iowa 2019) (Appel, J., concurring) ("[A]ll of us—judges, lawyers, legislators, and jurors—have unconscious or implicit biases."). For example, wittingly or not, a prosecutor or judge may take steps to rehabilitate a white juror who expressed bias and not take those same steps to rehabilitate a Black juror. See, e.g., Frampton, *supra* note 6, at 802; Barbara O'Brien, Catherine M. Grosso & Abijah P. Taylor, *Examining Jurors: Applying Conversation Analysis to Voir Dire in Capital Cases, A First Look*, 107 J. CRIM. L. & CRIMINOLOGY 687, 723 (2017).

²²⁹ See *supra* Section I.A.

²³⁰ Sheri Lynn Johnson, *Batson Ethics for Prosecutors and Trial Court Judges*, 73 CHI.-KENT L. REV. 475, 481-82 (1998) (criticizing *Batson*'s "blurred rationale"); see also Tetlow, *Why Batson*, *supra* note 57, at 1715 (noting that "because *Batson* focuses on discrimination against jurors, we still need a solution for the problem of discrimination by jurors").

²³¹ See, e.g., *supra* Section I.C.

placed before them, and not otherwise.”²³² While for-cause challenges allow for the removal of jurors with “cognizable bias,” the “peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable.”²³³

With this understanding of peremptories in mind, it is easy to see why some believe eliminating them would be antithetical to racial justice. If peremptories are truly designed to keep biased jurors out of the jury box, then it seems that they would be an especially important tool for keeping *racially* biased jurors out of the jury box. Here’s why: People are unlikely to overtly express their racial bias during voir dire.²³⁴ Thus, to the extent bias is revealed during voir dire, it’s more likely to manifest in vague, coded ways.²³⁵ In those cases, especially given the discomfort that comes with labeling someone as racially biased, a judge may be unwilling to strike a juror for cause, either because they do not recognize the bias or do not want to engage in the labeling, leaving the defendant with the use of a peremptory as the only option for removal.²³⁶

Professor Charles Ogletree raised a variant of this concern in his sustained critique of peremptory elimination.²³⁷ Ogletree believed that without peremptory strikes, “some defendants may find themselves facing jurors who should not have been impaneled, jurors whom they hate or fear or believe on some arguably reasonable grounds to be seriously biased against them, but whom they are powerless to remove.”²³⁸ While at least one study shows²³⁹ that *most* exercises of peremptory strikes will not affect the verdict,²⁴⁰ peremptory strikes for defendants nevertheless act as an important “hedge” against biased jurors, given that the same study suggests peremptories make a difference in at least *some*

²³² Swain v. Alabama, 380 U.S. 202, 218-19 (1965).

²³³ *Id.* at 220; *see also* Hayes v. Missouri 120 U.S. 68, 70 (1887) (“Experience has shown that one of the most effective means to free the jury-box from [persons] unfit to be there is the exercise of the peremptory challenge.”).

²³⁴ Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 840 (2012) (“The process of voir dire, the dialog with jurors during jury selection, has proven largely unable to detect or correct implicit bias in jurors.”).

²³⁵ *See generally* IAN HANEY LÓPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM & WRECKED THE MIDDLE CLASS 129 (2015) (“The once pervasive use of epithets has morphed into the coded transmission of racial messages through references to culture, behavior, and class. We live in a political milieu saturated with ugly racial innuendo.”).

²³⁶ *See* Babcock, *supra* note 63, at 554.

²³⁷ *See* Ogletree, *supra* note 22, at 1100.

²³⁸ *Id.* at 1145.

²³⁹ *See* Hans Zeisel & Shari Seidman Diamond, *The Effects of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491, 491-92 (1978).

²⁴⁰ *See* Ogletree, *supra* note 22, at 1145 (explaining that study found “that most attorneys do not exercise their peremptory challenges wisely, and that therefore most actual exercises of peremptory challenges fail to affect the verdict,” and then explaining that “[t]his conclusion is given much more prominence than their separate conclusion that in a significant minority of cases the challenges probably matter a lot”).

trials.²⁴¹ At bottom, then, without peremptories, more defendants, at the margin, “are likely to be falsely or unjustly convicted.”²⁴² In a world where criminal defendants are disproportionately poor people of color,²⁴³ and where Blackness is associated with criminality and thus there is very real risk that prospective jurors will harbor anti-Black bias (knowingly or not),²⁴⁴ it is easy to see why *retaining* peremptories can be seen to *further* racial justice. Even assuming peremptories work to remove demonstrably biased jurors in the rarest of cases, keeping such tools in place as even a modest measure to protect against racially biased convictions is of vital importance.²⁴⁵

2. Disempowering Defendants

In arguing against Arizona eliminating peremptories, the National Lawyers Guild (“NLG”) briefly made a point that often goes overlooked in the literature:²⁴⁶ the elimination of peremptories “will deprive the accused in criminal cases, who are disproportionately people of color because of discriminatory policing and prosecution policies, of the only tool available to them to participate in a system widely viewed as rigged against them from the start.”²⁴⁷

Although this comment could seem like a throwaway observation, NLG made a vital connection between what Professor Caren Morrison has called a litigant’s interest in “autonomy”²⁴⁸ and how criminal defendant autonomy has a particularly racialized valence. Morrison argues that perhaps “the most persuasive argument in favor of the peremptory challenge is that it protects the parties’ autonomy by allowing them an active role in choosing their fact finder, beyond the court’s control.”²⁴⁹ While Morrison suggests that this is a reason to retain peremptories across the board, she takes a beat to note that “in a criminal

²⁴¹ *Id.* at 1146.

²⁴² *Id.*; see also Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 129-30 (1993).

²⁴³ See, e.g., John R. Sutton, *Structural Bias in the Sentencing of Felony Defendants*, 42 SOC. SCI. RSCH. 1207, 1207 (2013); Cassia Spohn, *Racial Disparities in Prosecution, Sentencing, and Punishment*, in OXFORD HANDBOOK OF ETHNICITY, CRIME, AND IMMIGRATION (Sandra M. Bucerius & Michael Tonry eds., 2014).

²⁴⁴ L. Song Richardson, *Implicit Racial Bias and Racial Anxiety: Implications for Stops and Frisks*, 15 OHIO ST. J. CRIM. L. 73, 75 (2017) (“Research in the field of social psychology over the past four decades repeatedly demonstrates that most individuals of all races have implicit, i.e., unconscious, racial biases linking Blacks with criminality and Whites with innocence.”).

²⁴⁵ See *Rose v. Mitchell*, 443 U.S. 545, 555 (1979) (“Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice.”).

²⁴⁶ But see Morrison, *supra* note 25, at 15-17 (discussing defendant autonomy as a reason to retain peremptories).

²⁴⁷ NLG Comment, *supra* note 172, at 6.

²⁴⁸ Morrison, *supra* note 25, at 15.

²⁴⁹ *Id.*

justice system that can reduce defendants to near-powerlessness, the challenge's arbitrariness can give participants a sense of control—they can get rid of jurors simply because they develop a spontaneous dislike for them based on no more than sudden impressions and unaccountable prejudices.”²⁵⁰ This important observation deserves to be further ventilated, as it is worth thinking of the many ways—from policing, to arrest, to trial, should a defendant even get there—that the criminal legal system strips people, particularly Black people and other people of color, of power and autonomy.

Depending on where you live and/or the color of your skin, before even making official contact with the criminal legal system, your movement through the world is monitored and restricted. You may live in a community that is surveilled by sky or by camera.²⁵¹ You may live in a neighborhood where police patrol in military-style vehicles, wear riot gear, and may aggressively “jump out” at you at any given moment, forcing you to justify your presence and dissuade them of a presumed criminality.²⁵² You may be afraid to run in your neighborhood,²⁵³ wear certain colors,²⁵⁴ or exercise your rights.²⁵⁵ You may be constantly followed, waiting with bated breath for the next time police harass you.²⁵⁶ In other words, long before arrest, police have an ominous omnipresence in certain individuals' lives. When thinking about autonomy, it's important to remember that certain people, particularly poor people and people of color, regardless of whether they have engaged in criminalized conduct, walk the world less freely than others.

After arrest, the official power stripping begins. The arrestee, though presumed innocent, may be jailed pending trial—a far more likely outcome if

²⁵⁰ *Id.* at 16.

²⁵¹ See, e.g., *Leaders of a Beautiful Struggle v. Balt. Police Dep't*, 2 F.4th 330, 334 (4th Cir. 2021) (en banc) (describing Baltimore Police Department aerial surveillance program); see also Joseph Lanuti, *In the Officer's Omnipresence: Live Surveillance and Warrantless Misdemeanor Arrests*, 55 AM. CRIM. L. REV. ONLINE 29, 29-30 (2018) (discussing surveillance programs of Las Vegas, Baltimore, and Los Angeles police departments).

²⁵² See, e.g., *Jackson v. District of Columbia*, No. 23-CV-922, 2023 WL 7182120, at *6 (D.D.C. Nov. 1, 2023) (describing tactics of gun recovery unit of the D.C. Metropolitan Police Department).

²⁵³ See, e.g., Elise C. Boddie, *Racially Territorial Policing in Black Neighborhoods*, 89 U. CHI. L. REV. 477, 495 (2022).

²⁵⁴ See, e.g., *United States v. McKinney*, 980 F.3d 485, 492 (5th Cir. 2020) (where police justified stopping someone in part because they “were wearing some red clothing”).

²⁵⁵ See, e.g., *United States v. Black*, 707 F.3d 531, 540 (4th Cir. 2013) (where a North Carolina trooper stopped a Black person because he was openly carrying a gun despite that being legal under North Carolina law).

²⁵⁶ See, e.g., Monique Jindal, Kamila B. Mistry, Maria Trent, Ashlyn McRae & Rachel L. J. Thornton, *Police Exposures and the Health and Well-Being of Black Youth in the US*, 176 JAMA PEDIATRICS 78, 78 (2022) (discussing how disproportionately elevated police contact affects Black youths' mental health).

they are Black and poor.²⁵⁷ There is no need to dwell on the fact that being held behind bars is disempowering. Even if they are not jailed, individuals placed under arrest may be forced to comply with demeaning, autonomy-stripping pretrial release requirements (urine tests, check-ins, ankle monitoring, movement restrictions, and so on).²⁵⁸ Then, if the now-labeled defendant is indigent, they have to put their fate in a stranger's hands. This can be a particularly dicey proposition for poor people of color who have little choice over who will represent them and could be appointed counsel lacking basic cultural competency, or worse, counsel who is outright racist.²⁵⁹ Before even getting to trial, a defendant—already from a position of relative powerlessness—must withstand the awesome power of the prosecutor and the other forces of the criminal legal system that impel defendants, particularly defendants of color, to plead guilty regardless of their innocence or the strength of the government's case.²⁶⁰ In short, from the first moment of contact, the criminal legal system reminds criminal defendants, particularly poor defendants of color, of the precarious position they are in and how little power they have.

Given the above, in many ways, making it to trial is an act of resistance. But even when a defendant gets to trial, most of what they do involves sitting and

²⁵⁷ See, e.g., Wendy Sawyer, *How Race Impacts Who Is Detained Pretrial*, PRISON POL'Y INITIATIVE: BRIEFINGS (Oct. 9, 2019), https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/ [<https://perma.cc/2LK7-NUPW>] ("Black and brown defendants are at least 10-25% more likely than white defendants to be detained pretrial or to have to pay money bail"); Bernadette Rabuy & Daniel Kopf, *Detaining the Poor: How Money Bail Perpetuates an Endless Cycle of Poverty and Jail Time*, PRISON POL'Y INITIATIVE: REPS. (May 10, 2016), <https://www.prisonpolicy.org/reports/incomejails.html> [<https://perma.cc/4NGV-E9JE>].

²⁵⁸ See, e.g., Kate Weisburd, *The Carceral Home*, 103 B.U. L. REV. 1879, 1895-1900 (2023); Kate Weisburd, *Sentenced to Surveillance: Fourth Amendment Limits on Electronic Monitoring*, 98 N.C. L. REV. 717, 719-20 (2020).

²⁵⁹ See Alexis Hoag, *Black on Black Representation*, 96 N.Y.U. L. REV. 1493, 1512-20 (2021); Peter A. Joy, *Unequal Assistance of Counsel*, 24 KAN. J. L. & PUB. POL'Y 518, 519 (2015) ("[C]lass and race are largely determinative of the lawyer, and often the amount of justice one receives."). For examples of cases where it was discovered that defense counsel said racist things, see *Commonwealth v. Dew*, 210 N.E.3d 904, 906, 908-09 (Mass. 2023) (noting that a white defense lawyer repeatedly posted racist and Islamophobic sentiments on Facebook); *Ellis v. Harrison*, 947 F.3d 555, 556 (9th Cir. 2020) (recognizing that a white defense lawyer was a "virulent racist"); see also Paul Messick, Note, *Represented by a Racist: Why Courts Rarely Grant Relief to Clients of Racist Lawyers*, 109 CALIF. L. REV. 1231, 1236-39 (2021) (giving more examples of cases where defense counsel said racist things).

²⁶⁰ See, e.g., Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 18 (1998) ("Through the exercise of prosecutorial discretion, prosecutors make decisions that not only often predetermine the outcome of criminal cases, but also contribute to the discriminatory treatment of African Americans as both criminal defendants and victims of crime."); Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1306 (2018) (describing how prosecutors use tactics such as "charge bargaining" to coerce plea agreements). See generally CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL 11-34 (2021); Daniel Harawa, *Trials Without Justice*, INQUEST: INST. & PRACS. (Sept. 21, 2021), <https://inquest.org/trials-without-justice/> [<https://perma.cc/3K9J-NTFT>].

watching.²⁶¹ While witnesses testify about events, lawyers argue about the law and facts, judges issue rulings that shape the case, and twelve strangers watch in judgment, defendants sit silently.²⁶² Indeed, the jurors will likely not hear the defendant's voice before they render their verdict.²⁶³ It is hard to imagine anything more demeaning than being a planted supplicant forced to do nothing while your life is on the line. The subjugating nature of the trial process is only intensified by the racial bias, both subtle and overt, that thrives in the everyday criminal courtroom.²⁶⁴

Against this backdrop, the idea of stripping *any* power from a criminal defendant, no matter how slight, should be viewed with immense skepticism. This is true for all defendants, but is especially true for poor defendants of color who are navigating a system that is likened to Jim Crow and some believe can be traced back to slavery.²⁶⁵ In a system that renders defendants powerless, any morsel of agency must be jealously guarded, even if it is only the power to lean over to one's lawyer and tell them to strike a juror because they do not like the look of them.²⁶⁶

²⁶¹ Hanan, *supra* note 26, at 495 (highlighting how defendants' involvement during trial proceedings is exceedingly limited).

²⁶² See *supra* note 33 and accompanying text.

²⁶³ See generally *id.*

²⁶⁴ See, e.g., L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 YALE L.J. 864, 867 (2017) (reviewing NICOLE VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT (2016)) (explaining that Van Cleve's work reveals how courts are "transformed from central sites of due process into central sites of racialized punishment"); Amanda Carlin, Comment, *The Courtroom as White Space: Racial Performance as Noncredibility*, 63 UCLA L. REV. 450, 453 (2016).

²⁶⁵ See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); Dorothy E. Roberts, *The Supreme Court, 2018 Term—Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 7 (2019) ("[T]oday's carceral punishment system can be traced back to slavery and the racial capitalist regime it relied on and sustained."); Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 67 UCLA L. REV. 1108, 1113 (2020) ("Indeed, policing today can be traced directly to slavery and the racial regime it relies on and violently sustains."). The accuracy of these claims and characterizations is contested. See, e.g., James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 23 (2012) (arguing that Jim Crow frame "obscures much that matters"). Weighing in on this contest is not the point of this Article.

²⁶⁶ I understand that not all lawyers may engage their clients in the jury selection process in this way, but ideally they would, because as one leading trial manual explains:

Counsel should usually give the client the opportunity to advise counsel of any prospective jurors that she does not like and should strike those jurors unless there is a strong reason not to. Considering how unscientific *voir dire* is and considering that the defendant has experience in knowing who will dislike or fear him or her, the client is as likely to be right about whom to select or reject as is counsel. And because it is the defendant's liberty that is at stake, counsel ordinarily should give the defendant a veto over the persons who will sit in judgment on him or her.

Focusing on just the interests of potential jurors, whether or not eliminating peremptory challenges is the promised boon for racial justice that commentators suggest it to be raises complex questions about efficacy and approach. When one weaves in and elevates the interests of defendants, particularly defendants of color, then the racial justice picture becomes much more complicated, as there are competing concerns that weigh in favor of retaining peremptories.²⁶⁷ This knotty racial justice picture must be accounted for, and the tradeoffs acknowledged, both in the literature and the policy debates, before trumpeting peremptory elimination as a racial justice win.

C. *Protecting All Interests: Alternative Solutions*

When thinking about the interests of citizens of color who wish to exercise their right to serve on a jury, and defendants of color who wish to retain the power to shape the jury that will judge them, there are solutions other than eliminating peremptories that better protect both sets of interests. This Subpart uplifts two: Beefing up the *Batson* standard—an approach already taken by some states—and asymmetric elimination of peremptories, where prosecutors do not exercise strikes. But before proceeding, it is important to note that neither one of these solutions would solve the problem of racial bias in the jury selection system, let alone the entire criminal legal system, and thus must be considered alongside and in tandem with a host of other proposals designed to address racial bias in the administration of criminal law. But for those looking for a solution pertaining to peremptories, if racial justice is the goal, these solutions might be better fixes.

1. *Beefing Up Batson*

Before getting rid of peremptory strikes, one approach jurisdictions can take to solve the problem of prosecutors discriminatorily wielding their peremptories is to amend the *Batson* framework to better detect and prevent bias—an approach already taken by several states. Recall that *Batson* has three steps.²⁶⁸ First, a defendant must make out a prima facie case of discrimination, which generally requires a defendant to show a pattern of strikes against jurors of color.²⁶⁹ Then, the prosecutor can rebut that prima facie showing by providing race-neutral reasons for the strikes.²⁷⁰ Finally, the burden shifts back to the defendant to prove that the prosecution's race-neutral reasons were pretextual and that the prosecutor purposefully discriminated.²⁷¹

ANTHONY AMSTERDAM & RANDY HERTZ, TRIAL MANUAL 9 FOR THE DEFENSE OF CRIMINAL CASES 1190 (2024). That all defenders do not follow best practice does not detract from the broader point.

²⁶⁷ See, e.g., *supra* text accompanying note 247.

²⁶⁸ See *infra* Section I.A.

²⁶⁹ *Batson v. Kentucky*, 476 U.S. 79, 96-97 (1986).

²⁷⁰ *Id.* at 97.

²⁷¹ *Id.* at 98.

Some states have attempted to reinforce the *Batson* framework by eliminating step one. For instance, in California, Connecticut, New Jersey, and Washington, a defendant does not have to make out a *prima facie* case of discrimination.²⁷² Rather, they can object to a strike, cite the relevant rule, and then the burden shifts to the prosecutor to justify the strike.²⁷³

States have also amended *Batson* step two to presumptively take some common, racially-coded-race-neutral reasons off the table as legitimate justifications for a strike. For example, Washington provides a list of “presumptively invalid” reasons for a strike that historically “have been associated with improper discrimination in jury selection,”²⁷⁴ e.g., “distrust of law enforcement.”²⁷⁵ California likewise provides a list of presumptively invalid reasons for a strike—like a prospective juror’s neighborhood—“unless the party exercising the peremptory challenge can show by clear and convincing evidence that an objectively reasonable person would view the rationale as unrelated to a prospective juror’s race”²⁷⁶ Connecticut has a similar list of presumptively invalid “race-neutral” yet race-coded reasons, including the receipt of state benefits.²⁷⁷

Additionally, many of the states that have altered the *Batson* framework have gotten rid of the purposeful discrimination finding. Thus, in California, rather than determining whether there was purposeful discrimination, a court reviewing a *Batson* challenge must instead ask whether “there is a substantial likelihood that an objectively reasonable person would view race . . . as a factor in the use of the peremptory challenge.”²⁷⁸ Washington also has an objective observer standard,²⁷⁹ and an objective observer under Washington law is one who is “aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors.”²⁸⁰ Connecticut similarly has an objective observer standard in which the observer is presumed to be aware of “implicit, institutional, and unconscious biases.”²⁸¹ New Jersey asks whether a “reasonable, fully informed person would believe that a party removed a prospective juror based on the juror’s [race].”²⁸²

²⁷² See CAL. CIV. PROC. CODE § 231.7 (West 2021); CONN. SUPER. CT. GEN. R. § 5-12; N.J. CT. R. 1:8-3A; WASH. CT. GEN. R. 37.

²⁷³ See *supra* note 272.

²⁷⁴ WASH. CT. GEN. R. 37(h).

²⁷⁵ WASH. CT. GEN. R. 37(h)(ii).

²⁷⁶ CAL. CIV. PROC. CODE § 231.7(e).

²⁷⁷ CONN. SUPER. CT. GEN. R. § 5-12(g). New Jersey did not codify a list of presumptively invalid reasons, but did list some reasons that a court should “bear in mind” that “have historically been associated with improper discrimination, explicit bias, and implicit bias in jury selection” as presumptively invalid. N.J. CT. R. 1:8-3A cmt. 3.

²⁷⁸ CAL. CIV. PROC. CODE § 231.7(d)(1).

²⁷⁹ WASH. CT. GEN. R. 37(e).

²⁸⁰ WASH. CT. GEN. R. 37(f).

²⁸¹ CONN. SUPER. CT. GEN. R. § 5-12(e).

²⁸² N.J. CT. R. 1:8-3A(e).

In other words, these states have attempted to identify the weak points in the *Batson* framework and fortify them. Under some of the reforms, a defendant does not have to prove a pattern of discrimination at step one, rather, every strike can be objected to and thus must be justified.²⁸³ That means that a prosecutor likely has to think twice before striking a juror of color, and if they do, must be ready to justify that strike. And because some of the “race-neutral” reasons that prosecutors most often give for striking jurors of color—e.g., distrust of law enforcement, family members with criminal system experience, and appearance²⁸⁴—are now off the table given the changes made to step two of the *Batson* framework, it is more likely that a prosecutor will have to have a *legitimate* reason for a strike independent of a juror’s race. Finally, even if a prosecutor comes up with a permissible race-neutral reason, there is the backstop of the objective observer standard.²⁸⁵ If an objective person who is aware of racial bias in all its permutations could still reasonably believe that a strike was in part motivated by race, an objection will be sustained.²⁸⁶

While it’s still early and thus there is little data exploring how effective these reforms have been at diversifying juries, on their face, they are far more robust than the current *Batson* standard. To be sure, these reforms may not catch all racism. Prosecutors may become even more imaginative in their reasons for striking jurors of color and still may fall prey to their implicit and subconscious biases.²⁸⁷ And judges may still be loath to sustain *Batson* challenges for fear of calling the prosecutor a racist.²⁸⁸ Even so, these reforms will likely do some real work at curbing discrimination in jury selection, while also allowing defendants to retain the power to use peremptories to remove potentially biased jurors and to shape the decisional body that will decide their fate. Thus, beefing up *Batson* may better protect the various racial justice interests implicated by peremptory elimination.

There is another added benefit that a more robust *Batson* standard has over outright peremptory elimination: transparency and honesty. Start with transparency. Working through the *Batson* inquiry provides insight into prosecutors’ and judges’ biases that we would otherwise never see. Thus, peremptories have the potential to provide a better understanding of what motivates our governmental officials as they administer the awesome power of the state.²⁸⁹ This is true both in individual cases and in the aggregate, as one can

²⁸³ See, e.g., WASH. CT. GEN. R. 37(c).

²⁸⁴ See, e.g., CAL. CIV. PROC. CODE § 231.7(e); WASH. CT. GEN. R. 37(h).

²⁸⁵ See *supra* notes 278-82 and accompanying text.

²⁸⁶ See *supra* notes 278-82 and accompanying text.

²⁸⁷ See generally *supra* note 92 and accompanying text (discussing Justice Marshall’s view on how bias can impact prosecutors’ decisions).

²⁸⁸ See, e.g., Costa, *supra* note 89, at 6 (“[J]udges and lawyers seem to view *Batson* violations as charges of racism, a misperception that substantially contributes to *Batson*’s underenforcement.”).

²⁸⁹ I am grateful to Anna VanCleave for this insight.

analyze the prosecutor's use of peremptory strikes over time, which may reveal something far more pernicious than any singular case could.²⁹⁰

Turn to honesty: A beefed-up *Batson* standard has the potential to open up more honest conversations about race in the courtroom.²⁹¹ By creating standards that require an understanding of implicit bias, historic bias, and unconscious bias, states that are adopting these more robust *Batson* frameworks are requiring the bar to become competent in their ability to have nuanced discussions about racism. Lawyers will not have to go out on a limb to bring racial realism into the courtroom,²⁹² as some of the standards purposefully create space to have frank discussions about race in the criminal courtroom, a place where race and racism is always salient, but often goes unaddressed.²⁹³

On this point, in Washington, you see the cascading effects of how open discussions of race in one legal context can lead to open discussions in other contexts. There, the Washington Supreme Court cited General Rule 37—the rule amending *Batson*—to adopt a similar objective observer standard to be applied in the Fourth Amendment seizure context.²⁹⁴ In the process, the court explicitly noted that it was doing so to encourage more legal truth telling: “Today, we formally recognize what has always been true: in interactions with law enforcement, race and ethnicity matter.”²⁹⁵ Therefore, beefing up *Batson* creates a world in which the law encourages lawyers to engage in honest discussions about race and how it operates in the criminal legal system. By contrast, eliminating peremptories suppresses discussion, “feed[ing] into the fiction that race is irrelevant and that the world is postracial and thus law should be too.”²⁹⁶

2. Asymmetric Elimination

Another solution to the problem of discrimination in the use of peremptories that better protects the racial justice interests of both potential jurors and defendants is a solution previously urged by a handful of scholars: asymmetric

²⁹⁰ District Attorney Doug Evans and the case of Curtis Flowers perfectly proves this point, because while Mr. Evans engaged in rank discrimination in Mr. Flowers' repeated trials, investigative journalists found that over the course of twenty-six years, Evans' office had a pattern of striking “Black prospective jurors at nearly 4.5 times the rate they struck white ones.” Parker Yesko, *Judge Dismisses Lawsuit Against DA Doug Evans*, APM REPS.: POLICING & CRIM. JUST. (Sept. 11, 2020), <https://www.apmreports.org/story/2020/09/11/judge-dismisses-lawsuit-against-doug-evans> [<https://perma.cc/X2NG-ZCDV>].

²⁹¹ See generally Harawa, *Whitewashing*, *supra* note 220, at 979-80 (discussing importance of litigating race in criminal cases in Fourth Amendment context). I am thankful to Judge Veronica Galván of King County Superior Court for highlighting this benefit of the rule.

²⁹² See *id.* at 979-80.

²⁹³ See *id.* at 927-28.

²⁹⁴ *State v. Sum*, 511 P.3d 92, 106 (Wash. 2022) (explaining that concerns of discrimination in warrantless seizure context, similar to those surrounding peremptory challenge context, warrant adoption of a parallel standard).

²⁹⁵ *Id.* at 109-10.

²⁹⁶ Harawa, *Whitewashing*, *supra* note 220, at 981.

elimination of peremptory strikes—denying peremptories to prosecutors only.²⁹⁷ And as explained below, this asymmetric disarmament can be done legislatively or willingly. This solution makes better sense for several reasons.

First, it is *prosecutorial* abuse of the peremptory system that has led to peremptory challenges being used as a tool to systematically exclude people of color from juries.²⁹⁸ It therefore makes sense to deny the tool to the party that has abused it, rather than taking it away from everyone. Indeed, individual defendants, even if they wished to discriminate, could not engage in the same systematic discrimination that government actors have engaged in.²⁹⁹ What's more, if a defendant *does* engage in racial discrimination in their exercise of peremptories, current case law allows prosecutors to raise and judges to sustain reverse *Batson* challenges.³⁰⁰

But this raises a question: What if white defendants use peremptories to discriminate against jurors of color under the logic that those jurors will be less sympathetic? Assuming a reverse-*Batson* challenge does not capture the discrimination, then this Article's tentative response is three-fold. One, there is no clear data about how widespread this problem is. Absent evidence that such a phenomenon is commonplace, therein lies no automatic reason to reject a rule. Two, there is a difference in the state discriminating against a juror versus an individual defendant.³⁰¹ Individual discrimination, while odious, does not send the same government-endorsed message of racial inferiority.³⁰² The government can deny you your citizenship; individual discriminators cannot. Relatedly, three, when the government racially discriminates in jury selection, that discrimination is more totalizing—you are less likely to ever serve on a jury in that jurisdiction. By contrast, when an individual defendant discriminates, a

²⁹⁷ See, e.g., Abbe Smith, *A Call to Abolish Peremptory Challenges by Prosecutors*, 27 GEO. J. LEGAL ETHICS 1163, 1164 (2014) (calling for abolishment of peremptory challenges by prosecutors).

²⁹⁸ See *id.* at 1164, 1171, 1174-75.

²⁹⁹ See *id.* at 1175.

³⁰⁰ See *Georgia v. McCollum*, 505 U.S. 42, 55-56 (1992) (deciding that State can challenge a defendant's "discriminatory use of peremptory challenges"). In some ways, *McCollum* can be viewed as a racial justice case, as the case involved white defendants charged with assaulting African Americans who then discriminated against Black jurors. *Id.* at 44-45. Ironically (or tragically), reverse-*Batson* challenges are far more successful than *Batson* challenges and are most successful when the struck juror is white. See Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 462-63 (1996); see also Morrison, *supra* note 25, at 28 ("*Batson* has proved to be a far more effective sword against defendants than a shield to protect them, as 'reverse *Batson*' claims appear to enjoy a far higher success rate at trial than defendants' *Batson* claims against prosecutors.").

³⁰¹ See generally Smith, *supra* note 297, at 1175-78 (explaining why use of peremptories by defense lawyers is inherently different from use by prosecution).

³⁰² See generally *id.* at 1171 (noting "well documented unethical behavior by prosecutors with regard to racial composition of juries"); EQUAL JUST. INITIATIVE, *supra* note 44 (discussing how discriminatory jury selection can send harmful messages to people of color).

person may not serve on *that* jury, yet there is no reason to believe that that individual will be denied the right to serve in toto.³⁰³

Second, prosecutors do not have the same interests in using peremptory challenges as defendants. Under the Constitution, the defendant, not the prosecution, has a right to an impartial jury, and thus asymmetry is a feature of constitutional design.³⁰⁴ As the Supreme Court has said, the “right to jury trial is granted to criminal defendants in order to prevent oppression *by the Government*.”³⁰⁵ Indeed, given that prosecutors have an ethical obligation to purge the courtroom of bias, there is even more reason for prosecutors to forgo their peremptories while defendants retain them.³⁰⁶

Third, “[t]here is ample historical precedent for the allotment of peremptories to defendants but not the government.”³⁰⁷ In the colonial era, many states only allotted peremptory strikes to defendants.³⁰⁸ The trend toward parity would not happen until the mid-to-late nineteenth century, when states could no longer exclude Black people from jury service by law, at which point a number of states granted prosecutors the peremptory power as a new “procedural weapon” to ensure racial exclusion.³⁰⁹ Fast-forward to today, where the idea of peremptory parity has become deeply embedded in our collective consciousness, with many resisting asymmetric elimination because they believe it would redound to “an unfair advantage to the defense,”³¹⁰ even though the idea of an unfair advantage to the defense in the face of the awesome power of the prosecutor is laughable.

Despite the historical precedent for the uneven distribution of peremptory challenges, and despite asymmetric distribution adhering to constitutional

³⁰³ In *McCullum*, the NAACP Legal Defense Fund (“LDF”), as amicus curiae, proposed a solution for when defendants engage in invidious discrimination. Brief of NAACP Legal Def. and Educ. Fund, Inc., as Amicus Curiae Suggesting Reversal, *Georgia v. McCollum*, 505 U.S. 42 (1992) (No. 91-372). LDF argued that before applying *Batson* to defendants, courts should consider the composition of the venire, whether the defendant “was in a position to and did he actually produce a one-race (or virtually one-race) jury,” and “whether the excluded jurors were members of an historically discriminated against group.” *Id.* at 11-15. LDF believed that this inquiry was consistent with “the central purpose of the [Fourteenth] Amendment and [with] the several distinct and potentially conflicting constitutional interests involved.” *Id.* at 7. LDF’s position did not carry the day. *See generally McCollum*, 505 U.S. at 55-56.

³⁰⁴ *See Roberts*, *supra* note 68, at 1539.

³⁰⁵ *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968) (emphasis added).

³⁰⁶ *See* ABA CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.6(b) (4th ed. 2017) [hereinafter ABA CRIM. JUST. STANDARDS] (“A prosecutor’s office should be proactive in efforts to detect, investigate, and eliminate improper biases, with particular attention to historically persistent biases like race, in all of its work. A prosecutor’s office should regularly assess the potential for biased or unfairly disparate impacts of its policies on communities within the prosecutor’s jurisdiction, and eliminate those impacts that cannot be properly justified.”).

³⁰⁷ Ogletree, *supra* note 22, at 1148; *see also Roberts*, *supra* note 68, at 1536.

³⁰⁸ *See supra* Part I.

³⁰⁹ *See Colbert*, *supra* note 104, at 81.

³¹⁰ *Roberts*, *supra* note 68, at 1538.

structure, scholars have worried that there may not be legislative or judicial will to eliminate peremptory challenges for prosecutors while retaining them for defendants.³¹¹ Thus, for asymmetric elimination to happen, we may be left to hope that prosecutors will voluntarily waive their peremptory challenges.³¹²

Unilateral disarmament may have once seemed a pipedream, but in the wake of the “progressive” prosecutor movement,³¹³ asymmetric elimination may now be feasible given that a key tenet of the progressive prosecutor platform is to reduce racial bias in the criminal legal system.³¹⁴ As proof, there is at least one example of a prosecutor taking this previously unimaginable step.

Parisa Dehghani-Tafti is a former public defender and was elected Commonwealth’s Attorney for Arlington County and the City of Falls Church, Virginia, in November 2019.³¹⁵ As part of her platform, Dehghani-Tafti explicitly recognized “the outsized impact the legal system has on people of color,” and “committed to highlighting, addressing, and reversing these disparities.”³¹⁶ One policy Dehghani-Tafti adopted to further this mission is “eliminating peremptory strikes in juries,”³¹⁷ although it appears that this elimination is not absolute, as Dehghani-Tafti’s policy still allows prosecutors to use a peremptory strike if a “lawful” for-cause strike “is denied.”³¹⁸ Even so,

³¹¹ See *id.* at 1542-43; Aliza Plener Cover, *Hybrid Jury Strikes*, 52 HARV. C.R.-C.L. L. REV. 357, 389-80 (2017).

³¹² Howard, *supra* note 66, at 372.

³¹³ There is a rich academic debate about progressive prosecution in which this Article does not engage. See, e.g., Shaun Ossei-Owusu, *The New Penal Bureaucrats*, 170 U. PA. L. REV. 1389, 1426-33 (2022) (cataloguing some of the debate).

³¹⁴ See, e.g., Miriam Krinsky, Chris Kemmitt & Adam Murphy, *Opinion: What’s Wrong With the Jury Selection Process*, CNN (June 15, 2024, 11:30 AM), <https://www.cnn.com/2024/06/15/opinions/jury-selection-peremptory-challenges-krinsky-kemmitt-murphy/index.html> [<https://perma.cc/3AAC-XS5H>] (urging prosecutors to forgo use of peremptory challenges given persistent patterns of racial discrimination in their use); Satana Deberry, Jamila Hodge & Miriam Aroni Krinsky, *How Jury Selection Discriminates Against Black Citizens*, S.F. CHRON. (July 24, 2020), <https://www.sfchronicle.com/opinion/openforum/article/How-jury-selection-discriminates-against-Black-15430542.php> (calling for prosecutors to abandon peremptory challenges); see also Angela J. Davis, *The Progressive Prosecutor: An Imperative for Criminal Justice Reform*, 87 FORDHAM L. REV. ONLINE 8, 8 (2018) (explaining that new model of progressive prosecution includes seeking to “eliminate racial disparities” in criminal legal system). For an interesting take on how progressive prosecution may affect asymmetric peremptory challenges, see generally Savanna R. Leak, Comment, *Peremptory Challenges: Preserving an Unequal Allocation and the Potential Promise of Progressive Prosecution*, 111 J. CRIM. L. & CRIMINOLOGY 273 (2021).

³¹⁵ Parisa Dehghani-Tafti, ARLINGTON VA., <https://www.arlingtonva.us/Government/Departments/Courts/Commonwealth-Attorney/Meet-Parisa> [<https://perma.cc/W6ZQ-LSWK>] (last visited Oct. 7, 2025).

³¹⁶ *Id.* In an interview, Dehghani-Tafti said the policy has not had an impact on the Commonwealth’s win rates. See Rinconeno et al., *supra* note 184.

³¹⁷ Parisa Dehghani-Tafti, *supra* note 315.

³¹⁸ See Jenny Roberts, *Defense Lawyering in the Progressive Prosecution Era*, 109 CORNELL L. REV. 1067, 1123 n.233 (2024) (citation omitted).

Dehghani-Tafti's policy is proof that there may be prosecutors who will willingly forgo the use of peremptory challenges given that they have historically been a tool for discrimination. Asymmetric peremptory elimination of this kind will hopefully lead to more diverse juries while also allowing defendants the ability to retain peremptories to preserve their unique set of interests. Indeed, given that prosecutors are supposed to be "ministers of justice" who have an ethical obligation to "be proactive in efforts to detect, investigate, and eliminate improper biases, with particular attention to historically persistent biases like race,"³¹⁹ one would hope many more will follow Commonwealth's Attorney Dehghani-Tafti's lead.³²⁰

The proponents of eliminating peremptory challenges as a racial justice measure have failed to consider the full set of racial justice interests—particularly those of defendants of color. Likewise, they have not fully explained how eliminating peremptory challenges is a viable means to ensuring jury diversity given the structural barriers to jury service that disproportionately exclude people of color, and the adaptability of racism that will allow biases to operate at other points in the jury formation process. If proponents had considered all these complicating dynamics, then they may well have looked to other fixes to the jury selection process, like fortifying the *Batson* framework or eliminating peremptories for prosecutors only. Or they might have looked to address the structural barriers that hurt the diversity of the jury pool more broadly before turning to peremptories. This is not to say that one could not ponder each of these options and still walk away thinking that eliminating peremptory challenges is the best first solution (though I would disagree), but one cannot be so sure without the full consideration of all the interests and options that are available.

IV. BEYOND THE PEREMPTORY

The debates surrounding whether to eliminate peremptory challenges may carry important lessons that extend beyond the peremptory context. There is no one right way to do "racial justice" (though there could be obviously wrong ways), and people operating in good faith may disagree on what makes for an effective racial justice measure. Understanding that, this Article is focused less

³¹⁹ ABA CRIM. JUST. STANDARDS, *supra* note 306; *see also* MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

³²⁰ More modestly, in 2024, Mike Schmidt, District Attorney for Multnomah County, Oregon, announced that his office would no longer use peremptory challenges in misdemeanor trials. *See* Conrad Wilson, *On His Way Out, Multnomah County District Attorney Makes Change to Jury Selection*, OR. PUB. BROAD. (July 24, 2024, 12:35 PM), <https://www.opb.org/article/2024/07/24/multnomah-county-district-attorney-mike-schmidt-new-policy-jury-selection-racial-bias/> [<https://perma.cc/SN6R-MEAU>].

on the quality of the racial justice measure and more on the process and thought that went into its formulation, and suggests that before proposing a measure or policy to further “racial justice,” its proponents must grapple with the nuances underlying the measure. This grappling can be done along many dimensions: feasibility, effectiveness, reach, etc. And determining the “best” racial justice measure will often depend on which dimension one prioritizes.

Not grappling with the complexities of race—or at least naming one’s priorities—is what this Article cautions against, as such omissions risk unwittingly adopting solutions that ensconce racism and racial bias as opposed to alleviating it. With that in mind, there are at least three lessons we can learn from the ongoing peremptory elimination debate that can be referenced when evaluating other racial justice measures going forward.

A. *Beware Cosmetic Fixes*

First, the story of peremptory elimination is a broader reminder to be aware of racial justice measures that are cosmetic, meaning they do not actually do the work of addressing the root causes of the racial bias. The problem with discrimination in the use of peremptory challenges is not the availability of peremptories, but rather that prosecutors are wont to discriminate. This could be for an understandable reason—perhaps prosecutors genuinely believe that race is a good indicator of the views of a juror.³²¹ As recovering federal prosecutor Professor Paul Butler explained: “Like any other lawyer, a prosecutor wants a jury that is predisposed to decide the case in favor of his client. In that equation, of course race makes a difference.”³²²

But if that is the reason for the widespread discrimination in the use of peremptory challenges, getting rid of strikes does not solve the problem. To the contrary, it just pushes prosecutors to act out their bias in other ways—with or without peremptory strikes, most prosecutors will still have the urge to empanel a jury that they think will be favorable,³²³ which, of course, aligns with data showing that there are racial disparities in the use of for-cause challenges, too.³²⁴

This exemplifies why cosmetic racial justice measures are unlikely to solve the problem they are trying to fix—they do nothing to address the root causes of

³²¹ As Professor Paul Butler recalled from his time as a federal prosecutor:

Some of my fellow prosecutors believe that in your average [B]lack male defendant case, you try to avoid [B]lack male jurors. The fear is they’ll be overly sympathetic. Others think just the opposite—a [B]lack man is just the juror you want, because he’ll want to distinguish himself from this [B]lack man on trial. He’ll prove he’s different by voting to convict the defendant.

PAUL BUTLER, LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE 12 (2009).

³²² *Id.*

³²³ *Id.*

³²⁴ See Frampton, *supra* note 6, at 793-97 (offering numerical and graphical data on racial disparities in for-cause challenges).

bias.³²⁵ It is understandable why cosmetic fixes are appealing; the logics of racism are engrafted onto our societal DNA. If one believes that the system is designed to serve a racially subordinating function, they may also view it as difficult, if not impossible, to fully remediate racism and racial bias within the criminal legal system. With these headwinds, cosmetic quick wins might be the most (or only) viable path forward *precisely* because they avoid addressing the logics underlying racial discrimination.

For example, here, eliminating peremptories avoids addressing what prompts prosecutors to discriminate in the first place—the belief that jurors of color are bad for their cases.³²⁶ This belief (misguided or not), has a dark underbelly—the thought that people of color are more likely to be lenient toward criminal defendants is born from the fact that people of color are disproportionately targeted by criminal law enforcement.³²⁷ So fully shaking the belief system that drives prosecutors to discriminate would require reinventing the way criminal punishment is doled out in the United States. Now if this seems like too big of an undertaking, it is important to acknowledge that. If we think that racism and racial bias are such intractable problems that we can only seek out cosmetic reform, then honesty about that point is important, as it rebuts any narrative that racism is in America’s rearview mirror.³²⁸

With this in mind, it is important to revisit Justice Marshall’s call to eliminate peremptories in *Batson*.³²⁹ True, Justice Marshall did champion getting rid of peremptories across the board, but he did so against the backdrop of a career spent fighting for racial justice and equity and advancing a broader vision of the

³²⁵ Making a similar point, social psychologists Julian Rucker and Jennifer Richeson have explained that understanding racism as “structural” is necessary to “address the stark and obstinate racial disparities in criminal justice.” Julian M. Rucker & Jennifer A. Richeson, *Toward an Understanding of Structural Racism: Implications for Criminal Justice*, 374 *Sci.* 286, 289 (2021) (explaining “structural nature of racism”).

³²⁶ See BUTLER, *supra* note 321, at 12 (discussing why some prosecutors believe jurors of colors are unfavorable for their cases.).

³²⁷ See *id.* (“The fear is they’ll be overly sympathetic.”); Alafair S. Burke, *Prosecutors and Peremptories*, 97 *IOWA L. REV.* 1467, 1476-83 (2012) (explaining that prosecutors may discriminate against jurors of color out of belief that they are predisposed to be favorable to defense).

³²⁸ See, e.g., *Alexander v. S.C. State Conf. of the NAACP*, 144 S. Ct. 1221, 1236 (2024) (accusing civil rights litigants raising racial gerrymandering claims of “seek[ing] to transform federal courts into weapons of political warfare that will deliver victories that eluded them in the political arena”); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2160 (2023) (announcing that “[t]he time for making distinctions based on race had passed”); *Flowers v. Mississippi*, 139 S. Ct. 2228, 2242 (2019) (asserting that “*Batson* ended the widespread practice in which prosecutors could (and often would) routinely strike all [B]lack prospective jurors in cases involving [B]lack defendants”); *Shelby Cnty. v. Holder*, 570 U.S. 529, 547 (2013) (declaring that things have “changed dramatically” since passage of Voting Rights Act).

³²⁹ See *supra* Section I.A (discussing Justice Thurgood Marshall’s concurrence in *Batson* where he calls for end of peremptories).

antiracist and emancipatory power of the law.³³⁰ It thus would be a mistake to believe Justice Marshall would think that eliminating peremptories alone would solve a problem as complex as that of discrimination in jury selection—after all, he spent his career defending Black men being tried by all white juries. He would have understood that eliminating racial discrimination in jury selection would require an enduring, multi-pronged approach, of which eliminating peremptories would be just one step. Selling simplistic racial justice measures as a fix to systemic problems of racial discrimination, especially in the criminal legal system, does nothing but obscure the real role that race plays in society and ensures that true racial equity will never be realized. That is the opposite of what Justice Marshall would have wanted.

B. *Heed Non-Racial Justice Interests*

Second, the story of peremptory elimination is a call to pay close attention to other interests unrelated to racial justice or equity that may be driving a proposed reform measure. In addition to scholars, the loudest calls to eliminate peremptory challenges come from judges. Many of the arguments that judges make in favor of elimination have nothing to do with racial justice. To be sure, judges who push for eliminating peremptories say they are doing so in part to address the rampant discrimination in the use of peremptories, but that is not the only reason. Alongside the racial justice reason, judges often also cite efficiency concerns as justifying the elimination of peremptories, arguing that eliminating peremptories can save the time and expense of conducting *Batson* inquiries.³³¹ A judicial desire to eliminate peremptories to streamline court proceedings has little to do with racial justice. In fact, the efficiency reason reveals an underlying impatience with the difficult process of ferreting out racial bias.³³²

Related to efficiency, many judges just do not like *Batson*. As one group of judges explained, “our society is very uncomfortable talking about discrimination,” and a “[*Batson*] challenge is almost always perceived as an

³³⁰ See generally GILBERT KING, *DEVIL IN THE GROVE: THURGOOD MARSHALL, THE GROVELAND BOYS, AND THE DAWN OF A NEW AMERICA* (1st ed. 2012).

³³¹ See *supra* Section I.B.2. A recent survey of jury trials showed that on average, the median length of voir dire was two hours. HANNAFORD-AGOR ET AL., *supra* note 209, at 15.

³³² The story of Arizona eliminating peremptory challenges perfectly proves that nonracial justice interests can drive a measure framed in racial justice terms. As Frampton and Osowski retell, part of the reason the judges there proposed eliminating peremptory challenges could be viewed as *anti*-racial justice. After doing a deep excavation of the Arizona origin story, Frampton and Osowski assert that the judges proposed eliminating peremptories as opposed to amending the *Batson* standard—which as explained above, may better protect the various racial justice interests—as “judicial aversion to the perceived ‘wokeness’ of Washington and California’s reforms.” Frampton & Osowski, *supra* note 8, at 35. Thus, the judges in Arizona proposed eliminating peremptories as the “colorblind” solution to the entrenched problem of discrimination during jury selection. *Id.*

accusation that the opposing lawyer is a racist.”³³³ Thus, getting rid of peremptories not only has the upside of addressing the discriminatory use of peremptories; from a judge’s perspective, it also leads to more efficient trials and relieves them of having to find that a lawyer may have discriminated.

In that way, the debates around peremptory elimination call to mind what Professor Derrick Bell referred to as interest convergence.³³⁴ In discussing the school desegregation litigation culminating in *Brown*, Bell asserted that the “interest of [B]lack in achieving racial equality will be accommodated only when it converges with the interests of whites.”³³⁵ It was this convergence of interests that led to the Supreme Court’s decision in *Brown*, Bell contended, as the interests of Black people in pursuing equal education for their children converged with the interests of white people “in policymaking positions able to see the economic and political advances at home and abroad that would follow abandonment of segregation.”³³⁶ What else, Bell asked, could account “for the sudden shift in 1954 away from the separate but equal doctrine and towards a commitment to desegregation?”³³⁷

However, if the story of peremptory elimination is also a story of interest convergence—the interests of people of color not being discriminated against during jury selection converging with the non-racial interests of a predominantly white judiciary yearning for efficiency—then it is equally important to remember Bell’s admonition about being “hard-eyed” about the permanence of racism.³³⁸ Bell believed that “a yearning for racial equality is fantasy,”³³⁹ but Bell did not suggest that this meant giving up hope. Rather, as he saw it, one could recognize “the futility of action (where action is more civil rights strategies that are destined to fail)” and nevertheless maintain “the unbelievable conviction that something must be done, that action must be taken.”³⁴⁰

Taking a step back, if a racial justice measure is seemingly born from a convergence of interests, some of which have nothing to do with racial justice or equity, that does not necessarily mean that the measure should not be

³³³ Steven Kirkland, Latosha Lewis Payne & Ravi. K. Sandill, Batson: *Protecting Every Citizen’s Right to Participate in Jury Service*, HOUS. LAW., Sept.-Oct. 2020, at 34, 36; see also *Coombs v. Diguglielmo*, 616 F.3d 255, 264 (3d Cir. 2010) (discussing lawyers and judges’ uncomfortableness in accusing fellow professional of “exercising peremptory challenges based on forbidden racial considerations”).

³³⁴ Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

³³⁵ *Id.*

³³⁶ *Id.* at 524.

³³⁷ *Id.*

³³⁸ Derrick Bell, *Racism is Here to Stay: Now What?*, 35 HOW. L.J. 79, 79 (1991) [hereinafter Bell, *Now What?*].

³³⁹ *Id.* at 91.

³⁴⁰ *Id.*

pursued.³⁴¹ Indeed, one may prioritize interests other than racial justice when promoting the elimination of peremptories, such as broader democracy interests. If so, it is important to be explicit about that.

The debate over eliminating peremptories is a reminder to be clear-eyed about the converging of interests and a warning that it would be a mistake to think that any one remedial measure is racism's silver bullet.³⁴² Instead, each measure taken must be seen as a call to do more, as our humanity "grows stronger through resistance to oppression even if that oppression is never overcome."³⁴³

C. *Mind Competing Racial Justice Interests*

Third, the story of peremptory elimination is, at bottom, a story of how racial justice interests can conflict, and thus a call for us all to contemplate how proposed racial justice measures mediate those conflicts.³⁴⁴ Black people can at times have competing intracommunity interests. Derrick Bell taught us this lesson, too.

In his seminal article, *Serving Two Masters*, Bell explored the racial justice tensions underlying the school desegregation strategy.³⁴⁵ On one hand, there was the interest in racial integration prioritized by civil rights groups and the Black middle class.³⁴⁶ But as Bell explains, in the face of increasing resistance to integration, many Black community groups shifted focus, caring less about integration and instead deciding to place greater emphasis on upgrading the quality of education.³⁴⁷ In telling this story, Bell excavates a very real tension that existed within the Black community, often divided by class, over what "racial justice" meant in this particular context.

Similarly, when thinking about racial justice and the criminal legal system, it's important to be mindful of the fact that the interests of Black people, and people of color more broadly, may not be neatly aligned. This is abundantly clear in the jury context. First, there are the interests of jurors of color who wish to

³⁴¹ I plan to explore the idea of interest convergence as a sliding scale in future work, the thought being that the more pressing the Black interest, the more willing we should be to accept whatever downsides come with converging with white interests and vice-versa.

³⁴² See Bell, *Now What?*, *supra* note 338, at 92.

³⁴³ *Id.*

³⁴⁴ See Trevor George Gardner, *The Conflict Among African American Penal Interests: Rethinking Racial Equity in Criminal Procedure*, 171 U. PA. L. REV. 1699, 1701-02 (2023). In an important work discussing the competing interests in the Black community may have with regard to penal administration, Gardner identifies three distinct interests that Black Americans may have in the administration of criminal law: a liberty interest, security interest, and democratic interest. *Id.* at 1703. Gardner further explains that there can be conflict among these interests when pursuing various criminal justice reforms, and that some reforms may not be able to satisfy all three interests. *Id.* at 1703-04.

³⁴⁵ See generally Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

³⁴⁶ *Id.* at 489.

³⁴⁷ *Id.* at 482.

serve, which is being frustrated by the use of peremptories. Prioritizing this racial justice interest, peremptory elimination makes sense (although, as discussed above, whether it should be the first fix is debatable). Meanwhile defendants, especially defendants of color, have an interest in shaping their jury, both as an exercise of autonomy and as a measure, meagre though it may be, to ensure biased people do not sit in their judgment. Eliminating peremptory strikes frustrates this interest.

This raises bigger questions about racial justice more broadly. How do we think of racial justice in a world where there are real differences between communities of color, and real differences within each community? Should we adopt the measure that will help the most people? Should we pursue the measure to help those with the least political power? Or should we focus on the measures that will get the broadest buy-in? This Article leaves these (and other) questions for another day. But these questions are worth asking when pursuing “racial justice.” In adopting a remedial measure in the name of “racial justice,” we must recognize the tradeoffs being made and think carefully about who is potentially being left behind.

CONCLUSION

While eliminating peremptories has simplistic appeal, as a racial justice measure, this solution has predictable downsides: By not addressing the underlying assumptions and stereotyping that drive the discriminatory use of peremptories, the bias will likely manifest elsewhere in the jury formation process. By not solving the structural issues that lead to the underrepresentation of people of color in jury pools across the country, there will still likely be issues of racial underrepresentation. By taking away a tool of agency, we are disempowering defendants, who are disproportionately people of color, in a system that engages in totalizing dehumanization.

These are just the predictable downsides. There could be others that may not be so easily imaginable. If one considers all this and still believes that peremptory elimination is the best path forward, so be it. I may not agree with that solution as a first measure if racial justice is the goal, but if it is a solution that is adopted with foresight and care, then I am also humble enough to know that there is often more than one answer to complex problems. But to be clear, eliminating all vestiges of racial bias, both in the jury system and beyond, will never be so simple; it “is the struggle of a lifetime, or maybe even many lifetimes, and each of us in each generation must do our part.”³⁴⁸

³⁴⁸ JOHN LEWIS, *ACROSS THAT BRIDGE: A VISION FOR CHANGE AND THE FUTURE OF AMERICA* 66 (2017).