RESPONSE

RACIAL JUSTICE THROUGH PEREMPTORY CHALLENGES[†]

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[†] An invited response to Daniel S. Harawa, *Complicating Racial Justice Narratives: The Peremptory Elimination Debate*, 105 B.U. L. REV. 1731 (2025).

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INTRODUCTION

The peremptory challenge in the United States currently stands at a historic inflection point. In response to the abject failure of the Supreme Court's *Batson v. Kentucky*[1] decision and intensified by the racial justice protests of 2020, states across the country have enacted legislative changes or adopted new rules aimed at significantly reforming or even abolishing peremptory challenges.[2] Indeed, in 2022, Arizona became the first state in U.S. history to take the dramatic step of entirely eliminating peremptory strikes, reflecting a growing belief that drastic reform is necessary to rectify systemic racial discrimination in jury selection.[3]

In his excellent article, *Complicating Racial Justice Narratives: The Peremptory Elimination Debate*, Daniel S. Harawa comprehensively examines the current debate surrounding peremptory challenge elimination. He notes that the current legal and policy debates are heavily, though not exclusively, centered on the need to eliminate racial bias and to enhance racial diversity and representation on juries.[4] Harawa, however, cautions against embracing elimination without deeper reflection, urging readers to critically consider both what is at stake if peremptory challenges are abolished, and whether abolition would advance racial justice in the manner anticipated.[5] And, overarchingly, he asks readers to take seriously the task of working toward racial justice and to be diligent, perhaps even skeptical, in our review of simple solutions.[6]

I share Harawa's call for caution and applaud his review of the debate over peremptory elimination. However, I am somewhat surprised that his rigorous exploration of the issue ultimately refrains from staking out a normative position. This is especially so because, at least to my reading, his analysis strongly suggests that eliminating peremptories would be a negative development for those looking to advance racial justice.[7] As such, adding to and drawing on the persuasive arguments Harawa himself acknowledges, this brief Response seeks to explicitly answer the questions he poses. I conclude that

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

[2] *See generally* Thomas Ward Frampton & Brandon Charles Osowski, *The End of* Batson*? Rulemaking, Race, and Criminal Procedure Reform*, 124 COLUM. L. REV. 1, 3-5 (2024) (reviewing these changes).

[3] *See id.* at 2.

[4] *See* Daniel S. Harawa, *Complicating Racial Justice Narratives: The Peremptory Elimination Debate*, 105 B.U. L. REV. 1731, 1733 (2025).

[5] *See id.* at 1758-59.

[6] *See id.* at 1784-85.

[7] *See id.* at 1760 ("[T]hose 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."). My reading is perhaps biased, as I have argued elsewhere that the peremptory challenge is a necessary incident of trial by jury. *See* Richard Lorren Jolly, *The Constitutional Right to Peremptory Challenges in Jury Selection*, 77 VAND. L. REV. 1529, 1538 (2024) ("The peremptory challenge has been an integral part of common law trial by jury going back centuries, with its purpose being to provide the perception, if not the reality, of impartiality in order to place court proceedings above all suspicion.").

eliminating peremptory challenges would significantly diminish the procedural rights and autonomy of criminal defendants while doing little to meaningfully remedy the entrenched underrepresentation of Black and other minority jurors. Taking peremptory challenges seriously, then, reveals that they are not an antiquated procedural tool for selecting juries, but a fundamental substantive protection for the accused—and, properly configured, a tool in this time for racial justice.

I. A BRIEF HISTORY OF PEREMPTORY CHALLENGES

The peremptory challenge is an ancient protection for the accused, dating back to the earliest days of the common law.[8] Harawa notes these beginnings yet moves on quickly.[9] But this history is central to the conversation. It shows that peremptory challenges were long understood as a vital protection for defendants—an instrument of agency and dignity against the power of the state. Only after the U.S. Civil War did they become systematically distorted into tools of racial exclusion. In this light, the modern peremptory challenge reflects precisely the kind of "adaptive discrimination"[10] Harawa warns against,[11] but also retains the potential to be reclaimed as a meaningful protection for the accused.

At common law, the right to strike some number of venirepersons came nearly concomitantly with the Magna Carta and the expanded use of jury trials.[12] Under the original practice, in felony criminal trials the Crown enjoyed unlimited peremptory challenges while criminal defendants had just thirty-five challenges.[13] This inequitable allocation proved problematic in practice, as Crown prosecutors regularly struck all jurors suspected of favoring defendants, leading to credible allegations of jury stacking.[14] Because of this, in 1305, Parliament passed the Order of Inquest, finding the Crown's use of unlimited strikes objectionable and eliminating prosecutor peremptories altogether while maintaining the accused's thirty-five strikes.[15]

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[8] *See* Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 818-19 (1997) (tracing the history of the peremptory challenge to the medieval roots of the jury trial).

[9] See Harawa, supra note 4, at 1738-399.

[10] *See id.* at 1765 (citing Elise C. Boddie, Adaptive Discrimination, 94 N.C. L. Rev. 1235, 1239 (2016)).

[11] *See id.* at 1762-65.

[12] *See* J.G. BELLAMY, THE CRIMINAL TRIAL IN LATER MEDIEVAL ENGLAND: FELONY BEFORE THE COURTS FROM EDWARD I TO THE SIXTEENTH CENTURY 100-01 (1998); *see also* Hoffman, *supra* note 8, at 818-20 (explaining that "the notion of peremptory challenge appears rather suddenly to have taken root" with the signing of Magna Carta).

[13] *See* Hoffman, *supra* note 8, at 819-20.

[14] *See id.* at 821.

[15] *See* An Ordinance for Inquests 1305, 33 Edw. c. 4. (Eng.) ("[I]f they that sue for the King will challenge any of those Jurors, they shall assign of their Challenge a Cause certain, and the Truth of the same Challenge shall be enquired of according to the Custom of the

From this asymmetric right, the ability to strike jurors arbitrarily grew over the centuries into a celebrated protection against the Crown. Writing in the sixteenth century, John Fortescue explained:

> [I]n favor of life, he may challenge five and thirty . . . and this peremptorily, without assigning any cause for such challenge; and no exceptions are to be taken against such his challenge; who then in England can be put to death unjustly for any crime? . . . [N]one but his neighbors, men of honest and good repute, against whom he can have no probable cause of exception, can find the person accused, guilty. Indeed, one would much rather that twenty guilty persons should escape the punishment of death, than that one innocent person should be condemned, and suffer capitally.[16]

That the peremptory challenge might work not to create a substantively fair tribunal but instead one perceived as biased in the defendant's favor was precisely the point.

Given these common law foundations, it should be no surprise that the North American colonists celebrated peremptories, viewing them as one of "the free liberties of the free-born people of England."[17] Perhaps indicative of the right's importance, it was discriminatorily applied. Consider, for instance, the New York Colony's statutory response to a slave revolt in 1712, which established a special judicial process for trying enslaved individuals of certain crimes. Although the statute provided proceedings before five freeholders, it explicitly noted that as to those freeholders, "no peremptory challenge shall be allowed."[18] And should a "Master or Mistress [of the accused]" demand a full trial by jury, a petit jury would be impaneled, but again "no peremptory challenge shall be allowed."[19] This restriction underscored the statute's intent to ensure total state control and to deny procedural protections to Black defendants.

In contrast, the peremptory challenge was freely secured to white Americans in every colony and, later, every state.[20] And after the Revolution, it became a central concern in the debates over the Constitution's ratification. Many feared

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Court . . . ."); *see also* JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 147 (1977).

[16] JOHN FORTESCUE, COMMENDATION OF THE LAWS OF ENGLAND 44-45 (Francis Grigor ed. & trans., London, Sweet & Maxwell 1917) (1537) (emphasis omitted).

[17] 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 59, at 41-42 (Boston, Hilliard, Gray & Co. 1833).

[18] An Act for Preventing, Suppressing, and Punishing the Conspiracy and Insurrection of Negroes and Other Slaves, 1712 N.Y. LAWS 88, *reprinted in* 1 THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION, INCLUDING THE CHARTERS TO THE DUKE OF YORK, THE COMMISSIONS AND INSTRUCTIONS TO COLONIAL GOVERNORS, THE DUKE'S LAWS, THE LAWS OF THE DONGAN AND LEISLER ASSEMBLIES, THE CHARTERS OF ALBANY AND NEW YORK AND THE ACTS OF THE COLONIAL LEGISLATURES FROM 1691 TO 1775 INCLUSIVE 761-67, 766 (Albany, James B. Lyon 1894).

[19] *Id.*

[20] *See* VAN DYKE, *supra* note 15, at 148.

that the absence of explicit jury trial protections in the original Constitution could permit their erosion. In Virginia, George Mason criticized the Constitution's silence on the matter, asking pointedly: "If I be tried in the federal court for a crime which may affect my life, have I a right of challenging or excepting to the jury? . . . This sacred right ought, therefore, to be secured."[21] In response, James Madison reassured that there was "no such provision made [for peremptory challenges] in our Constitution or laws" because "where a technical word was used, all the incidents belonging to it necessarily attended it. The right of challenging is incident to the trial by jury, and therefore," he explained, "as one is secured, so is the other."[22] The peremptory challenge was so integral to the institution of trial by jury that it required no separate constitutional or statutory enumeration.

The right to peremptory challenges remained closely guarded into the nineteenth century and was gradually extended to Black Americans via personal liberty laws enacted in the North.[23] In 1840, New York and Vermont led the way by passing statutes that granted the right to trial by jury—including its customary incidents, such as peremptory challenges—to alleged fugitive slaves.[24] The purpose of this expansion was unabashedly to frustrate the first federal Fugitive Slave Act passed in 1793.[25] Consider, for instance, abolitionist Horace Mann's critique of the second, more stringent Fugitive Slave Act enacted in 1850,[26] in which he demanded judicial process for the accused and listed "the right of peremptory challenge" as among those "noble barriers . . . against the oppression of a powerful Government, and the malignant passions of powerful men."[27] Northern jury nullification of the Act was incredibly effective.[28] In fact, the strategic expansion of jury trial rights—including peremptory challenges—was so effective in frustrating federal law that it contributed directly to the sectional tensions that ignited the Civil War.[29]

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[21] 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott & Co. 2d ed. 1866) (1836). George Mason was not alone. Patrick Henry likewise voiced concerns over the lack of the right to peremptory challenge in the Constitution: "I would rather the trial by jury were struck out altogether. There is no right of challenging partial jurors. . . . Yet the right is as valuable as the trial by jury itself." *Id.* at 542.

[22] *Id.* at 530-31.

[23] *See* THOMAS D. MORRIS, FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH 1780-1861, at ix-x, 1 (1974).

[24] *See* MARION GLEASON MCDOUGALL, FUGITIVE SLAVES (1619-1865), at 67 (Boston, Ginn & Co. 1891).

[25] *See id.*; *see also* Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302 (repealed 1864).

[26] Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (repealed 1864).

[27] CONG. GLOBE, 31st Cong., 2d Sess. app. at 247 (1851) (statement of Rep. Horace Mann).

[28] *See* James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895, 898-901 (2004).

[29] *See id.* at 908-09 (recounting the building tensions between abolitionists and enslavers as Northern states used first the jury system and then extralegal means to resist slavery).

Following the Civil War, Radical Republicans in Congress significantly expanded peremptory challenges at the federal level, extending them to misdemeanor charges, to civil litigants, and to prosecutors.[30] Although the legislative record is silent on the precise rationale, the context suggests that one purpose was to equip federal prosecutors and Black litigants with tools to combat the lawlessness of racist jurors, particularly in cases involving racial violence.[31] Between 1870 and 1873, the Department of Justice achieved remarkable success in prosecuting white supremacist violence: federal prosecutions increased nearly twelvefold, and integrated juries returned guilty verdicts in over 90% of these cases—almost twice the conviction rate in other federal criminal trials.[32] So effective was this campaign that one federal officer in 1872 reported that the Department "was on the verge of destroying the Klan."[33] The postwar expansion of peremptory challenges was thus, at a minimum, a means of securing lawful and reliable jury verdicts, and quite possibly a deliberate step toward achieving greater racial justice through the jury system.[34]

But this did not last. Although the Fourteenth Amendment prohibited excluding individuals from jury service on the basis of race, state prosecutors—particularly in the South—quickly turned to peremptory challenges as a tool to reestablish all-white juries under the guise of facially neutral procedures.[35] The Supreme Court largely ignored this practice. A telling example is the Court's 1887 decision in *Hayes v. Missouri*.[36] There, the Court considered a Fourteenth Amendment challenge to a Missouri statute that allocated different numbers of peremptory strikes based on the location of the trial. Specifically, the law provided that "in all capital cases, except in cities having a population of over 100,000 inhabitants, the state shall be allowed eight peremptory challenges to

[30] *See* Act of March 3, 1865, ch. 86, § 2, 13 Stat. 500 (extending challenges to prosecutors); Act of June 8, 1872, ch. 333, § 2, 17 Stat. 282 (misdemeanor charges and civil litigants).

[31] An alternative explanation might be that legislatively expanding peremptory challenges to prosecutors was meant to provide the state a tool for restricting access to the jury box on the basis of race; but there is no evidence in the congressional record supporting this rationale. *See* Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 11 n.38 (1990) (acknowledging this history but suggesting instead that expansion was "a response to the 1856 United States Supreme Court decision in United States v. Shackleford, 59 U.S. (18 How.) 588 (1855)," where the Court "rejected the government's 'stand-aside' power as equivalent to the defendant's right to peremptorily challenge jurors").

[32] *See id.* at 54-55.

[33] *Id.* at 55.

[34] *Cf.* Jonathan Bressler, *Reconstruction and the Transformation of Jury Nullification*, 78 U. CHI. L. REV. 1133, 1150-53 (2011) (discussing post-Civil War concerns over jury nullification).

[35] *See* Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1593-94 (2018).

[36] 120 U.S. 68 (1887).

jurors, and in such cities shall be allowed fifteen."[37] The appellant argued that he was denied equal protection after he was tried in St. Louis.[38]

The Court disagreed, emphasizing: "In our large cities there is such a mixed population, there is such a tendency of the criminal classes to resort to them, and such an unfortunate disposition on the part of business men to escape from jury duty, that it requires special care on the part of the government to secure there competent and impartial jurors."[39] The Court thus upheld the statute.[40] But, of course, the purpose of this statute was to provide a tool to prosecutors to more effectively strike Black and other disfavored venirepersons.[41] This method of racial exclusion, shielded by the formal neutrality of peremptory challenges, persisted well into the twentieth century, entrenching systemic discrimination in jury selection.[42] And though the Court finally attempted to address this in 1986 with *Batson*, studies show that peremptories continue to be used regularly to discriminate on prohibited bases.[43]

As this brief history shows, the peremptory challenge was originally designed to protect the accused against the arbitrary power of the state. Yet its history in the United States has become a story of adaptive discrimination—not because the tool itself changed, but because it was captured by state actors. In considering the origins and purposes of the peremptory challenge, it becomes clear that elimination is not the answer. Racial justice is advanced not by discarding the tool but by returning it to its proper hands.

II. RACIAL JUSTICE AND THE PROPER ROLE OF PEREMPTORIES

History alone, of course, cannot resolve the policy questions Harawa poses. But it does bring into focus a truth often overlooked in this debate: Peremptory challenges were never intended to function as neutral procedural devices. They arose at common law to provide the accused with a limited but meaningful measure of control over the tribunal. Their purpose was not to guarantee a substantively fair jury, but rather to allow defendants a degree of subjective assurance that the body was not predisposed against them. It is only in light of this foundational role that the various alternatives to peremptory abolitions can be meaningfully evaluated.

The subjective dimension of peremptory challenges is not an incidental feature of the procedure, but rather its most fundamental characteristic. As William Blackstone explained in his Commentaries: "[E]very one must be sensible, what sudden impressions and unaccountable prejudices we are apt to

[37] *Id.* at 69 (citing MO. REV. STAT. §§ 1900, 1902).

[38] *See id.*

[39] *Id.* at 71.

[40] *See id.* at 72.

[41] *See* John M. Van Dyke, *Peremptory Challenges Revisited*, 12 NAT'L BLACK L.J. 114, 121 (1992).

[42] *See id.*

[43] *See, e.g.*, Frampton, *supra* note 34, at 1623.

conceive upon the bare looks and gestures of another . . . ."[44] For this reason, "the law wills not that [the defendant] should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike."[45] By affording the accused—with all the embarrassments surrounding him in that moment—a right to shape the composition of the tribunal that will determine his fate, the law acknowledges his humanity and vulnerability.[46]

Providing the accused with a voice is particularly important, as Harawa aptly notes, given the state's dominance in the criminal justice system and process of assembling juries.[47] Consider the expansive authority that the state exercises in assembling jury venires. Although constitutional doctrine formally requires that venires represent a "fair cross-section" of the community, this requirement provides little practical constraint.[48] Similarly, trial judges exercise broad discretion in ruling on challenges for cause, which studies show frequently reflect racial and other forms of invidious bias.[49] Peremptory challenges offer defendants a tangible assertion of agency in a process that otherwise reduces them to passive subjects of state power. Without peremptories, defendants would be entirely dependent on prosecutorial restraint and judicial fairness—reliance that history has repeatedly shown to be unreliable.[50]

Viewed through this lens, peremptory challenges are not merely compatible with the pursuit of racial justice, they are essential to achieving it within a justice system marked by persistent racial disparities. Again, this is not because peremptory challenges guarantee substantive fairness. Empirical studies show

[44] 4 WILLIAM BLACKSTONE, COMMENTARIES *346-47.

[45] *Id.* at *347.

[46] This interest has been recognized consistently in U.S. courts. *See, e.g.*, Swain v. Alabama, 380 U.S. 202, 220 (1965) (noting the role of peremptory challenges in addressing "imagined partiality").

[47] *See* Harawa, *supra* note 4, at 1736-37 ("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 . . . that disempower[s] and silence[s] defendants.").

[48] *See, e.g.*, Mary R. Rose & Jeffrey B. Abramson, *Data, Race, and the Courts: Some Lessons on Empiricism in Jury Representation Cases*, 2011 MICH. ST. L. REV. 911, 954.

[49] *See, e.g.*, Thomas Ward Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, 118 MICH. L. REV. 785, 788 (2020) ("[R]acial disparities pervade the exercise of challenges for cause.").

[50] Consider an example from early American history, *Commonwealth v. Cook*, 6 Serg. & Rawle 577 (Pa. 1822). There, three Black men were charged with murder in a highly publicized Pennsylvania case. *See id.* at 577-78. Defense counsel William Morris Meredith clashed with the trial judge over the court's refusal to allow questioning of potential jurors about their exposure to pretrial publicity. *See* JAMES CORNELL BIDDLE & WILLIAM MORRIS MEREDITH, A STATEMENT 10-11 (1822). When the judge denied this request, Meredith declared: "I thank my God that we can challenge peremptorily and do ourselves that justice which the Court deny us! I have never known any court of justice guilty of so gross a violation of their duty as this Court, in refusing to punish the insolence of a juror to counsel in the discharge of their duty." *Id.* at 12.

that the process of voir dire and peremptory challenges is "grossly ineffective" in identifying and striking potentially unfavorable jurors.[51] Instead, the practice is valuable because it wrestles power away from the state, providing the accused assurance and dignity in a moment of profound insecurity. These interests should not be dismissed as relics of the Founding era. On the contrary, it represents a vital protection in a criminal justice system that is regularly perceived to be stacked with bad actors.

Understanding the foundational purposes of the peremptory challenge allows for a more meaningful examination of reforms short of total abolition. Harawa identifies two such alternatives. The first involves systematic refinement of the existing *Batson* framework, which some have called "*Batson*-plus" reforms.[52] The second is restoring asymmetrical peremptory challenges, preserving them for defendants and eliminating them for prosecutors.[53] But applying Harawa's own analysis, the limitations of the first approach become increasingly apparent, while the appeal of the second approach grows more compelling.

The most common alternative to complete elimination of peremptory challenges has been systemic reforms to the *Batson* framework.[54] As Harawa explains, *Batson*-plus approaches attempt to salvage the peremptory challenge by refining the procedural machinery designed to root out discrimination.[55] These reforms include procedures such as requiring contemporaneous records of voir dire, mandating race- and gender-neutral justifications that meet heightened evidentiary thresholds, and establishing rebuttable presumptions against strike patterns that disproportionately impact protected groups.[56] The idea is to keep the baby while throwing out the bathwater.

Although these reforms initially appear promising, their practical effectiveness is doubtful. Like *Batson*, they rely on judges to assess arbitrary acts—an inquiry that is inherently fraught. Judges are reluctant to impugn the integrity of attorneys they regularly encounter, leading them to accept facially

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[51] *See* Dale W. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503, 505 (1964); *see also* Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491, 517 (1978) (studying and concluding that attorneys' effectiveness at peremptorily striking biased venirepersons was "not impressive").

[52] Harawa, *supra* note 4, at 1773; *see also* Frampton & Osowski, *supra* note 2, at 2-3 (describing legal frameworks that are sometimes called "*Batson*-plus" regimes).

[53] *See* Harawa, *supra* note 4, at 1776-77.

[54] *See* Frampton & Osowski, *supra* note 2, at 3 (explaining that "[n]early one-fifth of the country's population now lives in a jurisdiction" with systemic reforms to the *Batson* framework).

[55] *See* Harawa, *supra* note 4, at 1774-75.

[56] *See id.* at 1751-59 (cataloguing recent *Batson* reforms). For a tracker of *Batson* reform proposals across the United States, see Batson *Reform: State by State*, UC 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/AJ28-PLLT] (last visited Oct. 7, 2025).

neutral explanations that are weak, unsupported, or plainly pretextual.[57] Nothing about these *Batson* reforms changes this flaw. If anything, they merely consolidate power in the hands of judges—one of the very state actors whom the peremptory challenge is designed to check. Rather than curbing discretion, these reforms amplify it, placing yet more responsibility on judges to police systemic, often unconscious, and institutionally entrenched discrimination.[58] While studies on these reforms are still needed, decades of experience already suggest they will fail to provide what they promise.

Worse still, the illusion of reform may well prove more corrosive than no reform at all. *Batson*-plus could entrench the status quo by offering the appearance of progress, thereby diffusing public concern and deflecting calls for more radical restructuring in areas of need—specifically the need to expand the representativeness and diversity of jury venires.[59] As with so many procedural innovations in criminal law, it may serve to legitimate rather than dismantle systemic discrimination.[60] Accordingly, the problem is not that *Batson* is in need of fixing; it is that the framework advanced is structurally incapable of delivering racial justice. Adding more gears to this broken clock will not make it keep time.

The second approach, asymmetric elimination of peremptories, offers a more principled alternative to wholesale abolition. By eliminating peremptory challenges for the prosecution while preserving them for criminal defendants, this approach realigns jury selection with its original logic: that the individual, standing alone against the coercive power of the state is entitled to heightened procedural protections.[61] Unlike defendants, state prosecutors face no personal risk at trial and have no comparable need for the expressive or protective function arbitrary strikes provide.[62] Asymmetric abolition respects this imbalance of interests. It avoids the core dangers of total elimination, which

[57] *See, e.g.*, Nancy S. Marder, *Race, Peremptory Challenges, and State Courts: A Blueprint for Change*, 98 CHI.-KENT L. REV. 65, 78 (2024) (highlighting instances of trial court accepting inconsistent and shifting reasons for striking prospective Black jurors).

[58] *See, e.g.*, Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099, 1145 (1994) (criticizing reforms that increase already "excessive deference to the questionable findings of trial courts").

[59] It is axiomatic that the number one predictor of who the jury will comprise is who shows up to the courthouse.

[60] Harawa himself has noted this risk in other contexts. *See* Daniel S. Harawa, *The False Promise of* Peña-Rodriguez, 109 CALIF. L. REV. 2121, 2131-32 (2021) (discussing the Supreme Court's approach to substantive review of jury verdicts).

[61] *See* Anna Roberts, *Asymmetry as Fairness: Reversing a Peremptory Trend*, 92 WASH. U. L. REV. 1503, 1533 (2015) ("The allocation of peremptory challenges in the United States is rooted in asymmetry. At the time of their importation from England, peremptory challenges were the 'exclusive right' of defendants.").

[62] *See* Richard D. Friedman, *An Asymmetrical Approach to the Problem of Peremptories?*, 28 CRIM. L. BULL. 507, 513 (1992) ("The crucial function of increasing the accused's perception of fairness is not served by prosecutors' peremptories.").

would leave defendants powerless in the face of overwhelming state power and bias.

Harawa is correct to note that adopting asymmetric abolition is not without challenges.[63] Prosecutors have long defended peremptories as vital instruments for removing biased jurors and managing trial dynamics.[64] Legislatures may be pressured to avoid enacting reforms that seem to favor the defense.[65] And courts, who have long misrepresented peremptory challenges as operating toward substantive impartiality, may hesitate to adopt rules that treat the two sides unequally.[66] But these objections rest more on institutional inertia than on constitutional necessity. In fact, there is a strong constitutional argument that prosecutorial peremptory strikes, regardless of the bases on which they are exercised, violate the Fourteenth Amendment and therefore must be eliminated.[67]

If racial justice is the goal of these reform efforts, asymmetric elimination is the only answer. As Harawa himself acknowledges, the primary victims of total elimination are not prosecutors or courts, but defendants.[68] In a system already characterized by pervasive patterns of unequal treatment for racial minorities, the elimination of one of the few procedural mechanisms that empowers defendants would serve only to deepen and exacerbate existing imbalances. That insight, more than any technical defect in *Batson* or practical limitation in reform, should drive the path forward.

CONCLUSION

Professor Harawa's thoughtful intervention complicates the dominant narrative around peremptory elimination and rightly warns against embracing false solutions to real harms. But taking peremptory challenges seriously requires more than critique. These challenges were never intended as neutral procedural tools. They were born as a structural concession to the vulnerable, empowering defendants with a rare measure of agency in a system marked by overwhelming state control. Racial justice cannot begin by disarming those already disempowered. It can only occur through reclaiming the right of the accused and abolishing prosecutorial peremptories altogether. Abandoning

[63] *See* Harawa, *supra* note 4, at 1776-79.

[64] *See, e.g.*, Frampton & Osowski, *supra* note 2, at 30 (noting strident opposition among prosecutors against reforming peremptory challenges).

[65] *See* Aliza Plener Cover, *Hybrid Jury Strikes*, 52 HARV. C.R.-C.L. L. REV. 357, 389-90 (2017) (questioning the political feasibility of asymmetric abolition of peremptory challenges).

[66] *See, e.g.*, Hayes v. Missouri, 120 U.S. 68, 70 (1887) ("[I]mpartiality requires, not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.").

[67] *See* Richard Lorren Jolly, Overruling *Batson*, Etc. 1 (June 13, 2025) (unpublished manuscript) (on file with author).

[68] *See* Harawa, *supra* note 4, at 1768-69.

peremptories now in the name of racial justice would harm the very people we claim to protect.